

FIGHTING CORRUPTION IN EASTERN EUROPE AND CENTRAL ASIA

# Anti-corruption reforms in Kazakhstan

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

# **Anti-Corruption Reforms in** **KAZAKHSTAN**

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

**2017**

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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, Kyrgyzstan, 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 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

### *Anti-corruption policy*

Kazakhstan adopted a new **Anti-Corruption Strategy** for 2015-2025 that aims to reduce the level of corruption in such areas as civil service, quasi-state sector, private sector, judicial and law enforcement bodies. On its basis, all central state authorities approved their respective plans, while local executive authorities approved regional implementation plans. However, the report finds the 2015-2017 **Action Plan** to be, in general, inadequate to the current situation, as many of its activities have no clear anti-corruption nature. The new strategy and action plans have not been based on a thorough analysis of the corruption situation and its trends, analysis of the previous anti-corruption efforts, the outcomes of corruption studies, including those carried out by NGOs. The report acknowledges the development of the first **National Anti-Corruption Report** to be a positive step. It should become the main document assessing the status quo with the implementation of the Strategy during the preceding year.

Even though some members of civil society could contribute to the development of the Strategy and make their position and concerns over corruption known to the authorities, overall the **process of civil society engagement** was not entirely open, inclusive and transparent. The report acknowledges the importance of introduction of the monitoring mechanism for anti-corruption policy documents and corruption risks assessment. It is an important step in the shaping of a mature anti-corruption policy. Although, experts believe that it is too early to draw any conclusions about the efficiency of the monitoring and corruption risk assessment.

Kazakhstan has continued positive practice of **sectoral studies** in the area of anti-corruption. But there was no regular assessment of corruption covering also the private sector and including such elements as the most corrupt areas, frequency and patterns of corrupt practices, parties to corrupt relations, and types of corruption benefits. Despite the significant number of **awareness-raising campaigns** aimed at preventing and combating corruption, no assessment has been made as to their impact on the dynamics of qualitative and quantitative aspects of corruption.

Since the previous monitoring round, Kazakhstan has carried out several institutional reorganisations of the **anti-corruption agency**. During the latest one, in 2016, it established the Agency for Civil Service Issues and Countering Corruption, which also has within its structure the National Bureau on Countering Corruption. The Agency's competence, as it was recommended, now includes elaboration and coordination of the anti-corruption policy implementation. There was no progress in ensuring independence of the specialized anti-corruption body.

### *Prevention of corruption*

Kazakhstan has continued the important **civil service reform** that was started during the previous monitoring round and achieved further significant progress in this regard. However, a number of issues that were previously identified remain valid, including: there is still a possibility for non-competitive recruitment in the civil service and political bodies and other representatives continue to play the same role in the recruitment and other procedures; responsible secretaries (heads of secretariat) are appointed and dismissed by political bodies; it has not been established based on what criteria the winner of the competition is determined at the last stages of the selection; the practice of attestation is still being used and it undermines the transparent system of evaluation of officials; the new rules of bonus payments based on the objective and transparent criteria have not been approved. It is positive that Kazakhstan has implemented a new system of performance evaluation of public servants based on indicators, as well as established regulations on the competition, including internal ones.

The new Law on Countering Corruption and the Law on Civil Service extended provisions on the prevention and management of **conflict of interests (CoI)**. With the help of donors, Kazakhstan also developed and disseminated guidelines on CoI in the civil service. The Civil Service Agency conducted a wide awareness-raising campaign, which is commendable. There are first examples of cases of detected violations of CoI regulations. At the same time, the CoI definition is not fully in line with international standards. The report also found that the liability for violation of the respective provisions is not effective. As before, there is no mechanism to control enforcement of the post-employment restrictions. Restrictions with regard to gifts are scattered among several laws and require additional clarification and awareness raising to ensure their effective enforcement. Positions of **ethics officers** have been introduced in all public authorities; such officers should play an important role in providing guidance and enforcing anti-corruption

rules. The Anti-Corruption Law of Kazakhstan includes only a general provision about **protection of whistle-blowers** (persons reporting about corruption), which is insufficient; the existing rules on the protection of participants of criminal proceedings have a limited scope and concern a different group of persons.

As regards **assets and income declarations** of public officials, Kazakhstan yet again postponed the introduction of the new system (this time until 2020); the previously stated criticism in this regard also remains valid, namely that the new system would target only taxable assets and income which renders it ineffective, because declarations of public officials pursue other aims and require a broader scope of disclosure. The declarations also remain closed for the public access and are published only if agreed to by the declarant (even though such practice is widespread and is even taken into account during the official's evaluation).

Since in the area of **integrity of political officials** Kazakhstan achieved only minor progress, the report recommends establishing detailed rules on integrity of such officials who are not covered by the Law on Civil Service (with regard to conflict of interests, financial control, liability for corruption and related offences), taking into account their specific status and functions. It also recommends introducing an effective mechanism for ensuring compliance with the said integrity rules.

On the **integrity of the judiciary**, during the past three years Kazakhstan took serious efforts to modernise and increase confidence in the national judicial system. Among other measures, Kazakhstan adopted the new wording of the basic laws on the judiciary, a new Judicial Ethics Code, an updated Statute on the Judicial Jury, provisions on assessment of judicial performance. It also took measures to simplify administration of justice, bolster its efficiency, and complete the process of automation of courts' operation in order to facilitate access to courts and enhance the judicial system's transparency. However, the reform is far from its completion and most of the earlier identified problems remain valid. Among them: insufficient guarantees of judicial independence both at the level of the highest legal acts and in practice; excessive role of the political bodies in the appointment and dismissal of judges; the new procedure for forming the High Judicial Council improves the previous situation, but still falls short of the international standards; insufficient transparency and openness of courts to the public and media; the Union of Judges is not foreseen in the Law on the Judicial System and has the status of a voluntary civic organization, which means, among other things, that control over compliance with the Judicial Ethics Code has been placed outside the judicial system. Besides, the grounds for disciplinary liability of judges remain vague; functions of starting disciplinary proceedings and decision-making have not been separated; there is no possibility to challenge decisions of the Judicial Jury in court.

The fourth monitoring round of Kazakhstan reviewed for the first time issues of **integrity of the public prosecution service**. Experts recommended Kazakhstan, among other things, to define in the Constitution the status of the Public Prosecution Service and set guarantees to protect prosecutors from illegal interference into their work, and guarantees of their autonomy, including the financial autonomy. Besides, Kazakhstan should minimize non-competitive appointments to positions within the Public Prosecution Service and introduce objective and transparent selection procedures and criteria; expand the system of competitive appointments to all positions and set forth in the law precise, objective and transparent criteria for accessing such positions. Kazakhstan should regulate by law: establishment, reorganisation and liquidation of public prosecution offices, including the specialized ones; annual performance review of public prosecutors; periodic evaluation of ethics of all prosecutors and their compliance with the Code of Honour of the officers of public prosecution; the list of grounds and procedures to hold prosecutors disciplinarily liable, sanctions for specific wrongdoings and periods of limitation; salary rates of prosecutors and the exhaustive list of additional allowances (abolishing in due course bonuses for prosecutors). The report also recommends considering to set up the Prosecution Council as a body of prosecutorial self-government, and to introduce mandatory declarations of property, income and expenses of prosecutors and their family members (not connected with their tax liabilities) and make such declarations publicly available.

As regards **anti-corruption screening (proofing)** of draft legal acts, Kazakhstan made progress making results of such screening public and that the screening itself is conducted by the state authority (Ministry of Justice) as a part of the general legal expertise. At the same time the screening still does not cover all draft legal acts, as it was recommended. The report recommends Kazakhstan to resume the development of the **Administrative Procedures Law** and to adopt and ensure implementation of the **Administrative**

**Adjudication Procedure Code** which should not deal with administrative offences, as well as to create specialised administrative courts to consider private claims against the public administration.

Kazakhstan made an important step by approving in 2015 and starting implementation of the long-awaited **Law on Access to Information**. This is a first law on access to information in Kazakhstan. While the law has a number of positive provisions, it fails to comply with the key international standards and best practices and should be amended as a matter of urgency. The law has yet to be fully enforced, and there is no effective control over its compliance. In this regard, the Commission on access to information should be strengthened by changing its status, broadening its powers and ensuring its autonomy from the executive authorities. Kazakhstan did not implement the recommendation concerning **liability for defamation**; the latter was widely used in practice, which restricted freedom of speech and reporting of corruption. The new report recommends Kazakhstan to repeal criminal liability for libel, insult and other similar acts; should such liability be retained provisionally, it should be classified as criminal misdemeanour, thus excluding a possibility for sanctions in the form of restriction or deprivation of liberty. On measures to prevent exorbitant amounts of claims of moral damages, the report welcomes the fact that the amount of court fee was set proportionate to the amount of damages. However, this measure has failed so far to improve the situation significantly. Kazakhstan is also recommended to join the Open Government Partnership initiative.

In the area of **public procurement**, Kazakhstan continued reforms, in particular, aimed at expanding transparency and introducing electronic procedures. The new Law on Public Procurement decreased the number of exemptions from the law, but transferred majority of them to the category of sole-source procurement. Therefore, the volume of non-competitive procurement still remains too high and should be significantly reduced. Procurement in the national holding companies and other similar entities has not been regulated in the law. The report recommends Kazakhstan to: further enhance e-procurement system and open it for use by non-residents; ensure regular publication of up-to-date procurement information in machine-readable formats, including statistics on the complaints and their review; introduce explicit mandatory debarment for commission of a corruption-related offence by the company or its management; strengthen conflict of interest safeguards in the public procurement; align mandatory anti-corruption statements in tender submissions with the best international practice. It is also important to intensify regular training for private sector and procuring entities on public procurement and integrity matters.

As regards **business integrity**, the report welcomes a number of measures aimed at prevention of corruption in the quasi-public and private sectors, and especially the fact that anti-corruption restrictions are now also applicable to employees in the quasi-public sector. The reports notes the potential of the Anti-Corruption Charter of Entrepreneurs of Kazakhstan, which is poised to form a basis for model business integrity code and the one on good procurement practices, as well as policies and templates with regard to insider information, diagnostics of corporate governance, risk management, etc. Experts welcome the development of the Model Corporate Governance Code for joint-stock companies with state participation and the Corporate Governance Code of the National Welfare Fund “Samruk Kazyna”. The report recommends Kazakhstan to arrange an action plan aimed at promotion, in a close collaboration with business and public associations, of corporate compliance programs in the private sector entities taking into account good international practices and standards.

### ***Enforcement of criminal responsibility for corruption***

In the area of **criminalisation of corruption**, the remaining legislative deficiencies prevent Kazakhstan from being fully compliant with the international standards. This concerns, in particular, the following: the Code of Administrative Offences still includes provisions on liability for receiving illegal material rewards; there is a monetary threshold for criminal liability for active and passive bribery; not all mandatory elements of the bribery offences and trafficking in influence are criminalised; objects of corruption crimes do not cover non-pecuniary benefits; there is no effective liability of legal persons. Kazakhstan has introduced the definition of foreign public officials, which, however, is not sufficiently broad and should be clarified. Kazakhstan also implemented new provisions on confiscation which, in general, comply with the standards; Kazakhstan needs to strengthen safeguards for *bona fide* third parties holding assets subject to confiscation. Procedures for lifting immunities were not revised.

The report recommends Kazakhstan to set directly in the legislation the possibility of holding liable for **money laundering** without the need of prior or simultaneous conviction for the predicate offence, as well

as to extend the definition of politically exposed persons to national public officials who perform important public functions.

Kazakhstan showed high level of **criminal prosecution** of corruption crime, including those committed by senior public officials. Kazakhstan also provided detailed statistics that was requested and an analysis of criminal legislation enforcement. The report also welcomes the changes in certain provisions on holding liable for corruption crimes, namely linking of the amount of fine to the bribe amount, the mandatory lifelong ban to hold public offices in case of conviction for corruption, exclusion of conditional discharge of liability in the case of corruption offenses and non-application of statute of limitations to such crimes. The report considers such amendments as progressive and best practice. At the same time, there is a concern about shifting the emphasis on financial sanctions instead of applying deprivation of liberty for serious corruption crimes. Limiting sanctions for bribery to financial compensation only may not be dissuasive enough. The report, therefore, recommends Kazakhstan to review sanctions for corruption crimes to ensure that they are effective and proportionate, in particular by establishing mandatory sanction of imprisonment for the gravest corruption offences.

### ***Prevention and prosecution of corruption in a sector – Higher education***

As acknowledged by the authorities, the system of higher education in Kazakhstan has a high risk of corruption and, therefore, was selected for the in-depth study within the monitoring. The monitoring showed that the corruption prone areas include, among others, abuse during the distribution of budgetary funds through state grants, improper tracking of the student performance, lack of academic integrity when preparing written essays, incompliance with the licensing and accreditation requirements, lack of transparency and access to information, including to statistics, the so called academic inbreeding in the staffing policy, non-competitive salary and violations of the procurement procedures. Despite the adoption of the sector- and university-level anti-corruption programmes, none of them is based on a deep and comprehensive study of integrity issues and corruption risks in the higher education system, including through independent research.

The monitoring report recommends Kazakhstan to take a number of measures, including development of the new generation of anti-corruption policy documents with the involvement of all stakeholders, including the civil society, increasing transparency and upgrading the anti-corruption commissions in universities, adopting or reviewing rules of academic integrity that are used in universities, introducing more effective system of internal and external monitoring of compliance with such rules, diversifying sanctions for academic misconduct, establishing sanctions for fraud during the accreditation of universities, removing possibilities for violations in the licensing process, in particular by revising the risk criteria to make them more effective in countering corruption. In addition, it is recommended to step up prosecution of offences in the higher education area, in particular by duly investigating all reports of corruption by the law enforcement agencies with a focus on complex cases involving high level officials, as well as systemic corruption schemes penetrating the whole sector, and by applying dissuasive sanctions.

## SUMMARY TABLE OF COMPLIANCE RATINGS

**Table 1. Summary table of compliance ratings for the previous monitoring round recommendations**

Recommendations of the Third Monitoring Round of Kazakhstan	Rating of compliance for the previous recommendation			
	Fully	Largely	Partially	Not compliant
1.1.-1.2. Political will and anti-corruption policy			+	
1.3. Corruption surveys			+	
1.4. Public participation			+	
1.5. Raising awareness and public education			+	
1.6. Specialised anti-corruption policy and co-ordination institutions			+	
2.1-2.2 Offences and elements of offence			+	
2.3. Definition of a public official		+		
2.4.-2.5. Sanctions, confiscation			+	
2.6. Immunities and statute of limitations				+
2.7. International co-operation and mutual legal assistance			+	
2.8.-2.9. Application, interpretation and procedure, specialized anti-corruption law enforcement bodies			+	
3.2. Integrity of public service			+	
3.3. Promoting transparency and reducing discretion in public administration			+	
3.4. Public financial control and audit*	-	-	-	-
3.5. Public procurement			+	
3.6. Access to information			+	
3.7. Political corruption*	-	-	-	-
3.8. Judiciary			+	
3.9. Private sector			+	
<b>TOTAL</b>	<b>0</b>	<b>1</b>	<b>15</b>	<b>1</b>

\* The Fourth Round of Monitoring did not cover topics of “Public financial control and audit” and “Political corruption” and, therefore, the report did not evaluate respective recommendations.

## INTRODUCTION

The Istanbul Anti-Corruption Action Plan (IAP) was approved in 2003. It is the principal subregional initiative of the OECD's Anti-Corruption Network for Eastern Europe and Central Asia (ACN). While the Istanbul Action Plan covers Azerbaijan, Armenia, Georgia, Kazakhstan, Kyrgyzstan, Mongolia, Tajikistan, Uzbekistan and Ukraine, other ACN countries too contribute to its implementation. The implementation of the Istanbul Action Plan provides for systematic periodic reviews of legislation and institutions in the anti-corruption area in these countries.

The initial review of the legal and institutional anti-corruption framework in the Republic of Kazakhstan and recommendations thereto were approved in 2005. The report on the First Round of monitoring, which assessed the implementation of the original recommendations and provided ratings of compliance with these recommendations by Kazakhstan, was adopted in September 2007. The Second Round of monitoring for Kazakhstan was approved in September 2011, and the Third Round, in October 2014. The monitoring reports included updated ratings of compliance with the original recommendations by Kazakhstan as well as new recommendations.

In between of monitoring rounds, Kazakhstan provided progress updates on its actions to implement the recommendations made at all ACN monitoring meetings. In addition, Kazakhstan has been active in participating in and supporting other ACN events. All reports are available at the OECD ACN website at: [www.oecd.org/corruption/acn/istanbulactionplancountryreports.htm](http://www.oecd.org/corruption/acn/istanbulactionplancountryreports.htm).

The Fourth Round of monitoring under the Istanbul Action Plan was launched in 2016 based on the methodology approved by the ACN member countries. The Government of Kazakhstan provided answers to the country specific fourth round questionnaire in January 2017, and answers to follow-up questions, in April 2017. In addition, in accordance with the methodology for the 4th round monitoring, answers were received from NGO partners, namely the Research Centre Sange, Transparency International Kazakhstan, Internews-Kazakhstan, and the Legal Policy Research Centre (LPRC).

The country visit (to Astana) took place on 20-24 February 2017 and consisted of 11 thematic sessions with representatives of government agencies, including: Presidential Administration, Chancellery of the Prime Minister, Parliament, Supreme Court, High Judicial Council, Agency for the Civil Service Issues and Countering Corruption, National Anti-Corruption Bureau, Office of the Prosecutor General, National Security Committee, Ministry of the Interior, Ministry of Justice, Ministry of National Economy, Ministry of Finance, Tax Committee, Audit Committee, Ministry of Finance's Committee for Financial Monitoring, Central Election Commission, Public Administration Academy, and other departments and offices.

The OECD Secretariat arranged meetings with representatives of the civil society, business and international organisations. Meetings with representatives of civil society and international organisations were set up jointly with the OSCE Programme Office in Astana, and meetings with business, jointly with the American Chamber of Commerce. At the invitation of the American Chamber of Commerce, the monitoring team attended a meeting of the Investment Climate Council headed by the Prime Minister of the Republic of Kazakhstan.

Kazakhstan's national coordinator for the monitoring was the Agency for the Civil Service Issues and Countering Corruption; the coordination of and support to the monitoring in Kazakhstan were provided by Deputy Chairman of the Agency A. Zh. Shpekbayev, officers of the Anti-Corruption Department and Department of Strategic Development and International Programmes at the Agency (A. Parmenova, Zh. Kairalapina, N. Bekinov and others).

The monitoring team for the Fourth Round of Monitoring of Kazakhstan consisted of:

- Zurab Sanikidze (Ministry of Justice, Georgia; chapter 1, section 2.6.);
- Evgeniy Smirnov (European Bank for Reconstruction and Development; section 2.5.);
- Katerina Kardava (Bureau for Civil Service Affairs, Georgia; sections 2.1. - 2.2.);

- Natalia Petrova (USAID New Justice Program, Ukraine; section 2.3.);
- Emin Mursaliev (Main Anti-Corruption Directorate of the Office of General Prosecutor, Republic of Azerbaijan; section 3);
- Mikhailo Milovanovic (analyst on issues of integrity in education; section 4);
- Liubov Samokhina (ACN Secretariat; chapter 1, sections 2.3. and 2.6, chapter 4);
- Dmytro Kotlyar (ACN Secretariat, team leader; sections 2.1. - 2.2, 2.4. - 2.5, chapter 3 of the Report).

The monitoring team would like to express their gratitude to the Government of Kazakhstan for excellent cooperation during the Fourth Round of monitoring, and in particular, officers of the Agency for the Civil Service Issues and Countering Corruption. 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. The monitoring team expresses its gratitude to the OSCE Program Office in Astana and the American Chamber of Commerce in Kazakhstan for the support rendered in the organisation and facilitation of the monitoring 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 own 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 on 13 September 2017 in Paris at the OECD Headquarters. It contains the following compliance ratings with regard to recommendations of the Third Round of monitoring: **out of 19 previous recommendations, Kazakhstan was found to be not compliant with one recommendation, partially compliant with 15 recommendations, largely compliant with one recommendations; none of the recommendations was fully implemented.** Two recommendations from the previous round were not assessed since the Fourth Round of Monitoring did not cover the relevant topics (public financial control and audit and political corruption). **22 new recommendations were made as a result of the Fourth Round of monitoring, and seven previous recommendations were recognised as 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 the results of the Fourth Round of monitoring and promote their implementation, the ACN Secretariat will organize a return mission to Kazakhstan, which will have meetings with representatives of government 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.

The Fourth Round of monitoring under the OECD/ACN Istanbul Anti-Corruption Action Plan is carried out as part of the OECD/ACN Work Programme for 2016-2019 with the financial support of Latvia, Lichtenstein, Slovakia, the United States of America, Switzerland and Sweden.

## CHAPTER 1. ANTI-CORRUPTION POLICY

### Corruption Perception in the Republic of Kazakhstan

The 2016 Corruption Perception Index prepared by Transparency International had a score of 29 for Kazakhstan, one point more than in 2015. The country ranked 131st (out of 176 countries). In the Transparency International's 2016 Global Corruption Barometer, 29% of the respondents in the Republic of Kazakhstan reported that they offered bribes.<sup>1</sup> To compare, in 2013 the positive answer to the same question was given by 39,9% of the respondents, while 37% stated that the level of corruption decreased, 32% reported no progress in countering corruption, and 22% remained undecided.

Perception of corruption by institutions showed that perceived as the most corrupt were law enforcement agencies (35% of the respondents), leaders of business companies (29%), and judges and judicial officers (28%). The respondents admitted that most frequently they offered bribes to road police (47%), or in return for getting unemployment allowance (33%), or to courts trying civil law cases (31%). Less than a third of the respondents claimed to have paid bribes to be given a job in the education system (23%), or in return for having their child placed in the kindergarten or school (17%), getting an entitlement to social benefits (21%), accessing healthcare services (20%) or obtaining official documents from government authorities (19%). 46% of the respondents gave poor ratings to the efforts by the government to counter corruption ("bad" and "very bad"), against 37% rating them as "rather good".

Based on the World Economic Forum Shapes Survey, 80 per cent of young Kazakh respondents pointed out corruption as the most urgent problem of all.<sup>2</sup>

The authorities admit that the danger of corruption in the quasi-government sector is comparable in scale to that in the government sector. According to crime statistics, 55% of all crime registered in that area is committed in procurement. Importantly, procurement in the quasi-government sector, according to experts, is 6-8 times more in value than in public procurement.<sup>3</sup> During the monitoring visit, representatives of business community and civil society institutions emphasized repeatedly the lack of regulations in the quasi-government sector and the ensuing corruption risks.<sup>4</sup>

As for the business sphere in general (in RK it encompasses both the quasi-government and the private sector), according to the Business Climate survey conducted by the National Chamber of Entrepreneurs *Atameken* and published on 31 March 2017, practically every second entrepreneur in Kazakhstan (45%) faced corruption. Of those, 84% of the respondents believed that corruption was impeding development, and 16% that it helped. Only 16% of the respondents addressed their complaints against corruption schemes to law enforcement bodies, which may be largely due to the lack of trust in law enforcement officers.<sup>5</sup> The following factors were listed as encouraging criminal corruption in business: the high number of requirements; unenforceable mandatory requirements or administrative procedures of state authorities; unreasonably high fees payable for getting a permit (licenses, certificates, patents, etc.); entrepreneurs trying to evade liability for breaking the law; lengthy periods of review of complaints; involuntary

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<sup>1</sup> Source: <https://goo.gl/oDbXNG>.

<sup>2</sup> National Report on Countering Corruption, 2017, p. 18

<sup>3</sup> National Report on Countering Corruption, 2017, p. 46

<sup>4</sup> E.g., the attention of the monitoring team was drawn to high corruption in the execution of government order contracts. Government order contracts are regulated by Article 41 of the Budget Code. They are defined as a contract for certain government services, implementation of budget-sponsored investment projects or other objectives aimed to support socioeconomic stability of the state, with legal entities with a government interest in their charter capital, or with entities affiliated with the National Wealth Fund Group, National Chamber of Entrepreneurs of the Republic of Kazakhstan, the autonomous cluster fund, autonomous entities of education and their organisations, as determined by the Government of the Republic of Kazakhstan. In accordance with the Budget Code, government orders are executed outside competitive tenders that are stipulated in the public procurement legislation.

<sup>5</sup> <https://goo.gl/hhTkws>.

payments in an unfavourable administrative environment in an attempt to save business; frequent inspections; and the desire of entrepreneurs themselves to gain an added competitive advantage.<sup>6</sup>

Figure 1. Factors encouraging entrepreneurs to rely on corrupt schemes



Source: a survey by the National Chamber of Entrepreneurs *Atameken*.

This information is corroborated overall by other analyses, in particular the 2015 research on the most prevalent risks in business by the Sange Research Centre.

Table 2. Research into risks in the business area, Sange Research Centre.

	Proportion, %
Legal risks	
Lack of knowledge of laws and rules	32,0
Cumbersome administrative and licensing procedures	31,4
Non-compliance with the contractual obligations by suppliers and customers	19,8
Lack of access to legal information or education	19,0
Ambivalence in the interpretation of legal rules	17,5
Corruption and extortion by state authorities and inspectors	14,7
Lack of access to qualified legal aid	11,9
Unpredictability of central authorities and their actions	9,5
Defencelessness before the inspecting authorities	9,4
Lack of contracting skills	9,1
Lack of norms, laws, implementing regulations and stipulated procedures	8,8
Issues with workers and trade unions	6,9
Lawlessness of local authorities	6,9
Failure of state authorities to honour contractual obligations (in state order contracts)	6,2
State authorities having vested interest in having businessmen breaking the law	5,3
Defencelessness before court, prejudice	5,2
Illegal takeovers	4,5
Piracy, violation of copyright	3,4
Other (specify)	0,4

Source: Sange Research Centre, responses to the monitoring questionnaire.

<sup>6</sup> Source: <https://goo.gl/Lh1wtq>.

For international companies corruption is number one obstacle to doing business in Kazakhstan.<sup>7</sup> According to them, corruption is widespread among the country's political circles whereas networks of patronage and cronyism undermine business environment. In addition, foreign investment is being constrained by red tape and ambiguous legislation. They believe that corruption is also rooted in courts. Bribes and unofficial payments are often offered in exchange for obtaining a favourable court ruling. Corruption is said to be present at all stages of judicial process. Courts are controlled by the ruling elites with interests, and the same is also applicable to selection of judges whereby bribes are paid to high-placed officials and court administrators. In addition, court decisions are open to influence for lack of independence in the judicial system. The weak judicial also impedes implementation of the broad legislative framework underling anti-corruption efforts.<sup>8</sup>

As for the business companies themselves, according to Transparency International, large corporations working in the Republic of Kazakhstan show low levels of corporate reporting transparency. In 2014, only 13 of 55 companies implemented business transparency standards by more than 50%. In 2016, there were only 2 (Euras Group – 5.2 and ZTE Corporation – 5.9) out of 14.

The group of experts note the leading positions that the Republic of Kazakhstan has in Central Asia in the implementation of e-government. The e-government portal of the Government of the Republic of Kazakhstan contains essential information including tax, commerce and licensing issues. The e-services offered to individuals and legal entities help to reduce direct contacts with officials and thus mitigate corruption risks and petty corruption. The broadening of the spectre of e-government services was valued highly both by representatives of authorities and member of civil society. The latter, however, noted that relevant authorities had retained discretionary powers in services relating to legitimization of land and property titles. Also representatives of civil society pointed out that, contrary to the programmes and strategies adopted, corruption remained as high in government procurement, in the law enforcement system, and increased even more in the political sphere (elections, regulation of mass media, persecution of activists).

The first National Report on Countering Corruption published in April 2017<sup>9</sup> offers information on the 2016 rankings of Kazakhstan by some of the world ratings.

**Table 3. Kazakhstan rankings in world ratings**

Rating and relevant organization	Kazakhstan's ranking/grade	Number of countries rated
Illegal payments and bribes, Global Competitiveness Index, World Economic Forum	61st in 2016 (64th in 2015)	138
Doing Business Index, World Bank	35th in 2016 (41st in 2015)	190
E-Government Development Index, UN	28th in 2014 (38th in 2012)	193
Corruption Perception Index, Transparency International	Scored 29 in 2016 (28 in 2015)	176
Worldwide Governance Indicators, World Bank	Scored 24.5 in 2015 (19.4 in 2013)	212
Nations in Transit, Freedom House	Scored 6.50 in 2016 (6.50 in 2015)	29

The start of 2017 was marked in the Republic of Kazakhstan by arrests among senior officials (detained or arrested were the earlier dismissed deputy head of the Administration of the RK President, minister of economy and director of the Single National Pension Fund), and by a launch of the constitutional reform. The purpose of the latter, approved in March 2017 (after the monitoring visit), was to strengthen the role of parliament in the affairs of the state, among other things, in the formation of the government and in the management of the economy. From now on, parliament participates in the forming of the government. Now

<sup>7</sup> Source: <http://www.business-anti-corruption.com/country-profiles/kazakhstan>.

<sup>8</sup> Idem.

<sup>9</sup> National Report on Countering Corruption, 2017, p. 22

the prime minister presents his resignation not to the president elect, as before, but to the newly elected *Majilis* (lower chamber of the parliament). The country's president personally may only appoint three ministers: those of foreign affairs, interior and defence. The government has been given powers to approve state programmes and systems for the funding and payment of salaries to government employees. The president no longer has the right to repeal or suspend acts promulgated by the government and the prime minister. As a result, it is the government itself that is made now fully responsible for the acts it approves.

### 1.1.-1.2. Anti-corruption reforms, policy and its implementation, civil society participation

#### Recommendation 1.1-1.2 of the Third Monitoring Round Report on Kazakhstan

1. 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.
2. 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).

#### Recommendation 1.4 of the Second Monitoring Round Report on Kazakhstan (recommendation was confirmed during the Third Monitoring Round)

1. 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.
2. 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.

### Anti-Corruption Strategy

#### *Elaboration and adoption*

***“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.”***

The 2015-2025 Anti-Corruption Strategy of the Republic of Kazakhstan, approved with the Decree of the RK President on 26 December 2014,<sup>10</sup> has five chapters (introduction; analysis of the current situation;

<sup>10</sup> Published by the legal information system *Ediler*: <https://goo.gl/H78CrS>.

aims and objectives; key areas; principal approaches and priority actions; and monitoring and assessment of implementation). The aims of the Strategy are to enhance efficiency of the state's anti-corruption policies, engage the entire society in the anti-corruption movement by instituting an atmosphere of zero-tolerance to corruption, and to bring down the level of corruption. The purposes include: countering corruption in civil service; implementing an institution of public control; countering corruption in the quasi-government and the private sector; preventing corruption in courts and law enforcement agencies; establishing a level of anti-corruption culture; promoting international cooperation in issues of anti-corruption. The target indicators are: quality of government services, public trust in government institutions, level of legal awareness of the public, higher prestige enjoyed by the country among international community, and improved relevant international ratings, including Kazakhstan's ranking in the Corruption Perception Index by Transparency International. The introductory part of the Strategy emphasizes the comprehensive preventive measures capable of reducing radically the level of corruption and eradicating its causes and the conditions that lead to it in various spheres of the state and society.

The Strategy drew on the best international practices and the most recent strategies from Georgia, Moldova, Russia, Estonia and Romania. Its development benefited from the contributions by the Supreme Court, National Bank, Office of the Prosecutor General, National Security Committee, Auditing Committee for the monitoring of the execution of the republican budget, Agency for the Civil Service Issues and Countering corruption, ministries of foreign affairs, interior, justice, finance, education and science, defence, healthcare and social development, national economy, energy, culture and sport, agriculture, and local executive authorities, together with Transparency International, National Chamber of Entrepreneurs *Atameken*, political party *NurOtan*, and the Institute of Legislation of the Republic of Kazakhstan. The draft strategy was published on the official website, and any citizens or non-government organizations could take part in the discussion. All incoming proposals were forwarded to the working group responsible for the drafting of the Strategy.

The lead in the mechanism underlying the Strategy is given to the authorized anti-corruption body, i.e. the Agency for the Civil Service Issues and Countering Corruption (henceforth the Agency), with contributions from all government authorities, organisations and departments, state-owned companies, political parties, public associations, and civil society in general. The culminating stage in the implementation of the Strategy has been defined as presentation of the relevant report to the Head of the State. The annual National Reports on the implementation of the Strategy are published in mass media<sup>11</sup>. The first National Anti-Corruption report was published in April 2017.

For the purpose of gradual implementation of the Strategy, the Government, with its resolution No 234 of 14 April 2015, approved its **Plan of Activities** for 2015 - 2017, which includes, apart from the 64 proper anti-corruption activities, another 65 aiming to counter "shadow economy".<sup>12</sup> Paragraphs 63 and 64 of the Plan of Activities provides that reports on the implementation of the Plan shall be published in mass media and on the Agency's website. To have the Strategy (and the Plan) implemented, all central government authorities have approved their own departmental plans, and local executive authorities, their regional plans for the implementation of the Strategy.<sup>13</sup> There was approved, among other things, a 2016 Interdepartmental Plan of Preventive Activities to thwart corruption in courts and law enforcement agencies.

As for **the engagement of civil society**, representatives of authorities, in their responses to the questionnaire and in the course of the monitoring visit, described civil society's contributions towards the development of the Strategy as significant and systematic but failed to produce any specific examples showing how this engagement affected the contents of the Strategy and the Plan of Activities. The authorities pointed out to the recently approved Code of Ethics for public servants as reforms that proved most effective in practice (for details see the relevant chapter). Also, according to the authorities, prevention is ensured by extending the scope of corruption offences to executive officers of the quasi-government entities. Also, these officers are to ensure compliance with anti-corruption restrictions, thus creating an important preventative effect. A number of new legislative acts were adopted, together with amendments to current laws (e.g., On Civil Service, On Public Councils, On Access to Information, On

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<sup>11</sup> Part 5 of the Strategy.

<sup>12</sup> Source: <https://goo.gl/WqmoL1>.

<sup>13</sup> E.g., by the Akimat of the city of Almaty (see <https://goo.gl/1xnZin>), Akimat of the Pavlodar Region (see <https://goo.gl/KDS1Av>), Akimat of the West Kazakhstan Region (see <https://goo.gl/H2YRfd>), Akimat of the East Kazakhstan Region (see <https://goo.gl/FzUWqU>).

Universal Declarations, On Government Procurement, On State Audit and Financial Control, On Informatisation, and the Entrepreneurship Code). The Criminal Code was reformed: now the bribe covers not only tangible but also intangible benefits and advantages, inter alia, with respect to third parties. There are plans to require disclosure of beneficial founders of oil and mining companies from 2020.

*Engaging civil society in the development and implementation of the anti-corruption policy*

***“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.”***

As mentioned above, one of the priority areas of the Strategy is engagement of the entire society in the anti-corruption movement by creating an atmosphere of zero tolerance to any instances of corruption. The new Law “On Countering Corruption” (Anti-Corruption law), which came into effect on 1 January 2016, broadens the range of anti-corruption agents. They include, apart from government authorities, entities of the quasi-government sector, public associations, and individuals and legal entities. Also it introduces provisions that regulate engagement of the public in anti-corruption. Thus, under Article 23 of the law, individuals, public associations and other legal entities countering corruption shall rely on the following measures: report facts of corruption offences known to them in the manner prescribed by law; propose suggestions to improve legislation and law enforcement practices; contribute to the formation of anti-corruption culture; inquire about and stand informed, in the manner prescribed by law, by government authorities about anti-corruption activities; conduct research, including scholarly and sociological studies; contribute to the awareness through mass media, and organize publicly meaningful events in this area.

Opportunities for an active engagement also become available with an Open Agreement for the Consolidation of Anti-Corruption Efforts<sup>14</sup>, initiated by the Agency. The feedback from civil society is captured at video conferences and during the discussions of the more pressing issues and their solutions. As of today, parties to the agreement include over 39,000 organisations and 54,000 individuals. According to the authorities, the Public Anti-Corruption Council advising the Agency has also been active implementing the Strategy, inter alia, by engaging non-governmental organisations.

The year of 2016 saw the launching of the Public Control project commissioned by a state social order. Its goal is to engage NGOs in a set of actions preventing corruption, including anti-corruption monitoring, creation of anti-corruption culture through community liaison offices to be set up throughout the country where NGOs representatives will daily work on mechanisms to overcome administrative barriers, record allegations of abuse of power or overstated prices in public procurement, etc. So far in the project, over 1,000 individuals have contacted community liaison offices, and about 300 of them made that in writing. The Public Control project has conducted workshops, seminars, round tables and business forums. Each event served a platform for social groups to discuss relevant anti-corruption issues.<sup>15</sup>

In order to create an atmosphere of zero tolerance to any type of corruption and to promote an anti-corruption culture in society, there will be a grant allocated for NGOs in 2017. The grant is expected to be used to host events raising awareness of the public about procedures involved in the delivery of government services, produce videos to promote anti-corruption culture, develop recommendations, etc.

A monetary incentive has been introduced for members of the public reporting corruption incidents. In 2016, 185 individuals were awarded the total of KZT 27 mln,<sup>16</sup> which, the authorities believe, indicates the effectiveness of this method in practice.

*Monitoring and assessment of implementation*

***“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***

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<sup>14</sup> Anybody willing to contribute to countering corruption may accede the agreement. Information about the parties to the agreement can be found on the *Adaldyk alany* website (<http://adaldyk.kz/index.php/agreement>).

<sup>15</sup> National Report on Countering Corruption, 2017, p. 64

<sup>16</sup> National Report on Countering Corruption, 2017, p. 65

**following up on the monitoring results. To ensure civil society engagement in such monitoring process and publication of all monitoring reports (assessments)."**

An essential condition for achieving the Strategy's goals is the assessment of its implementation and the monitoring aimed at the activities of the government authority (authorities), organisations, and entities of the quasi-government sector that regulate applicable procedures in a certain sphere. The monitoring shall be conducted by the authorised anti-corruption body, i.e. the Agency, as well as other anti-corruption entities, i.e. state authorities, quasi-government entities, public associations, individuals and legal entities (all, except the Agency, at their own initiative).<sup>17</sup> Results of their monitoring activities shall be recorded according to a certain form and must include certain data.<sup>18</sup> The Agency shall consider and analyse, on a permanent basis, the results of the monitoring, produce quarterly reports and publish them on its website.

The anti-corruption monitoring can be internal and external. **The internal monitoring and assessment** shall be conducted directly by the organiser of the relevant activity. Additionally, as the authorised anti-corruption body, the Agency shall coordinate the implementation of the Plan of Activities and prepare annual (as well as quarterly) summary reports. Based on the 2015 analysis, government authorities performed 30 activities and failed to perform 2.<sup>19</sup> In 2016, 36 activities were performed. According to the authorities, the assessment of the implementation of the Strategy took into account the quality and timeliness of activities and compliance with the Strategy's target indicators.

**The external monitoring** shall be conducted by a group specifically set up for the purpose and including representatives of the public, mass media, state authorities, and the National Chamber of Entrepreneurs.<sup>20</sup> The composition and remit of the group were approved with the order of the minister for civil service issues (its composition updated with a new order of 18 January 2017). In its assessment, the group is guided by its Rules. In 2016, it held 3 meetings. In November 2016, it carried out visits to the cities of Uralsk and Kyzylorda. Results of external assessments are reported back to the government authorities for the follow-up on the Strategy's implementation. Based on their analysis, the group deemed the implementation of the Strategy as satisfactory.<sup>21</sup> Similar special monitoring groups have been set up at the regional level.

Results of the anti-corruption monitoring may serve grounds for internal and/or external corruption risk analysis. In 2016, e.g., 5 central and 16 local executive authorities analysed their main activities for corruption risks. No risks were found.<sup>22</sup> In the same period, the Agency reported having conducted an external analysis of corruption risks,<sup>23</sup> inter alia, pertaining to: 1) the activity of the Organisation and Recruitment Department of the General Staff of the Armed Forces and its subordinate local military authorities; 2) SME subsidising; 3) the activity of the Administrative Police Committee of the Ministry of Interior, units of the administrative police and local police units of the Departments of Interior of the cities of Astana, Almaty, regions and in transport, and 4) the activity of the Ministry of Energy, its departments and territorial divisions. Locally, activities of 158 territorial units, departments of central state and local executive authorities were subject made to external analysis. As a result, systemic drawbacks most typical of government authorities were identified, namely: far from perfect delivery of government services, presence of discretionary authorities in regulations and laws, and conflicts of interest. Out of 2,257 recommendations made by the Agency, according to the Agency itself, 1,516 were implemented (70%).<sup>24</sup> The reports are published on the Agency's website (<http://kyzmet.gov.kz/ru>).

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<sup>17</sup> In accordance with the monitoring rules of 19 October 2016, No 13.

<sup>18</sup> Information about the scope of anti-corruption monitoring; data about the individuals or legal entities that are engaged in the anti-corruption monitoring; the period covered by the monitoring; quantitative and qualitative indicators that describe the status and causes of corruption affecting the work of state authorities, organizations or quasi-government entities; assessment, conclusions and recommendations aimed at improving anti-corruption measures by anti-corruption agents.

<sup>19</sup> The above report of 15 April 2016 is published on the Agency's official website (at <https://goo.gl/rxvrPx>) and by newspapers *Kazpravda* (19 April 2016) and *Yegemen Kazakstan* (23 April 2016).

<sup>20</sup> President of the association of legal entities called Kazakhstan's Civic Alliance was elected head of the group. The group's methods of work include meetings, suggestions and recommendations to authorities and visits to the regions.

<sup>21</sup> National Report on Countering Corruption, 2017, p. 12.

<sup>22</sup> National Report on Countering Corruption, 2017, p. 31

<sup>23</sup> Subject to the Rules for conducting an external analysis of corruption risks, as approved with the Decree of the RK President of 29 December 2015, No 155.

<sup>24</sup> National Report on Countering Corruption, 2017, p. 31

The authorities believe that with the introduction of anti-corruption monitoring, state authorities will be sure to adopt measures to eliminate causes and conditions for corruption. The monitoring helps to identify areas and agencies most susceptible to corruption, and draw up recommendations. Implementing recommendations, they introduce amendments to laws to eliminate corruption-prone rules and collisions, take steps to enhance public access to information about the work of government authorities, lower administrative barriers to the delivery of government services, etc. As for the Agency, according to the authorities, there are 6 employees that are involved in monitoring and risk assessment.

The first National Report on Countering Corruption was published in April 2017. Its purpose is to provide an unbiased analysis of the outcomes of the country's anti-corruption policy and to help to develop some practical measures to eradicate corruption.<sup>25</sup>

### Public and Expert Councils

***“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.”***

The authorities reported about the amendments adopted in 2016 to the Law “On Public Councils” whereby the councils shall be set up both at the local level (in regions, cities and towns) as well as at the national level (pertaining to different areas of activity). Such councils shall be established by working groups headed by the leader of the relevant state authority at the republican level, or by the head of the local representative authority at the local level. They should have at least two thirds of its members coming from civil society and nominated by non-profit organisations and individuals. As of today, 229 public councils have been established with the total membership of about 4,000 people, of which 16 councils are at the republican level, 213 are at the regional and local levels. The authorities report that at least 75 per cent of the council members at the republican level representing civil society having been elected in a competitive procedure. To improve their work and pursuant to proposals from the councils, state authorities and international organisations, draft Model Rules for Public Councils have been drawn up.

Also, the Law on Access to Information was adopted on 16 November 2015. The law expanded the list of information access to which may not be restricted. Those include, inter alia: information on fire safety, sanitary and epidemiological situation and radioactivity, safety of food products, state of emergency and disasters that may threaten safety and health of individuals, and their consequences, and natural disasters, their official prediction and implications, incidents of violations of human rights and civil liberties, facts about acts of terrorism committed, etc.

### Public discussion of draft normative legal acts

***“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.”***

The Law on Legal Acts of 6 April 2016 provides for two procedures of public discussion of draft normative legal acts (NLA): 1) draft NLAs with implications for the interests of entities of private entrepreneurship should always be discussed with the National Chamber of Entrepreneurs and its territorial units<sup>26</sup>; 2) draft NLAs pertaining to human rights and individual freedoms as well as obligations shall always be agreed

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<sup>25</sup> <https://goo.gl/jxgSYb>.

<sup>26</sup> The authorities report that pursuant to Article 19 of the Law On Legal Acts the drafting agencies shall submit any NLA that may affect interests of private business to the accredited associations of private businesses and to the National Chamber of Entrepreneurship, attaching, as a mandatory requirement, an explanatory note, and seeking their expert opinion, including each subsequent time when the draft is discussed again with the state authorities concerned. The drafting agency, if it accepts the expert opinion, shall amend or amplify the draft accordingly. Should it disagree, the drafting agency shall, within ten working days of the day when the expert opinion was received, send to the accredited associations of private businesses and the National Chamber of Entrepreneurs their answer providing grounds for non-acceptance. Such responses with the explanations are the *mandatory addendum* to the draft all the way to the approval. Paragraph 34-1 of the 2002 Government bylaws provides that the drafting state authority shall, within seven working days of the day when expert opinions from the RK National Chamber of Entrepreneurs and accredited associations of private businesses reach them, publish them on its website, and, if in disagreement with them, publish *substantiated* grounds for non-acceptance.

upon with public councils.<sup>27</sup> In addition, the Access to Information Law of 16 November 2015 provides for mandatory publication of draft NLAs on websites of both information holders and drafters.<sup>28</sup> The same law makes it a requirement for information holders to publish draft NLAs for discussion on the Open Government web-portal in the section “Pending NLAs”<sup>29</sup> (<https://legalacts.egov.kz/>).

In addition, the authorities have informed about the work done to set up an e-Legislation information system aiming to speed up reporting and improve the transparency of law-making as well as to provide prompt reference information about the state of legislature plans online. The system is expected to be implemented before the end of 2017.

## Conclusions

The monitoring team welcomes the adoption of the **Anti-Corruption Strategy of the Republic of Kazakhstan for 2015-2025** and the improvement or adoption of new legislative and other acts within its framework to counter and fight corruption. It is obvious that one of the chief drawbacks of the earlier programmes in that area, i.e. their openly punitive nature, has been removed. In that light, the new Strategy has benefited from the fact that it aims to implement holistic measures of a preventive nature capable of reducing the level of corruption in such areas as civil service, quasi-government sector, private sector, judicial and law enforcement bodies. The adoption by all central authorities of their respective departmental plans also deserves a positive mention, as does the adoption of regional implementation plans by local executive authorities.

As for the 2015-2017 Plan of Activities, the majority of civil society representatives deemed it inadequate. The monitoring team is overall in agreement with this opinion, and points out that the Plan stipulates measures that are intended to counter not only corruption but also the “shadow economy”. The team also expresses its doubt whether quite a few of the activities listed in the Plan have indeed any anti-corruption thrust at all.

It would be worthwhile recalling in that regard the part of the recommendation that highlights the need to conduct a thorough analysis of the status of corruption and its trends, and also to look into the earlier anti-corruption efforts, and the outcomes of corruption studies, including those by NGOs. Unfortunately, the authorities failed to demonstrate any evidence that any such analysis had taken place or served as a starting point for the development of the Strategy and the Plan.

Also, the monitoring team studied with interest the first National Report on Countering Corruption. One would argue that a report of such level must not only be subject to publication in mass media and on the Agency’s website, which by itself suggests a responsible and open anti-corruption policy by the government, but it also must be subject to a comprehensive discussion, among other things, by engaging all stakeholders, including civil society and NGOs. Moreover, as experts point out, paragraph 5 of the Strategy actually provides for the drafting of an “annual national report on implementation” (i.e. of the Strategy). The approved report falls short of this objective, and this shortcoming ought to be remedied in future.

As for **the involvement of the civil society** in the development and adoption of the Strategy, opinions heard by the monitoring team, differed. During the visit some member of the public claimed to have taken part in the discussions on dialogue platforms organized by state authorities and political parties, and also to have submitted their recommendations through the drafter’s website.<sup>30</sup> Others believed that the preparation process was heavily restricted, and the feedback on comments and suggestions made was not sufficient. It is clear to the experts that not all members of civil society could contribute to the development of the Strategy

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<sup>27</sup> Article 20, “Specific procedures for the development and adoption of regulatory legal acts pertaining to individual rights, freedoms and obligations of the citizens”, Law of the Republic of Kazakhstan On Legal Acts of 6 April 2016.

<sup>28</sup> Subpara 5), paragraph 3, Article 16, of the Law of the Republic of Kazakhstan On Access to Information of 16 November 2015.

<sup>29</sup> Ibid, paragraph 4, Article 17.

<sup>30</sup> It was their recommendation to have the following covered by the Strategy: 1) declaration by public servants of their income, expenses, assets and property (postponed till 2020), 2) enhanced engagement of civil society, involving society in decision-making (new versions of the laws on access to information, on public councils and on countering corruption; 3) introduction of anti-corruption education, i.e. training courses beginning with the school age, and elimination of legal nihilism, improving legal literacy, raising awareness through mass media. Recommendations ultimately not incorporated in the Strategy concerned: 1) confiscation of property, should the official fail to explain its provenance; 2) anti-corruption assessment of regulatory and legal acts, and 3) accountability of national companies.

and make their position and concerns over corruption known to the authorities. Hence the process of discussion was not entirely open, inclusive and transparent. The same is true of the contributions from civil society institutions towards the implementation of the anti-corruption policy: while some measures engaging public associations, as shown above, had been taken, lack of information about specific practical outcomes of this activity today seems to suggest rather an insignificant progress in complying with the relevant parts of the recommendation.

Experts urge to maintain a constant dialogue with civil society during the elaboration of conceptual and strategic as well as programme anti-corruption documents, among other things, by expanding the NGOs representation in the Public Council on the Activity of civil service bodies and countering corruption,<sup>31</sup> and by mandatory incorporation of NGO representatives in the Presidential Anti-Corruption Commission.<sup>32</sup> Experts urge to keep this issue under continuous monitoring.<sup>33</sup> Kazakhstan authorities insist that representatives of civil society are currently involved in the elaboration of the 2018-2020 Plan of Activity.

Active **introduction of the monitoring mechanism**, involving, inter alia, the public, and corruption risks assessment are essential stages in the shaping of any mature anti-corruption policy. As experts point out, one of the conditions for proper monitoring in the Republic of Kazakhstan is its openness. Monitoring reports should always be made known to the public through publication on the Agency's website, whereas recommendations produced as a result of the monitoring and risk analysis, must be implemented within six months in accordance with a plan produced specifically for the purpose.

Despite the positive trend it appears too early to draw any conclusions about the efficiency of monitoring and corruption risk assessment. First, under the Agency's Rules, its recommendations are not mandatory.<sup>34</sup> Experts believe it to be a drawback that lowers significantly the effectiveness of the work being done, and this should be remedied.

Second, the lack of published reports about the implementation of recommendations casts doubt on the statistics showing that 70 per cent of all the recommendations by the Agency (1,520),<sup>35</sup> including the central and regional levels, have been implemented. The materials made available to the monitoring team suggest that out of the total of 1,520 only 10 recommendations in fact were implemented.

Third, apart from the minutes of the sessions, no other outcomes of external monitoring by a Special Monitoring Group were made available, hence making it impossible to assess the magnitude of the work done. Members of civil society denied having any information at their disposal showing the activity of that group or the outcome of their work for the two years since its establishment in 2015.

Fourth, there is no evidence of regular monitoring by civil society, i.e. any *independent* monitoring. Hence this part of the recommendation has been complied with only in part.

Experts call on the Republic of Kazakhstan to facilitate a more active role of NGOs, mass media, and civil activists in conducting a comprehensive and holistic independent monitoring and external assessment of the implementation of the Anti-Corruption Strategy, as well as to encourage and motivate NGOs and mass media to become engaged in anti-corruption investigative journalism and make their role and contribution more effective. It would be desirable to revisit the practice of drafting and preparation of the annual National Anti-Corruption Report both at the legislative and practical level, having envisaged some alternative monitoring by NGOs and mass media, anti-corruption investigations by them and presentation of the resulting facts to the drafting work group, mandatory public discussion of the draft report (providing reasonable and adequate deadlines for the submission of comments and suggestions), and other steps aimed at achieving maximum engagement of all stakeholders in the process.

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<sup>31</sup> The composition of the Public Council on Activity of civil service bodies and countering corruption can be found here: <https://goo.gl/ky69Fs>.

<sup>32</sup> The Decree of the President of the Republic of Kazakhstan of 2 April 2002, No 839, establishing the Commission of the President of the Republic of Kazakhstan on anti-corruption issues. See the text of the document here: <https://goo.gl/a6B3Fm>.

<sup>33</sup> Kazakhstan authorities note that the present composition of the Commission includes representatives of civil society.

<sup>34</sup> For comparison, instructions by the Agency to eradicate any violations uncovered during an audit and bearing on *civil service issues*, shall be mandatory and subject to implementation (see paragraph 43 of the Agency's Rules). Experts welcome the proposal to make such recommendations mandatory; such proposal is being detailed in the draft law on amendments to the anti-corruption legislation.

<sup>35</sup> National Report on Countering Corruption, 2017, p. 31

The monitoring team welcomes the adoption of amendments to the **Law on Public Councils** which have revised procedures for their establishment, making for a broader involvement of public institutions and individuals in decision-making by state authorities both at the republican and local levels, as required by the recommendation. However, according to the members of civil society, there have been and still are violations of law and procedure in the formation of councils.

In particular, in some cases functions of council presidents may be delegated to the current *maskhalit* secretaries. Often case, councils incorporate loyal members of civil society nominated by executive or representative authorities. The role of *akimats* and *maskhalits* continue to remain key in ensuring the functioning of the councils and their decision-making on issues topical to local communities and on draft NLAs, with the negative effect for the councils' independence.

In some cases, councils play rather a formal and rubber-stamping role, attached to executive authorities. Nevertheless, in such cities as Almaty, Ust-Kamenogorsk, Karaganda, etc. public councils act as expertise and dialogue platforms and serve as a good channel of interaction between authorities and the public.

As for the part of the recommendation that calls on the Republic of Kazakhstan to extend the positive practices of the National Council of the interested parties for the EITI promotion to other spheres, no new evidence has been provided, and the recommendation stands unfulfilled in this part.

Experts regard the adoption of laws on legal acts and on access to information as important steps towards involving the public in **the process of drafting of NLAs**, inter alia, in the anti-corruption area. However, these reforms have rather a mixed character.

Under the Legal Acts Law, the mandatory discussion practices apply only to those NLAs that touch upon private businesses or concern human rights and individual freedoms, and the discussion itself has limitations, i.e. agreement is to be sought only from the National Chamber of Entrepreneurs (and its territorial divisions) and public councils, respectively.

The monitoring mission found out that public councils not always had the human resources or expertise to ensure a truly comprehensive discussion, and, as a result, having them agreed to a draft is often a formality (i.e. no follow-up amendments or amplifications).

Experts note that the Law "On Public Councils" is new to the Republic of Kazakhstan and may, naturally, require more time for a full-fledged implementation of all its requirements and a certain level of preparedness of both civil society and government authorities. It is thus believed expedient to continue monitor the dynamic of its implementation and measures being drafted at present to boost the efficiency of the councils<sup>36</sup> and transparency of the competitive selection of the working groups that are responsible for the establishment of councils through the introduction of observers. It is imperative to strive for real, not declarative autonomy, professionalism and capacity of such councils, among other things, by revising rules and procedures for the selection and rotation of their members, defining sources that will be providing them with material and logistical support, elaborating procedures of active engagement in government decision-making, in particular in the anti-corruption area. It is assumed that in future reports the work of expert councils will not be looked into anymore.

Also, although public discussion procedures are stipulated by the Legal Acts Law, in practice, as became known to the experts, those had little effect, and in many cases remained declarative or symbolic. The time allowed for the discussions is insufficient (it is at least 10 days of the day when the draft was published under the law, but effectively, in many cases, only 10 days are set aside for a public discussion<sup>37</sup>).

State authorities that draft NLAs have no obligation to either explain their decision on the proposals they receive, except the ones that pertain to private businesses, or inform the applicant accordingly.

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<sup>36</sup> Elaboration of an analytical report by the Civil Alliance of Kazakhstan, complete with specific recommendations to be made public at the September 2017 conference and at the First republican Majilis of Public Councils in November 2017; drafting of methodological guidebooks, offering of training with the participation of international organisations and experts, organizing republican workshops, etc.

<sup>37</sup> The monitoring team was given an example when public discussions on amendments to the Mass Media Law were only given 2 days.

The rules for the publication of draft NLAs and their discussion on the website have been covered by an administrative ordinance - an order by the Minister of Information and Communications.<sup>38</sup>

According to civil society, the number of users of the Open Government website is small, there are no public awareness campaigns, and as a result this public discussion channel has also been rather weak. Also, NGOs and mass media point to the lack of feedback or overall willingness on part of the drafters to amend their draft NLAs, which from time to time may have negative implications.<sup>39</sup>

The monitoring team urges to have a more substantive, efficient and systematic dialogue with institutions of civil society and in practice incorporate their position in draft NLAs and specifically in drafts pertaining to development and implementation of the anti-corruption policy, among other things by increasing the time made available for the discussion, introducing the requirement for the government NLA drafters to offer substantiated explanations to suggestions they receive, and publishing all suggestions and resulting decisions on the web-site, etc. Therefore, this part of the recommendation is deemed to be complied with partially.

**Overall, Kazakhstan is partially compliant with Recommendation 1.1-1.2 and Recommendation 1.4, and they remain valid as Recommendations Nos 1 and 2.**

The monitoring team would like to remind that under the international standards, the state has the key responsible for the development and implementation of an anti-corruption policy embracing all spheres of life of the state and society. In this regard, experts would like to draw attention to the fact that the Anti-Corruption Strategy, in accordance with its Preamble, should “provide for the development and implementation of a set of comprehensive and consistent anti-corruption measures at all levels of the state power, *and also in private sector*”.

The Strategy talks of the need for “*systemic* countering of corruption”, of a clear requirement to have a “*holistic* anti-corruption strategy”, and urges to “finalise at last the approaches to anti-corruption *in private sector*”.<sup>40</sup> The document also recognizes that any intervention by the state in business operations should proceed from a *clear understanding of the sphere of application* of corruption and *the scope of persons that are covered by its definition* (paragraph 2.2).

The monitoring team welcomes the fact that countering corruption in private sector is defined as one of the key areas of the 2015-2025 Strategy (see 4.3 above). However, this choice, from the point of view of the experts, has not been properly supported with fundamental principles as well as legal, preventive, and organisational and administrative measures.

First, the Strategy has failed to establish the principle whereby it is the state that has the primary responsibility for the development and implementation of anti-corruption policies covering all spheres, including the private sector.

Second, measures aimed at countering corruption in the private sector have not been fleshed out properly in the Strategy, while respective areas of responsibility of the state and business community have not been allocated.

Third, the Plan of Activities for 2015-2017, covering three years and embracing, among other things, the quasi-government and the private sector, shows only four activities, whose significance for the fight with the most blatant incidents of corruption in business is not entirely evident (see activities 33-36), and their goal fails to align with the corruption countering objectives as they are defined in para 4.3 of the Strategy.

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<sup>38</sup> The order by the Minister of Information and Communications of the Republic of Kazakhstan of 30 June 2016, No 22, “On approving the Rules for the publication and public discussion of draft law concepts and draft regulatory legal acts on the pending RLAs web-portal”.

<sup>39</sup> E.g., in May 2016 lack of public discussion of the draft Land Code led to demonstrations, arrests among human rights activists and detentions of reporters, followed by a reorganization of the line ministry responsible for information and communications. In December 2016, there was a similar situation with the draft law “On amending and amplifying certain RK legislative acts on issues of countering terrorism and extremism”. The draft law proposed to introduce a requirement for citizens to be registered at the place of actual residence. Because of the inadequate time allowed and lack of efficient discussion procedures, implementation of some of the new rules provoked indignation and anger among country residents.

<sup>40</sup> The expert team would like to point out that the call to “develop measures to counter ‘criminal corruption’” was already made in the Decree of the RK President “On Further Measures to fight corruption” of 22 April 2009.

Fourth, the concern is that the Anti-Corruption Law fails to regulate properly public relations in the area of countering corruption in the private sector. This follows from Article 1 of the Anti-Corruption Law, which sets out such definitions as “corruption”, “official”, “persons authorised to carry out government functions”, and “person deemed to be equal to persons authorised to carry out government functions”. The analysis of relevant provisions leads to the obvious conclusion that the definition of “corruption” is not applicable to corruption offences in the private sector.

It is equally unclear in what way conflict of interest provisions of Article 15 of the Anti-Corruption Law, which attribute exclusively the public and quasi-government sectors (as it follows from Article 15, para 1) can be applied as an anti-corruption measure in the private sector (as required by Article 16 of the Anti-Corruption Law, and also by Article 15 of the Code of Entrepreneurship, which does not contain any independent definition of the conflict of interest).

Fifth, (elaboration and) coordination of anti-corruption policies in the private sector and collaboration with members of business community for anti-corruption purposes have not been part of the remit of the Agency or any other authorised state authority (either under the Agency’s Rules, or under the Anti-Corruption Law).

And finally, sixth, the National Report of Countering Corruption lacks any analysis of corruption risks in the business sphere, which makes it impossible to describe it as a comprehensive document on corruption in Kazakhstan.<sup>41</sup> The monitoring team encourages RK to take necessary steps, including legislative measures, in order to develop and implement the genuinely systemic and efficient anti-corruption policies aligned with the relevant world standards, and support it with mechanisms and institutions that will embrace, inter alia, the private sector.

### **New Recommendation No. 3**

*To recognize, at the level of anti-corruption policy documents, the responsibility of the state for the elaboration and implementation of a holistic anti-corruption policy, among other things, in the private sector; to extend the definition of corruption to the private sector, assign to a specialized state authority with powers to elaborate and coordinate the anti-corruption policy in the private sector, in cooperation with businesses.*

### **1.3. Public awareness and education in anti-corruption, corruption surveys**

*Recommendation 1.3 of the Second Monitoring Round Report on Kazakhstan (recommendation was confirmed during the Third Monitoring Round)*

1. 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.
2. 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.

*Recommendation 1.5. of the Second Monitoring Round Report on Kazakhstan (recommendation was confirmed during the Third Monitoring Round)*

To carry out an evaluation of how awareness-raising campaigns influenced the dynamics of qualitative

<sup>41</sup> Experts note that the National Chamber of Entrepreneurs Atameken develops and maintains, on a regular basis, an independent Business Climate rating, which, among other things, conducts periodic assessment of the level of corruption in the private sector (see also the respective chapter in this report).

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.

### *Assessing the corruption problem*

As reported by the authorities, in their assessment of the magnitude of corruption and elaboration of the Strategy they took into account the country's index produced from the legal statistics and broken down to government authorities. Also, surveys were conducted to determine the corruption perception index which characterises the opinion of the public about the extent of corruption among government authorities and is compiled from the following indicators: assessment of the perception of the level of corruption, assessment of the level of satisfaction with the state's anti-corruption policy, assessment of the openness of state authority from the point of view of information. References were made, among others, to the following studies:

- In 2015, PREKO Consulting conducted a study aimed at building the corruption perception index in Kazakhstan.<sup>42</sup> As the results suggest, the level of trust in the state's anti-corruption policy in general stood at 57.9%, that of central authorities, 64.8%, and that of local executive authorities, 51%. The authorities believe that comparing to a similar study carried out in 2013, there is a positive trend in the level of trust in the government's anti-corruption policies rising from 52.0% to 57.9%.
- The Public Opinion research institute has looked into the effectiveness of anti-corruption measures in the country in general and by central authorities and regions.
- In 2014, at the request of the Agency, a public monitoring of the quality of government services was conducted.
- In 2016, the Agency commissioned the National Research Centre *Bilim* to conduct a poll concerning the 50 most popular, problematic and publicly significant government services based on a set of 9,082 respondents. It covered also services provided by tax and customs authorities, and the survey did not uncover any particular public displeasure with corruption at these authorities. The service users expressed their dissatisfaction with requirements for too many documents, low competence of employees that provide the service, lack of consultation about government services, and long lines. The level of satisfaction by service users with the quality of government services stood at 72.8%. The best in terms of satisfaction among central authorities were the National bank, Ministry of Finance and Ministry of Justice. The worst were the Ministry of Information and Communications, Ministry of Energy and the Supreme Court.
- The research centre for the studies of public opinion and the Sange Research Centre conducted regular surveys of the public opinion of the quality of services at tax and customs administrations. The materials obtained offer information about corruption in these authorities, including specific corruption practices and amounts of bribes.

Additionally, the Administration of the RK President carried out an analysis into the implementation of the Sectoral Anti-Corruption Programme in 2011-2015. The authorities believe that overall the programme facilitated development of a set of interrelated measures, pointing out in particular to the following: development of computer databases of government authorities and their harmonisation; reduction of the licensed types of activity and licensing functions at government authorities; enhanced transparency of government procurement procedures; incorporation of representatives of civil society institutions as members of regional anti-corruption commissions, etc. There are plans, based on the results of public surveys, to involve extensively local executive bodies, and utilise their potential at the regional and district levels in the creation of anti-corruption culture in society.

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<sup>42</sup> The purpose of the study was to produce the corruption perception index characterising the opinion of the public about the extent of corruption among government authorities, determining, among other things, the level of anti-corruption culture in popular mentality and the most effective measures that help to cultivate anti-corruption culture in society.

As to the part of the recommendation, which suggested vesting the coordinating role in assessing the status of corruption and conducting relevant research with the body responsible for the implementation of the Strategy, the Agency has been carrying out some other functions in this area, including, in particular, annual contests (in 2015 and 2016) and some research.

### ***Awareness campaigns to prevent and fight corruption***

The authorities report about the following activities:

- There are annual projects as part of the state commissioning of social services intended to help to raise anti-corruption culture with reliance on the civil society resources. For that purpose, in 2015 republican and regional TV channels aired 3,369 stories, 15,992 articles were published in print and electronic media, and 82 regular anti-corruption columns were set up; in 2016, TV showed 2,615 stories, broadcasted 75 radio programmes, 17,798 articles were published in print and electronic media, and 139 videos were produced.
- In 2016, with the purpose of enhancing anti-corruption culture, a social project was implemented entitled “Organisation of a series of events aimed at creating anti-corruption culture with reliance on the NGO potential”. The project hosted 5 events (a promo event, a discussion, an informal conference, a seminar, a conference), and an awareness campaign (500 pieces of fliers, leaflets and booklets in the state and Russian languages were produced and distributed).
- As part of grant funding, a project was implemented in 2016 within the Anti-Corruption Culture theme with reliance on the NGO potential. It conducted a detailed content analysis of the available information about concerns and needs of the public. The more popular problems and concerns became topics for publications in electronic mass media. Altogether, 9 articles were published expounding on legal issues, legislation and anti-corruption tools, and the average number of hits for one article reached 6,557. A database of complains and applications (knowledge base) was set up and uploaded to the *Radiotochka* Information Agency’s website and that of Transparency Kazakhstan. It is freely available to read and download in Kazakh and Russian.
- There were produced 22,400 booklets offering a How to Apply to State Authorities Guide, in 2 languages, containing all contact details for each of the regions. 8 legal knowledge video lectures were produced and shown. Local universities hosted two dialogue venues.
- On 2 March 2017 the Agency initiated a project called “To the Future Without Bribes Together!”. The mobile anti-corruption taskforce included prominent public figures, *maslikhat* members, opinion leaders, actors and sport personalities. The mobile taskforce uses a specially designed bus to receive members of public or work teams at places where government services are offered (public services centres, tax and migration authorities). To date, the campaigning has been up and running across Kazakhstan and is set to continue throughout the year. Since the launch they have conducted 946 trips by anti-corruption mobile taskforces and have so far covered in its outreach activity 1741 work collectives, or more than 208,000 people; 313 personal applications have been received.
- In February 2017 a pilot programme “From Door to Door” was launched. It places information notices and billboards in public places, and attaches to utility bills booklets covering topics of anti-corruption. The practice has been rolled out across the entire country. According to the data supplied by the Agency’s territorial divisions, they distributed in places frequented by the general public almost 825,000 bills and leaflets, and sent about 7 million flyers attached or printed on utility bills; 920 anti-corruption banners were set up.
- On 28 February 2017, a flash mob called Anti-Bribe was launched by the Agency jointly with the Alliance of Kazakhstan Bloggers; it was actively supported by public figures, sportsmen and actors. Participants in the flash mob uploaded their photos with hashtags #ANTIBRIBE, #CHILDRENAGAINSTBRIBES, #IDONTACCEPTBRIBES. Over 15,000 social media users supported the flash mob.
- On 15 March 2017, the First Congress of Civil Anti-Corruption Initiatives was held to define five priority areas for joint efforts and to discuss zero tolerance of corruption.

The authorities believe that the on-going anti-corruption policy has helped to raise significantly the level of public awareness of anti-corruption laws and programmes for countering corruption. In the first half of 2017, the number of applications to the National Anti-Corruption Agency’s call-centre increased 13% (over

9,000 submissions), and 126 people received remuneration for their alleged corruption in the excess of KZT 18 mln total.

Besides, the Anti-Corruption Law has introduced the concept of the formation of anti-corruption culture (Article 9), implemented with education, awareness and organisation measures, together with the notion of the anti-corruption education deemed as a continuous process conducted with the aim of ethical, intellectual and cultural upbringing and shaping of an active civil posture of an individual rejecting corruption. E.g., paragraph 53 of the 2015-2017 Plan of Activities provides for the approval of a Work Plan aimed at raising intolerance of corruption at schools and universities, relying on youth organisations and incorporating issues of anti-corruption upbringing in curricula.<sup>43</sup> A model curriculum “Anti-Corruption Culture Fundamentals” was developed for use during the training and learning process across the universities. The curriculum was recommended by the Ministry of Education to all universities in the country as a basis for the development of their own anti-corruption curricula. Currently, 101 country universities have the anti-corruption discipline incorporated in the catalogues of their electives. A separate curriculum entitled “Fundamentals of anti-corruption culture” was developed and made available. Members of the faculty at the Public Administration Academy produced a teaching aide for the curriculum. As a result, 113 (out of 126) universities can now offer this study discipline, currently involving more than 114 students from a variety of specialities.

NGOs believe that efficiency and effectiveness of anti-corruption campaigns depend, among other things on the following: laws limiting the freedom of speech, mass media and information,<sup>44</sup> active presence of the state as a mass media owner in the media market,<sup>45</sup> and anti-corruption campaigns funding by government budgets as part of the state (social or information) contracting, a type of planning and organisation that does not presuppose achieving outcomes that would impact the dynamics of quality and quantity corruption indicator.<sup>46</sup> According to the Legal Policy Research Centre (LPRC), no impact assessment on qualitative and quantitative corruption indicators is being conducted by the contractors or budget programme administrators. As a result, it in no way impacts the effectiveness of subsequent campaigns, since they only target quantitative indicators, without taking any account of target audience or specific objectives. According to NGOs, the role and involvement of Kazakh journalists and mass media in anti-corruption reforms are minimum. The key function of journalism in fighting corruption has an extremely limited capacity for investigative reporting.<sup>47</sup>

### **Conclusions**

The above information is evidence of the continued positive practice of sectoral research in the area of countering and fighting corruption, and specific studies of the perception of corruption broken down by government authorities, compliant with one of the parts of recommendation 1.3.

Regrettably, there are no data on the practical application of the methodology aimed at periodical assessment of corruption covering not only the public but also the private sector and including such elements as the most corrupt areas, frequency and patterns of corrupt practices, parties to corrupt relations, and types of corruption benefits, as required by the recommendation.

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<sup>43</sup> To follow up on this activity, in 2015 the fundamentals of a system of anti-corruption education were set up. The model training modules for different subjects and disciplines were amended to include anti-corruption topics. In the 2015-2016 school year, those changes could already be seen reflected in the training process.

<sup>44</sup> International freedom of press and speech ratings give Kazakhstan a very low ranking. The World Press Freedom Index compiled by Reporter Without Borders ranked it 157th out of 180. For more details see here: <https://rsf.org/en/ranking>

<sup>45</sup> The statistics by the Ministry of Information and Communications showed that in 2015 in Kazakhstan there were 2,711 mass media, of which 687 were published or broadcast by state-owned enterprises, which is 25% of the total mass media in the country (<https://goo.gl/NzR4uw>).

<sup>46</sup> The decisive factor is the bulk size: number of articles, newspaper pages, minutes or hours of the airtime, printed leaflets, brochures, etc. The funding is given more often than not to state-run mass media and NGOs loyal to the authorities.

<sup>47</sup> Because of the restrictive media laws overall and the criminalisation of defamation and insult in particular (defamation alleging corruption wrongdoing is a criminal offence punishable with 3 years imprisonment - Article 130, part 3, of the RK CC) and broad discretion for charging reporters and mass media with civil law or administrative liability, large fines, suspension of closing down mass media (e.g., litigation on the action by a former official to the Ratel.kz web-site resulted in a fine of KZT 50 mln (over \$150 000) against the editorial staff) <https://goo.gl/1v7zdU>).

The fact that that it is still pertinent has been admitted to by the Strategy itself, which says that “the level and quality of sociology studies on topics of corruption problems and effectiveness of steps taken by the government are left to be desired.” (Paragraph 2.2). The civil society members that met with the monitoring team agree. They argue it is impossible to claim unequivocally that the Strategy has been developed based on a thorough analysis of the current status of corruption. Therefore, more needs to be done with the vesting of the duties involving arranging for and conducting such comprehensive studies with the body responsible for the implementation of the Strategy. There is no progress in that part of the recommendation.

As for the awareness campaigns aimed at countering and combating corruption, experts cannot but note the significant number and broad versatility of the activities carried out. However, no assessment has been made as to their impact on the dynamics of qualitative and quantitative aspects of corruption, and it therefore could not have affected the shaping of the strategy or planning for the subsequent awareness campaigns, taking due account of the goals to be achieved and the target audience, as required by the recommendation. It is equally unclear which specific practical aspects of the fight with corruption the initiatives listed by the authorities tried to focus on. The civil society members claimed that public liaison offices were not effective and pointed out to the lack of overall effectiveness of many of the activities completed. It is therefore impossible to judge about their practical achievements or make the conclusion about substantive progress in the compliance with the recommendation. Experts welcome the drafting of bills aimed at conducting impact assessment of awareness campaigns for qualitative and quantitative attributes of corruption, and urge Kazakhstan to rely on these data in the elaboration of future campaigns strategies, as it was urged by the recommendation.

**Kazakhstan is partially compliant with Recommendations 1.3 and 1.5 which remain valid as Recommendations Nos. 4 and 5.**

#### **1.4. Specialised anti-corruption policy and co-ordination institutions**

***Recommendation 1.6. of the Second Monitoring Round Report on Kazakhstan (recommendation was confirmed during the Third Monitoring Round)***

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

Currently the Republic of Kazakhstan has a specialized government body that combines regulatory, preventive and law enforcement functions in the anti-corruption area. It is the **Agency for the Civil Service Issues and Countering Corruption**. It was established with the Decree of the RK President of 13 September 2016, No 328, through the reorganization of the Ministry for Civil Service Issues. The Agency is subordinate and reports to the RK President. Under paragraph 20 of the Agency’s Rules, the Agency’s chairman is appointed to his office and relieved of his duty by the RK President.

The Agency’s jurisdiction includes, among other things, elaboration and implementation of the government policies in the anti-corruption area; coordination of activities of government bodies and organizations in anti-corruption issues; minimisation of causes and conditions that lead to corruption crimes; creation of an anti-corruption culture and a system for the prevention of corruption; and elaboration and implementation of strategies and programmes in the anti-corruption sphere. In addition, the Agency is also responsible for (a) the development and adoption of anti-corruption RLAs; (b) advising public servants and individuals on issues within its jurisdiction; (c) identifying causes and conditions that lead to corruption crimes in the work of government authorities, organisations and quasi-government entities; (d) conducting an external analysis of corruption risks; (e) monitoring the performance by government authorities, organisations and quasi-government entities of the follow-up recommendations on remedies to violations, causes and conditions that lead to corruption crimes, based on external analysis of corruption risks; (f) preparing summary information on the monitoring done and assessment of performance in the activities planned in the implementation of the Anti-Corruption Strategy, and submitting those to the Government; (g) defining a model procedure for the external analysis of corruption risks; and (h) determining the procedure of anti-corruption monitoring.

**The National Anti-Corruption Bureau** has the status of a department within the Agency and is a law enforcement body engaging in identification, disruption, detection and investigation of criminal offences of corruption. Among other things, it is to contribute to the drafting of the National Report of Countering Corruption and production of summary information on the monitoring conducted and assessment of performance of the activities planned in the Strategy's implementation. The Bureau also takes part in the development and implementation of key anti-corruption documents and in the elaboration of proposals to improve the regulatory and legislative framework in this sphere. Under paragraph 18 of the National Bureau's Rules, its leader is to be appointed by the RK President and nominated by the Agency's chairman.

### ***Other bodies***

The Decree of the RK President of 2 April 2002, No 839, instituted a **Presidential Commission on Anti-Corruption Issues** as an advisory and consultative body. The Commission shall perform the following functions: 1) elaborating and submitting to the head of State proposals on anti-corruption issues, among other things, to improve anti-corruption legislation, forms and methods of countering corruption; 2) monitoring and analysing the status of the fight against corruption; 3) looking into complaints from individuals and legal entities, as well as mass media publications alleging corruption offences by persons holding major government offices or unethical behaviour by public servants, and drafting relevant suggestions to persons authorised to introduce disciplinary sanctions recommending an internal investigation.

The Commission incorporates *ex officio* two deputy heads of the Administration of the RK President, Prosecutor General, Chairman of the National Security Committee, Chairman of the Audit Committee for monitoring the execution of the republican budget, chairman of the Agency for Civil Service Issues and Countering Corruption, Minister of the Interior, Minister of Justice, Minister of Finance, and by agreement, chair persons of the committees for the constitutional legislation, judiciary system and law enforcement agencies of the Senate of the Parliament of the Republic of Kazakhstan, and that of legislation and judicial and legal reform of the *Majilis* of the Parliament of the Republic of Kazakhstan. The Commission may incorporate members of non-governmental organisations and other persons. The Commission's working body is the Law Enforcement Department of the Presidential Administration.

The Commission meets as and when necessary but at least once every quarter, and its meetings can be open or closed by the decision of its chairman. In 2016, the Commission looked into such issues as countering corruption in education, architecture, urban development and construction; implementing Agrobusiness 2020 and Regional Development government programmes, and programmes of industrial and innovative development, etc. The Agency does not have any information as to the number of meetings the Commission had in 2014-2016.

### ***Conclusions***

The new institutional reorganisation that led in October 2016 to the establishment, pursuant to the Decree of the RK President, of the Agency for Civil Service Issues and Countering Corruption, prompted some positive changes in light of the criticism voiced with regard to the specialized anti-corruption agency during the Second and the Third Rounds of monitoring. Now, pursuant to paragraph 15 of the Agency's Rules, the competence of this body includes *elaboration and coordination of the implementation* of the anti-corruption policy. However, this resulted in a discrepancy between the Agency's Rules and the Law on Countering Corruption: under the latter the Agency has no powers in the area of elaboration of the anti-corruption policy. The Monitoring team urges the Republic of Kazakhstan to make relevant amendments in the law to ensure that appropriate powers be vested in the Agency, and to harmonise the Law on Countering Corruption with the Agency's Rules.

The experts also regret that no additional information was provided to testify to any progress in the implementation of the recommendation to ensure *independence* of the specialized anti-corruption body.

The monitoring team notes also that elaboration and coordination of the anti-corruption policy in the private sector (in collaboration with members of business community) is not currently part of the remit of either the Agency or any other authorized government authority (see paragraph 58 of the Agency's Rules). This gap should be bridged pursuant to the new recommendation above.

**Kazakhstan is partially compliant with the Recommendation 1.6. which remains valid as Recommendation No. 6.**

## CHAPTER 2. PREVENTION OF CORRUPTION

### 2.1. Integrity of civil service

#### ***Recommendation 3.2. of the Second Monitoring Round Report on Kazakhstan (recommendation was confirmed during the Third Monitoring Round)***

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

Recruitment and promotion. To continue reforming the system of recruitment and promotion of public 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 public servants, political public 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 public 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.

#### ***Risk-based policy, role of agency leaders in ensuring integrity***

The assessment of risks in the sphere of public service was implemented in the frame of general provisions of risk analysis provided for by the RK Law “On the Fight against Corruption”. The corruption risk is

defined therein as a possibility for the emergence of causes and conditions that facilitate commission of corruption offences. Art. 8 thereof sets a procedure of conduction the analysis of corruption risks (external and internal ones), that is, detection and examination of causes and conditions that facilitate commission of corruption offences. In addition, the Procedure of the conduct of the external analysis of corruption risks was adopted (Decree of the RK President of 29.12.2015), as well as the Model Procedure of the conduct of the internal analysis of corruption risks (Executive Order of the Minister for Civil Service Affairs of 29.12.2015).

The Government approved criteria of evaluation of the level of risks and check lists for government agencies' compliance with the legislation in the sphere of public service and public servants' compliance with integrity standards (Joint Executive Order of the Minister for Public Service Affairs of 14 April 2016 № 76 and the Minister of National Economy of 26 April 2016 № 186).

As follows from the wording of the Executive Order, Kazakhstan deems the external and internal analyses of corruption risks as a very important exercise and turns the notion into reality by examining the wording of normative acts for corruption and double-checking mechanisms of their enforcement. To cite a particular example, the external evaluation of corruption risks in normative and legal acts that concern operation of an object of the external analysis is carried out in the following directions: detection of corruption risks in the normative and legal acts, that concern the operation of the object of the external analysis, and identification of corruption risks in the organizational and managerial activities of the object of the external analysis (The RK President's decree of 29.12.2015, Chapter 2). Chapter three of the Decree in question sets forth the procedure of responding to findings of the external control. Specifically, findings of the external analysis of corruption risks form the basis for an analytical reference report that contains information on detected corruption risks and recommendations on their elimination. Within six months upon the signing of such a report, an authorized agency conducts monitoring of compliance by objects of the external analysis of corruption risks with recommendations on elimination of causes and conditions that facilitate commission of corruption offences, as per the findings of the external analysis of corruption risks. To ensure the recommendations that were developed on the basis of the assessment of corruption risks entail tangible results it would be appropriate to document findings of the authorized agency's monitoring activities within the said six month-long period and ensure their availability in the public domain.

Findings of the external analysis of corruption risks are posted on the internet resource of the subject of the internal analysis of corruption risks, followed by a public comments period thereon, including, inter alia, at meetings of collegial advisory and consultative bodies tasked to combat corruption at the subject of the internal analysis of corruption risks, except for special government agencies, and at meetings of public organizations. Subjects of the internal analysis of corruption risks are bound to submit, on a half-yearly basis and no later than on the 10<sup>th</sup> day of the following month, to the authorized anti-corruption agency updates on internal analyses of corruption risks conducted over the period in review, respective findings, and measures taken to rectify them.

According to Kazakhstan's responses to the Questionnaire, the government agencies' executives play a significant role in promoting integrity across the civil service by carrying out awareness activities in regard to compliance with the anti-corruption law, integrity standards, etc., as well as accountability before the citizens. For example, while reforming the public service and the nation's anticorruption policy, clarifications were made in mass media on improvement of the civil service and combating corruption, and fostering highly professional cadres. As well, since the beginning of the year, there have been published over 20 addresses by policy makers, including the President, Prime Minister, the First Deputy Prime Minister, the Agency Chair, Agency Deputy Chairs, city heads (*akims*), the chief justice of the Supreme Court, MPs, etc. The Central Communication Service's platform hosts briefings held by public agencies' leadership; also, they report to the population on a permanent basis.

**The Agency's role.** In accordance with the Statute of the Agency of the Republic of Kazakhstan for Civil Service Affairs and Anti-Corruption, it is tasked to:

- identify causes and conditions that facilitate commission of corruption offences in the public bodies and organizations' operation;
- submit to the Government of the Republic of Kazakhstan recommendations on minimization and elimination of causes for, and conditions of, emergence of corruption in the public bodies and organizations' operation;

- interact with civil society institutions and government agencies for the purpose of minimization of the level of corruption perceived of by the society;
- monitor and assess government bodies and organizations' compliance with directives on rectification of violations of law and prevention of causes and conditions facilitating commission of corruption offences;
- implement educational programs on matters pertaining to prevention of corruption, raise the population's awareness of corruption risks;
- create community councils to interact and collaborate with private individuals and non-for-profit organizations on matters of public services delivery and prevention of corruption;
- review public servants' submissions concerning government bodies or public officials' acts and decisions on matters of enforcement of the RK law on public service and prevention of corruption;
- exercise control over compliance with the RK law in the area of public service and prevention of corruption;
- review disciplinary cases in regard to public servants' compliance with the RK law;
- coordinate the operation of disciplinary commissions under government bodies tasked to review disciplinary cases of administrative public servants;
- exercise control over public servants' compliance with integrity standards.

The Agency's performance in promoting integrity within the public service is assessed against KPIs established in its Strategic Plan. Specifically, the Strategic Plan for 2017-2021 foresees such indicators as "the proportion of competitions held with observers' participation", "the proportion of recommendations put forward by Integrity Councils", "the proportion of individuals out of the overall number of those who demand protection of their rights, whose rights were reinstated resulting from a review of compliance with the law on public service", "the proportion of implemented suggestions and motions submitted to government agencies resulting from a review of compliance with the law on public service", "the proportion of implemented recommendations suggested basing on findings of an external analysis of corruption risks".

#### ***Assessment of the impact of the ongoing reforms***

According to the Kazakhstan Government's responses to the Questionnaire, the key reforms in the public service integrity area have been under way since 1 January 2016 (with the enactment of laws "On the Civil Service of the Republic of Kazakhstan", "On the Fight against Corruption", the Code of Ethics, the Statute of the Ethics Commissioner, etc.). In tandem with UNDP the Agency is going to conduct a survey into the present state of the public servants' integrity under the framework of a pilot document "Promotion of the civil service reform in the area of integrity, protection of meritocracy and prevention of corruption". Its findings should enable the Government to fine tune the ongoing measures on introduction of integrity standards and develop proposals on improvement of the Code of Ethics. The sociological survey is scheduled for April and May 2017.

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

Upon amendment of the 1999 RK Law "On the Civil Service" (CS), in 2013 Kazakhstan introduced a new model of the civil service, which comprises the following three corps: administrative public positions of corps "A"; administrative public positions of corps "B"; and political public positions. As to positions within corps "A", there was established a separate procedure of staff selection, service, assessment, rotation, and training.

The new law on civil service that was passed in November 2015 reaffirmed such a differentiation. The law holds that:

- the administrative civil servant is a civil servant that exercises his/her duties on a permanent professional basis, except for cases provided for by laws of the Republic of Kazakhstan and acts of the President of the Republic of Kazakhstan;

- the political civil servant is the one whose appointment (election), release from duties, and activity appear of politically determining nature and who is responsible for implementation of political tasks and purposes.

As noted in the official responses to the Questionnaire, since 2013, to protect civil servants from political influence, the powers of their appointment and dismissal, and addressing the matters of granting an annual leave, deployment to business trips, and holding them liable have vested in executive secretaries or chiefs of staff (should the position of the executive secretary has not been foreseen), that are administrative public servants.

Competitive selection for taking office or a temporary vacancy in office of corps "A" is held by a person (body) that has the power to appoint for a given position or a person authorized by him/her/it. Competitive selection for taking positions in corps "A", appointments for which are made by the President of the Republic of Kazakhstan, is held by the Administration of the President of the Republic of Kazakhstan, unless established otherwise by the President of the Republic of Kazakhstan. Competitive selection for taking positions in corps "A", appointments for which are made by the Prime Minister of the Republic of Kazakhstan, is held by the Chancellery of the Prime Minister of the Republic of Kazakhstan, unless established otherwise by the Prime Minister of the Republic of Kazakhstan. Within three business days upon receipt of a government agency's request in writing, the Agency shall submit a list of individuals assigned to the reserve of candidates for corps "A". Competitive filling a vacancy in a corps "A" office by decision of a person, that has the right to appointment for the given position, is made by reviewing documents and/or interviewing candidates. The appointment of a corps "A" succession candidate to a position is made within the category or a group of the category under which he/she was assigned to the corps "A" candidate reserve, provided the nominee meets special qualification requirements, and upon his/her consent. The corps "A" succession candidates can be appointed, upon their consent, to a lower-category position or a lower-grade group under one of categories. The appointment to a corps "A" position is made by the decision of a person (body) that has the power to appoint to the given position with account of requirements set forth by the effective law.

While appointing an individual to a corps "A" administrative public position, the parties enter into a labour contract for the term of 4 years, unless established otherwise by laws and acts of the President of the Republic of Kazakhstan, with an option of its one-off extension for the same term.

MPs, members of *maslikhats*, that work on a full-time basis, political public servants, judges whose term came to an end, except for those whose term in office was terminated early due to negative reasons, who have been exercising their duties in office for no less than six months and who meet qualification requirements, can take corps "A" administrative public positions without a conduct of selection in the candidate reserve and competitive selection, and by the decision of the President of the Republic of Kazakhstan. This manner of appointment may be deemed as appointment based on a political decision.

Executive secretaries are appointed and dismissed by the President of the Republic of Kazakhstan upon the recommendation of the Administration of the President and in concurrence with the Prime Minister. An executive secretary may be dismissed early upon the recommendation of the President's Chief of Staff in cases foreseen by the law on the civil service (Article 21-1 of the Constitutional law "On the Government of the Republic of Kazakhstan", and para 2 of the Presidential decree of 27 July 2007, No 372). The procedure for appointing and dismissing executive secretaries as described points to its political nature. At the same time, according to the information provided by Kazakhstan, since 2013 the executive secretaries (heads of staff) act as a safeguard protecting officials from any political pressure. It follows then that their appointment and dismissal should not be based on a political decision.

**The Register of Political and Administrative Civil Service Positions** is approved by the RK President (the current version - as of December 2015). In 2014, the number of political civil servants was 406; in 2015, 422. The number of administrative civil servants in 2014 was 98,912, and in 2015, 98,464.

As noted in the OECD report on the third round of monitoring of Kazakhstan, the number of political public posts was cut drastically, with the staff numbers plunged from 3,272 to 439. However, the Report criticized the fact that this category comprised some positions the duties under which cannot be deemed political: for example, the list precariously contained such positions as the Chair and members of the Constitutional Council; Chair, Deputy Chair, Secretary and members of the Central Electoral Commission; Chair of the Supreme Judicial Council; Ombudsman; Director of the President's 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 a structural division of the Presidential

Administration; Head of the Medical Centre under the President's Office and his deputies. The above positions do not meet the "whose activities have a politically-determining nature" criterion (as set forth by the Law on the civil service); as well, most of them do not meet the "who is responsible for implementation of political tasks and purposes" criterion. At the time, Kazakhstan noted that some of the above individuals were appointed to, and dismissed from, office by the Head of State; that is to say, "their appointment is based upon political trust". However, as noted in the Report in question, such a characteristic of political positions is not in line with the pillars of democracy, for the fact of political trust on the part of a country's president does not form a sufficient prerequisite for defining a given position's political nature, nor do the above individuals determine the government policy; furthermore, for some of them (CEC members, SJC members, the Ombudsman) it is independence of political relations and politicians that constitutes a crucial feature of their mission.

In accordance with the international practice and experience, while defining a particular office as political one should be guided by the analysis of its substance, powers vested therein, and the sphere covered by functions and duties thereof. The aforementioned offices and functions, such as the Chair and members of the Constitutional Council, Chair, Deputy Chair, Secretary and members of the Central Electoral Commission, Chair of the Supreme Judicial Council; Ombudsman; Director of the President's 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 a structural division of the Presidential Administration; Head of the of the Medical Centre of the Presidential Office and his deputies, practically do not and may not provide for political decision-making powers. For example, the chief justice of the Supreme Court, with account of his functions and duties, exercises the judicial powers and like any other judge shall stay away from any kind of political influence. His position, therefore, shall not be deemed a political one. Should the aforementioned public officials engage in political decision-making it would give rise to corruption risks. With account of the above, we believe that Kazakhstan failed to comply with this part of the Recommendations.

Page 75 of the Report of the Third Round of Monitoring of Kazakhstan also contains a critical remark as follows: "It should also be emphasized that while the corps of the civil service have been established in the law, there has remained discretion with regard to establishment in normative acts and bylaws as to which positions specifically fall under each of the three categories, as per the register of public servants approved by the presidential Decree. The monitoring group is of opinion that the said Decree extends the limits of offices available to political public servants vis-à-vis the ones set forth in the law. In general, it is recommended that attribution of offices to the categories of public service should be established in the law. Therefore, the recommendation put forward by the previous expert group has remained unchanged".

The statistical analysis provided by Kazakhstan demonstrates a slight increase in the number of political appointees, while the number of administrative public officials has posted an opposite tendency. The effective Register of offices contains the same list of political public servants as before. According to Kazakhstan, the increase in the number of political public officials was due to the creation of new government agencies. Besides, the RK President's decree of April 2017 reduced the number of "A" class officers to 278.

**Table 4. The number of political and administrative public servants**

	During the 2 <sup>nd</sup> round of monitoring (2011)	As of January 2014	As of January 2015	As of January 2016	As of January 2017
Political public servants	3 116	439	406 (de facto – 393 )	422 (de facto– 411)	433 (de facto– 425)
Administrative public servants, including	84 273	97 392	99318 (de facto – 90537)	98 886 (de facto – 91 330)	98705 (de facto – 92 203)
Corps «A»		539	513 (de facto– 501)	493 (de facto– 476 )	519 (de facto– 485 )
Corps «B»		96853	98399 (de facto – 89643)	97971 (de facto – 90443)	97753 (de facto – 91293)

Source: data of the Agency of the Republic of Kazakhstan for Civil Service Affairs and Anti-Corruption.

**Statistics of dismissals.** In 2014, as many as 12,224 public servants were dismissed, including 67 political public servants, 12,157 administrative public servants, of which in corps «A» - 60 persons and in corps «B» 12,097 persons. In 2015, as many as 11,086 persons were dismissed, including 36 political public servants, 11,050 administrative public servants, of which in corps «A» 36 persons and in corps «B» 11,014.

Kazakhstan provided an update on changes in the staff in 2016, too. Specifically, in 2016, the general changes affected 17,398 persons, or 17.6% of the overall staff number, including 135 political public servants in corps “A” and 17,140 in corps “B”. However, it remains uncertain how many staffers were dismissed over 2016 and whether the updates in question mirror the statistics on the actually dismissed staff.

The statistical data on staff of law enforcement agencies seem to highlight a positive trend. More specifically, as of 1 January 2017 the staff number ‘of the General Prosecutor Office accounts for 527, while the actual one is 483, including 5 political public servants (de facto also 5) and 522 (478) administrative public servants. In the Ministry of Interior, the figures are as follows: 2,987 (de facto 2,600), including 6 political public servants and 2,594 administrative ones. By contrast to the findings of the previous round of monitoring, the agencies in question saw the introduction of classification of positions, which should be undoubtedly recognized as a positive development. Also, during the visit to Kazakhstan, the monitoring team received an update on the competitive selection procedure for some positions in law enforcement agencies, namely, the selection is conducted in observance of the general competitive procedure and the two initial stages thereof in that particular case are held by the Agency itself. That also is a positive development.

The information of attestation of public officials is worth a special attention. As follows from the Kazakhstan’s update, in accordance with instructions the Head of State gave in a meeting on 14 June 2016, it was planned to hold a comprehensive attestation of administrative public servants of corps “B” in the first half of 2017. The procedure, timelines, and categories of public servants subject to attestation were defined by Decree of the Head of State “On the conduct of attestation of administrative public servants of corps “B” of 30 December 2016 № 404. Notably, by contrast to an earlier attestation at the administrative public service, which centred on the staff’s theoretical competencies, the present one focuses on identification of public servants’ competence, efficiency, and integrity. As noted above, it is public servants of corps “B” that are to undergo the attestation, which should be conducted in several stages. At the first stage, there should be compiled individual assessment lists that will contain the background data on each public servant, including reward and disciplinary record, previous assessment scores, and his/her immediate line manager’s reference. Subsequently, the time should come to assess a public servant’s competencies, such as promptness in performance, customer orientation, integrity, commitment, leadership qualities, resilience, etc. The last stage is an interview by the attestation board, by results of which the decision is made.

The attestation is run in 3 sequential stages, with attestation boards having been created at each level. Such boards include public servants, community representatives, and MPs. According to the information coming from the authorities, the composition of the attestation commissions was set up as follows: at tier one, by a decree of the Head of the Presidential Administration, at tiers two and three, by acts of executive secretaries, heads of staff and leaders of state authorities. Selection of members of the attestation commissions was from the most highly competent and experienced officers of state authorities. It was noted

that public representatives were called upon based on their reputation, the opinion of the working collective and their expertise in this or other professional area.

In its comments, Kazakhstan insists that under the effective Rules, for purposes of excluding any political influence on the course of attestation, officials who hold political offices may not be members of the commission. However, deputies of all levels are not considered political officials and they “acted as members of attestation commissions as representatives of service users”.

It is impossible to accept this description of the office of a deputy. Members of representative authorities are, by definition, political officials since they have been elected through the expression of will of the members of public based on their political programme or principles. Moreover, the presence of MPs on such boards should be recognized as a negative phenomenon, as such an activity is inconsistent with their mandate and powers. Furthermore, political office holders may not participate in an assessment of a public servant and his/her competencies, as it proves inconsistent with the principle of a strict division between public servants’ political and administrative powers and can compel one to suggest that an individual assessment in the course of the attestation could be driven by political considerations.

According to the information provided by Kazakhstan, as of today, nation-wide, as many as 21,857 individuals underwent a testing for assessment of personal competencies. By its results, there were issued conclusions with characteristics of public servants’ competence. As a result, 27.2% of the above number earned the score “excellent”, another 70% were awarded the score “efficient”, 2.7% - “satisfactory”, and the remaining 0.1% - “unsatisfactory”. In compliance with para. 8 Art. 63 of the Law on Civil Service, the public servant can challenge the attestation board’s decision by filing an appeal to the head of the state agency, at a competent agency or its territorial division, or in the court of law. No information about statistics of such appeals was provided.

**Conclusion: Kazakhstan partially complied with this part of the Recommendation.**

***Recruitment and promotion. To continue reforming the system of recruitment and promotion of public 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.***

#### ***Recruitment system***

As the RK Government informed in its responses to the Questionnaire, in 2016, it introduced a merit-based model of public service. Nowadays, a public servant starts his/her career from junior positions, while a further promotion is possible solely upon competition and with a due account of a person’s competencies. Thus, should there appear a more senior vacancy, the competition is held among public servants in the first place and only in the absence of a deserving nominee among staffers of the given government agency. Where the competition has failed to nominate a winner(s), there should be held a competition among all the public servants. Should that competition fail to nominate the right candidate within the public service, there should be announced a nation-wide competition open for everyone.

Art. 9 and 37 of the Law “On the Civil Service of the Republic of Kazakhstan” hold that promotion of public servants within the public service is carried out with account of their competencies. In accordance with the Model Qualification Requirements to public posts of corps ‘B’ approved by Executive Order of the Chairman of the Agency of the Republic of Kazakhstan for Civil Service Affairs and Anti-Corruption of 13 December 2016, No 85, contenders for public office shall, depending on the nature of the office in question, be in possession of a certain set of competencies. To introduce the competence-based approach to selection of nominees, there was developed an automated assessment of personal qualities, with contenders being tested for the required competencies, such as leadership and communication skills, analyticity, self-discipline, integrity, quality orientation, customer orientation, zero tolerance for corruption. Contenders for executive positions undergo additional tests for leadership qualities and strategic thinking capacity.

To select staff for the public service there was introduced a three-stage procedure (testing for expertise in legislation; assessment of personal qualities; and interview). At the first stage, contenders are tested for their knowledge of the domestic legislation. To ensure the selection process’s credibility and transparency security measures were implemented at respective physical locations. More specifically, rooms are equipped with card readers to scan IDs, while each workstation features a web camera to record the session

and take a photo of each candidate which is then uploaded onto the certificate. There are video cameras in all rooms to project the picture onto the Agency's video wall, and cell phone suppressors.

Successful contenders are then allowed to take the second stage, which is an automated assessment of their personal qualities. They are tested for leadership, communication skills, analyticity, self-discipline, integrity, quality orientation, customer orientation, and zero tolerance towards corruption. Contenders for executive position undergo additional tests for leadership qualities and strategic thinking. By results of the testing contenders earn certificates that are mandatory for the subsequent interview

The first two stages are held at the Agency which ensures impartiality and integrity in running the said procedures.

The third stage is an interview, which is held at the agency that announced the competition, with account of the agency's profile. To ensure the exercise's objectivity, there are observers present in the session, including MPs and members of *maslikhats* of all levels, mass media representatives accredited according to the procedure established by the law of the Republic of Kazakhstan, other government agencies, public associations (NGOs), commercial organizations and political parties, and the Agency staff.

According to the information provided by Kazakhstan, in 2016, the government ran quite a number of competitions to fill a total of 39,550 vacant positions, with observers and experts having participated in 78% of the total number of interview panels' sessions (17,032 out of 21,855 of them). The monitoring team believes it would be appropriate to promote the engagement with observers and experts and ensure their participation in all the interview panels, and make the arrangement mandatory rather than discretionary. Kazakhstan authorities do not believe it appropriate since participation in the meetings of the interview panel shall be the right of observers themselves, and it is impossible to ensure 100 per cent participation of observers during the competition.

Apart from observers, the Competition Rules approved by the Agency's order of 21 February 2017, No. 40, stipulate for a mandatory video and audio recording of the interview. The recordings are used in case of an appeal against the decision of the interview panel. In addition, according to the Rules, the candidate may make his or her own video or audio recording of the interview. In the event that they disagree with the decisions of the interview panel, the contenders may appeal the panel's decision to the Agency and examine the competition papers and outcome of the interview to the extent to which they concern them.

Kazakhstan should be commended for enforcing para. 33 of Art. 7 of the Procedure for Conduct of Competitions approved by the executive order of the authorized agency in the sphere of public service of 29 December 2015 which holds that, "Political public servant who is the head or deputy head of the state agency may not sit on the interview panel".

Under Article 27, para 5, of the Law "On Civil Service of the Republic of Kazakhstan", the head of the government authority must hire for the vacancy advertised the contender who has received a positive opinion from the interview panel. This is a positive norm. The contender shall deem to have a positive opinion if he has received the majority of votes of the panel in presence. It has remained unclear whether the interview panel's decision on the competition outcomes is mandatory for the public official who makes the appointment; likewise, it is not unclear whether such a public official can appoint a candidate that failed to earn the highest score from the panel, as well as whether the panel can come up with a positive evaluation on several contenders; lastly, it is unclear how the panels' operational transparency is ensured (apart from inviting observers).

The monitoring team welcomes the fact that the order by the Chairman of the Agency for the Affairs of the Civil Service and countering corruption of 21 February 2017, No. 40, approved the Rules for holding a competition for filling an administrative state position of B class, which set out in detail the competition procedures. However, it is believed that the provisions failed to regulate the criteria which guide the interview panes in the selection of the best contenders. Observers in such a commission have no right to ask questions to contenders, which should be improved. Also, it would be appropriate to remove MPs from the observers list.

According to data provided by Kazakhstan, in 2016 the authorized civil service authority received 626 complains against competition procedures, of which 525 came from individuals and 101 from public servants. Overall, 15 competitions were cancelled, and 29 administrative protocols executed under Article 99, para 1, of the Administrative Offences Code of the Republic of Kazakhstan. It is a positive development suggesting that the appeal procedure may be efficient. It is important, as during the meetings with the NGO

sector there was criticism of the procedures for decision-making by interview panels, in particular in the regions.

**Selection for positions of corps «A»** is regulated by Decree of the RK President of 29.12.2015 No. 151, which set forth:

- Special qualification requirements to administrative public positions of corps "A";
- Procedures of selection to the candidate reserve of the administrative public service of corps "A";
- Procedures of formation of the candidate reserve of the administrative public service of corps "A";
- Procedures of the conduct of competition to fill administrative public positions of corps "A".

Selection to the candidate reserve of the administrative public service of corps "A" (hereinafter referred to as the candidate reserve of corps "A") is performed by the National Commission for the Staff Policy under the RK President. The selection procedure comprises several consequent stages: 1) publication of an announcement of the conduct of selection to the candidate reserve of corps "A"; 2) collection and evaluation of candidates' documents to meet special qualification requirements to positions of corps "A"; 3) conduct of candidates testing; 4) interviews with candidates. The announcement on selection to the candidate reserve of corps "A" is posted by the authorized agency for public affairs on a respective web portal and published in periodical printed media defined by the agency.

One of the documents to be submitted for participation in the selection process is a letter of recommendation (at least one such a document). The right to produce such letters was granted to 1) political public servants; 2) the RK *Majilis* and Senate members; secretaries of *maslikhats* of regions, cities of republican status, and the capital city; 3) administrative public servants of corps "A" with the right to appoint to a position and dismiss therefrom; 4) board chairs of national companies, national holdings, national development institutions appointed by the agreement with the RK President or his Chief of Staff acting on his behalf.

As noted in the Report on the third round of monitoring, the requirement to submit such a recommendation gives rise to political engagement and the risk of a potential restriction of the right to equal access to public service (RK Constitution, Section 4 Art. 33). Whereas the comment in question has not been addressed and no updates followed on it, it remains in force and has an adverse effect on the assessment of the compliance with the Recommendation.

The list of contenders who submitted applications and other required documents is posted on the authorized agency's web portal within three business days upon the expiry of the documents acceptance timeline. At its concluding meeting, the National Commission makes the decision on nomination of candidates to the succession reserve of corps "A".

There can be organized a competition to fill administrative public positions of corps "A". The expert team believes that in this case, there should be no discretion and a legal act is needed to define criteria under which public servants of corps "A", in exceptional cases established by the law, may be recruited out of competition. Meanwhile, it is appropriate to specify both the list of individuals who can be appointed to office out of competition and concrete guiding criteria, while coordinating the matter with the Agency as an exception from the general procedure.

In their comments on this issue, Kazakhstan authorities noted that apart from testing and assessment of personal qualities, the selection to the corps "A" reserve includes an interview with the National Commission on human resources policies of the President. As a result, during their selection to corps A reserve candidates are to complete all stages of the competition that is established for corps B. The interview however, in contrast to corps B, is not with the state authority but with the National Presidential Commission.

The competition to fill a vacant or temporarily vacant administrative public office of corps "A" is held among individuals assigned to the candidate reserve of the administrative public service of corps "A".

Competitive selection for taking office or a temporary vacancy in office of corps "A" is held by a person (body) that has the power to appoint to a given position or a person authorized by him/her/it. Competitive selection for taking positions in corps "A", appointments to which are made by the Prime Minister of the Republic of Kazakhstan is held by the Chancellery of the Prime Minister of the Republic of Kazakhstan unless established otherwise by the Prime Minister of the Republic of Kazakhstan. Competitive selection for taking positions in corps "A" appointments to which are made by the President of the Republic of

Kazakhstan is held by the Administration of the President of the Republic of Kazakhstan unless established otherwise by the President of the Republic of Kazakhstan.

By the decision of a person having the powers to appoint to a position of corps “A”, competitive selection for filling it is performed by means of evaluation of documents and/or holding an interview. Interviews with contenders are performed by the public official that has the power to appoint to the position or a public official authorized by him/her. The appointment to the position of corps “A” is made by the decision of the public official (agency) that has the power to appoint to the position and with account of requirements established by the law of the Republic of Kazakhstan in the sphere of public service.

It is allowed to temporarily mandate the duties pertinent to a post of corps “A” to a public servant of corps “B” without holding the competitive selection procedure for the period of no more than two months.

The National Commission for the Cadre Policy under the RK President includes, ex officio, the President’s Chief of Staff who Chairs the Commission; the Deputy Head of Staff to the RK President for regional policy who is the Deputy Chair of the Commission; the Deputy Prime Minister in charge of the administrative reform and public service; Head of the President’s Chancellery; Deputy Chair of the Senate of the RK Parliament; Deputy Chair of the *Majilis* of the RK Parliament; Assistant to the RK President in charge of socio-economic matters; Chair of the Agency of the Republic of Kazakhstan for Civil Service Affairs and Anti-Corruption; Minister of Justice; Chair of the National Commission on Women’s Affairs and Family and Demographic Policy under the RK President. As noted in the Report on the third round of monitoring, the Commission includes political public officials and MPs, and the experts believe that with such a composition, the National Commission seems to be oriented towards selection on the basis of political, rather than professional, criteria.

In general, as noted in the previous monitoring reports, the law holds that there should be conducted a competitive selection; however, it falls short of specifying that it should be done on the basis of merits and personal qualities, and the drawback has not been rectified as yet. As well, the law failed to unequivocally establish on the basis of which criteria a winner of the competition for appointment to a specific administrative post is picked. That is to say, the law lacks the requirement to specify a rationale for his/her selection on the basis of his/her merits and personal qualities thereby justifying selection of the most successful contender. It is critical to ensure that anyone interested in the matter can realize what kind of objective criteria underlay the appointment of a given contender to the post as a consequence of the competitive selection process. In principle, there should be adopted an informed decision in writing with a reference to the reason to believe that the nominee meets the requirements and his/her background and expertise better suit the position than others’.

Kazakhstan provided an example of minutes of an interview a competition commission held with a candidate. The document contains a list of questions posed by its members; however, it is not clear from the minutes by which principle the commission was guided while making its decision, either; in other words, it is not clear what criteria are employed in recognizing a particular prospective nominee as the most successful contender.

Meanwhile the list of rules for competitions for contenders falling under corps “B” known as “On the procedure of the conduct of competitions by executive order of the authorized agency in the sphere of public service of 29 December 2015 №12” does specify the contender assessment criteria, as well as methodology and procedure for allocation of scores. It is a laudable development, which should be appropriate to apply to the competitions announced to fill corps ‘A’ vacancies.

**Table 5. Statistics of recruitment to civil service posts**

	2014		2015	
	Political posts	Administrative posts	Political posts	Administrative posts
The number of vacancies	13	8,768, of which:	11	7,545, of which:
		12 («A»)      8,756 («B»)		17 («A»)      7,528 («B»)
The average contender-to-vacancy ratio	1,3		1,1	
Hired without competitive selection (full-time employed <i>maslikhat</i> members, political public servants, per para 3 Art. 12 of the RK Law «On civil service»)	255		29	

Source: data of the Republic of Kazakhstan for Civil Service Affairs and Anti-Corruption.

***Filling the vacancy without competitive selection***

In its responses to the Questionnaire, Kazakhstan argued that with the new Law in place, possibilities for an out-of-competition appointment to office shrank drastically. The possibility of a change of duties is now out of question for 97% of public servants. In practice, such measures promoted stability of the state machinery and ensured termination of a negative practice of team migrations. The available statistics prove that the number of individuals appointed without the competitive selection procedure dwindled significantly (29 cases in 2015), albeit it was not completely weeded out, as recommended earlier.

As of 1 January 2017, the number of vacancies was 6,502, while the contenders-to-vacancy ratio accounted for 1.1 In compliance with para. 4 Art. 29 of the Law “On Civil service”, filling vacant or temporarily vacant administrative positions of assistants or advisors to heads of public agencies and press secretaries is allowed without holding competition, while subsequent transfers of the said persons within the government body and across its divisions, including territorial ones, are not allowed. The information is worth commending.

Only 123 out of 20,813 appointed public servants filled vacancies out of competition (0.5%), (in compliance with para 3 Art. 15 of the Law, those were a total of 34 judges, MPs and political public servants; also, in compliance with para 4 of Art. 29 of the Law, those were 89 assistants, advisors, and press secretaries). In 2014, the number of positions filled on a temporary basis was 3,476, in 2015, 3,667, and 2016, 3,465, respectively.

Art. 15 of the Law on the civil service still contains the clause that holds that by the decision of the President of the Republic of Kazakhstan judges in office, MPs, full-time members of *maslikhats*, political public servants, judges whose term came to an end, except for those whose term in office was terminated early due to negative reasons, who have been exercising their duties in office for no less than six months, can take administrative public positions of corps ‘A’ and corps ‘B’ without conducting selection into the candidate reserve and competitive selection. The RK President has the right to appoint the said persons to the administrative public posts of corps ‘A’, appointment to which is made by the RK President without selection to the candidate reserve and decision by an authorized commission. Administrative public servants of corps ‘A’ who meet the established qualification requirements can take administrative public posts of corps ‘B’ out of competition and by the authorized body’s approval.

These provisions contravene the recommendation made in the course of the previous round of monitoring and should be abrogated.

In their comments, Kazakhstan noted that non-competitive appointment might only be possible by decision of the National Presidential Commission on Human Resources Policies, which is comprised of representatives of the Presidential Administration, Government, Parliament, the authorized agency, assistant to the President and other public officers. According to the official authorities of Kazakhstan, a joint decision passed by representatives of various state bodies, including the legislature, should preclude politicization of non-competitive appointments.

***To regulate in the law the procedure of promotion on the basis of merits and qualities and the procedure of conduct of internal competitions***

The procedure of conduct of internal competitions, including internal ones, was regulated by executive order of the authorized agency in the sphere of public service of 29 December 2015 №12.

**Evaluation of public servants' performance.** In compliance with Art. 33 of the Law “On Civil Service of the Republic of Kazakhstan”, in order to measure public servants' efficiency and quality of performance there should be conducted evaluation thereof. Results of public servants' performance form a rationale for making a decision on granting them bonuses, rewards, as well as on their training, rotation, demotion or dismissal from post. Where a public servant of corps “B” earned unsatisfactory scores for two years in a row, it entails his/her demotion, provided that he/she matches the respective qualification requirements and such a vacancy is available. Where a vacant inferior position is unavailable, the public servant is offered another one. Should the latter be unavailable or that public servant refuse thus offered position, he/she shall be dismissed from the public service.

The procedure of, and timelines for, conduct of evaluation of public servants' performance were approved by the Head of State's Decree of 29 December 2015 № 152 "On some issues of passing the Civil Service". The list of authorized persons to exercise the evaluation of political public servants was established by presidential Decree of 4 July 2016 №295. The authorized agency on public service affairs approved the Methodology of evaluation of performance of public servants of corps “A” and the Standard Methodology of evaluation of performance of public servants of corps “B” (of 29 December 2016 № 110). Pursuant thereto and with account of respective sectoral peculiarities, each government agency set its own methodology.

Evaluation of the public servant of corps “A” consists of an assessment of his/her implementation of priorities of the annual agreement between the authorized person and the public servant of corps “A”, as well as an assessment of the latter's professionalism and personal qualities. As well, such agreements contain operational priorities formed by sectoral programs and strategic plans.

In accordance with the procedure of, and timelines for, conduct of evaluation of public servants' performance approved by the Head of State's Decree of 29 December 2015 № 152, in regard to those of them falling under corps “A”, the authorized body on public service affairs runs an analysis of the annual evaluation of the public servants of corps “A” and no later than 10 February submits its findings to a working body of the National Commission for Staff Policy under the RK President. Should a public servant of corps “A” be in disagreement with the performance evaluation results, he/she can file a respective motion to the National Commission within ten business days as from the date of familiarization therewith. Having reviewed the materials provided by its working body and, where necessary, having interviewed that public servant of corps “A”, the National Commission takes one of the following decisions: he/she is adequate /not adequate for the job. A low grade forms a legitimate cause for termination of the labour contract with the public servant of corps “A” upon clearance thereof with the authorized commission. The expert team considers the National Commission's powers to take the ultimate decision in regard to evaluation of public servants of corps “A” to be inappropriate. The effective procedure does not provide for the right for public servants of corps “A” to challenge the decision in the court of law to protect their rights in the case of a negative evaluation outcome. Meanwhile, as the National Commission for Staff Policy under the RK President has political public servants and MPs as Commissioners, the expert team suggests that its composition leaves an impression of being focused on political criteria.

A pilot evaluation of public servants of corps “A” was conducted in December 2016.

The annual score of the public servant of corps “B” is an aggregate of the average quarterly scores, the assessment of implementation of his/her individual operational plan, and a 360° evaluation. That said, the operational plan in question comprises measures aiming at attainment of the government agency's strategic objectives. As far as the evaluation of this category of public servants is concerned, there is a reference to a possibility for employment of procedural remedies to protect their rights, which is indeed commendable; however, we recommend the arrangement should be also made available for public servants of corps “A” to make it possible for them to challenge respective evaluation outcomes.

According to the data provided, in 2016, as many as over 65,000 administrative public servants of corps “B” underwent evaluation, of whom some 80% earned the “excellent” and “efficient” grades.

In compliance with the RK law, “evaluation of performance of public servants is conducted for the purpose of verification of efficiency and quality of their work” (Head of State's Decree of 29 December 2015 № 152), while the objective of the attestation is identification of the degree of professional training and

adequacy for the job of public servants of corps “B” (Decree of the Head of state “On the conduct of attestation of administrative public servants of corps “B” of 30 December 2016 № 404).

The monitoring group tends to opine there is no huge distinction between attestation and purposes of evaluation. However, an attestation commission includes political public officials (MPs) who make decisions on matters pertaining to adequacy for the job of public servants of corps “B” (see above) That said, proceeding from the fact that none of the political public servants contribute to the evaluation of the said category of public servants, a legitimate question arises as to which objective is pursued by the attestation held by an attestation commission that includes political public officials, when a similar result (conclusion) on the matter of a given bureaucrat/public servant’s adequacy for the job could be secured by merely complying with the evaluation procedures. The relevance of running the attestation is doubtful, which can be explained, and the progress in this particular area cannot be deemed positive.

**Conclusion: Kazakhstan is mostly compliant with this part of the Recommendation.**

***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.***

In the meantime, any additional remunerations apart from the basic fixed salary are regulated by the Rules of Awarding, Provision of Financial Assistance and Establishment of Supplements to Salaries of Employees of Bodies of the Republic of Kazakhstan approved by the RK Government’s Resolution of 29 August 2001 № 1127. In accordance with the Rules, public servants are eligible for bonuses, supplements to the basic salary, and financial assistance. The amount and frequency of bonuses shall be stipulated by the head of the state agency that administers the budgetary programme (sub-programme) in accordance with the budgetary programme (sub-programme) plan of funding of the agency's current expenses, in equal shares by quarters.

As part of the implementation of Nation’s Plan 100 Specific Steps to implement five institutional reforms, public servants will benefit from a new performance-based remuneration system which will see: 1) introduction of a factor-score scale of positions with a relevant level of salary; 2) bonuses to efficient public servants based on their performance assessment.

The new remuneration approach has been approved by the National Commission on Modernisation and is being supported by government agencies. To expose it to a comprehensive examination, this system will be pilot-tested at 2 government agencies at the central and regional levels. Also, there will be a performance assessment based on individual plans for public servants, and strategic plans for government agencies assessing achievement of various indicators of the quality of government services, living standards, investment mobilisation for ministers and *akims*, and on the basis of integrated macroeconomic indicators for members of the Government.

The Ministry of National Economy in its turn developed a draft resolution by the Government which provides for the approval of Rules and Conditions of awarding bonuses to public employees (the draft document was submitted to the PM office in December 2016). It is envisaged that the Rules and Conditions should regulate the procedure, size, frequency of the awarding of bonuses, and caps thereon. The rationale behind the decision to award a bonus or reward should stem from evaluation of the public employee’s performance.

Kazakhstan did not provide quantitative data regarding a fixed part-to-variable part ratio in a public employee’s aggregate remuneration across different agencies and categories of public employees, as well as data on the level of remunerations payable to public servants of the executive, mid-ranking, and junior levels across sectors and on the regional level as such data are restricted and for official use only.

In their comments, Kazakhstan authorities noted that although they could not provide an official document (Residential Decree of 17 January 2004, No 1284, “On the Unified System of Remuneration of Workers of RK Agencies Funded by the state budget and that of the RK National Bank”) on the level of remuneration of public servants, as it is restricted in access (“Not for Public Use”), information about the official salaries of the administrative public servants is published online in the announcements of vacancies, indicating the minimum (with less one year length of service) and maximum (with length of service in excess of 17 years) amounts depending on the total time in service.

For instance, in a notice advertising vacancies for positions in class A-1, the following minimum and maximum salaries are indicated:

**Table 6. Official salaries of public servants, class A-1**

Category	Depending on the length of service	
	min	max
A-1	KZT 363,238	KZT 490,083

Source: written comments by Kazakhstan authorities

The size of remuneration for other categories may also be found in vacancy notices on the web-site of the Kazakhstan Agency for civil service affairs and countering corruption, please see here: <http://kyzmet.gov.kz/ru/kategorii/konkursy-na-vakantnye-dolzhnosti>.

Neither the materials provided, nor the data collected during the field visit to Kazakhstan testify in favour of transparency of awarding to civil servants' bonuses, rewards and supplement payments. At the same time, the monitoring group welcomes the news about the drafting of an act which will regulate issues of remuneration of servants based on principles of transparency and performance assessment. Acts that regulate the matter remained unavailable for both the experts and the community, although the basic information about the fixed remuneration is published in the vacancy notices. At the heart of the principle of the transparent and accountable civil administrative/public service lies the imperative to keep citizens aware of matters related to remuneration of public/public servants. The monitoring team believes that the key rules about the transparency of salaries, awards, bonuses, and supplements, as well as their regularity and criteria of their disbursement should be established by a law rather than by-laws.

**Conclusion: Kazakhstan is partially compliant with this part of the Recommendation.**

***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.***

Previously, the Law «On the Fight against Corruption» did not foresee a concept of conflict of interest. Presently, the said provision has been incorporated in the Law in question and the Law “On the Civil Service of the Republic of Kazakhstan”. Thus, conflict of interest is a contradiction between personal interests of persons that hold an executive public office, persons authorized to exercise public functions, persons equivalent to them, public officials, and official powers, under which personal interests of the said persons may entail an improper exercise thereof. In compliance with Article 15 of the Law “On the Fight against Corruption”, persons that hold an executive public office, persons authorized to exercise public functions, persons equivalent to them, public officials are prohibited to exercise their official duties where there is a conflict of interest.

The said persons must:

- take measures to prevent and resolve the conflict of interest;
- once they have become aware thereof, report in writing to their direct supervisor or the executive leadership of the organization in which they are employed on the existing conflict of interest or on a possibility for its emergence. Upon receipt of such a report or an update from other sources, the direct supervisor or the executive leadership of the organization is bound to promptly undertake the following measures on prevention of and resolving the conflict of interest

1) suspend such persons' duties and mandate another person to carry on the duties on the matter in connection with which the conflict of interest has arisen (may arise);

2) modify that person's official duties;

3) take other measures to eliminate the conflict of interest.

There are no other normative clauses regulating conflict of interest.

Neither the Code of Administrative Offenses, nor the Criminal Code provides for responsibility for performance of acts or failure to act in the conditions of conflict of interest, as well as for a failure to undertake measures to preclude or resolve the conflict of interest, failure to report the ongoing conflict of interest or a possibility for its emergence. Art. 680 of the Code of Administrative Offenses foresees the government agency head' responsibility for the failure to undertake measures against corruption; however, it implies only the failure to undertake measures towards the subordinated staff responsible for commission of corruption offenses. Meanwhile, the Law «On the Fight against Corruption» defines corruption offense as an illegal act (action or the absence thereof) which displays signs of corruption and for which the law establishes administrative or criminal responsibility. Whereas no administrative or criminal responsibility has been foreseen for performance of acts or failure to act in the conditions of conflict of interest or failure to report it, Art. 480 of the Administrative Offense Code will not be applicable in that regard, either.

The only form of responsibility for a breach of duties in office in regard to conflict of interest is the disciplinary one. In compliance with Art. 51 of the Law on civil service, a public official, his/her direct supervisor and the government agency's executive leadership bear disciplinary responsibility for failure to undertake measures to prevent and resolve conflicts of interest of which they became aware; that said, the list of disciplinary offences in Art. 50 of the Law does not contain a reference to this particular offense.

At the same time, in their comments Kazakhstan authorities insist that violations pertaining to conflict of interest were effectively covered in Article 50 of the Law on Civil Service. Some circumstances of conflict of interest are indeed covered by Article 50 (e.g., "using official capacities to satisfy own material interests or those of next of kin and in-law relatives"); however, not all cases are covered. The liability in Article 50 ought to be directly linked to the violation of conflict of interest norms found in Article 51. With that, the issue raised by the experts would have been addressed.

The absence of an effective responsibility for breaching requirements associated with prevention and elimination of conflict of interest appears a serious drawback. Kazakhstan should, as a minimum, establish administrative responsibility therefor and delegate its enforcement to respective law enforcement bodies and the Agency.

Together with UNDP, Kazakhstan developed the Methodological Guidelines on issues of conflict of interest in the civil service. The Agency for Civil Service Affairs and its territorial branches run a permanent awareness raising campaign on matters of compliance with the anticorruption law, including the need to address conflict of interest. The Agency presented the Methodological Guidelines at workshops and roundtables and sent it to all the central public agencies and local bodies of executive power. In 2016, the Agency developed a booklet on main requirements to integrity standards for public servants. The Agency should be commended for the measures in this direction.

The Agency is engaged, on a systematic basis, in awareness raising activities aimed at preventing cases of conflict of interest, lobbying of some organizations' interests by public servants. Specifically, by results of 2016, it ran more than 82 columns in the central and regional media and facilitated publication of 3,151 articles and entries to promote the anti-corruption culture in the community. The central and regional TV channels broadcast 1,735 anticorruption programs, radio stations aired 468 programs, and 8,197 anticorruption entries were uploaded on the Internet. At the legislative level, the notion of conflict of interest was incorporated since January 1, 2016, which is why there is no statistical data on measures in that regard in 2014-2015. In addition, in 2016, the Agency's local branches in the regions held 691 events to promote provisions of the Law "On the Fight against Corruption", including the issue of conflict of interest, while Agency's staff responsible for integrity matters ran 993 similar events. They were held in accordance with regional plans (e.g., with regard to implementation of the Nation's Plan-100 Concrete Steps).

According to the RK Government, in 2014, the nation saw approval of a Standard Curriculum to train public servants on matters of combating corruption. It was developed by the Academy for Public Governance under the RK President in coordination with the Agency for Civil Service Affairs and Anti-Corruption. The standardized curriculum addresses matters related to a new approach to the civil service system, namely, ensuring a greater efficiency of anti-corruption measures, promotion of transparency in selection of public servants, integrity control, introduction of the principle of meritocracy. The Academy's measures are commendable. The monitoring team recommends developing a module of the respective

training course to address conflict of interest and making it mandatory and available, particularly in the form of online classes, for public servants of all ranks.

**Restrictions upon completion of one's tenure in public office.** According to sub-para 1 item 2 Art. 26 of the Labour Code, upon completion of his/her tenure in public office, the person is prohibited to seek employment in a commercial organization where during the year prior to the termination of that person's public service tenure, the said person exercised, in connection to his/her official duties, a direct supervision in the form of inspection of the said commercial organization's operation or where the latter was directly associated with the said person due to his/her mandate. The restriction is not applicable to employment in public organizations and the ones in the authorized capital of which the state-owned share is over 50%, including, *inter alia*, national management holdings, national holdings, national companies, national development institutions where the government is a shareholder, their daughter organizations in which they own over 50% of voting shares, as well as legal entities in which the ownership share of the said daughter organizations is over 50%.

However, there is no control mechanism in place to ensure compliance with the restriction.

**Case studies.** Kazakhstan provided examples of application of such anticorruption norms in practice:

- 1) While evaluating corruption risks in the operation of the Committee for Construction, Housing, Utilities, and Land Management in 2016, auditors exposed facts of conflicts of interest in the form of a joint employment of close family associates. Based on the findings, the recommendation was made to eliminate the conflict of interest and, as a consequence, the public servants concerned were dismissed.
- 2) Another fact of unacceptability of a joint service of close family associates that sparked a massive public outcry was noted in Aktyubinsk oblast. A deputy *akim's* (the region's head) son and daughter-in-law were employed in the spheres curated by that deputy *akim*. The fact was exposed at the Republican Public Anti-Corruption Council under *Nur Otan* political party. According to one of the councillors, the *akim's* son was a deputy head of the regional department of education and prior to that he had been running the Department on Youth Affairs. After his transfer to the educational sphere, he was replaced by his spouse.
- 3) In the course of an audit of Partner Aktau Company, Ltd, inspectors detected substantial price differences between the volume of shipped products and entries in dispatch notes. The department of internal security of the State Revenue Committee arranged a tax audit that unearthed a few more violations. Specifically, it was found out that the company's founder was the spouse of a department head of the Economic Investigation Service of the State Revenue Committee in Mangystau region. The internal investigation and the disciplinary commission's recommendations resulted in the dismissal of the public servant concerned.

The information provided by Kazakhstan displays a positive trend and some progress vis-à-vis previous reports.

Also, Kazakhstan reported that government authorities, on a systematic basis, offer consultations to public servants on compliance with the civil service legislation, conflict of interest, among other things. This work is to be done by ethics officers. In the first half of 2017, ethics officers at central and local government agencies received 165 applications pertaining to issues of compliance with the civil service legislation, anti-corruption and Code of Ethics. The ethics officers examined 119 allegations of breach of office ethics, in 28 of which relevant measures were taken (explanations given, recommendations made to the head of the relevant government agency, etc.).

Since early 2017 the Agency has completed monitoring of 2,031 government agencies for instances where next of kin worked in the same office, and other types of conflict of interest. In addition, 1,143 briefings were conducted for representatives of civil society and NGOs, 109 announcements published in mass and social media, and 425 individuals consulted at personal meetings on the issue. The activity conducted helped to identify instances of conflict of interest among public servants. E.g., in the Almaty region, following the report by the director of Taldykorgan-Avtokolik limited partnership, a conflict of interest was established in the public procurement by the Passenger Traffic and Highways Department as the chair of the tender committee failed to report family ties with a potential supplier of services, Zhelmaya limited partnership.

It should also be noted that Kazakhstan's definition of conflict of interest does not appear fully consistent with the international standards. According to the OECD's definition developed for the Guidelines for Managing Conflict of Interest in the Public Service, "conflict of interest" involves a conflict between the public duty and private interests of a public official, in which the public official has private-capacity interests which could improperly influence the performance of his/her official duties and responsibilities. Defined that way, 'conflict of interest' has the same meaning as an 'actual conflict of interest'. A conflict of interest situation can thus be current, or it may be found to have existed some time ago.

By contrast, an apparent conflict of interest can be said to exist where it appears that a public official's private interests could improperly influence the performance of his/her duties but this is not in fact the case. A potential conflict arises where a public official has private interests which are such that a conflict of interest would arise if the official were to become involved in relevant (i.e. conflicting) official responsibilities in the future".<sup>48</sup>.

According to the RK Law "On the Fight against Corruption" the conflict of interest is understood as a contradiction between private interests of persons that hold a significant public office, those authorized to exercise public functions, persons equivalent to them, public officials, and their official duties, under which private interests of the said persons can result in an unduly exercise of their official duties. The bottom line is, the definition in question implies an actual, or real, conflict of interest. The issue of potential conflict of interest is partly addressed by the fact that pursuant to Article 15 of the RK Law "On the Fight against Corruption", public servants must inform, in writing, their immediate supervisor or the leadership of their organization about the emerging conflict of interest *or about its possibility* as soon as it comes to their knowledge.

Besides, the Law on the Fight against Corruption does not comprise a definition of personal interest, which should be sufficiently ample and encompass both tangible (asset-wise) interests and any other intangible ones, including interests guided by private, family, friendly, or any other out-of-office relations with private individuals and corporations (e.g. in connection with holding membership in a public, political, other organization). Such legislative deficiencies should be eliminated.

**Conclusion: Kazakhstan is largely compliant with this part of the Recommendation.**

***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.***

At the Kazakhstan's government bodies, there are internal audit service (IAS), ethics officers, disciplinary commissions and councils on ethics.

1. The **internal audit service's** scope of duties involves analysis, assessment, and verification of trustworthiness and credibility of the financial and managerial information, efficiency of the organization's internal operational processes, quality of delivery of public services, and analysis of conditions that give rise to a conflict of interest.

Guided by the Standard Provisions on internal audit service, such divisions provide consulting services with regard to organization of an internal audit system in organizations that report to the respective government body, submit to its head a report on findings of the internal public audit along with recommendations on prevention and avoidance of offenses in the course of spending the national and/or local budget resources in compliance with the RK law, elimination of exposed drawbacks, promotion of efficacy of the government body's internal operational processes. They also report to the first heads of the central government body, central public agencies, the *akims* of the regions, city of national status, or the capital city on conditions that can give rise to a conflict of interest.

According to the Kazakhstan's update, as of January 2017, the internal audit service units were established under 23 central government bodies, with their staff accounting for a total of 192; as well, they were created in 16 regions (125 staffers). Notably, the IAS's staffing level across central government bodies is 86.5% (166 staffers), and the one across local bodies of executive power 84.8% (106 staffers), and a competitive selection for the remaining positions is under way.

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<sup>48</sup> Source: <https://goo.gl/iwbMCG>.

2. **Ethics officer** is a public servant that exercises duties related to the enforcement of compliance with integrity standards and prevention of violations of the legislation on the civil service, fight against corruption and the Code of Ethics for public servants. The ethics officer also provides, within the scope of his/her duties, counselling to public servants and citizens. The respective functions are mandated to the current employees in public bodies in addition to their routine duties. Typically, such public officials are affiliated with an organization's HR division.

The introduction of the institution of ethics officers is a laudable move. It is recommended that their powers should be broadened and their status should be raised; it is also recommended that their scope of duties should not comprise other functions (as supplementary ones). In addition, ethics officers should be co-opted to integrity commissions as full members, rather than observers.

As reported by Kazakhstan authorities, the Decree of the President of 1 June 2017, No. 487, introduced some amendments to the Register of political and administrative public offices where the ethics officer position is shown independently. In addition, this Decree strengthened the powers of the ethics officer by amending Statutes of the Ethics Officer approved by the Presidential Decree of 29 December 2015. There, paragraph 3 of the Statutes says: "persons occupying an independent office of the ethics officer shall coordinate and provide methodological guidance of ethics officers of agencies and territorial divisions." It is also planned to incorporate ethics officers in the Ethics Council and the authorized agency's Commission.

3. The main tasks of the **Ethics Council** are: 1) development of measures aimed at prevention of corruption and failures to comply with the integrity standards, including, *inter alia*, disciplinary offences that discredit the public service; 2) undertaking measures on ensuring public servants' greater responsibility in their compliance with the integrity standards; 3) development of recommendations and proposals on coordination of ethics officers' operation and interaction with disciplinary commissions under government bodies. Ethics councils were established on the basis of the previously existed Agency's disciplinary councils.

The Statute on ethics councils of the RK Agency on the Public Service Affairs and Anti-corruption in the regions, the cities of national status and the capital city was approved by the presidential Decree of 29.12.2015. In accordance to the Statute, it is *maslikhat* deputies, representatives of public associations, NGOs, mass media, heads of government bodies, and other persons that can sit on the Council. The number of the Council members should be odd and account for no less than 7.

Proceeding from the principle of division of powers, deputies of representative bodies may not sit on ethics commissions under the executive power bodies. In their capacity of political public office holders, the deputies should be separated from assessment of bureaucrats' conduct. Should the deputies be members of such commissions, that would allow one to assume that it could consider a public servant's political views or his/her conduct could be assessed from the political perspective. This is in conflict with the imperative to separate the political component of the public service from the administrative one. The Statute should also specify how many non-governmental bodies, public associations' and mass media representatives should be co-opted to the Integrity Commission.

Kazakhstan authorities informed that the work and competence of a *maslikhat* deputy is regulated by the Law "On local government and self-government in the Republic of Kazakhstan". Note that the status of the *maslikhat* deputy is not deemed to be a political office listed in the Register of political and administrative officials. Moreover, except for the *maslikhat* Secretary, a *maslikhat* deputy acts for free. Members of the Ethics Council who are *maslikhat* deputies are, as a rule, heads of public non-governmental associations and represent institutions of civil society. Therefore, political views of a public servant in the case of *maslikhat* deputies are not under consideration.

Each law enforcement agency has its **internal security service** in operation.

The Agency on Civil Service Affairs and Anti-Corruption regularly holds workshops and roundtables on matters pertinent to activities of ethics officers and councils. The Agency developed and disseminated among public servants a booklet on main requirements of the Code of Ethics and Recommendations on main requirements to the dress code for public servants.

More specifically, in 2016, ethics officers considered 445 submissions by public servants and citizens, held 993 events on integrity (workshops, roundtables, etc.), broadcast and aired 867 publications and radio programs. In all, as many as 468 public servants were held responsible for breaching the Ethics Code.

In 2016, the Ethics Council conducted 158 meetings which looked into 1,002 items, including: the outcome of the corruption risks analysis – 56; results of the work by government agencies in preventing violation of the civil service and anti-corruption legislation– 113; performance of ethics officers – 26; performance of the disciplinary commission at government agencies based on the outcome of disciplinary practice analysis – 76; disciplinary offences – 591; other – 140. During this period 618 disciplinary actions were started, of which, ethical wrongdoing– 196; discredit to civil service– 422. Based on the consideration of recommendations by Ethics Councils 422 disciplinary sanctions were imposed, of which 232 for the violation of the Ethics Code and 190 for discrediting.

No examples have been provided about any of the Agency’s recommendations, which had been submitted for the Government’s consideration, on minimization and elimination of causes for, and conditions of, emergence of corruption in the public bodies and organizations’ performance. Based on the above, it appears impossible to unambiguously assess the efficiency of the said institutions’ performance, though their mere establishment, existence, and functioning has undoubtedly become a sign of progress.

**Conclusion: Kazakhstan is largely compliant with this part of the Recommendation**

***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 public servants, political public 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.***

In the late 2015, Kazakhstan adopted Law “On introducing amendments to some legislative acts on matters of declaration of income and assets of private individuals” (hereinafter the Law on Universal Declaration) of 18.11.2015 r. № 412-V, which provided for a gradual transition to declaration of income and assets by private persons, as follows: the 1<sup>st</sup> stage (since 2017) is to include public servants, judges, MPs, executives and administrative staff of the national companies, and public sector; the 2<sup>nd</sup> stage (since 2020) should encompass all other private persons.

However, the RK Law “On introducing amendments to some legislative acts of RK on matters of taxation and customs administration” of 30 November 2016 № 26-VI provided for a postponement of the said timelines for all the private persons, including public servants, and its implementation in a single stage effective of 2020. According to local NGOs, the official reasons for such a postponement of the universal declaration timelines became “incompletion of public data bases”<sup>49</sup> and a tax administration’s insufficient preparedness for processing and verification of returns.

The Law on universal declaration reads that while entering the system of declaration, all private individuals shall submit a declaration of their assets and liabilities for the purpose of entering the data on their assets and savings into a database. In the future those who have filed such a return will be bound to file it again in the form of the declaration of income and assets, with income over the reporting period, as well as information about alienation or purchase of assets subject to public or other registration, being entered therein. That would allow the competent authorities to expose a mismatch between private persons’, including public servants, income and expenses.

In compliance with para 2 Art. 11 of the Law «On the Fight against Corruption» (effective through 01.01.17.), persons that hold public office are bound to annually submit, during the period of their exercise of respective powers and in compliance with the procedure established by the RK tax law, to the state revenue office at their domicile the declaration of taxable income and assets which are located both in the country and abroad.

Para 1 Art.186 of the Tax Code holds that unless established otherwise by the present Article, the declaration is submitted to the tax office at the domicile no later than on 31 March of the year following the tax one, except for cases provided for by the RK Constitutional Law «On Elections in RK», the Criminal Procedural Code, and the Law «On the Fight against Corruption».

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<sup>49</sup> «The Ministry of Finance once again adjusted the timelines for introduction of the universal declaration” (in Russian). The text of the entry is available at: <https://vlast.kz/novosti/19506-minfin-ynov-skorrektiroval-sroki-ynedrenia-vseobsego-deklarirovania.html>

In compliance with para 3 Art. 584 of the Tax Code of RK, the e-tax report submitted to the tax agency by means of transmission via a telecommunications network until 23:59 of the last day set by the present Code to file the tax return is considered to have been submitted in a timely manner.

According to the Kazakhstan authorities' responses, where a public servant has failed to meet the timeline in question, his/her responsibility is considered in compliance with Art. 274 of the Code of Administrative Offenses.

Verification of the information in a declaration for completeness and adequacy is organized by means of comparing it with data provided by authorized government bodies and banks, which submit such data on the public revenue bodies' request.

Tax offices exercise tax control over compliance with the tax law provisions and clauses of other legislation - the power which has been assigned to them in accordance with para 1 Art. 556 of the Tax Code.

In compliance with para 9 of Art. 11 the Law «On the Fight against Corruption» (effective of 2020) returns filed by the following private persons and their spouses are subject to publication no later than 31 December of the year following the one in review: 1) persons that hold political public office; 2) persons that hold administrative public office of corps "A"; 3) MPs; 4) judges; 5) persons exercising executive functions in organizations and corporations of the quasi-governmental sector. By his Executive Order № 3 of 6 October 2016 the Chair of the Agency for the Civil Service Affairs set forth the List of Data, except for the data that constitute state secrets per the RK law, that are subject to publication. The data provided in declarations of persons that hold administrative public posts of corps "A" are posted by HR divisions of the respective public agencies, organizations, Parliament, and Supreme Court on their official internet portals.

In compliance with the provisions effective through 2020, publication of data from declarations is not mandatory. Furthermore, in compliance with the RK the Law «On the Fight against Corruption», the data from declarations provided to the state revenue agencies constitute the state secret, and their disclosure results in dismissal of the offender. In 2016, journalists of an information and analytical portal "Informbureau.kz" suggested *akims* (heads) of regions disclose the level of their remuneration. Some *akims* provided the requested information, while others rejected the request by arguing that the information in question is classified and therefore not subject to disclosure<sup>50</sup>.

Tax returns and other data are made available only on request from a competent anti-corruption agency, prosecutor's office, national security, state revenue and law enforcement agencies, military police, antic-corruption service, the Border Control Service under the RK National Security Committee, as well as from the court of law, as established by law

As Kazakhstan noted in its responses, presently, it is just a narrow circle of individuals (public servants, MPs, judges) that files declarations of income and assets, which does not ensure a possibility for exercising any efficient control over origins and sources of their income and assets, because one can change the owner of illegal proceeds and assets for the one who will not be bound to file a return. The one-off fixing by all the private individuals of their assets and liabilities and a subsequent annual declaring of income and changes in assets by all private persons will allow the government to exercise an effective control to expose cases of illicit enrichment and tax avoidance.

According to a NGOs' assessment, the effective declaration system for public servants suffers a number of drawbacks. First, it is opaque, as not only do the data on both public servants and their spouses' income and assets prove publicly unavailable, but it was recognized as classified at the legislative level. This inhibits the rise of public declarations verification mechanisms and poses a challenge to journalists and civil activists' efforts to conduct investigations, including anti-corruption ones. Art. 11 of the Law «On the Fight against Corruption», whose enforcement was postponed until 1 January 2020, holds a clause on the mandatory disclosure and publication of declarations and data on the income and assets. Article 11 Of the RK Anti-Corruption Law, which is not to come into force till 1 January 2020, in fact provided for publication of income and asset declarations and information.

Second, information about findings in the declarations, their verification, or statistics of violations of the law is not published.

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<sup>50</sup> For more detailed information, see "How much do akims earn?" at: <https://informburo.kz/novosti/bauyrzhan-baybek-i-danial-ahmetov-zasekretili-svoi-dolznostnye-oklady.html> (in Russian)

Third, the public servants' responsibility for a deliberate failure to file the declaration or for provision therein of false or incomplete data is foreseen by the RK Code of Administrative Offenses (Art. 274 «Breaching the financial control measures») and is punishable by a fine of 50 monthly calculation rates (MCRs) (about €300), which is an insignificant amount vis-à-vis a potential concealment of income or failure to file the declaration. It was proposed to reduce the amount of the fine for a deliberate failure to file the declaration or provision of false or incomplete data to 30 MCRs, effective of 1 January 2020.

The report on the third round of monitoring contained a note that the intention to introduce the universal declaration of income and assets by private persons in Kazakhstan had been there since the second round of monitoring. In compliance with the previous version of the Law “On the Fight against Corruption” persons that held public posts were bound to submit to the tax office at the domicile their declarations of income and assets. At the time, it was only taxable per the RK law income and assets that were subject to declaration, and the previous reports criticized such a system.

Appended hereto is a comparison between clauses of the effective RK Law “On the Fight against Corruption” and those to be promulgated since 2020.

In compliance with Art. 274 of the RK Code of Administrative Offenses (“Breaching the measures of financial control”), a deliberate failure to file a declaration or provision of false, incomplete declarations and information about taxable income and assets by the person holding a public office, or the person dismissed from the public service due to negative reasons, as well as the said persons' spouses, within the timelines set forth by the RK law is punishable by a fine equivalent of 50 MCRs<sup>51</sup>.

In compliance with Art. 244 of the RK Criminal Code («Citizen's avoidance of paying the tax and (or) other mandatory payments to the budget»), the citizen's avoidance of paying the tax and (or) other mandatory payments to the budget by means of failure to file the tax return in the instances when such a filing appears mandatory, or by means of including therein or in other documents associated with calculation and payment of taxes and (or) other mandatory payments to the budget deliberately distorted data on income or expenses, or taxable assets, where such an act resulted in failure to pay the tax and (or) other mandatory payments to the budget on a large scale (over 2,000 MCRs), is punishable by the fine in an amount of up to five hundred MCRs, or correctional treatment equivalent thereof, or a community order for the term of up to three hundred hours, or custodian restraint for the term of up to ninety days.

The notes and comments delivered during the previous monitoring mission with regard to declaration of public officials' assets retained their relevance and may not be considered complied with.

In addition, while approving the form of the declaration, the competent agencies should ensure that it should reflect not only the information on income but provide detailed information about both the public official and his family members' expenses, as well as registers of their assets and liabilities, including gifts, and about contracts which that public official and his family members have entered into over the year in review. The law should also specify the body responsible for making the public officials declarations publicly available as well as the body that will monitor their filing and a subsequent verification thereof. Publication of the content of declarations of assets forms a critical element of disclosure of public servants' income and expenses, and without that, the system in question will not be complete and fail to duly play its role. Kazakhstan should review the effective law and introduce, as soon as possible (prior to 2020), the practice of compulsory publication of updates with declarations on the respective bodies' websites and, in a centralized manner, on the website of the Agency or other body. That said, all the information should be made subject to disclosure, bar some confidential data on private persons in accordance with a list stipulated directly in the body of the law (e.g., the domicile, the physical address at which the real estate is located, date of birth, and passport data).

**Conclusion: whereas Kazakhstan has failed to enforce the new norms on declaration of assets by public servants and they have been postponed for a significant period of time, it failed to comply with this part of the Recommendation.**

***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 public 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***

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<sup>51</sup> 1 MCR in 2017 was 2,269 Tenge (KZT) or about €6.6.

***continuous training on the issues of preventing and combating corruption with the focus on the practical implementation of the legislation.***

The effective Code of Ethics of Public Servants of the Republic of Kazakhstan (*aka* The Rules of Ethics in Office of Public Servants) was approved by presidential Decree of 29.12.2015 №153. In accordance to its clauses, the Code is aimed at promotion of the society's trust in government bodies, a high culture of relations in the public service, and prevention of public servants' unethical conduct

Para 1 of the Code holds that "public servants in their activities should commit to the policy of the First President of the Republic of Kazakhstan – the Leader of the Nation Nursultan Nazarbaev - and consistently pursue it in practice". Such a provision appears inconsistent with the objectives of such a document as a code of ethics for public servants, which should strive to promote objectivity and commitment to the rule of law, rather than a policy, will or formal norms instituted by a single person. The substance of the public service reform lies in the service free of politics. Hence, a code of ethics should guarantee bureaucrats' political neutrality, rather than the opposite. That also directly contravenes the previous recommendation.

In the opinion of Kazakhstan authorities, this provision is not running counter to the principles of the rule of law and objectivity as stipulated in paragraph 5 of the Ethics Code of public servants of the Republic of Kazakhstan and aligns with the norms of the Constitutional Law "On the First President of the Republic of Kazakhstan – *Elbasy*" which lays down the state policy.

Heads of central bodies, as well as executive secretaries of the central agencies of executive power or public officials to whom the powers of executive secretaries of the central agencies of executive power were assigned in line with established procedures, and, where there are no executive secretaries of the central agencies of executive power or the said public officials, heads of central executive bodies ensure compliance with the requirements of the Ethics Code, placement of the text of the Code in accessible locations. Within three days since the date of admittance in the public service, the public servant must be familiarized with the text of the Code in the written form.

In the updated version of the Ethics Code, Kazakhstan failed to implement a recommendation made by results of the previous monitoring reports, namely, the need to incorporate therein a definition of compliance with the principles of rule of law and promotion of the civil service's professional excellence as a public servant's major duties. The Code still retains a provision that reads that once a public servant faces an unsubstantiated public charge on corruption, he/she should take measures on its refutation within a month since the date of finding out such an accusation.

Following from the comments by Kazakhstan authorities, the above recommendations were reflected in the Rules of Office Ethics of public servants approved by the decree of 29 December 2015, No 153. Paragraph 5 of the Rules stipulates that public servants must ensure legality and fairness of decisions made and improve their professional competence and qualifications to perform their official duties efficiently. In addition, paragraph 14 of the Rules states that "should the public servant be faced with an arbitrary public allegation of corruption wrongdoing, he must, within one month of learning about the allegation, take steps to refute it."

In its responses, Kazakhstan noted that law enforcement agencies are adopting codes of ethics and there is an effective dedicated Code of Ethics for Judges.

Following recommendations by Councils on Ethics, in 2016, as many as 232 disciplinary actions were imposed for breaches of the Ethics Code vis-à-vis 338 in 2015.

To advance the level of the public servants' anti-corruption literacy the Agency in tandem with the Academy developed and approved a Model Curriculum to train public servants on matters of countering corruption. The Curriculum helps master such skills and competencies as the anti-corruption legislation, prevention of corruption offences, ethics and conflict of interest in public service, etc.

The new entrants to the civil service and newly appointed executives undergo an anti-corruption training. The advance training and retraining agenda in 2015 alone allowed holding as many as 28 training classes on anti-corruption issues for 727 staffers from the central government agencies and local executive bodies.

In this regard, Kazakhstan proved partly compliant with the recommendations. It is appropriate to continue the work in this direction and intensify training activities, and undertake measures on raising the trainees' awareness of anti-corruption restrictions and requirements.

**Conclusion: Kazakhstan is partially compliant with this part of Recommendation**

***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***

In compliance with sub-para 4) Art 12 of the Law «On the Fight against Corruption», in order to preclude persons that hold an executive public office, persons authorized to exercise public functions, persons equivalent to them (except for candidates for RK President, MPs or *maslikhat* members, *akims* of towns of local status, settlements, villages, rural counties, as well as candidates for elected local self-governance bodies), public officials, as well as persons being candidates for the exercise of the said functions (hereinafter, persons) from commission of acts that may result in their use of respective powers in pursuing a personal, group or other out-of-office interests the said persons assume anti-corruption restrictions in receiving gifts in connection to their exercise of the respective official powers in compliance with the RK law.

Sub-para 17) para 1 Art. 50 of the Law «On Civil Service» reads that public servants' acceptance of gifts or services in connection with the exercise of public or equivalent functions from public servants or other persons depending on them by virtue of employment is recognized as a disciplinary offense that discredits the civil service.

Gifts given without the public servant's knowledge or consent and those received by him/her in connection with the exercise of the respective duties are subject to an unrequited handover to a special government fund within seven days thereupon, while services provided to the public servant under the same circumstances shall be refunded by him/her by transferring the monetary equivalent thereof to the Republic's budget.

The public servant in receipt of gifts may, upon his/her line supervisor's consent, buy them back from the said fund at market retail prices applicable in the respective area, with the revenue resulted therefrom to be transferred by the special state fund to the Republic's budget.

Pursuant to the Law «On the Fight against Corruption», with its Resolution of 31 December 2015 № 1166 the RK Government amended the Procedure of accounting, storage, appraisal, and further use of assets in eminent domain on some grounds, in regard to the handover of gifts to the authorized body for state assets management or local executive bodies of districts, cities of regional status, procedure of redemption of such goods, and their sales. In accordance with para 25 of the Rules, the accounting, appraisal and storage of gifts handed over to the special state fund is mandated to an authorized body for government assets management represented by the State Property and Privatization Committee of the Ministry of Finance of RK and its territorial branches. Meanwhile, gifts handed over to local bodies of executive power are subject to a handover to the authorized body to arrange their accounting, storage, and appraisal.

In addition, in accordance to para 2 Art. 50 of the Law on civil service, a public servant's family members may not accept gifts and services, invitations to tourist, recreational and other travels at the expense of foreign and local private persons and legal entities with whom (which) the said person is connected due to his/her official duties. The public servant is bound to hand over, on an unrequited basis, the gifts illegally received by his family members to a special state fund and reimburse the cost of services which his family members wrongfully enjoyed by transferring the monetary equivalent thereof to the Republic's budget.

Public servants are prohibited to accept invitations for domestic and overseas tourist, recreational and other travels at the expense of foreign and local private persons, and legal entities, except for in the following cases: on the invitation and at the expense of the spouse and relatives; on invitation of other private persons (upon a line supervisor or body's consent) where relationship with them does not concern the invitee's scope of duties in office; undertaken in accordance with the RK's treaties or upon a mutual agreement between RK government agencies and foreign states' ones at the expense of respective state agencies and/or international organizations; undertaken upon a line supervisor or body's consent - to participate in scientific, sport, creative, professional, humanitarian events at the expense of respective organizations, including travels arranged in the frame of such organizations' statutory activities.

In accordance with sub-para 4) para 1 Art. 472 of the Code of Administrative Offenses, should a person fail to ensure a complete and/or timely handover of assets in the form of gifts to the authorized body and where such acts do not bear signs of criminal offense, that person is held administratively and legally liable.

Pursuant to Article 509 of the Civil Code, no gifts can be accepted except ordinary presents whose value does not exceed ten multiples of the monthly reference indicator fixed by legislative acts, *inter alia*, by public servants or members of their families in connection with their official position or in connection with their performance of their official duties.

Pursuant to Article 216 of the Law “On state property”, any gifts in excess of ten multiples of the monthly reference indicator established by the laws of the Republic of Kazakhstan, handed over (presented) publicly or during any official events to public servants in connection with their official position or in connection with their performance of official duties, or to their family members, shall be deemed a gift to the state and be collected into state property, accumulate in a special state fund and be transferred to the authorized state property management agency or to local executive authorities in the manner and under terms and conditions as defined by the laws of the Republic of Kazakhstan.

The Ministry of Finance developed Guidelines on handover of gifts received by persons that hold an executive public office, persons authorized to exercise public functions, persons equivalent to them, and public servants. The Guidelines provide for a mechanism and timelines of the handover of gifts to the special state fund, a procedure of their redemption, as well as sale in the event of refusal of the latter. The Guidelines were disseminated among government agencies and offices of *akims* of Astana and Almaty.

According to statistics, in 2015-2016, as many as 141 gifts (souvenirs, candies, liquors, certificates, paintings, notepads, pens, etc.) were received at an estimated total of KZT1,457,171, of which 5 gifts were redeemed for KZT49,176, 38 ones were sold for a total of KZT517,189, 1 was disposed of (KZT16,995), with the remaining balance of 97 gifts worth a total of KZT295,489.

The Guidelines addressed only a limited array of matters related to the handover and accounting of gifts and fails to encompass other provisions of the domestic law on gifts to clarify them. That is why it would be safe to suggest that the document only partly reflects compliance with the Recommendation. The Guidelines should cover all issues relevant to the limitations pertaining to gifts (what gifts may not be allowed, the meaning of “in connection with the performance of their state or equivalent functions”, etc.). As the above suggests, receiving gifts and handling them are regulated by various regulatory acts that operate with different terminology. The purpose of the guidelines is to explain the legislative requirements and describe clearly the algorithm to be followed by the public servant in case of an offer of a gift, its acceptance or discovery at the work place, etc.

No monitoring was held regarding enforcement of the provisions on gifts, nor were developed proposals on their improvement.

One should also notice lacunas in the effective law. More specifically, it fails to set forth the value of allowed gifts and the circle of those persons whose gifts will not be considered prohibited ones, nor is it clear whether gifts of minor tokens of appreciation of hospitality may be allowed. There is no definition of the concept of gift. Plus, all the gifts received by a public servant or his/her family member (including intangible objects) with a value over an established threshold should be entered in that public servant’s declaration of assets.

**Conclusion: Kazakhstan is partially compliant with this part of Recommendation.**

***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***

In compliance with Art. 24 of the RK Law “On the Fight against Corruption” a person in possession of information about a corruption offense reports it to the executive management of the organization in which he is employed or an authorized anti-corruption body. The executive management of the government body, organization, the authorized anti-corruption body is bound by law to take measures in response to such a report. The person aware of the fact of a corruption offense or otherwise contributing to anti-corruption

efforts is under the government’s protection and is rewarded according to a procedure established by the Government of the Republic of Kazakhstan. The provision is not applicable to persons that reported intentionally false information about a corruption offense. Such persons are held liable in compliance with the law. The information about a person that cooperates with the authorities in the fight against corruption is a state secret, and it is divulged according to the procedure set forth by law. Disclosure of such information results in a liability established by law.

In compliance with Art. 9 of the RK Law on civil service, a public servant has the right to “legal and other protection in compliance with the RK law where he/she has made the executive management of the public body in which he/she is employed and /or law enforcement agencies aware of credible cases of corruption offences he/she became aware of.”. Art 52 of the Law in question also holds that where the public servant is aware of a corruption offense, he/she shall undertake necessary measures to prevent and cease such an offense, including an immediate report thereon in writing to his/her line manager, the executive management of the government body in which he/she is employed, and authorized government agencies. The public servant shall also promptly notify them in writing of other persons’ attempts to abet him/her to commission of corruption offences. The government body’s executive management is bound, within one month upon receipt of the information, to take measures in regard to the public servant’s information about corruption offences, instances of abetting him/her to commission thereof, including, in particular, by arranging audit and forwarding the information to the competent authorities.

According to the Kazakhstan authorities, the overall number of reports on corruption offences entered in the Anti-corruption Service’s Register of information (the National Anti-Corruption Bureau) in 2015 was 3,308, while in 2016 accounted for 1,623. The Bureau does not collect information in terms of whistle-blowers. Persons in possession of information about facts of corruption can contact the Bureau via its call centre, by postal service, Internet (via the e-government portal at: egov.kz (the Agency Chair’s blog), as well as in person. The National Anti-Corruption Bureau’s website (anticorruption.gov.kz/rus/soobshit\_o\_korruptcii) features an interactive interface with buttons «”Report corruption” and “Call Centre”, along with a guide on how to report facts of corruption, an algorithm of review of reports/claims, a whistle-blowers awarding procedure, and information about the call centre. Efficiency of the channels in question may vary depending on particular circumstances. For example, in case of emergency it is a telephone call that appears the most optimal means.

The National Anti-Corruption Bureau’s website features guidelines on how to report facts of corruption, an algorithm of consideration of reports/claims, the text of the Rules of rewarding, and information of the operation of the Anti-corruption Service’s Call Centre 1424<sup>52</sup>.

In 2012, in the frame of implementation of provisions foreseen by Art. 7 of the RK Law “On the Fight against Corruption”, there were approved Rules of rewarding persons that have reported the fact of a corruption offence or otherwise assisted in the fight against corruption. In 2012-2013, as many as 343 persons were rewarded for a total of KZT40.7m (some €109,000). Such a practice and allocation of funding for its implementation should be commended.

**Table 7. Statistics of Rewarding Persons that Have Reported a Fact of Corruption Offense or otherwise Assisted in the Fight against Corruption**

	The number of rewarded persons	The amount of reward
2014	171	KZT 19.7m
2015	7	KZT 870,000
2016	167	KZT 21.5m

Source: National Anti-Corruption Bureau.

In accordance with para 2 of the Rules, the reward in the form of a one-off monetary disbursement is set in the following amounts:

- 1) on administrative cases on corruption offences – 30 MCRs;
- 2) on criminal cases on corruption misdemeanours – 40 MCRs;
- 3) on criminal cases on corruption crimes – 50 MCRs;

<sup>52</sup> See <https://goo.gl/vyKGkJ>.

4) on criminal cases on corruption felonies– 70 MCRs;

5) on criminal cases of especially high crimes – 100 MCRs.

In cases foreseen by para 9 of the Rules, rewards may be established in the form of a certificate of recognition or an official gratitude.

It proved impossible to ensure a successful roll-out of the Rules in 2015, because it was the financial police that controlled the budget program. That is why with its Resolution № 1131 of 30 December 2015 the RK Government approved new Rules of rewarding persons that have reported a fact of corruption offence or otherwise assisted in the fight against corruption. In accordance with the new Rules it was the Anti-Corruption Service represented by the National Anti-Corruption Bureau that was mandated to administer the program implementation.

Besides, the new procedure holds that the set of documents submitted to disburse the reward no longer includes a copy of the verdict that has come in effect or a court order on cessation of the criminal case on non-exonerative grounds.

As well, norms on other provisions that regulated both the whistle-blower and anti-corruption body's responsibilities were excluded from the new procedure.

The amendments recommended to the provision of the Code of Administrative Offenses, that establishes administrative responsibility for reporting false information about corruption, were not incorporated therein, and the new 2015 Code (Art. 439 of the CoAO) comprises the same clause. Furthermore, the 2014 Criminal Code of RK established criminal responsibility for “dissemination of intentionally false information” (Art. 274), namely, “for dissemination of intentionally false information that creates a danger of violation of public order or infliction of a substantial damage to rights and legitimate interests of citizens or organizations, or protected by law interests of the society, or the state”. Meanwhile, dissemination of such information with the use of mass media or telecommunications networks forms a qualified corpus delicti (punishable by custodial restraint for the term between 2 and 5 years); similarly, dissemination of such information in the course of holding public events is punishable by custodian restraint for the term between 5 and 10 years. These clauses can have an extremely adverse impact on reports on corruption.

The concept of whistle-blower appears missing in the effective RK law. That said, the local authorities refer to the RK law “On state protection of persons taking part in the criminal proceedings” which specifies persons being subject to state protection, such as, for example, citizens that assist agencies in carrying out investigative activities, witnesses, etc. The state protection measures can also be applicable to persons assisting in prevention or solution of crimes, where there is a real danger of commission of an act of violence against them or any other act prohibited by the criminal law. Furthermore, suspects and accused cooperating with the investigation and resolution of corruption crimes can conclude a deal with the law, under which their punishment may be eased (Chapter 63 of CPC). In compliance with Art.97, 98 of CPC, data on the witness can be made classified in the respective file. As well, according to note 2 to Art. 367 of CC, the person that voluntarily reported the fact of bribe extortion is acquitted of criminal charges.

In 2015 and 2016, the Anti-Corruption Service extended measures of state protection to 155 whistle-blowers on corruption offenses, of whom:

- in 2015, 84 persons (aggrieved persons – 25, witnesses – 46, their family members - 31);

- In 2016, 71 persons (aggrieved persons – 38, witnesses – 46, their family members - 36).

The establishment of a procedure of rewarding whistle-blowers and allocating funding therefore is a positive development; however, the RK law does not suggest a concept of whistle-blower. The law on the state protection of persons participating in the criminal trial concerns only those who have a standing in a criminal trial and does not encompass whistle-blowers. There are no special measures in place to protect the latter.

In their comments, Kazakhstan authorities notes that Article 3 of the Law “On state protection to persons participating in the criminal process” establishes the list of persons eligible for state protection. However, the list is not exhaustive. Pursuant to the article indicated, “measures of state protection may attach to persons facilitating prevention or detection of crimes provided there is a real threat of exposing them to violence or other acts prohibited under criminal laws.” Pursuant to Article 4 of the law the right to state protection emerges in circumstances stipulated by the laws of the Republic of Kazakhstan, and the decision

to apply security measures with respect to individuals who assist authorities that engage in operative-detective, counterintelligence activities, together with the authority that conducts the criminal process, in the manner provided for by this law, shall be made by the agencies that engage in operative-detective, counterintelligence activities.

It should be noted in this regard that the above provision only concerns those persons who may face a real danger of violence or another act prohibited by criminal laws, while persecution of whistle-blowers may take different forms, many of which will not be prohibited by criminal laws. Thus, there are still doubts about the effectiveness of protection that may be granted under the legislation on protection of individuals participating in the criminal process.

Instead of the recommended elimination of liability for reporting false information about corruption, the respective law was only made yet more stringent in that regard, with a new Article on dissemination of intentionally false information having been incorporated in the Criminal Code, which allows a broad interpretation and can be applicable to reports on corruption.

The monitoring team believes that it is imperative to establish in the law a procedure for responding to exposure of facts of corruption and making a respective decision, as well as detailed measures on protection of respective persons.

**Conclusion: Kazakhstan did not comply with this part of the Recommendation.**

**In all, Kazakhstan is partially compliant with previous Recommendation 3.2., and it remains in force as Recommendation № 7.**

## 2.2. Integrity of political officials

***Recommendation 3.7. of the Second Monitoring Round Report on Kazakhstan (recommendation was confirmed during the Third Monitoring Round)***

“... 5. 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).”

In the course of the previous rounds of monitoring, it was noted that per the interpretation of the Law on the civil service, MPs and deputies of *maslikhats* did not fall under the category of public servants<sup>53</sup>, thereby not being subject to the Law on the fight against corruption. However, clauses of the conflict of interest appeared missing in the latter. As well, whilst the Law in question established the deputies' mandatory declaration of income and assets to tax authorities, the financial control system was found to be inefficient (see above).

The 2015 Law “On the Civil Service” defines political public official as a public official whose appointment (election), dismissal and activities in office bear politically determining nature and who bears responsibility for implementation of political objectives and tasks. The register of political public servants was approved by the RK President upon the recommendation of the authorized body (the Agency on Civil Service Affairs) (see above the section on division of political and administrative posts) and includes, *inter alia*, the Prime Minister, the First Deputy Prime Minister and other Prime Minister's deputies; the Secretary of the State of the Republic of Kazakhstan; the Chief of Staff of the President of the Republic of Kazakhstan, the first Deputy Chief of Staff of the President of the Republic of Kazakhstan and other deputies to the Chief of Staff; heads of government bodies directly reporting to the RK President, their first deputies and other deputies; ministers of the Republic of Kazakhstan, their first deputies and other deputies; *akims* of regions, the capital city and cities of national status, their first deputies and other deputies.

Deputies of representative bodies appeared missing in the Register. Furthermore, in compliance with Art. 13 of the Law “On the Civil Service” a public servant may not be elected as a legislative body deputy.

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<sup>53</sup> According to the Register of Civil Service approved by the RK President's Decree of 7 March 2013, both MPs and *maslikhat* deputies did not fall under any civil service position.

Thus, the Law “On the Civil Service” is not applicable to MPs and *maslikhat* deputies. Meanwhile, in compliance with the recently enacted Law “On the Fight against Corruption”, MPs fall within the category of persons that “hold public office of responsibility”, while *maslikhat* deputies fall under the category of “persons authorized to exercise public functions”, and political public servants are defined as “persons holding government office of responsibility”.

In compliance with the Law “On the Civil Service” (Art. 11 thereof to take effect in 2020), persons holding a public office of responsibility, their spouses, as well as persons authorized to exercise public functions and their spouses, are bound to file a declaration on income and assets. Such persons are also subject to the following anticorruption restrictions:

- 1) on performance of activities inconsistent with the exercise of public functions;
- 2) impermissibility of having close relatives, spouses, and in-law relatives’ be employed in the same organization;
- 3) on the use of official and other information not subject to official dissemination for the purpose of obtaining tangible or intangible benefits and preferences;
- 4) on receiving gifts in connection with the exercise of official duties in compliance with the RK law.

The persons that hold public office of responsibility, the persons authorized to exercise public functions (except for *maslikhat* deputies, that perform their duties on a basis other than the full-time one), public officials are prohibited to:

- 1) participate in management of an economic agent where the management of the economic agent or participation therein does not constitute their official duty in compliance with the RK law; facilitate satisfaction of organizations or private individuals’ financial interests by virtue of abuse of office for the purpose of obtaining assets or other benefits;
- 2) engage in entrepreneurial activities, except for purchase and/or sales of shares in mutual and interval funds, bonds on the organized stock market, corporate stock (ordinary stock in a volume of up to five per cent of the overall number of voting stock of such organizations) on the organized stock market;
- 3) engage in any other kind of gainful activity, except for pedagogical, research, and other creative activities.

Within thirty days upon the date of taking office, the said persons are bound to hand in trust, for the length of the term of the exercise of the said functions per the procedure set forth by the RK law, their assets whose use entails receiving income, except for cash, bonds, shares in open and interval mutual funds legitimately being in their ownership, as well as hired property. Where such persons have acquired stock, they are bound to hand it in trust within 30 calendar days since the acquisition date per the procedure set forth by the RK law and to submit to the HR division (service) at the place of employment a notarized copy of the respective contract within ten days upon notarization thereof.

The persons holding public office of responsibility, the ones authorized to exercise public functions, public officials are prohibited to exercise official duties where there is a conflict of interest. They are bound to take measures on prevention and concluding a conflict of interest.

The Laws «On the Parliament of the Republic of Kazakhstan and Status of Its Deputies” and “On Local Public Governance and Self-Governance” do not provide for such a basis for termination of an MP and *maslikhat* deputy’s powers as violation of provisions of the Law on the fight against corruption, nor may they be held liable for numerous breaches of the anti-corruption restrictions and requirements under the effective Criminal Code or the Code on Administrative Offenses. Hence, there are no legal grounds to hold them liable for commission of such violations, unless they commit a crime.

There are no codes of ethics in place for MPs and *maslikhat* deputies, while the Ethics Code for public servants is not applicable to them. The Regulation of the RK Parliament adopted at a joint session of its two Chambers features a dedicated “The Rules of the Deputy Ethics” chapter; however it has failed to address the issues of conflict of interest, its disclosure, prevention of corruption, etc. There are no bodies in the Parliament responsible for such issues, either. All that is inconsistent with Art. 8 of the UN Convention against corruption (“Codes of Ethics for Public Servants”), which is also applicable to the legislature.

The para of the Regulation regarding rules of the MPs’ ethics establishes the following rules:

- deputies of the Republic's Parliament should treat with respect each other and all other persons that contribute to the operation of both Chambers of the Parliament, committees, commissions, and other deputy formations set up by the Parliament;
- in their public presentations, they shall not use unsubstantiated accusations, rude, insulting expressions that cause damage to the dignity of MPs and other persons;
- they shall not call for illegal and violent acts;
- they shall not obstruct a normal operation of the Parliament's Chambers, its coordination and working bodies;
- they should not yield the floor;
- they should not vote by using another MP's card;
- they shall not allow offensive gestures, threats, and violence.

Where an MP breaches the rules of the deputies ethics established by the Parliament Regulation and its Chambers' Regulations, by the decision of the respective Chamber's Chair that MP could be subjected to the following disciplinary measures: 1) parliamentary warning; 2) coercion to offering a public apology; 3) deprivation of the right to speak at a joint plenary session of the Chambers or a separate plenary session of the respective Chamber; 4) deprivation of the right to speak at three joint or separate plenary sessions of the Chamber(s); 5) expulsion from the hall for a joint plenary session of the Chambers or a separate plenary session of the respective Chamber; 6) expulsion from the hall for three joint or separate plenary sessions of the Chamber(s); 7) deprivation of one-day remuneration.

The preparation for matters pertaining to the enforcement of disciplinary measures towards MPs, their compliance with the requirements and rules of the MPs ethics, as well as termination of MPs' mandates and cancellation of their powers, and stripping MPs of the parliamentary immunity has been assigned to the Central Electoral Commission.

In its responses to the Questionnaire Kazakhstan noted that "there is no statistics on MPs. There were no violations".

Major functions of **political public servants**, that are heads of public bodies and *akims* of regions, the cities of national status, and the capital city, are stipulated in Art. 11 of the Law "On Civil Service". Those are:

- 1) identification of the public body's objectives, development of the respective territory;
- 2) making decisions facilitating development, identification and implementation of the government policy;
- 3) interaction with heads of foreign diplomatic missions upon the approval of the authorized body in the foreign policy area;
- 4) representation of the government body in the RK Parliament, other government organizations and bodies;
- 5) regulation and assessment of progress in implementation of state, government and other programs and projects;
- 6) other functions provided for by the Constitution, laws of the Republic of Kazakhstan and legal acts of the RK President.

Political public servants' functional duties are determined by the RK law and presidential Decrees, a respective public body's statutes, and the allocation of duties.

The Law "On the Fight against Corruption" provides for measures of financial control over persons running for the Parliament and seats on *maslikhats*, as well as MPs. Specifically, the former and their spouses prior to registration as candidates are bound to submit a declaration of assets and liabilities. In addition, in compliance with the Law "On the Fight against Corruption", the data contained in MPs' declarations is subject to mandatory publication.

Kazakhstan did not provide information of the level of **remuneration** (the average actual salaries of MPs, members of the Cabinet, President, local councillors, other political servants) of political servants by referring to the official secrecy thereof. The same reason was behind Kazakhstan's failure to provide data on additional payments and rewards.

In the same vein, Kazakhstan did not provide information about any special measures for political servants with regard to raising their awareness, training, and counselling.

In addition, criticized in the previous reports, the role of the Central Electoral Commission in the area of deputies' ethics and responsibility remained unchanged. In compliance with Art. 52 of the RK Constitution, the preparation of matters pertinent to application of disciplinary measures to deputies, their compliance with the requirements of incompatibility, rules of deputy ethics, as well as termination of their mandate and stripping them of powers and immunity is laid upon the Central Electoral Commission. Plus, in compliance with Art. 33 of the Constitutional Law "On the Parliament of the Republic of Kazakhstan and Status of its Deputies" the Central Electoral Commission is also mandated to carry out preparation of matters related to application of disciplinary measures to deputies, control over their attendance of sessions and meetings of the Chambers and their bodies, impermissibility of vote transfer. As noted in the previous reports, the powers in question appear fairly extravagant and may be deemed as an attempt to constrain the MP's independence. The OECD reports also questioned the CEC's independence.

Kazakhstan also informed that in September 2016, the Global Economic Forum published its annual Global Competitiveness Report for 2016-2017 covering 138 nations (vis-à-vis 140 in 2015). Kazakhstan was ranked 53<sup>rd</sup> therein, while by the "societal trust in policy makers" index the country climbed from the 34<sup>th</sup> position in 2014 up to the 32<sup>nd</sup>.

Kazakhstan's updates allow one to suggest an insignificant progress in implementing this part of the Recommendation, as the new Law on the fight against corruption comprises clauses on conflict of interest and other anti-corruption constraints applicable to the legislature and other political servants. That said, there is no mechanism in place to enforce such norms, nor are there sanctions for their breaching. The deputies' Ethics Rules does not comprise guidelines regarding integrity and prevention of corruption.

**Conclusion: Kazakhstan is partially compliant with this part of the Recommendation.**

#### **New recommendation No. 8**

- 1. To establish detailed integrity rules for political officials who are not subject to the Law on Civil Service (with regard to conflict of interest, financial control, responsibility for corruption and related offences) taking into account the peculiarity of their status and exercised functions.*
- 2. To implement an effective mechanism of control over political officials' compliance with integrity rules.*

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

### Judiciary

**Recommendation 3.8. of the Second Monitoring Round Report on Kazakhstan (recommendation was confirmed during the Third Monitoring Round)**

1. 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 dealing with 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.
2. 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.
3. 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.

### Legislation

The judiciary in RK is regulated by the RK Constitution, the Constitutional Law "On the Judicial System and Status of Judges in the Republic of Kazakhstan", the Code of Judicial Ethics of 21 November 2016, and presidential Decrees (e.g. the Statute on the Judicial Jury).

**«To amend legislative acts in order to strengthen the independence of the judiciary and judges ...».**

While integral, the public governance system in RK is exercised in accordance with the principle of its division into the legislative, executive, and judicial branches. The concerted functioning of all the branches of power and *the government bodies' responsibility before the people are ensured by the RK President* (Art. 3 (4) and 40 (3) of the Constitution). The judicial power is established by the Constitution and the Constitutional Law "On the Judicial System and Status of Judges in the Republic of Kazakhstan" (JSSJ) and is aimed, *inter alia*, at protection of citizens and organizations' rights, liberties and legitimate interests.

The judicial power is vested solely in permanent judges acting on behalf of courts of law, as well as jurors engaged in criminal proceedings, according with a procedure foreseen by law. The judicial power is exercised by virtue of civil, criminal and other forms of judicial proceedings established by law. The judicial proceeding is exercised solely by the court of law, while it is prohibited to set up special and extraordinary panels.

The judicial system in RK consists of three tiers and includes: 1) district courts and the ones equivalent to them; 2) regional courts and the ones equivalent to them (appeals instance); and 3) the Supreme Court (the cassation instance). There are a total of 371 courts in the country, including the Supreme Court, 17 regional and 353 district courts and the ones equivalent to them (i.e. 265 district and city courts, 10 military garrison courts, 16 specialized inter-district economic courts, 26 specialized administrative courts, 19 specialized inter-district juvenile courts, 17 specialized inter-district criminal courts, including a military one). The authorized staff number of judges is 2,664. In the first half of 2017, the actual number of judges was 2,509 of which 1,290 were men and 1,219 women.

The district and regional courts are established, reorganized, renamed and dissolved by the *RK President* based on the recommendation of the chief justice of the Supreme Court of RK submitted upon the Supreme Judicial Council's (SJC, see below) consent. The aggregate number of judges of district and regional courts is approved in the same fashion, while the number of judges at each court of law is established by the chief justice of the Supreme Court of RK per the recommendation of SJC on the basis of a motion of an authorized body for logistics support of the courts' performance.

The Supreme Court of RK is the supreme judicial body with regard to civil, criminal and other cases. In the cases provided for by the law, it adjudicates the matters within its competence and provides clarifications on matters of judicial practice. The total number of judges of SC is established by the *RK President* upon the recommendation of its Chair (Article 18 of JSSJ).

Courts of law consist of judges whose powers can be terminated or ceased solely upon the grounds established by law (Article 79 (1) of the RK Constitution). Art. 23 (1) and 24 (1) of JSSJ set forth that the judge is a public official of the state mandated, pursuant to the procedure established by the Constitution and JSSJ, to administrate justice. The judge functions on a full time basis and is a repository of the judicial power.

The judges' independence is protected by the Constitution and law; in administering justice, the judge is independent and subject only to the Constitution and law.<sup>54</sup> Interference with the court of law's administration of justice, as well as embracery, is impermissible and results in legal accountability (see also Art. 25 of JSSJ). Judges are not accountable for specific cases, and their orders and court orders are binding on all the government agencies, their public officials, private individuals, and corporations.

Judges of all the courts enjoy the same status and differ only in terms of their powers. The judges' legal status is determined by the Constitution, JSSJ, and other laws.

### ***Judiciary Reform***

Kazakhstan informed of the following avenues of the judiciary reform since 2015:

Changes in the Constitution that led to the revision of the Judicial System in June 2017.

As of 1 January 2016, the Supreme Judicial Council (see below) is an autonomous public institution, with its own staff. Its composition is set up by law (previously, it was the RK President's prerogative). Its mandate has been expanded. It now comprises, *inter alia*, review and assessment of the performance of judges who have been in office for up to one year; formation, together with the SC, of a candidate reserve to fill executive posts in the judiciary; and consideration of judges' appeals against decisions passed by the Judicial Jury (see below).

Since 2016, the requirements to internships for candidates to the judiciary have been tightened. Presently, the internship is carried out on a full time and day release basis, with its term for all the candidates being 1 year (of which 11 months to be spent at the court of law of the first instance and one month -at the regional court).

Since 2016, there have been in effect provisions about assessment of the judge's performance, and in 2016 a new version of the Statute on jury trial was adopted, with some last amendments made on 28 July 2017.

On 21 November 2016 r. the 7<sup>th</sup> congress of judges of RK adopted a new Code of Judicial Ethics (aka Judicial Ethics Code) (to replace the 2009 one). The new Code recognizes, *inter alia*, that the citizenry's trust in the judicial power and its authority in the matters of judges' integrity, honesty and incorruptibility plays a critical part in the contemporary democratic society.

In 2016, the Academy of Judiciary under the Supreme Court was established (previously known as the Institute of Judiciary, it was a part of the Academy of Public Governance under the RK President). The Academy is an institution of higher education and enjoys a special status which grants it the right to independently determine curricula and organize its scientific and educational activity as foreseen by law. The Academy's profile is training MAs degree holders in law as future judges and the staff reserve for the judiciary.

The RK's Anti-Corruption Strategy for 2015-2025 puts a high premium on the promotion of trust in the judiciary. More specifically, it is proposed to take measures to weed out corruption in judges' performance,

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<sup>54</sup> Art.77 (1) and 79 (1) of the Constitution.

including, *inter alia*, by toughening requirements to candidates. It is also suggested that simplification of legal procedures, promotion of their efficacy, and automation of the court of law's functioning should enable a freer access to justice and enhance transparency in the judiciary's operation.

In his address of 31 January 2017, the RK President called for promoting trust in the judicial system and emphasized importance of exclusion of any wrongful influence on judges' performance.

The authorities also updated that in 2015, UNDP in tandem with Centres for research into legal policy and public opinion conducted an independent sociological survey among participants in trials in Kazakhstan. They surveyed a total of over 12,000 respondents at 193 district courts and equivalent courts. The survey findings exposed a fairly high degree of the citizens' satisfaction with the courts' performance (71.3%). Meanwhile, nearly 80% of the respondents voiced out their trust in judges, another 89% highly valued judges' clarifications of rights and obligations to parties to the trial, 87.5% cited the judges' respectful attitude. The index of satisfaction with the judges' preparedness for the trial accounted for 83%.

To find out the degree of citizens' satisfaction with the level of accessibility of courts and quality of their performance in 2016, there was conducted an online anonymous survey of participants in trials and users of the "Judicial Office" service (see below). As many as 74.4% out of 16,000 respondents was satisfied with the courts' performance, 87% believed that the administration of justice has become more accessible with the introduction of information technologies, 81.2% were satisfied with the degree of courts' openness, 77.3% thought that the reduction in the number of court instances was a positive development, 73.4% cited their objectivity and impartiality, 75.1% noted professionalism, 79.3%, the judge's integrity and culture of conduct, 87.4% were of opinion that the audio and video recording of the trial enhances the quality of consideration of a case.

### ***The Judicial Community's Bodies***

**«...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; ...»**

**The Supreme Judiciary Council (SJC)** is an autonomous public institution with its own staff established to ensure *the RK President's constitutional powers to form courts of law*, guarantees of judges' independence and their immunity. Among other things SJC: 1) runs a selection of candidates, or recommends candidates, for vacant offices of judges of different tiers within its remit; 2) considers matters of termination of powers and dismissal of judges within its remit; 3) considers performance of judges appointed to office for the first time; 4) reviews judges' appeals against the Judicial Jury's verdicts (see below); 5) submits to the RK President a conclusion to resolve the matter on granting consent to applying to a judge a disciplinary action or remedial measures in the frame of punitive proceedings; 6) takes measures to promote judges' competence development; 7) together with the Supreme Court, SJC forms the candidate reserve (see below) and approves, upon the recommendation of the chief justice of the Supreme Court, the composition of the Republic Commission on Staff Reserve and its Chair; 8) approves the Statute on the Council on Engagement and Interaction with Courts (see below).

SJC consists of the Chair and members *appointed by the RK President*. Half of the SJC members, under the law, are serving judges (1 judge of the Supreme Court, 2 judges of regional courts and equivalent courts, 2 judges of district courts and equivalent courts) and retired judges (presently, 2 such judges) who were elected and recommended by a plenary meeting of the Supreme Court of RK (a total of 7 judges, including 2 retired ones). Nominations submitted for consideration at the plenary meeting of the Supreme Court of RK are selected by plenary meetings of regional courts with account of the need to ensure an equal representation of serving judges and retired judges of district and regional courts, and the Supreme Court. The chief justice of the Supreme Court, the General Prosecutor, Minister of Justice, Head of the Agency on Civil Service Affairs, Chairs of the respective standing committees of the Senate and *Majilis* are appointed as *ex officio* members of the SJC by the RK President (a total of 6 members). Other persons, including academic lawyers, foreign experts, representatives of the Union of Judges) can also be appointed as SJC members (currently there are 2 such members there: 1 jurist and 1 member of the Bar). The term in office for SJC members is three years, except for the Chair and *ex-officio* members. SJC members are subject to a number of restrictions.

SJC operates on the basis of principles of independence, legality, collegiality, openness, and impartiality. SJC considers cases no later than in two months upon their acceptance, with a mandatory notification of the applicant of a verdict thereon. Decisions are passed *in absentia* by no less than two-thirds of votes of

members in presence. Decisions on procedural matters are passed by a majority vote of those in presence. SJC's decisions should be motivated and executed in writing.

There is the **Qualification Commission** under SJC. It conducts a qualification examination under the judicial selection procedure. It consists of the following SJC's appointees: 1) the Commission Chair, 2) five experts out of lecturers in law and jurists, 3) three judges, including retired one(s), assigned by the Judicial Jury on the basis of rotation, 4) representatives of the General Prosecutor's Office, the Ministry of Justice, and the Bar, one from each structure, 5) other community representatives. Foreign experts may also sit on the Commission.

**The Judicial Jury** is established to assess an effective judge's professional performance, confirm the judge's right to resignation and termination of his/her tenure, as well as consider the matter of institution of disciplinary proceedings and review of disciplinary cases against judges. The Jury consists of a qualification commission and a disciplinary one. The membership of the commissions includes: 3 judges of district or equivalent courts, 5 judges of regional or equivalent courts, 5 judges of the Supreme Court and 3 retired judges (16 members total). The qualification commission of the Judicial Jury has seven members: 2 judges of regional courts, 2 judges of the Supreme Court and 3 retired judges. The disciplinary commission of the Judicial Jury has nine members: 3 judges of district or equivalent courts, 3 judges of regional courts and 3 judges of the Supreme Court.

#### *Appointment of Judges*

***«...to limit, to the maximum extent possible, the influence of political bodies (the President, and Parliament) on the appointment and dismissal of 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»***

Judges are elected or appointed to their office and receive their powers on a permanent basis (24 (1) Judiciary System Law).

To qualify for the position of a judge of the district court one must hold the RK citizenship and must 1) be 30 years old; 2) have a university degree in law, high moral qualities, impeccable reputation and, as a rule, the record of service as a court session secretary, court consultant (assistant), prosecutor, attorney at-law, or no less than a 10 year-long record of service in law; 3) have successfully passed the qualification examination (a person that has completed the specialized MA course and successfully passed the respective qualification examination is exempted from the examination for four years since the date of graduation); 4) have passed a medical examination and proved the absence of medical conditions precluding one from the exercise of professional duties of judge; 5) have successfully passed a full-time paid annual internship at the court of law and earned a positive attestation from its plenary session (a person that has completed the specialized MA course and successfully passed the respective qualification examination is exempted from the internship for four years since the date of graduation); 6) have passed a polygraph test.

To qualify for the position of a judge of the regional court one must meet all the above requirements plus have the record of service in jurisprudence of no less than 15 years, of which no less than 5 years in the position of judge, as well as have a conclusion by a plenary session of the respective regional court and surety in writing from two judges of an upper court, and a retired judge. The conclusion of the plenary session of the respective regional court can be challenged at the plenary session of the Supreme Court.

To qualify for the position of a judge of the Supreme Court one must meet all the above requirements plus have the record of service in jurisprudence of no less than 20 years, of which no less than 5 years in the position of judge, as well as have a conclusion by a plenary session of the Supreme Court and a surety in writing by two judges of an upper court and a retired judge. The requirements to the record of service as a judge, the need to provide a positive conclusion of the plenary session of the Supreme Court and a respective surety in writing are not applicable to the candidate for the Chairmanship of the Supreme Court.

Selection of candidates for vacant positions of district court judges and its Chair, judge of a regional court, and judge of the Supreme Court is made on the competitive basis. Announcements thereof should be

published in no less than a month prior to the competition in the periodical printed media and posted on the SC website. Upon collection of all submissions for the competition, the SJC staff forwards the candidate lists to all the regional courts for background checks at the candidates' primary place of employment and for collection of data from law enforcement agencies and the Bar, and posts such data on its web portal.

Prior to participation in the competition, each candidate must complete either training course: 1) a two years-long training at the Academy of Jurisprudence, including an internship at the court of law; or 2) to pass a qualification exam at the Qualification Commission under SJC, take a polygraph test and complete a full-time paid annual internship at the court of law.

Having submitted documents to SJC, participants in the competitions must obtain a conclusion from the plenary session of the regional court at the domicile and the place of employment and from the Council on Engagement and Interaction with Judges (such Councils are established under regional courts to assess candidates' integrity and moral qualities.<sup>55</sup>). These reports are advisory in nature.

Judges of local and other courts of law are appointed by the RK President upon the SJC's recommendation. The Supreme Court judges are elected by the Senate as advised by the RK President upon the SJC's recommendation.

Kazakhstan provided the following information about vacant positions in the judiciary: in 2014 – 74 judges, in 2015 – 114, and in 2016 – 142 ones.

### ***Administrative Positions in the Courts of Law***

***«...to revoke court chairmen's powers in relation to careers of judges, their material provision, or liability;...»***

The Supreme Court in tandem with SJC forms a reserve (pool) of candidates for positions of chairs of district courts, chairs of regional courts, chairs of judicial panels of the regional court judges and chairs of judicial panels of the Supreme Court (Art. 17 (2.3-1) of the Law "On the Judicial System"). The procedure of formation of the candidate reserve and organization of the work with candidates is adopted by SJC upon the recommendation of the chief justice of the Supreme Court.

Candidates for vacant positions of Chairs of regional courts, chairs of judicial panels of the regional court judges and chairs of judicial panels of the Supreme Court are considered by SJC on an alternative basis upon the chief justice of the Supreme Court's recommendation, which is based on the decision passed by the plenary session of the Supreme Court. The selection process is competitive. Candidates for vacant positions of Chairs of district courts are recommended out of the circle of serving judges or persons with the record of service in the position of judge for no less than 5 years; as to candidates for the position of the Chair of the regional court or chairs of judicial panels thereof, their respective record of service must be no less than 10 years. With that, the priority is granted to those who were included in the candidate reserve. While selecting a nominee, a due consideration is given to his/her leadership qualities.

Judges of local and other courts of law are appointed by the RK President upon the SJC's recommendation for the term of 5 years and may not hold office for more than 2 consecutive terms.<sup>56</sup> The Supreme Court judges are elected for the same term in office (i.e. 5 years) by the Senate as advised by the RK President upon the SJC's recommendation.

### ***Attestation and Promotion***

Except for judges with tenure of more than 20 years behind their belt, every 5 years all the judges undergo an assessment of their performance in office. The assessment is conducted by the Qualification Commission of the Judicial Jury (Art. 28 (1-1) of the Law "On the Judicial System"), which consists of 7 members, 2 of whom are regional court judges, another 2 are the Supreme Court judges, and the remaining 3 are retired judges. The assessment of performance in office comprises 1) evaluation of the level of professional expertise and ability to apply it while administering justice, 2) evaluation of the performance in

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<sup>55</sup> The authorities explain that the Council's objective is to study the community's opinion on each candidate. Such Councils consist of distinguished representatives of local communities (journalists, veterans of law enforcement agencies and judiciary). The lists of Councils' members are posted on the respective courts' websites.

<sup>56</sup> Art 82 (1) and (2) of the Constitution and Art. 31 of the Law "On the Judicial System"

office, 3) evaluation of professional and moral qualities 4) check of compliance with requirements stipulated in the Law “On the Judicial System and the Code of Judicial Ethics”.

The initial assessment is carried out based on results of the judge’s performance over the first year in office and is repeated every five years, as well as where the judge takes part in a competition for a higher office. The assessment is conducted based on the following criteria: 1) justice administration indicators, and 2) compliance with the judicial ethics standards and labour discipline. More specifically, the assessment takes into account substantiated complains about the judge’s breaches of the integrity principles, delays and disruptions of trials, failure to accomplish scheduled events, orders and instructions of the court’s Chair, and public opinion (reviews) of the judge’s performance. The Commission reviews the judge’s annual performance at its meeting and submits findings, upon the recommendation of the chief justice of the Supreme Court, to SJC for endorsement.

Based on the results of case assessment, the Commission takes one of the following decisions: 1) to recognize the judge’s job competence; 2) to recommend appointment as a judge of an upper court, Chair of court/judicial panel; 3) to recommend assigning to the reserve of candidates for a higher-ranking position; 4) to recognize the judge as unfit for the job due to professional incompetence; 5) withhold the recommendation for appointment to the position of a judge of higher instance, Chair of court/judicial panel. The decision by the Judicial Jury’s Qualification Commission recognizing a judge unfit to keep the office due to professional incompetence based on the outcome of periodic professional performance assessment serves the grounds for the Chairman of the Supreme Court to make a submission to the Supreme Judicial Council recommending to relieve the judge from his office. The decision by the Judicial Jury’s Qualification Commission to have a judge transferred to another court based on the outcome of professional performance assessment serves the grounds for the Chairman of the Supreme Court to make a submission to the Supreme Judicial Council recommending having the judge transferred to another court, or should he or she reject the transfer, dismiss the judge. The decision by the Qualification Commission can be appealed at SJC. Where SJC has refused to provide a recommendation to dismiss a judge, based on the assessment results, the Chair of the court or the Chair of the judicial panel comes up with the substantiation for revocation of the Judicial Jury’s decision and its revision.

### ***Dismissal***

Judges’ powers can be terminated or suspended in no other way but solely on the grounds of, and according to, the procedure, foreseen by the Law “On the Judicial System” and other RK laws.<sup>57</sup> The causes for dismissal are: 1) the judge’s retirement; 2) dismissal on the judge’s own volition; 3) health conditions that preclude the judge from a further exercise of the duties, per the medical report; 4) upon coming into legal force of a court’s ruling acknowledging the judge being really incapable or partially incapacitated, or the application to the judge of compulsory measures of medical nature; 5) upon coming into legal effect of a judgment of conviction, termination of a criminal case at the pre-trial stage on non-rehabilitating grounds; 6) termination of the RK citizenship; 7) death or upon coming into legal effect of a court’s decision on proclaiming the judge dead; 8) appointment, election of the judge to another position and his/her transfer to another place of employment; 9) abolition or reorganization of the court, reduction in the number of judges of the respective court, end of term of office, where the judge/chair of the court/judicial panel decides not to accept a vacant position of a judge at another court, and refusal by the judge, chair of the court or judicial panel to be transferred to another court, or a different specialization, in the event that the Judicial Jury’s Qualification Commission makes such decision based on the examination of the materials pertaining to his qualification assessment; 10) a decision by the qualification commission of the Judicial Jury on the judge’s incompatibility due to his/her professional impropriety; 11) the Judicial Jury’s decision on dismissal of the judge for the commission of a disciplinable offense or failure to comply with the requirements stipulated in Art. 28 of the Law “On the Judicial System” (on the requirements towards judges); 12) the judge’s reaching the age limit or the expiry of his/her judicial tenure

The decision to dismiss the judge is taken by 1) the resolution of the Senate upon the motion of the RK President, where the case concerns the Chair and judges of the Supreme Court; 2) by the presidential Decree, where the case concerns chairs of judicial panels of the Supreme Court, chairs of judicial panels and judges of local and other courts.

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<sup>57</sup> Art. 24 (2) of the Law “On the Judicial System”

**Table 8. Statistics of Dismissal of Judges**

Year	Judge's resignation	On judge's own volition	Due to judge's death	Appointment/lection to another position, transfer to another job	By the decision of the Judicial Jury	Due to reaching a the retirement or ultimate age	Termination of a judge's powers as the Chair of the court with retention as a judge of the same court	TOTAL
2014	52	17	4	22	11	8	1	115
2015	92	25	3	40	6	6	4	176
2016	30	29	3	11	2	6	1	82
TOTAL	174	71	10	73	19	20	6	373

Source: data provided by Kazakhstan authorities

Transfer of judges to other courts is foreseen solely in the event of revocation of a given court or expiry of the term of powers of the courts' Chairs. The authorities provided the following information on the number of judges, including the court Chairs, transferred from one court to another: in 2014, there were 265 such transfers, in 2015, 196, and in 2016, 185.

#### ***Assignment of cases among judges***

In the Kazakhstan's courts of law, cases are assigned with the use of an automated information and analytical judicial system «Төрелік» and in accordance with the Uniform Classification of cases into criminal, civil cases, and cases on administrative offences.<sup>58</sup> The assignment of cases in the courts of the first instance and court of appeals is done according to the following criteria: 1) the category of a case, materials (the judge's speciality); 2) the case administration language; 3) complexity of the case. At the cassation instance, yet another category is added, namely, "region".

The principle of automated assignment of cases is applicable to all the cases except for an assignment of cases, claims and materials to the judge who considered them earlier or is considering them as of the moment of their assignment (counter-claims, requests for revocation of a judicial order, revision of the court order, revision of the court motion (decision, verdict, resolution) on newly discovered evidence, on cancelation of the decision to recognize a person missing or pronouncing him/her dead, on suspension or extension of judgment, change of the method and procedure of honouring the decision prior to its execution, on cancelation of a judgment in default, on revocation of a decision in the simplified (in writing) procedure. Information on assignment of cases is available in the "Judicial Office" information service of the Supreme Court's Internet portal for claimants who earlier filed lawsuits through the said online service.

In compliance with the Law "On the Judicial System" (Art. 8b, 14b, 20 (6) and (7)б 21 (1-1)), in addition to the exercise of the judge's duties, chairs of district and regional courts are tasked, *inter alia*, to address matters of organization of the administration of law at the court and approve the courts' operational plans. The chief justice of the Supreme Court approves its operational plan and where necessary, attracts judges from one judicial panel to consider cases as members of another one. The Chair of the judicial panel of the Supreme Court is tasked, among other things, to address matters of organization of administration of justice thereat.

#### ***Transparency and openness to the mass media***

SJC holds all its sessions in an open manner, with the community and mass media representatives being eligible for presence in the room and taking photos and making video- and audio recording thereof, provided they do not hamper the proceedings. The SJC's verdicts are posted on a dedicated web resource. Likewise, the Qualification Commission under SJC holds its sessions in an open manner and typically posts on its website the following information and updates: 1) lists of persons who have passed the qualification

<sup>58</sup> In accordance with the Procedure the automated assignment of cases in the automated information and analytical system of the domestic judicial bodies «Төрелік» approved by the chief justice of the Supreme Court of RK on 5 July 2016

exam and typical questions thereof; 2) announcements on competitions for filling vacant posts in the judiciary; 3) lists of persons cleared to take part in a competition; 4) a schedule of plenary sessions of respective regional courts, the Supreme Court, Councils for Interaction and Engagement with courts of law and their decisions based on results of reviews of candidates for posts in the judiciary (the latter are also published in local mass media); 5) lists of persons recommended for filling vacant posts in the judiciary. The authorities reckon that the SJC's operation is to a maximum degree transparent and it is only the decisions that are of a purely classified nature or containing candidates for the judicial posts or judges' private data that are not subject to publication.

Information about disciplinary measures applied by the Judicial Jury/Supreme Council *is not published*. The authorities inform that disciplinary practices reviews are made available to members of the judicial community and the citizens whose rights were violated. The authorities point out to the fact that the official information about facts of holding judges liable for criminal and administrative offenses is published.

The principles of openness of court proceedings, including for mass media representatives, are stipulated in the adjective legislation, including, *inter alia*, Art. 29, 322 (4) and 345 (6) of the Criminal Procedural Code, Art. 19 (7) and 173 of the Civil Procedural Code, Art. 21 of the Code of Administrative Offences, and the Supreme Court's regulatory statutes. Updates on all cases scheduled for the trial are uploaded on the courts' web portals in an automated mode via the «Төрөлiк» system.

In accordance with the "Rules of the procedure of operation and support of the internet resources of the Supreme Court, local and other courts of law" approved by the Supreme Court's Chair's Executive Order, the following judicial acts may not be made subject to publication: 1) rulings on all the in-camera hearings; 2) acts on civil, criminal and administrative cases associated with holding minors liable or with matters of protection of the minors' rights and legal interests; 3) rulings on cases on application of compulsory measures of medical nature, on petitions about certification; 4) on petitions on recognition of a person partially incapacitated or legally incapable; 5) rulings on cases on establishment of inaccuracies in vital record entries; 6) verdicts on cases on crimes for the commission of which the law establishes criminal responsibility in the form of death penalty or life sentence; 7) verdicts on cases on crimes against sexual immunity and indecent assault; 8) rulings on cases on crimes containing signs of extremism; 9) rulings on cases on terrorist crimes; 10) rulings on petitions on recognition of a foreign or international organization, that carries out extremist or terrorist activity in the country's territory and/or another state's territory, extremist and terrorist one, including establishment a change of its name, as well as on recognition of information materials, that are imported, published, produced and/or disseminated in the country's territory, extremist or terrorist ones; 11) verdicts on petitions on recognition illegal of an internet casino, product of a foreign mass media resource disseminated in the country's territory and containing information contrary to laws.

Judicial acts are published using the Supreme Court's website in two formats: 1) they are uploaded onto "The Reference on Judicial Acts" service and 2) they are posted in "The Bank of Judicial Acts of the Supreme Court and Local Courts of Law" one. Both services allow access to full-text files of judicial acts on cases considered by the Supreme Court, regional, district courts and equivalent courts. Since 2016, it is the «Төрөлiк» that has become an authoritative source of data on judicial acts.

The authorities also inform of the following measures on enhancement of the judicial system's transparency:

1. Establishment of information activities divisions under all the courts of law; also, there has emerged an institution of judges-coordinators of interaction with mass media. Such judges regularly hold press briefings, open-house days, are engaged in drafting press releases and their timely forwarding to mass media, preparation of contributions to mass media. With Executive Order of 28.04.2016 № 6001-16-7-4/87 the chief justice of the Supreme Court approved the Concept of courts' engagement and interaction with mass media, which is aimed at an institutional development of collaboration between courts of law and mass media.

2. Judicial bodies have promoted interaction with editorial boards of all the mass media, regardless of their form of ownership, and delivered joint projects on production of TV shows, documentaries, audio and video uploads, talk shows, and information updates.<sup>59</sup>
3. All the courts of law established mobile groups that work on the basis of critical updates in mass media and promptly react to community challenges on specific matters. In addition, the Supreme Court has a judiciary contact centre.
4. The Supreme Court has helped establish and promote a public association “The Guild of Judicial Reporters”. All the courts set up press centres that ensure an online broadcasting of hearings. Courts of law hold briefings on outcomes of consideration of high-profile cases.
5. As many as 1,396 court rooms, or 100% of their overall number across RK, now have audio- and video recording systems in operation. Taking minutes of trials with the use of electronic equipment tends to discipline both parties thereto and the judge that chairs the session.
6. The Supreme Court and other courts’ internet resources were upgraded, and since 2014, the average figures of visits to the Supreme Court’s website alone doubled. By results of the 2014 and 2015 ratings built by JSC “Kazkontent”, the Supreme Court’s internet portal proved second to none among all the central government bodies’ websites. Visibility of the resources in question is propelled by other courts’ social media accounts which feature nearly real-time (video-) updates on those judicial bodies’ operations.
7. A greater access to the judicial information became possible particularly thanks to putting in operation the “Judicial Office” e-information service on the Supreme Court’s portal, which became a one-stop shop for judicial bodies’ online services. Presently, it is possible to submit e-claims and applications to all the judicial instances, pay stamp duties online, monitor progress in consideration of a case, promptly receive documents and notifications from the court. The Judicial Office also functions as a mobile app, which allows one to receive updates on scheduled court sessions, review e-documents with an option of their downloading on a mobile device, monitor their status, enter events in the e-calendar, and enter information on court sessions to which the user is a party.
8. The «Төпенік» system was integrated with the Judicial Office and the practice of audio-and video recording of trials, thereby adding to transparency of the law administration process. A complete introduction of the integrated system is going to reduce procedural violations to a minimum. The integrated system allows tracking the exact time of the beginning of the trial. Each party thereto can familiarize itself with audio and video materials thereof by visiting the Judicial Office. In addition, having submitted a statement of claim in the hard copy, the citizen receives a ticket and thereafter is instantly notified by text or e-mail of the initiation of proceedings in the case, rendering of ruling, setting the date of the trial, as well as of the fact of the performance of the respective judicial act, which he/she can check on the court’s web portal.
8. The Supreme Court collaborates with NGOs and international organizations, including, *inter alia*, the Union of Judges, the Union of Journalists of Kazakhstan, the Club of Editors-in-Chief, the international foundation for protection of freedom of expression «Әділ сөз», «Internews», UNICEF, the OSCE program office in Astana. Such collaboration is aimed at organization and conduct of joint workshops and trainings for mass media representatives, and creativity competitions for journalists, as well as provision of assistance to their work of highlighting on the judicial system’s performance.

### **Judicial ethics**

In conformity with Art. 28 (1) of the Law “On the Judicial System” the judge is bound to 1) remain loyal to the oath 2) in the exercise of his/her duties of administering justice, as well as in unofficial relations, to comply with the requirements to the judges’ ethics and avoid anything which could tarnish his/her

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<sup>59</sup> More specifically, in association with JSC “Khabar Agency” the Supreme Court successfully implemented a TV project «Сот төпелірі» ( “Justice”) about the rise of courts of law in Kazakhstan and has collaborated with information agencies «Zakon.kz», «Kazinform», «Bnews.kz», «Tengrinews.kz», «Informbureau» on a prompt placement of critical materials on matters of judicial and legal practices. As well, together with TV channels «Қазақстан» and «КТК» the Supreme Court has proactively developed TV projects «ҚЫЛМЫС пен жаза» and «Black Square» on high-profile trials. The major national TV channels broadcast movies about, and shows with, judges to promote the population’s legal literacy.

authority, dignity or raise doubt about his/her integrity, fairness and impartiality; 3) resist any manifestations of corruption and attempts to illegally intervene in the administration of justice.

The new Judicial Ethics Code adopted by the 7<sup>th</sup> congress of RK judges on 21 November 2016<sup>60</sup> comprises 15 paragraphs that regulate their performance in office, conduct out of office, acceptance by the judge and his family members of gifts, benefits, privileges, gratis services and other benefits in connection with the judge's administration of justice, and prevention of conflict of interest. The judge has a right to put a query to a judicial community body concerning the conformity of a model of possible conduct with the rules of ethics under specific circumstances, including issues of conflict of interest, restrictions in office, declaration of assets. That body's response is of advisory nature; meanwhile, a violation of the Code that has entailed an impairment of the judicial power's authority and caused damage to the judge's reputation forms the grounds for bringing him/her to disciplinary responsibility under the law. For such offenses, based on a citizen's petition, the judge can become subject to measures of social influence. The Code was published as a booklet, and every judge has a copy thereof.

The authorities reckon that control over compliance with the Code is exercised by Commissions on Judicial Ethics established under territorial branches of the Union of Judges. The latter is a *voluntary* public association functioning on the basis of the RK Law "On Public Associations". The Commissions' operational procedure is established by the Statute on the Commissions of Judicial Ethics under branches of Union of Judges. Based on findings of the review of a given case, the Commission has the right to recognize commission by a judge of a discrediting act that contravenes the judicial ethics and: 1) to confine itself to a discussion thereof; 2) to render a public warning; 3) to suggest the chair of the respective regional court or an equivalent court consider a matter of submission a motion to the Judicial Jury on instituting disciplinary proceedings against judges of a regional court, chairs and judges of a district court; suggests the chief justice of the Supreme Court do the same against a chair of a regional court, chair of a judicial panel of a regional court upon his/her commission of a grave discrediting act that contravenes the judicial ethics. It is the decision of the plenary session of a regional court, or of the Supreme Court, or a notion by the Chair of the regional court or the chief justice of the Supreme Court that forms the grounds for consideration of documentary evidence about a given judge.

The authorities provided the following statistics about the Commissions' performance: in 2014, they issued a public reprimand with respect to 19 judges, in 2015, to 21, and in 2016, to 19 ones. In 2014, the Commissions resorted to the discussion of judges' misdemeanours in 30 instances, in 2015, in 40, and in 2016, in 23 ones.

Art. 8, 14 and 20 (6-1) of the Law "On the Judicial System" hold that in addition to the performance of the judge's duties, Chairs of district, regional courts, and the Supreme Court are tasked, *inter alia*, to ensure the anti-corruption activities and compliance with the judicial ethics norms are in place at the court of law.

### ***Restrictions***

The judge's post is incompatible with the legislator's mandate, any gainful activity, except for tuition, research or any other creative activity; likewise, it is incompatible with entrepreneurship, sitting on a commercial entity's managerial or supervisory body (Art. 79 (4) of the Constitution and 28 (2) of the Law "On the Judicial System"). Judges cannot hold membership in a political party, trade union; they may not publicly express support of, or speak against, any political party. As public officials, they are subject to restrictions per the aforementioned Law "On the Fight against Corruption». The authorities note that it is an authorized agency in the area of public service and the fight against corruption which is the body authorized to exercise control over compliance with the established restrictions.

### ***Conflict of interest***

Conflict of interest in the frame of administration of justice is regulated by the respective procedural Codes and the Law "On the Judicial System". In addition, in their capacity of public officials judges are subject to provisions of the Law "On the Fight against Corruption" (see above). Liability for offences is established by both the said Law and the Code of Judicial Ethics. The body authorized to exercise control over compliance with restrictions established by the Law "On the Fight against Corruption" is the authorized

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<sup>60</sup> According to judges with whom the Expert Team had meetings, the draft Code was under discussion for nearly a year and was adopted at a congress by some 700 judges.

body in the sphere of public service and the fight against corruption. The authorities argue that there were no precedents of judges' violations of the said rules in 2014 – 2016.

### *Declarations of income and assets*

#### **«3. 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»**

In their capacity of public officials judges are bound to declare taxable income and assets that are located in the territory of RK and outside it, as per Art. 11 of the Law “On the Fight against Corruption” and Art. 185 (2) of the Tax Code. Declarations are submitted to the public revenue office at the domicile, and the examination thereof is exercised by tax authorities by checking information available in databases. Where the judge has breached the rules of declaration of income and taxes, he/she is subject to disciplinary and administrative measures; however, no such substantiation is provided for in the profile law.

### *Training and raising qualification level*

Art. 5 of the Code of Judicial Ethics holds that the judge should regularly take measures to develop his/her expertise, improve practical experience and personal qualities by employing to that effect continuous learning and self-education methods. The authorities note that the upgrade of judges' professional expertise is a continuous process and it is such educational instruments for young judges as mentorship and supervision over their first year in office which are particularly relevant.

There is the Judicial Academy under the Supreme Court (Art. 18 (b) and 38-2 of the Law “On the Judicial System”). The Academy is a public institution that delivers postgraduate educational courses, retraining, qualification upgrade of the judicial system's cadres, and carries out research. The curriculum for the specialized MAS course includes the subject “Intercultural communications in the system of law and ethics” that reflects on problems of judicial ethics and integrity.

All categories of judges enrol in qualification upgrade classes under the Academy. Such classes include, *inter alia*, workshops on judicial ethics,<sup>61</sup> lectures (e.g. the one on the anti-corruption program was held on 15 February for a total of 35 Chairs of district courts and equivalent courts), training on top-priority anti-corruption issues and matters of compliance with ethical standards in the judiciary (conducted on 17-18 November 2014).

In the frame of the Interdepartmental Plan of Corruption Prevention Measures at courts and law-enforcement agencies for 2016, there was held a string of events, including, *inter alia*, inter-district roundtables on ethics in office and high-integrity environment in the exercise of the activity on protection of citizens' rights and legal interests.

### *Disciplinary proceedings*

#### **«...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 dealing with such issues and the possibility of appeal against their decisions in court...»**

The judge can be made subject to disciplinary liability for the commission of a disciplinable offense, i.e. guilty activity (failure to act) while exercising duties in office or out of office, which resulted in a violation of a provision of the Law “On the Judicial System” and/or the Code of Judicial Ethics, *which entailed an impairment of the judicial power's authority and stigmatization of the judge's standing*. Art. 39 of the Law “On the Judicial System” comprises an exhaustive list of the grounds for holding the judge disciplinary liable: 1) a grave violation of law while considering cases in the court; 2) commission of a discrediting act that contravenes the judicial ethics; 3) breaking the labour discipline; 4) an improper exercise of duties (applicable to executive positions in the judiciary). A judge's mistake, as well as a cancellation of, or a change in, a judicial act does not entail such a liability, provided the judge has not committed any grave violations of law, to which an upper court's judicial act would refer.

The grounds for consideration of respective evidence are formed by a decision of the presidium of the plenary session of the regional court or Supreme Court, as well as petitions submitted by a private

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<sup>61</sup> In the first half of 2017, 7 lectures on that topic were conducted for 240 judges.

individual or a corporation, where they have exhausted all other available means to appeal against the judge's acts.

The presidium of the regional court includes 7 members – the Chair of the regional court, Chairs of judicial panels thereof, the Chair of a local branch of the Union of Judges, the Chair of the Judicial Ethics Commission, and two judges whom the regional court assigns thereto for the term of 2 years. The presidium of the plenary session of the Supreme Court comprises 11 members, including the chief justice of the Supreme Court, Chairs of judicial panels of the Supreme Court, the Chair of the Union of Judges, the Chair of the Judicial Ethics Commission, the Chair of the National Commission for Staff Reserve, and three judges delegated thereto by the plenary session of the Supreme Court for the term of 2 years.

Consideration of the matter of institution of disciplinary proceedings and cases falls within the purview of the **Disciplinary Commission of the Judicial Jury**. The Commission consists of 9 members and includes 3 judges of district courts, 3 judges of regional courts, and 3 judges of the Supreme Court (Art. 38-1 of the Law “On the Judicial System”, the Statute approved by the RK President).

The disciplinary proceedings can be instituted in no less than 3 months since the date the offense was detected, less the length of the official probing and the judge's absence in office for a valid reason, and within no more than a year since the date the offense was committed. In the event of a motion filed by a private individual, the disciplinary proceedings can be instituted in no less than 6 months since the date of receipt thereof, less the aforementioned reservations. The disciplinary proceedings shall be considered within two months since the date of institution thereof. The respective findings form the basis for one of the following rulings: 1) on institution of disciplinary proceedings, 2) on refusal to institute disciplinary proceedings.

Findings of the consideration of the case result in either ruling, as follows: 1) on imposition of a disciplinary penalty, 2) on termination of the disciplinary proceedings. Both rulings can be challenged at SJC. The SJC's refusal to provide the recommendation on dismissal of a judge/Chair of the court or judicial panel or a SJC's decision about groundlessness of imposition of any disciplinary penalty on the judge forms the grounds for cancellation of the Judicial Jury's ruling and its revision.

Judges are subject to imposition of the following kinds of disciplinary penalties: 1) reprimand, 2) admonition, 3) dismissal from the post of the Chair of the court/judicial panel for an improper exercise of duties, 4) dismissal from the post on the grounds foreseen by the Law “On the Judicial System”.

**Table 9. Statistics of Disciplinary Penalties Applied to Judges**

Type of disciplinary penalty	2014	2015	2016
Reprimand	20	17	14
Admonition	21	26	23
Dismissal from the post	11	6	4
Dismissal from the post of the court Chair	2	-	-

Source: data provided by the Kazakhstan authorities.

The judge may not be apprehended, detained, placed under house arrest, summoned to the court of law, subjected to a penalty under administrative law imposed through legal proceedings, indicted without the RK President's consent based upon the SJC's conclusion, or – where it concerns the chief justice of the Supreme Court and judges – without the Senate's consent, except for cases of catching that judge in the act or his/her commission of a felony (Art. 79 (2) of the Constitution and 27 (1) of the Law “On the Judicial System”). Upon entering the pretext for the commencement of a pre-trial investigation in the Single Register of Pre-trial Investigations, such an investigation can be continued only upon the Prosecutor General's consent. Where the judge is caught in the act or there has been established the fact of his/her preparations for, or attempt to commit, felony or an especially serious crime, the pre-trial investigation may be continued prior to the obtaining of the Prosecutor General's consent but with a mandatory notification thereof forwarded to the Prosecutor General within the same day, (Art.27 (2) of the Law “On the Judicial System”).

In accordance with the criminal procedural legislation, due to specific charges, the law enforcement and specialized public agencies conduct investigations of a judge, as follows:

- where there have been offenses under ordinary law, the pre-trial investigation is held by investigation officers of law enforcement bodies;

- as to the cases associated with divulgence of state secrets, the pre-trial investigation is conducted by investigation officers of the National Security Committee;
- corruption cases are subject to the pre-trial investigation conducted by investigation officers of the National Anti-Corruption Agency.

In compliance with Art. 193 of the Criminal Procedural Code, in exceptional cases, for the sake of objectivity and sufficiency of the investigation the prosecutor may, upon receipt of a prosecuting authority's written motion or *proprio motu*, hand the case over to another pre-trial investigative agency or adopt the case and investigate it regardless of its established competence. Administrative proceedings are exercised by authorized agencies in accordance with the Code of Administrative Offences.

Kazakhstan authorities have noticed a recent trend to decline in the number of offences, including corruption ones, committed by judges (see statistics of indictments for corruption offenses in Chapter 3 herewith).

As to judicial immunity, during the visit to Kazakhstan, the authorities cited an example of indictment, upon the RK President's consent, of a judge who knocked down a pedestrian in a road accident.

### ***Complaints***

Petitions and motions filed by private individuals and corporations are considered in compliance with the Law "On the Procedure of Consideration of Private Individuals and Legal Entities' Petitions" and respective procedural codes. Citizens can file such petitions in writing, through e-portals, and on the video. Complaints are considered by the Judicial Ethics Commission and the Judicial Jury. In 2014, there were registered 1,633 complaints against judges, of which 186 were recognized as grounded ones, in 2015, 1,350 (183), and in 2016, 1,476 (185). In the first half of 2017, judiciary authorities received 2,571 complaints, of which 377 went to the Judicial Ethics Commission, and 291 to the Judicial Jury.

The entire wealth of information about the judiciary is to be found on the websites of the Supreme Court and local courts. There is a call centre which the public may use to apply and get advice on all issues pertaining to the work of the judiciary authorities. In the first half of 2017, the call centre received 23,300 applications from the public.

### ***Remuneration***

***«...to specify in law the salary rates for judges and an exhaustive list of all possible wage increments, eventually cancelling bonuses for judges.»***

Funding of the courts' operation, judges' financial and social security, and provision them with housing is made at the expense of the national budget and should ensure a possibility for a complete and independent administration of justice (Art. 80 of the Constitution and Art. 25 (4) of the Law "On the Judicial System"). Judges' remunerations are determined by the RK President with account of a specific judge's status, the procedure of his/her appointment/election and the nature of functions he/she exercises (Art. 47 of the Law "On the Judicial System"<sup>62</sup>). Organizational and material support of the courts' operation is exercised by an authorized agency established by the RK President (Art. 56 of the Law "On the Judicial System").

The amounts of official salaries for judges of different tiers were set by presidential Decree of 17 January 2004 №1284 «On the uniform system of labour compensations to public employees and the budget of the National Bank of RK». An exhaustive list of available monetary benefits and bonuses was established by Resolution of the RK Government of 29 August 2001 №1127 «On approval of the Rules of bonus pays, provision of financial assistance and setting bonuses to official salaries of employees of RK bodies at the expense of the Republic's budget». The net average amount of the official salary of a justice of the Supreme Court is KZT628,400, the regional court judge's one, KZT286,400, and the district court judge's official salary is KZT215,900.

Business travel expenses are payable in the same amount as to all public servants on the basis of Resolution of the RK Government of 22 September 2000 №1428 «On approval of Rules on business trips within RK of employees of public institutions supported at the expense of the Republic's budget, as well as of members of the RK Parliament ». No additional cash payments for judges have been foreseen.

<sup>62</sup> Also the Presidential Decree "On the unified system of remuneration of public servants".

## Conclusions

Over the past three years, pursuant to the Anti-Corruption Strategy for 2015-2025, Kazakhstan embarked on a serious effort to modernize the national judicial system and to increase the trust in it. Among them, the enactment of a new version of the Law “On Judicial System and Status of RK Judges”, “On the Supreme Judicial Council of the Republic of Kazakhstan”, a new Judicial Ethics Code, an updated Statute on the Judicial Jury, provisions on assessment of judges’ performance in office, and the grounds and procedures of holding judges disciplinary responsible were incorporated in the Law “On the Judicial System”. The Academy of Judiciary<sup>63</sup> has been reassigned to the Supreme Court and became a higher education institution with a special status, which granted it the right to independently determine the substance and organization of its research and educational operation. There have been taken measures to simplify administration of justice, bolster its efficiency, and complete the process of automation of courts’ operation in order to facilitate access to administration of justice and enhance the judicial system’s transparency. Whilst the Republic of Kazakhstan posted a certain progress in the spheres encompassed by the Recommendation, it has remained party compliant, or failed to comply, with some parts thereof.

As to the recommendation **to strengthen the independence of the judiciary and judges**, the monitoring team, notes, for one, that provisions *that guarantee the judicial power’s independence as one of the three branches of the public power* appear missing in both the RK Constitution and the Law “On the Judicial System”. Furthermore, proceeding from the Constitution, the judicial power’s responsibility before the people is ensured by *the RK President* (See Art. 40 (3) of the Constitution).<sup>64</sup>

Second, courts of law still undergo reorganization, renaming, and liquidation based on the decision of the RK President. At this point, there is a conflict between Art. 75 (4) of the Constitution that holds that the judicial system is established only by the Constitution and the constitutional law (i.e. the Law “On the Judicial System”) and its Art. 5 which reads that courts of law can also be set up on the basis of other legislative acts, i.e. presidential decrees. Furthermore, Art. 1.1 of the Law on SJC directly refers to *RK President’s constitutional powers with regard to formation of courts of law* and the SJC’s task to ensure such powers.

Third, despite requirements of the Recommendation, the role of the President and Parliament in the appointment and dismissal of judges was not limited. The overall number of judges of all courts of law is still established by the RK President, while judges and Chairs of district and regional courts are still appointed by the RK President upon the recommendation of SJC. The chief justice and members of the Supreme Court are elected by the Senate as advised by the RK President whose advice is based upon the SJC’s recommendation. Meanwhile, SJC consists of the Chair and other persons appointed by the RK President. Hence, there are no grounds to suggest that Kazakhstan has complied with the respective parts of the Recommendation, including the ones that concern election to administrative positions at the court of law.

Fourth, experts note that in the earlier RK legislation independence of both judges and the entire judiciary, as well as rights of specific parties to due process, were facing a real threat coming from the interference by the prosecution with the administration of justice outside the process. So, despite the declarative statement in Article 28 of the earlier Public Prosecution Law alleging that public prosecution shall not be supplanting other state authorities and shall not interfere with the activities of organisations or private life of citizens, yet another norm of the same law, Article 31 of the PPL, gave the public prosecution the authority to appeal the rulings of the court that have not yet become final, *irrespective of their involvement in the trial*. Experts welcome the abolition of these provisions.

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<sup>63</sup> Previously known as the Institute of Judiciary, it was a part of the Academy of Public Governance under the RK President.

<sup>64</sup> In the opinion of Kazakhstan authorities, the Constitution of the Republic of Kazakhstan lays down a clear criterion of independence of the judiciary and judges. The criterion is stipulated by Article 77 of the Constitution saying that in administering justice the judge shall be independent and obey only to the Constitution and the law. Any interference in the administration of justice by the court shall be disallowed and shall be prosecuted under law. Judges do not report to anyone on specific cases. Article 40, paragraph 3, of the Constitutions stipulates that the RK President shall ensure coordinated functioning of all branches of state power and accountability of authorities to the people. Justice shall be dispensed directly, not vicariously.

However, pursuant to Article 32 of the previous version of the PPL, the prosecutor still may, within the limits of his competence, request from the court any cases in which rulings or verdicts have already become final; importantly, the category of such cases *was not limited to criminal justice process only*. This provision still holds. Under Article 13 of the new PPL, the prosecutor continues to enjoy the right to supervise the legality of court rulings that have become final. The public prosecutor may request from the court not only cases of criminal or administrative offences, or materials on issues pertaining to the execution of judgments, but also civil law cases in which court rulings have come into legal force, in order to examine legality of rulings made and, given sufficient grounds, he may appeal those. According to Kazakhstan authorities, under the CPC, such powers have only been given to the RK Prosecutor general.

Such provisions in the LPP run counter to the principle of separation of powers and are in violation of the principle of legal certainty since prosecutors have the right, at their own discretion and at any moment, resume the already completed trial and, with that, interfere in the jurisdiction of the judiciary power.

In his address of 31 January 2017, the RK President called for striving to ensure a greater trust in the judicial system. The expert team believes that the objective can be attained solely through strengthening independence of the judicial system as a whole and each judge in particular, as suggested in the Recommendation. The experts also took into account updates on the judicial system and judges' dependence from the executive power received from civil society representatives in writing and in the course of the evaluation visit.

The Monitoring Group welcomes amendments to the Law “**On the Supreme Judicial Council of the Republic of Kazakhstan**”. As of 1 January 2016, SJC was transformed into an autonomous public institution with its own staff and operates as a duly incorporated organization. Its mandate was expanded and currently encompasses, *inter alia*, assessing and approving the performance of judges who have been in office for one year, and looking into judges' appeals against decisions made by the Judicial Jury. However, Kazakhstan failed to fully comply with the Recommendation.

More specifically, the SJC's mandate does not comprise the task of *ensuring guarantees of the judicial power's independence* (vis-à-vis other branches of power), rather, it provides for just judges' independence and the aforementioned *securing the RP President's constitutional powers with regard to formation of courts of law*. The overall number of SJC members has not been established by law, which bears the risk of prevalence of non-judge members or judges in retirement over adjudicating judges. As of today, the number of active judges that hold membership in SJC (excluding the SJC Chair and retired judges) accounts just for one-third of the total number of its members (five out of 16). As noted above, the RK President appoints all the SJC members (upon the recommendation of the Plenary Session of the Supreme Court, rather than the conference/congress of judges), and approves the Statute of the SJC's staff and structure and appoints its Head.

Hence, the procedure of formation of SJC still does not meet international standards. The expert team reiterates that judicial council shall be a body of the system of administration of justice (judicial system) and, consequently, be independent of other branches of power and even the head of state.

As to **announcement of competitions** for filling the position of the district court judge, publication of the candidate list, availability of updates on all the candidates passing all the stages of the competition, publication of results of their testing and other components of the qualification examination, and announcement of the results of the competition, the respective information is posted on the SJC's website and published in mass media. As well, representatives of the local community and mass media are allowed in competition commissions' sessions.

In accordance with the Law “On the Judicial System”, **court chairpersons** do not exercise powers associated with judicial careers, liability, and support of their activities. The Report on the Second Round of Monitoring found the definition of court chairs' powers to be vague and too broad (e.g.: “ensures the work on fighting corruption and compliance with the judicial ethics norms”, “issues executive orders”). The Report on the Third Round also noted that court chairs retained excessive powers and possibilities for influencing the judges' career advancement, holding them accountable, awarding them qualification degrees, etc. In their 2011 analysis of the Law “On the Judicial System”, the OSCE Office for Democratic Institutions and Human Rights and the Venice Commission (Joint Opinion № 629/2001) also criticized the court Chairs' excessive powers, in particular ones with regard to the right to “address matters of organization of administration of justice at the court of law” and “issue executive orders”. During the on-site visit, experts found no evidence of the chairs of courts influencing promotion of judges.

As to assignment of cases at the courts of law, the monitoring team recognizes that, indeed, there is an automated system of assignment of cases in accordance with established criteria in place. That said, the principle of a random assignment of cases has not been stipulated in the Law “On the Judicial System”, nor does it comprise a clause on responsibility for an unauthorized tampering therewith.<sup>65</sup> Therefore, this part of the Recommendation can be considered only partly complied with.

The monitoring team notes Kazakhstan’s considerable efforts to enhance the judicial system’s **transparency**. It is the introduction of the “Judicial Office” online service (which appears a one-stop-shop as far as online access to judicial bodies’ services is concerned), which enables one to submit e-claims and petitions to judicial instances of RK, pay stamp duties online, monitor the progress in consideration of cases, and promptly obtain judicial documents and notifications, and the integration of the «Төрелік» system with the “Judicial Office” and the practice of audio and video recording of trials which should be particularly commended.

Notwithstanding, the degree of the courts’ openness and accessibility for mass media has remained insufficient. In compliance with the “Rules of the procedure of operation and support of the internet resources of the Supreme Court, local and other courts of law”, a long list of judicial acts is not subject to publication, with the exclusions having been established by the chief justice of the Supreme Court’s executive order, rather than by law. According to the information provided by Kazakhstan, the above list is based on the provisions of the procedural laws.

Information about disciplinary sanctions imposed by the Judicial Jury/Supreme Council is not published. Whilst the authorities argue that reviews of the disciplinary practice are shared with members of the judicial community and citizens whose rights were violated, the experts failed to obtain an unequivocal proof thereof from the judicial community representatives. Authorities of the Republic of Kazakhstan insist that while developing its advanced training programs for judges the Academy of Justice does not take into account the relevant practice for the sake of an in-depth analysis and prevention of similar offences.

The adoption by the 2016 judge congress of a new **Judicial Ethics Code**, that regulates the judges’ exercise of professional duties and their conduct outside of the courtroom, can be considered an important milestone in the development of deontological fundamentals of the judicial community in Kazakhstan. Underlying the Code are provisions of the UN Bangalore Principles and other international standards. The Code contains necessary rules of conduct for judges in the light of the accountability principle. That said, the process of its adoption and oversight of compliance with it, as well as its universal coverage, appear challenging, nonetheless. There are several reasons for the assumption.<sup>66</sup>

First, the Code was adopted by a body (congress of judges) not foreseen by the Law “On the Judicial System”. That is to say, it was adopted by a voluntary public organization operating on the basis of the Law “On Public Organizations”. Membership in such an organization does not appear mandatory for judges in RK, while its documents may be deemed as binding only within the Union of Judges and solely on its members.

Second, control over compliance with the Code has also been taken out of the judicial system regulated by the Law “On the Judicial System”. Bodies that exercise the control function are Commissions on Judicial Ethics under branches of the Union of Judges. In other words, the state de facto delegated oversight of the judges’ compliance with the integrity standards to a public association, which is unlikely to ensure a meaningful control, on the one hand, and may potentially prove an external influence on the judge, on the other.

The Monitoring Team reminds that where a judge has committed a misdemeanour that conflicts with the Code, it forms a rationale for his becoming subject to disciplinary action to the extent of his/her dismissal. From such a perspective, mandating a public association to exercise oversight of judges’ performance and their conduct out of the courtroom poses a threat to their independence.<sup>67</sup>

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<sup>65</sup> According to information provided to the Expert Team during the evaluation visit, the idea of introduction of administrative responsibility was discussed, but failed to garner support, while an attempt to hold a district court Chair liable for such an offense failed.

<sup>66</sup> See also the Opinion of the Venice Commission on the draft RK Code of Judicial Ethics of 13 June 2016

<sup>67</sup> Also, notably, the list of powers granted to the Judicial Ethics Commission does not appear characteristic of a public association’s body – provisions holding a possibility of imposition of sanctions on its members appear missing in the respective Law.

In the light of the above, the Monitoring Team recommends that the profile Law, namely, the Law “On the Judicial System” should regulate the status of judicial self-governance bodies representative institutions within the judicial system to address issues of internal organization and operation of courts of law and judges’ performance and for the sake of interpretation of provisions of the Code of Ethics and a proper control over judges’ (including in particular justices of the Supreme Court) compliance therewith.

Representatives of the Supreme Court of Kazakhstan did not accept such interpretation of the legislation and the Code.

The experts also note that in compliance with Art. 8, 14 and 20 (6-1) of the Law “On the Judicial System”, in addition to the performance of a judge’s duties, Chairs of courts of law of all tiers oversee the work on judges’ compliance with standards of the judicial ethics. During the evaluation visit, the Monitoring Team failed to understand how the standards work in practice and how the interaction between courts Chairs with ethics commissions and the Judicial Jury is arranged. It appears obvious that the matters in question regulated by the Law “On the Judicial System” should be clarified.

In addition to the above, the experts note that compliance with ethical norms forms one of the criteria of the **professional assessment of judges**, except for those with the record of service of over 20 years (the assessment is conducted by results of the judge’s performance over the first year in office and, subsequently, every five years, as well as where the judge participates in a competition for a higher office). That said, in compliance with the Law “On the Judicial System”, it is just the presence of substantiated complains on the judge’s breaches of the integrity principles, delays and disruptions of trials, failure to accomplish scheduled events, orders and instructions of the court’s Chair, and public opinion (reviews) of the judge’s performance that are subject to checks. All that allows one to conclude that currently there is no assessment of judges’ compliance with the Code of Ethics.

From the experts’ perspective, the chasm should be bridged through incorporation into the Law “On the Judicial System” of a requirement to test the judge’s conduct on compliance with requirements of the Code of Ethics in the course of running a regular assessment of his/her performance in office. The respective assessment should also apply to the judges with the record of service of more than 20 years. Furthermore, the practice of clarification of provisions of the Code and its application, as well as generalization of disciplinary proceedings on cases on breaching the provisions in question, should be incorporated in curricula of mandatory advance training courses for judges.

The amendments made to the Law “On the Judicial System” in December 2015 implied a revision of the grounds and procedures of bringing judges to **disciplinary responsibility**. Whilst most amendments proved positive, the law has fallen short of specifying quite clearly the grounds for invoking liability. For example, the Law still contains such wording as, “... resulted in bringing a judicial office into disrepute and stigmatization of the judge’s standing”, “a grave violation of law”, “commission of a discrediting act contravening the judicial ethics”<sup>68</sup>. Nor does it appear clear enough which disciplinary powers have been given to “superior court executives” (apparently what is meant here is the chair of the court) or to “judiciary community bodies” to which individuals and legal entities may appeal actions of a judge under paragraph 44 of the Judicial Jury Statutes and Article 38-1 of the Judiciary System Law.

As to the Judicial Jury’s operation and some matters of the disciplinary procedure, they are regulated by the presidential Decree, whose clauses at times contravene the Law “On the Judicial System”, rather than by law. More specifically, in compliance with Art. 43 (5) of the Law in question, the judge has the right to appeal against decisions of commissions of the Judicial Jury at SJC, while Art. 45 of the Decree holds that such decisions shall not be subject to appeal.<sup>69</sup> The conflict shall be eliminated.

The function of institution of disciplinary proceedings is yet not separated from decision-making; there is no possibility to appeal against the Judicial Jury’s decisions at a court instance, as required by the Recommendation.

The Monitoring Team once again notes that the Supreme Court’s refusal of providing a recommendation to dismiss a judge/Chair of the court of or judicial panel or a SJC’s decision on groundlessness of imposition

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<sup>68</sup> See also para 60-67 the 2011 Joint Opinion of the Venice Commission and OSCE/ODIHR and the Opinion of the Venice Commission on the draft RK Code of Judicial Ethics of 13 June 2016 on the matter of the usage of the Code of Judicial Ethics in disciplinary proceedings against judges.

<sup>69</sup> This also concerns decisions made by results of the assessment of judges’ performance in office (see above).

on a judge of disciplinary sanction forms the grounds for cancelation of a Judicial Jury's disposition and its revision.<sup>70</sup>

The experts once again refer to the need for deleting from Art. 39 of the Law "On the Judicial System" the clause on breaking labour discipline as a rationale for judges' disciplinary responsibility, as they enjoy a special status different from the one of other employees and public servants who are subject to provisions of the Labour Code or the Law on the civil service.<sup>71</sup>

Furthermore, the experts consider it appropriate to complement the section of the Law "On the Judicial System" on disciplinary responsibility with clauses strictly specifying the disciplinary proceeding procedure with detailed guidelines as to which body and in which format private individuals and corporations can submit petitions and claims on judges' conduct. Authorities of the Republic of Kazakhstan do not accept the above statement.

Further, in the course of the country visit, the experts learned that citizens were largely unaware where they should lodge a petition against a judge's acts (at this point in time, as experts believe, complaints can be lodged with the Court Chair, or Ethics Commission, or the Judicial Jury).

As to other issues in the light of the present Recommendation, Kazakhstan failed to provide information about **restrictions** established in relation to judges with respect to ownership of corporate assets and other financial interests, as well as any recommendations applicable to judges after their retirement. Kazakhstan also failed to comply with the recommendation to introduce the mandatory declaration, without conjunction with tax obligations, of income, assets, and, where possible, expenses of judges and their family members with a subsequent publication thereof. The respective norm should come into effect only of 1 January 2020.

Kazakhstan failed to provide information on compliance with the Recommendation in terms of defining in law **the size of judges' remuneration**, an exhaustive list of possible supplements thereto, as well as elimination, over time, of the practice to pay bonuses to judges.

**Conclusion: Kazakhstan is partially compliant with Recommendation 3.8, and it remains valid with regard to its points 1 and 3 as recommendation No. 9.**

During the course of the assessment visit, the Monitoring Team received an additional update on over 6,000 public servants in the judicial system, who have no judge status and are staffers of the Department for the Judiciary Operation Support under the Supreme Court and, separately, staffers of the Academy of Justice under the Supreme Court. Their staff numbers are nearly four-fold greater than the number of judges, and the Monitoring Team believes that the judicial power's integrity to a large degree depends on them, too. That is why it is imperative to ensure a due implementation of the anti-corruption policy across the RK's judicial system with respect to the public servants in question.

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

- 1. To regulate, in accordance with international standards, in the Law on the judicial system the status of the judiciary's self-governance bodies and grant them the powers to address matters of the internal organization and operation of courts and judicial activities, implementation of non-procedural functions of presidiums of regional courts and the plenary session of the Supreme Court, exercise due oversight of compliance of all the judges in Kazakhstan, including justices of the Supreme Court, with the Judicial Ethics Code.*
- 2. To ensure, within the framework of the program for the mandatory in-service training of a judges, practical training of all judges on matters of application of the Judicial Ethics Code.*
- 3. To establish in law the principle of random allocation of cases among judges taking into account their workload and speciality, as well as to establish responsibility for an unauthorized tampering with the automated system of allocation of cases in the court and foresee the openness of results of such an assignment of cases.*

<sup>70</sup> This also concerns decisions made by results of the assessment of the judge's performance in office (see above).

<sup>71</sup> See: para 62 of the 2011 Joint Opinion of the Venice Commission and OSCE/ODIHR

## Public prosecution service

### ***Laws and Regulations***

The organization, rules of procedure of the public prosecution service and the scope of prosecutors' authority are set forth in the Constitution, Law on Public Prosecution dated 30 June 2017 (LPP), Law on Law Enforcement Service dated 6 January 2011 (LLES), Law on Civil Service dated 23 November 2015, Criminal Procedural Code (CPC, 2014), Code of Administrative Offences (CAO, 2014), Civil Procedural Code (CPC, 2016), other legislative acts, international treaties ratified by RK and orders of the RK General Prosecutor.

### ***General Overview***

The RK Public Prosecution Service conducts, on behalf of the state and within the limits and forms established by the law, supreme supervision over the accurate and uniform process of law across the territory of the Republic of Kazakhstan, represent interests of the state in courts and, on behalf of the state, prosecute crime. The supervision is done by way of inspections and analysis of the state of crime as well as by assessment of acts that have come in force.

The new LPP has for the first time ever introduced limits to the general supervisory powers. Article 6, para 1, stipulates that public prosecution may now supervise legality of the acts, actions/inaction of government, local executive bodies and their officials. Supervision over legality of any other entity irrespective of the form of ownership may only be allowed under exceptional circumstances, at the instruction of the President or the Prosecutor General. Previously, any district prosecutor could authorize an inspection. Pursuant to para 3, compliance inspections shall be arranged for and conducted by a public prosecutor subject to the instruction of the President of the Republic of Kazakhstan or its Prosecutor General. The General Prosecutor's deputies, regional or district prosecutors may only instruct to conduct checks for the protection of rights, freedoms and legitimate interests as follows: for persons who by force of physical, mental or other circumstances may not be in a position to defend such rights or freedoms; for the general public; for individuals, public or state where it may be necessary to prevent any irreversible effects impacting their life, health or the security of Kazakhstan. However, even in those exceptional cases, inspections may be authorized only given an established fact of a failure to exercise or undue exercise of their powers by other controlling or supervising authorities within their respective jurisdiction. Under Article 3, paragraph 4, of the law, the public prosecution may not interfere with the operations of businesses, organizations or state authorities; authorize inspections into their activity; request information or documents on the grounds that are not stated explicitly in the law. Therefore, according to the authorities, the new LPP has limited significantly the sphere of general supervisory powers. At the same time, supervision over criminal process has been strengthened.

The Public Prosecution is a single centralized system of bodies, agencies and educational organizations and establishments, with low-level prosecutors being subordinate to upper level prosecutors and to the General Prosecutor (GP). Such subordination, among other things, means that: 1) the instructions of superior prosecutors with respect to the organization and activities of subordinate prosecution offices are binding on the latter; 2) the subordinate prosecutors are liable for the way they perform their official duties to their superiors; 3) whenever necessary, the superior prosecutors may perform the functions of their subordinates; 4) the superior prosecutors may annul, revoke and alter the acts of their subordinates; 5) the superior prosecutors may handle the complaints about the acts and actions of their subordinates. The GP may establish other forms of subordination of prosecutors.

The unified system of prosecution bodies consists of the General Prosecutor's Office headed by the General Prosecutor, prosecution offices of the regions, major cities and the capital of Kazakhstan, prosecution offices of various townships and districts, military and other specialized prosecution services (environmental and transportation prosecution services and prosecution services of certain special objects). Formation, reorganization or abolition of offices of Public Prosecution, establishment of prosecution bodies and setting forth their structures, rights and obligations, payroll and the size of their staff (in each case, within the limits approved by the RK President) take place in the manner prescribed by the legislation.

The system of the Public Prosecution bodies consists of the General Prosecutor's Office, 16 regional Public Prosecution offices, Public Prosecution offices of the cities of Almaty and Astana, Chief Military and Chief Transportation Prosecution offices, the Committee on Legal Statistics and Special Records and the Law Enforcement Academy. The General Prosecutor's Office consists of the Administrative Office of the General Prosecutor, 10 departments and 4 divisions. The structures of the regional Public Prosecution offices, Public Prosecution offices of the cities of Almaty and Astana and the Chief Military and Chief Transportation Prosecution offices are similar to the structure of the General Prosecutor's Office. According to the authorities, there are 4,800 prosecutors in Kazakhstan, 80% of which are men and 20% - women. In 2014, there were 115 vacancies in the country's Public Prosecution Service, in 2015 – 90 vacancies and in the first 9 months of 2016 – 119 vacancies.

According to Art. 43 of the LPP, the prosecutor is an officer of public prosecution who exercises powers and authorities stipulated in the LPP with the objective of implementing the functions of the office of prosecution.

### ***Overview of recent reforms***

The RK 2015-2025 Anti-corruption Strategy has set the task of shifting the priority in the work of the law enforcement agencies from the detection of crimes to their prevention. In particular, the Strategy provides that HR policies of the law enforcement authorities should incorporate the principles of meritocracy and competitive selection, which are used in the administrative part of the country's Civil Service, improve employee attestation and testing procedures and ban transfers of employees when the personnel reserve is not used.

According to Art. 11 of the LLES, starting from 1 January 2017, prosecutors dismissed from the civil service for negative causes during three years after such dismissal must file returns (as provided by tax laws) on their income and properties (whether located in Kazakhstan or abroad) which are subject to taxation.

### ***Independence***

The Public Prosecution Service operates independently of the other government bodies or officials and *is accountable only to the President of Kazakhstan*. Acts of prosecutorial supervision issued on grounds and under procedures set forth by the law are binding upon all government bodies, organizations and officials. The General Prosecutor's Office reports to the RK President on the state of law in the country and work of the Public Prosecution Service. The law does not provide for any periodic reporting by the General Prosecutor's Office to the Parliament.

In the performance of his duties, a prosecutor is subordinate only to the GP, his immediate and authorized supervisors, except when otherwise provided for by the laws of RK. Any influence on the prosecutor in any form with an aim to prevent him from exercising his powers or to have him make any unlawful decision is punishable by law.

### ***General Prosecutor (GP)***

GP is a political civil officer. He is appointed by the President with the consent of the Senate for a term of 5 years and *is accountable only to the President of Kazakhstan*. The deputies of the GP are appointed by the President of Kazakhstan as requested by the GP.

The GP's powers are set forth in Art. 37 of the LPP and include, among other things, the issue of orders, instructions, resolutions and rules regulating organizational and operational issues pertaining to the Public Prosecution Service and measures of its material and social support, which are binding upon all the employees of the Public Prosecution Service. Article 59 (Separation of political civil officers from service) of the Law on Civil Service regulates separation of GP from service, including in cases when the GP committed a corruption offence, knowingly provided false information about his income and properties or failed to transfer his properties to a fiduciary manager.

According to Art. 551 of the CPC (Pre-trial investigations with respect to the General Prosecutor), upon registration of a reason to start a pre-trial investigation with respect to the GP in the Unified Register, such a pre-trial investigation may go forward only subject to the consent of the GP's first deputy. If the GP is caught in the act or the fact of his preparation for, or attempt to commit, a grave or a particularly grave crime, is established, or if he committed a grave or a particularly grave crime, a pre-trial investigation may

go forward prior to securing the consent of the GP's first deputy, provided the first deputy is notified of it within 24 hours. Pre-trial investigations of cases with respect to the General Prosecutor are mandatory.

The GP, while he holds his office, may not be detained, kept in custody, placed under home arrest, prosecuted or stripped of immunity without the Senate's prior consent, unless the GP is caught in act or committed a grave or a particularly grave crime. Upon consent of the Senate, further investigation shall be conducted in accordance with parts 6 through 9 of Art. 547 of the CPC. The GP's first deputy supervises the legality of the pre-trial investigation with respect to the GP. After the GP's first deputy consents to continue the pre-trial investigation with respect to the General Prosecutor he will issue mandates to conduct investigative actions. A case investigated with respect to the GP may be brought to court hearing only after the GP's first deputy has resolved to commit the GP to trial.

### ***Appointment***

Under Art. 6 of the LLES, RK citizens of at least 18 years of age and capable of performing prosecutor's official duties due to their personal, moral and professional qualities, their state of health, physical fitness and education may be admitted to serve as public prosecutors. Any person: 1) adjudged incapable (wholly or partially), 2) having a disease (as concluded by a special military medical commission) that prevents him from performing official duties, 3) that failed to pass pre-employment medical and psychophysiological (including lie detector) examination, 4) that refused to be bound by restrictions applicable to any law enforcement officer, including the anticorruption restrictions set forth by the Law on Countering Corruption (LCC), 5) that within one and three years, respectively, prior to employment, was adjudged administratively liable for a wilful and corruption offense, 6) that within three years prior to employment was held by a court criminally liable or was discharged from criminal liability based on certain CPC articles, 7) that committed a corruption crime, 8) whose employment was terminated for committing a corruption offense, 9) who is an ex-convict or was discharged from criminal liability based on certain CPC articles, or whose prior employment with the public service, law enforcement agencies, courts or other institutions of justice was terminated based on negative grounds may not be admitted to the Public Prosecution Service. When admitted to service, a citizen and his (her) spouse must file returns on their income and properties with the local revenue service at the place of their residence, as required by the LCC.

Chapter 2 of the LLES, GP's order No. 40 of 4 May 2014 "On Procedures to hold tenders and internships for positions in the Public Prosecution Service", GP's order No. 156 of 26 December 2015 "On procedures of selection and preliminary review of candidates for positions in the Public Prosecution Service" and GP's order No. 76 of 24 July 2013 "On procedures of non-competitive admission to the Public Prosecution Service" regulate the selection of candidates for prosecution positions.

A candidate will not be hired unless he has successfully passed through a process of competitive selection. Announcements of such selections are posted on the web sites of the General Prosecutor's Office and published in printed periodicals. The process includes several selection stages, including a computer test of the candidate's knowledge of law, a candidate's examination by a special military medical commission, a lie detector examination, a special check-up and other assignments (description of the candidate's personal experience, writing essays and case analysis), psychological testing, assessment interview and mandatory probation. Special military and medical commissions check each candidate's state of general and psychophysiological health and credibility of information he provided about himself. National intelligence agency checks whether there is any information about the candidate that prevents him from being admitted to serve with the public prosecution. Other branches of government do not take part in selecting candidates for prosecutor positions. But Public Prosecution Service conducts information exchanges to find out whether there is any information about the candidate that prevents him from being admitted to the public prosecution service. Under Articles 5-1 and 7 of the LLES, the personnel department does the preliminary review and selection of candidates.

Each stage of such selection is graded under the five-point grading scale. Candidates who earned more than 3 points but were not appointed to any office are included into the personnel reserve (pool of candidates, not more than three candidates for each vacancy). Results are graded by independent experts (anonymized works are sent to experts unaffiliated with the Public Prosecution, ex., to leading consulting firms and universities), and computerized legal tests are graded automatically. All grades are saved in the database of the General Prosecutor's Office. Upon completion of all the selection sages, the results are added up and taken into account when final decisions are made.

According to Art. 6 of the Law on Civil Service, the HR service sets up the Selection Commission which conducts the selection process and decides what candidates are to be selected. New entrants are to go through a special adjustment procedure and a probation period of up to one year, they will also be coached by mentors.

Graduates from educational establishments of law enforcement agencies, ex-employees of such agencies, ex-servicemen, members of Parliament, political public servants and judges that abandoned judicial careers (with certain exceptions) are entitled to non-competitive appointments.

Regional prosecutors and other prosecutors of the same level are appointed by the GP, subject to the consent of the RK president, for five years. Municipal and district prosecutors and other prosecutors of the same level are also appointed for five years. The GP also appoints deputy heads of various establishments and educational institutions of the Public Prosecution Service, deputy regional prosecutors and other prosecutors of the same level, and deputy municipal and district prosecutors and other prosecutors of the same level.

### ***Evaluation***

Pursuant to Articles 46-2 and 54 of the LLES, Decree of the RK President No. 211 dated 16 March 2016 “On certain matters of HR policy in law enforcement agencies” sets forth the rules of annual evaluations of prosecutors and other employees of the service by means of measuring their key performance indicators and compliance with service standards. The key performance indicator is an indicator which is based on the strategy (strategic plan) of the law enforcement agency and designed to evaluate an official’s performance to achieve certain objectives and purposes of the service. The results are graded as “highly effective”, “effective” and “ineffective”. The evaluation results are used as grounds for decisions to award bonuses and other incentives, to provide educational and career opportunities, to rotate and differentiate wages (based on categories within each position). According to Art. 5-1 of the LLES, the HR department conducts evaluations of prosecutors. Within three years such evaluation results can be used as grounds for review of prosecutors.

### ***Attestation review***

Attestation is a regular procedure to test the level of professional training and legal culture of the prosecutor, his ability to work with people. The main criterion is having the required level of professional competence and skills factoring in competition. The attestation takes place upon completion by the prosecutor of each three-year period of his uninterrupted service (Arts 47-53-1 of the LLES). Heads of prosecution bodies, their deputies and any employees with the length of service in the law enforcement agencies in excess of 20 years are not subject to any reviews. The attestation commission consists of at least five members, including heads of departments, representatives of HR services and educational establishments and is approved by the GP. Upon review the commission makes one of the following decisions: 1) fit for the position and is recommended for inclusion into the personnel reserve or promotion to an upline position, 2) fit for the position, 3) shall undergo another review, 4) unfit for the position and is recommended for downgrading. Appeals with respect to any such decision may be brought within 1 month to the head of the respective body of public prosecution and / or to court. Upon completion of the review for each officer, a post-review development program is prepared aiming at improving his professional competence and skills.

### ***Promotion***

Promotion issues are regulated by: Chapter 5 of the LLES (Appointments, transfers and career growth in law enforcement bodies); GP’s order No. 90 dated 28 August 2013 “On qualification requirements for public prosecution officers”; President’s decree “On presidential reserve of heads of law enforcement and special government agencies”; GP’s order No. 163 dated 26 December 2015 “On rules of formation of personnel reserves, requirements to qualifications of officers’ enrolled into personnel reserves, and rules of work with the data bank of employees enrolled into personnel reserves”.

Planned career transfers are made by heads of public prosecution bodies, provided a person meets qualification requirements and has gone through all the stages of the career path (Art. 29(3), LLES). Career transfers are made, inter alia: 1) to promote to an upline position (from candidates from the personnel reserve, with due regard to the candidate’s professional and personal qualities, state of health, see Art. 33(1) of the LLES), 2) upon a candidate’s consent, if there is a need to fill in a vacancy or its better use with due regard to a candidate’s professional and personal qualities, training in a new line of profession, family

reasons, state of health or age, or due to staffing measures to better use an employee in his line of profession, in accordance with his experience, or as part of a rotation program, or because the employee's term at his current position has expired – to a position of equal rank, 3) as part of staff cuts or service reorganization and if impossible to transfer an employee to a position of equal rank, subject to such employee's consent, - to a position of a lower rank, 4) if an employee is unfit for his position, as was found out as a result of his attestation review, 5) for disciplinary reasons.

A vacant senior management position is filled by a candidate from the personnel reserve, as decided by the head of the respective prosecution body (Art. 34(4) of the LLES). One's term in the personnel reserve should not exceed three years. There are two personnel reserves in the Public Prosecution Service.

The presidential reserve of candidates for leading positions in the law enforcement bodies, including the Public Prosecution Service, is formed to select high-quality candidates to fill in high-level vacant positions (Art. 33-1 of the LLES). The rules governing the formation of this reserve and the list of positions filled from it are set forth by a decree of the RK President. Members of the reserve undergo special training in the educational institution of the Public Prosecution Service. The Public Prosecution Service has its own high-level personnel reserve. It is formed with candidates which, based on the results of their attestation reviews, are recommended for promotion to leadership positions or for positions with a large scope of work, or candidates who showed good management abilities in their regular services or special assignments (Art. 34 of the LLES).

Information about high-level vacant positions and requirements to candidates willing to fill them in are posted in the information systems of the Public Prosecution Service, as determined by the GP. The list of positions filled in on a competitive basis, and qualification requirements to candidates for such positions, are determined by the head of the respective Public Prosecution body, subject to approval by public service authorities.

The Public Prosecution Service rotates its high-level officers. The GP determines the list of such positions. Such rotation takes place one in five years and is sanctioned by a special order.

### ***Distribution of cases***

According to Art. 16(1.8) of the LLES, public prosecutors shall execute legitimate orders and resolutions of superior officials and bodies, issued within the scopes of their respective authorities. According to the Instruction on supervision over legality of pre-trial criminal proceedings, the investigative jurisdiction of criminal cases within RK is determined by the GP, his deputy supervising the legality of the pre-trial criminal proceedings, or the head of the Department; the investigative jurisdiction within any Region (Oblast) is determined by the Regional Prosecutor; transportation public prosecutors are supervised by the Chief Transportation Prosecutor, military public prosecutors – by the Chief Military Prosecutor. By order of the GP, or his deputy in charge of this segment of supervision, or the head of the respective department, the investigative jurisdiction of any case may be changed. If required, regional prosecutors may within 24 hours transfer a case to another region of the country (to the investigative jurisdiction of a body not under their supervision) and must ensure its delivery to such body not later than 10 days before the expiration of the period of pre-trial investigation. Regional prosecutors transfer through the Department criminal cases from lower level investigative bodies to the care of the headquarters of the same or different body. Municipal and district prosecutors may transfer a case to another district of the region, provided they send a 24 hour subsequent notice to the Public Prosecution Office of the region and make sure the case is transferred to such other district not later than 10 days before the expiration of the period of pre-trial investigation.

Prosecutors are entitled to appeal the decisions and actions made with respect to them to higher-level officers and/or to court. Actions and decisions of a prosecutor may be appealed to the superior prosecutor or to court. Filing an appeal against the actions or decisions of the prosecutor does not suspend their execution. A court or superior prosecutor may, pending its decision on the merits of the appeal (complaint), suspend their execution. A higher-level prosecutor, at requests of legal entities or individuals or at his own initiative, may revoke or nullify the acts of a lower-level prosecutor.

Upon receipt of an instruction or order which may contravene the law, a prosecutor must act in compliance with, and is protected by, the law (Art. 14(6) of the LLES). A prosecutor who fulfilled an *a priori* illegal order or instruction is not relieved from liability (Art. 19(2) of the LLES). When in doubt whether the order he has received is legal or not, he shall immediately notify his immediate superior and the superior

prosecutor who has given him such order. If the superior prosecutor re-iterates the order in writing, the lower level prosecutor must fulfil it, if it will not result in any actions punishable under criminal law. The superior prosecutor who confirmed the order shall be responsible for its consequences.

### ***Dismissal from office***

According to Art. 80 of the LLES, a prosecutor may be dismissed from office, inter alia, for the following causes: 1) in connection with the staff reduction or reorganization of the law enforcement agency, if it is impossible to use another position, 2) if he is unfit for the position, as confirmed by his attestation review, 3) for a gross disciplinary violation, 4) for actions damaging the reputation of the law enforcement body, 5) for corruption-related offences, 6) in connection with the liquidation of the law enforcement agency. Heads of territorial prosecution offices are dismissed for failures to take measures to prevent their subordinates from committing crimes, for systematic violations of discipline and secreting crimes.

### ***Transparency***

Prosecution bodies must act openly as long as this does not contravene RK laws on rights and freedoms of RK citizens and laws on protection of public interests. For example, meetings of commissions convened to select candidates for prosecutorial positions may be attended by public and media. Also, for the sake of openness of their work, prosecution bodies *may* publish in mass media acts of public prosecutors' supervision addressing illegal actions of government bodies and officials violating constitutional and other public, individual and legal entities' rights protected by law. The aggregate biannual schedule of audits of regulatory and local executive bodies of government is posted on the official web site of the General Prosecutor's Office.

Twice a year, there are plenary meetings at the central and regional level to sum up the results of the done of the reporting period, which are made public. There is an Advisory Board to consult the Office of the Prosecutor general, which has among its members MPs and representatives of the public.

There is no information available as to whether top prosecution officials hold regular press conferences at national or regional levels to update public on the work of the Public Prosecution Service.

### ***Ethics***

Persons admitted to the Public Prosecution Service for the first time take an oath. According to Art. 16 (1.7) of the LLES, prosecutors must honour the Code of Ethics of the Civil Service (see above). The Code of Honour of Prosecutors was adopted in 2009 by an order of GP and it was drafted, among other things, in line with the Code of Honour of Public servants.<sup>72</sup> It consists of five parts (general requirements, requirements with respect to the performance of official duties, requirements to out-of-office activities, requirements to officers on executive positions, requirements with respect to public speech) and final provisions. For example, the Code requires to promptly report to one's superiors all information about any corruption-related offences and any attempts of any third parties to make prosecutors commit such offences, to take legal measures to prevent and settle any conflicts of interest and stop one's colleagues and other public servants from violating the rules of public service ethics. Public prosecution officials must know and comply with the requirements of the Code, it is a major condition of their service and one of the criteria by which their moral, ethical and professional qualities are evaluated.

According to the authorities, the Code of Ethics training is done individually in each Public Prosecution office under either a plan or a decision of the head of such office. Persons admitted to serve in the Public Prosecution must be made familiar with the Code within the first month of their work. Any failure to meet, or violation of, the requirements of the Code gives rise to a liability as set forth by the law. The heads of structural units, bodies and agencies of the public prosecution must control their employees' compliance with the Code. Upon its adoption, the Code was made available for everyone to read in all public prosecution facilities. The authorities also point out that state security agencies (and other government bodies within their competence) supervise public prosecutors' compliance with the Code of Ethics.

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<sup>72</sup> The Code was last amended in 2011.

### ***Conflict of interests***

Conflicts of interest with respect to prosecutors, and prevention and settlement of such conflicts, are regulated by the Procedural Codes, the Law on Countering Corruption (LCC), LLES and Law on Civil Service. Under Art. 16 (1.12) of the LLES, a prosecutor must report to his immediate superior in writing if and when his personal interests come across, or conflict with, his duties and authorities. According to Art. 15 of the LCC and Art. 51 of the Law on Civil Service, in such a case, his immediate superior or the head of the respective body of public prosecution must take timely measures to prevent and settle the conflict of interest, specifically, to suspend such a prosecutor from his duties and authorize another prosecutor to perform them, to change the scope of the prosecutor's authorities and take other measures to settle the conflict of interests. The law imposes on prosecutors disciplinary liability for breaching conflict of interests rules and criminal liability – for actions having elements of corruption. According to the authorities, such facts have never occurred.

### ***Restrictions***

Prosecutors must abide by restrictions related to their work for law enforcement authorities and anti-corruption restrictions (Art. 16 (1.6) of the LLES).

The restrictions related to the work for law enforcement authorities are listed below. The prosecutor cannot: 1) be a member of any representative body of power or local self-governing bodies, a member of any party, trade union, support any party, create any social unions within the system of law enforcement bodies which have any political goals or are based on common professional interests or aim at representing and protecting labour, social, economic and other rights and interests of their members, 2) be engaged in any gainful activity other than teaching, scientific or another creative work, 3) be engaged in any commercial business, including governance of any for-profit organization regardless of its institutional form, 4) represent other persons, with very few exceptions, 5) use for personal purposes material, financial and information resources and properties provided to support his official activities, 6) take part in actions preventing the normal functioning of government bodies and fulfilment of official duties, including strikes, 7) use services of other individuals or legal entities in connection with his performance of his official duties, 8) use his position for personal gains, including by means of collusion with other officials or persons, 9) occupy a position directly subordinate to another position occupied by his close relatives (parents, children, adoptive parents, adopted children, full- and half-blood siblings, grandparents, grandchildren) or spouse.

Within one month upon taking the office, the prosecutor must transfer his shares of stock (interest in the capital) of a for-profit company and other properties that generate income to a fiduciary manager, except money, bonds, interests in open-end and interval mutual funds, and leased properties. The fiduciary management contract must be notarized. The prosecutor may receive income from properties he transferred to the fiduciary manager, including in the form of remuneration, dividends, wins from bets, lease income, and from other legal sources of income.

The prosecutor must keep in confidence all state and other secrets protected under law, including within certain time as set forth by the law after termination of his service for the law enforcement agencies (as to which he executes a written covenant not to disclose such information), and must preserve the property of the state (Art. 16 (1.9 and 1.11) of the LLES). According to the Law on State Secrets (Art. 32), prosecutors who have or used to have access to state secrets may be restricted from travelling abroad for a term set forth in their employment contracts if and when they get such access, or from exploiting the inventions and discoveries that contain state secrets and from disseminating them, or may have limited privacy rights when they are being checked to get access to state secrets.

For failure to perform his duties (or for undue performance of his duties) the prosecutor bears criminal, administrative, civil and disciplinary liabilities under the laws of RK (Art. 19 of the LLES). The HR service ensures the restrictions related to his law enforcement service are complied with (Art. 5-1 of the LLES).

As for the anti-corruption restrictions, under LCC the prosecutors cannot: 1) be engaged in any activity incompatible with their functions, 2) work (serve) jointly with their close relatives, spouses and relatives by marriage, 3) use their service-related and other information which is not subject to disclosures to get material and immaterial benefits and advantages; 4) accept presents in connection with the execution of his duties in accordance with law. Moreover, the prosecutors must not: 1) participate in the management of an economic agent if such management is not part of their official duties under law, or help organizations or individuals to satisfy their material interests by exploiting their official position to obtain material or other

gains; 2) engage in any business activity, except buying and / or selling interests in open-end and interval mutual funds, bonds and shares of for-profit companies on established securities markets; 3) be engaged in any gainful activity other than teaching, scientific or another creative work. If the prosecutor does not agree to such restrictions he will be denied a job offer or dismissed from office, if he fails to comply with them, in the absence of criminal or administrative offences elements, his civil service may be terminated. State security agencies (and other government bodies within their competence) supervise public prosecutors' compliance with these restrictions.

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

Prosecutors must file the same form of income and tax return as all other categories of public servants. Pursuant to Art. 11 of the LCC and Art. 185 (2) of the Tax Code, prosecutors file with local revenue service offices at places of their residence annual returns on income and properties (whether located in Kazakhstan or abroad) which are subject to taxation. Under Art. 16 (1.16) of the LLES, prosecutors dismissed from the civil service for negative causes and their spouses, within three years after such dismissal must file returns on their income and properties with the local revenue service officers at the place of their residence, as required by tax law. Tax authorities audit such tax returns by comparing them with the data from their own databases. If prosecutors breach such declaration rules disciplinary and administrative sanctions will be applied against them.

### ***Training and support***

In-service training of prosecutors is regulated by LPP (Art.4), GP's Order No. 111 dated 23 January 2012 "On rules of upgrading professional level of public prosecution officers", Joint Order of GP No. 152 dated 24 December 2015, Minister of Finance No. 684 dated 25 December 2015, Ministry of Civil Service Affairs No. 3 dated 28 December 2015 and Minister of the Interior No. 1062 dated 25 December 2015 "On rules and contents of professional training, retraining and upgrading qualifications of law enforcement officers".

According to Art. 16 (1.13) of the LLES, prosecutors must upgrade their professional qualifications and skills. New entrants into law enforcement agencies attend special initial training programs in educational institutions of the Public Prosecution Service (Art. 11 of the LLES). Under Art 5-1 of the LLES, the HR department of the Public Prosecution Service organizes the training, re-training and upgrading of the qualifications and skills of prosecution officers. No special written guidelines, methodologies or manuals on countering corruption, prevention and settlement of conflicts of interest, compliance with restrictions related to their service and Code of Ethics, and declaration of income and assets have been developed specifically for public prosecutors. According to the authorities, prosecutors use common materials and guidelines.

According to the Interdepartmental plan of preventive measures to counter corruption in courts and law enforcement agencies, in 2016 a number of measures were taken to prevent and uncover corruption-related offences among employees of law enforcement agencies, to promote service ethical and moral standards in law enforcement agencies, and quarterly lectures were held to explain a special role of law enforcement officers in the society and the importance of enhancing the image of law enforcement officers and people's confidence in them. It was also planned to conduct an anonymous survey among law enforcement officers, including officers of the Public Prosecution Service, as to whether heads of units violate any norms of ethical behaviour and to determine moral and psychological environment in the units. The plan also included district and regional "round tables" titled "Service ethics and high moral standards of activities to protect rights and interests of citizens."

### ***Remuneration***

Pursuant to Art. 64 of the LLES, the service pay of public prosecution officers is based on the unified service pay system for RK agencies funded from the state budget approved by the *RK President*, and includes salaries and perks for special service conditions. According to Art. 15 (1.14) of the LLES, prosecutors are entitled to housing and social support. Under Art. 5-1 and Art. 55 of the LLES, the HR Service designs rules and procedures to provide incentives, including one-time cash allowances.

According to the authorities, incentives are provided transparently and objectively. Upon discussion of the matter in each unit, a recommendation is filed with respect to a selected specific candidate, and the matter is then considered by a special commission of the General Prosecutor's Office, which passes its decisions by open ballot. All other remuneration and incentives related matters are handled in accordance with the

Award Rules approved by Presidential Decree No. 155 dated 30 September 2011. According to the established line of authority all the decisions are made by the GP upon recommendation of the Commission of the General Prosecutor's Office.

### ***Complaints and disciplinary proceedings***

Under Art. 1 of the LLES, the disciplinary wrong-doing is the illegal and culpable failure of the law enforcement officer, including the public prosecutor, to perform his duties, abuse by him of his official powers, violation of the service and labour discipline and of the Code of Honour of Public servants (rules of ethics of public servants), and failure by such officer to comply with the restrictions related to his law enforcement service. Disciplinary wrongdoings are punished by disciplinary sanctions.

A system that grades disciplinary wrong-doings and sets rules of establishing disciplinary liabilities is approved by a decree of the RK President. The wrong-doings that discredit a law enforcement agency (including the Public Prosecution Service) mean actions, including those not related to official duties of the officer, explicitly compromising in the eyes of the citizens the dignity and authority of the law enforcement service, namely: being drunk (or intoxicated) and disorderly, and apparently (to any observer) belonging to a law enforcement agency; disclosure of confidential information that damages an investigation; abuse of one's official position to obtain material (personal) gains; bullying and similar pressures and relations between officers and students of law enforcement educational establishments that resulted in the public embarrassment of the service. Disciplinary wrongdoings related to violations of citizens' constitutional rights are quantified and deemed to be systematic if three or more wrongdoings are committed by one's subordinates within 12 months after the first one occurred (Art. 80 of the LLES).

The following disciplinary sanctions may be applied for failures to perform (or duly perform) one's service duties: 1) admonition; 2) reprimand; 3) severe reprimand; 4) warning of not being fully fit for the position; 5) removal from office; 6) reduction by one grade; 7) termination of employment with a law enforcement agency; 8) termination of employment with a law enforcement agency coupled with a loss of honorary ranks, lapel badges, awarded by heads of the law enforcement agencies; 9) termination of employment with a law enforcement agency coupled with a loss of a special or class rank.<sup>73</sup>

If a disciplinary wrong-doing is committed but the prosecutor in question does not recognize in writing that he has committed it, pursuant to a decision of the head of his prosecution office a special disciplinary commission<sup>74</sup> must conduct an internal investigation within one month after the date of the decision. The commission submits to the head of the prosecution office who made the decision the results of its investigation, together with its recommendation as to the disciplinary sanction that should be applied. The sanction must be applied not later than within one month after the wrongdoing was uncovered and cannot be applied later than six months after the wrongdoing was committed. Disciplinary sanctions for wrongdoings that resulted in the public embarrassment of the service may be applied not later than three months after the wrong-doing was uncovered and cannot be applied later than one year after the wrong-doing was committed (Art. 45 of the Law of Civil Service). If it is necessary to apply sanctions that go beyond the scope of authority of the immediate supervisor of the wrongdoer, such supervisor may apply to such an upline supervisor who is authorized to apply such sanctions. Such supervisor may annul the sanction that has been applied by the immediate supervisor if it inconsistent with the gravity of the committed disciplinary wrongdoing. The disciplinary sanction may be appealed with the upline office or court (Art. 57 of the LLES and Art. 43 of the Law on Civil Service).

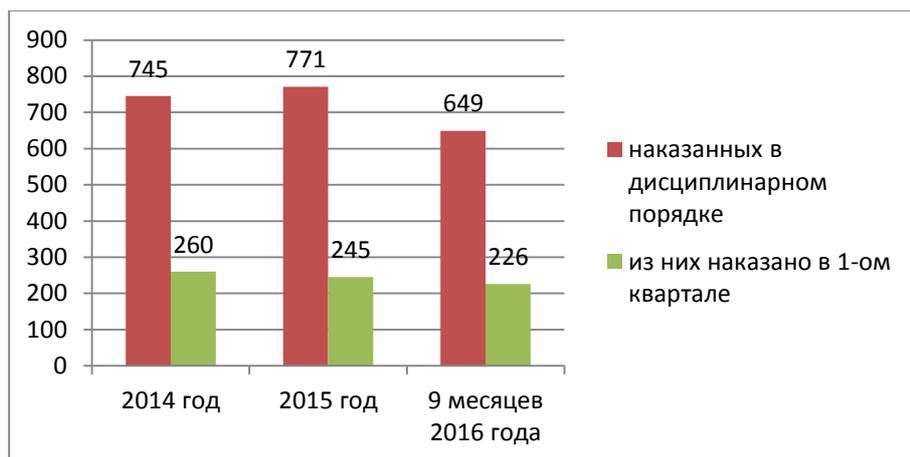
The authorities have provided the following statistics of disciplinary sanctions applied against public prosecutors (also available on the site of the General Prosecutor's Office).

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<sup>73</sup> Art. 56 of the LLES.

<sup>74</sup> Under Art. 6 of the Law on Civil Service, the personnel department organizes the special disciplinary commission. According to the authorities, disciplinary commissions are formed in the regional public prosecution offices and in the General Prosecutor's Office.

**Figure 2. Statistics of disciplinary sanctions against prosecutors**



Source: data of the RK General Prosecutor's Office.

According to the authorities, 10 public prosecutors were dismissed from office in 2014, 12 - in 2015 and 10 – in 2016 for violating ethics rules. There is no statistics for other types of disciplinary sanctions.

The authorities have provided the following statistics on numbers of public prosecutors dismissed from office, with causes for such dismissals.

**Table 10. Statistics of dismissals and transfers of prosecutors**

	At one's own volition	Transfer to another body of public prosecution	Transfer to another law enforcement agency, to court or to another government body	For violation of service ethics and other denigrating wrong-doings	Including, for corruption related offences	With criminal charges	Young specialists	Due to retirement
2014	160	146	72	10	2	1	14	31
2015	184	217	32	12	0	0	11	75
9 months 2016	144	168	66	7	0	0	12	58

Source: data of the RK General Prosecutor's Office.

Any review of any notice that a prosecutor has committed an administrative offence shall be conducted with participation of representatives of the Public Prosecution Service. No administrative arrests, personal searches or searches of the prosecutor's car or personal belongings are allowed while he is in the execution of his duties, except in cases set by the RK laws. Criminal cases against prosecutors are investigated by counter-corruption authorities. Prosecutors have no immunity.

### ***Integrity Measures***

The authorities believe that the main mechanism to ensure the integrity of public prosecutors is public control. Any acts of dishonour of public prosecutors may be video-recorded and / or reported to the internal security service of the public prosecution service or to other government bodies.

### ***Conclusions***

The legal framework, competence, organization and activities of the RK Public Prosecution Service are governed by the Constitution and the recently revised LPP and LLES. In each of these three acts there are gaps and contradictions that weaken the public prosecution service as a fully functional and independent government body it holds itself out.

Firstly, the Constitution fails to define precisely the status of public prosecution. The provisions on public prosecution are in Section VII of the Constitution titled "Courts and Justice". Neither the Constitution, nor

the LPP offers grounds for including public prosecution among law enforcement agencies. However, Article 48 of the new LPP provides that service in public prosecution shall be a type of law enforcement service, and the procedure and specific rules applicable to the service in public prosecution offices are defined. It aligns with Art. 3 of the LLES that establishes the list of law enforcement bodies, which incorporates offices of public prosecution, together with the Ministry of Interior, Counter-Corruption Service and Economic Investigation Service. Based on that, the Public Prosecution Service is subject to numerous regulatory acts (decrees, resolutions, rules and regulations) which govern the work of law enforcement agencies.

Secondly, although the Constitution provisions guarantee independence of the public prosecution from the other government bodies or officials, they neither guarantee independence of prosecutors in the exercise of their procedural powers, nor protects them against unjustified interventions into their professional activities (including interventions by superior prosecutors, in certain instances).<sup>75</sup>

Thirdly, such key matters as establishment, reorganization and liquidation of public prosecution offices are regulated by the Civil Law Code and not by the LPP.

Fourthly, the Public Prosecution Service is not truly independent, because none of the aforesaid legal acts provides who sets its budget and how this should be done, whether it is entitled to independent financing of its own needs or its budget is part of the aggregate budget of all law enforcement agencies.

All these gaps must be bridged and inconsistencies cured and the status of the public prosecution must be precisely defined, first of all in the Constitution. As for its accountability, currently the General Prosecutor is supposed to submit periodic reports to the RK President. The experts believe that in the light of recent constitutional reforms it is desirable that the General Prosecutor periodically reports also to the RK Parliament.

The preliminary **selection of candidates** for the public prosecution service is regulated by the LPP and orders of the General Prosecutor and is based on a contest, the information about which is publicly available, psychological test, assessment interview, internship and certain other examinations. The experts believe that such a selection process as a whole complies with the principles of meritocracy and transparency.

As for other appointments, the experts are concerned that about 15% of employees are admitted to serve in the public prosecution on a non-competitive basis (about 640 out of 4 800 for the last five years, based on the information obtained during the visit<sup>76</sup>). In certain cases, such appointments can be justified by specific requirements (ex., to hire officers with law enforcement experience). Nevertheless, the scale of such appointments and the fact that they are regulated not by law, but by the GP's Decree, makes the entire process of such non-competitive hiring look arbitrary and even based on nepotism or favouritism.

In this light, we think it necessary to minimize such appointments and to resort to them only in exceptional circumstances set forth by the law, and they must be based on objective and transparent selection procedures and criteria, which allow to assess properly professional qualities and skills of candidates. Kazakhstan authorities report about the drafting of new rules aimed to reduce to the maximum the instances of non-competitive appointment to the offices of public prosecution.

With respect to the **appointments to top level positions**, the experts see only two persons involved in the process: the RK President who appoints the General Prosecutor and the General Prosecutor himself who appoints all the other heads and deputy heads of all the institutions, establishments and educational organizations of the Public Prosecution Service.

The monitoring group is of the opinion that RK should move in the direction of the international standards and best practices in this area. It is recommended to consider setting up the Prosecution Council as a body of prosecutorial self-government. Such a body would represent all the prosecutors, it would handle the internal affairs of the Public Prosecution Service and would propose candidates for appointments to and

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<sup>75</sup> Kazakhstan authorities point out to the fact that independence of public prosecutors is safeguarded by Article 58 of the CPC and Code of Administrative Offences.

<sup>76</sup> Under Art. 7 of the LLES, graduates from educational establishments of law enforcement agencies, ex-employees of such agencies, ex-servicemen, members of Parliament, political public servants and judges that abandoned judicial careers (with certain exceptions) are entitled to non-competitive appointments.

dismissals from offices, including the General Prosecutor, it would supervise the prosecutors' compliance with the Code of Ethics<sup>77</sup> and perform disciplinary functions.

Because the Public Prosecution Office positions itself as an independent body of government committed, among other things, to the principals of meritocracy, and because independence primarily means competitive and transparent appointments to positions of all levels, RK is advised to consider expanding the system of competitive appointments to top level positions and to set forth in the law precise, objective and transparent criteria of access to such positions.

The experts also note that Art. 83 (3) of the Constitution does not prohibit or restrict the re-appointment of the **General Prosecutor** (his term of office is equal to five years). Given the fact that the General Prosecutor is a political public servant who is appointed by, and is accountable only to, the RK President the monitoring group proposes to consider prohibiting the re-appointment of the incumbent General Prosecutor for a new term to prevent the risk of political commitment of the candidate seeking to be re-appointed. As for the immunity of the General Prosecutor from criminal liability the experts consider it excessive for a public official. A recommendation to narrow it down to a functionally expedient level is included into this Report and is reviewed in Chapter 3.

The monitoring group welcomes the implementation of such measures of the personnel policy as **annual reviews** of prosecutors. However, it is dissatisfied with the fact that the mechanism of such review is regulated by the RK President's Decree, rather than by the LPP. As for the attestation review of the prosecutors once in three years to test their level of professional training, legal culture and ability to work with people, the experts are of the opinion that such a procedure overlaps in part with the annual review and should be re-considered within the framework of the general recommendation pertaining to the attestation review of public servants (see the respective section of this Report).

It is not clear either whether one can challenge the results of the annual review and, if yes, to what body one can bring his appeal. Moreover, there are no facts from which one can conclude that the annual review or the periodic attestation take into account as one of their criteria the prosecutors' compliance with the Code of Honour of the prosecution officers.<sup>78</sup> It should be noted that under paragraph 6 of the Code, it is a duty of the prosecutor to know the Code and to comply with it, which is also one of the conditions of his service and one of the criteria by which his moral, ethical and professional qualifications are evaluated. However, Articles 47 – 53-1, which regulate periodic attestation reviews of law enforcement officers (including prosecutors), say nothing about the necessity to evaluate their moral and ethical qualities. The experts think this gap should be bridged in the specialized law, i.e. the LPP, and the requirement to evaluate one's compliance with ethical norms must be extended to heads of public prosecution offices, their deputies and other officers with a track record of service in excess of 20 years, who currently are not subject to any periodic reviews.

The experts also note that according to the authorities the **Code of Honour** trainings are conducted individually in each office either in accordance with a plan or the decision of the head of the office<sup>79</sup>. The experts checked out the topics of the Law Enforcement Academy which conducts professional training programs for law enforcement officers (including prosecutors) and did not find any evidence that at the Academy they lecture on matters of professional ethics.

This seems important if we take into account the recent substantial renewal of the prosecution service ranks (according to the information received during the visit 2 250 new officers – of 4 800 new officers in total – were admitted in the last five years).

Moreover, because a failure to comply with or a violation of the Code result in the disciplinary sanctions (including the dismissal from office) the experts recommend adding courses aimed at explaining the provisions of the Code and how they are applied (including analysis of disciplinary cases of prosecutors' violations of its provisions) to their mandatory professional training programs. From the available statistics

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<sup>77</sup> Currently, the heads of structural units, bodies and educational establishments of the Public Prosecution Service supervise the prosecutors' compliance with the Code.

<sup>78</sup> During the evaluation visit public prosecution officers admitted that control over such compliance is exercised only when signals of non-compliance are detected.

<sup>79</sup> According to paragraph 3-1 of the Code, all new officers admitted to service with the bodies, agencies and establishments of the General Prosecution Service, within one month after such admission must be familiarized with the Code.

(32 prosecutors dismissed from office in 2014-2016 for violating the Code of Honour) one can conclude that practice in this area is quite substantial.

**Disciplinary proceedings** against prosecutors are governed by the LLES, the Law on Civil Service and the Decree of the RK President dated 16 March 2016 “On certain matters of the implementation of personnel policies in the law enforcement agencies”. The latter set forth a system of assessing the gravity of disciplinary wrongdoing and rules of disciplinary liability. The monitoring group is of the opinion that all the matters of disciplinary proceedings, including the list of grounds for such proceedings, their procedures and sanctions, must be set forth in the specialized statute i.e. the LPP.

At the same time, one must take into account and try to avoid the discrepancies between the LLES, the Law on the Civil Service and the aforementioned decree of the President. For example, the Decree defines two terms - “a wrong-doing that discredits the law enforcement agencies” and “systematic disciplinary wrongdoings related to violations of citizens’ constitutional rights”. The sanctions with respect to such wrongdoings must be applied, under the general rule, not later than one month after the wrongdoing is uncovered and not later than six months after the wrongdoing is committed.<sup>80</sup> At the same time, the Law on Civil Service uses the term “disciplinary wrong-doing that discredits the civil service”, and it is explained nowhere whether it is applicable to public prosecutors. The sanctions with respect to such wrongdoings must be applied not later than three months after the wrongdoing is uncovered and not later than one year after the wrongdoing is committed.<sup>81</sup> In addition, Art. 80 of the LLES provides that a prosecutor may be dismissed from office, among other things, for *grave* violation of the service discipline, and this term is nowhere defined in the law.

The experts believe that all the categories of disciplinary wrongdoings which may be committed by prosecutors must be clearly defined in the LPP, with specific sanctions and limitation periods applicable to them. The monitoring group appreciates that the statistics of disciplinary measures applied against public prosecutors is freely accessible on the site of the General Prosecutor’s Office, which is a sign of openness and transparency.

The **remuneration** of public prosecution officers is based on the unified service pay system for RK law enforcement agencies and includes salaries and perks for special service conditions. Under Art. 1 and 35 of the Law on Civil Service, monetary allowances of public servants are set based on the review of the effectiveness of their work as provided by the law. This is confirmed by the Decree of the RK President dated 16 March 2016 “On certain matters of the implementation of personnel policies in the law enforcement agencies”, which provides that results of annual reviews of law enforcement officers, including prosecutors, are grounds to pay bonuses, provide incentives, differentiate service pays (according to grades within each rank or position). Despite the fact that grades for each position are set forth in the decree of the President, the procedures of such differentiation is yet to be developed.

Incentives, including one-time monetary remunerations, are regulated by a decree of the President and are provided by the HR services of structural units in accordance with decisions of their heads.

Although the authorities assert that the process of decision-making is objective, transparent and collegiate, the LPP does not set forth any precise, objective and transparent criteria of awarding service payments and incentives to prosecutors. As is the case with the judges, the monitoring group is of the opinion that the law must define the sizes of wages of prosecutors and the exhaustive list of additional allowances, and the system of monetary incentives must be abolished in time.

Today, the prosecutors and their family members are not obliged to declare their income, properties and expenses (not connected with their tax liabilities) or to make such declarations publicly available. The experts are of the opinion that a recommendation similar to the one given with respect to judges shall apply to the prosecutors as well.

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<sup>80</sup> Art. 57 of the LLES. Experts note that the Human Resources Unit drafted a bill which increases the period of limitations for the prosecution of law enforcement officers from one to three months of the day when the disciplinary wrongdoing (including any dishonour to the law enforcement service) was discovered and from six months to one year from the day when it was committed. The proposed amendments have been supported by the Prosecutor general.

<sup>81</sup> Art. 45 of the Law on Civil Service.

## New recommendation No. 11

1. *Define in the Constitution of Kazakhstan the status of the Public Prosecution Service and set guarantees to protect prosecutors from illegal interference into their work, and guarantees of their autonomy, including the funding autonomy.*
2. *Consider reforming the Public Prosecution Service to:*
  - 1) *introduce the practice of GP's regular reports to the Parliament;*
  - 2) *prohibit the re-appointment of the incumbent General Prosecutor to prevent the risk of political commitment of the candidate seeking to be re-appointed.*
3. *Minimize non-competitive appointments to positions within the Public Prosecution Service and introduce objective and transparent selection procedures and criteria which allow to access properly professional qualities and skills of candidates; expand the system of competitive appointments to all positions of prosecutors and set forth in the law precise, objective and transparent criteria of access to such positions.*
4. *Regulate by law:*
  - 1) *establishment, reorganization and liquidation of public prosecution offices, including the specialized ones;*
  - 2) *annual appraisal of the public prosecutors' performance;*
  - 3) *periodic evaluation of moral and ethical qualities of all prosecutors and compliance of their behaviour with the Code of Honour of the officers of public prosecution;*
  - 4) *the list of grounds and procedures to hold prosecutors disciplinarily liable, sanctions for specific misconduct and periods of limitation;*
  - 5) *sizes of wages of prosecutors and the exhaustive list of additional allowances (abolishing in due course monetary incentives (bonuses) for prosecutors).*
5. *Consider setting up a Prosecution Council as a body of prosecutorial self-governance, which, among other things, will propose candidates for appointment to and dismissal from offices, including the General Prosecutor, and will supervise the compliance by prosecutors with the Code of Honour of the officers of public prosecution.*
6. *Include practical courses with respect to the Code of Honour of the prosecution officers in the mandatory professional training programs.*
7. *Introduce mandatory declarations of assets, income and expenses of prosecutors and their family members (not connected with their tax liabilities) and make them publicly available.*

## 2.4. Administrative procedures, accountability and transparency in the public sector

### *Recommendation 3.3. of the Second Monitoring Round Report on Kazakhstan (recommendation was confirmed during the Third Monitoring Round)*

1. 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.
2. 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.
3. To bring the legislative act on the administrative procedure in line with international standards of regulation of the procedure for considering administrative cases.
4. 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.

#### *Anti-corruption screening*

With the adoption in April 2016 of a new updated version of the Law of the Republic of Kazakhstan “On Legal Acts”,<sup>82</sup> the separate anti-corruption screening of draft laws and regulations was abolished. The law provides for **legal assessment** (screening of draft laws or regulations, or any adopted legal or regulatory acts for their compliance with the Constitution and legislation of the Republic of Kazakhstan and, among other things, anti-corruption laws). This legal assessment is entrusted to the RK Ministry of Justice at the stage where draft legal acts are being coordinated with government authorities. Under this methodology, legal assessment includes the screening for any corrupt legal provisions in the draft bill.<sup>83</sup>

The Ministry of Justice has drawn up, pending adoption in the near future, some Methodological recommendations for the application of legal assessment of draft regulatory legal acts by the RK President and Government, and regulatory legal acts submitted for registration (regulations promulgated by central authorities), whereby justice authorities shall be conducting their screening for any corruption factors.

In accordance with the order of the Ministry of Justice, the **legal assessment** shall proceed from the fact that corrupt legal provisions cover:

- 1) broad discretionary powers;
- 2) defining competence under “having the right to” formula;
- 3) setting steep requirements to anybody seeking to exercise the right they already hold;
- 4) selective changes in the scope of rights;
- 5) absence or else improper regulation of administrative procedures;
- 6) absence or else improper regulation of tender (auction) procedures;
- 7) improper definition of functions, duties, rights and obligations of public servants (public officials);
- 8) legally and linguistically formulated conditions for corruption that enable corrupt acts;
- 9) conflicts of law enabling corrupt acts;
- 10) any gaps in regulations enabling corrupt acts;
- 11) excessive blanket or reference legal provisions in the regulatory act;
- 12) adopting a legal regulatory act outside the scope of competence;

<sup>82</sup> Law of the Republic of Kazakhstan of 6 April 201, No 480-V, “on Legal Acts”, Article 30. The text of the law is available at: <https://goo.gl/JCsDFj>.

<sup>83</sup> Order of the Ministry of Justice of the Republic of Kazakhstan of 26 September 2016, No 800, “On approving Methodological recommendations for the application of juridical (legal) assessment of draft legislative acts”, para 5.3.5. The text of the order is available at: <https://goo.gl/xCHzSE>.

- 13) filling in legislative gaps with secondary regulatory acts without any legislative delegation of the relevant authority;
- 14) false aims and priorities;
- 15) distortion of balance of interests;
- 16) insufficient control mechanisms;
- 17) “imposed” corruption conditions;
- 18) excessive administrative barriers.

The legal assessment screening corrupt provisions shall strive to examine:

- provisions of the draft law;
- established corrupt practices in the specific area in question;
- current corruption schemes;
- legal statistics on corruption offences committed by public state officials;
- specific operations of state authorities and public officials known to be most vulnerable to corrupt acts;
- modes of operation of corruption in the work of government authorities and public officials;
- Interconnection between corrupt deficiencies in the legal framework of a government authority, and corrupt offences committed by its public officials/current corruption schemes/corrupt practices.

Should any corruption factors be identified in the draft law, it is deemed to be short of anti-corruption requirements pointing to high corruption risks in its implementation and application.

The legal assessment shall result in a well-grounded opinion that details the substance of comments, if any, and the rules to which those pertain. Based on the comments, the draft law shall be improved by the drafting authorities that shall also draw up a reasoned note on comments accepted and rejected. As a result, comments resulting from the legal assessment are not mandatory to be accepted by the drafting authority, and may well be declined.

In addition, legal regulatory acts may be subject to a **scholarly assessment** (legal, linguistic, environmental, economic, etc.) depending on the legal relations regulated by the proposed bill. The laws and regulations that are developed by the government must always be subjected to the scholarly assessment; draft legislative acts by the RK President do not require scholarly assessments. Scholarly assessments are to be conducted by research establishments or universities, as well as by experts, scholars and specialists, depending on the topic of the legal act.

The following methodology is being used in a scholarly assessment: 1) legal provisions of the draft law are screened for corruption risks; 2) apparent or hidden departmental or group interests enabled by the draft law are identified.

Should the draft provisions fail to comply with anti-corruption legislation, this fact is stated in the opinion resulting from the scholarly legal assessment. However, conclusions made by the scholarly legal assessment are for guidance only. Based on comments and/or suggestions in the expert opinion of the proposed draft bill, the drafting authority will decide whether any improvement must be made in the draft law, accepting comments and/or suggestions of the expert opinion.<sup>84</sup>

Neither does the RK Law on countering corruption makes any mention of anti-corruption screening of legal and regulatory acts as one of the elements of anti-corruption policies. Essentially, the anti-corruption screening of NLAs has lost its autonomous status and become a mandatory part of scholarly legal assessment as well as of legal assessment of draft NLAs.

While legal assessment of draft NLAs is handled by the RK Ministry of Justice, the scholarly legal assessment is done by academic and expert institutions, universities, scholars, experts and specialists.

Since legal assessment is one of the key tasks of the Ministry of Justice, no funds are set aside for it. At the same time, scholarly legal assessments have had certain funds allocated to them:

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<sup>84</sup> Paragraph 27, Regulations of the Government of the Republic of Kazakhstan of 31 August 2016, No 497, “On approving the Rules of scholarly assessment of draft legal and regulatory acts.” The text of the regulations is available at: <https://goo.gl/2wq14K>.

**Table 11. Funds allocated from the republican budget to conduct scholarly legal assessment of draft laws**

	Number of draft laws that underwent scholarly assessment	Funds allocated
2014	65	KZT 45 217 327
2015	83	KZT 39 040 202
2016	36	KZT 8 483 526

Source: data provided by Kazakhstan authorities.

Assessments covered a broad scope of questions in which corruption factors have only been one of the issues considered.

Outcomes of legal assessments and results of the scholarly legal assessments are published (usually on the web-sites of the drafting state authorities). This kind of information can be found on the web-site of Majilis of the RK Parliament following the submission of the draft law for consideration. Results of assessments of NLAs are not published in the *Edilet* NLA database (<http://adilet.zan.kz/rus>), which gives free access to the NLA database. The web-site called *Zakon.kz* (<http://online.zakon.kz>) offers access to assessments for a small fee, and in some cases that concern publicly significant draft laws all assessments are made available for free in public domain.

### ***Discussion of legal acts***

According to the Legal Policy Research Centre (LPRC), currently in Kazakhstan there is a duty to subject draft normative legal acts (NLAs) to public discussion. The new version of the RK Law “On Legal Acts” of 6 April 2016 sets forth as least two procedures for public discussion of NLAs:

draft NLAs that concern private business interests must be mandatorily coordinated with the National Entrepreneurship Chamber and its territorial divisions;

draft NLAs that concern civil rights, freedoms and duties shall be coordinated with public councils.

Additionally, the RK Law “On Access to Information” of 16 November 2015 provides for mandatory publication of draft NLAs on the web-sites of information holders and drafters.<sup>85</sup> The law also obligates information holders to publish draft NLAs for discussion on the Open Government web-site on the Open NLAs page<sup>86</sup> (<https://legalacts.egov.kz/>). However, as the number of unique users on that web-site is low, and it does not conduct any awareness campaigns for the general public, this channel for public discussions of draft NLAs is yet to make its contribution.

In 2017 the Ministry of Information and Communications, in order to raise awareness of the portals, allocated funds to a set of activities (publications in mass media, promotion in social media and contests) that are expected to inform the general public about the Open Government and its capacities. Currently, this work is in preparation. In addition, to upload the required information on the Open Government websites, under the Information Access Law, since the start of the year together with the company called National Information Technologies the Ministry has arranged for a number of events: informing information holders at state authorities about the now effective rules regulating information content on the Open Government websites; appointing officers responsible for the uploading of information, granting them access to the websites, training workshops, telephone consultations as to the use of Open Government websites.

The rules for having NLAs published and discussed on the Open Government web-site are regulated at the level of the subordinate act, viz., an order by the RK Minister of Information and Communications.<sup>87</sup>

While there are procedures for public discussion of NLAs detailed by the legislation, in practice they have failed to make a real impact and in many cases remain purely declarative and formalistic procedures. It may

<sup>85</sup> Subpara 5), paragraph 3, Article 16 of the Law of the Republic of Kazakhstan of 16 November 2015 “On Access to Information”. The text is available at: <https://goo.gl/7cCUxe>.

<sup>86</sup> Paragraph 4, Article 17, *ibid*.

<sup>87</sup> Order of the Minister of Information and Communications of the Republic of Kazakhstan of 30 June 2016, No 22, “On approving the Rules for the publication and public discussion of draft concepts of draft laws and draft normative and legal acts on the Open NLAs web portal”. Available at: <https://goo.gl/9Ckz7e>.

be to a great extent due to the fact that the deadline for public discussions is extremely tight (under law, they have at least 10 working days after the draft NLAs has been published on the web-site, but in fact in many a case there are only 10 days for public discussion). Besides, there are frequent manipulations with the date when NLAs are made available for public access.

The drafting state authorities are under no obligation to provide grounds for their choice in accepting suggestions they receive to amend or amplify draft NLAs, or inform the applicants. As a result, NLAs drafters tend to view the draft NLAs public discussion as a formality having little impact on the quality of NLAs as drafted.

NGOs and mass media, together with the expert community with an interest to contribute to the drafting of some specific NLAs, have highlighted the lack of feedback from NLA drafters and almost no willingness on part of the drafters to amend their drafts. NGOs have referred to some specific instances of fallout as a result of the formalistic and declarative procedure of public discussion of draft NLAs in Kazakhstan. In May 2016, the lack of public discussion of the proposed draft Land Code led to demonstrations, arrests among human rights activists and detentions among reporters, followed by the reorganisation of the line ministry in the area of information and communications. In December 2016, a similar case happened with the draft RK law “On amending certain RK legislative acts bearing on issues of countering terrorism and extremism” which proposed introducing registration at the place of actual residence for RK citizens. It was reported that for lack of sufficient time or efficient discussion procedure, or any explanations to the proposed law, implementation of some of the provisions caused indignation and anger among local residents.

### ***Legislation on government control and supervision***

According to official sources, the Entrepreneurship Code (EC henceforth) was adopted on the instructions of the Head of Government issued at the opening of the IVth session of the Vth Parliament in September 2014. Together with the Institute of Legislation, the Ministry of Justice developed its concept and had the scholarly legal assessment done. Working on the draft EC, they drew on the foreign experience (examined commercial and trade codes from France, Austria, Germany, Japan, and the Business Code of Ukraine).

Contributing to that draft were representatives of government authorities concerned, academic community and various associations of private business. The draft EC was discussed at 3 international seminars, round tables and public hearings, to which foreign experts and scholars from Russia, Ukraine and Germany were invited. The most direct contribution was made by representatives of the Atameken National Entrepreneurship Chamber, Kazenergy, and other accredited private businesses.

The Entrepreneurship Code and the corresponding RK Law “On amending and amplifying certain legislative acts pertaining to entrepreneurship” were adopted on 29 October 2015. The purpose of adopting the Entrepreneurship Code was to improve and develop legislation of the republic of Kazakhstan pertaining to interactions between businesses and government, including state regulation of and support to entrepreneurship, bridging the gaps in the legal regulation of entrepreneurial relations and defining legal, economic and social conditions and safeguards to the freedom of entrepreneurship in the Republic of Kazakhstan.

The Entrepreneurship Code consolidates the earlier laws such as on private entrepreneurship, on state control and supervision in the republic of Kazakhstan, on peasants’ farms and farming, on investments, on competition, on state support to industrial and innovative activities, and some of the law on concessions.

In addition, on 29 December 2014 they adopted the RK Law “On amending and amplifying certain legislative acts bearing on issues of radical improvement in the conditions for entrepreneurial activities in the Republic of Kazakhstan” which provided for:

- gradual transition from planned inspections to risk-based inspections, and introduction of a possibility for the business to acquire, as an alternative to inspections, a liability insurance. Under a new risk assessment system, there will be selective inspections only of “potential violators”, thus ensuring a shift from the “detect and punish” policy to “prevent and encourage good faith businessmen” policies;
- fewer requirements that are subject to testing by state control and supervision;
- simplified procedures for the liquidation of small and medium businesses;

- stronger role of the National Entrepreneurship Chamber, among other things, by introducing the role of ombudsman for the rights of entrepreneurs;
- reducing the number of various permits;
- implementing the one stop shop principle for investors; obtaining industry-based assessments of construction documentation through one stop shop arrangements;
- simplified customs procedures;
- reducing the time needed to register a business to 1 hour, and abolishing the requirement to have a minimum charter capital of KZT 100;
- abolishing the mandatory requirement of a seal for private businesses;
- revisiting approaches to planning and conducting inspections of entrepreneurs. In some areas (sanitary and epidemiological supervision, fire safety, tax administration), off-site oversight and audit have been introduced as an alternative to inspections;
- a substantially simplified procedure for the liquidation of private businesses, shorter and less numerous procedures for obtaining a construction permit;
- in land use: abolishing classification of dedicated land plot uses and implementing 3 types of functional land use in townships (residential, social and commercial).
- to avoid unnecessary personal expenses in dealing with public authorities, abolishing the mandatory requirement for having notary certification of copies of documents; inspections of personal motor vehicles, not used for commercial purposes, if exploited for fewer than 7 years, or authorisation papers for driving somebody's transport vehicle.

At the present time, implementing the above changes, relevant departmental risk assessment systems, where needed, have been approved. Overall, according to Kazakhstan authorities, the reform has encouraged businessmen to conduct business in compliance with the law, thus allowing for fewer inspections into compliance whereas before, the entrepreneur, whether good or bad faith, was subject to inspections on a regular basis. Thus, the described changes help to maximize transparency of control and oversight by public authorities and to alleviate the administrative burden for businesses, which is expected overall to improve business climate in the country.

The Entrepreneurship Code has codified key laws regulating business activities. The Code covers provisions on economic competition, permits and notifications, technical regulation, state price regulation, mandatory insurance, state control and supervision. As a result, as of now these provisions have precedence over provisions of sectoral laws in the hierarchy of legal and regulatory acts.

The Code has implemented such new principles as incentives to social responsible business, limited presence of state in entrepreneurship, promotion of self-regulation in business, reciprocal responsibility of business and state.

The Code provides for the role of Ombudsman for the rights of Kazakhstan entrepreneurs, and an investment ombudsman.

Since 22 April 2015, the Law limiting the role of state in entrepreneurial activity has introduced the Yellow Pages Rules principles.

To reduce the state's presence in the economy, on 30 December 2015 the Government approved a new comprehensive 2016-2020 Plan for Privatisation whereby, during the 10 months of 2016, 83 out of 783 listed entities were effectively transferred into a competitive environment.

On 28 December 2015, the Government of Kazakhstan with its ruling approved a list of activities where quasi-government companies may engage in entrepreneurial business. This effectively has reduced the types of activities allowed for quasi-government entities (joint-stock companies, limited partnerships) by 47 per cent, from 652 to 346.

Following the instructions of the Head of Government urging to make sure that Kazakhstan moves up into the top 30 countries in the World Bank's Doing Business rating, the Government has been working consistently to reform current legislative acts.

To achieve the said goal, over the past 3 years 4 packages of legislative amendments have been approved to reduce the number of procedures, deadlines and costs to businesses, which, in turn, serves to alleviate the burden for business.

At his point in time, a fifth package of amendments to RK legislation has been drawn up and submitted to the RK Government, stipulating introduction of some systemic changes aligned with the rating's key indicators.

These changes are welcome as they are intended to improve business conditions and reduce possibilities for corruption. However, many new instruments and practices are yet to be implemented and made to work in practice. As business representatives reported during the onsite visit, investment and business conditions remained unsatisfactory. In particular, they talked about such issues as corruption and administrative pressure in courts, cumbersome licensing in construction and engineering, requirements to hire locally, non-recognition of permits issued in OECD countries, opaque procurement by Samruk-Kazyna fund and mineral resource companies, etc.

### ***Law on administrative procedures***

As reported by Kazakhstan authorities, pursuant to the decision of the RK President of December 2016, drafting of the Administrative Procedures bill (updated version) and the corresponding draft law has been postponed because of the need to discuss further the parameters of the administrative justice model. As a result, the draft law was omitted from the draft 2017 Plan of Legislative Work of the Government. Earlier, in 2015, the Ministry of Justice developed a draft law "On administrative procedures" (updated version) for which the Legal Analytics Institute offered its scholarly legal assessment.

### ***Administrative justice reform***

According to official reports in Kazakhstan, there are plans to set up, along with criminal and civil justice, administrative legal proceedings based on the currently existing system of specialised administrative courts where specialised panels are to be set up to adjudicate in matters of administrative offences and to look into public law disputes, which are to be transferred from the general jurisdiction court and specialised inter-district economic courts.

One of the key areas of the Kazakhstan 2050 Strategy has been defined by the Head of State as creating favourable investment climate to boost the country's economic potential. The Strategy notes that Kazakhstan is to become a regional magnet for investment. With the independent administrative justice in place, the operation of the government will become more open due to better connectivity to law and oversight by independent administrative courts, facilitating better economic and investment climate in the republic.

The Supreme Court has already drafted an Administrative Procedures Code. The draft Administrative Procedures Code has been published on the Supreme Court's web-site for public discussion.<sup>88</sup> The expert assessment of the draft Administrative Procedures Code of the Republic of Kazakhstan (authored by R.A. Kuybida, and O.A. Banchuk) has been published on the Legal Policies Research Centre's web-site.<sup>89</sup>

As suggested by the experts assessment, the draft law as assessed, in contrast to its previous version, is a very progressive documents, as it regulates 'a private person vs. an administrative authority' disputes and not the other way; it also provides for the introduction of some most important aspects of the administrative process, i.e. an active role of the court, the presumption of guilt of the administrative authority, and mediation, and it also allows for the implementation of some elements of e-justice. Noted as one of the merits of the draft Administrative Procedures Code is the fact the draft act will no longer regulate procedure relations in cases of administrative offences which legally may be closer to criminal than to administrative proceedings. Also, the administrative court will no longer have jurisdiction over actions of administrative authorities against private persons.<sup>90</sup>

### ***Conclusions***

In terms of **anti-corruption screening** of draft legal and regulatory acts, Kazakhstan has made some progress in that results of such screening are published together with the proposed drafts whereas the

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<sup>88</sup> See at: <https://goo.gl/mruv78>.

<sup>89</sup> <https://goo.gl/bDvv1U>.

<sup>90</sup> Op. cit.

assessment itself is conducted by a state authority (Ministry of Justice) as part of the general legal assessment. At the same time, such legal assessment (and hence its anti-corruption element) is not done for all draft NLAs as recommended. The assessment is conducted for draft legal acts drawn up as part of the legislative initiative granted to the RK Government, except for: draft legal and regulatory resolutions of the Parliament; normative resolutions by the Constitutional Court; legal and regulatory resolutions of the central Election Commission, Audit Committee for the monitoring of the execution of the republican budget, National Bank or other central government authorities; legal and regulatory orders by ministers of the Republic of Kazakhstan and other heads of central government authorities; legal and regulatory decrees by heads of agencies of central government; legal and regulatory decisions by maslikhats, akimats, audit commissions. However, such draft laws are assessed as part of their statutory registration pursuant to Article 44 of the Law on legal acts.

A scholarly assessment which also covers an anti-corruption screening, is mandatory for draft NLAs tabled at the Parliament of the Republic of Kazakhstan, except when draft laws are being submitted as part of the legislative initiative of the President of the Republic of Kazakhstan, “where such assessment does not have to be conducted”.

Thus, this part of the recommendation is complied with in part, since draft legislative acts submitted by the RK President are not subject to anti-corruption screening.

As to the amendments to the provision of the Law on **state control and supervision**, note the adoption of the new RK Entrepreneurship Code, which has repealed that law, and the Law on Private Entrepreneurship. As a result, this part of the recommendation pertaining to the need to reconcile these two laws has been complied with. The new code does not regulate issues of internal control at government institutions, and focuses on protecting the rights of businessmen. Also, welcome and deemed as positive are the significant steps made by Kazakhstan towards simplification of business conditions and rules of operation, fewer oversight powers and grounds for abuse. This part of the recommendation may be deemed complied with.

Drafting of the new version of the **Administrative Procedures Law**, deplorably, has been halted by the decision of the RK President “because of the need to have additional discussions on the parameters of the administrative justice model”. Therefore, this part of the recommendation has not been complied with. At the same time, the monitoring group welcomes the reports of Kazakhstan authorities that in the near future there are plans to finalize the drafting of the legal regulation mechanism in the administrative justice model and incorporate the development of the draft Law “On Administrative procedures” in the 2018 Legislative Plans of the Government.

The development of an **Administrative Procedures Code** by the Supreme Court is welcome. The draft code has been highly regarded by experts, and complies with the recommendation to exclude proceedings on administrative offences from it. However, since the code is still to be adopted or even tabled at parliament, this part of the recommendation is deemed as not complied with. According to Kazakhstan authorities, “the specific developments in that area have been scheduled for the first part of 2018.”

**Overall, Kazakhstan is partially compliant with recommendation 3.3.**

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

- 1. Ensure mandatory anti-corruption screening of all draft laws submitted for consideration to the Parliament irrespective of the subject of legislative initiative and also continue screening of draft acts of the President, Government, and ministries. The results of the screening must be published online (within a reasonable time prior to adoption of the draft) whereas the screening methodology should be discussed with civil society and academic institutions, and be subject to a periodic review. To consider ensuring anti-corruption screening as a separate procedure carried out by a public authority.*
- 2. Continue selected anti-corruption screening of the active laws and codes in areas of regulation most vulnerable to corruption risks.*
- 3. Adopt and enforce a new legislative act on the administrative procedure in compliance with international standards.*
- 4. Adopt and enforce the administrative adjudication procedure code that should not regulate issues of administrative liability, as well as set up specialised administrative courts with the jurisdiction*

*over claims by private persons against public authorities.*

***Recommendation 3.6. of the Second Monitoring Round Report on Kazakhstan (recommendation was confirmed during the Third Monitoring Round)***

1. 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.
2. To achieve compliance with standards of the Extractive Industries Transparency Initiative.
3. 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.
4. 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.

***Law on Access to Public Information***

***«To ensure speedy adoption of the Law on Access to Public Information, which would comply with international standards and recommendations.»***

After a long period of drafting, Kazakhstan adopted the Law “On Access to Information” (ATI) on 16 November 2015. This important step, which Kazakhstan has taken so long to take, merits welcome. According to NGOs, the drafting and adoption of the RK Law “On Access to Information” were initiated by RK MPs and enjoyed steady support by Kazakhstani non-government and international organisations.

Having the ATI law drafted and adopted was envisaged in a handful of strategic and programme documents of later years, as, e.g., “Five Institutional reforms”, Plan of the Nation “100 specific steps”, or the 2015-20125 Anti-Corruption Strategy of the Republic Kazakhstan.

Having the law adopted is just a first, albeit important, step towards the establishment and exercise of the human right of access to information, and towards ensuring transparency and accountability of public authorities. Also, this law may become an important tool of corruption prevention and detection.

At the same time, the law as adopted is not fully in line with international standards or best practices, which may negatively impact its further implementation and effectiveness.

According to the Global Right to Information Rating the adopted Law “On Access to Information” was given 61 points out of 150. As a result, Kazakhstan was ranked 104<sup>th</sup> in the rating of 111 countries with similar laws.<sup>91</sup> This is quite low among the countries that recently adopted laws on access to information. Although many OECD countries also have low levels in the ranking, this is because the relevant laws in these countries were adopted a considerable time ago and no longer meet good practice standards, however often it does not affect the exercise of the right to access to information in practice and it remains high in most of these countries.

Experts from the Legal Policy Research Centre<sup>92</sup> (LPRC) believe it was an objective assessment reflecting true legal gaps and conflicts in ATI: weak safeguards to enforcement and protection of the right of access to information, failure to comply with the basic principles of freedom of information.

Listed below are the major defects of the RK Law “On Access to Information” which, in the opinion of NGO experts, testify to its non-compliance with international standards and recommendations:

<sup>91</sup> See at: [www.rti-rating.org/country-data](http://www.rti-rating.org/country-data).

<sup>92</sup> For more details and publications on access to information in Kazakhstan see [www.lprc.kz](http://www.lprc.kz).

- the law fails to stipulate the presumption of openness of all information belonging to the jurisdiction of government authorities unless it falls under the clear and precise list of exemptions. The RK Law “On Access to Information” fails to proclaim the principle whereby all information is deemed open, and also fails to provide a narrow list of exemptions as required by the basic principles. Instead, the law stipulates different categories, e.g., “information with restricted access”, “information access to which may not be restricted”. The first category covers: state secrets protected by law and proprietary information labelled “for internal use only”. Such division of information handled by government bodies and other authorities or organisations fails to facilitate the key objective: changing the culture of secrecy and a closed nature of government authorities to a culture of openness and transparency;

- the RK Law “On Access to Information” does not have precedence: there is a parallel effective RK Law “On the procedure for handling applications from individuals and legal entities”, there are also provisions in other laws, regulating access to specific information: RK Law “On Mass Media” for reporters, RK Law “On the national archive fund and archives”, for access to archived information);

- lack of the tripartite test, a universal legal toolkit which implements fully the principle of ultimate openness of information and proportionality of any restriction to the right to information. The proportionality principle may be reflected in Article 5 of the ATI (“...only to the extent that is needed for purposes...”), however, without further detailing in the form of a full-fledged tripartite test it is highly unlikely it will be applied consistently in practice or applied at all, even by courts;

- without the list of exemptions or mechanisms enforcing and protecting the right of access to information, the law lacks efficiency. The ATI does not have sufficient legal safeguards, and it offers weak protection to the right of access to information;

- lack of provisions establishing an independent administrative body to handle complaints against unlawful actions by public officials in the area of access to information, or complaints against the violation of the right of access to information. Such acts may only be appealed to a higher officer or authority and in courts. Note that these procedures are far from straightforward, or free, and may take a lot of time. Experts believe that the rules and regulations of the Commission on issues of access to information in the law fail to ensure the appropriate level of appeal set by the basic standards of freedom of information. This Commission on issues of access to information has a limited status and no jurisdiction over complaints against violations or restriction of right of access to information;

- administrative fines stipulated by the Code of the Republic of Kazakhstan on administrative offences are insignificant. The extent of liability of public officials for the violation or restriction of the right of access to information as provided by the RK Law “On Access to Information” is insufficient;

- lack of provisions intended to protect whistle-blowers, i.e. persons that report information helpful in the detection of an offence;

- lack of provisions that obligate information holders or government authorities to implement measures promoting the law. This makes the law vulnerable when applied in practice. Information holders are not obligated to maintain registers of documents that they adopt and issue. Nor is there any such obligation binding on them to set up any structural units responsible for the enforcement of and compliance with the law.

This assessment is overall in line with the notes offered by the Report on the 3<sup>rd</sup> round of monitoring of Kazakhstan on an earlier draft. According to the team of monitors, these deficiencies undermine significantly the effectiveness of the new law, and they should be remedied as a matter of urgency. The authorities of Kazakhstan disagreed in their comments with these notes and pointed out that the list of rights of citizens defined by the Law enables to exercise their right of access to information in full and freely.

There are issues with ATI implementation in practice too. Journalists, civil activists, and NGO members, all insist that so far there has been little progress in ensuring access to information about the work of government authorities, and that their web-sites have not become more informative.<sup>93</sup>

According to the Legal Policy Research centre (LPRC), the following regulatory and legal acts were passed in 2015-2016 to implement the ATI:

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<sup>93</sup> See, e.g., <https://goo.gl/yZUSKT>.

- on determining the amount of actual copying or printing costs, and the procedure for their compensation to the information holder, and on exempting vulnerable groups of population from paying the actual copying or printing costs;
- on approving the Rules for classifying information as proprietary, with restricted circulation, and handling it;
- on approving the Statutes of the Commission on issues of access to information;
- on the composition and rules and regulations of the Commission on issues of access to information;
- on approving the Rules for the publication of information on the Open Budget web portal;
- on approving Rules for the publication of information on the Performance Assessment web portal;
- on approving Rules for the publication and public discussion of draft law concepts and draft legal and regulatory acts on the Open NLAs web portal;
- on arranging accountability meetings with communities by heads of central executive authorities, akims, and presidents of national universities;
- on amending model terms of reference of an RK central government authority, some of its instructions, and also the rules and regulations of the RK Government.

The NGOs noted that most of secondary acts implementing the RK Law “On Access to Information” were adopted without any public discussion in December 2015. NGOs conducted their assessments of the approved implementation acts and identified certain substantial deficiencies and contradictions, and made some recommendations to remedy those.<sup>94</sup> However, the majority of NLAs have never been amended. NGO experts note the low quality of approved regulations, their conflicts with legislative provisions, and concluded that not only would they not facilitate ATI efficient implementation in practice, but rather would impede it.<sup>95</sup>

In May 2016 the Committee for communications, informatization and information of the RK Ministry for Investment and Development, which was the authorised government authority responsible for issues of access to information, was abolished, and a new RK Ministry of Information and Communications was set up.<sup>96</sup> The new ministry includes a Committee on Information, and also an Informatization Department which are responsible for implementing and promoting the Open Government online services,<sup>97</sup> provided for under Article 17 of the Law “On Access to Information”. The RK Ministry for Information and Communications is now the authorised government authority for the implementation of the ATI.

According to NGOs, the new Ministry has so far been active only in promoting the Open Government portal and its components. Since 1 January 2017, yet another service, Assessment of State Authorities Performance, has come on line. The Ministry is not engaged in any outreach or promotion of the above online services.

The Ministry of Information and Communications noted in its comments that in 2017 funds are allocated for a complex of activities (media coverage, social media, tenders) in order to exercise promotion of the portals aimed at informing the public of the Open Government possibilities. At present preparations to implement the activities are under way. In addition, since the beginning of the year the Ministry jointly with JSC "National Information Technologies" have conducted a series of actions to add contents to the portals of the Open Government with the necessary information in line with the Law "On Access to Information": notification of holders of information – public authorities about the entry into force of rules on publishing information on the Open Government portals, identifying persons responsible for placement, provision of

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<sup>94</sup> See, e.g., recommendations on amending the Resolution of the RK Government of 31 December 2015, No 1175, “On approving Statutes of the Commission on issues of access to information”, available at: <https://goo.gl/Ay6hMT>.

<sup>95</sup> For more detailed assessment of regulations implementing the RK Law “On Access to Information” see at <http://lprc.kz/ru/library>.

<sup>96</sup> The official web-site of the Ministry of Information and Communications of the Republic of Kazakhstan is [www.mic.gov.kz/ru](http://www.mic.gov.kz/ru).

<sup>97</sup> The Open Government portal is a subdomain of E-Government and is to be found at: <https://open.egov.kz/>. It offers four main online services: Open NLAs (<https://legalacts.egov.kz/>), Open Data (<https://data.egov.kz/>), Open Dialogue (<https://dialog.egov.kz/>), and Open Budgets (<https://budget.egov.kz/>)

access to portals, training seminars, telephone consultation on handling the Open Government portals. Since the beginning of 2017, 224,119 people have visited the Open Government portal.

In August 2016, the RK Ministry of Information and Communications announced that they were drafting the Rules for information work conducted by central and local executive authorities, “whereby authorised public officials shall be personally responsible for information and awareness work”.<sup>98</sup>

The Ministry of Information and Communications has been monitoring on a regular basis web resources of central and local executive authorities by 52 indicators stipulated in Article 16 of the RK Law “On Access to Information”. Based on this monitoring, the government authorities are issued recommendations as to how align the contents of their web resources. Additionally, they monitored compliance with the requirement to place information on the premises occupied by information holders.

The monitoring is conducted once every six months to evaluate official web resources of government authorities on a scale of 20. The methodology suggests assessing efficiency of web resources according to three main indicators: accessibility of web resources, completeness and relevance of information, and the mobile version. Based on the earlier 2016 assessment, it was found that the majority of web resources maintained by government authorities are in need of updating their information, and be faster in placing draft NLAs and approved NLAs, and budget data.<sup>99</sup>

Under Art. 9, paragraph 2, subpara 10), of the RK Law “On Access to Information”, holders of information, including government authorities, must ensure internal control over the quality and promptness of the disclosure of information. Same measures are also stipulated in regulatory and legal acts concerning document flow in government authorities. However, there is no information as to the enforcement of these provisions.

The Ministry of Information and Communications has a Division for the elaboration of state policies in the area of access to information, within the Department of state policies in the area of mass media (two employees).

NGOs note that since the RK Law “On Access to Information” does not require to appoint or set up specialised units or officers responsible for its implementation, nor does it offer specific measures to promote it, the internal control is limited to the same resources and capacities that had been there before the law was passed. The RK Law “On Access to Information” prescribes “*personal responsibility of heads of information holders for the organisation of work with individual applications and arrangements for their receipt, registration, accounting and consideration*”. For instance, it is the existing staff of government authorities that is charged with the publication of information on the component of the Open Government portal.

**The Commission on the issues of access to information** was established as an advisory and consultative body advising the RK Ministry of Information and Communications. Its rules and regulations have been approved with the resolution of the RK Government, and its membership is approved with the order of the head of the authorised government authority. Initially, the Commission had no representation of NGOs, mass media or other information users; in the autumn of 2016, its membership was rotated through the inclusion of more than 10 representatives of NGOs and industry associations.<sup>100</sup>

The Commission’s functions and competence are limited by its advisory and consultative status. Decisions passed by an advisory and consultative body (ACB) are for guidance only, and the government authority that it advises may disregard its decisions. Any ACB tends to act quite formally. As for the Commission on issues of access to information, according to NGOs, its formalistic and declarative nature is only underscored by the lack of the function that looks into complains against violations or restriction of the right of access to information. Under its rules, the Commission on issues of access to information holds its meetings “no more often than once every six months”.

Kazakhstani NGOs point out that the approved rules and regulation of the Commission on issues of access to information run counter to Article 19 of the RK Law On Mass Media whereby the commission is to be

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<sup>98</sup> For more details see at <https://goo.gl/tCKvE3>.

<sup>99</sup> See the report on the monitoring of official web resources of government authorities for June-December 2016 at <https://goo.gl/YcSUdp>.

<sup>100</sup> The new membership of the Commission on issues of access to information is available at: <https://goo.gl/JwaTvr>.

“established for the purpose of maintaining and protecting public interests in the area of access to information, as well as meeting the needs of information users”. Additionally, the commission’s rules fail to take into account principles of transparency and openness to be observed while discussing issues; its functions are extremely narrow as are also powers and competence of the commissioners.<sup>101</sup>

According to NGOs, they have repeatedly called for attention and directed their suggestions to the RK Ministry of Information and Communications and RK Government urging amendments to the Commission’s rules and regulations, broadening its functions, ensuring appropriate frequency of its meetings, better performance, openness and accountability.<sup>102</sup> However, so far there have been no changes to the Commission’s rules and regulations.

The Ministry of Information and Communications reported that amendments to the regulations of the Commission on access to information are under way. In May 2017, this issue was introduced at the meeting of the Commission.

Since 2016 the Commission on issues of access to information has held only two meetings. These meetings recommended that:

1. A working group should be set up to consider suggestions on access to information within the competence of the Government of the Republic of Kazakhstan, in particular amending the resolution of the Government of the Republic of Kazakhstan of 31 December 2015, No 1175, “On approving Rules and Regulations of the Commission on issues of access to information and the draft law “On amending and amplifying certain legislative acts on issues of information and communications””.
2. The Central government authorities, akimats of the cities of Astana, Almaty and the regions shall:
  - 1) starting 1 January 2017, ensure online web broadcasting of open sessions of the chambers of the Parliament of the Republic of Kazakhstan, including joint ones, those of local representative bodies of the region, republican city, capital city, and plenary sessions of government authorities reporting on progress for the year;
  - 2) make sure that their web resources are adapted for the needs and requirements of the disabled people.

There is no unified statistics of information requests, nor is there a register of information announcements. Kazakhstan authorities provided data on the number of applications by citizens, the total of which also includes information requests, which are not identified separately.

According to the Open Government portal statistics, the blog platform of the heads of government authorities and local executive bodies (akimats) has received 178,225 applications, of which 584 have been redirected, and 133,938 have been responded to (<https://dialog.egov.kz/>). It is unclear how many of those had to do with access to information.

An online polling of journalists conducted by Internews-Kazakhstan in December 2016, 79.81% of the reporters surveyed (a representative sampling of 105) pointed to delays in responding to requests as the most frequent violation of the right of access to information.

Based on the NGO monitoring of the ATI’s first year in application, the following key issues have been identified:

- 1) poor awareness of both information holders, largely government authorities and quasi-government companies, and information users about the duties and opportunities stated in the law. The holders are not aware of their duties under law, and the users do not know how to apply the law;
- 2) lack of control over enforcement of the law. Apart from the official monitoring of the information holders’ web-sites and some control over the contents of the Open Government portal, other requirements are not being properly controlled;
- 3) lack of measures promoting the law and popularising it either in the law itself or in practice. Promotion may include such measures as raising public awareness and making the law better

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<sup>101</sup> The Rules and regulations of the Commission on issues of access to information are available at: <https://goo.gl/v7F6o9>.

<sup>102</sup> See proposals by the Legal Policies Research centre, Internews-Kazakhstan on changing the status of the Commission on issues of access to information, its functions, powers and competence at: <https://goo.gl/JrDo2z>.

- known; incentivising its active application; training and enhancing skills of the authorised staff, etc.;
- 4) lack of adequate resources – technical, human or others – at the information holders, first and foremost, government administration;
  - 5) inaction on part of the Commission on issues of access to information; its status, functions and competence;
  - 6) the number of regulations adopted to implement the ATI.<sup>103</sup>

According to NGOs, in 2016 training was provided for the personnel at government authorities and bodies of local self-government as well as information users (NGOs, mass media, civil activists). The series of seminars and training sessions were held jointly by UNDP, the OSCE Programme Office in Astana, Majilis of the RK Parliament, with the support of local executive authorities. Seminars and training sessions (the total of 27) were conducted in Russian and Kazakh in Almaty, Astana, Uralsk, Petropavlovsk, Ust-Kamenogorsk, Kyzyl-Orda, Shymkent, Aktau, Karaganda, and Kokshetav. The programme covered basic standards of freedom of information, provisions of the RK Law “On access to information”, rights and duties of information users and information holders, means and forms of obtaining information, liability of information holders for violating or restricting the right of access to information. Kazakhstan NGOs provided trainers.

### ***Liability for violating the right of access to information***

#### ***To revise provisions on liability for non-provision or incomplete (untimely) provision of information upon request of individuals and legal entities.***

A commensurate and proportional penalty for violating the right of access to information is an important factor for the efficient implementation of the Law “On Access to Information”.

Kazakhstan has reviewed and revised those provisions of the Code of Administrative Offences that deal with the liability of public officers for violating various requirements of the legislation on access to information. It was done as part of the drafting of the corresponding amendments, the Law of the Republic of Kazakhstan “On amending certain legislative acts of the Republic of Kazakhstan on issues of access to information”.<sup>104</sup>

Now the Code of the Republic of Kazakhstan incorporates a new article (Article 456-1) stipulating an administrative liability for public officers for restricting the right of access to information. The new article classifies elements of crime by mode of access to information; strengthens penalties depending on the subject of administrative impact; provides for an administrative liability for repeated acts. Under Article 456-1, an administrative sanction for violating the right of access to information may be imposed on commercial and non-profit organisations as well as on the officers.

However, as is justly underlined by NGOs, administrative penalties under this article are insignificant. The most serious administrative offence, unlawful classification of information as restricted, sets the fine at 20 multiples of the monthly reference indicator, or about Euro 130. At the same time, according to the authorities of Kazakhstan these fines are adequate and proportionate to the offence. According to the Ministry of National Economy at present the average salary in the country is 136 thousand KZT. The abovementioned fines are about 30-50% of an official’s monthly income.

In addition, there is no liability for failing to respond to information requests (“administrative silence”), or for untimely response or incomplete information provided.

There is zero statistics on the application of Article 78 (Refusing an individual access to information) or Article 456-1 (Unlawful restriction of the right of access to information) (statistic data of the Legal Statistic Committee or special registers of the RK Office of the Prosecutor General).

In 2014, Article 84 (Denial of information to an individual or, equally, unlawful restriction of the right of access to information resources) of the 2001 RK Code of Administrative Offences led to just one resolution dismissing the proceedings, and one resolution imposing an administrative sanction (a fine).

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<sup>103</sup> Source: <https://goo.gl/pMxnkL>.

<sup>104</sup> Law of the Republic of Kazakhstan “On amending certain legislative acts of the Republic of Kazakhstan on issues of access to information” of 16 November 2015, No 404-V ZRK. The text is available at: <https://goo.gl/kKZvEv>.

## **Extractive Industries Transparency Initiative**

### ***To achieve compliance with standards of the Extractive Industries Transparency Initiative***

According to the public foundation Institute for National and International Development Initiatives, since 2012, the EITI implementation in the Republic of Kazakhstan has been going on steadily, without halts or breaks (in contrast to what happened before). Parties to the EITI (companies, general public and government authorities) are truly independent in their decision-making. Kazakhstan has been one of the first countries to introduce EITI reporting on social investment and has been one of the first to publish these data although it was not strictly mandatory. In the EITI national report for 2015,<sup>105</sup> these data were fully reconciled under the EITI standard with data from local government (akimats).

Kazakhstan has produced an interactive extractor map with some EITI data. The 2014 and 2015 statements were also produced in a user-friendly format for boarder readership/general public. Under the new 2016 EITI standard, a road map was developed for the introduction data on beneficiaries (information on beneficiary ownership in extracting companies) in the EITI reporting.

In 2016 Kazakhstan hosted an EITI International Board session. Kazakhstan is still in the pre-validation period, with validation scheduled for later in 2017. Under the EITI standard, all information about the EITI progress and impact on the economy shall be reflected in EITI national reports available on the web-site of the Committee on Geology and Mineral Resources of the RK Ministry of Investments and Development.<sup>106</sup>

According to the information available on the EITI web-site, Kazakhstan is compliant with the Initiative's standards under the 2011 rules (validation under the new standards should have started on 1 July 2017).<sup>107</sup>

### ***Open data***

The obligation to publish and provide information in the open data format has been enshrined in two laws: the RK Law "On Access to Information" and the RK Law "On Informatization". The duty for publishing open data is vested in government authorities, state legal entities, legal entities with a government interest in the charter capital, and in bodies and institutions of legislative, executive and judiciary branches of power, local administration and self-government.

The Open Government has an Open Data section (<https://data.egov.kz/>). It has published 2,170 sets of open data of central government, local executive authorities and other organisations, however, for lack of hit statistics for the portal, it is difficult to draw any conclusions on the popularity of open data with businesses, civil society or mass media. Implementing the legislative requirements as to information accessibility in the open data format, each of the information holders has approved their lists of open data sets to be published on the Open Government portal. The approved open data sets, as a rule, replicate the information already available on the web-sites of the government authorities and do not provide open access to databases or registers maintained by the government authorities and actually quite sought after.

There is training provided for civil servants on procedures for publishing open data on the portal, on the other hand, NGOs and the joint-stock company, National Information Technologies, offer training to mass media and all parties concerned, including applications developers, in the use and application of open data in their operations.<sup>108</sup>

### ***Transparency of budget information***

The following measures have been taken to ensure transparency and accessibility of budget information:

1. Administrators of budget-supported programmes are obligated to publish draft budget programmes, reports on the execution of budget programmes and their public discussion, in the Open Budgets section of the Open Government portal (<https://budget.egov.kz/>);<sup>109</sup>

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<sup>105</sup> EITI national reports are available at: <http://eiti.geology.gov.kz/ru/national-reports>.

<sup>106</sup> For more details about the implementation of the Extractive Industries Transparency Initiative in 2014-2016 see at: <http://eiti.geology.gov.kz/ru/>

<sup>107</sup> <https://eiti.org/kazakhstan>.

<sup>108</sup> For more details go to: <https://goo.gl/673TMg>; <https://goo.gl/ZHswGx>; <https://goo.gl/ofud3c>.

<sup>109</sup> The duty to publish budget programmes, reports and their public discussion, together with the results of state audit and financial control, is stipulated in the RK Budgetary Code, RK Law "On Access to Information", and under the order by the acting Minister of Investment and Development of the Republic of Kazakhstan of 30 December 2015, No

2. Government authorities, institutions, quasi-government companies and legal entities that are granted budgetary funds are obligated to disclose, on their respective web-site, budget allocations (draft republican and local budgets, budget reporting, consolidated financial statements; outcomes of state audits and financial control);

3. Draft budgets and budget-sponsored programmes must be coordinated with public councils and the National Entrepreneurship Chamber.

While the Open Budgets shows the statistics of more than 13,5 thousand draft budget programmes, it is difficult to conclude on the extent of the public involvement in the discussion of draft budget programmes or reports on the execution of budget, as there is no statistics on hits.

According to NGOs, it is not infrequent that information holder do not comply with the requirement to have budget-related information published on their web-sites, and or provide this information even in response to written requests. Additionally, there is weak compliance with the requirements to central government authorities to publish civilian budgets,<sup>110</sup> and most ministries either fail to publish their civilian budgets at all, or do that with violations.

### ***Public registers***

Almost all of the above government registers are virtually closed and inaccessible for public scrutiny. While some of the online resources are open for public access (e.g., the register of state-owned enterprises or the register of companies to be privatised), other registers offer restricted access or else their information may only be provided to government authorities. The register of legal entities has a limited access on the Government portal.<sup>111</sup> The service is only available to registered users with an electronic digital signature. The open access is provided for the information on administrative and criminal offences, there are online services to follow up on fines, certificates, applications, etc.

The e-procurement web portal ([www.goszakup.gov.kz/](http://www.goszakup.gov.kz/)) was at one time open to public, but currently access to the information on the portal requires from the users to register and have a security certificate.

Many e-services of the Committee for state revenues of the Ministry of Finance of the Republic of Kazakhstan (<http://kgd.gov.kz/ru/all/services>), such as the VAT payers register or the tax payer search facility, are in open access.

There is a public domain *Edilet* legal information system (<http://adilet.zan.kz/rus>), with the register of adopted NLAs.

### ***Defamation***

***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***

According to NGOs, in the autumn 2016, the RK Ministry of Information and Communications initiated the drafting of amendments to the RK Law “On Mass Media”, which included proposed amendments and amplifications to Article 26 of the law that lists grounds for exempting journalists and mass media editors from liability for spreading inaccurate information (the list of grounds is to be expanded).<sup>112</sup> Representatives of foreign NGOs prepared and submitted their proposals to the ministry, and some of them were accepted.

As noted by NGOs, in the absence of legislative initiatives or other measures aimed as limiting liability for defamation, deontological documents are being passed with ambiguous provisions on liability for defamation or charges for corruption. For instance, the RK Code of the civil servant, which is effective since 1 January 2016, obligates civil servants, on the one hand, “with their actions and behaviour, give no

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1271, “On approving the Rules for the publication of information on the open budgets web portal”. The text of the order is available at: <https://goo.gl/FxVFgU>.

<sup>110</sup> Methodology for the formulation of civilian budgets has been approved with the order of the Minister of Finance of the Republic of Kazakhstan of 27 June 2011, No 331. The text of the document is available at: <https://goo.gl/bcu5sQ>.

<sup>111</sup> <https://goo.gl/8iY6Lo>.

<sup>112</sup> The draft RK Law “On amending and amplifying certain legislative acts of the Republic of Kazakhstan on issues of information and communications”. The summary table of proposed amendments and amplifications is available at: <https://goo.gl/L2thso>.

grounds for criticism by the public, disallow persecution for criticism, rely on constructive criticism to remedy shortcomings and improve one's performance", and on the other, recommends that "should there be any ungrounded public accusations of corrupt practices, the civil servant must, within one month after such allegations become known, take steps to refute them".

In November 2016, the Code of Ethics for Judges was adopted which, although limiting the judicial community in commenting or making public statements, recommends however that "suing at court for the protection of honour, dignity and business reputation can be allowed in exceptional cases when other remedies to protect the judge's reputation have been exhausted".

In the opinion of NGOs, since 2014 no steps have been taken to consider the possibility of repealing criminal liability for libel and insult or similar special types of offences against public officials. According to Kazakhstan authorities, the Government, Prosecutor General's Office and Parliament looked into repealing criminal liability for defamation during the drafting and discussion of the draft new Criminal Code. Ultimately it was decided to retain such liability.

In 2015-2016, more criminal prosecutions of reporters and members of the public for the exercise of their right to freedom of speech and dissemination of information were recorded (55 criminal cases in 2016, 77 in 2015, and 38 criminal cases in 2014). It resulted from stricter criminal laws on libel, insult, dissemination of knowingly false information, propaganda of terrorism and extremism, inciting social, ethnic or religious enmity. The libel (Article 130 of the RK CC) and insult (Article 131 of the RK CC) alone were used to charge 42 people, of which 7 were journalists. After criminal proceedings, most of the cases lead to mediation and acquittals. There were only 4 convictions in 2016, with the restriction of freedom and fines as the maximum penalty.<sup>113</sup>

According to NGOs, it appears to suggest that most of the criminal charges of libel or insult are never substantiated in court. However, the criminal liability as it is and a possibility to prosecute a reporter criminally is a "chilling" factor for the professional journalist community, hampering their investigative journalism and anti-corruption reporting and publications.

Below are some data from the Legal Statistics Committee and special registers of the RG Office of the Prosecutor General.

**Table 12. Statistics of prosecutions for libel, insult and dissemination of knowingly false information**

Article of the Criminal Code	Number of verdicts		
	2014	2015	2016
Art. 130 (libel)	177	231	272
Art.131 (insult)	100	174	205
Art. 274 (dissemination of knowingly false information)	1	3	4
Art. 373 (public insult aimed at the First President of the Republic of Kazakhstan – Nation's Leader)	0	0	0
Art. 376 (offence against honour and dignity of a member of parliament)	0	0	0
Art. 378 (insulting a representative of authorities)	32	404	495
Art. 411 (libel against a judge or a prosecutor)	0	2	0

Source: data of the Legal Statistics Committee and special registers of the RK General Prosecutor's Office.

**Table 13. Statistics of penalties used in the offences of libel and insult in 2016**

Criminal sanction	Art. 130 of the CC (Libel)	Art. 131 of the CC (Insult)
Deprivation of liberty	1	0
Fine	13	58
Probation	1	0
Community works	0	32
Restriction of freedom	10	0

Source: data of the Legal Statistics Committee and special registers of the RK General Prosecutor's Office.

<sup>113</sup> Statistics of judicial proceedings against mass media, journalist or individuals pertaining to the right of freedom of speech, January-February 2016, International Foundation for the Protection of Freedom of Speech, *Adil Soz*. For more details see: <http://www.adilsoz.kz/politcor/show/id/190>; <http://www.adilsoz.kz/politcor/show/id/175>

**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.**

On 1 January 2016, the new version of the RK Civil Procedures Code was made effective; claims of monetary damages for moral suffering caused by the dissemination of statements that besmear honour, dignity or business reputation are now classified together with pecuniary claims.<sup>114</sup> The RK Tax Code prescribes taxing claims by individuals of monetary compensation of moral damages suffered through dissemination of statements besmearing honour, dignity and business reputation at 1 per cent of the amount of the claim; claims by legal entities of damages caused by the dissemination of statements besmearing business reputation are taxed at 3 per cent of the amount of the claim.<sup>115</sup> Previously such claims were qualified as non-pecuniary, and because of a small state duty charged for the trial (50% of 1 monthly reference indicator), there were a lot of them. Reporters and mass media are the most frequent defendants in such proceedings.

In autumn of 2016, the RK Parliament debated a draft law “On amending and amplifying certain RK legislative acts bearing on civil law issues”. And although NGOs provided their suggestions for reducing the statute of limitations in cases alleging protection of honour, dignity and business reputation, Majilis deputies refused to support them.

During the 2016 monitoring, the International Foundation for the Protection of Freedom of Speech, *Adil Soz*, recorded a smaller number of actions and lower amounts of claims in cases against journalists and mass media (64 claims in 2016 vs. 110 claims in 2015; KZT 736,460,001 claims in 2016 vs. KZT 880,400,001 in 2015).<sup>116</sup>

However, according to data available to NGOs, there were other issues during the year: if an action claiming protection of honour, dignity or business reputation is raised as part of criminal proceedings, the state duty is not differentiated but charged at a rate of 50% of the monthly reference indicator. In addition, under the effective RK tax laws, whereas government institutions are exempt from state duties, statistics suggests that the most frequent plaintiffs in slander suits are civil servants and legal entities (including government institutions and enterprises).

**Table 14. Statistics on the amount of claims of moral damages awarded against journalists and mass media**

Year	Damages claimed	Damages awarded
2016	KZT 736 460 001	KZT 42 260 000
2015	KZT 880 400 001	KZT 41 435 000 (between September 2014 – May 2015)
2014	KZT 724 400 000	No data

Source: data of the International Foundation for the Protection of Freedom of Speech, Adil Soz, [www.adilsoz.kz](http://www.adilsoz.kz).

According to the authorities, the Justice Academy offered seminar training (Supreme Judge S.A. Abdrakhmanov) under the topic “Judiciary practice in cases involving claims of moral damages” (30 October 2016, for judges of district and equivalent courts; 15 November 2016, for presiding judges of district and equivalent courts).

In the course of 2014-2015 the following training sessions were provided for judges at upgrading courses: “Judiciary practice in cases involving claims of moral damages”, “Practice of compensation for material damage or moral injury and civil law claims in the criminal process”. The training was in the form of lectures and workshops. The audience included judges of district and equivalent courts trying criminal, civil

<sup>114</sup> Article 104 of the Civil Procedures Code of the Republic of Kazakhstan. The text of the code is available at: <https://goo.gl/fmrKHU>.

<sup>115</sup> Article 535 of the Code of the Republic of Kazakhstan “On Taxes and other Mandatory Charges to the Budget”. The text of the code is available at: <https://goo.gl/rrqqYE>.

<sup>116</sup> Statistics of judicial proceedings against mass media, journalist or individuals pertaining to the right of freedom of speech, January-February 2016, International Foundation For the Protection of Freedom of Speech, *Adil Soz*. For more details see: <https://goo.gl/WgfMLM>; <https://goo.gl/YmCpLm>.

and administrative cases, and judges of regional and equivalent courts. The lecturers were Supreme Court judges G.O. Ryspekova, Ye.Zh. Ismailov, S.A. Abdrakhmanov, and Supreme Court Judge, retired, A.R. Ryskaliev. The training was prepared by the Supreme Court together with its Justice Academy (prior to 2016, Institute of Justice of the Presidential Government Administration Academy).

### **Conclusions**

Kazakhstan has made an important step, having approved in 2015 and started implementing the long-awaited **Law “On Access to Information”**. This is a first law on access to information in Kazakhstan. While the law has a number of positive provisions, it fails to comply with the key international standards and best practices and ought to be amended as a matter of urgency. The application of the law has been lacking, and there is no efficient control over its enforcement. In this regard, the Commission on issues of access to information must have its role enhanced and powers broadened, by changing its status and ensuring its independence from executive authorities.

Kazakhstan has revised, as recommended, **provisions on administrative liability for the violation of the right of access to information**. It is a welcomed fact. However, certain violations (untimely response to information requests, incomplete disclosure of information, failure to respond to requests) have not yet been covered. In addition, the sanctions as provided cannot be deemed effective. Also, indicative is the fact that new provisions are not being applied (as was typical of the previous version of the administrative liability provision).

Kazakhstan is partially compliant with this part of the recommendation.

On the **Extractive Industries Transparency Initiative**, according to the information on the Initiative’s web-site, Kazakhstan is compliant with the Initiative’s 2011 standards (the new standards validation was to start on 1 July 2017). Therefore, Kazakhstan is fully compliant with this part of the recommendation.

On the recommendation to avoid using **liability for defamation** to restrict freedom of speech and whistle-blowing, Kazakhstan failed to comply with this recommendation as this kind of liability was widely used in practice. Moreover, the new Criminal Code offers even stricter sanctions for relevant offences and makes disseminating knowingly false information a new criminal offence.

Kazakhstan, while drafting and debating its new Criminal Code, looked into the possibility of repealing criminal liability for libel and insult and other, similar offences against public state officials. They have also retained the aggravated qualification of the crime of libel combined with allegations of corruption, which is unacceptable from the point of view of the need to encourage whistle-blowing.

While the team of monitors remained dissatisfied with the decision adopted after the debates (viz., retaining the liability in the new version of the code), that part of the recommendation, which suggested looking into the possibility, was complied with.

On measures to **prevent exorbitant amounts of claims of moral damages**, it is a welcome fact that the amount of court fee is set proportionate to the amount of damages. However, this measure has failed so far to improve the situation there significantly. This may be partly due to the fact that the provision on the proportionate amount of fee is not applicable to claims lodged during the criminal process, and partly because the plaintiffs that are public officers and government institutions are exempt of state duties. These gaps should be remedied. It is also essential to remember that government establishments should not have any right to start such actions (since honour and dignity are attributes of physical persons only, and business reputation is inherent in commercial entities), while public officers may only sue as private persons, and not in their official capacity.

In accordance with the Civil Code of RK (Article 187) on protection of personal non-property rights (honor, dignity and business reputation) **an unlimited statute of limitations** is set forth. This fact also negatively affects media freedom and the activities of journalists as the requirements for refutation, the protection of honor, dignity and business reputation and compensation for moral damage can be claimed at any time after publication. This weakens the legal safeguards for journalists and media to be protected from unjustified claims, especially in cases of investigative journalism.

This part of the recommendation is generally complied with.

**Overall, Kazakhstan is partially compliant with recommendation 3.6.**

### ***Additional issues***

The team of monitors expresses its concern over legislative initiatives aimed at introducing additional restrictions to the work of mass media and journalists in Kazakhstan. According to mass media publications,<sup>117</sup> amendments to several laws regulating the activities of journalists and media, in particular, to laws on media, television and radio broadcasting, communications, informatization and advertising<sup>118</sup> were introduced to Majilis. These changes have caused a resonance among the media and public organizations, which were concerned, in particular, by the following provisions of the draft:

- obligation for Kazakh journalists doing work at the request of foreign mass media to undergo a mandatory accreditation procedure with the Ministry of Foreign Affairs;
- extension of the period of consideration of a journalistic request to government authorities – from three days to two weeks;
- obligation of mass media editors to publish a response to the previously circulated information within five days without recourse to courts;
- obligation of a journalist to obtain the individual's consent for circulating information constituting a legally protected secret and use of personal data in media;
- definition of "propaganda" (spread in mass media opinions, facts, arguments and other information, including deliberately distorted to form positive public opinion about the prohibited information by law and (or) encouraging to commitment of wrongful acts and (or) inactivity of an unlimited range of persons);
- additional grounds to bring journalists, cameramen of broadcasting media to an administrative liability imposing payment of penalties.

The most problematic of all is the proposed duty to obtain an individual's consent to use his or her personal data prior to publication. It is bound to have a serious limiting effect on investigative journalism and will compound even further the work of mass media that are called upon to play the key role in the detection of corruption. In addition, such a provision is directly in conflict with international standards for the protection of personal data, which offer an exemption and allow handling of personal data for journalism purposes without any consent of the subject of such data.<sup>119</sup>

Meanwhile many of the NGOs proposals on the draft law were rejected: for example, introduction of a requirement for transparency of the media outlets owners' rights during registration, introduction in open access of a registry of mass media registered in Kazakhstan, introduction of new mechanisms and forms of state support of the media, aimed at the development of the entire media industry, not primarily the state media.

The representatives of the Kazakhstan authorities stated in their comments that most of the mentioned issues had not been included in the final version of the draft or were set out in another edition.

The team of monitors recommends to refrain from making any such amendments and to conduct a meaningful discussion of these issues with NGOs, mass media, journalists and international organisations.

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

1. ***Bring the Law on Access to Information in line with international standards, in particular: stipulate presumption of openness of information, tripartite test for restricting access to information, priority of the law on access to information over any other laws regulating issues of information, and exclude any automatic restriction of access to certain categories of information.***
2. ***Set up an effective independent mechanism of control over the enforcement of the Law on Access to Information, and create (identify) public officers (units) in the authorities that will be responsible for the implementation of the law, granting them sufficient powers and resources. To***

<sup>117</sup> See, e.g., <https://goo.gl/mMY5a6>, <https://goo.gl/LmjgAV>.

<sup>118</sup> The text of the draft law of Republic of Kazakhstan "On Amendments and Additions to Some Legislative Acts of the Republic of Kazakhstan on Information and Communication" is available at: <https://goo.gl/sxfEfw>.

<sup>119</sup> See, e.g., Article 85 of Regulation 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC, available at: <https://goo.gl/efytn1>.

*take measures for promotion and popularization of the Law on Access to Information, training of both users and holders of information.*

3. *Broaden the liability for violating the right of access to information and enforce dissuasive sanctions due for violations.*
4. *Ensure introduction of agency-level recording of information requests, process and outcome of their consideration, and implement relevant centralised statistics collection with regular online publication of the data. Ensure preparation of an annual national report on the status of implementation of the Law on Access to Information and safeguards to the right of access to information in the country.*
5. *Ensure open online access to key databases (registers) of state authorities, among them, registers of legal entities, ownership titles to real property and transport vehicles, inter alia, in the open data format.*
6. *Repeal criminal liability for libel, insult and other similar acts. Should this liability be retained provisionally, classify it as criminal misdemeanours, thus excluding a possibility for sanctions in the form of restriction or deprivation of liberty. Repeal aggravated qualifications of offences in relation to the dissemination of information about potential corrupt acts.*
7. *Ensure effectiveness of measures aimed at preventing exorbitant monetary claims of moral damages against mass media and journalists, inter alia, by a restriction to one year the statute of limitations for such claims, forbidding public officials and public authorities themselves to sue seeking protection of honour and dignity; extending the fees proportionate to the amount of claim to claims lodged in the criminal process; conducting regular training of judges on international standards applicable in relevant cases. Provide in the normative ruling of the Supreme Court of the Republic of Kazakhstan the rules for adjudicating claims of honour and dignity in compliance with international standards and recommendations.*
8. *Join the international initiative Open Government Partnership.*

## 2.5. Integrity in public procurement

### *Recommendation 3.5.*

1. 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.
2. 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.

Public procurement in Kazakhstan accounts for 11 per cent of the GDP. In 2016 its volume was KZT 8.3 trillion (EUR 24 billion), whilst GDP was KZT 73.8 trillion (EUR 210 billion). This figure does not take into account the public procurement undertakings by Samruk-Kazyna, a national holding for the management of state assets of the Republic of Kazakhstan. The annual volume of procurement of the group of companies of Samruk-Kazyna in 2016 was about KZT 4.1 trillion (EUR 11.7 billion).

Large part of the public procurement is carried out through the e-procurement systems (both national and Samruk-Kazyna ones). In 2016 more than 6.1 million contracts were placed via the national e-procurement system alone. The system serves about 288,000 users, including 243,000 bidders.

Since the 3rd round of monitoring the following major reforms of the procurement system in Kazakhstan were:

A new public procurement law (the PPL) was adopted on 4 December 2015 and became effective on 1 January 2016.

On 1 January 2016, a comprehensive national e-procurement system is launched and all public procurement must be carried out via the system, except for cases of direct contracting (in case of 13 out of 54 overall reasons) and national security (state secrets) related procurement. As results all public contracts are signed in a digital format; the state procurement authorities monitor public procurement via the portal.

Since 1 January 2017 the system is expanded to serve the contract administration, including invoicing and acceptance documents.

The system of public hearings for technical specifications to be used and conditions of the forthcoming tenders in the planned tenders, as well as a complete disclosure of all tenders submitted, were introduced.

In June 2013, Samruk-Kazyna introduced e-procurement system and mandated all companies of the Holding to transfer all their procurement to the portal. The transfer was completed in 2014.

In January 2016, Samruk-Kazyna introduced new procurement rules largely aligned with the new state public procurement law.

The list of exceptions from the PPL was shortened, at the same time it includes procurement by national management companies and holdings, national companies and their affiliates, the National Bank and the companies majority owned by it etc., as well as procurement of the military and dual usage goods. This procurement still represents a large portion of public sector economy.

In this respect, it shall be noted that as mentioned above the largest National holding Samruk-Kazyna developed their own set of procurement regulations modelled upon the PPL.

Large number of exemptions was moved into the direct contracting (single source procurement) – the process, which is currently covering 54 different circumstances, but does not provide for a competitive selection of the suppliers/contractors/consultants, de facto bypassing the key principle of the public procurement – competitiveness and, therefore, not ensuring the best value for money.

The authorities of Kazakhstan in their comments noted that a procedure of a single source procurement by a direct contract is stipulated in 54 cases, which comply with the provisions of the Treaty on the Eurasian Economic Union. Such procurement is implemented on certain grounds and where there is no competitive

environment (procurement from monopolists, persons having copyrights, etc.). Thereby according to Kazakhstan, implementation of a single source procurement by a direct contract does not affect the development of competition and is not contrary to the principles of procurement, including the ones applied in European countries.

The Ministry of Finance also noted that in public procurement a large proportion of a single source procurement due to the failed competitive bidding remains, which in turn creates corruption risks. In this regard the Ministry has undertaken to minimize a single source procurement due to the failed competitive bidding by reducing submissions by potential suppliers confirming material and labor resources.

The e-procurement portal publishes information in respect of every direct contract, including the justifications for selection of the specific supplier/contractor/consultants and the contract price, as well as the contract conditions. The PPL also provides the right to appeal against any actions or inactions of a procuring entity, which is understood to cover selection of a procurement method, as annual procurement plans must be published on the e-procurement system.

A notable progress in the reform is linked to channelling the public procurement via e-procurement system. All relevant procurement information is made public from planning to the contract award phase. A special data base of the signed contracts is maintained, which collect the basic key information on all contracts, which now can be signed electronically via the portal. There are plans for further development of the system to cover complaint procedures, price monitoring and integration of the system with other state data base to increase efficiency of its work and audit.

It shall be noted that to use the e-procurement system the contractors/suppliers/consultants must have e-signature, which can be obtained only if the company is registered as a tax payer in Kazakhstan. This fact coupled with the actioned driven by the national program for an increase of domestic content in public procurement skew the public procurement system towards less competitive market environment.

As e-procurement of Samruk-Kazyna is concerned, it is similar to the state one, with less information made public (for example, no information in respect of the signed contracts can be found) and also requiring the e-signature. Samruk-Kazyna also focuses their strong attention to increasing the share of domestic content in their procurement.

Given the declared intention by the Government of Kazakhstan to enter the WTO GPA, the situation would need to be revised. Meanwhile, the closure of the public procurement market for foreign companies may explain a low level of competition on many tenders and relatively high prices in certain sectors.

The Government of Kazakhstan has informed that it plans to develop a firm legislative framework to cover procurement in sub-sovereign sectors, including the national management companies and holdings, national companies and their affiliates, the National Bank and the companies majority owned by and affiliated with it etc . It is understood that such procurement regulations will cover procurement by subsoil users, currently regulated by law No 291-IV “On mineral resources and subsoil users”.

Procurement planning, reflected in the e-procurement systems (both state and Samruk-Kazyna), is done for one year period on recurrent basis. With a few exemptions (five reasons to use single source procurement (emergency situations, investigation activities, security and operations of the top Authorities, legal support for the Authorities in dispute resolution, arbitration and courts) and procurement of confidential (state secret) goods/works/services) contracting authorities are not allowed to initiate a procurement process, unless the goods/works/services are included in the procurement plan, which is published.

In view of the above, a factor, which may reduce the number of direct contracts and increase attractiveness and competitiveness of the public procurement, especially in infrastructure sector, is an extension of planning horizons from one year to a longer, e.g. three years, period. Such planning may be of indicative nature.

Concerning of the application of the PPL, it shall be noted the overall statistics on the procurement in the state sector is as follows:

Table 15. Public sector procurement statistics in Kazakhstan

Year	2014		2015		2016 (11 months)	
	Number of contracts	Value in KZT	Number of contracts	Value in KZT	Number of contracts	Value in KZT
<b>Total</b>	<b>1,912,709</b>	<b>1,367,552,445,965</b>	<b>1,848,530</b>	<b>2,368,996,638,523</b>	<b>3,048,650</b>	<b>1,314,315,923,268</b>
including						
Open tender	21,050	274,609,027,959	17,423	192,041,686,727	34,726	263,134,530,347
Reverse auction	559	12,498,659,031	517	10,011,434,067	1,569	13,334,915,550
Shopping / Запрос котировок/ ценовых предложений	702,228	84,911,723,577	555,894	63,574,828,063	589,936	103,753,747,549
Single source	116,510	600,944,754,631	92,150	579,481,230,244	246,018	423,537,040,193
Commodities	994	3,684,520,206	1,463	5,179,110,244	1,630	7,420,106,935
Outside of the law	1,071,366	390,900,680,025	1,181,082	1,518,308,336,177	2,174,771	503,135,582,694

Source: Information provided by the Kazakhstani authorities.

The above statistics shows that a share of competitively awarded contracts during last three years varies between 15 and 30 per cent of the total state procurement spending, which are extremely low. Direct contracting (single source) is used for a worrying level of 70-80 per cent, thus diminishing substantial efforts to open up the public procurement and increase its efficiency. Such a large level of direct contracting represents a fertile soil for corruption, even if there are reasonable justifications for its use provided in the PPL.

Samruk-Kazyna cumulative procurement statistics is as follows:

Table 16. Total volume of procurement by Samruk-Kazyna

Year	2014	2015	2016
	Value in mln KZT	Value in mln KZT	Value in mln KZT
<b>Total</b>	<b>3,870,073</b>	<b>3,486,110</b>	<b>4,121,927</b>
including			
Open tender	881,239	565,783	531,206
Centralised energy trading	1,262	2,775	2,432
Shopping	25,697	20,080	21,318
Single source	2,958,187	2,895,287	3,566,823
Commodities	3,688	2,168	147

Source: Information provided by Samruk-Kazyna.

The above data shows even higher level of single source procurement (76 to 87 per cent of the total value), than in the state sector. As mentioned above suggest that the system is far from being efficient, and, as a result, is open for abuse, providing enormous opportunities for corruption.

As the state procurement is concerned, the system of its external audit is maintained by Accounting Committee and special audit commissions of each region and Astana and Almaty cities. External audit reviews procurement at the sub-sovereign sector.

Control over compliance with the procurement legislation and review of complaints is carried out by the Internal State Audit Committee of the Ministry of Finance. The specific review is undertaken based on a written complaint by a tenderer, a request by the law enforcement agencies, or based on the risk analysis of the available information. There is an appropriate mechanism to appeal against decisions of the Committee (via common court system). In case of finding a violation, the Committee issues mandatory orders to the procuring entity to address violations, applies to court to revoke contracts that entered into force, suspends

the procurement process. If the Committee detects elements of a criminal offence, it refers such information to the law enforcement authorities.

In accordance with the PPL, a potential supplier has the right to complain against actions (inactions), decisions by a client, a procuring entity, a solitary public procurement organisation, commissions, experts, a solitary public procurement operator, if their actions (inactions), decisions violate the rights and legitimate interests of the potential supplier. The decision of the authority in respect of the complaint may be appealed against in through a regular judicial procedure in accordance with the laws. Unlike previous version of respective legislation, the new PPL does not provide for any exceptions to the right to appeal. The Monitoring Group welcomes this approach, which is in line with the recommendations of the Istanbul Action Plan.

**Table 17. Statistics on procurement-related complaints**

Year	2014	2015	2016
Complaints reviewed	1,215	1,464	8,359
Complaints upheld	705	954	4,771

Source: Information provided by the Kazakh authorities.

A steep increase in the number of complaints in the recent years suggests that the business and other stakeholders believe in the efficiency of the current system. Around 60 per cent of the complaints were upheld.

A large part of the complaints is about biased technical requirements. In 2016 as results of complaint review decisions 3,953 tender documents had to be revised. Some complaints are about the time limits, which if set at the minimal level may be seen as an instrument to facilitate corrupt activities. No complaints were made in respect of the selected procurement method.

Unfortunately, the statistics on the complaints review is not published. The Authorities shall consider broad disclosure of the statistics as well as publication of the typical complaint review cases. We should welcome information from the Ministry of Finance that the Ministry is working on introduction of the Register of Complaints into the system of public procurement. It is expected that this system will be implemented on the public procurement web portal, which will display all information on complaints and their feedback. The Register of Complaints will be viewable to everyone without going through an appropriate registration.

On the level of Samruk-Kazyna the tenderers beyond direct appeal to the Holding or its affiliates may complain through the common court system.

**Table 18. Statistics on procurement-related complaints in Samruk-Kazyna**

Year	2014	2015	2016
Complaints reviewed	1,032	1,856	1,620
Complaints upheld	329	515	399
Complaints referred to relevant organisations	354	749	479
Complaints deferred	349	547	667
Number of staff subject to disciplinary actions	28	144	149

Source: Information provided by Samruk Kazyna.

The Ministry of Finance runs a black list of companies and individuals, who may be included in it based on fraudulent information provided in the course of procurement procedures, decline of signing public contract upon award or due to poor performance on the signed contracts. Corrupt and other prohibited practices are not considered as the grounds for inclusion of the companies or individuals on the procurement black list. Similarly, no disqualification of tenderers for prohibited practices is envisaged under the laws. That shall be done without further delays.

No information was provided for the last three years in respect of the administrative and criminal offences due to prohibited practices. Nevertheless, the Anticorruption services undertook 1,127 pre-trial investigations on public procurement cases, including 438 cases in 2014, 421 – in 2015 and 268 – in 2016.

At the same time 10,442 companies and individuals were blacklisted in 2015, based on 16,477 requests, and further 7,958 - in 2016, based on 11,151 requests. As of the end of December 2016 only 131 blacklisting decisions were considered by courts on appeals of the affected tenderers. 56 blacklisting decisions were cancelled by the court. Further information on the black list can be found on the web-site [www.goszakup.gov.kz](http://www.goszakup.gov.kz).

The PPL in the current edition provides for comprehensive provisions in respect of a conflict of interest, albeit it does not include affiliates of the potential tenderers or the procuring agency in respect of their participation in earlier phases of the project/tender preparation. The respective provisions shall be enhanced.

Anti-corruption declarations do not exist. Hence, introduction of integrity covenants and/or declarations to be provided by tenderers with their offers shall be considered. In parallel the tenderers shall be encouraged to sign the existing Anti-Corruption Charter, launched by the National Chamber of Entrepreneurs. The procuring agencies shall be encouraged to adopt anti-corruption mechanisms allowing them in the nearest future to be certified under the Anti-corruption standard ISO 37001. Such certification may be considered as mandatory condition for eligibility to carry out public procurement in the mid-term perspective. In the near future, the standard tender documents and contract conditions shall be enhanced by anti-corruption/integrity provisions.

Discussions with the representatives of NGOs suggests that although there is no organisation with the specific focus on public procurement, many of them to different extent monitor such procurement either in specific sectors or on a regional/municipal basis. Given that large volume of information is made public, it appears that there are no barriers for civil society engagement in monitoring public procurement at least at tendering and contract award phase. In order to increase both efficiency and effectiveness of such civil society monitoring the authorities may consider special training for CSOs and NGOs, who may be instrumental for the authorities in identifying and flagging problems and cases, which may need to be further investigated professionally in respect of potential corruption or other prohibited practices, as well as in order to increase effectiveness of public finance as a whole.

Procurement is recognised as a profession and the Ministry of Finance in December 2015 adopted the Rules for training of procurement officers. At the same time staff training for public procuring agencies does not appear to be sufficient for the volume of the procurement, as only 70 training courses were carried out during last three years for representatives of 611 organisations only. Private sector training appears to be have very limited coverage as within the same period only representatives of 280 companies benefited from such training.

The authorities of Kazakhstan actively cooperate with the international organisations, multilateral development banks and authorities in other countries in the public procurement area, participating and organising conferences and seminars.

### ***Transparency in public procurement***

In accordance with the Law of the Republic of Kazakhstan "On Public Procurement", openness and transparency is one of the principles of public procurement. In practice, this principle is implemented through the following mechanisms and procedures:

- an obligation of administrators of budget programmes and customers to publish prospective and current plans of public procurement on the Internet resources;
- an obligation to publish the announcement of the competitive bidding (tenders) for state procurement, with the publication of all tender documentation and information about the date, time and venue of the competition;
- an obligation to publish the requirements for potential suppliers, as well as other tender documentation, results of public procurement tenders, etc.

In addition, the Law of the Republic of Kazakhstan "On Public Procurement" provides for keeping the national registers of public procurement. These registers are: 1) customers; 2) contracts on public procurement; 3) unscrupulous bidders; 4) qualified potential suppliers.

The information contained in the registers, with the exception of information constituting state secrets in accordance with the legislation of the Republic of Kazakhstan on State Secrets and (or) containing proprietary information of limited distribution defined by the Government of the Republic of Kazakhstan, are published on the public procurement web portal and should be available to interested parties free of charge.

The registers formed in the sphere of public procurement are published on the "Public Procurement in the Republic of Kazakhstan" portal at [http://portal.goszakup.gov.kz/portal/index.php/ru/public\\_careless/index#](http://portal.goszakup.gov.kz/portal/index.php/ru/public_careless/index#).

According to the Public Fund "Transparency Kazakhstan" transparency and accountability in public procurement in Kazakhstan is still not as appropriate. First, administrators of budget programmes and customers don't publish the minutes of the commissions' meetings determining the winner of the tender or recognition of the competitive bidding failed. Secondly, any statistics on appealing the results of public procurement tenders are not publicly available. Thirdly, acceptance documents of the executed works signed by suppliers and customers are not published.

Another problem is the lack of information on the spending of budgetary funds received by commercial and non-profit organizations within the public procurement. In accordance with the Law of the Republic of Kazakhstan "On Access to Information" all legal entities – recipients of budgetary funds are recognized as holders of information and are obliged to publish on the Internet resources the information on expenditure of budgetary funds.

The Public Fund "Transparency Kazakhstan" conducted a public monitoring of the budgetary funds recipients. 10 NGOs, 10 media outlets and 10 private enterprises were selected randomly. None of the 30 sites of the respective organizations published the information in respect of the use of funds allocated from the state budget and which is not the restricted information. Private enterprises were selected on the public procurement website. However, they appeared not to have their own websites where from the information could be obtained. Nor was it possible to trace the expenditure of funds received, as this information wasn't available neither from suppliers nor from customers<sup>120</sup>.

### ***Procurement for PPP/concession like projects***

In October 2015, the Republic of Kazakhstan adopted the Public-Private Partnership (PPP) law. It was amended in April 2016. Hence, the results of the application of the law can only be assessed during the next monitoring mission. However, it shall be noted that the law (Article 31) does not provide for a competitiveness of selection of concessionaires to be a default option, therefore, leaving the public client to use direct contracting without any appropriate justifications. The use of direct award for the PPP/concessions significantly increases the risk of corrupt practices. Hence, the law shall be further enhanced by making a competitive selection the default option.

### ***Contract implementation***

As mentioned above the procurement system publically provides very limited information on the contract implementation, and based on the random sample analysis of the published information may be controversial. It is recommended to further enhance the e-procurement system to allow for more comprehensive monitoring of contract implementation.

Based on limited analysis of the cost savings (about 30 per cent vis-à-vis the cost estimates) on works contracts implemented under the MDB financed infrastructure projects suggests that Kazakhstan would substantially benefit from introduction of standard balanced contracting arrangements modelled on internationally recognised contract terms and conditions. The current contracting practices, especially in construction sector, do not seem to provide for fair and balanced risk allocation and relationships between the parties, that forms the ground for corrupt practices during contract implementation, including payments, acceptance of works, variation orders.

### ***State social orders and NGOs***

In addition to the overall procurement activities it is important to highlight that part of them is undertaken under the social projects within the framework of the Law 429-V "On the state social order". This law provides for special procurement arrangements for such projects in accordance with the PPL.

As the social projects are concerned, the following procurement data were reported:

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<sup>120</sup> "Open and Accountable Government in Kazakhstan: Positive or Negative Trends?" The publication is available at: <https://goo.gl/764hgu>.

**Table 19. Statistics on procurement of social services**

Year	Value of social services (mln KZT)
2014	1,356.9
2015	872.6
2016	401.9

Source: Information provided by the Kazakh authorities.

In total, the procurement value in this area was 2,631.4 mln KZT, including

- state general services - 727.2 mln KZT;
- public security, legal, court and penitentiary activities – 41.6 mln KZT;
- health care – 291.3 mln KZT;
- social care – 23.8 mln KZT;
- sport, culture, tourism, information – 1,547.5 mln KZT.

In the discussion with the Ministry of Education it was learnt that they follow the PPL for all their procurement. In 2016 the Ministry awarded 329 contracts for 4 bln KZT, as follows: 100 through open tenders, 89 – shopping procedure, 139 – single source procurement, 10 – state social orders. No specific procurement issues, except for a large segment of direct contracting, were noted during the discussion. At the same time, it shall be noted that the specifics of the sector provides for larger than usual share of single source procurement requirements.

In discussions with NGOs the Monitoring Group concluded that participation in the procurement for social projects is formally duly open and provide for equal opportunities for all. At the same time, 90 per cent of the contracts for broadcasting state information were awarded only to two TV channels. It was reported that about 35 bln KZT equivalent of contracts from the overall procurement for the value of 50 bln KZT equivalent were awarded through direct resource allocation.

During the last decade, the NGOs have observed a trend for overall information closure. Alleged lack of clarity and contradictory nature of many bylaws (secondary laws and regulations) was suggested to be a main danger of legislative framework.

Although acknowledging the broad scale anti-corruption expertise for laws, they believe it is rather formal, than objective, when a very limited time is provided for the discussions on issues affecting large groups of people and businesses, and relatively loyal groups are included into the sounding boards.

The NGOs also mentioned unproportioned punishment for small offences as compared to large scale offences.

#### ***State Information Ordering for Media***

According to the Ministry of Finance of the Republic of Kazakhstan the following amounts were allocated and actually spent on implementation of the state information ordering:

in 2013 – 31 934 578 KZT;

in 2014 – 37 437 541 KZT;

in 2015 – 39 318 844 KZT.

In 2016 more than 40 bln KZT (41 060 359 KZT) was allocated from the budget on implementation of the state information ordering. The amount of budgetary funds allocated for the state information order is increasing from year to year.

Public Foundation "Legal media center"<sup>121</sup> notes that from 2013 to 2016 more than 150 bln KZT was allocated from the state budget for the activities of the state media (the owners of which are JSC and LLP with state participation) and affiliated organizations. Permanent and the most significant recipients of budgetary funds (96.63% or more than 140 bln KZT) for implementation of the state order are four joint-

<sup>121</sup> More detailed information is published at: <https://goo.gl/Kjr6xt>.

stock companies, where the state is the only shareholder: JSC "Agency "Khabar", JSC "RTRC "Kazakhstan", JSC "Kazcontent", JSC "Kaztelradio".

NGO representatives noted a number of issues related to the allocation of funds in the information sphere:

1. The opacity of decision-making about the budget allocation (especially in the form of a state task) and the lack of publicly accessible financial, contractual and reporting documentation by both administrators of the budgetary programmes and the recipients of budgetary funds.
2. Audit (especially government) and monitoring data on the expenditure of budgetary funds allocated for the state information policy, including in the form of a state task, are not published and are not available for review, discussion and analysis. These data are neither published on the website of the administrator of the budget programme - the Ministry of Information and Communications of the Republic of Kazakhstan, nor it is available on the websites of contractors implementing state tasks in the sphere of information. Although information on audit and monitoring must also be disclosed in accordance with the provisions of the Law of the Republic of Kazakhstan "On Access to Information".

In the first quarter of 2016 the Audit Committee of the Republic of Kazakhstan conducted the audit to control the execution of the Republican budget on implementation of the programme "Informational Kazakhstan - 2020" and the use of budgetary funds allocated to the former administrator of the budget programmes – the Committee of Communication, Informatization and Information of the Ministry of Investments and Development of the Republic of Kazakhstan. However, according to NGOs the data of the state audit were not published neither on the website of the administrator of the budget programmes nor on the websites of legal entities – recipients of budgetary funds within this programme, as well as other budget programmes.

**Conclusion: Kazakhstan is partially compliant with the previous recommendation 3.5.**

#### **New recommendation No. 14**

1. *Reduce the volume of single-source procurement by either altering the Law "On Public Procurement" or changing the rules of procurement. Shorten the list of exemptions to the application of the Law "On Public Procurement".*
2. *Introduce a principle based procurement law (or incorporate specific provisions in the existing law) for national management holdings, national holdings, national bank, national management companies, national companies, the National Bank and legal entities affiliated with them.*
3. *Accede to the WTO Government Procurement Agreement, as planned by the Government.*
4. *Further enhance e-procurement system and open it for use by non-residents.*
5. *Ensure regular publication of up-to-date procurement information in open data formats (i.e. machine readable data), including statistics on the complaints and their review.*
6. *Enhance the rules on the debarment of entities from the public procurement, in particular by introducing explicit mandatory debarment for commission of a corruption-related offence by the company or its management.*
7. *Strengthen conflict of interest safeguards in the public procurement (in particular, by expanding affiliation cases).*
8. *Ensure that the public procurement entities are required to implement internal anti-corruption programmes.*
9. *Bring mandatory anti-corruption statements in tender submissions into line with the international best practice.*
10. *Intensify regular trainings for private sector and procuring entities on public procurement and integrity matters at central and local level, and for law enforcement and state control*

*organisations – on public procurement procedures and prevention of corruption.*

## 2.6. Business integrity

***Recommendation 3.9. of the Second Monitoring Round Report on Kazakhstan (recommendation was confirmed during the Third Monitoring Round)***

1. 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.
2. 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.
3. 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.

### ***Countering corruption in business***

As suggested above, countering corruption in the quasi-government and private sectors is one of the priority areas of the RK 2015-2025 Anti-Corruption Strategy (see expert criticism on this issue in Chapter 1 conclusions and the new recommendation there). The Strategy's paragraph 2.3 highlights insufficient transparency of corporate governance and the closed nature of management decision-making. The ensuing need is therefore to set up organisational and legal mechanisms which will ensure accountability, auditability and transparency of decision-making procedures. Moreover, Kazakhstan can only make it in the top 30 most advanced world states if it ensures compliance with the best modern principles of business integrity and good faith conduct of business. It is also believed that, apart from protecting interests of domestic business, the National Entrepreneurship Chamber must assume its share of responsibility for business integrity and transparency and take steps to counter corruption in the corporate sector. Also, under the Strategy, "pending are a number of other anti-corruption measures to be adopted across various spheres of financial and business activities", provided that the fight against corruption does not lead to the worsening of investment climate and risks for businessmen (para 4.3).

Pursuant to the most recent amendments to the Anti-Corruption Law, prevention of corruption in business is set out in a separate article (Article 16). Under this article, businesses are to establish their organisational and legal mechanisms that are to ensure accountability, auditability and transparency of decision-making procedures; take steps to comply with the principle of good-faith competition, adopt and implement rules of business ethics, introduce measures promoting anti-corruption culture, interact with government authorities and other organisations on prevention of corruption. The law allows quasi-government entities to adopt their own corruption prevention standards. They can be developed by associations (amalgamations, unions) of businesses. It is assumed that such mechanisms together with anti-corruption restrictions in the Anti-Corruption Law, *inter alia* those preventing conflict of interest, which are now applicable also to the workers at quasi-government entities (but not to the workers in the private sector – see Conclusions to Chapter 1), will help to mitigate corruption risks.

Also, under Articles 18 and 22-23 of the Anti-Corruption Law, quasi-government entities, public associations and legal entities are now classified with the so called “other anti-corruption subjects” and, as such, are responsible for countering corruption within their competence. It includes whistle-blowing, making suggestions towards improving legislation and enforcement practice, contributing to the establishment of anti-corruption culture, interacting with other anti-corruption subjects and the authorised anti-corruption agency, requesting from government authorities and obtaining, in the manner prescribed by law, information on anti-corruption activities, conducting research, among other things, academic and sociological, engaging in outreach activities through mass media and staging events of social significance.

### ***The National Chamber of Entrepreneurs***

In 2013, in order to consolidate entrepreneurs and strengthen the business community’s institutional capacity there was founded the National Chamber of Entrepreneurs «Atameken» (NCE). It is based on the principle of mandatory membership for economic agents incorporated in compliance with the RK law, except for those that hold a mandatory membership in other non-for-profit organizations, and bar public enterprises. One of NCE’s tasks is organization of an efficient interaction between economic agents and their associations (unions) with government agencies.<sup>122</sup> NCE annually publishes the National Report on the state of business activity in RK and a “Business Climate” ranking that also features a shadow turnover rating and perception of corruption rating (see also Chapter 1). As noted above, NCE contributed to the development of the national Anticorruption Strategy for 2015-2025.

On 16 June 2016, NCE adopted the Anticorruption Charter of Entrepreneurs of Kazakhstan which comprises fundamentals and postulates a concept of doing corruption-free business, as well as voluntary commitments aimed at introduction and implementation of additional mechanisms of prevention of corruption. The Charter is open for signing by all companies and business organizations, as well as profile associations. It is envisaged that the Charter should form a basis for the development and adoption of three model Codes (Business Ethics Code; Procurement Good Practice Code; and Corporate Governance Code<sup>123</sup>), 22 policies and templates (concerning insider information, evaluation of corporate governance, risk management, etc.), and two ratings (the shadow turnover and perception of corruption ones)<sup>124</sup>. To engage large corporations in the process of implementation of the Charter it is planned to set up a Charter Implementation Council. It is envisaged that leading economic agents would join the Council.

Under the aegis of NCE, there has already been in operation the Council for protection of entrepreneurs’ rights and the fight against corruption (per the executive order of 17 January 2017). Its mission implies prompt and systemic addressing matters related to granting rights to, and securing the rights and legal interests of, business agents and combating corruption, and raising awareness of such activities in the public domain. One of Council’s tasks is rendering assistance to the Government’s policy on fighting against corruption and helping central and local executive government bodies, agents of the quasi-public sector, private businesses, the National Chamber in various spheres of the societal life in that regard by developing recommendations and taking other measures aimed at provision of assistance in a) consolidation of entrepreneurs to fight against corruption; b) promotion of the interaction between the state and the business community in their fight against corruption in the business area; c) shaping anti-corruption practices in the business area; d) improvement of resource allocation and infrastructure access mechanisms. The Council enjoys the right to interaction with government agencies, associations (unions)

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<sup>122</sup> The National Chamber: 1) conducts public monitoring, 2) submits to the Government proposals on improvement of operation of the central and local public bodies with regard to entrepreneurship; 3) contributes to conducting an assessment of efficiency of corporate governance in state-controlled joint-stock companies, 4) deals on a regular basis with development and drafting of the “Business Climate” independent rating, 5) provides updates to the community and the Government on the state of business activity by means of development and publication of a report on the state of business activity in RK, 6) conducts, on a regular basis, collection, generalization and analysis of information about government bodies and/or civil servants’ observance of economic agents’ rights and legal interests. The analysis outcomes are submitted to the Government and/or competent government agencies; findings of the annual analysis are submitted to the RK President for review as a part of the annual national report on the state of business activity in the country.

<sup>123</sup> The latter has already been developed - see below

<sup>124</sup> See: <https://goo.gl/Dv9e9Y>.

and other organizations of any form of property and can request and receive from public agencies and other organizations information necessary for the conduct of its operation in accordance with the procedure established by law. Members of the Council are Senate and *Mezhlis* deputies, a deputy Prosecutor General, a deputy Head of the Agency of the Republic of Kazakhstan for Civil Service Affairs and Anti-Corruption, heads of government bodies, public activists, business community and mass media representatives.<sup>125</sup> Over the past three years, the Council considered over 17,000 petitions and claims filed by businessmen, with the majority of them concerning land and urban development/architectural issues, as well as public procurement.

In 2014, in the frame of the Law «On introducing amendments to some legislative acts on matters of cardinal improvement of conditions for entrepreneurial activity in the Republic of Kazakhstan » and to ensure an efficient protection of entrepreneurs' rights and legal interests the country saw the establishment of the post of Business Ombudsman.<sup>126</sup> Since 2015, the Ombudsman has been appointed by the RK President and reports to him. The Ombudsman holds membership in the NCE Presidium and the office's operation is funded by NCE.

### ***Accountability, internal control and transparency systems at the national companies***

As to corporate governance of the national management holdings and national holdings under the RK Government, the respective matters are regulated, *inter alia*, by provisions of the Law "On the state assets". Kazakhstan also updates on having taken the following measures on setting up due accountability, internal control, transparency and disclosure procedures at the national companies.

First, to bolster the efficacy of corporate governance and ensure a greater transparency with its Resolution of 15 April № 239 the Government amended the Corporate Governance Code of the JSC "The National Welfare Fund "Samruk-Kazyna", which now is fully in line with the OECD standards.<sup>127</sup> The new Code focuses on introduction of best practices in the corporate governance area, including, in particular, enhancement of transparency, improvement of risk management, internal control and audit procedures, sustainable development, bolstering the Board of Directors' efficiency, and a fair treatment of shareholders. An effective internal control system implies, in particular, an efficient use of the company's resources, completeness, reliability and credibility of its financial and management reporting, a proper internal control to prevent fraud and ensure an efficient functioning of its primary and secondary business processes, and evaluation of the company's performance.

In terms of transparency, the Fund and its daughter organizations are bound to disclose, in a timely and trustworthy manner, the information about all critical aspects of their operation, including their financial health, performance outcomes, assets structure and management structure. In addition, the Fund's internet portal should be well-structured, easy to navigate and should contain information necessary for the parties concerned to understand the Fund and its organizations' operation. The corporate governance code is in force both in the Fund and 545 portfolio management companies.

The Fund's portal features an update that holds that the adoption of the Code helped, *inter alia*, increase its corporate governance ranking. Specifically, the Fund's 2015 annual report refers to the fact that the average

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<sup>125</sup> <https://goo.gl/WXdme7>.

<sup>126</sup> The Business Ombudsman exercises the following powers: 1) representation, securing and protection of rights and legal interests of entrepreneurs before government agencies and other organizations, as well as international organizations and foreign states; 2) consideration of petitions filed by entrepreneurs; 3) submission to government bodies proposals on protection of entrepreneurs' rights and recommendations on cessation of by-laws; 4) to forward to government bodies (public officials), whose action (failure to act) has violated entrepreneurs' rights and legal interests, recommendations regarding a legal redress, including holding individuals responsible for violation of the said rights and legal interests; 5) forwarding motions to authorities of the prosecutor's office where the Ombudsman is in disagreement with the government bodies' opinion – to restore the entrepreneurs' violated rights; 6) submission of motions to the RK President where there have arisen facts of a systemic violation of entrepreneurs' rights and the impossibility of their resolution at the government bodies level; 7) requesting from government bodies (public officials) information, documents and evidence that concern entrepreneurs' rights and obligations, except the data that constitutes state, commercial, bank and other secret protected by law; 8) filing a lawsuit (petition) to the court of law per the procedure established by law; 9) taking other legal measures aimed at ensuring a legal redress for entrepreneurs' violated rights and legal interests.

<sup>127</sup> <http://sk.kz/sustainable-development/compliance>.

value of the corporate governance rating in its large companies rose from 47% in 2009 to 79% in 2015, thus having allowed to attain a 75% efficiency rate of implementation of its 2015 Development Strategy.<sup>128</sup>

In 2017, it is planned to further promote the Samruk Kazyna revamp program (which was approved in September 2014). The Program includes revision and optimization of business processes both in the management and production areas. More specifically, the envisaged changes concern the human resources management model, adding to the quality of management reporting and financial control, introduction of a project-based approach and constant improvement practice, and introduction of such a new function as compliance (see also below).<sup>129</sup> The objective of the aforementioned Code is, *inter alia*, to help implement the transformational process. It is envisaged that the holding's corporate governance standards shall be raised to the international level. Reorganization processes should also be launched at Bayterek and KazAgro holdings.

Second, with its Resolution of 24 February 2016 № 103 the RK Government adopted the Detailed Plan of improvement of the investment climate in accordance with the OECD standards for 2016-2017. The Plan provides for introduction of corporate governance in joint-stock companies with state participation.

Item 1 of the Detailed Plan foresees amendments to the Model Corporate Governance Code for joint-stock companies with state participation. The respective amendments were incorporated therein on 1 November 2016 by the executive order of the RK Minister of National Economy. Behind the move was a strive for securing compliance with the OECD standards with account of good domestic and international practices. According to Chapter 2 of the Model Code ("Principles of the Corporate Governance of the Company. Definition and Principles"), corporate governance should build upon fairness, integrity, responsibility, transparency, professionalism, and competency. An efficient corporate governance structure suggests respect for rights and interests of persons interested in the Company's operation and facilitates its successful performance.

Underlying the Code are the following fundamentals: division of powers, protection of shareholders' rights and interests, efficient governance of the Company on the part of its Board of Directors, sustained development, risk management, internal control and audit, corporate conflict and conflict of interest regulation policy, principles of transparency and objectivity in disclosing information about the Company's operation.

The Code is non-binding and was sent to all the joint-stock companies with state participation, i.e. a total of some 757 companies and 600 daughter companies. The authorities believe that improved on its basis, the corporate governance system should bolster the companies' efficiency and transparency. It is planned to monitor the practice of its implementation in 2017. The system of monitoring includes assessment of corporate governance in accordance with the Methodology of Introduction of Corporate Governance Best Principles and Standards and the Annual Report to the Government on the compliance results. In addition, the National Council on Corporate Governance has been established with a view to formulate proposals for developing and implementing a unified policy in this area and further improving the system of corporate governance in the Republic of Kazakhstan.

Third, there continues to operate the Depository of Financial Reporting for public-interest organizations (national management holdings, national holdings, national companies). In compliance with Art. 19 (7) of the Law «On Accounting and Reporting», the respective reports are regularly posted on the Depository's website at [www.dfo.kz](http://www.dfo.kz). The procedure of filing financial reports is regulated by the RK Government's Resolution of 14 October 2011 r. The Depository contains annually filed by organizations financial reports and auditors' reports, lists of joint-stock companies' affiliated persons, and information on their corporate developments. The Depository ensures users open access to the information.

As well, effective of January 2016, there has been introduced the Procedure for posting on the stock exchange repository's internet resources updates on corporate developments, financial reporting and auditors' reports, lists of joint-stock companies' affiliated persons, as well as updates of the aggregate amount of the end-year remuneration payable to an executive body's members (approved by a National Bank Board's Resolution). Presently, the repository contains some 27,000 reports.

Fourth, in order to implement the Law «On State Assets» with his executive order of 26 February 2015 №

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<sup>128</sup> <http://sk.kz/sustainable-development/compliance>.

<sup>129</sup> *Ibid.*

139 the RK Minister of National Economy approved the procedure for development, approval and delivery of progress reports on implementation of development strategies and action plans by national management holdings, national holdings, national companies, in which the state is a stockholder.

Fifth, with its Resolution of 31 October 2012 № 1384 the RK Government approved the Procedure for posting on the National Welfare Fund's internet resource the reporting government agencies are in need for. As well, the Government established the list of templates and periodicity of uploading thereon the reporting in question.

Sixth, prevention and regulation of conflict of interest, and declaration of income and assets (due to take effect of 2020) with regard to the heads of public companies who fall under the definitions of "public official" and "person equivalent to the ones authorized to exercise public functions" is performed in compliance with the Law "On the Fight against Corruption" (Art. 1).

### ***Monitoring of Expert Councils' performance***

In compliance with Art. 64 of the Commercial Code, an expert council on matters of private entrepreneurship is an advisory body established under a central government body, local representative and executive bodies for the purpose of organization of the work on collection of expert testimonies from accredited associations of private businesses entities and development of proposals on improvement of the legislation that affects the business community's interests. The procedure of formation and operation of such councils is defined by the model regulation on expert councils on private entrepreneurship. Seats on such councils are granted to representatives of the National Chamber of Entrepreneurs, accredited in accordance with respective procedure associations of private business entities, non-for-profits, and public agencies.

In compliance with Art. 65 of the Commercial Code and the Law «On legal acts», central government bodies, local legislative and executive bodies forward, via the expert councils, drafts of normative and legal acts (NLA), that affect private entrepreneurs' interests, to accredited unions of private business entities and the National Chamber of Entrepreneurs with a mandatory attachment thereto of a memorandum to seek an expert testimony, in particular, in the course of each subsequent stage of clearing a given project with interested government agencies.

The timeline set by the state bodies for the submission of an expert testimony to a draft NLA that affects the private businesses' interests may not be less than ten business days since the moment of receipt thereof. A memorandum thereto should comprise results of calculations that prove an increase/reduction in entrepreneurs' costs due to the introduction of the NLA. Should the government body that has developed the draft NAL be in agreement with the expert testimony, it should incorporate the respective amendments therein.

Where in disagreement, within no more than ten business days the said government body forwards the accredited associations of private business entities and the National Chamber of Entrepreneurs its response with a rationale for reasons for such a disagreement. Such responses with the rationale appended thereto constitute a mandatory attachment to the draft NLA prior to its adoption.

As to the minimum timeline of publication of a draft bill prior to its adoption, the Law "On Legal Acts" sets forth that *ad referendum* draft legal acts and NLAs together with memorandums and comparative tables thereto (where the legislative acts are envisaged to be amended), except for normative statutes of the Constitutional Council and normative resolutions of the Supreme Court, are posted on a dedicated web-portal for open NLAs. Draft NLAs concerning trade in goods, services or IPRs are posted on web resources of profile government bodies within no less than 30 calendar days prior to their adoption for public review and comments, unless foreseen otherwise by law and ratified treaties.

In addition, Art. 19 of the Law "On Legal Acts" and Art. 67 of the Commercial Code set forth that draft NLAs that affect private entrepreneurs' interest are subject to a mandatory publication (dissemination) in mass media, including internet resources, prior to their consideration by the expert council. Furthermore, para 34-1 of the 2002 Government Regulation holds that where the government body that developed a given draft NLA has received expert testimonies from the RK National Chamber of Entrepreneurs, accredited associations of private business entities, it shall post them on its web resources within seven

business days upon receipt thereof; further, where the said government body is in disagreement therewith, it shall post thereon a substantiated rationale for reasons therefor.

There has been launched a web portal for entrepreneurs (<http://business.gov.kz>), which hosts all the draft NLAs that affect businesses' rights and interests.

In compliance with Art. 64 of the Commercial Code, the task of analyzing and monitoring expert councils' operation is performed by the Coordination Board under the competent body for entrepreneurship. The authorities report that such a Board was created by the order of the Ministry of National Economy dated July 11, 2017 and is headed by the Minister of National Economy. Currently the work is under way on development of the Board's regulation, the procedure for the analysis and monitoring expert councils' operation, interaction between members of the Coordination Board and the expert councils of private entrepreneurship.

### ***Promotion of corporate compliance programmes taking into account good international practices and standards***

According to the business community representatives interviewed by the Monitoring Team, most large companies in RK have developed and implemented compliance programs, in particular, for the sake of combating corruption. As to the National Welfare Fund "Samruk-Kazyna" that unites 545 portfolio companies, its Board ruled to introduce its compliance control procedure on 23 November 2015. As well, it approved the Methodological Recommendations on the matter, and the work on setting up the compliance function has been under way since 2016. An open competition to the Fund's Compliance Service resulted in hiring two compliance officers.

Presently, the compliance program is at its inception stage. It encompasses the Fund and its 195-strong staff. In the future, the program is envisaged to also encompass the portfolio companies with a total of 350,000 employees. The compliance program includes: 1) business integrity and rules of conduct, including the Code of Conduct for the staff; 2) an integrated risk management and internal control system, which is proportional to compliance risks 3) legal support, 4) internal audit, 5) a hotline (it is planned to upgrade it and enable registration of anonymous reports), 6) due diligence of suppliers and external operators, 7) investigation of breaches of compliance and taking remedial measures.

### ***Conclusions***

The Monitoring Team welcomes the adoption of the aforementioned measures that are aimed at prevention of corruption in the quasi-public and private sectors of RK. It specifically commends the fact that anticorruption restrictions set by the Law "On the Fight against Corruption" are now also applicable to employees in the quasi-public sector, which should allow a reduction of corruption risks in that particular sphere. The attribution of agents of the quasi-public sector, public associations, and corporations to the so-called "other anti-corruption agents" and making them responsible to fight against corruption within the limits of their remit also appears a positive development. The Monitoring Team expects much from implementation of the Anti-Corruption Charter of Entrepreneurs of Kazakhstan, which is poised to form a basis for model business integrity code and the one on good procurement practices, as well as policies and templates with regard to insider information, diagnostics of corporate governance, risk management, etc. The experts hope that the Board would unite all the leading entrepreneurs in the work on the Charter implementation and would engage meaningfully with SMEs. The Monitoring Team also hopes that updates on the Charter implementation would be regularly posted on the web portal of the National Chamber of Entrepreneurs and be made otherwise publicly available.

As to setting up **due systems of reporting, disclosure, internal and external audit, financial control, and promotion of transparency in the operation of national management holdings**, national companies, national development institutions, national holdings and other corporations, the development of the Model Corporate Governance Code for joint-stock companies with state participation and the Corporate

Governance Code of the JSC “the National Welfare Fund “Samruk Kazyna”<sup>130</sup> appeared milestone developments aimed at implementation of the respective part of the Recommendation. As a reminder, it was in the course of the Third Round of monitoring that Kazakhstan was recognized to be largely compliant with that particular part of the Recommendation, and the expert team reaffirmed that in the frame of the present Round. Given that improving a corporate governance system in 757 joint-stock companies and 600 companies with state participation - is a long and challenging process and that the process of implementation of the Codes still is at its nascent stage, the Monitoring Team calls on the authorities and the entrepreneur community to keep a watchful eye on the matter in the future too, in particular, in regard to the planned monitoring of the practice of implementation of clauses of the Model Corporate Governance Code for joint-stock companies with state participation.

With respect to that part of the Recommendation that concerns **conduct of monitoring of performance of expert councils** under government bodies and a dialogue with representatives of entrepreneurs’ associations on introduction of anticorruption mechanisms in the public and private sectors, since the Third Round of Monitoring the local authorities have not made any concrete steps in the area with the exception of information about the establishment for this purpose of the Coordination Board in July 2017. Regretfully, the authorities informed that presently, the work is under way just on collection of government bodies’ updates on the expert councils’ performance, while they failed to provide any concrete monitoring findings. That notwithstanding, the experts recognize that Kazakhstan complied with the part of the Recommendation that requires that a minimum timeline for holding consultations with business community representatives, as well as timelines for publishing draft NLAs prior to their adoption be established. The expert team is satisfied that such terms have been stipulated in both the Commercial Code and the Law “On the Legal Acts”.

Lastly, as far as the third part of the Recommendation is concerned, the Monitoring Team notes that most large companies in RK have developed and implemented their **corporate compliance programs** with account of best international practices and OECD standards. That said, however, the process has not yet encompass medium- and small-sized companies, which is why Kazakhstan only partly complied with that part of the Recommendation.

**Kazakhstan is partially compliant with recommendation 3.9.**

#### **New Recommendation No. 15**

- 1. To ensure, in compliance with the Anticorruption Strategy, that economic agents of the quasi-public sector develop and implement effective procedural and institutional mechanisms of accountability, auditability and transparency of decision making procedures, disclosure, internal and external audit, measures on compliance with principles of fair competition, adoption and observance of business ethics and integrity standards.*
- 2. To arrange a system of actions aimed at promotion of implementation, in a close collaboration with business and public associations, of corporate compliance programs in the private sector entities with account of good international practices and standards and, in particular, Annex II to the Recommendation of the OECD Council of 26 November 2009.*

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<sup>130</sup> In compliance with the law on joint-stock companies (Art. 4-1 and 53), every public JSC shall have its corporate governance code, while its Board of Directors shall exercise oversight of efficacy of the corporate governance practice in the company.

## CHAPTER 3. ENFORCEMENT OF CRIMINAL LIABILITY FOR CORRUPTION

### 3.1. Criminal law against corruption

#### ***Recommendation 2.1.-2.2. of the Second Monitoring Round Report on Kazakhstan (recommendation was confirmed during the Third Monitoring Round)***

1. *To continue harmonisation of the legislation on corruption offences (Law on the Fight against Corruption, Criminal Code, Code of Administrative Offences).*
2. *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.*
3. *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.*
4. *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.*
5. *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.*

#### ***General information***

According to the Kazakh state authorities, since the beginning of 2015 there were introduced four new codes: the Criminal Code, the Criminal Procedural Code, the Penal Enforcement Code and the Code on Administrative Offences.

Among the novelties aimed to strengthen the liability for committing corruption crimes, the following should be highlighted:

- prohibition to impose conditional sentences for convicts for corruption crimes;
- prohibition to release persons, who have committed corruption crimes, from criminal liability in connection with the reconciliation of the parties;
- penalty in the new Criminal Code is referred as the main form of punishment. At the same time, the amount of fines for committing crimes for taking bribes, giving bribes, and mediating bribery depends not on the size of the monthly calculation rate, but rather on the amount of the bribe and the fine is set as a multiple of the amount of the bribe, thus allowing a differentiated approach to imposition of the penalties. Failure to pay a court-appointed "multiple" fine necessarily entails a substitute for punishment in the form of imprisonment;
- there is envisaged a mandatory confiscation of property for all corruption crimes. Moreover, in case of commission of corruption crimes, confiscation extends to criminally received assets or assets acquired with criminally received funds and transferred into the others' ownership by the convicts.

Deprivation of liberty as the sole type of punishment is reserved only for crimes committed as part of organized criminal groups, as well as those related to causing death to a person aimed at the sexual inviolability of minors.

Also for the commission of corruption crimes, there was introduced a lifetime deprivation of the right to hold certain positions in the state authorities and organizations (previously, the deprivation of the right to hold certain positions or carry out certain activities was applied for the term of up to seven years).

The Law on the Fight against Corruption defines a new concept of corruption, establishes anti-corruption restrictions for all civil servants and subjects of the quasi-public sector, and broadens the range of subjects of corruption offenses.

In order to distinguish violations of official ethics from corruption offenses the disciplinary liability for corruption offenses is excluded. Now such violations are recognized as acts (misdemeanours) that discredit the public service.

Thus, the liability of the subjects of corruption will be considered only through the prism of criminal and administrative legislation.

For the purposes of harmonization, the Law on the Fight against Corruption defines the subjects of corruption offenses in accordance with the new Criminal Code.

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

The Criminal Code of the Republic of Kazakhstan of 2014 (RK CC), as in the previous version of the code, contains a list of corruption crimes. At the same time, if according to the 1997 Code the condition for considering an act as corruption was defined as "the receiving by the persons, who committed them, of property benefits and advantages", then this condition does not exist in the new Code.

In addition, the new Criminal Code of the Republic of Kazakhstan contains a separate Chapter 9 "Criminal offenses against the interests of service in commercial and other organizations", which consists of five articles: "Abuse of powers" (Article 250), "Abuse of powers by private notaries, appraisers, private court marshals, mediators and auditors working in audit organization" (Article 251), "Excess of power by employees of private security services" (Article 252), "Commercial bribery" (Article 253) and "Careless attitude to the duties" (Article 254).

Most of these crimes, in fact, criminalize corruption in the private sector, but are not classified as "corruption crimes". Also, the constituent elements of crime (*corpus delicti*) "Receiving illegal remuneration" (Article 247 of the 2014 Criminal Code, Article 224 of the Criminal Code of 1997) are not attributed to corruption, which sets liability for "*illegal receiving by an employee of a state body or state organization that is not an authorized person for performance of the state functions or equivalent thereof, as well as an employee of a non-governmental organization that does not perform administrative functions, of material compensation, of benefits or services of a property nature for performance of work or provision of services that fall within the scope of his duties.*"

The Code of Administrative Offenses of the Republic of Kazakhstan of 2014 (the Administrative Code) contains a separate chapter "Administrative Corruption Offenses". It envisages liability, in particular, for "failure of the heads of state bodies to take measures to fight against corruption" and "Employment of persons who have committed a corruption crime before". These offenses are not corruption crimes in the sense of the Law on the Fight against Corruption, since they do not provide for the transfer of property (non-property) benefits. Such offenses may be considered to be corruption-related.

At the same time, Kazakhstan really agreed on the definition of the subjects of the offenses contained in the new Law on the Fight Against Corruption and the Criminal Code of the Republic of Kazakhstan. In addition, in December 2014 the amendments were introduced into Article 274 of the Code of Administrative Offenses, which got a new wording. This article now also sets liability for "deliberately presenting incomplete, unreliable declarations and information on income and assets", which brings it in conformity with the provisions of the Law on the Fight Against Corruption and removes one of the remarks contained in the Third Round Monitoring Report.

It should also be noted that the chapter "Administrative Corruption Offenses" of the Code of Administrative Offenses of Kazakhstan lists such offenses as "Providing illegal material remuneration by

individuals”, “Receiving illegal material remuneration by a person authorized to perform public functions or person equated to them”, “Providing illegal material remuneration by legal entities”. These elements of crime duplicate similar elements of bribery in the Criminal Code, and this does not meet international standards.

Although the aforementioned provisions of the Code of Administrative Offenses indicate that they are applied, if “the actions do not contain any attributes of a criminal offense”, this is not enough to eliminate duplication and possible abuse in the qualification of acts. For example, according to the note to Article 366 of the Criminal Code, receiving property, property rights or other property benefits as a gift for the first time in the absence of prior agreement for the earlier committed legal acts (inaction) if the value of the gift did not exceed two monthly calculation rates is not considered to be a crime due to its insignificance and is pursued in disciplinary or administrative order. Such elements as “absence of prior agreement”, “legal actions (inaction)”, as well as the value of the gift may be subject to various interpretations and open the possibility for incorrect qualification of the act for various reasons (including corruption ones).

As noted in the IAP Third Round Monitoring Summary Report, international standards require the criminalization of corruption. Criminal-legal sanctions ensure the necessary level of deterrence and punishment for such a grave offense as corruption. Criminal law and procedures provide for the most effective ways to detect and prosecute corruption through a number of investigative tools. Therefore, the systems in which both administrative and criminal sanctions exist in relation to bribery and other offenses are consistently criticized during monitoring within the framework of the Istanbul Action Plan. Amongst the IAP countries only Kazakhstan and Tajikistan retained administrative liability for major corruption offenses, such as bribery, along with the criminal law rules, which sometimes compete with them. Ukraine initially had the same administrative rules, but gradually abolished them in response to the recommendations of the IAP and GRECO<sup>131</sup>.

In this regard, it is also problematic to set a value threshold for criminal liability. As it was noted in the Third Round Monitoring Report on Kazakhstan, there are some doubts about validity of the differentiation of receiving of gifts prosecuted in disciplinary or administrative order and criminally punishable bribery, as envisaged in the new Criminal Code of the Republic of Kazakhstan.

According to the above note to Article 366 of the Criminal Code (Receiving a bribe), one of the criteria for differentiating liability is the value of the gift, which should not exceed two monthly calculation rates (approx. EUR 13). This situation also contradicts international standards, since it allows monetary gifts and promotes the development of a culture of corruption in the public sector, thus destroying the understanding that gratitude in the form of a gift should not be required or expected while providing public services.

This conclusion was confirmed in the IAP Third Round Monitoring Summary Report, where it was noted that the establishment of such a threshold does not meet the international standard that requires the criminalization of bribery regardless of the size of the received advantage<sup>132</sup>. One of the ways to solve the problem of proportionate liability is the concept of “minor” crime (de minimis), which is applied in Kazakhstan as well and allows to stop the prosecution of offenses that have all the formal attributes of a crime, but are considered minor (for example, too insignificant value of the gift). Another way to solve this problem, as noted in the Final Report, is to reform the criminal and administrative legal systems and introduce into them the notion of minor criminal offenses (misconduct) covering some minor crimes and grave administrative offenses (which are often still of a criminal nature).

**Conclusion: This part of the recommendation can be deemed as largely implemented.**

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

- 1. To remove duplicate provisions from the Code of Administrative Offenses in respect of liability for receiving illegal material remuneration.***
- 2. To cancel the monetary threshold for criminal liability for receiving or giving bribes.***

<sup>131</sup> The Third Round Monitoring Final Report of the OECD ACN, 2016, is available at <https://goo.gl/XuWcTe>.

<sup>132</sup> Ibid.

## **2. 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; ...**

Kazakhstan continues to disagree with this recommendation, noting that the issue of criminal liability for a proposal / solicitation of a bribe was considered within the framework of an interdepartmental working group and was not supported by the members of the group. Recognition of the intention to commit a crime as the completed crime is unacceptable for the national criminal legal doctrine of Kazakhstan. Only socially dangerous actions / inaction, which entail socially dangerous consequences can be recognized as criminally punishable.

It should be noted that this issue was repeatedly discussed during previous rounds of monitoring of Kazakhstan. One can cite excerpts from the previous monitoring report on Kazakhstan:

“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/offering/solicitation of a bribe” have been time and again analysed and refuted in IAP reports... 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). ...

### Arguments of the authorities of Kazakhstan:

1) In the opinion of the authorities of Kazakhstan, actions to “promise, offer an undue advantage to a public official” are essentially expressed in a communication to an official, verbally or otherwise, intent on giving him a bribe. Recognition of the intention to commit a crime as the completed crime is unacceptable for the national criminal legal doctrine of Kazakhstan. Only socially dangerous actions / inaction, which entail socially dangerous harm or create a real threat of its infliction, can be recognized as criminally punishable.

Commentary of the monitoring group: This is exactly the contradiction with the international standards that consider the promise, offering of a bribe, solicitation of a bribe, acceptance of a promise or offering as acts that have a sufficient social danger to be considered as completed crimes and, moreover, to be sanctioned not less than for receiving or giving bribes. For example, in the Third Round Monitoring Report on the Russian Federation GRECO notes that *«under the COE 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 offering and the promise, the request and the acceptance of an offering 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>133</sup> Similar conclusions are also contained in other GRECO reports, as well as in the reports of the OECD Working Group on Bribery.

2) Kazakhstan also notes that “in accordance with the theory of criminal law, the idea of recognizing the beginning of preparatory actions at the time of the end of the crime only extends to particularly grave and grave crimes, while according to the current national criminal legislation simple corpora delicti of giving and receiving bribes are not considered as such. Crimes with truncated corpora delicti envisaged in the Criminal Code of the Republic of Kazakhstan are an exception to the rules. These include, for example, the planning, preparation or unleashing of an aggressive war (part 1 of Article 156 of the RK Criminal Code), espionage (Article 166 of the RK Criminal Code), crimes of a terrorist nature, but equating corruption crimes to them will be inadequate toughening of criminal liability.

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<sup>133</sup> See GRECO Third Evaluation Round Report on the Russian Federation (Theme I), pages 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).

Therefore, the criminalization of the promise or offering of undue advantage, as well as their acceptance, is now premature.”

Comment: The theory of criminal law is not a firm absolute, it can and must change with the development of social relations and international standards. Since Kazakhstan agreed to adopt the standards enshrined in the international documents, this is a sufficient basis for changing the doctrine. This route was followed by other countries, including the IAP countries (Georgia, Azerbaijan, Ukraine and others). In addition, as indicated in the responses of Kazakhstan, even the current Criminal Code provides for appropriate exceptions, that is, setting of liability for the specified corruption acts can be carried out without changing the provisions of the General Part of the Criminal Code.

3) Kazakhstan further notes: *“At the same time, the essential elements of the bribery provided for in Article 15 of the UNCAC as a “proposal” and “promise” of an undue advantage are fixed in the General Part of the RK Criminal Code relating to attempt and preparation for the commission of a crime (bribery) (Article 24 of the RK Criminal Code). In the Russian language, the terms “promise” and “offering” encompass cases of unilateral expression of intent to accomplish something. In accordance with the Legislative Guide for the Implementation of UNCAC, the Convention defines a promise as reaching of an agreement on the transfer (receiving) of a bribe. Such actions in the legislation of Kazakhstan are determined by collusion and are evaluated as a type of preparation. In accordance with the Guidelines, the Convention defines offering as a unilateral intention to do something. The Kazakh legislation qualifies such act as preparation for the commission of a crime. The offering of a bribe does not involve an agreement between the parties.”*

Comment: The IAP Second Round Monitoring Report on Kazakhstan analysed in detail whether the attempt / preparation for giving / taking of a bribe is equivalent to criminalization of these acts as completed. The Report (page 32) lists the following reasons for the negative conclusion:

- The liability for preparing for a crime (Article 24 of the RK Criminal Code) comes only for grave or particularly grave crimes, while not all offences of bribery are classified as grave and particularly grave crimes (the first and the second paragraphs of Article 312 of the RK Criminal Code provide for crimes of medium gravity). Consequently, the criminal liability for the promise and offering of bribe giving that are not a grave or particularly grave crime is not provided for at all;
- According to Article 24 of the RK 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 RK 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 RK 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 RK 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 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) Kazakhstan further notes that inclusion in Article 312 of the RK Criminal Code (bribe giving) of the notions “promise” and “offering” of bribe giving will lead to the incorrect orientation of law enforcement agencies to identify only certain attributes of the completed corpora delicti of receiving and giving bribes, which in essence should be qualified through attempt and preparation for a criminal offense and will create problematic issues in the qualification of the crime and the differentiation of bribery and provocation. Thus, when corpora delicti of the offering and the promise of a bribe are revealed, evidence will be collected without fixing the taking or giving of bribe, which is the main evidence of bribery, without which the accusation will be built only on the assumption of intent to commit bribery. At the same time, in the opinion of Kazakhstan, there is a possibility that the completed crime of receiving and giving of bribes will be left without due attention in the detection of corruption crimes.

Comment: Such problems in law enforcement will not take place should the relevant articles of the RK Criminal Code establish that the “promise” and “offering” are completed corpora delicti on a par with bribe giving. At the same time, the goals of criminal liability for corrupt acts are achieved - moreover, this will even lead to strengthening of the prevention of corruption, since it will be sufficient to prove the intentional act of the offering / promise or solicitation of a bribe without the need for waiting and proving the response. Otherwise, a softer liability or even absence of liability for offering or promise of a bribe as for preparation for crime stimulates the commission of corruption acts, since the subject has the opportunity to easily “withdraw” his offering / promise / solicitation before receiving a positive reaction from the other party - this stimulates the offering or solicitation of bribes. Concerning the differentiation of bribery and provocation, the provocation of bribes giving is prohibited for public officials (if it is a matter of provocation, and not about the authorized imitation of bribes giving as an operational measure), and for others, the offering / promise of a bribe will be regarded as a completed crime.

*“Thus, when corpora delicti of the offering and the promise of a bribe are revealed, evidence will be collected without fixing of the taking or giving of a bribe itself, which is the main evidence of bribery, without which the accusation will be built only on the assumption of intent to commit bribery.”* It is unclear what the problem is here if evidence of the intent of offering or promise of a bribe will be sufficient to establish liability for the respective acts. At the same time, fixing of the taking or giving of a bribe does not really make sense, if it is possible to prove a completed crime on the basis of offering / promise without the need to prove the intent to give / take a bribe.

*“At the same time, in the opinion of Kazakhstan, there is a possibility that the completed crime of receiving and giving of bribes will be left without due attention in the detection of corruption crimes.”* - According to best international practice, the investigation of corruption crimes should not be limited to proactive methods (catching red-handed during the commission of a corrupt transaction), but should rather actively use retrospective investigation methods (for example, financial investigations) after the act was committed. In the latter case, as a rule, there will be a giving / taking of a bribe that can be established by tracking the monetary funds, the actions of the official for the exercise of authority, and so on.

5) Kazakhstan also refers to Article 30, paragraph 9, of the United Nations Convention against Corruption, according to which the description of the offences established in accordance with this Convention is reserved to the domestic law of each State Party and that such offences shall be prosecuted and punished in accordance with that law.

Comment: According to the Legislative Guide for the Implementation of UN Convention against Corruption (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 uniform threshold that States must meet for the sake of conformity.”

Thus, the Convention specifies that the provisions of national law may implement the requirements of the Convention differently, but in doing so, it is mandatory to achieve a minimum level of compliance with the mandatory provisions. Besides, pursuant to Article 65, paragraph 1, of the Convention, each

State Party shall take, in accordance with the fundamental principles of its domestic law, the necessary measures, including legislative and administrative measures, to ensure the implementation of its obligations under this Convention. Thus, this provision of the Convention cannot serve as a ground for refusing to implement mandatory provisions on the criminalization of certain corrupt acts provided for in the UN Convention against Corruption.”

The rationale for the need for an autonomous criminalization of the offering / promise / acceptance of bribes is also provided in the OECD ACN Third Round Monitoring Summary Report<sup>134</sup>. It is noted there that the conclusion from the IAP monitoring is that the unfinished offenses in the case of bribery are not functionally equivalent for the following reasons:

First, the liability for preparing for a bribe giving comes only in the case of crimes of a certain gravity.

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 offering or promise of a bribe before receiving an unambiguous refusal from a potential bribe-taker.

Secondly, an attempt by a person to commit a crime connected with bribery occurs when the crime itself was not completed due to reasons beyond the control of such a person. In addition, some criminal codes contain rules for the release of a person from liability in case of voluntary refusal of such person from committing a crime, i.e., in cases when the offender stops preparing to bribe or attempt to bribe. This, for example, means that if a person asks for a bribe and then withdraws his request, he is released from liability. Similarly, a person will be exempted from criminal liability if he withdraws his offering or promise to give a bribe before receiving an unambiguous refusal of a potential bribe payee<sup>135</sup>.

Thirdly, incomplete crimes are often punished with less severe sanctions.

Fourthly, setting of the liability for promise and offering of a bribe is much more effective than trying to cover the same deeds with the notion of attempt. In this case, it is sufficient to prove the intentional promise or offering of a person to give a bribe, instead of proving intent to give a bribe, which did not occur due to circumstances beyond the control of such a person. The same applies to the request for or acceptance of an offering / promise to give a bribe.

And finally, the prosecution of promise / offering to give a bribe as an unfinished crime does not cover all situations which may possibly exist in practice. For example, an oral promise or offering that will be seen as a demonstration of intent to give a bribe, without committing a minimum of actions that will constitute a preparation for giving a bribe or attempting to give a bribe, will remain unpunished<sup>136</sup>.

One of the arguments that are often used against the criminalization of the offering / promise to give a bribe and request for a bribe as separate crimes is that a simple offering or promise shows only an intention in respect of which the person has not yet committed any acts. And such an intention does not pose a danger which is sufficient to criminalize it to the full extent<sup>137</sup>. However, this directly contradicts how the international standards relate to a promise or an offering to give a bribe, an request for a bribe, acceptance of the promise or offering - as acts that pose a sufficient social danger so that they can be treated as completed crimes, and moreover, in order to punish them with at least the same severe sanctions that apply to bribe giving and taking. For example, GRECO noted in its Third Evaluation Round Report on Russia 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

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<sup>134</sup> See OECD Report, 2016, available at <https://goo.gl/XuWcTe>.

<sup>135</sup> See, for example, the IAP Second Round Monitoring Report on Kazakhstan, page 28; <http://goo.gl/gqiE0m>; IAP Joint First and Second Round Monitoring Report on Mongolia, page 33, <http://goo.gl/8IKeV3>.

<sup>136</sup> For example, in a judgment of 18 May 2001 the Oudenaarde criminal court in Belgium considered that the question put by a person to the policeman accompanying him in the police car for a breathalyser test after a serious road accident ("Couldn't something be arranged? It's just the two of us") could be deemed to be an offer. The individual was convicted of active bribery. (GRECO, Third Evaluation Round Report on Belgium, page 25; <http://goo.gl/68idUI>).

<sup>137</sup> See OECD/IAP (2014), Third Round Monitoring Report on Kazakhstan, pages 36-37, <http://goo.gl/k0Y1Pn>.

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>138</sup>.

**Conclusion: This part of the recommendation remains unimplemented.**

**- to establish criminal liability for: ... giving bribe and commercial bribery for the benefit of third persons; ...**

Kazakhstan in its progress update of September 2016<sup>139</sup> noted that bribery committed for the benefit of third parties has been criminalized by introducing criminal liability for bribe taking in favour of third parties. At the same time, acts committed by the briber in favour of third parties, are covered by the disposition of such corpora delicti as “Bribery” and “Commercial bribery” (Articles 367 and 253 of the Criminal Code). This argument was mentioned during the Third Monitoring Round and was not accepted.

As noted in the Third Round Monitoring Report, 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 prevents from introducing amendments to article of the RK Criminal Code on bribe giving which are similar to the amendments, which have been introduced to the article on bribe taking and which have explicitly provided for the liability for bribe taking “for oneself or other persons”. Such amendments would then comply with clear-cut international standards and the IAP recommendation.

In their written comments the Kazakh authorities have given a new argument, namely, that in accordance with the Normative Resolution of the Supreme Court No. 8 mediation in bribery to the same subject receiving a bribe from several bribers or intermediation in bribery by several subjects receiving bribes from one briber should be considered as repeated, if for the benefit of each of a bribe givers the bribe taker performs (does not perform) certain actions or each subject receiving a bribe for the benefit of a bribe giver is acting a certain way, and these circumstances are understood by the mediator. In this regard, the Kazakh authorities believe that bribing for the benefit of third parties is criminalized in the national legislation and envisaged by Article 368 of the Criminal Code.

This argument also cannot be accepted as it refers to mediation in bribery, a separate crime under the Criminal Code, and to the issue of repeatedness.

Kazakhstan needs to amend Article 367 of the Criminal Code and to add the words "for oneself or other persons", as has been done in relation to a bribe receiving in Article 366 of the Criminal Code.

**Conclusion: This part of the recommendation remains unimplemented.**

**- to establish criminal liability for: ... trading in influence;**

Kazakhstan in its interim report of September 2016 noted that Article 18 of the UN Convention against Corruption (Trading in Influence) does not require mandatory criminalization of the offense. In accordance with the requirements of this article, the States should consider the possibility of recognition of trading in influence as a criminal offense. This issue was considered during the preparation of the new draft Criminal Code (2014) but was not supported.

As it was noted in the Third Round Monitoring Report on Kazakhstan, 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 the member states under the Council of Europe Criminal Law Convention on Corruption (Article 12).

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, including Kazakhstan. At the same time

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<sup>138</sup> GRECO (2012), Third Evaluation Round Report on Russia (Theme I), pages 22-23, <http://goo.gl/J3zacr>.

<sup>139</sup> Available at <https://goo.gl/DEfaz5>.

Kazakhstan agreed with this recommendation having voted in favour of approving the second round of monitoring report.

In the course of the Third Round of Monitoring Kazakhstan was referring to such corpora delicti as “Abuse of official powers” and “Exceeding of authority or official powers”. However, it was noted already in the IAP Second Round Monitoring Report that these corpora delicti do not cover all elements of the crime “Trading in influence” envisaged by Article 18 of the United Nations Convention against Corruption. In particular, actions of “any other persons” not related to the category of “persons performing state functions or persons equated to them” are not criminalized at all.

“Intermediation in bribery” envisaged by Article 368 of the 2014 Criminal Code, which means “facilitating a bribe payer and a bribe-taker in the achievement or implementation of an agreement between them on taking and giving of a bribe”, cannot be deemed as liability for trading in influence. Trading in influence should mean liability for promise/offering/transfer of undue advantage to a person who claims that he can have illegal influence on an official, as well as request/taking/acceptance of an offering or promise of such advantage for such influence – regardless of the fact whether such influence took place or whether such influence caused necessary results.

Having considered the criminal, criminal procedural and other legislative acts in the sphere of regulation of corruption criminal acts, the monitoring group came to the conclusion that the current legislation of Kazakhstan does not contain provisions that could in some way contradict the establishment of criminal liability for the trade in influence and its inclusion in a special part of the criminal law as a separate crime.

**Conclusion: This part of the recommendation remains unimplemented.**

***- 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;***

Kazakhstan in its interim report of September 2016<sup>140</sup> noted that the notion of a bribe was introduced in the disposition of Part 1, Article 366 of the Criminal Code (Receipt of ... in person or through the intermediary of a bribe in the form of money, securities, other property rights to property or property-related benefits ...) and the concept of “property” in the meaning of “bribe” includes intangible benefits under the Criminal Code.

In accordance with the Regulatory Resolution of the Supreme Court of the Republic of Kazakhstan of 27 November 2015 No. 8 (On the case law regarding considerations of some corruption offences), the object of a bribe can be money, securities, tangible assets, right to property, as well as illegal provision of services of a property nature, including exemption from property obligations.

The object of commercial bribery (Article 253 of the RK Criminal Code) includes money, securities or other property, as well as illegal provision of services of a property nature.

The object of provocation of commercial bribery or bribery (Article 417) includes money, property benefits and advantages. In accordance with the Regulatory Resolution of the Supreme Court of the Republic of Kazakhstan of 27 November 2015 No. 8, the receipt of property benefits and advantages should be understood as the acceptance by a person belonging to the object of the crime, not only for themselves but also for other persons or organizations, services rendered for free where they should be paid for, or the illegal use of benefits, performance of construction or maintenance work, grants of sanatorium or tourist vouchers, travel tickets, loans or credits on preferential terms, etc.

Since the previous rounds of monitoring, the criminal legislation of Kazakhstan in this regard, in fact, has not changed. The object of bribery in Kazakhstan is still limited to material benefits. The same approach is also fixed in the new Regulatory Resolution of the Supreme Court of the Republic of Kazakhstan of 27 November 2015 No. 8 “On the case law regarding considerations of some corruption offences”.

Kazakhstan’s statement that “the concept of “property” in the meaning of “bribe” includes intangible benefits under the Criminal Code, is not confirmed either in the Criminal Code or in the Regulatory Resolution of the Supreme Court. No other materials were given for confirmation. In this case, as follows from the very concept of “property”, it covers material objects.

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<sup>140</sup> Available at <https://goo.gl/DEfaz5>.

According to the international standards, the question should be about a broad content of the notion of a bribe or undue advantage, which should include benefits that are non-material (i.e., benefits that are not a tangible object and are not represented by them and whose value cannot be accurately measured ) and/or non-monetary (not related to money and not consisting of money). That is why in all constituent elements of corruption crimes, mentioned in Chapter 3 of the UN Convention against Corruption, the object of crime is not determined through a list in the form of money, securities, other property, property rights or property benefits, but is formulated broadly as an “undue advantage”.

As noted in the Explanatory Report to the Criminal Law Convention on Corruption, the undue advantages exist when the offender (or any other person, for instance his/her relative) is placed in a better position than he was before the commission of the offence and that he is not entitled to the benefit<sup>141</sup>. According to another explanation, the term “advantage” shall be applied as broadly as possible and to cover all instances “where the benefits create or may create a sense of obligation on the side of the recipient towards the giver”<sup>142</sup>.

Examples of non-material advantages include: sexual relations; solution of an issue in a shorter time or other preferential treatment; better career opportunities, including promotion and horizontal transfer to another position within the organization; symbolic advantages or benefits associated with honours, such as titles and insignia; positive coverage in the media; scholarship; unpaid work practices; the passage of school and other selection procedures; etc. The practice existing in some ACN OECD countries extends the notion of benefit by including any benefit that has a market value, which in principle includes some intangible benefits. However, such an approach will unlikely meet the requirements of the international standards to the full extent, since for some goods there is no legal market (for example, prostitution), and some goods are difficult to estimate in terms of market value (for example, insignia)<sup>143</sup>.

Also, the notion of a “bribe” envisaged in Part 1, Article 366 of the Criminal Code (*“Receipt of ... in person or through the intermediary of a bribe in the form of money, securities, other property rights to property or property-related benefits ...”*) cannot be deemed as a valid one, as it refers to the “types” of bribe but does not define it and also it only relates to Article 366 and does not apply automatically to Article 367 of the RK Criminal Code.

Thus, as before, Kazakhstan should replace the notion of bribe with an “undue advantage” and include its clear definition in the Criminal Code in accordance with the above-mentioned international standards.

**Conclusion: This part of the recommendation remains unimplemented.**

**- to consider establishing criminal liability for illicit enrichment.**

As noted in the responses of the Kazakh authorities, the issue of criminal liability for illicit enrichment was considered within the framework of the interdepartmental working group and was not supported by the group members. According to the responses of the Kazakh authorities, it would be correct to change the income declaration system prior to the introduction of a criminal liability rule for “illicit enrichment”: firstly, to oblige public officials to submit their declarations of expenditures, and secondly, income declaration should be made mandatory for all able-bodied adults. Such step would make the provision about the illicit enrichment effective, efficient, and most importantly a “working” anti-corruption tool in law enforcement.

The introduction of mandatory income declaration by the population in the Republic of Kazakhstan is envisaged by the Anti-Corruption Strategy for 2015-2025 in the framework of the implementation of the 100 Precise Steps National Plan on implementation of the institutional reforms by the Head of the State. Starting 2020 the system of income declaration will cover all individuals.

In addition, according to the information provided, the recommendation to establish criminal liability for illicit enrichment was repeatedly discussed in the working groups of the General Prosecutor's Office of the Republic of Kazakhstan, the Majilis and the Senate of the Parliament of the Republic of Kazakhstan, and were also discussed at the international conferences organized by the General Prosecutor's Office. The establishment of such liability is recognized inexpedient and incompliant with the national legislation and contradicting the Constitutional norm on the presumption of innocence.

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<sup>141</sup> Explanatory Report to the Criminal Law Convention on Corruption (ETS No. 173), §37, <http://goo.gl/qiu9KG>.

<sup>142</sup> State of implementation of the United Nations Convention against Corruption, page 16, see <https://goo.gl/zlM9SP>.

<sup>143</sup> See, for example, GRECO, Third Round Report on Lithuania, §70, <http://goo.gl/173O7y>.

Kazakhstan provided the minutes of the meeting of 14 March 2017 of the interdepartmental sub-working group established under the General Prosecutor's Office to monitor and summarize the practice of applying the provisions of the Criminal and Criminal Procedural Legislation, where this decision is fixed.

According to the methodology of the fourth round of monitoring, when recommending that the country consider the possibility of taking certain measures, a "recommendation" will be considered "fully implemented" ("fully compliant") if the country demonstrates that the possibility of introducing the proposed measures was considered at the official level (in the form of a draft document, a public discussion and others), and an official decision was made on the basis of such examination of the expediency of introducing or rejecting of the recommendation.

**Conclusion: This part of the recommendation has been fully implemented.**

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

1. *To bring the provisions on criminal liability for corruption offenses in line with the international standards, namely, to establish criminal liability for:*
  - 1) *promise, offering of a bribe, acceptance of a promise or offering of a bribe, and also for request of a bribe as completed corpus delicti in the public and private sectors;*
  - 2) *bribe giving and commercial bribery for the benefit of third persons;*
  - 3) *trading in influence.*
2. *To provide in the Criminal Code that the object of corruption crimes is an undue advantage, a clear definition of which should cover both material and any other (including non-pecuniary) benefits.*
3. *To list jurors as the subjects of liability for corruption crimes.*

**3. 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 the Third Round Monitoring Report it was acknowledged that the definition of criminal liability for money laundering as part of the list of acts that were criminalized in the new 2014 Criminal Code is believed to be overall in line with the international standards. However, the 2014 Criminal Code now has a new element – relevant actions are prosecuted under criminal law only if they have been committed in "significant amount". Under Article 3 of the 2014 Criminal Code the significant amount is taken to mean in Article 218 an amount in excess of 2,000 MCRs, i.e. in excess of almost EUR 14,500. According to the report, this provision directly contravenes the international standards. According to the Explanatory Notes to FATF Recommendation No. 3, the money laundering offence must mean to include any type of assets, irrespective of value, which is direct or indirect income generated by crime<sup>144</sup>.

On 8 April 2016 there was adopted the Law "On Amending Certain Legislative Acts of the Republic of Kazakhstan on Arbitration", which amended Articles 3 and 218 of the Criminal Code by excluding the words "if these acts are committed in a significant amount" (2,000 MCRs) and Article 1 of the Law "On Countering Legalization (Laundering) of Criminally Received Proceeds and Financing of Terrorism" in part of bringing the notion of "Legalization (laundering) of criminally received money and/or other assets" in compliance with Article 218 of the Criminal Code. Thus, inconsistency of the provisions of the Criminal Code and the Law "On Countering Legalization (Laundering) of Criminally Received Proceeds and Financing of Terrorism" were removed.

It is noted in the Third Round Monitoring Report that analysis of the disposition of Article 218 of the Criminal Code shows certain inconsistencies in the provision. Legalization (laundering) of criminally received money and/or other assets is defined as introduction into legitimate circulation of criminally received money and/or other assets through transactions by way of conversion or transfer of assets being income from criminal and/or administrative offences, to hide or conceal the genuine nature, source, origin, means of disposal, movement, right to assets or their ownership, knowing that such assets represent income

<sup>144</sup> See: [http://eurasiangroup.org/Rekomendacii\\_FATF.pdf](http://eurasiangroup.org/Rekomendacii_FATF.pdf).

from criminal and/or administrative offences, or to possess and use such assets, or to offer mediation in legalization of criminally received money and/or other assets. In this case, it is not believed to be proper to use the set phrase “criminally received” in conjunction with the transaction with assets representing income generated by administrative offences.

Since that time, the disposition of Article 218 of the RK Criminal Code has been changed and the contradiction has been eliminated (“Involvement of criminally received money and/or other assets into legitimate circulation by way of conversion or transfer of assets being income from criminal offences, or possession and use of such assets, hiding or concealing its genuine nature, source, location, means of disposal, movement, right to assets or their ownership, knowing that such assets represent income from criminal offences, as well as offering mediation in legalization of criminally received money and/or other assets”).

**Conclusion: This part of the recommendation has been fully implemented.**

***Practice of application.***

**Table 20. Statistics of criminal prosecution of money laundering in 2014-2016**

	2014				2015				2016			
	registered	forwarded to court	dismissed for non-rehabilitative reasons	judgement of conviction is issued	registered	forwarded to court	dismissed for non-rehabilitative reasons	judgement of conviction is issued	registered	forwarded to court	dismissed for non-rehabilitative reasons	judgement of conviction is issued
Money laundering (Article 218 of the RK CC)	96	113	13	11	54	22	-	4	64	56	1	1

Source: information provided by the General Prosecutor’s Office of Kazakhstan<sup>145</sup>.

An additional issue that is considered in the course of the IAP monitoring is the self-contained nature of money laundering, which means that laundering of proceeds from the corruption activities 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<sup>146</sup>.

This problem is also inherent in Kazakhstan, which can also explain the tendency of a decreasing number of sentences in money laundering cases (see above). Therefore, it is recommended that the law directly sets the possibility of prosecuting money laundering cases separately from pursuing a predicate offense (see examples of the legislation in Ukraine and Tajikistan)<sup>147</sup>.

<sup>145</sup> Kazakhstan also provided data from the Ministry of Finance, which differ from those of the General Prosecutor's Office. According to the Ministry of Finance, for example, eight judgements of conviction were issued under this article in 2015, and nine judgements in 2016.

<sup>146</sup> OECD IAP Third Round Monitoring Final Report, 2016, available at <https://goo.gl/XuWcTe>.

<sup>147</sup> In Tajikistan Article 262 of the Criminal Code specifically provides (Note No. 9) that the criminal liability for committing a crime of laundering criminally received proceeds occurs regardless of whether the offender has been prosecuted for the main (predicate) offense, as a result of which illegal means have been received. In October 2014, the Ukrainian parliament approved a new version of the law on money laundering, which came into force in February 2015. The new law introduced important changes to the Criminal Procedural Code of Ukraine (Article 216), according to which the prosecution of money laundering cases is conducted without preliminary or simultaneous criminal prosecution of persons who have committed predicate crimes, in particular in cases where: 1) the predicate offense has been committed outside Ukraine, while money-laundering has been committed in Ukraine; 2) the fact of a predicate offense is established by the court with appropriate procedural decisions.

## New recommendation No. 18

1. *To provide directly in the legislation for the possibility of prosecution for legalization (money laundering) without the need for prior or simultaneous criminal prosecution of persons who committed predicate crimes.*
2. *To train investigators, prosecutors and judges on issues of autonomous liability for money laundering in accordance with the international standards.*

***4. 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.***

As noted in the responses of the Kazakh authorities, when developing a new draft of the RK Criminal Code, the members of the interdepartmental working group unanimously decided that the introduction of criminal liability of legal entities is inexpedient in view of the absence of a legal entity's personal liability, which is an obligatory sign of the crime and may lead to serious negative consequences for the country's economy. According to the members of the working group, administrative pressure on business will increase from the control and supervisory bodies, additional conditions for corruption and raider schemes will be created, which in turn will lead to the withdrawal of assets abroad, the investment expectations of Kazakhstan's economy may not be justified, as the income received by domestic and foreign entrepreneurs will not be invested in the development of their own production.

Moreover, Kazakhstan noted that no international act ratified by the Republic of Kazakhstan directly envisages the establishment of criminal liability of organizations. In particular, under Article 26 of the United Nations Convention against Corruption, subject to the legal principles of the State Party, the liability of legal persons may be criminal, civil or administrative. Due to the fact that this provision of the Convention is not an imperative regulation, in fact the resolution of this issue is left to the discretion of the State Party to the Convention, which must deal with it in light of the current legal system. The main thing in this case is the provision by the State Party of the application of "effective, proportional and dissuasive criminal or non-criminal sanctions against legal entities". Similar provisions are provided for by the International Convention for the Suppression of the Financing of Terrorism and the UN Convention against Transnational Organized Crime.

It should be noted that the authorities of Kazakhstan have revised their position on this issue. As mentioned in the Second Round Monitoring Report, in May 2010 the Government of Kazakhstan submitted in the Parliament the draft Law "On Amending Certain Legal Acts of the Republic of Kazakhstan on Introduction of Criminal Liability of Legal Entities" which passed the first reading in December 2010. At the same time, later the draft law was withdrawn from the Majilis of the Parliament by a decree of the Government of the Republic of Kazakhstan of March 2012. As noted in the official information of Kazakhstan, "the results of almost two-year work on the bill showed that the deputy corps did not come to an unequivocal opinion. At the same time, the opponents of the institution of criminal liability of legal persons were representatives of the business community, since introduction of this institution can lead to serious negative consequences for the country's economy. In particular, the administrative pressure on business by administrative and supervisory bodies will increase, additional conditions for corruption and raider schemes will be created, which in turn will lead to the stripping of assets abroad."

In addition, according to the authorities of Kazakhstan, the Code of Administrative Offenses of the Republic of Kazakhstan already provides for liability of legal entities (fine, revocation of a license, special permission, suspension of its effect, suspension or prohibition of their activities).

Concerning the reference to the Code of Administrative Offenses, the provisions of the Code of Administrative Offenses were already analysed in the Second Round Monitoring Report on Kazakhstan and there was made a clear conclusion about 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 the 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 case an individual commits a corruption crime. Obviously, this makes corporate liability ineffective and allows to hold legal entities liable only for minor administrative corruption offences.”*

In the new Code of 2014 similar provisions are contained in Article 678 of the Code of Administrative Offences.

It can be added to the above that the anti-corruption conventions of the Council of Europe and the United Nations contain a specific obligation to establish the liability of legal entities for the corruption crimes described in their texts (according to the Council of Europe Convention the liability is envisaged for active bribery, abuse of influence and money-laundering, while according to the UN Convention the liability is envisaged for all offenses specified in this Convention). This means that even if the administrative liability of legal entities is established, it must contain a reference to criminal offenses that comply with the requirements of the said conventions, or the constituent elements of administrative offenses must duplicate the relevant criminal offenses<sup>148</sup>.

It is important to recall that the recommendation did not refer to the mandatory establishment of criminal liability. The form of liability of legal entities remains at the discretion of the authorities of the country; however, the provisions on liability must comply with the standards of efficiency and effectiveness.

**Conclusion: Kazakhstan has not implemented this part of the recommendation.**

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

***To establish an effective and dissuasive liability of legal entities for corruption crimes with proportionate sanctions that will be commensurate with the committed crime, in accordance with the international standards and best practices.***

***5. 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 in its interim progress report of September 2016<sup>149</sup> noted that there had been performed an analysis of enforcement of the provisions regarding effective regret in administrative and criminal proceedings resulting in corresponding changes introduced by the new Criminal Code and Code of Administrative Offences. The article providing for exemption from administrative liability in connection with effective regret was removed from the new version of the Code of Administrative Offences adopted in July 2014 (Article 67 of the previous version of the Code of Administrative Offences).

According to the authorities of Kazakhstan, the provision of Article 65 of the Code of Administrative Offences “Release from criminal liability in connection with effective regret” applies to corruption-related crimes as it really helps investigators in solving them.

<sup>148</sup> IAP Second Round Monitoring Report for 2009-2013, page 83.

<sup>149</sup> Available at <https://goo.gl/DEfaz5>.

Regarding the analysis of the use of effective regret, Kazakhstan repeated the arguments that were given during the third round of monitoring (see Report on Kazakhstan, pp. 52-54). As it was noted in the Third Round Monitoring Report, the Report never doubted the need for the concept of effective regret as such; similar provisions are used in other countries and may indeed prove to be 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.

Kazakhstan conducted a certain analysis of the application of provisions on effective regret in administrative and criminal proceedings and even provided for certain changes in the new Criminal Code and the Code of Administrative Offenses. However, at the same time, the specific comments contained in the Reports on the second round and the third round of monitoring were not considered, and the analysis did not cover these issues.

As noted in the ACN OECD Summary Report for 2013-2015, if it is decided to keep the provisions on effective regret in the legislation, certain guarantees should be made against possible abuse:

- it should not be applied automatically – the court should have the possibility to take into account different circumstances, e.g. the motives of the offender;
- it should be valid only during a short period of time after the commission of a crime and in any case, before the allegation was brought to the attention of the law enforcement authorities through other sources;
- the briber who denounces the crime should be obliged to co-operate with the authorities and assist in the prosecution of the bribe-taker;
- it should not be applicable in cases when bribery was initiated by the briber himself;
- the bribe should not be returned to the bribe giver and should be subject to mandatory confiscation.

Article 65 provides that a person having committed a criminal misdemeanour or having committed for the first time a crime, may be released from criminal liability taking into account the personality of the perpetrator, his voluntary surrender with acknowledgement of guilt, if he facilitated in disclosing and investigation of the criminal offence, compensated the damage caused by the criminal offence.

Besides, in Kazakhstan, as in some other countries in the region, in addition to the article on release from liability due to effective regret, there is a provision (note 2 to article 367 of the Criminal Code) on release of a bribe giver from liability if there an official has been extorting a bribe from him, or if the person has voluntarily informed a law enforcement or special state body of bribery.

Hence, for the crime of giving bribes, there are two competing provisions for the release of liability. Moreover, Article 65 is much broader and contains a list of grounds for release from liability. In general, according to the monitoring group, note 2 to article 367 can be retained, but it should be brought into line with the international standards (see above). There is no need to extend the provisions of Article 65 of the Criminal Code to corruption crimes, since this article contains too broad and unclear reasons for release from liability. From the standpoint of prosecution of corruption crimes, the main value of the effective regret provision is the stimulation of reporting about of receiving or requesting of an undue advantage and thus revealing a corrupt act that would otherwise be difficult or impossible to identify.

Note 2 to article 367 (after it has been brought into line with the standards) copes with this task. Thus, it is recommended to exclude the effect of Article 65 of the Criminal Code on corruption crimes.

According to the note to Article 367 of the Criminal Code of the Republic of Kazakhstan release from liability in the case of extortion is also problematic, as it is envisaged even if the bribe-giver has not voluntarily reported the fact of extortion<sup>150</sup>. According to the definition of extortion given in the legislation of Kazakhstan (paragraph 11 of the Regulatory Resolution of the Supreme Court of the Republic of Kazakhstan No. 5), extortion means demanding of a bribe by a person under the threat of committing acts

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<sup>150</sup> See, for example, GRECO (2010), Third Evaluation Round Report on Armenia, §90, <http://goo.gl/FTPOnB>.

that may damage the legitimate interests of the bribe-giver or the persons he represents, or the deliberate creation of conditions under which he is forced to bribe in order to prevent harmful consequences for law-enforceable interests. The OECD Working Group on Bribery in its report on **Latvia** expressed their concern many individuals who commit foreign bribery could qualify for immunity from prosecution as extortion victims.

Latvian criminal legislation “defines extortion as bribe demands associated with threats to harm” the lawful interests of “a person, which could conceivably include interests of an economic nature. A threat by a foreign official to breach a contract or to deny participation in a tender might thus be sufficient<sup>151</sup>.”

Besides, according to the standards of the OECD Working Group on Bribery, effective regret shall not apply to the crimes of bribery of foreign public officials. If in the case of bribery committed inside the country, the mechanism of effective regret can facilitate the disclosure of the relevant crime and the prosecution of the public officials, but in the case of bribery of a foreign public official, who has taken a bribe, there is no guarantee that he will be criminally prosecuted. “If this occurs, the defence serves no useful purpose: the crime may come to light, but the offenders remain unpunished and the ends of justice remain unserved”<sup>152</sup>.

**Practice of application.** Kazakhstan cited the following data on the Anti-Corruption Service in the responses to the questionnaire:

**Table 21. Number of criminal cases closed in connection with effective regret**

	Number of cases closed under Article 65 of the RK Criminal Code	Paragraph 2 of the note to Article 367 of the RK Criminal Code (release from liability) is applied
2014	51	0
2015	178	71
2016	178	81

Source: information from the state authorities of Kazakhstan.

**Conclusion: Kazakhstan has not implemented this part of the recommendation.**

**In general, Kazakhstan is partially compliant with Recommendation 2.1.-2.2.**

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

- 1. To exclude corruption crimes from the scope of Article 65 of the Criminal Code (“Release from criminal responsibility in connection with effective regret”).**
- 2. To bring the note to Article 367 of the Criminal Code (“Bribe giving”) in accordance with the international standards regarding the grounds for release from liability in case of a voluntary reporting to the law enforcement agency and in case of extortion.**
- 3. To exclude the possibility of release from liability in accordance with the note to Article 367 of the Criminal Code in case of bribe giving to a foreign public official.**

<sup>151</sup> OECD/WGB (2014), Phase 1, Report on Latvia, §76, <http://goo.gl/Oh8U5I>.

<sup>152</sup> OECD/WGB (2005), Phase 2 Report on Slovakia, §160, <http://goo.gl/Yw2Mxe>.

***Recommendation 2.3. of the Second Monitoring Round Report on Kazakhstan (recommendation was confirmed during the Third Monitoring Round)***

1. 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.
2. 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***

Both the Criminal Code the Law “On the Fight against Corruption” (adopted in November 2015) have consistent definitions of the subjects of corruption crimes, namely:

- a person holding a highly important public office;
- a public official;
- a person authorized to perform public functions;
- a person equated to the persons who are authorized to perform public functions.

The definitions of these notions in the Law “On the Fight against Corruption” are brought in compliance with the new Criminal Code.

**Conclusion: Kazakhstan is fully compliant with this part of Recommendation.**

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

This recommendation from the previous rounds of monitoring was not implemented in part of the jurors. The latter are not civil servants and cannot be attributed to any of the categories covered by the definitions in the Criminal Code. The closest to them is the concept of “officials”, which includes persons who permanently, temporarily or by special authority exercise the functions of a representative of the authority. However, a representative of the authority means a person who is on the civil service. Thus, jurors are not covered by the provisions on liability for corruption offenses and this part of the recommendation is only partially implemented.

The authorities of Kazakhstan reported in their responses to the questionnaire of the Fourth Round of Monitoring that the Anti-Corruption Service had considered the proposals of the General Prosecutor's Office to implement the recommendations of the Istanbul Anti-corruption Action Plan with the study of forensic investigation and analysis of the international and national legislation. The proposals to include jurors in the list of persons subject to anti-corruption legislation are supported. In the aspect of strengthening guarantees of observance of the rights of citizens and ensuring the rule of law in the administration of justice, the assignment of jurors to the subjects of corruption offenses is justified and timely. It is further noted that this change can be implemented by expanding the list of persons equated to those who are authorized to perform public functions in paragraph 28 of Article 3 of the Criminal Code.

**Conclusion: Kazakhstan has not implemented this part of the recommendation, since the respective amendments into the Criminal Code have not been introduced yet.**

**New recommendation regarding this issue is included into Recommendation No. 17 above.**

***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.***

Article 366 of the 2014 Criminal Code envisages criminal liability for receiving a bribe in the form of money, securities, other property, property rights or benefits of a property nature for himself or others for the actions (inaction) in favour of the bribe-giver or the persons represented by him, in person or through an intermediary, by an official of a foreign state or an international organization, if such actions (inaction) are

part of the official powers of this person, or it by virtue of the official position can facilitate such actions (inaction), as well as general patronage or connivance.

Pursuant to Article 367 of the Criminal Code, criminal liability is stipulated for bribing an official of a foreign country or an international organization in person or through an intermediary

In accordance with paragraph 2 of the Normative Resolution of the Supreme Court of the Republic of Kazakhstan of 27 November 2015 No. 8 “On the case law regarding considerations of some corruption offences”, foreign public officials or officials of an international organization are subjects of corruption crimes.

According to paragraph 3 of the said Resolution, foreign public officials or officials of an international organization mentioned in articles 366 and 367 of the Criminal Code include persons recognized as such by the international treaties of the Republic of Kazakhstan in the field of the fight against corruption. A public official of a foreign state is recognized as any appointed or elected person holding a position in the legislative, executive, administrative or judicial body of a foreign state and any person performing any public function for a foreign country, including for a public agency or an enterprise. The official of an international organization is an international civil servant or any person authorized by such organization to act on its behalf.

Hence, this Regulatory Resolution of the Supreme Court eliminates the gap in the Criminal Code, which does not contain a definition of these persons.

In general, the extension of the provisions on bribery to foreign public officials or officials of an international organization, as well as the inclusion of the definition of foreign public officials in the legislation of Kazakhstan should be welcomed.

This definition reflects the relevant provision of the UN Convention against Corruption. However, such definition may not fully cover all relevant actors that are explicitly provided for by other international instruments.

As it was noted in the IAP Third Round Monitoring Summary, in accordance with the international treaties, the definition of a foreign public official should include the following groups of persons:

1. Persons holding legislative, administrative or judicial offices in a foreign state (regardless of whether such person is elected or appointed; whether such person holds his/her office permanently or temporarily; whether s/he is remunerated or not; regardless of the seniority of his/her office)<sup>153</sup>;
2. Officials and agents of international public organizations (including those authorized by such organizations to act on their behalf)<sup>154</sup>;
3. Persons exercising public functions (for example, for the public agency or public enterprise)<sup>155</sup>;
4. Members of parliamentary assemblies of international and supranational organizations<sup>156</sup>;
5. Persons holding judicial offices or officials of an international court<sup>157</sup>;
6. Persons providing public services (such as notaries, advocates and auditors)<sup>158</sup>;
7. Arbitrators of the national and foreign arbitral (arbitration) tribunals<sup>159</sup> and

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<sup>153</sup> OECD Anti-Bribery Convention, Article 1.4(a); COE Convention, Articles 1 and 6, Explanatory Report, §28; UNCAC, Article 2(a)(i), (b).

<sup>154</sup> OECD Anti-Bribery Convention, Article 1.4(a); UNCAC, Article 2(c).

<sup>155</sup> OECD Anti-Bribery Convention, Article 1.4(a); UNCAC, Article 2(a)(ii), (b).

<sup>156</sup> COE Criminal Law Convention on Corruption, Article 10. COE Convention contains a qualification characteristic, saying, namely, that the country has to be a member of such international or supranational organization. However, the OECD Anti-Bribery Convention does not stipulate for such limitation.

<sup>157</sup> COE Criminal Law Convention on Corruption, Article 11; Explanatory Report to the Criminal Law Convention on Corruption, §63. Article 10. COE Convention contains a qualification characteristic, saying, namely, that the country has to accept the jurisdiction of such court. Should an international court be deemed as “international organization”, then the OECD Anti-Bribery Convention does not stipulate for such limitation.

<sup>158</sup> UNCAC, Article 2(a)(ii). Please note that the idea that a person providing “public services” is a public official is included into the definition of “public official” in UNCAC, but is not explicitly included in the definition of the “foreign public official” in UNCAC.

8. Jurors in the court system of another state<sup>160</sup>.

The persons indicated in paragraphs 4-8 of the above list are not covered directly in the definition contained in the Normative Resolution of the Supreme Court of Kazakhstan.

In its written comments Kazakhstan did not agree with this conclusion. According to the authorities of Kazakhstan, the wording used in the Normative Resolution fully covers not only persons specified in international treaties, but also others occupying a large variety of any positions in a foreign country and international organization.

As the practice of application of the relevant provisions is missing, the alleged broad interpretation of the wording in the Normative Resolution cannot be approved. So that to eliminate uncertainty and an unambiguous expanding the provisions on bribery of foreign public officials to all persons to be covered according to international standards, the Criminal Code or Regulatory Resolution of the Supreme Court should be amended appropriately.

The effect of the criminal law on persons who have committed a criminal offense in the territory of the Republic of Kazakhstan is regulated by articles 7-8 of the RK Criminal Code:

1. A person who has committed a criminal offense in the territory of the Republic of Kazakhstan is liable under this Code.

2. A criminal offense committed in the territory of the Republic of Kazakhstan is an act which is committed or continued or completed in the territory of the Republic of Kazakhstan. This Code also applies to the criminal offenses committed on the continental shelf and in the exclusive economic zone of the Republic of Kazakhstan.

3. A person who has committed a criminal offense on a ship assigned to a port of the Republic of Kazakhstan and located in an open water or airspace outside the limits of the Republic of Kazakhstan shall be subject to the criminal liability under this Code unless an international treaty of the Republic of Kazakhstan provides otherwise. Under this Code, criminal liability is also borne by a person who has committed a criminal offense on a warship or military aircraft of the Republic of Kazakhstan, regardless of where it was.

4. The issue of criminal liability of diplomatic representatives of foreign states and other citizens who enjoy immunity, if committed by these persons, a criminal offense in the territory of the Republic of Kazakhstan shall be settled in accordance with the norms of international law.

5. Citizens of the Republic of Kazakhstan who have committed a criminal offense outside the Republic of Kazakhstan are subject to criminal liability under the Criminal Code of the Republic of Kazakhstan, if the act committed by them is recognized as a criminal offense in the state in whose territory it has been committed, and if these persons have not been convicted in another state. In the conviction of these persons the punishment may not exceed the upper limit of the sanction provided for by the law of the state in whose territory the criminal offense has been committed. The foreigners and stateless persons being in the territory of the Republic of Kazakhstan shall be liable on the same grounds in cases when they cannot be extradited to a foreign state for bringing to criminal liability or serving a sentence in accordance with the international treaty of the Republic of Kazakhstan.

6. Foreigners, as well as stateless persons permanently residing in the territory of the Republic of Kazakhstan, who have committed a crime outside of the Republic of Kazakhstan, are subject to criminal liability under this Code in cases where this act is directed against the interests of the Republic of Kazakhstan, and in cases provided for by an international treaty of the Republic of Kazakhstan, if they were not convicted in another state and brought to criminal liability in the territory of the Republic of Kazakhstan.

In connection with the rules for determining jurisdiction in Kazakhstan, the following can be noted:

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<sup>159</sup> Additional Protocol to the COE Criminal Law Convention on Corruption, Articles 1, 2 and 4; Explanatory Report to the Additional Protocol, §9. Amongst the IAP countries, Armenia, Azerbaijan, Georgia and Ukraine are parties to the Additional Protocol.

<sup>160</sup> Additional Protocol to the COE Criminal Law Convention on Corruption, Article 6; Explanatory Report to the Additional Protocol, §37.

- 1) The requirement that citizens of the Republic of Kazakhstan who have committed a criminal offense outside the Republic of Kazakhstan are subject to criminal liability under the Criminal Code of the Republic of Kazakhstan only if the act committed by them is recognized as a criminal offense in the state in whose territory it was committed, is excessive. This reduces the effectiveness of prosecuting bribery of foreign public officials in those states where such liability is not envisaged<sup>161</sup>.
- 2) Liability for the acts committed abroad should extend not only to the citizens of the Republic of Kazakhstan, but also to the persons permanently residing in Kazakhstan.
- 3) The rule that the foreigners and stateless persons who do not permanently reside in the territory of the Republic of Kazakhstan and who committed a crime outside of the Republic of Kazakhstan are subject to criminal liability under the Criminal Code of the Republic of Kazakhstan in cases where their act is directed against the interests of the Republic of Kazakhstan, is unclear as it does not specify what is “an act directed against the interests of the Republic of Kazakhstan”. For example, can a corruption crime itself be considered as one that is directed against the interests of the Republic of Kazakhstan, or should there be an additional element of connection with Kazakhstan – and if so, which one<sup>162</sup>.

In its written comments Kazakhstan has provided a reference to the Law "On the National Security of the Republic of Kazakhstan", where the national interests of the Republic of Kazakhstan are defined as a complex of legally recognized political, economic, social and other needs of the Republic of Kazakhstan determining the ability of the state to ensure the protection of the rights of an individual and citizen, values of the Kazakhstan society and foundations of the constitutional order. However, there is no affirmation that this definition will be applied in the context of criminal law, and how it will be used for consideration of corruption offences (see previous paragraph).

- 4) It should be clarified whether there is jurisdiction of Kazakhstan when the crime has been committed by two or more accomplices and one of the accomplices has committed part of the crime in the territory of Kazakhstan, but the crime has been completed outside the territory of Kazakhstan. It should also be clarified whether it is sufficient to establish the jurisdiction of Kazakhstan, if only the preparatory part of the crime was committed on its territory (for example, if a telephone call or an e-mail message with an offering of a bribe has been sent from the territory of Kazakhstan).

Kazakhstan should consider examples of the best practices for establishing universal jurisdiction for corruption crimes. For example, Article 7 of the Criminal Code of Lithuania establishes universal jurisdiction over a list of offences governed by the international treaties, including the active bribery offence, which means that Lithuania has jurisdiction to prosecute the bribery of foreign public officials regardless of the citizenship and/or place of residence of the defendant; the place of commission of the offence; and whether it is criminalised under the laws of the place where the crime occurred<sup>163</sup>.

Kazakhstan is recommended to consider the possibility of establishing such a universal jurisdiction or by broadly interpreting the notion “an act directed against the interests of the Republic of Kazakhstan” so that it covers all corruption crimes as offenses that are provided for by the international obligations of Kazakhstan or by introducing additional regulations.

***Practice of application.*** During 2014-2016 the anti-corruption service had no criminal cases on giving bribes to foreign public officials.

**Conclusion: Kazakhstan has largely implemented this part of the recommendation.**

<sup>161</sup> See, for example, the OECD/WGB Report (2002), Phase 2, Report on Finland, page 25, <https://goo.gl/u9o2vB>, the OECD/WGB Report (2008), Phase 2, Report on Estonia, § 158, <https://goo.gl/n8a4Dg>, where a similar approach was criticized by the OECD Working Group. See also the example of Poland, where bribery of foreign public officials is excluded from the requirement of dual criminalization for establishing jurisdiction (OECD/WGB Report (2007), Phase 2, Report on Poland, § 143, <https://goo.gl/vawTMT>).

<sup>162</sup> See, for example, the issues that the OECD Working Group on Combating Bribery of Foreign Public Officials rose in connection with a similar provision in the Criminal Code of the Russian Federation. OECD/WGB (2014), Phase 2, Report on the Russian Federation, § 178-1799, <https://goo.gl/EJ1LD6>.

<sup>163</sup> OECD/WGB (June 2017), Phase 1, Report on Lithuania, §69, <https://goo.gl/b9Chsp>.

In general, Kazakhstan is largely compliant with Recommendation 2.3.

#### New recommendation No. 21

1. *To expand the notion of foreign public officials in accordance with the international standards.*
2. *To consider the possibility of establishing universal jurisdiction for cases of bribery of foreign public officials and other corruption crimes, namely the establishment of jurisdiction over such crimes regardless of the nationality of the person who has committed the crime or the place of its commission.*
3. *To eliminate the requirement of dual criminality for liability of the citizens of Kazakhstan who have committed a corruption crime in a foreign country.*
4. *To train investigators, prosecutors, judges, representatives of Kazakh diplomatic missions on the effective detection, investigation, prosecution and adjudication of criminal cases on foreign bribery.*

### Confiscation

#### *Recommendation 2.4.-2.5. of the Third Monitoring Round Report on Kazakhstan*

- ...
2. 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.
  3. 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 bone fide buyers of the property to be confiscated.

***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.***

According to the previous Criminal Code of 1997, confiscation of property was understood as forced gratuitous withdrawal of all or part of property belonging to the convicted person, as well as property being an instrument or means of committing a crime. Besides, apart from the property of the convicted person, the criminally received property or property acquired with the criminally received funds and transferred by the convicted person into the ownership of others, was subject to confiscation in case of commission of corruption and certain other crimes (including money laundering). Confiscation as an additional punishment could be imposed only in cases provided for in the relevant articles of the Special Part of the Criminal Code. Confiscation was envisaged as a sanction not for everything, but only for the qualified corpora delicti of taking and giving bribes as well as commercial bribery.

In addition, the Criminal Procedural Code of 1997 provided for the so-called special (or procedural) confiscation, which was applied regardless of confiscation as a punishment and could be used for any crime. In accordance with Article 121 of the Criminal Procedural Code, when rendering a sentence, dismissing a case or refusing to initiate a case, the question of material evidence should have been resolved. The material evidence could be items if there were reasons to believe that they served as instruments of crime, or retained the traces of a crime, or were objects of criminal acts, as well as money and other valuables, items and documents that can serve as means to detect a crime, establish the actual circumstances of the case, identify the perpetrators, refute the charge or mitigate liability. At the same time: the instruments of crime were subject to confiscation; criminally received money and other valuables were subject to conversion into the state's income under the court verdict.

According to the new Criminal Code of the Republic of Kazakhstan of 2014, the object of confiscation as an additional punishment is shrinking. Confiscation means the forced free of charge withdrawal and conversion into the state's ownership of the property owned by a convicted person, obtained by criminal means or acquired with the criminally received funds, as well as property that is an instrument or means of

committing a criminal offense. As noted in the Third Round Monitoring Report, limiting the object of confiscation is the right approach, as confiscation of all property of the convicted person is a disproportionate measure.

According to the 2014 Criminal Code confiscation extends to money and other property:

- 1) received as a result of committing a criminal offense and any proceeds therefrom, with the exception of property and income therefrom to be returned to the rightful owner;
- 2) in which the property received as a result of committing a criminal offense and the proceeds therefrom were partially or fully converted or transformed;
- 3) used or intended to finance or otherwise support extremist or terrorist activities or criminal group;
- 4) being an instrument or means of committing a criminal offense;
- 5) transferred by the convicted person into the ownership of others.

If confiscation of a particular item, being part of the property that is subject to confiscation, is impossible at the time of the court ruling on confiscation of this item due to its use, sale or for any other reason, under the court ruling a sum of money, which corresponds to the value of this item, should be confiscated.

These new provisions generally correspond to the international standards, since they envisage confiscation of tools, funds and proceeds from bribery; value (equivalent) confiscation; confiscation of converted proceeds; confiscation of benefits arising from the criminal proceeds. However, the Third Round Monitoring Report contains the recommendation on amending the Criminal Code with the provisions on protection of a bona fide purchaser of the property that is subject to confiscation, as well as on confiscation of the property transferred to a third party who knew or should have known about the criminal origin of this property.

In this regard we should welcome development by the Ministry of Justice of RK of the draft law "On Amendments and Additions to Some Legislative Acts of Kazakhstan on Reinforcement of Property Rights Protection and Arbitration", which provides amendments to improve the rules of criminal procedure, criminal-executive legislation governing sanctions in the form of a property confiscation, execution of sentences in the specified part, encumbrances removal (arrest) of seized property by specifying separate rules. In particular, the draft law specifies that in relation to the ownership of third parties only property of a criminal origin can be seized or which is used for funding or as a means and instrument of criminal activity. Currently the draft law has been submitted to the Government and agreed with all interested state bodies.<sup>164</sup>

At the same time, although this is not explicitly stated in the General Part of the Criminal Code, based on the provisions of the Special Part confiscation will be applied in cases specified in the relevant articles of the Special Part of the Criminal Code. Like before, compulsory confiscation is provided for many, but not all, corruption crimes. Confiscation, as a mandatory measure, is envisaged for all types of the bribe-taking and income legalization, qualified corpora delicti of bribe-taking and Intermediation in bribe-taking, passive commercial bribery and qualified corpora delicti of active commercial bribery; as an optional but possible punishment, confiscation is provided for the basic corpus delicti of bribe-giving, Intermediation in bribery, and receiving illegal remuneration.

Hence, according to the provisions of the RK Criminal Code, confiscation of the object of crime in case of bribery is optional and theoretically, when rendering a sentence with the appointment of punishment without confiscation of property, it should be returned to the bribe-giver.

The Third Round Monitoring Report casted some doubt on the 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.

According to Article 55 of the 2014 Criminal Code 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

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<sup>164</sup> The text of the draft law has not been reviewed in the present Monitoring Round.

sanction established as a mandatory one. A similar norm is to be found in the current RK Criminal Code. In such circumstances confiscation of means and instruments of crime and criminal proceeds established under the Criminal Code, may not be considered unconditional, in the broad sense.

The Third Round Monitoring Report criticized the provisions of the 2014 Criminal Code envisaging that the new rules on confiscation would be put in effect only on 1 January 2018 (contrary to the remaining provisions of that code which would come into force on 1 January 2015). Therefore, it should be welcomed that in November 2015, the Final Provisions were amended and the deadline for the implementation of the confiscation rules was shifted to 1 January 2016, as recommended.

Important are also the provisions of the new 2014 Criminal Procedural Code on **confiscation without a sentence** (Section 15 of the Criminal Procedural Code “Proceedings on confiscation prior to rendering a sentence”). Article 667 of the new Criminal Procedural Code 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 Criminal Procedural Code (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 underling 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?

The 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).

The provisions of Chapter 71 of the Criminal Procedural Code on the proceedings for confiscation of the criminally received property prior to rendering a sentence will become effective from 1 January 2018.

The **procedural confiscation** is also retained in accordance with the current Article 118 of the Criminal Procedural Code, according to which the issue of material evidence must be resolved when taking a decision on dismissal of a criminal case or rendering a sentence. Herewith:

- 1) instruments of a criminal offense are to be confiscated in a judicial proceeding or transferred to appropriate institutions to certain persons or destroyed;
- 2) items prohibited for circulation or restricted in circulation are to be transferred to the relevant institutions or destroyed;
- 3) items that are of no value and which cannot be used are subject to destruction, and per request of the interested persons or institutions may be handed to them;
- 4) money and other valuables, acquired by criminal means, as well as objects of illegal business and smuggling are subject to conversion to state revenue by court decision; the remaining items are given to the rightful owners, and if the latter are not identified, they become the state property. In the event of a dispute over the ownership of these items, the dispute shall be resolved through the civil proceedings;
- 5) documents being the physical evidence remain on file during the entire period of storage of the latter or are transferred to the interested individuals or legal entities in the manner provided for in part four of Article 120 of this Code.

In fact, Article 118 of the Criminal Procedural Code reproduces the provisions of Article 48 of the Criminal Code, as both of them provide for the confiscation of the criminally received money and other valuables (property), as well as instruments (tools) of the criminal offense into the state's income.

The responses to the questionnaire contain the following analysis of Kazakhstan's legislation on confiscation:

In contrast to the old criminal legislation (Article 51 of the Criminal Code), Article 48 of the Criminal Code does not provide for confiscation of property acquired by the accused through legal means and does not mention crimes for which confiscation of property may be imposed. As a result, the court may apply confiscation of property only if this type of additional punishment is provided for by the sanction of the article (part of the article) under which the offense is qualified, and with respect to money and other property listed in paragraphs 2 and 3 of Article 48 of the Criminal Code.

Property that is owned by the convicted person or transferred to other persons and acquired legally is not subject to confiscation.

A general legal analysis of the rules on confiscation of property allows us to conclude that this measure of punishment is inherent in special functions: the function of depriving the guilty person of his own property, including the property with the criminal origins; the function of restoring and regulating the regulatory framework of property relations and normal economic activity; Function of eliminating the economic basis of terrorism, extremism and organized crime; the function of seizure of weapons and other means of committing crimes; the function of ensuring compensation for damage caused by the crime; the fiscal function, i.e. the conversion of the above property into the state ownership.

**Conclusion: This part of the recommendation was partially implemented (with regard to the enactment of the confiscation rules).**

*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.*

The changes from November 2015 supplemented the object of confiscation in Article 48 of the Criminal Code, extending confiscation to property "transferred to other persons by the convict". This partially meets the IAP recommendation to confiscate property from third parties. However, it seems that the introduced changes are insufficient, since the recommendation referred to "confiscation from third parties who knew or should have known about the criminal origins of property, as well as protection of bona fide purchasers of property that is subject to confiscation".

In its interim report of September 2016 Kazakhstan also referred to the civil law provisions. In accordance with Article 261 of the Civil Code, if the property has been procured from a person who had no right to

alienate it and the acquirer had or should have had the knowledge of it (bona fide purchaser), the owner has the right to reclaim the property from the purchaser only when property has been lost by the owner or the person in whose possession the property was transferred to by the owner or stolen from one or the other, or the property falling out of their possession in some other way against their will. However, if the property was acquired free of charge from a person who had no right to alienate it, the owner has the right to reclaim it in all cases.

These provisions of the Civil Code do not appear to apply to the confiscation procedure under the criminal law.

**Conclusion: This part of the recommendation has been partially implemented.**

**Practice of application.** The authorities of Kazakhstan presented the following statistics.

**Table 22. Statistics of confiscation in cases of corruption crimes for 2014-2016 (number of cases)**

Crimes	2014	2015	2016
Misappropriation or embezzlement of entrusted property (paragraph 2) part 3 of Article 189 of the RK Criminal Code)	14	16	57
Fraud (paragraph 2) part 3 of Article 190 of the RK Criminal Code)	63	60	84
Legalization (laundering) of criminally received monetary funds and/or other assets (paragraph 1) part 3 of Article 218 of the RK Criminal Code)	N/A	N/A	2
Abuse of official powers (Article 361 of the RK Criminal Code)	35	46	86
Exceeding of authority or official powers (paragraph 3) part 4 Article 362 of the RK Criminal Code)	17	6	22
Bribe taking (Article 366 of the RK Criminal Code)	107	250	376
Bribe giving (Article 367 of the RK Criminal Code)	44	35	59
Intermediation in bribery (Article 368 of the RK Criminal Code)	1	7	24

Source: data provided by the General Prosecutor's Office of the Republic of Kazakhstan.

**Table 23. Statistics of seizure and confiscation of property for certain corruption crimes in 2014-2016 (amount)**

Corruption crime	2014		2015		2016	
	Seized	Confiscated	Seized	Confiscated	Seized	Confiscated
Misappropriation or embezzlement of entrusted property (cl. 2) part 3 of Article 189 of the RK Criminal Code)	KZT 28,522,000 EUR 77,600	KZT 902,276,000 EUR 2,400,000	KZT 68,539,686 EUR 187,000	KZT 150,578,000 EUR 409,000	KZT 2,105,308,808 EUR 5,737,000	KZT 2,210,885,000 EUR 6,013,000
Fraud (cl. 2) part 3 of Article 190 of the RK Criminal Code)	KZT 110,139,000 EUR 300,000	KZT 180,213,000 EUR 490,000	KZT 92,249,817 EUR 251,000	KZT 171,360,000 EUR 466,000	KZT 59,597,839 EUR 162,000	KZT 135,075,000 EUR 367,000
Legalization (laundering) of criminally received monetary funds and/or other assets (cl. 1) part 3 Article 218 of the RK Criminal Code)	0	N/A	0	N/A	0	N/A
Abuse of official powers (Article 361)	KZT 32,294,000 EUR 88,000	KZT 191,777,000 EUR 520,000	KZT 3,951,950,023 EUR 10,763,000	KZT 7,509,010,000 EUR 20,428,000	KZT 906,174,610 EUR 2,469,000	KZT 4,957,000,000 EUR 13,481,000
Exceeding of authority or	KZT 28,000	KZT 2,719,000	KZT 3,064,000	KZT 3,792,000	KZT 16,660,553	KZT 20,660,000

Corruption crime	2014		2015		2016	
	Seized	Confiscated	Seized	Confiscated	Seized	Confiscated
official powers (Article 362)	EUR 76	EUR 7,300	EUR 8,300	EUR 10,300	EUR 45,000	EUR 56,000
Bribe taking (Article 366)	KZT 2,379,447,000  EUR 6,481,000	KZT 2,822,843,000  EUR 7,681,000	KZT 287,255 588  EUR 782,000	KZT 437,688,000  EUR 1,190,000	KZT 168,656 005  EUR 459,000	KZT 176,929,000  EUR 481,000
Bribe giving (Article 367)	KZT 47,516,000  EUR 129,000	KZT 55,020,000  EUR 150,000	KZT 35,585,700  EUR 97,000	KZT 68,170,000  EUR 185,000	KZT 128,784,057  EUR 360,000	KZT 129,327,000  EUR 352,000
Intermediation in bribery (Article 368)	0	N/A	KZT 2,425,500  EUR 6,600	KZT 7,080,000  EUR 19,000	0	KZT 1,502,000  EUR 4,000

Source: data provided by the General Prosecutor's Office of the Republic of Kazakhstan. (Data were given in Tenge, the corresponding Euro equivalent is approximate).

Analysis of the provided statistics shows that the amount of seized and confiscated property for main corruption crimes is going down. This is particularly indicative of the confiscated property under the article on bribe-taking: EUR 7.6 mln in 2014, EUR 1.1 mln in 2015, and only EUR 481,000 in 2016. At the same time, most of the seized and confiscated property falls on such crimes as misappropriation or embezzlement of entrusted property, as well as abuse of official powers. In general, relatively small amounts of the seized (confiscated) property can be noted, taking into account the size of Kazakhstan's economy.

As noted in the information provided by the Kazakh authorities, the problem associated with the application of the confiscation rules is the possible alienation of property prior to seizure due to the length of the procedure (sending requests to the authorized body, collecting materials for the prosecutor's office and then for the court). The search is carried out with the purpose of detection and seizure of items or documents relevant to the case, including the detection of property subject to seizure. In order to ensure the enforcement of the sentence in the part of civil action, other property penalties or possible confiscation of property, the person conducting the pre-trial investigation is obliged to take measures to seize property. In accordance with Article 254 of the Criminal Procedural Code of the Republic of Kazakhstan, the person conducting the pre-trial investigation is searched and seized by a reasoned decision. The resolution on the conduct of the search, as well as the seizure of documents, must be authorized by the investigating judge in the manner provided for in Parts 13-1, 13-2, 13-3 and 13-4 of the Criminal Procedural Code of the Republic of Kazakhstan. Thus, the person conducting the pre-trial investigation shall issue resolutions on the initiation of the petition before the court and send it to the prosecutor. One way to solve this problem may be to authorize the search, seize documents, seize property directly by the investigating judge.

At the same time, the Criminal Procedural Code of Kazakhstan (Article 161) contains a number of provisions that already allow the investigative body to quickly limit the disposal of property in case of threat of its concealment:

- In urgent cases the person conducting the pre-trial investigation has the right, subject to the consent of the prosecutor, to establish a temporary restriction on disposal of the property for a period not exceeding ten days.
- Where there are reasons to believe that the property subject to seizure can be hidden or lost, the person conducting the pre-trial investigation has the right to issue a resolution on suspension of transactions and other operations with property or it may be withdrawn before receipt of the court's sanction with notification of the prosecutor within 24 hours.

Therefore, it is recommended to further investigate the effectiveness of the seizure of property, which may be subject to confiscation, and to make appropriate changes, if necessary.

**In general, Kazakhstan is partially compliant with recommendation 2.4.-2.5.**

## New recommendation No. 22

1. *To provide mandatory confiscation for bribe-giving.*
2. *To provide confiscation from third parties who knew or should have known about the criminal origins of property, as well as protection of bona fide purchasers of property that is subject to confiscation.*
3. *To analyse the practice of applying the procedure for seizing property in criminal proceedings from the standpoint of its effectiveness and to make appropriate changes, if necessary.*
4. *To establish an agency or a division responsible for the tracing, identification, seizure and management of criminal proceeds subject to confiscation, including abroad.*

### Statute of limitations

***Recommendation 2.6. of the Second Monitoring Round Report on Kazakhstan (recommendation was confirmed during the Third Monitoring Round)***

... 2. 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 in its interim report of September 2016 noted that according to article 62 of the Code of Administrative Offences, a person shall not be subject to administrative liability for corruption offenses after one year from the date of its commission and legal persons - after three years. Practical experience shows that there are no objective reasons for the increase of the above statute of limitations.

This statement is not enough to consider the recommendation as fulfilled, as there is no confirmation that the possibility of increasing the statute of limitations for bringing to administrative responsibility for corruption offenses was considered. Also, no information was provided on the number of cases on administrative corruption offenses in which there was a release from liability due to the expiry of the statute of limitations for prosecution.

In general, there should be noted a short statute of limitations of holding someone liable. One year following the commission of corruption offenses is inadequate due to the public safety issues and complexity of detection of such offenses. It is recommended to set the statute of limitations for release from liability for at least three years from the date of the commission of corruption offenses and at least one year from the date of their detection.

In its written comments, the Ministry of Justice of RK reported about the developed amendments in Articles 62 and 439 of the Code of Administrative Offences. The Ministry noted that according to Article 62 of the Code of Administrative Offences a natural person shall not be subject to administrative liability for committing a corruption offence at the expiry of one year from the date of its execution, whereas a legal entity at the expiry of three years from the date of committing a corruption offence. However, for offences in the sphere of finance, as well as for offences in the area of taxation, protection of competition, customs affairs, RK legislation on pension benefits, on compulsory social insurance, on natural monopolies committed by a legal person the statute of limitations is five years. Thus, the statute of limitations for these offences is greater than the statute of limitations established for corruption offences which is unacceptable, as the fight against corruption is a strategically critical task of the state. The monitoring group welcomes development of those amendments which will increase the statute of limitations for an administrative liability for committing corruption offences to three years or more.

In addition, it is noted there's a need to harmonize the Code of Administrative Offences with Laws "On Fight against Corruption" and "On Civil Service" in terms of termination time for disciplinary and administrative sanctions. For example, in Part 6 of Article 62 of the Code of Administrative Offences it is

provided that in the event of termination of criminal proceedings where the offender's acts indicate the attributes of an administrative offence a person may be brought to administrative liability not later than three months from the date of receipt of the decision on its termination. However, according to Article 45 of the Law "On Civil Service of the Republic of Kazakhstan" in case of termination of criminal proceedings by the criminal prosecution body or the court or of proceedings concerning an administrative offence, but where a person's acts indicate the attributes of a disciplinary offence discrediting civil service, a disciplinary sanction shall be imposed not later than three months from the date of the decision on termination of criminal proceedings, but not later than one year from the date of committing the offence.

In this regard, the Ministry of Justice has offered to bring into line the provisions of Article 45 of the Law "On Civil Service of the Republic of Kazakhstan" with Article 62 of the Code of Administrative Offences.

In general, such a harmonization should be welcome. However, according to the experts' opinion, three months for administrative or disciplinary prosecution in the event of termination of criminal proceedings is not sufficient and it is advisable to extend it, for example, up to six months.

**Conclusion: This part of the recommendation has not been implemented.**

Article 71 of the 2014 Criminal Code provides that the statute of limitations does not apply to the corruption crimes. This is a positive change that can serve as an example of good practice. The exclusion of the statute of limitations for corruption crimes also proves the need for an extended statute of limitations for the administrative corruption offenses, especially given that some of the latter duplicate certain bribery crimes.

#### **New recommendation No. 23**

*To increase the statute of limitations for imposing administrative liability for corruption offenses.*

### **Immunities**

***Recommendation 2.6. of the Second Monitoring Round Report on Kazakhstan (recommendation was confirmed during the Third Monitoring Round)***

1. 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. ...

According to the Criminal Procedural Code of the Republic of Kazakhstan (Chapter 57) the following persons enjoy privileges and immunities from criminal prosecution:

- 1) Deputies of the Parliament of the Republic of Kazakhstan;
- 2) Candidates for the President of the Republic of Kazakhstan, candidates for deputies of the Parliament of the Republic of Kazakhstan;
- 3) Chairperson or members of the Constitutional Council of the Republic of Kazakhstan;
- 4) judges;
- 5) General Prosecutor of the Republic of Kazakhstan;
- 6) persons possessing diplomatic immunity from criminal prosecution.

#### ***Deputies of the Parliament of the Republic of Kazakhstan***

After registration of a cause to initiate the pre-trial investigation in the Unified Register, the pre-trial investigation with respect to a deputy of the Parliament can be continued only with the consent of the General Prosecutor. In cases where a deputy of the Parliament of the Republic of Kazakhstan is detained at the scene of a crime or if a fact of preparation or attempt to commit a grave or particularly grave crime has been established or such deputy has committed a grave or especially grave crime, the pre-trial investigation against him can be continued before getting the consent of the General Prosecutor subject to mandatory notification of the latter within 24 hours. It is obligatory to carry out a preliminary investigation on cases against a deputy of the Parliament.

The General Prosecutor shall, within two days after receiving the notification, examine the legality of the procedural actions carried out and give a consent to the continuation of the pre-trial investigation issuing a resolution on this or refuses to do so terminating the pre-trial investigation. If the pre-trial investigation is continued illegally before obtaining a consent of the Prosecutor General, its results cannot be admitted as evidence in the criminal case.

The General Prosecutor issues a resolution on qualification of the act of a suspect deputy of the Parliament.

A deputy of the Parliament during his term of office cannot be detained, kept in custody, put under house arrest, brought to court, or held criminally liable without the consent of the relevant Chamber to lift his immunity, except for the cases of arrest at the crime scene or committing grave or especially grave crimes.

In order to obtain a consent to hold a deputy of the Parliament criminally liable, to detain him, to keep in custody, to put under house arrest, to bring to court the General Prosecutor submits an application to the Senate or Majilis of the Parliament of the Republic of Kazakhstan. The lifting of immunity is understood as giving a consent to hold a person criminally liable and to apply procedural coercive measures.

The issue of authorizing a restraint in the form of detention or house arrest of a suspect deputy of the Parliament in the commission of a crime shall be authorized by the investigative judge of the District Court of Astana City on the basis of the decision of the person conducting the pre-trial investigation supported by the General Prosecutor. An application for extension of the term of detention or house arrest of a deputy of Parliament in accordance with the procedure provided by the Criminal Procedural Code can be sent to a court only if supported by the General Prosecutor.

In the event that the relevant Chamber of the Parliament did not give its consent to holding a deputy criminally liable, the criminal case is subject to dismissal on this ground.

If the relevant Chamber of the Parliament of the Republic of Kazakhstan does not give its consent to apply to the deputy a restraint, procedural coercive measure in the form of detention, house arrest, custody, bringing to court, these measures cannot be applied to him. In order to apply other procedural coercive measures to the deputy, the consent of the respective Chambers of the Parliament is not required, and they can be applied in accordance with the procedure established by this Code.

According to the provided information, the procedure for lifting of immunity is envisaged in paragraph 6 of the Regulations of the Senate of the Parliament of the Republic of Kazakhstan approved by the Resolution of the Senate of 8 February 1996. When the General Prosecutor submits an application to the Senate to obtain a consent to hold a deputy criminally liable, to arrest him, to apply administrative penalties imposed in court, the application is sent by the Senate to the Central Election Commission of the Republic of Kazakhstan. The application of the General Prosecutor and the determination of the Central Election Commission shall be considered no later than two weeks from the date of their receipt. The Senate has the right to require the relevant officials to submit additional information.

The Senate takes a reasoned decision and sends it within three days to the General Prosecutor as well as the head of the state body of the Republic of Kazakhstan which conducts the inquiry and preliminary investigation. The deputy has the right to participate in the consideration by the Senate of the question of his immunity. If he fails to be present for good reason, the consideration of the matter will be shifted to the next meeting of the Chamber.

A similar process is provided for by the Majilis regulations.

**Candidates.** The pre-trial investigation of cases involving a candidate for the Presidency of the Republic of Kazakhstan and a candidate for the deputy of the Parliament of the Republic of Kazakhstan is carried out under the same rules as for a deputy of the Parliament of the Republic of Kazakhstan. The consent to lifting of immunity of a candidate for the President and a candidate for the deputy of the Parliament is requested in the Central Election Commission.

#### ***Chairperson or member of the Constitutional Council***

After registration of a cause to initiate the pre-trial investigation in the Unified Register, the pre-trial investigation with respect to a Chairperson or a member of the Constitutional Council can be continued only with the consent of the General Prosecutor.

In cases where a Chairperson or a member of the Constitutional Council is detained at the scene of a crime or if a fact of preparation or attempt to commit a grave or particularly grave crime has been established or

such person has committed a grave or especially grave crime, the pre-trial investigation against him can be continued before getting the consent of the General Prosecutor subject to mandatory notification of the latter within 24 hours.

The General Prosecutor of the Republic of Kazakhstan issues a resolution on qualification of the act of a suspect Chairperson or member of the Constitutional Council.

A Chairperson or a member of the Constitutional Council during his term of office cannot be detained, kept in custody, put under house arrest, brought to court, or held criminally liable without the consent of the Parliament to lift his immunity, except for the cases of arrest at the crime scene or committing grave or especially grave crimes.

In order to obtain a consent to hold a Chairperson or a member of the Constitutional Council criminally liable, to detain him, to keep in custody, to put under house arrest, to bring to court the General Prosecutor submits an application to the Parliament of the Republic of Kazakhstan.

The issue of authorizing a restraint in the form of detention or house arrest of a suspect Chairperson or member of the Constitutional Council in the commission of a crime shall be authorized by the investigative judge of the District Court of Astana City on the basis of the decision of the person conducting the pre-trial investigation supported by the General Prosecutor. An application for extension of the term of detention or house arrest of a Chairperson or a member of the Constitutional Council in accordance with the procedure provided by the Criminal Procedural Code can be sent to a court only if supported by the General Prosecutor.

Once the General Prosecutor of the Republic of Kazakhstan has received the decision of the Parliament of the Republic of Kazakhstan, further proceedings on the case are made in the manner described above with regard to the deputies of the Parliament.

**Judges.** This issue is considered in detail in the section on the integrity of judges.

#### ***General Prosecutor of the Republic of Kazakhstan***

After registration of a cause to initiate the pre-trial investigation in the Unified Register, the pre-trial investigation with respect to the General Prosecutor can be continued only with the consent of the First Deputy of the General Prosecutor. In cases where the General Prosecutor is detained at the scene of a crime or if a fact of preparation or attempt to commit a grave or particularly grave crime has been established or such person has committed a grave or especially grave crime, the pre-trial investigation against him can be continued before getting the consent of the General Prosecutor subject to mandatory notification of the latter within 24 hours. The First Deputy of the General Prosecutor issues a resolution on qualification of the act of the suspect General Prosecutor.

The General Prosecutor during his term of office cannot be detained, kept in custody, put under house arrest, brought to court, or held criminally liable without the consent of the Senate of the Parliament of the Republic of Kazakhstan to lift his immunity, except for the cases of arrest at the crime scene or committing grave or especially grave crimes.

In order to obtain a consent to hold the General Prosecutor criminally liable, to detain him, to keep in custody, to put under house arrest, to bring to court the First Deputy of the General Prosecutor submits an application to the Senate of the Parliament.

Once the First Deputy of the General Prosecutor of the Republic of Kazakhstan has received the decision of the Parliament of the Republic of Kazakhstan, further proceedings on the case are made in the manner described above with regard to the deputies of the Parliament.

**Analysis.** It was noted in the Second Round Monitoring Report (and confirmed during the Third Round of Monitoring) that the regulations for both chambers of the Parliament provide that the decision on lifting of immunity (of deputies of the Parliament, the General Prosecutor, Chairperson and judges of the Supreme Court) shall be taken within 14 days following 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. This undermines the efficiency of the immunity lifting procedure. From the information provided, it follows that the deadline for consideration of the respective applications to the Central Election Commission of the Republic of Kazakhstan has not been established.

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

It is also possible to question the expediency of including the Central Election Commission in the procedure for lifting the immunity of the deputies of the Parliament. As in the case of imposing disciplinary sanctions on the deputies, such role is not typical for the Central Election Commission and can be considered both as a limitation of the deputies' independence and as an excessive element that complicates the procedure for lifting immunity, which may lead to its ineffectiveness.

In addition, the provided procedure does not specify the list of grounds for rejecting the applications on lifting immunity of the relevant persons. This can lead to abuse, unreasonable rejection of applications, and vice versa – to lifting of immunity without valid grounds.

According to Kazakhstan, in 2011-2013 there were no requests for lifting of immunity of the deputies of the Parliament and their prosecution for violations of ethical rules and corruption offenses.

**Conclusion: this part of the recommendation has not been implemented.**

**In general, Kazakhstan is not compliant with recommendation 2.6.**

#### **New recommendation No. 24**

*To improve procedures for lifting immunity from criminal prosecution and application of procedural coercive measures against the deputies of the Parliament, the General Prosecutor, in particular to set a clear statutory procedure and timing for such decisions, to exclude the Central Election Commission from this process, to specify clear grounds for rejecting applications on lifting of immunity. To limit immunities to functional ones.*

### **3.2. Procedures for investigation and prosecution of corruption offences**

#### **Detection**

**Sources of information.** According to the information provided by the authorities of Kazakhstan, the grounds for initiating the pre-trial investigation are sufficient data indicating the attributes of a criminal offense, provided there are no circumstances precluding the proceedings, namely:

- 1) an application of an individual or a communication from an official of a public authority or a person performing managerial functions in an organization, about a criminal offense or an unknown disappearance of a person;
- 2) voluntary surrender;
- 3) mass media communications;
- 4) report of an official of the criminal investigative authority on a criminal offense that is being prepared, being committed or which has been committed.

The criminal prosecution body is obliged to receive and register an application, a report on any criminal offense that is being prepared, being committed or which has been committed. The applicant receives a document confirming registration of the accepted application or the report on the criminal offense. It shall be prohibited to refuse accepting and registering an application on a criminal offense and to refer to other reasons in order not to initiate a pre-trial investigation, as otherwise such acts may trigger a statutory liability and may be appealed to the prosecutor or to a court in the manner provided for in the Criminal Procedural Code.

The procedure for receiving and registering applications, information or reports on criminal offenses, as well as the procedure for maintaining the Unified Register of Pre-Trial Investigations shall be established by the General Prosecutor.

**Anonymous communications** cannot be used for initiation of investigation of corruption cases. The authorities in their responses to the questionnaire referred to Article 5 of the Law of the Republic of Kazakhstan “On the Procedure for Considering Appeals from Individuals and Legal Entities”, according to which there cannot be considered: 1) an anonymous communication, except for cases when such appeal

contains information about the criminal offenses being prepared or committed, or about a threat to the state or public security and that is subject to immediate redirection to the state bodies in accordance with their competence; 2) an appeal in which the essence of the matter is not stated.

However, it just follows from this provision that anonymous communications on criminal offenses are an exception and should be considered. It is necessary to clarify the possibility of registering anonymous communications on crimes. In general, anonymous communications can be a useful source of information about a corrupt crime that is being prepared, being committed or which has been committed, which are difficult to identify due to their nature. Therefore, it is worth considering the possibility of initiating criminal proceedings on corruption crimes on the basis of such reports.

In its written comments the General Prosecutor's office of Kazakhstan noted that according to Para 5 of the Rules of Reception and Registration of an Appeal, Communication or Report on Criminal Offences and also the Rules of Keeping the Unified Register of Pre-Trial Investigation (URPTI) approved by the General Prosecutor's Order of 19 September 2014 No. 89, anonymous communications, including communications of unknown persons received via communication channels are recorded in Incoming Information Log (КВИ) and a contained information about the criminal offence can be registered in URPTI only in case of confirmation by the official's report in accordance with the requirements of Para 2) of Part 1 of Article 184 of the Criminal Procedure Code. Thus, a pre-trial investigation of anonymous communications doesn't start automatically. That in turn allows to avoid unwarranted involvement of citizens in the criminal prosecution. The communication is verified in accordance with the Law "On Operative Investigation Activity". If confirmed, the investigation begins upon the official's report. This procedure is acceptable.

**Information from the financial intelligence unit.** In accordance with paragraph 3 Article 18 of the Law "On Countering Legalization (Laundering) of Criminally Received Proceeds and Financing of Terrorism", submission of requests to the authorized body on provision of details and information on a transaction subjected to the financial monitoring shall be carried out by the law enforcement and special state bodies with the approval of the General Prosecutor of the Republic of Kazakhstan and his deputies.

Law enforcement and special state bodies shall submit their requests on cases and materials, which are registered in the manner established by the legislation of the Republic of Kazakhstan and related to countering legalization (laundering) of criminally received proceeds and financing of terrorism.

Execution of the requests of the law enforcement and special state bodies shall be carried out by the authorized body within the framework of the details and information on the transactions subjected to the financial monitoring existing in republican database in the field of countering legalization (laundering) of criminally received proceeds and financing of terrorism, as well as within the framework of the details and information received from the competent bodies of the foreign states in the field of countering legalization (laundering) of criminally received proceeds and financing of terrorism.

According to the monitoring group, it is worth paying attention to the complicated procedure for obtaining financial monitoring data by the investigative bodies and units, namely subject to the approval of the Prosecutor General and his deputies only. Such procedure seems to be excessive and may be an obstacle to an operative investigation of corruption crimes.

In its written comments, the General Prosecutor's office of Kazakhstan noted that the conclusion, that the said procedure is an obstacle for an operative investigation of corruption crimes, is premature. Since the establishment of the Financial Monitoring Committee there's no evidence that the excessiveness of the procedure affects the operational efficiency of investigating corruption cases. According to GP the procedure of submitting by law enforcement and special state bodies of their requests for information and information about transactions subject to financial monitoring to the authorized body with approval of the General Prosecutor and his deputies is consistent with the provisions of the Constitution that each person has the right to confidentiality of personal deposits and savings, correspondence, telephone conversations, postal, telegraph and other messages.

**Politically exposed persons.** The Law of the Republic of Kazakhstan "On Countering Legalization (Laundering) of Criminally Received Proceeds and Financing of Terrorism" provides for special measures of financial control with respect to the foreign public officials. Such a person is defined as "an appointed or elected person holding an office in the legislative, executive, administrative, judicial bodies or military forces of a foreign state; any person who performs any public function for a foreign state; a person holding

managerial positions in organizations created by countries on the basis of agreements that have the status of international treaties”.

Article 8 of the Law “On Countering Legalization (Laundering) of Criminally Received Proceeds and Financing of Terrorism” provides that in addition to the general measures of financial control, with respect to the foreign public officials the financial monitoring entities are additionally obliged:

- 1) to verify the client’s belonging to and/or affiliation with the foreign public official, his family members and close relatives;
- 2) to assess the reputation of this foreign public official with regard to his involvement in the legalization (laundering) of the criminally received proceeds financing of terrorism;
- 3) to get approval from the organization’s executive officer for establishment and continuation of business relations with such clients;
- 4) to take available measures to establish the source of funds.

Additional measures of financial monitoring with respect to the public officials are an important source of detection of money laundering and corruption crimes.

The current legislation of Kazakhstan do not comply with the international standards, namely the FATF Recommendations and the UN Convention against Corruption. Article 52 of the latter provides that each State Party shall take such measures as may be necessary, in accordance with its domestic law, to require financial institutions within its jurisdiction to conduct enhanced scrutiny of accounts sought or maintained by or on behalf of individuals who are, or have been, entrusted with prominent public functions and their family members and close associates or on behalf of any above-mentioned persons.

According to the revised FATF Recommendations of 2012 the provisions on financial monitoring with respect to the foreign public officials should also apply to the national public officials<sup>165</sup>.

Therefore, Kazakhstan is recommended:

- to extend the notion of the public officials (politically exposed persons) stipulated in the legislation on combatting legalization (laundering) of criminally received proceeds to the national officials who perform important public functions;
- to extend the notion of the politically exposed persons to the heads of state enterprises and leading officials of political parties;
- to include in the definition of politically exposed persons their family members and close (connected) persons.

**Statistics.** In 2015 the Anti-Corruption Service registered in total 1,963 corruption crimes in the Unified Register of Pre-Trial Investigations, from which 1,413 crimes were detected in the course of the operative measures and 550 crimes were detected based on the reports. In 2016 the Anti-Corruption Service registered 2,229 corruption crimes, from which 2,113 crimes were detected in the course of operative measures and 116 crimes were detected based on the citizens’ reports.

From the above statistics, it follows that the National Anti-Corruption Bureau does not use information from the media about possible corruption crimes. It is recommended to pay attention to this and conduct explanatory work and training. Mass media communications should be actively used to detect corruption crimes.

## **Investigation and criminal prosecution**

### ***Access to financial information***

According to the Law of the Republic of Kazakhstan “On Banks and Banking Activities”:

References on the existence and numbers of bank accounts of a legal entity and/or its structural subdivision as well as current accounts of an individual engaged in entrepreneurial activities without the formation of a

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<sup>165</sup> See FATF Guidance on Politically Exposed Persons <https://goo.gl/QFFUWP>.

legal entity, private notary, private court marshal, lawyer, professional mediator, on the balances and cash flows on these accounts are released to:

- inquiry and preliminary investigation bodies: on criminal proceedings under their care as sanctioned by a prosecutor;
- courts: on proceedings under their care, based on the ruling of a court;
- prosecutor: on the basis of the resolution on performance of inspection within its competence on the material under his consideration.

References on the existence and numbers of bank accounts of an individual, on the balances and cash flows on these accounts as well as available information on the nature and value of that individual's property placed for keeping in safe boxes, cupboards, and premises of a bank shall be released to:

- inquiry and preliminary investigation bodies: on criminal proceedings under their care in cases when money and other property of an individual deposited on the accounts or kept in the bank can be seized, the property can be subject to recovery or confiscation on the basis of a written demand signed by the first head or investigator and sealed by the inquiry or preliminary investigation body, the sanction of the prosecutor imposed, *inter alia*, in electronic form;
- courts: on proceedings under their care, based on a court ruling, resolution, verdict, sentence in cases when money and other property of an individual deposited on the accounts or kept in the bank can be seized, the property can be subject to recovery or confiscation;
- prosecutor: on the basis of the resolution on performance of inspection, submitted on paper or in the form of an electronic document, within its competence on the material under his consideration;

The specified references on the existence and numbers of bank accounts, balances and cash flows on customer's bank accounts are submitted on paper or in electronic form within three business days from the date of receipt of the request of the authorized body. The reference can be presented in the form of an electronic document upon receipt of a judicial authorization sanctioned by a court marshal in electronic form through a state automated information system of enforcement proceedings.

The existence of bank accounts of individuals or legal entities in certain banks is established by sending an inquiry regarding the existence or absence of an account sanctioned by the prosecutor's office. Requests on where the legal entity is registered are addressed to the tax authorities.

Access to financial reports and commercial information of legal entities is carried out within the framework of the Criminal Procedural Code through search and seizure of documents.

### ***Procedural agreements***

According to the 2014 Criminal Procedural Code, the investigation of criminal cases within the framework of the concluded procedural agreement is made:

- 1) in the form of a plea bargain – for offences of minor, moderate gravity or grave crimes – in case of the consent of the suspected, accused with suspicion, accusation;
- 2) in the form of a cooperation agreement – for all categories of crimes at facilitating the detection and investigation of crimes, committed by a criminal group, particularly grave crimes, committed by other persons, as well as extremist and terrorist crimes

The procedural agreement in the form of a plea bargain may be concluded under the following conditions:

- 1) the voluntary expression of the suspected, accused wishes to conclude a procedural agreement;
- 2) the suspected, the accused does not dispute the suspicion, accusation and the available evidence in the case of a crime, the nature and extent of harm caused by them;
- 3) the consent of the injured person to conclude a procedural agreement.

The Anti-Corruption Service concluded 119 procedural agreements in 2015 and 313 procedural agreements in 2016. The main subject-matter of the concluded procedural agreements is to mitigate the punishment for the committed crime.

### ***Transfer of criminal cases from one body to another***

Article 187 of the Criminal Procedural Code defines the exact investigative jurisdiction of criminal cases. In the event that a criminal case does not fall within the investigative jurisdiction of the investigative body, which takes care of the proceedings (where it has been re-qualified or initially registered based on application), it is transferred under the investigative jurisdiction through the supervising prosecutor's office. The prosecutor's office is the supervising authority and it receives for examination from the criminal prosecution authorities criminal cases, documents, materials, including the results of the operative and search activities and secret investigative actions. It also retrieves the cases from the pre-trial investigation body and transfers them to another body of the pre-trial investigation; in exceptional cases in order to ensure objectivity and adequacy of the investigation at the written request of the criminal prosecution body or on its own initiative it transfers the cases from one body to another, or withdraws them under its own proceedings and investigates them independently of the investigative jurisdiction established by this Code (Article 193 of the Criminal Procedural Code of the Republic of Kazakhstan).

Also, when the criminal cases being investigated by the different preliminary investigation bodies are joined in one proceeding, the investigative jurisdiction is determined by the prosecutor (paragraph 7 Article 187 of the Criminal Procedural Code of the Republic of Kazakhstan).

In addition, the prosecutor has the right by his decision to take the case under his proceedings and personally conduct investigations, taking advantage of the powers of the investigator (Article 58 of the Criminal Procedural Code of the Republic of Kazakhstan).

### ***Transfer of criminal cases from one investigator to another***

The head of the investigation unit and the head of the inquiry body are empowered to entrust the conducting of the investigation to several investigators; to remove the investigator from the proceedings within his competence, to withdraw a criminal case from one investigative unit of the subordinated body, conducting the preliminary investigation, and transfer to another investigative unit of this or other subordinate body, conducting preliminary investigations (Articles 59, 62 of the Criminal Procedural Code of the Republic of Kazakhstan). Besides, the head of the investigation unit has the right by his resolution to take the case under his proceedings and personally conduct investigations, taking advantage of the powers of the investigator.

### **New recommendation No. 25**

- 1. To extend the notion of politically exposed persons in the anti-money laundering legislation to national officials who perform important public functions. To extend the notion of politically exposed persons to cover managers of the quasi-state sector entities, heads of political parties, as well as family members and close (affiliated) persons of the PEP.***
- 2. To consider the possibility of enabling the investigative authorities to interact with the financial monitoring body without a prosecutor's sanction.***
- 3. To consider the possibility of creating a central register of bank accounts for the effective detection and tracing of criminal proceeds.***

### **International co-operation**

***Recommendation 2.7. of the Second Monitoring Round Report on Kazakhstan (recommendation was confirmed during the Third Monitoring Round)***

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 Third Round Monitoring Report acknowledged that the provisions of the new 2014 Criminal Procedural Code (Article 601) embody Article 57 of the United Nations Convention against Corruption.

At the same time, it was noted that the provisions of Article 53 of the United Nations Convention against Corruption (“Measures for direct recovery of property”) were not reflected in the new Criminal Procedural Code.

According to Article 53 of 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 argued that in accordance with Article 71 of the new Criminal Procedural Code public authority of a foreign state which suffered damage is recognized as a victim of crime and, according to Article 73 of the Criminal Procedural Code, as a civil plaintiff in the criminal case with all the rights following from such legal status (according to Article 71.12 of the new Criminal Procedural Code 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 provisions of the Criminal Procedural Code, 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 of the Criminal Procedural Code 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 of the Criminal Procedural Code, 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 Criminal Procedural Code of the Republic of Kazakhstan 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 Criminal Procedural Code of 1997. Therefore there are no new provisions in this regard in the 2014 Criminal Procedural Code. Kazakhstan did not provide proof that the said terms extend to foreign states (e.g. court case law under the Criminal Procedural Code of 1997).

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 Criminal Procedural Code.

In its additional written comments, the General Prosecutor's office of RK noted that Kazakhstan agreed with the recommendation that the CPC should specify that a foreign country may be recognized as a victim and civil plaintiff. In this regard, the draft law "On Amendments and Additions to Some Legislative Acts of the Republic of Kazakhstan on Improvement of Criminal and Criminal-Procedural Legislation" has provided for relevant amendments. The new wording of Article 71 set forth as follows: "12. A legal entity, a foreign state may be recognized as a victim of a criminal offence which caused a property damage. In this case the rights and obligations of the injured party shall be carried out by a representative of a legal person or a foreign state." The draft law has to be approved by the state bodies and then will be submitted to the Parliament. This is a positive step that is welcomed by the monitoring group.

**Examples.** As noted in the responses of Kazakhstan, witnesses of a crime, property subject to confiscation, items requiring inspection, often appear on the territory of another state and circumstances require to coordinate efforts of law enforcement agencies of several countries in order to achieve the tasks of judicial proceedings.

At present, the Anti-Corruption Service is investigating criminal cases against Ablyazov M.K., former Chairman of the Board of Directors of BTA Bank JSC, and other managers of the bank, who in 2005-2009 have formed and managed an organized criminal group to steal money from BTA Bank JSC in large amounts for their subsequent legalization.

The scale of the committed crime, location of a number of the involved persons in the countries of the far-abroad and near-abroad countries and stripping of assets dictated close cooperation with the competent authorities of foreign countries (by sending instructions and requests for legal assistance). The legal basis for such cooperation is the UN Convention against Corruption, Convention on Transnational Organized Crime, Minsk and Chisinau Conventions, bilateral agreements between the authorized bodies of our states, as well as the principles of reciprocity.

In the course of this criminal case there were sent more than 60 international investigative assignments to the CIS countries, Europe and the United States. The most successful cooperation was achieved with the Russian Federation, the Kyrgyz Republic, Uzbekistan, Belarus, the Republic of Lithuania and Latvia, as well as the United Arab Emirates and the United States. The received documents served as the basis for initiating civil suits abroad in order to return the stripped assets and to identify new accomplices of the organized criminal group.

Another example of the effective international cooperation is the criminal case against Akhmetov S.N., the former Prime-Minister of the Republic of Kazakhstan, the officials of the Karaganda region akimat and others. Akhmetov S.N. was suspected of embezzling budgetary funds, part of which was transferred to the corporate accounts of a foreign company registered in the UAE. In the end of December 2014 an international investigation order was sent to the UAE authorized bodies to verify the indicated circumstances, including the ownership structure of the company and the receipt of funds on its accounts.

Analysis of the materials received from the UAE confirmed the receipt of these funds on the company's bank account. The results of the executed separate order were used as the evidence in the criminal case.

On 11 December 2015, the former Prime-Minister Akhmetov S.N. and a number of other persons were convicted of embezzlement and sentenced to 8 years of deprivation of liberty by the sentence of the specialized inter-district court of the Karaganda region.

Kazakhstan provided the following statistics:

**Table 24. Statistics on mutual legal assistance in corruption cases**

	2014	2015	2016
Number of outgoing MLA requests sent to other countries regarding corruption offenses, including for search, seizure, confiscation and return of property abroad on corruption offenses	25	20	26
Number of incoming MLA requests sent from other countries regarding corruption offenses, including for search, seizure, confiscation and return of property abroad on corruption offenses	13	9	15
Number of outgoing requests for extradition of persons for corruption crimes (number of those satisfied)	0	1 (1)	2 (1)
Number of incoming requests for extradition of persons for corruption crimes, which were satisfied	3	2	0

Source: information of the General Prosecutor's Office of the Republic of Kazakhstan.

There is no information on the value of property that was returned from other countries to Kazakhstan or to other countries from Kazakhstan as a result of MLA on corruption crimes.

## *International treaties*

According to official information, as of August 2017 Kazakhstan signed 51 bilateral agreements on extradition of criminals, mutual legal assistance in criminal matters and transfer of convicts. More than half of them, i.e., 28, signed in the period from 2011 to 2016, including India, USA, China, UK, Italy, Spain, Turkey, and 30 more projects are being coordinated with the foreign states. In 2017 Kazakhstan signed three bilateral treaties with Lithuania on the transfer of convicts, with Vietnam on mutual legal assistance and extradition of criminals, as well as 3 Memoranda of Cooperation with UNODC. In 2017 bilateral treaties are planned to be signed with Brazil, Mongolia, Arab Emirates, Jordan. The Inter-American Convention on extradition is in the process of ratifying.

Also, Kazakhstan is under way to join the four European conventions (47 countries) and the ASEAN Convention on mutual legal assistance in criminal matters (10 countries). In general, Kazakhstan carries out a serious work in the framework of international legal assistance. In 2017 more than 700 international requests for legal assistance were executed.

Regarding the Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism 2015, Kazakhstan reported that in 2014 the Ministry of Foreign Affairs sent to the Council of Europe (COE) an appeal on the accession of Kazakhstan to the Convention. According to the Ministry of Foreign Affairs the application of Kazakhstan on accession to the Convention has still being considered by the Council of Europe. The reason is that to the moment between the Republic of Kazakhstan and the Council of Europe the Action Plan of the RK and COE to conduct criminal proceedings for the period 2014-2018 is implemented; only after the completion of the implementation of the Plan that consideration of Kazakhstan's application for the accession to the Convention will commence.

**Conclusion: Kazakhstan is partially compliant with recommendation 2.7.**

### **New recommendation No. 26**

- 1. To stipulate in the legislation the procedure and conditions for the return of assets and their disposal in accordance with Article 57 of the United Nations Convention against Corruption.**
- 2. To consider a possibility of executing requests for mutual legal assistance in connection with the corruption crimes, which are not envisaged in the legislation of the Republic of Kazakhstan, and also to provide for the procedure for considering requests for mutual legal assistance in investigations concerning legal entities.**
- 3. To continue work on the accession of Kazakhstan to the Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism of 16 May 2005.**

## **3.3. Enforcement of corruption offences**

### **Statistics, sanctions**

#### ***Recommendation 2.4.-2.5. of the Third Monitoring Round Report on Kazakhstan***

- 1. 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. ...**

According to the responses of the authorities of Kazakhstan to the questionnaire, the Anti-Corruption Service conducted an analysis for the first half of 2016, in which 1,038 criminal cases were submitted to the court. 235 persons were convicted (taking into account the criminal cases of the past years), among them: 1 person was convicted to deprivation of the right to engage in certain activities (specific weight 0.4%); 152 persons – to a fine (67%); 9 persons – to conditional imprisonment (3.8%); 17 persons – to restraint of liberty (7.2%). 56 persons or 24% were sentenced to the real deprivation of liberty (for a period of up to two years - 6 persons, from two to five years – 33 persons, from five to twelve years – 17 persons). “Fine” prevails among the penalties, the total amount of fines was equal to KZT 654 million.

Hence, there is a tendency of expansion of the scope of application of criminal penalties not related to deprivation of liberty in the judicial practice of dealing with the corruption crimes.

In general, as noted in the responses, with the adoption of the new Criminal Code the approaches were changed in setting the punishment towards humanization and reducing repressiveness and there is a wider use of penalties being alternative to deprivation of liberty.

In addition, the review of sanctions carried out by the General Prosecutor's Office of the Republic of Kazakhstan is provided in the annex to this report.

Although Kazakhstan has done certain work on analysis of the sanctions' application, there is no information on a meaningful analysis of the effectiveness and proportionality of the sanctions that were established by the 2014 Criminal Code.

**Conclusion: this part of the recommendation has not been implemented. Please see above evaluation of the general fulfilment of recommendation 2.4.-2.5.**

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 25. Comparison of provisions on the punishment in the form of deprivation of liberty in the criminal codes of the Republic of Kazakhstan**

1997 Criminal Code		2014 Criminal Code	
Types of crime	Sanction in the form of deprivation of liberty	Types of crime	Sanction in the form of deprivation of liberty
<i>Bribe taking</i> , Article 311 (basic corpus delicti)	Up to 5 years	<i>Bribe taking</i> , Article 366 (basic corpus delicti, including bribe taking by an official or a person holding a highly important public office)	Up to 5 years
Bribe taking (by an official for illegal actions)	3-7 years	Bribe taking (substantial amount; for illegal actions)	3-7 years
Bribe taking (by a person holding a highly important public office)	5-10 years	Bribe taking (extortion; by a group of persons; large amount <sup>166</sup> ; repeatedly)	7-12 years
Bribe taking (extortion; by a group of persons; large amount <sup>167</sup> ; repeatedly)	7-12 years	Bribe taking (by a criminal group; particularly large amount <sup>168</sup> )	10-15 years.
Bribe taking (particularly large amount <sup>169</sup> )	10-15 years		
<i>Bribe giving</i> , Article 312 (basic corpus delicti)	Up to 3 years	<i>Bribe giving</i> , Article 367 (basic corpus delicti, including giving a bribe to an official or a person holding a highly important public office)	Up to 3 years
Bribe giving (to an official for illegal actions)	Up to 5 years	Bribe giving (substantial amount)	Up to 5 years
Bribe giving (to a person holding a highly 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 official powers</i> (part 1 of Article 307)	Up to 2 years	<i>Abuse of official powers</i> (part 1 of Article 367)	Up to 3 years
<i>Abuse of official powers</i> (part 4 of Article 307)	Up to 8 years	<i>Abuse of official powers</i> (part 4 of Article 367)	4-8 years
<i>Exceeding of authority</i> (part 1 of Article 308)	Up to 3 years	<i>Exceeding of authority</i> (part 1 of Article 362)	Up to 3 years
<i>Exceeding of authority</i> (part 4 of Article 308)	Up to 10 years	<i>Exceeding of authority</i> (part 4 of Article 362)	5-10 years
<i>Legalization of monetary funds</i> (part 1 of Article 193)	Up to 3 years	<i>Legalization of monetary funds</i> (part 1 of Article 218)	Up to 3 years

<sup>166</sup> Over 3,000 MCI (approx. EUR19,800).

<sup>167</sup> Over 500 MCI (approx. EUR3,300).

<sup>168</sup> Over 10,000 MCI (approx. EUR66,000).

<sup>169</sup> Over 2,000 MCI (approx. EUR13,200).

1997 Criminal Code		2014 Criminal Code	
Types of crime	Sanction in the form of deprivation of liberty	Types of crime	Sanction in the form of deprivation of liberty
Legalization of monetary funds (part 3 of Article 193)	3-7 years	Legalization of monetary funds (part 3 of Article 218)	3-7 years
<i>Commercial bribery</i> (part 1 of Article 231 – active bribery)	Up to 3 years	<i>Commercial bribery</i> (part 1 of Article 253 – active bribery)	Up to 5 years
Commercial bribery (part 3 of Article 231 – passive bribery)	Up to 5 years	Commercial bribery (part 4 of Article 253 – passive bribery)	Up to 5 years
<i>Misappropriation or embezzlement of entrusted property</i> (cl. «d» part 3 of Article 176*)	5-10 years	<i>Misappropriation or embezzlement of entrusted property</i> (paragraph 2 part 3 of Article 189**)	5-10 years
<i>Fraud</i> (cl. «d» part 3 of Article 177*)	5-10 years	<i>Fraud</i> (paragraph 2 part 3 of Article 190**)	3-7 years

\* 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

The 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.

Besides, 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 EUR 182,500; main offence of bribe giving, to EUR 73,000; the minimum fine in case of aggravated bribe taking (by a criminal group or in a particularly large amount) amounts to EUR 5,840,000; and a similar offence in bribe giving is EUR 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 (EUR 3,650) to no less than 3,000 MCRs (EUR 21,900) but no more than EUR 10,000 MCRs (EUR 73,000), and the “particularly large amount” increased from 2,000 MCRs (EUR 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.

According to Article 55 of the 2014 Criminal Code, 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. 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 Third Round Monitoring Report contains a conclusion about 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.

### Statistics

**Table 26. Statistics of criminal prosecution of corruption crimes**

	2014				2015				2016			
	registered	forwarded to court	dismissed for non-rehabilitative reasons	judgement of conviction is issued	registered	forwarded to court	dismissed for non-rehabilitative reasons	judgement of conviction is issued	registered	forwarded to court	dismissed for non-rehabilitative reasons	judgement of conviction is issued
Bribe giving	162	143	11	115	232	134	71	81	260	147	31	104
Bribe taking	244	202	1	222	501	366	3	279	657	514	1	391
Abuse of official powers	284	215	81	243	631	260	98	141	487	248	50	138
Exceeding of authority or official powers	22	16	0	32	7	12	0	10	16	8	0	25
Intermediation in bribery	20	10	5	15	59	36	14	25	41	32	9	36
Misappropriation or embezzlement of entrusted property	22	16	0	154	7	12	0	78	16	8	0	81
Commercial bribery	-	-	-	2	7	-	-	1	4	3	-	5
Money laundering	96	113	13	11	54	22	-	4	64	56	1	1

Source: information of the General Prosecutor's Office of the Republic of Kazakhstan.

In 2014 the anti-corruption service, i.e. the National Anti-Corruption Bureau, registered 177 corruption crimes in the internal affairs bodies, 34 corruption crimes in the tax authorities, 32 corruption crimes in the customs authorities, 19 corruption crimes in the in the ministry of education, and 1 corruption crime in the ministry of health protection.

In 2015 there were registered 196 corruption crimes in the internal affairs bodies, 72 corruption crimes in the customs authorities, 10 corruption crimes in the tax authorities, 6 corruption crimes in the ministry of education, and 5 corruption crimes in the ministry of health protection.

In 2016 there were registered 213 corruption crimes in the internal affairs bodies, 12 corruption crimes in the ministry of health protection, 9 corruption crimes in the tax authorities, 6 corruption crimes in the customs authorities, 4 corruption crimes in the ministry of education.

The number of high-ranking officials convicted of taking bribes, abuse of official powers, money laundering:

**Table 27. Statistics on bringing of high-ranking officials to liability in 2014-2016**

	2014	2015	2016
Ministers, other heads of executive bodies	1	1	0
Deputy ministers, deputy heads of executive bodies	-	1	-
Parliament members	0	0	0
Judges	4	1	0
Prosecutors	0	0	1
Akims	45	33	19

Source: responses of the authorities of Kazakhstan to the monitoring questionnaire.

According to the Anti-Corruption Service, in 2014-2016 the following number of heads of various levels were held liable, i.e. a judgement of conviction was issued or criminal prosecution was dismissed for non-rehabilitative reasons:

**Table 28. Statistics on bringing of heads of various levels to liability in 2014-2016**

	2014	2015	2016
Heads of the republican level	6	9	18
Heads of the regional level	46	64	59
Heads of the city and district level	87	191	134

Source: data of the National Anti-Corruption Bureau.

Examples of criminal cases against the high-ranking officials:

- The criminal case in 2016 against Yermegiyeu, the Chairman of the Board of JSC NC Astana EXPO-2017, for receiving bribes and stealing KZT 10.4 billion of the budgetary funds allocated for the construction of EXPO (sentenced to 14 years of deprivation of liberty).

- Akhmetov, Former Prime-Minister of the Republic of Kazakhstan, Abdishev, Akim of Karaganda Oblast, Smagulov, Akim of Karaganda City, as well as other officials of the Akimat and quasi-public sector (21 persons in total) who stole the public funds in the amount of KZT 2 billion, were convicted.

- Kusherbayev, the head of the Department for Control in the Field of Education in the Aktobe Oblast, was convicted for repeatedly receiving bribes in the amount of KZT 1.5 mln through his subordinates (intermediaries) from representatives of the Aktobe regional schools for the positive resolution of the issue of attestation, he was sentenced to three years of deprivation of liberty.

- The following persons were sentenced to the different terms of deprivation of liberty: Rakishev, the head of the Justice Department of Astana, and Arystanov, the Chairman of the Notary Chamber of Astana, who in a group and by prior concert received from Dakhkilgov M. a bribe in the amount of USD 8,000 for issuing a license to carry out notarial activities. At the same time, Kusainov M., the head of the Department of Justice, acted as an intermediary in the receipt and transfer of bribes to Rakishev and Arystanov. With regard to Kusainov, the criminal case was dismissed due to his effective regret.

- Ospanov, the Chairman of the Agency of the Republic of Kazakhstan for Regulation of Natural Monopolies (ARNM), was sentenced to a fine in the amount of KZT 1.1 bln for taking USD 300,000 as a bribe for illegal lowering of the tariff for electricity of AtyrauZharyk JSC.

Other examples of bringing leaders of the republican level to liability:

- Deputy Head of the Executive Office of the Prime-Minister;
- Chairman of the Board of NMH Kazagro JSC;
- former Chairman of the Board of Kazagrofinance JSC;
- Chairman of the Board of National Company Astana EXPO-2017 JSC and his deputies and counsel, managing director of National Company Astana EXPO-2017 JSC;

- Head of the Operative-Criminalistics Department of the Ministry of Internal Affairs of the Republic of Kazakhstan;
- President of Khorgos International Centre of Boundary Cooperation JSC;
- Chairman of the Committee for Veterinary Control and Supervision of the Ministry of Agriculture of the Republic of Kazakhstan;
- Deputy Chairman of Baiterek Development JSC, Head of the Directorate of Public-Private Partnership, Managing Director of Baiterek Development JSC;
- Chairman of the Information and Archives Committee, Deputy Chairman of the Communications Committee;
- Director of the Republican Scientific and Practical Centre for Medical and Social Problems of Drug Addiction and his deputy.

The statistics of application of various types of punishment for corruption crimes are given in the annex to the report.

The General Prosecutor's Office of the Republic of Kazakhstan also provided an **analysis of the application** of the criminal legislative provisions on corruption crimes, which is set out in the annex to this report.

### *Conclusions*

Kazakhstan demonstrated a high level of criminal prosecution of corruption crimes, including those committed by high-ranking officials. Kazakhstan also provided the requested detailed statistics and analysis of the application of the criminal law provisions. This should be welcomed.

Also, there should be welcomed the changes in certain provisions on holding liable for corruption crimes, namely linking of the fine to the bribe amount, the mandatory lifelong ban to hold on public offices in case of prosecution for corruption, exclusion of conditional discharge of liability in the case of corruption offenses and non-application of statute of limitations to such crimes. These innovations can be viewed as progressive and considered to be best practice.

At the same time, there is a concern about shifting the emphasis on financial sanctions instead of applying deprivation of liberty for serious corruption crimes. As it was noted in the recent OECD Report on Kazakhstan, limiting sanctions for bribery to financial compensation however may not be dissuasive and could allow corrupt officials to avoid hard sanctions by paying off<sup>170</sup>. This is also indicated by the increased number of fines compared with the use of deprivation of liberty.

### **New recommendation No. 27**

- 1. To review sanctions for corruption crimes in order to ensure their effectiveness and proportionality, including by providing mandatory imprisonment for particularly grave corruption crimes.*
- 2. To eliminate the possibility of applying part 1 of Article 55 of the Criminal Code to corruption crimes.*
- 3. To conduct an annual analysis of the imposed penalties for corruption crimes with an assessment of their effectiveness and to publish the results of such analysis.*

<sup>170</sup> OECD Integrity Scan of Kazakhstan, 2017, pages 303-304. Available at: <https://goo.gl/ki6uVH>.

### ***Recommendation 2.8.-2.9. of the Third Monitoring Round Report on Kazakhstan***

... 2. 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.

Kazakhstan reported that free online access to periodically updated detailed statistical information on criminal and other corruption offenses is provided on the website of the Anti-Corruption Service [www.anticorruption.gov.kz](http://www.anticorruption.gov.kz), on which there are sections: Analysis of the activities of the National Bureau and information on socially significant investigations.

It is also noted that on the basis of the results of operational and investigative activities, an analysis of the work of a state body is conducted to determine the causes and conditions that facilitate the commission of corruption offenses. To date, such analyses were conducted in the areas of education, healthcare, agriculture, road construction, land relations, physical culture and sports, quasi-public sector. Taking into account the recommendations of the Anti-Corruption Service, the relevant authorized bodies are also working on elimination of corruption risks, including by amending legislative acts.

The Committee on Legal Statistics and Specialized Statements of the General Prosecutor's Office (hereinafter referred to as the CLSSS) compiles a monthly report on Form 1 M "Registered Crimes and the Results of the Activities of Criminal Prosecution Bodies", which also includes statistical information on corruption crimes. Also it publishes the reports on further development of criminal cases and information on penalties for corruption crimes.

This report is posted monthly to the CLSSS website and every citizen of Kazakhstan has free access to it (<http://service.pravstat.kz/portal/page/portal/POPageGroup/Services/Pravstat>).

It was noted in the Third Round Monitoring Report that the 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 General Prosecutor's Office of the Republic of Kazakhstan. A large amount of the 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, the law enforcement statistics are available on the web-site of the Committee on Legal Statistics and Specialized Statements (<http://service.pravstat.kz/>). During the Fourth Round of Monitoring the authorities of Kazakhstan provided a significant amount of statistical data following the repeated request.

**Generally, this part of recommendation has been largely implemented except for publication of the analysis of trends and causes for their changes.**

### **3.4. Anti-corruption criminal justice bodies**

#### ***Recommendation 2.8.-2.9. of the Third Monitoring Round Report on Kazakhstan***

1. To introduce specialization of prosecutors to supervise investigations and to supporting accusation on corruption cases during trial. ...

**Investigative bodies.** The system of criminal prosecution bodies (investigative bodies) of the Republic of Kazakhstan includes: bodies of internal affairs, national security, anti-corruption service, economic investigation service, prosecutor's office. Article 187 of the Criminal Procedural Code of the Republic of Kazakhstan clearly delineates the investigative jurisdiction between the criminal prosecution bodies.

The status and powers of investigators are regulated in Article 60 of the Criminal Procedural Code of the Republic of Kazakhstan. At the same time, as reported, a draft law "On the preliminary investigative bodies and the status of investigators in the Republic of Kazakhstan" has been prepared. The bill is aimed at consolidating and enhancing the state and legal status of the investigator in the Republic of Kazakhstan, carrying out special state activities to prevent, uncover and investigate the crime. The need to adopt such a bill is caused by the imperfection of the current legislation, its disunity and differences in the legal, social and legal guarantees of the activities of investigators from various law enforcement agencies of the

Republic of Kazakhstan, which ultimately hampers the effectiveness of their activities in combatting criminality.

According to paragraph 12-2, Article 1 of the Law of the Republic of Kazakhstan “On the Law Enforcement Service” (6 January 2011, No. 380-IV) law enforcement include the anti-corruption service (National Anti-Corruption Bureau of the Agency of the Republic of Kazakhstan for Civil Service Affairs and Anti-Corruption) – operative and search units of the authorised body on civil service affairs and anti-corruption performing activities aimed at prevention, detection, suppression, exposure and investigation of corruption crimes.

The Anti-Corruption Service includes the Investigative Department, whose officers carry out direct investigation of corruption offenses (the activity is also regulated by the provisions of the Investigative Department). In the territorial departments, there exist the investigative directorates.

The National Anti-Corruption Bureau (Anti-Corruption Service) of the Agency of the Republic of Kazakhstan for Civil Service Affairs and Anti-Corruption is the authority of the Agency of the Republic of Kazakhstan for Civil Service Affairs and Anti-Corruption, carrying out within its competence the functions on detection, suppression, exposure and investigation of corruption criminal offences and other functions in accordance with the legislation of the Republic of Kazakhstan.

The National Bureau carries out its activities in accordance with the Constitution and laws of the Republic of Kazakhstan, acts of the President and the Government of the Republic of Kazakhstan, other normative legal acts, these Regulations, as well as international treaties ratified by the Republic of Kazakhstan. The National Bureau is a legal entity established in the organizational and legal form of the republican state institution.

The National Bureau takes decisions in matters of its competence in the order established by the law in the form of orders of the head of the National Bureau and other acts envisaged by the legislation of the Republic of Kazakhstan.

According to the Decree of the President of the Republic of Kazakhstan of 13 September 2016 No. 328 “On the Reorganization of the Ministry of Civil Service of the Republic of Kazakhstan” the Agency of the Republic of Kazakhstan for Civil Service Affairs and Anti-Corruption (hereinafter - the Agency) is a state body which is directly subordinated and accountable to the President of the Republic of Kazakhstan. The National Anti-Corruption Bureau of the Agency (hereinafter - the National Bureau) has the status of the authority in the structure of the Agency and is a law enforcement agency that detects, suppresses, exposes and investigates corruption criminal offenses.

The constituent document of the National Bureau is its Regulations approved by the Agency's Chairman Order of 13 October 2016 No. 6. According to the Regulations, the structure and staffing limit of the National Bureau are approved by the Chairman of the Agency at the proposal of the head of the National Bureau.

The Regulations also provide that the Head of the National Bureau determines the powers of his deputies and heads of structural subdivisions of the National Bureau, solves the personnel issues of the National Bureau and its territorial bodies in the order established by the Agency's Chairman Order. The functions of the National Bureau as well as its tasks, rights and duties are specified in the Regulations.

According to the list of positions of political civil servants and other officials appointed by the President of the Republic of Kazakhstan or by the agreement with him, elected at his representation, as well as appointed by the agreement with the Administration of the President of the Republic of Kazakhstan, approved by the Decree of the President of the Republic of Kazakhstan of 29 March 2002 No. 828 “On Certain Issues of Personnel Policy in the System of State Authorities” the Head of the National Bureau is appointed and dismissed by the President of the Republic of Kazakhstan at the proposal of the Agency's Chairman and agreed with the Head of the Presidential Administration. The procedure for and organization of the coordination, appointment and dismissal of the Head of the National Bureau are also regulated by the aforementioned Decree of the President of the Republic of Kazakhstan.

The grounds for dismissal, the procedure and conditions for the dismissal of law enforcement officers are regulated in Articles 80 and 81 of the Law of the Republic of Kazakhstan “On the Law Enforcement Service”.

The procedure for selecting employees is stipulated by the order of the Chairman of the Agency of the Republic of Kazakhstan for Civil Service Affairs and Anti-Corruption of 7 October 2016 No. 4 (registered in the Ministry of Justice of the Republic of Kazakhstan on October 10, 2016 No. 14318) "On Certain Issues Related to Organization of the Selection of Candidates for the National Anti-Corruption Bureau (Anti-Corruption Service) Agency of the Republic of Kazakhstan for Civil Service Affairs and Anti-Corruption and its territorial bodies". In accordance with Article 8 of the Law, admission to the service in law enforcement agencies is carried out by appointment to the office. Admission to the service in law enforcement agencies is formalized by orders of heads of law enforcement agencies or authorized executives. The grounds for dismissal, the procedure and conditions for the dismissal of law enforcement officers are provided in Articles 80 and 81 of the Law.

The staff of the National Bureau includes 447 operational officers, 349 investigative officers, 686 officers performing seconding (administrative) functions (including 68 civil servants).

The average length of service of the operational and investigative staff is 13 years. 100% of employees have higher education, while 451 employees have more than two higher educations. The number of employees in the context of the existing higher education is as follows: 226 employees have legal and economic education; 225 employees have legal and other types of education; 167 employees have legal education; 130 employees have economic education; 25 employees have technical education; and 23 employees have other types of education (state management, international relations, natural relations).

The National Anti-Corruption Bureau has independent technical capabilities to carry out unsolicited investigative and operative and search activities, including the recording of information from communication channels.

In July 2017 amendments were adopted where the National Security Committee (NSC) has obtained an alternative investigative jurisdiction over corruption cases, thereby limiting the exclusive jurisdiction of the National Anti-Corruption Bureau. In its written comments, the National Security Committee noted that this decision was taken in accordance with the prevailing situation and aimed primarily at improving the efficiency of combating corruption and maximizing the use of the specific capabilities of intelligence agencies in the implementation of such activities. Another aspect of this decision is the need to comply with one of the basic requirements of the principles of government – to ensure a system of "checks and balances". Concentration in a single public body exclusive rights to detect corruption offences creates the risk of corruption offences by the employees of this body. According to NSC transfer to its alternative jurisdiction of corruption offences does not limit the activities of the Agency for Civil Service and Fight against Corruption, which is the only competent authority in formation of anti-corruption policy. In addition, the concentration of powers in combating corruption in several state agencies is not contrary to the provisions of the UN Convention against Corruption and other treaties.

The monitoring group has doubts about the appropriateness of such changes because it erodes specialization in investigating such corruption cases, limits independence of Anti-Corruption Agency, may lead to institutional conflict and reduction of effectiveness of corruption crimes investigation. The risk of committing corruption crimes by employees of Anti-Corruption Agency could be reduced by empowering the NSC or other authority to investigate only such category of cases, not all of corruption crimes.

### ***Powers for initiating, closing and transferring of criminal proceedings to another body***

According to Article 179 of the Criminal Procedural Code of the Republic of Kazakhstan,

the beginning of the pre-trial investigation is the registration of the applications, reports of a criminal offence in the Unified Register of Pre-Trial Investigations or the first urgent investigative action.

In the cases, specified in the Article 184 of the Criminal Procedural Code, the prosecutor, investigator, interrogating officer, the body of inquiry prior to the registration of applications and reports of criminal offence shall make urgent investigative actions for finding and fixing traces of a criminal offence. At the same time, they are obliged to take measures for the registration of applications and reports of a criminal offence in the Unified Register of Pre-Trial Investigations, including by using means of communication.

In accordance with Article 180 of the Criminal Procedural Code, if there is a reason to implement the pre-trial investigation the interrogating officer, the body of inquiry, the head of the investigation department, investigator and the prosecutor within its competence and in the manner prescribed by this Code, shall take

by its decision a criminal case to the proceedings, except for the cases envisaged in the second paragraph of part 1 Article 185 of the Code.

According to Article 186 of the Criminal Procedural Code, the applications, reports with the existing materials shall be sent in accordance with the jurisdiction by the head of the criminal prosecution body through the prosecutor.

The Department of Special Prosecutors and the Office of Special Prosecutors, respectively, are part of the General Prosecutor's Office and Prosecutor's Offices of the provinces and those equated to them. The special prosecutor is an official authorized to carry out pre-trial investigation and who has all the powers of the investigator and the head of the investigation team. The priority categories of cases for special prosecutors are criminal offenses committed by law enforcement officers on duty, including torture. In addition, "in exceptional cases, in order to ensure completeness and objectivity, carrying out of pre-trial investigation in criminal cases of other criminal offenses is allowed in agreement with the General Prosecutor"<sup>171</sup>. Hence, it is possible to withdraw cases from the proceedings of the Anti-Corruption Service.

Also according to Article 193 of the Criminal Procedural Code, a prosecutor supervising the legality of the pre-trial investigation, as well as the criminal prosecution shall have the right to withdraw cases from the body conducting the pre-trial investigation and to transfer them to another pre-trial investigative body; in exceptional cases, in order to ensure the objectivity and adequacy of the investigation on a written request of the criminal investigative body or at its own initiative to transfer cases from one authority to another or to take them into their own proceedings and investigate them independently of investigative jurisdiction established by the Code. These powers are also not limited to clear criteria or conditions for withdrawal and transfer. Although withdrawal of a case may be appealed to a higher prosecutor, in the absence of clear criteria and grounds for the transfer of cases, such appeal cannot be considered effective.

According to the information provided by the General Prosecutor's Office of the Republic of Kazakhstan, in 2016 the special prosecutors had 121 pending criminal cases on corruption crimes (during the same period of 2015 they had 138 criminal case), of which 56 (72) cases were referred for trial on the merits, 20 (10) cases were dismissed, the investigation terms were interrupted for 9 (5) cases, 13 (26) cases were transferred according to the investigative jurisdiction, and 23 (25) criminal cases remained. From the specified number 36 (26) criminal cases were related to giving, taking of bribes and mediation in bribery, 55 (69) criminal cases related to abuse of official powers and service forgery, 12 (27) criminal case related to embezzlement of others' property by misappropriation and fraud using official position, and 18 (16) criminal cases related to other corruption crimes.

**Budget autonomy.** According to the Regulations on the National Bureau, it is a legal entity in the organizational and legal form of the republican state institution and it is financed from the republican budget.

Article 44 of the Constitution of the Republic of Kazakhstan specifies the powers of the President of the Republic of Kazakhstan, including approval, upon the proposal of the Prime-Minister of the Republic of Kazakhstan, of a unified system of financing and remuneration of employees of all authorities funded at the expense of the state budget (Decree of the President of the Republic of Kazakhstan of 17 January 2004 No. 1284 "On the Unified System of Remuneration of Employees of the Republic of Kazakhstan Funded at the Expense of the State Budget and Cost Sheet (Budget) of the National Bank of the Republic of Kazakhstan").

Incentives for the employees (personnel) of the National Bureau and its territorial bodies are applied by the Head of the National Bureau in accordance with the Regulations.

There are established internal security units within the structure of the National Bureau and its territorial bodies.

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<sup>171</sup> Instruction on the organization of pre-trial investigation in the prosecutor's offices, approved by the order of the General Prosecutor of the Republic of Kazakhstan on 27.03.2015 No. 48, paragraph 10.

**Table 29. Budget of the Agency of the Republic of Kazakhstan for Civil Service Affairs and Anti-Corruption in 2016-2017**

Name of program / subprogram	Budget for 2016 (ths. Tenge)	Budget for 2017 (ths. Tenge)
<b>Agency of the Republic of Kazakhstan for Civil Service Affairs and Anti-Corruption</b>	<b>11,708,897</b>	<b>13,381,703</b>
Forming and implementing the unified state policy on Countering Corruption crimes	11,708,897	13,381,703
Ensuring the protection of the rights and freedoms of persons involved in the criminal proceedings on corruption crimes and offenses	219,767	249,466
Operative and investigative activity on Countering Corruption crimes and offenses	4,419,864	5,614,249
Ensuring the activity of the authorized body for the prevention, detection, suppression, disclosure and investigation of corruption offenses	6,881,836	7,332,732
Ensuring the operation of information systems and information and technical support of the state body	78,376	179,129
Capital expenditures of the National Anti-Corruption Bureau	109,054	6,127

Source: information of the National Anti-Corruption Bureau.

**Specialization of prosecutors.** According to the progress report of Kazakhstan of September 2016, the new Criminal Procedural Code introduced the office of a procedural prosecutor, who supervises a particular criminal case (including corruption cases) from the start of the pre-trial investigation to provision of support to public prosecutor in court. According to subparagraph 35, Article 7 of the Criminal Procedural Code, the procedural prosecutor is the prosecutor vested with the function of supervision of compliance with the law in a criminal case. These powers are granted by the head of the prosecutor's office in accordance with the Code. According to Part 3, Article 193 of the Criminal Procedural Code, the procedural prosecutor supervises the criminal case from the start of pre-trial investigation and participates in the court of first instance as a public prosecutor.

As noted in the report, currently, the government puts into practice the use of procedural prosecutors in pressing and highly complex criminal cases, regardless of their category. This is due, primarily, to limited human resources. In the long term, as these issues will be gradually solved, it is planned to set specific categories and increase the number of cases where supervision and participation in court proceedings will be covered by the procedural prosecutors.

The acts allocating the responsibilities among virtually every structural unit of the General Prosecutor's Office and territorial offices of public prosecutors also assign the supervisory function to different officers regarding the application of anti-corruption legislation.

At the same time, within the Department of the General Prosecutor's Office of the Republic of Kazakhstan, the Office for Supervising the Legality of Pre-Trial Proceedings for Corruption and Economic Crimes is in charge of supervision of the legality of the pre-trial stage of the criminal procedure.

In its written comments, the General Prosecutor's Office of Kazakhstan noted that there is a specialization of prosecutors in the prosecution bodies. The CPC provides for the institute of procedural prosecutors who carry out supervision over a criminal case since the start of pre-trial investigation and participate in the trial court as a public prosecutor. In this regard, the groups of procedural prosecutors were established in the territorial divisions who share the criminal cases in their areas of specialization. Such groups are established by the authorities of the Prosecutor's office of the region among the staff of the Office for Supervision the Legality of Pre-Trial proceedings. The Office of Corruption and Economic Crimes is established in the General Prosecutor's Office as well. There are also special prosecutors with a specialization on corruption crimes.

**Simulation of bribery.** An important tool for identifying and documenting corrupt acts is the ability to conduct undercover operations and imitate criminal activities (for example, imitate a bribe). At the same time, such operations of investigative bodies may violate human rights in case of provocation of bribery. In this case, evidence collected with violation of human rights will be unacceptable for use in court. Therefore, it is recommended to clearly separate the permissible simulation of criminal activity from unacceptable provocation (in cases when investigative or operational staff or persons cooperating with the investigation

do not join a criminal act that has already been initiated or prepared, but provokes a person to commit it). This delimitation should be stipulated in the Criminal Procedural Code.

The effective legislation of Kazakhstan does not contain criteria for such delimitation. According to Article 251 of the Criminal Procedural Code, it is permitted to implant a person and/or simulate criminal activity with the written consent of a person who has been introduced and/or simulates criminal activity in order to obtain factual data on crimes which are being prepared or committed or which have been committed. The person implanted and/or imitating criminal activity is prohibited to perform actions (inaction) associated with the threat to life, health of people, property, except for cases of necessary defence, detention of a person who has committed an infringement, emergency necessity, reasonable risk in accordance with the provisions of the Criminal Code of the Republic of Kazakhstan. Subject to agreement with the investigator, officer of the inquiry body, the authorized body constantly informs about the process of implanting and/or imitating of criminal activity. These provisions are insufficient to guarantee the observance of human rights.

The importance of this delimitation is also justified by the fact that in Kazakhstan provoking commercial bribery or bribery triggers criminal liability (Article 417 of the RK Criminal Code). According to the Regulatory Resolution of the Supreme Court of the Republic of Kazakhstan of 27 November 2015 No. 8, liability for provoking a bribe under the second part of Article 417 of the Criminal Code only occurs when an attempt to transfer the object of a bribe was carried out for the purpose of artificial formation of evidence of a crime or blackmail and the person specified in part one of Article 366 of the Criminal Code (i.e., a bribe-taker) knowingly for the perpetrator did not commit acts indicating his consent to accept a bribe. This explanation seems to be insufficient.

As noted in the IAP Third Round Monitoring Summary Report, police incitement occurs where the officers involved or persons acting on their instructions do not confine themselves to investigating criminal activity in an essentially passive manner, but exert such an influence on the subject as to incite the commission of an offence that would otherwise not have been committed. In the case of *Bannikova v. Russia*, the European Court of Human Rights summarized the criteria for distinguishing entrapment from permissible conduct: 1) substantive test (whether the offence would have been committed without the authorities' intervention; whether the undercover agent merely "joined" the criminal act or instigated it; whether person was subjected to pressure to commit the offence); 2) procedural test (the way the domestic courts dealt with the applicant's plea of incitement)<sup>172</sup>. Whether provocation of bribery is criminalised or not, the countries should specify in law (and not in the secondary legislation) clear procedures and guarantees against abuses that may occur when using imitated bribery as an investigative tool. Law enforcement authorities should also adopt clear guidelines setting apart entrapment and legitimate bribery simulation<sup>173</sup>.

**Conclusion: this part of the recommendation has not been implemented.**

**In general, Kazakhstan is partially compliant with Recommendation 2.8.-2.9.**

#### **New recommendation No. 28**

- 1. To ensure permanent specialization of prosecutors in supervising the investigation and presenting cases on corruption crimes in courts.**
- 2. To establish clear criteria for transferring the proceedings on corruption crimes to special prosecutors of the prosecutor's office, as well as to withdraw cases from the Anti-Corruption Service according to Article 193 of the Criminal Procedural Code of the Republic of Kazakhstan.**
- 3. With a view to guaranteeing human rights and ensuring the admissibility of collected evidence, to establish in the Criminal Procedural Code a clear delimitation between the permissible imitation of bribery and its provocation as well as detailed rules for imitating criminal activities.**
- 4. To carry out an analysis of implementation of alternative investigative jurisdiction in corruption cases and, if the analysis establishes that the effectiveness of the investigation of such cases has decreased or that institutional conflicts have appeared, introduce necessary changes.**

<sup>172</sup> *Bannikova v. Russia*, application No. 18757/06, Judgement of 4 November 2010., §37-65, <http://goo.gl/ALIISl>.

<sup>173</sup> OECD/IAP (2012), Second round monitoring report on Kyrgyzstan, page 23.

## CHAPTER 4. PREVENTION AND PROSECUTION OF CORRUPTION IN A SELECTED SECTOR – HIGHER EDUCATION

### 4.1. Introduction

#### *Short background*

During the current 4th round of monitoring countries have the opportunity to choose for in-depth research a sector that, in their opinion, is at high risk of corruption. In the Republic of Kazakhstan, it was decided to perform such an in-depth study of the national education system. As this sphere is extensive and versatile, the initial choice of the object of research was narrowed down to the system of higher education. The analysis is based on the methodology of the 4th round of monitoring, as well as the results of similar assessments of individual sectors in other OECD countries in the fight against corruption.

The task of this chapter is to identify the structural and practical aspects of the higher education system, which adversely affect the ability of the anti-corruption departments and educational authorities, as well as higher educational institutions (universities) to prevent and counteract corruption. The following subsections of the introduction provide a brief overview of the higher education system in the Republic of Kazakhstan, as well as information on the prevalence of corruption and specific areas of corruption risks identified by experts. Further, there is discussed the content and effectiveness of the state policy of counteracting corruption in the sphere of higher education. The third part is devoted to the analysis of measures for prevention of corruption and identification of shortcomings. In the fourth part attention is paid to ensuring compliance with anti-corruption legislation. In the fifth final part, there are given the recommendations for improving measures for counteracting and fighting corruption.

#### *Brief overview of the system of higher education in Kazakhstan*

##### *Size and funding of the higher education sector*

According to the data received from the authorities, there were 129 higher educational institutions in the Republic of Kazakhstan in the 2016/2017 academic year.<sup>174</sup> Since the year 2000, more than 50 universities were closed as not meeting the education quality standards. Statistics suggest that private educational institutions took their place – today the number of the private universities (55) exceeds the number of the state universities (43). There are also 17 universities with mixed state-private ownership registered as joint-stock companies; 13 universities belonging to the law enforcement agencies or armed forces; and one international university.

The programmes offered by these universities lead to Bachelor, Master and PhD degrees. In 2016, there were 472 557 students enrolled in them and 38 294 teachers. 211 600 of the students were enrolled in public universities.<sup>175</sup>

The largest share of funding for both public and private universities in Kazakhstan comes from **private sources**. On average, study fees and other private investment, *e.g.* donations, fee-based services, loans, etc. account for about 80% of the budget of public universities and some 88% of funding in private institutions.<sup>176</sup> The main source of public funding are state tuition grants. These are voucher-like grants that are allocated to students on the basis of the score they attain on the Unified National Test,<sup>177</sup> which is compulsory for admission to higher education. Public and private universities receive these funds if chosen by the students-holders of the grants. The number of grants is set annually by study subjects in accordance with the anticipated needs of the national economy of the Republic of Kazakhstan.

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<sup>174</sup> According to the state statistics service their number is equal to 125. See <https://goo.gl/qdc84U>.

<sup>175</sup> Source: responses to the monitoring questionnaire.

<sup>176</sup> TEMPUS (2012). Higher education in Kazakhstan. Almaty: Tempus national office in Kazakhstan; OECD. (2017). Reviews of the National Policy in the Field of Education: Higher Education in Kazakhstan. Paris: OECD Publishing.

<sup>177</sup> Graduates of vocational-technical schools and a number of other categories of graduates who have received secondary and specialized secondary education (for example, training abroad), take so-called Integrated Testing of Applicants (ITA) instead of UNT.

### *General principles, governance and steering of the higher education*

Higher educational institutions in the Republic of Kazakhstan, like in many other countries in which higher education governance adheres to the principles of academic freedom and institutional autonomy,<sup>178</sup> enjoy a degree of independence to manage and govern themselves, and are trusted to do so in conformity with rules and regulations. In Kazakhstan, higher education providers have full (private institutions) or almost full (public institutions) control of their day-to-day operations, including in sensitive areas such as procurement, assessment of academic performance, and staffing decisions. The framework in which such activities are carried out include sectoral legislation, namely the Law on Education, various regulations and model rules. They regulate such issues as the overall development goals for the sector, educational standards and curricula, formal requirements for licensing and accreditation, human resources policy, enrolment capacity, performance ratings, etc. The regulatory framework also includes legislation that has a wider application, and whose scope extends to all individuals and legal entities. The Criminal Code, the Code of Administrative Offenses, the Law on the Fight against Corruption, the Law on Public Procurement, the Law on Licensing, the Business Code directly related to the fight against corruption and its prevention in the higher education sector. It should be noted that the legislation applicable to the civil service is irrelevant for university staff, since they have the status of *civil servants* (*гражданские служащие*), rather than public employees (*государственные служащие*) (see below).

The Ministry of Education and Science (MoES) is responsible for formation and implementation of the policy in the field of higher education. It develops drafts of primary and secondary sectoral legislation, while compliance with norms and proper functioning of the system is ensured by a “model of collegiate leadership”<sup>179</sup>, carried out jointly by MoES, universities and external actors (accreditation agencies and supervisory boards). The structure of higher education governance thus has a direct impact on the methods of counteracting corruption in this segment, which should be kept in mind when assessing their coverage and the possible effect.

As for the MoES itself, it defines and controls key procedures such as licensing and accreditation of higher educational institutions, admission to higher education and conferment of academic degrees, formation of a budget and allocation of budgetary funds, as well as development and acceptance of international obligations.<sup>180</sup> Compliance with the established regulations, management and control are exercised through subordinate bodies, committees and commissions in the key areas (see below). Most of these bodies focus on monitoring the educational process, analysing and improving the educational materials, procedures and reporting documents of educational institutions and are not concerned about enforcing anti-corruption legislation as such, although institutional integrity and anti-corruption issues may partly fall within their competence.<sup>181</sup> MoES reports to the Presidential Administration, the Ministry of National Economy and the Ministry of Finance.<sup>182</sup> Since its employees are public employees, MoES also reports to the Agency for Civil Service Affairs and Anti-Corruption.

### ***Prevalence of corruption***

The most recent and complete data of the unofficial assessment of the level of corruption in the higher education in the Republic of Kazakhstan is based on the 2010 survey among the staff of 45 universities in the Central Asia conducted by a researcher from Slovenia in the course of his scientific work. Only 31% of respondents believed that there are no abuses in their universities; 31% of respondents were not sure of the

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<sup>178</sup> Academic freedom, i.e. the freedom to lecture and research, and the closely related principle of institutional autonomy, are centuries-old, key principles which help to define the relationship between academia and state power. The international academic community counts among its most important achievements. The Republic of Kazakhstan has committed to these principles on various occasions, most recently by becoming a signatory of the Bologna Process and signing up to the European Area of Higher Education.

<sup>179</sup> Salmi, J. and Helms, R.M. (2013). Governance instruments to combat corruption in higher education. Global corruption report on education (pages 108-113). New York: Routledge.

<sup>180</sup> The Law of the Republic of Kazakhstan of 4 April 2016 No. 501-V “On Education”.

<sup>181</sup> For example, a number of bodies in this category – in particular, the Ethics Commission and the Disciplinary Commission of the MES – have the area of responsibility which is limited to offenses committed by the ministry employees. At the same time, there are also such structures as the Committee for the State Control in Education, accreditation agencies or the newly created Commission on Personnel, Addressing Reports and Counteracting Corruption in Education and Science and Monitoring Compliance with the Service Ethical Standards, whose sphere of competence also covers public and private educational organizations and their employees.

<sup>182</sup> Tempus (2012). Higher education in Kazakhstan. Almaty: Tempus national office in Kazakhstan.

existence of abuses, and 39% were sure that the corruption was present.<sup>183</sup> The survey was devoted only to a narrow category of corruption offenses – bribes for awarding academic degrees and titles, as well as for admission to a university and obtaining a diploma.

Another, but even more limited source of independent information is the results of external audit. In the course of the auditor checks the basic attention is given to use of the state funds and the financial reporting. The audits conducted by the Audit Committee of the Republic of Kazakhstan in 2016 showed that only in the second quarter of 2016 the higher educational institutions committed 109 financial violations totalling KZT 14.3 billion.<sup>184</sup> To give some idea about the figures in question, we note that according to the official sources in 2015 KZT 166 billion were allocated from the state budget for higher the education. In addition, the audit found violations such as fraudulent data on the employment of graduates, the allocation of funding for the MoES on the fictional activities of universities, unauthorized investments, etc.<sup>185</sup> In 2016 approximately 24 universities were also examined by the MoES Internal Audit Department. These examinations revealed financial violations amounting to KZT 2.2 billion: 41% of violations were related to the current expenses; 31% related to misuse of the budgetary funds and inadequate management of these funds; 5% of violations related to material and technical supplies; 3% accounted for violations of the financial statements, and 21% were classified as “other violations”.<sup>186</sup>

As for the official position of the authorities, the deputy head of the Agency for Civil Service Affairs and Anti-Corruption said in his statement of 16 November 2016 that education is one of the sectors most susceptible to corruption, and the number of criminal cases instituted against corruption crimes compared to 2015 increased by 50%. The same statement noted that the most common manifestations of corruption are property theft and fraud, including in the area of personnel records (for example, the inclusion of the “dead souls” in the payroll), falsification of data, plagiarism and unreasonable overestimation of ratings.<sup>187</sup> In another statement made by the head of the Department of Higher and Postgraduate Education of the Ministry of Education and Science, it was noted that in 2015 most of the complaints received from the citizens by the Ministry concerning education related to abuses when entering universities.<sup>188</sup> The data from the National Anti-Corruption Report published in April 2017 are also indicative and show a high degree of corruption in the education system as a whole.<sup>189</sup>

### *Spheres of corruption risks*

During the monitoring visit the Expert Group’s attention was drawn to the following areas in the higher education sector, which deserved serious attention from the point of view of the presence of corruption-related factors (experts are aware that this is an incomplete list of problems, shortcomings and vulnerabilities in the fight against corruption):

#### *Abuses in the allocation of budgetary resources through government grants*

The state educational grant for education is the main source of the state support for the majority of students in Kazakhstan. It is granted at the first admission to the university. Those students who failed to get a grant may count on its allocation already in the process of education provided the following two conditions are met: the average score of academic performance must be above a certain level, and one of the previously allocated grants should be “unoccupied”, i.e. the student who has received his grant, has left the university, moved to another university or other specialty, etc.<sup>190</sup> Because of the relatively high cost of education<sup>191</sup> these freed grants are highly demanded “commodities”

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<sup>183</sup> Istileulova Ye. (2010). Transformation of higher education in Central Asia for 20 years. Received on 15 May 2017 from <https://goo.gl/vfLEJn>.

<sup>184</sup> Audit Committee of the Republic of Kazakhstan. (2016). The results of the auditing activities of the Audit Committee on control over the republican budget performance.

<sup>185</sup> Shibutov M.M. (2016). Ways to improve the efficiency of public assets management in education. Almaty.

<sup>186</sup> Source: responses to the monitoring questionnaire.

<sup>187</sup> Source: <https://goo.gl/MfddfF>.

<sup>188</sup> Source: <https://goo.gl/nHanwp>.

<sup>189</sup> National Report on Counteracting Corruption, 2017, pages 32-35.

<sup>190</sup> See the Rules for Allocation of the State Educational Grants in the Resolution of the Government of the Republic of Kazakhstan No. 58 of 23 January 2008.

<sup>191</sup> OECD. (2017). Reviews of the National Policy in the Field of Education: Higher Education in Kazakhstan. Paris: OECD Publishing.

According to the information received by experts during the country visit as well as the responses to the questions of the monitoring questionnaire, often there is no transparency in the process of such a “secondary” grant allocation. At the same time, it is said that the advantage is given to students enjoying a privileged attitude from the administration of the university for the reasons unrelated to their academic performance. Such privileged attitude can be explained by political, family or business connections or by calculations of the received donations that are considered important for the institution and its employees. Such “rogue” students are allegedly included in the so-called “lists of the dean”, whose existence was denied by some representatives of the universities, but was confirmed by other colleagues during the country visit.

Unlike the initial allocation of grants by the National Competition Commission<sup>192</sup>, the responsibility for allocating grants that are freed up rests primarily with universities, and this practice is in full compliance with the rules in force. Thus, the Government Resolution regulating the procedure for allocating grants that have been released describes in detail the qualification requirements for candidates, the time frame for decision-making, the procedure for filing applications and processing grants. Nevertheless, it does not stipulate the obligations regarding the transparency of the granting process, in particular, regarding the timely provision of information on newly released grants. It also does not provide for an opportunity to appeal the decisions on refusal to give a grant. According to the information received by the experts, many materials and decisions on the allocation of grants are made public post factum only. From the point of view of the Expert Group, such shortcomings pose a serious threat to the fair distribution of budgetary funds. In this connection, the Republic of Kazakhstan should take measures to ensure the distribution of the state educational grant through the open process, including by publishing within a reasonable time the information on freed grants, their distribution and decisions in this regard, providing an opportunity for an appeal with a clearly defined procedure, consideration of complaints and application of sanctions to violators.

#### *Undue process of recording students’ performance ratings*

According to the information received from students during the visit, with the internal certification of students (which is conducted by teachers of the higher educational institutions) the assessments can be deliberately underestimated to create conditions for obtaining illegal rewards in exchange for a higher score. The task of this chapter does not include the search for arguments that confirm or refute such statements, but it is important to find out whether the testing conditions and the concurrent circumstances favour the emergence of this type of abuse.

Experts note that the academic performance of students in Kazakhstan is regularly assessed through internal and external evaluations, described in the Model Rules for the Ongoing Monitoring of Academic Performance, Intermediate and Final Certification of Students.<sup>193</sup> The External Assessment of Educational Achievements (EAEA) is an independent standardized test for a limited number of subjects that students undergo during the fourth year of study in order to verify compliance of the quality of knowledge with the requirements of the state standards of higher education. The internal assessment is carried out directly by the higher educational institutions and is conducted at the different stages of study. There is an intermediate assessment at the end of the semester or academic year, the final assessment marking the completion of training (for a bachelor's, master's or doctor's degree), as well as regular assessment of academic performance throughout the school year.

The situation of students and teachers depends on the results of the internal assessment, and therefore both are interested in its favourable outcome for certification: assessments are crucial for the academic career of students, the right to receive state grants as well as on state funding of universities and their risk indicators depend on such assessments. An even more important point is that, according to the information received by the experts, the typical conditions for carrying out the assessment seem to create favourable conditions for abuse. Many of the test in the course of the monitoring and some exams at the intermediate control stage are still conducted orally and one-on-one with the teacher, while in case of written exams the assessment

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<sup>192</sup> See Order of the Minister of Education and Science No. 349 of 1 July 2010.

<sup>193</sup> Order of the Minister of Education and Science No. 125 of 18 March 2008. See also the Standard Rules for the Activities of Educational Organizations Implementing Higher Education Educational Programs No. 449 of 17 May 2013.

criteria are not always transparent and not in all cases reported to the students accordingly.<sup>194</sup> This creates conditions for application of double standards and deliberate bias in the assessment. Moreover, there are cases of open dissemination of information on the sale of diplomas of higher education.<sup>195</sup>

The monitoring group notes that such risks are often encountered in responsible examinations (i.e., those which seriously affect the future fate of the student) in other countries<sup>196</sup> too, and one can be protected from them in various ways, in particular by establishing an appropriate procedure for assessing knowledge.

With respect to the Republic of Kazakhstan this means the need for a comprehensive analysis of the causes and factors that affect the integrity of students' performance records in practice, the significant restriction or abandonment of the use of oral examinations and interviews alone, and the limitation of the ability to make subjective assessments by clearly defining the standards of academic performance and communication of these Standards to students.

At present, in order to prevent abuses most universities in the Republic of Kazakhstan (namely, in 99 universities at the time of the completion of this report) use the Platonus system<sup>197</sup> to carry out some of the current monitoring and intermediate certification electronically. This automated information system (AIS), which is developed and implemented by a private company, allows universities to manage most aspects of the online learning process, conduct multiple-choice examination, and record the results in a form which is protected from interference and excludes abuses.

Unfortunately, according to the reports of students and representatives of civil society, Platonus system has a number of disadvantages that limit its effectiveness as a way of counteracting corruption. First, the use of the AIS is carried out on a voluntary basis, and it covers only part of the subjects for which examinations are conducted. Secondly, Platonus system can be temporarily disconnected in order to retrospectively correct the answers to improve their results. Finally, the AIS is not designed to provide protection in situations where those who exercise control over the examination themselves are involved in deception acting as accomplices to dishonest students.

Despite the advantages of this and other AIS, the experts recommend regularly reviewing the practice of using the Platonus system and other similar mechanisms to identify and reduce the opportunities for their misuse and manipulation.

#### *Academic dishonesty in the performance of written assignments*

Currently, certain the higher educational institutions are responsible for ensuring academic integrity in the preparation of written assignments, i.e. recognition of academic dishonesty. It is assumed that they independently develop rules for compliance with academic integrity, covering the execution of written assignments, the preparation of scientific papers and written answers in the course of tests and examinations.<sup>198</sup> Though adoption of such rules is one of the conditions for accreditation,<sup>199</sup> the framework standards do not require that rules and manifestations of academic dishonesty are formulated in any specific way. The only clarification can be considered that they should be focused primarily on students, not on teachers.<sup>200</sup> Given that the framework standards are formulated in the most general way, it can be assumed that, in all likelihood, the documents of all higher educational institutions have a formal mentioning of the principle of academic integrity. However, it is unclear how many universities have introduced in their

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<sup>194</sup> Despite the claim of authorities that to date the admission exams at universities are generally carried out in written form, during the monitoring visit experts received information that many universities conduct oral examinations. Experts take into account the fact that at the time of examinations video can be used and there's a possibility of appeal.

<sup>195</sup> For example, see <https://goo.gl/DL5zK6>. Experts take into account that the forms of diplomas are related to the category of documents of strict accountability and the process of their storage and accounting is regulated.

<sup>196</sup> On the impact of responsible examinations on school education in the U.S., see, for example, the work of Nichols and Berliner, 2007.

<sup>197</sup> [www.platonus.kz](http://www.platonus.kz).

<sup>198</sup> The Model Rules on the Activities of Educational Organizations Implementing Educational Programmes of Higher Education No. 449 of 17 May 2013.

<sup>199</sup> For example, see <https://goo.gl/eP4A9E>.

<sup>200</sup> According to Para 34 of the Model Rules the academic integrity expresses the honesty of the student in the learning and performing of written work (a test, essay, coursework, thesis, dissertation). According to Para 35 the academic integrity is the main principle of the learning process. To avoid plagiarism all of the above types of written works are checked for plagiarism, the procedure of which is determined by the University itself.

internal regulations specific provisions that define academic dishonesty (except plagiarism) as a violation, and on this basis have developed the rules that ensure effective counteracting to them.

The expert group notes that the Code of Administrative Offenses of the Republic of Kazakhstan provides for sanctions for higher educational institutions that do not comply with the requirements for developing the rules against academic dishonesty. As for the choice of punishments for individual offenders, this is the universities' exclusive right. The Model Rules for Certification contain only an indirect indication that higher educational institutions can expel students who resort to cheating and other forms of deception. Nevertheless, according to the information received during the visit, this measure is extremely rare. From the point of view of the experts, the weakness of control in this area can be explained by a limited set of sanctions. Regardless of the severity of the deed, the only sanction provided by the Model Regulations is the expulsion of a student from a higher education institution.

It appears that the diversification of sanctions towards the possibility of imposing milder penalties together with the introduction of effective external monitoring will contribute to more effective prevention and detection of cases of academic dishonesty in the course of execution of written assignments. Also, it appears necessary to make sure that all higher educational institutions have adopted (or have revised) the rules for academic integrity and that such rules clearly regulate the behaviour and actions of students, teaching staff and employees of the administration of the higher education institutions. This should include, in particular, methods for monitoring written assignments for plagiarism.<sup>201</sup>

#### *Compliance with the licensing and accreditation requirements*

During the monitoring visit, representatives of the MoES stated that the manipulation and providing false information by universities in order to obtain their license is a very common fact and a chronic problem, especially in private universities. In this regard, the Expert Group notes with satisfaction that the participation of higher educational institutions in fraudulent licensing activities is punishable under the Code of Administrative Offenses, which prohibits the deliberate provision of false information in order to obtain a license.<sup>202</sup> The higher education institutions and persons acting on their behalf may be subject to fines. If the fraud is committed by providing knowingly false information, the penalty may be significant. For MoES staff involved in such actions the provided administrative sanctions can go up to dismissal from the service.<sup>203</sup> Moreover, licensing bodies are prohibited from engaging in selective law enforcement and allowing conflicts of interest.<sup>204</sup>

Unlike fraud in licensing, fraud in accreditation, apparently, does not find a similar reflection in the legislation. The experts were unable to come to any definite conclusions as to what consequences such violations entail in real life. Also the authorities did not provide any statistical data on fraud in either accreditation or licensing spheres. The expert group believes that these issues deserve close attention. In particular, it is desirable to collect and analyse information on violations in the licensing and accreditation process in order to determine the prevalence of illegal practices, and to develop and implement specific measures to prevent them.

#### *Transparency and access to information, including statistical data*

Access to the up-to-date and accurate statistics is an important condition for the formation of the effective anti-corruption policies, as well as informed public participation in Countering Corruption and control by the civil society. According to the information received during the visit, a serious difficulty is caused by the fact that the National Statistics Committee provides limited information on the segments of higher education. The experts note that the Committee collects and summarizes data on various aspects of

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<sup>201</sup> During the monitoring visit, the experts received information that all important written assignments for students, such as master's and doctoral dissertations, are subject to plagiarism testing through online services and internal commissions, but representatives of the civil society expressed skepticism about the strict application of these monitoring measures. See also the Standard Rules for the Activities of Educational Organizations Implementing Higher Education Educational Programs No. 449 of 17 May 2013. The frequency and method of conducting inspections is determined independently by educational institutions (see an example of a service that is supposedly widely used in Kazakhstan at [www.antiplagiat.ru](http://www.antiplagiat.ru)).

<sup>202</sup> Article 464.

<sup>203</sup> According to the Law on Public Service, violations by the staff of the Committee for Control in the Sphere of Education and Science of the MES, which contribute to the perpetration of fraud in licensing, are qualified as disciplinary offenses.

<sup>204</sup> The Law of the Republic of Kazakhstan "On Permits and Notifications", Article 9.

educational activities and publishes them in periodicals (statistical bulletins) or on its website.<sup>205</sup> The decisions on what information is made public and about the degree of aggregation of data are taken in consultation with the sectoral ministers in preparation for the annual Schedule of Dissemination of the Official Statistical Information (SDOSI).

According to the available information, the information selected by the MoES for inclusion in SDOSI is much smaller in volume than the available data. Users who wish to access more complete data need to submit an official request and pay to the external supplier for the processing and delivery of information. Only a few organizations resort to such requests or can afford it from a financial point of view.

The monitoring group notes that a compilation of indicators planned for publication in 2017 in the field of higher education will include such useful information as information on the total number of higher educational institutions, the number of students admitted to the first year and graduated from higher educational institutions, the number of university staff, senior students and students transferred from one higher educational institution to another, as well as data on graduates with a breakdown by academic degrees and enrolment rates by education.<sup>206</sup> Many pieces of data will be disaggregated by region, type of higher educational institution and form of ownership (public and private), profiling disciplines and the form of education (full-time or distance learning), etc. With all its importance none of these areas is important from the standpoint of preventing and Countering Corruption and identifying corruption risks.

Discussions during the visit showed that the National Statistics Committee actually possesses at least two blocks of information in the field of higher education, which are undoubtedly subject to corruption risk and in which external audits have repeatedly revealed violations and the presence of corruption risks. This information is about procurement<sup>207</sup> and financing. As for the information on financing, the plan of implementing the anti-corruption strategy for 2017 (see below) provides for regular publication of data on total incomes and expenditures of educational institutions, as well as on the total amount of services in terms of money provided in the education sector.<sup>208</sup> However, these data are presented in such an aggregated form that they hardly have any practical significance for the external stakeholders.<sup>209</sup> In particular, there is no possibility to study data broken down by type of the higher educational institutions, regions, sources of income, purpose of expenditure (i.e., current or capital expenditures), etc.<sup>210</sup>

In this regard, Kazakhstan is recommended to revise the process of selecting data to be published by the National Statistics Committee and systematically include information on financing / expenditures in the list of such data, and to provide details down to the level allowing external parties to monitor relevant processes.

### *Human resources policy*

In accordance with the order of the Minister of Education and Science No. 719 of 31 December 2015, the higher educational institutions are required that at least 70% of their graduates work for the last three years in the received specialty (see also below). The inability to achieve this target is considered an “material” violation.<sup>211</sup> The majority of higher educational institutions looking for a way out from this situation resort to “academic inbreeding”, i.e. they employ as many of their graduates as possible. Employees and students of higher educational institutions, with whom the members of the Expert Group were able to communicate, told that in most higher educational institutions their former students comprise up to one-third of the

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<sup>205</sup> The Statistics Committee of the Republic of Kazakhstan (2017a). План статистических работ на 2017 год; The Law of the Republic of Kazakhstan “On the State Statistics” No. 257-IV of 19 March 2010, Articles 18 and 19.

<sup>206</sup> The Statistics Committee (2017b). Schedule of distribution of the official statistical information for 2017.

<sup>207</sup> The experts have noted that the relevant information is published at a special portal [gozakup.gov.kz](http://gozakup.gov.kz).

<sup>208</sup> By the end of June 2017 (after the completion of this monitoring report), the Statistics Committee also plans to issue a newsletter on the financial and economic activities of educational institutions, which will reproduce the expenditure data authorized for publication in 2017.

<sup>209</sup> Provision of a free access to normative and planning documents is one of the accreditation requirements for the universities, but this does not mean that they will include up-to-date information reflecting the state of affairs in the field of financial reporting and the effectiveness of the university management.

<sup>210</sup> An example of a typical set of performance indicators of investments in education in the form of financial and human resources, see OECD publication “Education at a Glance” (indicators B1 – B7), available at <https://goo.gl/GoYmX8>.

<sup>211</sup> See criterion No. 144, Order No. 719. The government of RK reported that to the moment of adoption of the review the provisions of this Order are in the process of revision.

scientific and pedagogical personnel. At the same time that's how the favourable conditions for favouritism in the personnel policy of higher educational institutions are created. Some indicators of the degree of possible influence of informal preferences on the selection of personnel in the higher education sector of the Republic of Kazakhstan can serve as statistics on the academic degrees of university staff. About one-third of the employees who lectured, assessed the knowledge of students and, possibly, participated in scientific research in 2014–2015, had only a first-degree diploma (bachelor's degree or its equivalent) and only 12% of teachers had a degree of Doctor of Philosophy (PhD) or its equivalent.<sup>212</sup>

The monitoring group notes that academic inbreeding is a widely known phenomenon spread throughout the world. It should also be categorized as a highly controversial phenomena, since it produces a number of negative effects. One such effect is that in the higher education systems with a high level of academic inbreeding, informal ties play an important role, which can become a determining criterion in making personnel decisions.<sup>213</sup> This phenomenon takes place even in countries where, like in the Republic of Kazakhstan, strict rules exist to ensure objectivity in the selection of personnel.<sup>214</sup> The experts believe that the requirement to provide 70 percent employment of graduates of higher educational institutions in those spheres, on which they received diplomas, go beyond the competence of higher educational institutions.

The expert group recommends revising the commitment of higher educational institutions in this field with a view to abandoning this practice or limiting it in the context of what directly depends on higher educational institutions or what they can directly influence.

#### *Remuneration of labour*

As public employees, higher education professionals are paid according to a set salary scheme that is binding and defines a base salary, multiplied by a coefficient which reflects tenure, qualifications, and professional category. The salary progression of academic and administrative staff depends on their years of experience and academic seniority, and can be steep.<sup>215</sup> For example, the difference in monthly income<sup>216</sup> between lecturers of the lowest and highest professional category is about 45%, and between those at the beginning of their careers and those close to retirement - over 20%. At the time of preparation of this monitoring report, those at the top of the salary scale earned over 76% more than those at the beginning of their academic careers.

The experts say that a low level of income is called as one of the most common reasons of the existence of corruption in the public sector, including education.<sup>217</sup> If low salaries are indeed a source of corruption risk, then the system of higher education in the Republic of Kazakhstan is certainly subject to it. Even those teachers of the state universities who have the highest salaries earn less than representatives of other professions with similar qualifications. The salary of a mid-career teacher in the higher educational institution is almost twice less than of comparable employees in other spheres. In the last quarter of 2016, the average monthly income of employees with higher education qualifications was KZT 154,632<sup>218</sup>, compared to KZT 108,660<sup>219</sup> in statutory salary of the highest earning professionals in a public university, while the salary of the experienced lecturers<sup>220</sup> would be around KZT 84,946 per month. Most of the

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<sup>212</sup> Reviews of the National Policy in the Field of Education: Higher Education in Kazakhstan. Paris: OECD Publishing.

<sup>213</sup> Altbach, P.G., Yudkevich M. and Rumbley L.E. (2015). Academic inbreeding: Local challenge, global problem. Digest, ed. Altbach, P.G., Yudkevich M. and Rumbley, Academic inbreeding and mobility in the higher education sector (pages 1-16). Palgrave Macmillan, the United Kingdom.

<sup>214</sup> See the Law on Education, Article 5, and Order of the Minister of Education and Science No. 230 of 23 April 2015.

<sup>215</sup> The calculations given in this section are based on tariff rates approved by the Resolution of the Government of the Republic of Kazakhstan No. 1193 of 31 December 2015.

<sup>216</sup> The official salary for employees with minimum qualifications required for the relevant professional category and position.

<sup>217</sup> U4. (2006). Corruption in the Education Sector.

<sup>218</sup> The Statistics Committee of the Republic of Kazakhstan. (2016). The salaries of employees by occupation (positions) in certain economic activities of the Republic of Kazakhstan. Astana: the Statistics Committee of the Republic of Kazakhstan.

<sup>219</sup> The given figures are based on tariff rates approved by the Government of the Republic of Kazakhstan No. 1193 of 31 December 2015 and reflect the amount of statutory salary.

<sup>220</sup> From 13 to 16 years of professional experience, professional category B1-3.

teachers earn even less than that, as over half<sup>221</sup> do not have a qualification required to advance to higher professional categories, and many are working on part-time rates.

The results of assessment of academic integrity in other countries indicate that the link between income and corruption is complex, and in itself a direct increase in wages carried out in isolation from other measures does not automatically lead to a reduction in corruption risks. To increase their income, teachers of higher educational institutions in Kazakhstan, like their peers in other countries, try to find additional official and unofficial sources of income and often work at several places simultaneously. In itself, such practice does not contradict the law, but the discussions held during the country visit testify that it helps to create conditions for the emergence of corruption, as due to lack of time and proper motivation teachers begin to neglect their professional duties. Such teachers are more tolerant to academic dishonesty or expose students to higher grades than they deserve to avoid the additional burden associated with failed students and the organization of re-examinations. In other words, the presence of several jobs at the teacher, which compensate for unsatisfactory salary conditions in his higher educational institution, can induce him to aiding and abetting corruption.

From the experts' point of view bringing the level of wages in the higher education sector in line with similar professions in other sectors of the economy would be desirable for the Republic of Kazakhstan.

## 4.2. Anti-Corruption Policy

### *Higher education sector in the national anti-corruption documents*

As already noted above (see Chapter 1), over the last several years there were adopted two national documents in the field of preventing and Countering Corruption: the Anti-Corruption Strategy for 2015-2025 and the Action Plan for 2015-2017. Education is directly mentioned in the Strategy only once in the context of the need for widespread introduction of anti-corruption training courses, which is an important task, but by no means is similar to the measures for Countering Corruption in the field of education itself. The Strategy also primarily focuses on *public employees*, which reduces its relevance to higher education: in the Republic of Kazakhstan, public employees comprise only a small part of personnel and are represented mainly by the MoES employees, while the majority (21,691 persons as of 2015) is the *civil servants* or works under private contracts in private universities (16,179 persons as of 2015).<sup>222</sup>

The Action Plan for 2015-2017 is somewhat richer in terms of the number of links to the education sector. In the section on the measures for preventing corruption it is proposed to take into account anti-corruption criteria while assessing sectoral ministries and to create “Anti-Corruption” sections<sup>223</sup> on the websites of the state institutions; to organize electronic processing of applications of graduates of educational institutions of vocational and post-secondary education upon admission to universities; to prohibit participation of unreliable suppliers in tenders for the supply of food products for secondary schools. In the Plan it is proposed to list in the section on the establishment of public control mechanisms representatives of civil society in a commission that allocates state grants to universities and to create online portals where information on student performance, distribution of the state educational grants, and availability of student dormitories will be published for universal access. Finally, the Plan contains a section on raising public awareness about corruption issues, which calls for the development of another plan to conduct awareness-raising anti-corruption campaigns with the support of youth organizations. Four of the above-mentioned problem areas directly concern the sphere of higher education.

As already noted in Chapter 1, in the Republic of Kazakhstan there were conducted full-scale studies on specific corruption risks, including in the higher education sector. The Expert Group did not submit any materials, studies or data on the basis of which the areas included, for example, in the above-mentioned Action Plan, were selected. One of the ways of interpreting its priorities is the experts' assumption that the inclusion of certain areas is explained by the presence of a large number of violations. In this regard and as part of the recommendations addressed to the Republic of Kazakhstan in Chapter 1 the Expert Group encourages to prioritize a full-scale independent assessment of institutional integrity and corruption risks in

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<sup>221</sup> OECD. (2017). Reviews of the National Policy in the Field of Education: Higher Education in Kazakhstan. Paris: OECD Publishing.

<sup>222</sup> <https://goo.gl/5G9hZt>.

<sup>223</sup> The web page of the Ministry of Education and Science on the fight against corruption is located on the web-site of the Committee for Control in the Field of Education and Science: <http://control.edu.gov.kz/>

the higher education sector in order to have a full basis for making informed decisions about the actions within the current and future anti-corruption strategies and plans both of a national nature and specific for the sector of (higher) education (see below).

### ***Sectoral anti-corruption documents***

In 2015, in order to implement the Anti-Corruption Strategy for 2015-2025 the MoES approved the Comprehensive Plan to Counteract Corruption in Education and Science for 2015-2017.<sup>224</sup> It includes 77 items and covers such areas as the comprehensive anti-corruption measures, introduction of the public control institutions, improvement of the personnel policy, formation of the anti-corruption culture, improvement of the quality of educational services and raising awareness about corruption. Fourteen of the planned activities relate directly to higher education and are designed to eliminate violations and deficiencies in allocation of the state grants, allocation of places in student dormitories, recognition of academic merits, preparation of written assignments (master's dissertations), administration of universities, compliance with the licensing requirements, assessment of academic integrity of the faculty, ensuring of transparency and access to information, academic integrity of universities management, corruption awareness.

At the time of the monitoring visit the vast majority of the activities included in the Plan and related to the higher education sector were to be completed. Nevertheless, the Expert Group was unable to obtain reliable information on the degree of their implementation. The only publicly available report on this issue relates to the first quarter of 2016 and it lacks information related to the higher education sector.

The additional materials provided by the authorities also report nothing about the progress of work and the achieved results. According to the experts, the Comprehensive Plan can be taken seriously only if the information on its implementation is regularly published and communicated to all stakeholders.

In this regard, the experts urge the Republic of Kazakhstan to regularly publish reports on the implementation of the Comprehensive Plan, achieved progress and encountered obstacles. As for the contents of the Plan, the experts are forced to repeat that they were not provided with evidence that it is based on a thorough analysis of the corruption risks. This deficiency should be eliminated.

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

As already mentioned above (see Chapter 1), public councils are the main mechanism of the public participation in the policy making in the Republic of Kazakhstan.<sup>225</sup> These structures, which have consultative and control functions, are created in the sectoral ministries and other executive bodies.<sup>226</sup> Their recommendations are not binding, but public authorities must take them into account. The decision on how to proceed with the recommendations of the councils should be justified.

Until July 2016 the Public Council for Countering Corruption at the MoES was dealing with corruption problems in education sphere.<sup>227</sup> Among its 16 members there were two university rectors, two journalists, five parliament members, two MoES staff members, one honoured school teacher, one trade union representative, one research employee and the head of the MoES contractor organization. The Council paid attention to a wide range of issues and solved important tasks to coordinate collective efforts in the field of Countering Corruption and increasing the participation of the civil society, but worked only one month and a half and was dissolved.<sup>228</sup>

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<sup>224</sup> Resolution of the Committee for Control in the Field of Education and Science No. 1084 of 4 August 2015.

<sup>225</sup> The purpose and task of the public council is to express the opinion of the civil society on important issues, to represent its interests and to expand the possibilities for public control. Public councils can deal with matters relating to the planning and execution of the budget, reports on the results of the work of public authorities, consultations on new legislation, public responses to the various problems in the form of complaints and proposals, proposed bills and creation of thematic commissions. Any citizen of the Republic of Kazakhstan, who has the right to participate in elections and who has not previously been held criminally liable, may become a member of the public council. Another form of the public participation is working groups set up by line ministries to discuss the technical problems of the relevant sector. In this chapter, the activities of these structures are not discussed, since they have a narrow special focus.

<sup>226</sup> The Law of the Republic of Kazakhstan "On Public Councils" No. 383-V of 2 ноября 2015.

<sup>227</sup> Order of the Minister of Education and Science No. 518 of 10 December 2014.

<sup>228</sup> Order of the Minister of Education and Science No. 424 of 4 July 2016.

In 2016, it was replaced by the Commission on Personnel, Addressing Reports and Counteracting Corruption in Education and Science and Monitoring Compliance with the Service Ethical Standards under the new Public Council of the MoES. The commission consists of 21 members, has a presidium of nine people and deals with a wide range of issues.<sup>229</sup> One of the tasks of the Commission, in all likelihood, is to involve the public in discussing measures to prevent and combat corruption. However, the lack of information makes it difficult to assess the effectiveness of its activities. It follows from the relevant regulations that this structure is only one of the five thematic commissions established under the Public Council, and that it is headed by its high-ranking representative in the field of higher education. In addition, there are no publicly available documents that provide information on the membership of the Commission, its priorities, work and results achieved. The only public mentioning of its activities can be found in the work plan of the Council for 2016, which provides for the Commission's continuing obligation to conduct analysis of the anti-corruption activities of the MoES and to submit a report on the results of the analysis once every six months. The lack of such information contradicts the goals and principles laid down in the very idea of the "public council" and contradicts Article 7 (rights and duties of public councils and their members) and Article 14 (publicity of the work of the public council) of the Law "On Public Councils". In the Council's work plan for 2017 prevention of corruption is not mentioned at all.<sup>230</sup>

Discussions with the civil society and media representatives during the monitoring visit showed that the activities to engage the public through the public councils of the MoES and other ministries are very insignificant (see also Chapter 1). The expert group presented preliminary results of the ongoing NGO survey<sup>231</sup>, according to which approximately 70% of the civil society organizations in the Republic of Kazakhstan have never participated in public councils. Of more than 20 participants in the discussion with the experts, only one person reported that he had the opportunity to participate in the meeting of the council. In the opinion of the majority of the participants in the discussion, unsuccessful attempts of the state bodies to ensure the engagement of the public in the process of fighting corruption do not necessarily hide any intent. Rather, they are inclined to see the reason for the imperfection of regulations on the public councils that do not provide for the allocation of appropriate financial resources for their work and contribute to the fact that people who do not have the necessary knowledge and experience become members of the council (especially in the sphere of Countering Corruption). Since this issue is fully covered in Chapter 1, the Expert Group refrains from further comments on this topic.

### 4.3. Preventive measures

Information on the following preventive measures was provided to the Expert Group in responses to the monitoring questionnaire and during the visit to the Republic of Kazakhstan.

#### *Prevention of corruption at the MoES level*

With regard to the MoES personnel, including those whose functions are related to higher education, they are public employees, and all questions relating to their integrity are highlighted in the relevant section of the report on the ethics of the *public employees*. The MoES is headed by a minister appointed by the country's political leadership. All questions concerning his/her integrity and incorruptibility are highlighted in the relevant section of the report on the ethics of conduct of *senior public officials*.

In addition to the Comprehensive Plan for Countering Corruption in Education and Science for 2015-2017<sup>232</sup>, in order to improve the quality of services offered to the society, as well as institutional integrity, the MoES has developed anti-corruption standards that set out general rules for the conduct of the public employees working in the Ministry in the performance of their duties.<sup>233</sup> These rules are quite comprehensive, but it is unclear whether they are binding, since no sanctions are provided for their non-compliance. Thus, it seems that the MoES standards are predominantly recommendatory and declarative in nature and it is impossible to trace the compliance of the MoES public employees with them.

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<sup>229</sup> Order of the Minister of Education and Science No. 163 of 23 February 2016.

<sup>230</sup> See also <https://goo.gl/zZgmoE> (last accessed on: 21.05.2017).

<sup>231</sup> The survey was performed by the Research and Consulting Center "Kameda": <http://kameda.kz>.

<sup>232</sup> Resolution of the Committee for Control in the Field of Education and Science No. 1084 of 4 August 2015.

<sup>233</sup> See <https://goo.gl/dRF1nH>.

For greater effectiveness, the experts recommend proper monitoring of compliance with the MoES anti-corruption standards through their inclusion in the programs for regular assessment of the effectiveness, professionalism and ethical conduct of the MoES employees.

### ***Prevention of corruption at the level of higher educational institutions***

#### *Legal framework*

Except for the requirements of adherence to academic integrity, the sectoral legislation does not impose any obligations on higher educational institutions to counteract corruption. It also does not provide any explanation as to whether compliance with more general regulatory requirements (i.e. the Anti-Corruption Law, the provisions of the Criminal Code) implies the need to make special changes to the university regulations, for example, to establish internal audit and control units.

As the meetings of the experts with the universities' representatives showed, in the absence of such duties and guidelines, the universities do not independently fill the existing lacunae. During the visit, the experts were also informed that the internal regulatory documents of most higher educational institutions are aimed at ensuring compliance with the necessary minimum of the licensing and accreditation requirements, none of which concerns corruption-related issues.

The experts point out that in accordance with the Model Rules of Educational Organizations Implementing Educational Programs of Higher Education<sup>234</sup>, universities are obliged to create their own internal quality assurance system. These systems should be coordinated with the similar mechanisms of higher educational institutions participating in the European Higher Education Area (the Bologna Process) and cover the main aspects of university life, such as human resource management and information flows, training programs, etc. The Model Rules, however, are silent about the administrative and financial aspects of the activities of higher educational institutions and do not oblige them to have an internal control or audit unit.<sup>235</sup>

The monitoring group believes that in view of the situation that has arisen it would be useful to identify certain starting points and formulate initial recommendations so that they can track the further progress in implementing anti-corruption reforms in the higher education sector at the university level both state and private ones.

#### *2) Plans of actions and commission on counteracting corruption*

In order to implement the Comprehensive Plan to Counteract Corruption in Education and Science for 2015-2017, some universities voluntarily adopted and published on their websites their own action plans of Countering Corruption, and some trustees and supervisory councils of higher educational institutions set up appropriate commissions.

With respect to the action plans the Expert Group got the impression that the main emphasis in these documents was made on raising awareness of the manifestations of corruption during the meetings of the faculty and students. It is unclear whether these plans are fully implemented and, if so, how they are implemented and correlated with the internal regulations of higher educational institutions and what their positive effect on the institutional integrity would be. As far as the anti-corruption commissions<sup>236</sup> are concerned, in a small number of universities, where these commissions were established in the form of advisory collegial bodies with a consultative vote, such commissions had to study the causes and conditions of corruption in order to prepare recommendations for improving the management system and internal labour regulations, analysis of the report notes on violations filed by students and teachers, determination of appropriate disciplinary sanctions imposed for violations, generalization and analysis of data on corruption in the higher educational institution, preparation of proposals on improvement of the national legislation. Nevertheless, based on the scant information received during the visit, the experts find it difficult to conclude how effective such commissions are in practice. Also, none of the universities that had posted information about the existence of such commissions on their websites did not publish protocols containing

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<sup>234</sup> Resolution of the Government of RK No. 449 of 17 May 2013 on the Activities of Educational Organizations Implementing Educational Programs of Higher Education.

<sup>235</sup> According to the authorities as of September 1, 2017 20 out of 28 state universities have established the internal audit units.

<sup>236</sup> The commissions usually include the rector of the university, the deans of faculties, the heads of administrative and financial departments and the head of the personnel department.

information on violations and results of work. In addition, apparently, students' representatives are not included as commission members.

The experts recommend that the information on implementation of the anti-corruption action plans should be regularly monitored and published in the universities where such plans are adopted, and encourage the MoES to provide methodological support to those higher educational institutions that have created or are planning to establish anti-corruption commissions in order to establish the uniform requirements for their roles, functions and effectiveness.

#### *Integrity in the performance of official duties*

As already mentioned above, personnel of the state universities has the status of civil servants.<sup>237</sup> The Labour Code defines this category as persons who, in accordance with the legislation of the Republic of Kazakhstan, take a paid position in the state enterprises, state institutions and perform official duties in order to fulfil their tasks and functions, perform maintenance and ensure the functioning of the state authorities.<sup>238</sup> Civil servants work in the public interest and bear the corresponding responsibilities. In particular, they are obliged to comply with the requirements of professional ethics.

With regard to the hiring of scientific and pedagogical and administrative personnel in private higher educational institutions, according to the provisions of the Labour Code it is carried out on a contract basis. This report already mentioned the need for universities to review the rules of academic integrity, which apply to scientific and pedagogical personnel.

In the experts' opinion, *the rules of bona fide performance of duties that extend to the administrative employees hired under private contracts should also be regularly reviewed in order to meet the society's growing anti-corruption and ethical demands, and strict adherence to these rules should be ensured, including by regular publication of information on the detected violations and the imposed sanctions.*

#### ***Integrity of procurement in the higher education sector***

Assessment of the progress made in implementation of the recommendations on procurement mentioned in this report also applies to the higher education sector, but some aspects of the procurement practice of universities deserve special mentioning.

According to the official information received in the preparation of this report, in 2016 procurement accounted for only 5% of the value of violations related to misuse of the public funds identified during external audits and for about 4% of all complaints received by the MoES. However, information from the same sources indicates that in 2016 more than 40% of all procurements in the higher education sector (139 out of 329 purchases) were single-source procurements.

Single-source procurement is a well-known cause that generates corruption risk. Those who adhere to good international practice avoid such a non-competitive way of purchasing, and instead use a tender as the standard method of procurement. In many OECD countries deviations from this recommendation are extremely rare and are subject to increased attention.<sup>239</sup>

The Law of the Republic of Kazakhstan "On Public Procurement" (which does not apply to the funding of universities from their private sources) contains an extensive list of 54 situations when single-source procurement is allowed.<sup>240</sup> Only a small part of them is applicable to higher education. According to the representatives of universities, the most commonly used provision that allows such a method of procurement, is when the relevant goods and services are the intellectual property of the suppliers. Many of these goods and services are produced and delivered by the higher educational institutions themselves. This happens either directly or through the companies or through the associated individuals, for example, teachers. During the monitoring visit the Expert Group was provided with examples from this category of goods, such as training materials and manuals, software, specially designed training courses or provision of expert services, etc. Although this does not contradict the current legislation the implementation of such procurements directly causes serious problems, since the decision to purchase can be financially beneficial

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<sup>237</sup> The Law of the Republic of Kazakhstan on Labour, Article 1.

<sup>238</sup> Ibid, Article 139.

<sup>239</sup> OECD. (2015). OECD Recommendation on Public Procurement. Paris: OECD Publishing; OECD. (2016b). Checklist for supporting the implementation of the OECD Recommendation on Public Procurement. Paris: OECD Publishing.

<sup>240</sup> See the Law on Public Procurement, Article 39.

to both parties to the transaction, both to the organizations and individuals, and there is a clear conflict of interests and conditions for abuse.

### ***Notification of illegal actions***

Both the public employees of the MoES and its subordinate structures and the civil servants in the higher educational institutions of the Republic of Kazakhstan are obliged to take certain measures if they become aware of the facts of corruption in the (higher) education system. They should try to stop or prevent corruption manifestations and, most importantly, report them<sup>241</sup>. Failure to notify of the facts of corruption is considered an administrative offense<sup>242</sup> and may result in a fine.

Representatives of the general public can report corruption facts in the form of letters of appeal, send messages to blogs of the MoES and rectors of universities, and also speak at youth and civil forums, dialog sites, etc. The annual “Clean Session” project implemented by “Zhas Otan”, the youth wing of “Nur Otan” party, also provides information on detection of corruption facts in the higher education system. According to the authorities, in 2016 more than 15 complaints were received regarding the corruption-related nature of the actions of the university administration when entering the magistracy, doctoral studies, payroll, etc. In the first quarter of 2016 there were also registered 43 applications: 37 of them were filed by individuals and six were filed by legal entities.

The experts believe that complainants about violations play a crucial role in preventing corruption and increasing accountability, institutional integrity and transparency in any sector, but the effectiveness of this mechanism depends on the availability of appropriate incentives and, more importantly, on providing the applicants with adequate protection. Until real efforts are made to create guarantees for such protection, such notifications can only provide very modest results.<sup>243</sup> Representatives of the civil society, with whom the Expert Group met, reported numerous technical problems in the functioning of hotlines. Also operators of those telephone lines, whose work is assessed as satisfactory, often propose to write a complaint against a minister’s blog, which is possible only with the presence of an electronic digital signature (and in such cases it is necessary to wait for an answer for 14 days<sup>244</sup>).

The experts recommend ensuring availability of the effective channels for reporting corruption in the higher education sector, due consideration of all communications, and improving the mechanism for protecting individuals reporting corruption in the higher education sector, both at the legislative and practical levels.

### ***Control and monitoring of compliance with the set requirements***

#### ***Internal control and monitoring***

As a rule, the Academic Council carries out general governance of the university<sup>245</sup>. The composition of this collegiate body includes representatives of faculty, students, government organizations and administration. Academic Councils deal with a wide range of tasks related to financing, partnerships, strategic development, amendments to the Bylaws and organizational structure of the university, etc. The important areas of the Academic Council’s activity include creation of the mechanisms for internal reporting and ensuring of the quality of education, monitoring of the proper functioning of these mechanisms and their finalization in case of disruption of normal work. This includes approval of the annual reports of the rector, deans and heads of various departments of the university. Since the Academic Council is the highest governing body of the university, it is also responsible for ensuring that its university meets its accreditation and licensing requirements and for eliminating the risks identified in the course of inspections of the Committee for Control of Education and Science (see below).

#### ***External control and monitoring***

As already mentioned, control and supervision in the higher education sector is carried out mainly by the MoES through subsidiary bodies and structures. The most important of these are the MoES Committee for

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<sup>241</sup> The Law on Public Service, Article 52; Rules for Pedagogical Ethics, Order of the Minister of Education and Science No. 9 of 8 January 2016.

<sup>242</sup> The Code on Administrative Offences, Article 409.

<sup>243</sup> The issues of protection of applicants are covered in more details in the relevant section of this report on the ethics of the public service.

<sup>244</sup> See <https://goo.gl/KTwGQq>.

<sup>245</sup> OECD. (2007). Reviews of the National Policy in the Field of Education: Higher Education in Kazakhstan. Paris: OECD Publishing. See also the Law on Education, Article 44.

Control of Education and Science<sup>246</sup>, accreditation agencies<sup>247</sup>, as well as university boards with external membership. The MoES also enjoys an opportunity to inspect universities that receive public funding through its internal audit department. The above-mentioned bodies and structures use different control mechanisms. They include licensing (initial permission for the institution to conduct educational activities), risk assessment and inspection, accreditation (confirmation of the conformity of educational institutions or educational programs with the existing standards and requirements at least once every five years), financial inspection and education quality control through the External Assessment of Educational Achievements (EAEA). Below is an overview of those mechanisms directly related to the sector of higher education:

#### *Licensing, risk assessment and inspections*

The Committee for Control of Education and Science, as ordered by the MoES, formulates the quality assurance and compliance policy, licenses higher education providers, and monitors compliance with the regulatory framework in all segments of education. It runs the licensing process for new institutions<sup>248</sup> and has the prerogative of regular and extraordinary inspections of all licensed universities.<sup>249</sup> The regular or “selective” inspections are conducted on the basis of a risk assessment system (RAS) as part of a monitoring routine meant to ensure that providers comply with the requirements of their license. The outcomes of these risk assessments are used to determine which providers must undergo an inspection and how often, and what areas of their operation are “at risk”. In addition to these planned inspections, the Committee can carry out “extraordinary” (*внеплановые*) inspections in response to “signals” and complaints by individuals and institutions, direct orders by the MoES, requests by the state prosecutor, or as an unscheduled follow-up to regular inspections in institutions deemed to be at risk. The administrative violations discovered during inspections are recorded in protocols and could be prosecuted.

During 2012-2016 the Committee conducted 21 scheduled and 35 unscheduled inspections in the state universities, as well as 65 scheduled and 54 unscheduled inspections in the private universities. During such inspections the auditors are guided by a total of 268 risk criteria in order to ensure a “high standard of education” and to protect the “rights and interests” of all stakeholders involved in the higher education system (beneficiaries and students).<sup>250</sup> Of these, 239 criteria are called “objective” criteria - i.e. these are official requirements related to the physical infrastructure, organizational structure and personnel, organization of the educational process and management activities, etc. The remaining 29 “subjective” criteria describe hypothetical administrative violations of varying degrees of severity. Ensuring compliance with these criteria is necessary to obtain and retain a license to conduct educational activities, as well as to expand or make any changes to the set of educational services offered by the university. This is also crucial for the rating of risks in the activities of higher educational institutions, which in turn determines the likelihood of future inspections.

According to the experts, this aspect of external quality control related to compliance with the established requirements is perhaps the most important area of interaction between universities and regulating bodies (MoES and its Control Committee). Unfortunately, the experts have reason to conclude that this key area is at risk of abuse. One of the main concerns is the risk criteria themselves. In particular, their excessive number and degree of specification of the requirements contradicts the statement of the Republic of Kazakhstan adherence to the principle of autonomy of universities and can create incentives for universities to search for all kinds of loopholes and resort to deception. This is especially applicable to universities that are struggling to meet the inflated demands for infrastructure and personnel.<sup>251</sup>

There are also questions about the quality of some criteria, which are very vague and leave the auditors with wide discretionary opportunities in decision-making. During the monitoring visit, some representatives of universities noted that arbitrariness during inspections in universities is a very common

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<sup>246</sup> See Resolution of the Ministry of Education and Science No. 162-K of 4 July 2016.

<sup>247</sup> See Orders of the Minister of Education and Science No. 629 of 1 January 2016 and No. 12 of 13 January 2017.

<sup>248</sup> During the first semester of 2017 799 applications for licensing at specialties of higher education were received, 88 of them were issued, 711 were rejected, 2 of them were appealed which were not confirmed during the inspection.

<sup>249</sup> See the Entrepreneurship Code of the Republic of Kazakhstan of 29 October 2015, Articles 144 and 145; Joint Order of the Ministry of Education and Science No. 719 of 31 December 2015 and the Minister of National Economy No. 843 of 31 December 2015, as well as Order of the General Prosecutor’s Office of the Republic of Kazakhstan No. 13 of 26 January 2016.

<sup>250</sup> See Order of the Minister of Education and Science No. 719 of 31 December 2015.

<sup>251</sup> In particular, according to Order No. 719, the area of the premises at the disposal of the university should correspond to the minimum norm of “6 square meters per one student”.

problem and, in their opinion, this represents a potential source of blackmail and corruption. It seems that the recent series of corruption scandals, in which the Committee's regional units were implicated, fully confirm this point of view.<sup>252</sup> The prime examples of the uncertainty and ambiguity of the situation can be, for example, the requirement to generate “new knowledge” through the “creative activity” of the faculty, “to develop and integrate innovative technologies” into the educational process, as well as relying on the fact that universities will carry out innovative research and dispose of their results.

Finally, some of the “subjective” criteria set a low risk threshold. For example, three complaints against higher education institutions from any private person or company would serve as sufficient ground to accuse the higher educational institution of a serious violation and arrange an unscheduled inspection. Messages in social networks can serve as the basis for such inspections. Too frequent inspections are not a good way to hedge against risks, as they create additional prerequisites for abuse by both inspectors and universities. The ability of the Control Committee to conduct excessively frequent inspections (moreover, it is reportedly implemented in practice) also directly contradicts the legislation regulating the licensing and permitting procedures, which aims, in order to avoid risks, at reduction of direct contacts between the licensees and representatives of the authorities.<sup>253</sup>

It is important to note that inspections can also be conducted independently from the MoES by the auditors of the Audit Committee and the Financial Control Committee under the Ministry of Finance. According to the information received during the visit, such inspections are also conducted quite often. Inspectors representing different supervisory bodies carefully study the same aspects of university governance: financial transactions, fair presentation of their financial statements and reliability of the internal control mechanisms, compliance with the public procurement legislation, etc.<sup>254</sup> Despite the coincidence of the objectives and the subject of inspections conducted by these bodies, they appear to have nothing to do with each other.

In order to reduce the number of inspections and to increase their effectiveness, the experts recommend improving coordination between all involved state control bodies, including by providing access to and exchanging data.

#### *Accreditation*

Unlike licensing and inspections, which for the most part monitor compliance with administrative requirements, the process of accreditation verifies that the content, structure and quality of study programmes corresponds to state standards.<sup>255</sup> Accreditation is not obligatory, but it is a prerequisite for providers that wish to issue degrees recognised by the state. It is also the most important, independent form of quality assurance in the higher education on behalf of the MoES

At the time of preparation of this chapter, Kazakhstan had two national, privately owned accreditation agencies: the “Independent Kazakh Agency for Quality Assurance in Education” and the “Independent Agency for Accreditation Rating”. There were also eight international accreditors which, however, are limited to the accreditation of individual programmes.<sup>256</sup> All accreditation agencies in order to carry out their activities must obtain a license from the Republican Accreditation Council, a permanent collegiate body of the MoES.<sup>257</sup>

#### *Other forms of control*

For some years now the MoES is encouraging universities to raise their capacity to be autonomous by establishing boards of trustees<sup>258</sup> and supervisory boards.<sup>259</sup> The idea is to strengthen the readiness of

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<sup>252</sup> For example, corruption scandals involving heads of the regional State Control Committees took place in Al-Farabi (June 2015), Aktobe (March 2016) and Almaty (July 2016).

<sup>253</sup> The Law of the Republic of Kazakhstan “On Permits and Notifications”, Article 9.

<sup>254</sup> See also the Law of the Republic of Kazakhstan “On the State Audit and Financial Control” No. 392-V of 12 November 2015.

<sup>255</sup> The Law on Education, Article 1.

<sup>256</sup> OECD. (2017). Reviews of the National Policy in the Field of Education: Higher Education in Kazakhstan. Paris: OECD Publishing.

<sup>257</sup> See Orders of the Minister of Education and Science No. 629 of 1 November 2016 и No. 12 of 13 January 2017.

<sup>258</sup> See the Law on Education, Article 44, and Resolution of the Ministry of Education and Science No. 501 of 22 October 2007.

<sup>259</sup> See Resolution of the Government of the Republic of Kazakhstan No. 499 of 17 May 2013.

universities to be more autonomous and accountable, and delegate some of the responsibility for monitoring and control away from the MoES. The boards of trustees have an advisory role, but the supervisory boards are entrusted with responsibility for decisions about the allocation of funds from non-governmental sources, such as sponsorships, charitable assistance, income from commercial activities, etc.<sup>260</sup>

### ***Raising awareness and education of public***

During 2013-2016 the MoES contributed to the introduction of a course on anti-corruption policy in the educational program at senior courses of law faculties. According to the responses to the monitoring questionnaire, there were also held over 300 advocacy events with the participation of students devoted to various topics, including the responsibility of society in terms of countering corruption manifestations. The expert group has no information on how many of these events were specifically aimed at Countering Corruption in the higher education sector, what their content was, and whether they had any effect. The results of a survey conducted in 2015 among the students and teachers in Astana by the Research and Analytical Centre for the Study of Anti-Corruption Issues indicate that only 16% of the students-respondents and 40% of the interviewed teachers took part in the events dedicated to Countering Corruption. Approximately 63% of the students and 37% of the teachers answered that they had never taken part in such meetings.<sup>261</sup>

## **4.4. Enforcement**

The responses to the monitoring questionnaire and the materials provided by the authorities show that the higher education sector is very rarely in the focus of attention when it comes to the actual application of the anti-corruption measures. The authorities themselves admit that such measures have a “limited” effect. For example, in 2015 the Internal State Audit Committee of the Ministry of Finance imposed disciplinary sanctions on more than 6,700 employees of the state organizations, instituted administrative proceedings against 2,047 public employees and issued 418 resolutions on administrative offenses. None of these cases featured university personnel.

As for the MoES public employees, the situation is somewhat different: in 2016 the disciplinary commission of the MoES Control Committee received 38 complaints. In 18 cases the employees were brought to disciplinary liability, another 17 were investigated and 10 officials were subject to administrative sanctions. During the same period the MoES Internal Audit Department conducted inspections in 24 universities, which led to the initiation of 48 disciplinary proceedings. Two of them culminated in the termination of the labour contract, 17 of them resulted in reprimands (including two “strict” ones) and 29 of them – in issuing “notices”. During the same period three criminal cases were initiated against high-ranking officials: the former Minister of Education, the former director of the state organization responsible for school infrastructure, and the former head of the joint-stock company engaged in vocational and technical education.

The experts urge to intensify prosecution of corruption offenses in the higher education in the framework of criminal and administrative processes and disciplinary proceedings, including by proper investigation of all reports of corruption and fraud, proactive detection of corruption by law enforcement agencies, focusing on complex cases involving high-ranking officials, as well as on schemes covering the whole sector, drawing attention to the importance of prosecuting corruption in the higher education by the heads of law enforcement agencies, the development of methodological recommendations on the specifics of identifying, investigating and prosecuting corruption in this area (including the development of a typology of corruption offenses) and relevant training activities for the law enforcement and judicial officials. The experts also call for ensuring the punishability of all types of corruption offenses in the higher education sector with the effective, proportional and dissuasive sanctions.

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<sup>260</sup> IAC. (2016). Background Report for the OECD Review “Higher Education in Kazakhstan” (2017). Astana: Information and Analytical Center JSC.

<sup>261</sup> Research and Analytical Center for the Study of Anti-Corruption Issues (2015). Analytical report on the topic: Formation of anti-corruption culture of students of higher educational institutions. Astana.

## Recommendations

### New recommendation No. 29

1. *To conduct, as soon as possible, a full-scale independent study of integrity and corruption risks in the sphere of higher education in the Republic of Kazakhstan with a view to making informed decisions on necessary reforms and developing measures aimed at reducing the corruption level.*
2. *To review the process of selecting statistical data and the data to be published by the National Statistics Committee in order to systematically include information on financing / expenditures in the higher education sector into the list of such data, and to provide details to a level allowing the public and other stakeholders to monitor relevant processes.*
3. *To develop a new generation of anti-corruption programme documents related to the higher education sector, based on the results of a full-scale independent study of integrity and corruption risks. To regularly publish reports on the implementation of the anti-corruption policy documents. To effectively involve the public in the development and implementation of the anti-corruption policies and relevant documents in the higher education sector.*
4. *To analyse the work of the Commission on Personnel, Addressing Reports and Counteracting Corruption in Education and Science and Monitoring Compliance with the Service Ethical Standards acting under the aegis of the Public Council at the MoES. To ensure the transparency of the work of the Commission / Public Council with the wide publication of the results of their activities and to ensure their cooperation with the qualified and interested representatives of the public.*
5. *To ensure greater transparency, usefulness and relevance of the work of the anti-corruption commissions of universities, including by engaging representatives of the students and organizations performing public oversight functions and actively involved in the anti-corruption sphere. To regularly publish reports on the work of the commissions and to introduce clear rules and procedures in cases where members of the commissions themselves are suspected of corruption.*
6. *To implement measures to raise awareness of corruption in the higher education sector covering all stakeholders, namely students, teachers, administration, management personnel, and parents. To analyse the effectiveness of the measures taken to further improve them.*
7. *To increase transparency in the process of accreditation of educational programmes of universities and impose liability for violation (similar to the process of licensing).*
8. *To ensure the allocation of public resources through the provision of public educational grants in a fair and open way, including by publication, within a reasonable time, of information on the freed grants, their distribution and decisions in this regard, providing an opportunity for an appeal with a clearly defined procedure, consideration of complaints and application of sanctions to violators.*
9. *Regarding the system of academic integrity:*
  - 1) *to adopt or revise the rules of academic integrity which are effective in higher educational institutions on the basis of detailed methodological recommendations;*
  - 2) *to make sure that such rules are applicable to written assignments, examinations, research work and assessment of academic performance, and also that they clearly regulate the behaviour and actions of the students, teaching staff and administrators of higher educational institutions;*
  - 3) *to introduce a system for bona fide internal and external monitoring the implementation of such rules and to diversify sanctions for academic dishonesty.*
10. *To oblige the bodies responsible for the internal control in higher educational institutions, including academic councils and anti-corruption commissions, to integrate anti-corruption measures into the internal control and quality control mechanisms of higher education, to monitor implementation of such measures and to systematically eliminate identified corruption*

*risks. To regularly publish reports on the results of inspections.*

- 11. To minimize unscheduled inspections of universities, to consider whether revision of the criteria and risk thresholds used during inspections are reasonable with a view to reduce them and avoid their discretionary interpretation.*
- 12. To review the practice of public procurement in the higher education sector with the aim of reducing the use of the single-source procurement method and limiting the participation in tenders of those individuals and entities who are directly or indirectly connected with higher educational institutions that conduct tenders, including their faculty and management personnel.*
- 13. To intensify the prosecution of criminal, administrative and disciplinary corruption offenses in the higher education sector, including by:*
  - 1) due investigation of all reports of the facts of corruption and fraud, proactive detection of the facts of corruption by the law enforcement agencies, focusing on complex cases involving high-ranking officials, as well as on schemes covering the whole sector, the use of effective sanctions;*
  - 2) systematic drawing of attention to the importance of prosecuting corruption in the sphere of higher education by the heads of the law enforcement agencies;*
  - 3) development of methodological recommendations on the specifics of the detection, investigation and prosecution of corruption (including development of the typology of corruption offenses) and the conduct of appropriate training events for representatives of law enforcement and judicial agencies.*

## ANNEXES

Annexes are available only in the Russian version of the document.

