

## Corruption in Ukraine and Recommendations

The Bleyzer Foundation

There are three levels at which corruption takes place in Ukraine, as follows:

- (i) High-level political corruption that distorts state decisions, leads to poor legislation and causes people's distrust of the state. This includes cases such as the indirect control by Rada members of the cash flows of state enterprises, which is the main reason for continuous delays in privatization programs. Also many members of the Rada are financed directly by rich entrepreneurs who unofficially influence the public decision-making process as legislation is passed just to favor a few contributors.
- (ii) At a second level, corruption is wide-spread in the interactions between businesses and the authorities. Therefore, the market mechanisms do not function properly; there is no fair competition and no protection of the consumer.
- (iii) The third level of corruption - day-to-day bribes - is common, with bribes taking various forms. They often facilitate everyday transactions, for instance, when a bribe helps to obtain certain goods or services more cheaply or quickly. On other occasions they take the form of extortion, for instance, as exercised by local administrations on businesses. Bribes cause losses of public finances, contribute to the malfunctioning of state institutions and public services, and result in degradation of the quality of life of people.

### Causes of Corruption

According to a number of surveys, the **main causes of corruption** in Ukraine are extensive **business-political ties**, a weak/non-transparent **judicial system**, an **over-controlling non-transparent government**, and a **weak civil society**.

According to a recent survey, the highest corruption levels as perceived by the population were found in government inspections (57.5%), the police (54.2%), health care (54%), the courts (49%) and higher education (43.6%). Some surveys around 2000 suggested that corruption costs the state budget USD 3 billion to USD 5 billion in revenues annually and that through corrupt dealings in public procurement 10% to 15% (USD 7.4 billion) of the state budget "ends up in the pockets of officials". A more recent estimate shows that in 2015 around USD 20 billion or almost 1/4 of the Ukrainian annual GDP were wasted through different corruption schemes.

In a survey in 2010, 30–50% of respondents admitted paying a bribe to a service provider during the past year. In a similar survey in 2007, 20% – 30% of respondents admitted paying a bribe. A comparable figure for Great Britain for 2011 was 1.9%. In a different survey in late 2008, 21% responded that they or anyone living in their household had paid a bribe in any form in the previous 12 months; comparable figures for the U.S. and UK were 2% and 3% respectively. In 2013 74%

would not report to the authorities an incident of corruption; 24% were afraid of consequences, 63% believed it would not make any difference.

Over the last decade, Transparency International has ranked Ukraine as one of the most corrupt countries in the world, with a ranking of over 100 over about 175 countries.

### **Juridical Corruption**

Analysts have described the system of justice in Ukraine as "rotten to the core" and have complained about political pressure put on judges. Human rights activists have complained Ukrainian judges regularly come under pressure to hand down a certain verdict. In addition, most judges themselves are corrupt, with their verdicts depending on the size of the bribe litigants are prepared to pay. A recent survey revealed that only 10% of respondents trusted the nation's court system. Less than 30% believed that it was still possible to get a fair trial.

Although judicial independence exists in principle, in practice there is little separation of juridical and political powers. Judges are subjected to pressure by political and business interests. An August 2014 Ukrayinska Pravda article claimed that the bribes judges receive ("from a few to many thousands of dollars") are sometimes much higher their salaries (of 915 US dollar). Ukrainian judges have been arrested while taking bribes.

### **Corruption in Higher Education**

In higher-education, according to Transparency International research done in 2008, 47.3% of university students stated that a bribe had been demanded from them; of those, 29% had paid this bribe freely. Students can "buy" a college entry, exam results, and marking doctoral and/or master's theses. According to government sources, bribes in higher education vary from US\$80 to US\$21,500. Ukrainian government officials have been caught with fake university diplomas.

### **Corruption and business**

Companies encounter corruption mainly in business licensing and inspection, taxation, and customs. The Organization for Economic Co-operation and Development has stated corruption is a "significant obstacle" to doing business in Ukraine. Research conducted by Ernst & Young in 2011 and 2012 showed that the practice of top managers accepting the payment of bribes increased by 9 percent in 2011 and 15 percent in 2012. Another 4 percent were ready to pay bribes in order to hide the details of their financial performance. Analysts have estimated that corruption has forced business to go in the shadow which now comprises 45% of the economy. The representative of one United Kingdom-based company has claimed non-Ukrainian companies often lose contracts if they will not pay bribes or fail to "out-bribe" their competitors. While some measures have been taken to launch a dialogue with business on corruption and improve the business environment, most of these measures have been of a window-dressing nature, and corruption remains one of the main risks for companies in Ukraine.

### **Corruption and Social Payments**

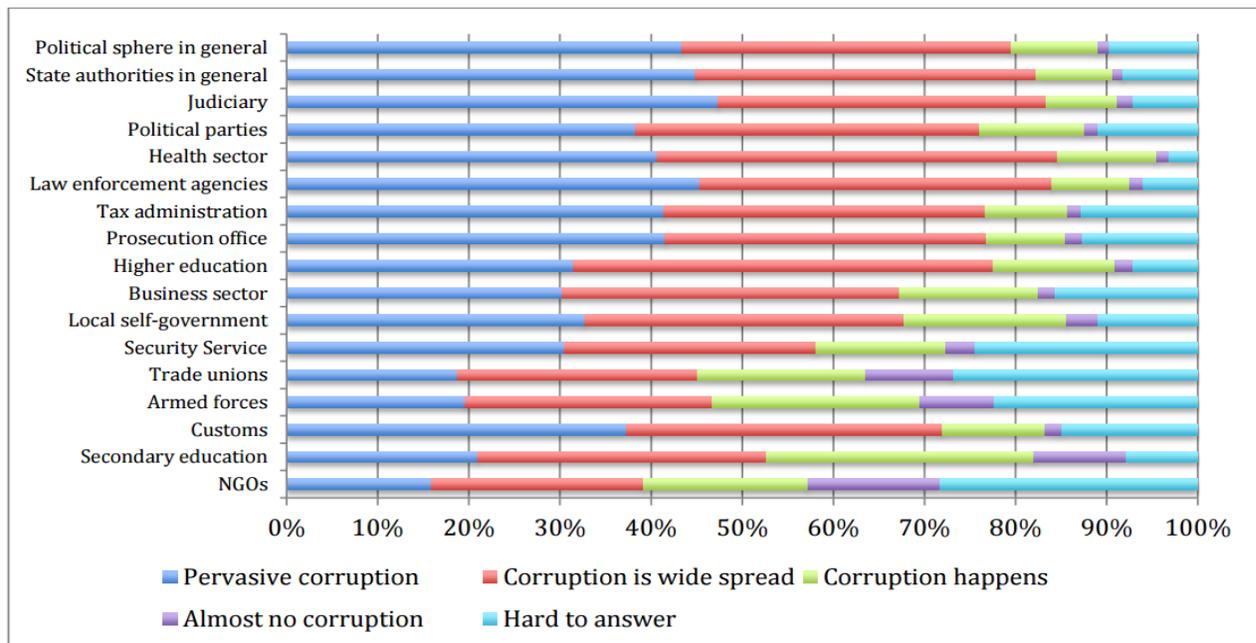
In 2012 a high-level government official reported that only about 23 percent of social service funds (particularly social security) go to those who actually need it. The Ukrainian media have featured many stories revealing that even parliamentarians illegally receive social benefits, fraudulently claiming to be war and Chernobyl veterans. In the health care area, though medical care in state-run

hospitals is theoretically free for Ukrainians, patient's paying money there to ensure they receive the treatment required is widespread.

## How wide Spread across public agencies is Corruption

A survey carried out in October 2013 showed the following results:

**Figure 1. How wide spread is corruption in different areas**



Source: Survey by Razumkov Centre, September-October 2013, [www.razumkov.org.ua/ukr/poll.php?poll\\_id=903](http://www.razumkov.org.ua/ukr/poll.php?poll_id=903).

## Past Attempts to Fight Corruption

Successive governments have been totally ineffective in fighting corruption. In a survey in 2001, when Kuchma was President, 80% of Ukrainians "totally/fairly agreed" with the statement: "The present government has no real interest in punishing corruption". During the Yushchenko administration, the former Security Service of Ukraine Chairman Oleksandr Turchynov claimed that in the summer of 2005 Yushchenko prevented an investigation into allegedly fraudulent practices in the transport of Turkmen natural gas to Ukraine and prevented the arrest of Boyko for abuse of office while heading Naftogaz. Turchynov stated that Yushchenko told him in mid-August to stop 'persecuting my men' and that the investigation of RosUkrEnergo was 'creating a conflict with Russian President Vladimir Putin'. Corrupt gas dealings were major sources of illegal funds for the presidency. A survey conducted in November 2008 showed that 73% of people in Ukraine considered the PM Tymoshenko Government's actions against corruption to be ineffective. Just like his predecessors, Viktor Yanukovich (and his Azarov Government) made the fight against corruption a spearhead in his domestic policies: they used anti-corruption campaigns just for politically motivated trials; the general public in Ukraine largely shared this view.

So far, the current government of President Poroshenko has failed to show results, except for the revision of the legal framework, but without real execution. Of 19 anti-corruption measures agreed upon under the 2014 OECD's Istanbul Anti-Corruption Plan, only three measures related to the legal criminalization of corruption have been implemented (related to the establishment of anti-corruption agencies).

## Anti-Corruption Agencies

There are now the following institutions to deal with corruption.

- **National Agency for Prevention of Corruption.** It would prevent corruption by monitoring government officials' lifestyles. According to the Law on Prevention of Corruption, adopted in October 2014, persons covered by this law (mainly civil servants at state and local levels - about 700,000 people) are obliged to submit declarations annually by 1 April – for the last year and in the form which is determined by the National Agency on Preventing Corruption, through an official single web portal which will be maintained by the National Agency. But only those declarations of officials that have responsible and highly responsible status, and declarations of persons who hold positions associated with high levels of corruption risks, are subject to mandatory complete examination by the agency. However, the Agency is not yet fully operational.
- **National Anti-Corruption Bureau (NAB).** It investigates corruption in Ukraine and prepares cases for prosecution. It will employ 700 people, with its first 70 inspectors having started work on 1 October 2015. The agency's detectives underwent training sponsored by the U.S. Federal Bureau of Investigation and the European Union. The NAB has narrow specialization focusing on corruption crimes committed by certain high-level public officials and corruption crimes involving significant amounts of bribes even if no high-level public official was involved. NAB also has exclusive investigative jurisdiction for foreign bribery regardless of the amount of bribe or officials involved. NAB will not deal with administrative offences related to corruption. It is the country's prime anti-corruption enforcement agency and should be independent.
- **States Bureau of Investigation.** According to Article 216 of the new Criminal Procedure Code (in force since November 2012), pre-trial investigation of criminal offences (including corruption offences) committed by officials occupying an especially responsible position (including civil servants, judges and law enforcement officers) was assigned to investigators of the State Investigation Bureau. Before establishment of the State Investigation Bureau - but not later than five years after enactment of the CPC (i.e. November 2017) - pre-trial investigation of criminal offences committed by any of the aforementioned persons was assigned to investigators attached to the prosecution service. From CPC it is clear that the SBI will be specialized in all crimes committed by certain officials, regardless of the nature of the crime – from murder, rape, etc. to financial and corruption offences. However, Part of the SBI's investigative jurisdiction has already been assigned to the NAB (certain high-level officials). It, however, is not clear what exactly will remain in the SBI's competence. The Coalition Agreement in the Parliament provided that the SBI should deal with corruption and organized crime offences (except those in the NAB's jurisdiction), as well as all especially grave crimes and crimes committed by law enforcement employees. The SBI is supposed to take on functions of the investigators attached to the prosecutor's office and partly investigators of the Security Service, as well units for combating organized crime.
- **Specialized Anti-Corruption Prosecutor's Office.** This office was set up as a division of the GPO for investigation of corruption crimes committed by officials holding especially responsible positions. The Law on the National Anti-Corruption Bureau envisaged secondment of specialized prosecutors from the GPO to the NAB to conduct oversight over investigations carried out by the NAB's

investigators. Relevant amendments were made to the Law on Prosecutor's Office. However, in October 2014 parliament new version of the general Law on Prosecutor's Office did not contain any similar provisions. This was addressed in the draft law no. 1660-d that was adopted in February 2015. The latter actually went further and provided for establishment of a Specialized Anti-Corruption Prosecutor's Office directly under the Prosecutor General. The law regulates its powers and procedure for selection of staff (open competition, including for the position of the head of the Specialized Office who is Deputy Prosecutor General ex officio). This will ensure effective specialization of the prosecutor's in corruption cases. Issues remain, however, with regard to autonomy of such office, which may be influenced by the Prosecutor General, who is currently appointed by the political bodies (Parliament and President) and is subject to fully discretionally dismissal by the President of Ukraine.

- **Other investigative agencies.**

Criminal offences related to corruption committed by other persons (not referred to under the jurisdiction of the above agencies) are investigated by police investigators under the Ministry of Internal Affairs.

However, it is not clear whether the new institutions will be allowed to function independently and with sufficient resources. The jury on the political will of this government to deal with corruption is still out.

## **Policy Recommendations for a Comprehensive Anti-Corruption Program:**

In the case of Ukraine, where corruption is systemic and involves a large portion of the economy, three categories of solutions must be applied at the same time: (i) Preventive measures; (ii) Enforcement measures; and (iii) Public Awareness and Support.

### **1. Preventive Measures:**

Prevention should aim at reducing opportunities for corruption and making corruption more expensive to undertake. It should be the key measure in fighting corruption. Some of the most important corruption prevention measures are as follows:

- a. Remove the **blanket immunity** from prosecution currently enjoyed by members of Rada and the judiciary, to make them subject to legal actions against any corruptive practice. Also, as in most European countries, remove most "special" privileges, utility payments, other subsidies, housing and other prerogatives to Rada members and high level officials to establish the principle that they equal under the law to the rest of the society.
- b. Following the recent enactment of the privatization law, proceed quickly to **privatize state assets and state enterprises**, since asset stripping and control of the cash flows of state enterprises are the main targets for high-level political corruption and allure their managers to seek rents for themselves. There are still about 1,800 state enterprises in Ukraine. This time, actual privatizations cannot fail, as was the case in the past. Any remaining state enterprises should be managed by competent independent managers under transparent performance plans
- c. The National Agency for the Prevention of Corruption, Ukraine's main corruption preventive body, should be made fully operational as soon as possible. It should verify the declaration

of civil servants, their income, assets and wealth and verify what they have spent and what they have shown in their declarations. This verification should be extended to close relatives of civil servants, to avoid the widespread practice to transferring corrupt funds to close relatives. The Agency should also carry out surveys to assess the evolution of corruption level on a semi-annual basis.

- d. Address high-level political corruption by separating businesses, politics and government. When appointed to a Presidential, Rada or government post, a businessman must sell his/her business interest or put them in a blind-trust managed by a reputable foreign group.
- e. Implement effective anti-trust regulations to decartelize the economy. The concentration of huge economic assets in one hand should be legally limited and dominant positions in all sectors of the economy should not be allowed, as is the case in most EU countries.
- f. Regulate tightly lobbying activities to reduce opportunities by Oligarchs to influence illegally parliamentary members or government officials, which might affect the legislative process. There is also a need to ensure that, according to the recent law of financing of political parties, all political parties will be exclusively funded from the state budget. Any political party that gets funds from shadow schemes should be brought to justice for political corruption.
- g. Cooperate more intensively with EU and US institutions to (i) identify illegal assets of high-level Ukrainian politicians in European and US banks, funds, and other places; and (ii) to provide training and best practices to the new Ukrainian anti-corruption institutions.
- h. Minimize human interaction between government bureaucrats and businesses. Prevention success depends on minimizing the occasion under which bribes are negotiated. This requires substantial deregulation of the economy, reducing the number of government agencies and staffing, reducing the number of business licenses and inspections, and decreasing the role of the government in business activities. Deregulation measures are discussed in the corresponding Investment Driver later on.
- i. Following the reduction in the number of public employees as proposed under Investment Driver 4, wages of remaining government officials should be increased to levels that would allow them to have a decent lifestyle comparable with Ukrainian middle class.
- j. Eliminate the need for discretionary decisions by the authorities which can change depending on the size of the bribe. For this, there is a need to:
  - i. Eliminate multiple prices, tariffs and tax rates which provide too much discretion to officials.
  - ii. Eliminate product subsidies (such as gas and other energy subsidies) which encourage re-commercialization schemes at higher prices.
  - iii. All procedures applied by public institutions must be written down in a detailed manner so that as little as possible is left to discretion in practice.
- k. Introduce E-government in all government agencies and institutions to minimize human contacts. It should be used as an electronic platform for exchanging information, providing

services and transacting with citizens, businesses, and other arms of government. E-government should cover activities such as issuance of licenses, certificates, registering businesses, public procurement, etc.

- l. Prohibit all government officials and close family members to participate in any public procurement contracts.
- m. All personnel in public institutions must be trained in anti-corruption behavior.
- n. Over time, a substantial portion of government employees must be replaced.

## 2. Enforcement Measures

For successful anti-corruption enforcement, the following measures are required:

- a. For anti-corruption measures to be effective there must be a thorough reform of the **Judiciary**. Key aspects of Judiciary reform are discussed in the last section of this note.
- b. There must be an **immediate increase in the number of corrupt officials and Rada members that are successfully prosecuted, convicted, and put in jail**. Punishment for corruption cases should be strong and non-selective. Otherwise, anti-corruption will have no credibility.
- c. Dismiss a number of public officials for whom evidence of corruption may not be available, but whose past behavior may be questionable, including the current General Prosecutor and other high level officials.
- d. All newly established anticorruption enforcement agencies (National Anti-Corruption Bureau and State Bureau of Investigation) should be in-place and fully staffed and operational as soon as possible.
- e. Enforcement requires the insulation of these new anticorruption agencies from political pressures. The President and Cabinet should have nothing to do with the operations of these agencies or the appointment of officials. Otherwise, political interference will emerge.
- f. Cases of corruption must be revealed by the appropriate agencies, investigated immediately and should not be stopped or delayed by other influential people. People involved in bribery have to be promptly prosecuted and convicted.
- g. Ensure high level of accountability and transparency for all public servants and institutions. Introduce electronic declaration of all earnings for public servants and their close family members, which should be freely accessible through internet for general public.
- h. Reinforce the supervisory and analytic capacities of the Main Control and Revision Office of Ukraine to enable it to (i) inspect the efficiency of public funds spent by all executive bodies, and (ii) verify whether these expenditure programs are justified by and comply with legitimate priorities of all agencies. This office should also be responsible for evaluation of all aspects of public procurements, including the transparency of the process, free access and competition.

## 3. Public Awareness and Support

Public support requires:

- a. More extensive publication of government activities and much better transparency in government actions. These publications would permit higher levels of surveillance by NGOs and the general public of decisions made by government bodies and officials. Furthermore, the level of transparency of government activities should be increased by broad introduction of the e-government.
- b. Anticorruption institutions should deepen their cooperation with civil society representatives to ensure their broader public control over government activities and officials. They should support the development of business associations that advocate business interests, government transparency and accountability.
- c. The events of the last two years have changed the attitudes of Ukrainians towards corruption. To further advance this progress, additional public education is needed about the need to control corruption, the alternative means to eradicate it, and the role of civil society.
- d. Public information campaign about these initiatives should help to revive the trust of the society on state institutions. In fact, social campaigns and media should convince the public that it is possible and beneficial to eradicate corruption.

## **Integrity in the Judiciary:**

- a. To regain public trust, in addition to removing blanket immunities for judges, there should be **a complete re-evaluation of all judges** (about 10,000), prosecutors (about 20,000) and key law enforcement personnel. These re-evaluations should be extensive and not limited to the selective lustration of only a few. Every judge, prosecutor and key law officer must satisfy a rigorous independent evaluation (with international support) of their professional ability, integrity and financial assets. For this reason the assessments must include their legal and professional ability, their integrity, and the extent to which they can justify financial and other assets in their possession/control or in the possession of close relatives. One option used by many institutions, such as the World Bank, was to legally remove all officers (about 10,000) from their jobs at a single date, but give them the possibility to re-apply to any job in the institution following re-evaluations of performance. Until a new official has been appointed, the incumbent will continue to perform functions in an “acting” capacity. This was also done by Estonia and East Germany.
- b. The current inconsistencies between the Commercial Code and the Civil Code have been a major source of corruption in courts, allowing judges to permit illegal corporate raiding and unlawful transfer of business ownership. Right away, eliminate the Commercial Code and merge any necessary sections into the Civil Code.
- c. The merge of the two codes during 2016 should be followed by a simplification of the entire business/commercial law environment. In particular, the entire business-related legislation must be replaced by a more business friendly legislation, possibly copying the best legislation of other former centrally-planned countries, such as Poland, Georgia, Estonia, and Slovakia.

This should be accompanied by improved enforcement. The new business legislation should also be amenable to alternative dispute resolution, such as arbitration.

- d. Although necessary, the dismissal of corrupt/incompetent judges, prosecutors and law officers will not be sufficient if the judiciary and prosecutorial systems are not revamped. Simple changes in people will not provide the expected results. As important is to restructure and simplify the court system and to ensure the real independence of courts/judges and prosecutors from any of the branches of political powers. This independence can be achieved by further removing the rights of politicians to appoint, supervise or remove judges. Although recent proposals to give more power to the Higher Council of Justice are welcome, the appointment of the members of this Higher Council has not changed and still allows the President and the Rada to directly appoint its members. Alternative schemes should be developed to ensure that civil society has more input into the process. Furthermore, there is a need to bring provisions on the judiciary in line with European standards and recommendations of the Venice Commission, in particular with regard to appointment and dismissal of judges, and life tenure.
- e. For any new proposed business legislation, improve the processes for drafting, presenting, and carrying out public reviews of proposed legislation.
- f. In order to gain the broadest possible trust in the re-evaluation process, there must be a Special Re-evaluation Task Force that is established to carry out the assessment both quickly, but also with a world class degree of competency. This can be done by employing respected foreign judges and investigators to be part of the composition of the Special Task Force alongside well-respected Ukrainian judges, lawyers and academics. Foreign composition will not only remove the risk of corruption, it will also publicly demonstrate the quality and objectivity of the process.
- g. The structure of the court system as a whole must be reformed to limit the number of courts, both horizontally (general, commercial and administrative divisions) and vertically (District, Oblast, High Court, and Supreme Court.) In particular, the High Commercial Court should be eliminated and its jurisdiction transferred to the Supreme Court. The court system would then have only three vertical levels, rather than the current four levels. Horizontally, the general and commercial divisions should be merged, following the elimination of the Commercial Code).
- h. The system of automated distribution of cases among judges should be revised to remove loopholes that allow manipulating the system and ensure that results of automated distribution are public and included in the case-file. Introduce digital technology tools in the judicial procedures and court functioning (e.g. electronic filing of lawsuits and other legal documents).
- i. The new Law on the Procuracy has recently curtailed the roles of prosecutors from their early wide powers of detention, investigation, arrest, and prosecution. This excessive power had led to the use of prosecutors by political authorities to further their political aims. The new Procuracy will now have the more western-type role of representing the state in criminal

prosecutions before the courts. The proposal to maintain its role of oversight of criminal investigations should be removed. Investigations will only be carried out by the newly formed State Bureau of Investigation. There is a need however to remove the Procuracy as a defined body in the Constitution, to avoid gradual reversals of the law, and to transfer the Procuracy Office to the Ministry of Justice, as is the case in most countries.

- j. To improve the standards of justice, it will also be necessary to raise the salaries of judges and prosecutors to upper-middle class levels, improve judicial/prosecutorial training and maintain a continuing process for the assessment of their performance. This requires sufficient and transparent funding of the judiciary and exclude possibility of financing of the judiciary by private donations and local self-government.
- k. It is also important to improve the transparency of court decisions by posting them online in the internet as soon as possible. Public attendance to the courts should be encouraged and in many cases televised. Judges should then be accountable for unjust or unethical decisions.
- l. New criminal offences must make it unlawful for judges to withhold information concerning corruption; and for litigants to make any unofficial contact with a judge about the subject matter of a case.
- m. The enforcement of court orders must improve drastically, partly through the creation of a private bailiff service (authorized private enforcers who can retain part of the benefits) and partly through the courts gaining and using new powers to ensure compliance.
- n. Together with judiciary reform, there is an urgent need to finalize the reform of the prosecutorial system, which today is working poorly without integrity. Based on the new role of prosecutors, training programs should be offered.
- o. There must be a fundamental reform of legal education. Teaching of legal matters should be uncoupled from law enforcement. The concept of the rule of law should be taught as the central organizing principle. EU legal studies must be introduced as a comprehensive subject for the first time in Ukraine and as an essential aid to EU association.
- p. Law enforcement agencies must be open to competitive recruitment, accountable, professional and autonomous: The protection of the rule of law and human rights by judges will not be possible without law enforcement agencies committing to these higher values.
- q. There is a need to improve the services provided by Lawyers, Public Notaries and other legal professionals. They have to become a part to the system of anti-corruption. They must be included in the category of persons, along with all law enforcement personnel, who are required to provide information concerning corruption or face criminal prosecution.