Norwegian Ministry of Foreign Affairs

Effective sanctions for corruption offences
Specialized anti-corruption courts/panels

International experiences and proposal for Moldova

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Abbreviations

CAO	Code of Administrative Offences
CC	Criminal Code
CCP	Criminal Procedure Code
ECtHR	European Court of Human Rights
GRECO	Group of States against Corruption
NAC	National Anticorruption Center
OSCE	Organization for Security and Co-operation in Europe
SCM	Superior Council of Magistrates
UNCAC	United Nation Convention against Corruption
Venice Commission	European Commission for Democracy through Law

Summary

Scope of the Study

The twofold subject of this Study is to provide recommendations

- for ensuring the proportionality and demotivating character of **sanctions** for corruption (related) offences;
- on the appropriateness of establishing specialized **anti-corruption courts**/panels in the Republic of Moldova.

The recommendations are based on an analysis of **international** anticorruption standards as well as of the national **legal framework**. Findings were discussed and revised based on exchanges with representatives from state bodies and civil society.[1]

Fines can have an important role in deterrence. Any reform of the dissuasiveness of fines will bring all its impact once there are fully effective investigations, prosecutions, and trials. However, analysis and recommendations in this regard for the **law enforcement process** fall **outside** the scope of this Study.

Part 1: Dissuasive sanctions

International standards call in unison for a wide range of **dissuasive** sanctions to corruption offences. This includes lesser offences, such as corruption related administrative offences. From an international perspective, fines are effective if they relate to the **income** of the offender, take into account the size of an undue **advantage** or of the **damage**. This aside, the **maximum** level of fines needs increase, whereas **mitigating schemes** need to be excluded or capped for corruption offences.

As for the **disqualification** from public service, it is an internationally recognised and recommended consequence of corruption. Case-law by the European Court of Human Rights, as well as other international standards, see the disqualification related to "**any** public employment or position". Disqualification as foreseen in the Moldovan Criminal Code and Code of Administrative Offences need to be brought in line with this principle. Furthermore,

[1] The authors are grateful to the following experts for providing their views: Elena Bedros (Head of Department for Legislation and Anticorruption Proofing Expertise, NAC); Elena Cobzac (Judge at the Supreme Court of Justice); Radu Scripnic and Cristian Postovanu (Specialists in the Drafting Legislation Department, Ministry of Justice); Radu Cotici (international anti-corruption expert, former Head of Directorate of NAC); Daniel Goinic (Legal Officer, Legal Resources Centre from Moldova – LRCM); Lilia Ioniță (Expert, Member of the Centre for Analysis and Prevention of Corruption – CAPC); Iurie Perevoznic (Deputy General Prosecutor); Cristina Țărnă (international anti-corruption expert, former Deputy Director of NAC).

disqualification should be applicable for all corruption offences and related administrative misdemeanours.

Part 2: Anti-corruption courts/chambers

Monitoring bodies such as **GRECO** or the **UNCAC** Implementation Review Mechanism have praised the progress in law enforcement facilitated by anti-corruption courts. The **Venice Commission** has explicitly supported the establishment of an anti-corruption court in Ukraine, including the involvement of international experts in the selection of judges.

From the comparative perspective, one can extrapolate three main reasons for establishing these specialised judicial units: (i) efficiency, (ii) expertise, and (iii) integrity in dealing with corruption cases. One EU-example (**Slovakia**) and one regional example (**Ukraine**) illustrate this, where anti-corruption courts made a difference in adjudicating corruption offences efficiently with the necessary expertise. As both courts operate in an environment of perceived and experienced corruption, **integrity** is key. Thus, it has been essential to select anti-corruption judges carefully for their integrity and to ring-fence them from the influence of "corrupt business-as-usual" in the ordinary judiciary.

There are strong indications that integrity deficiencies in the **Moldovan** judiciary would be the key factor in establishing an anti-corruption court, aside from some concerns regarding efficiency or expertise of courts. The most effective way to ring-fence a judicial body from a highly corrupt environment is to set up a separate anti-corruption court. However, a number of risks and challenges have to be taken into consideration.

Part 1: Dissuasive sanctions

1 General principles

1.1 International standards

There is no concrete international standard for criminal sanctions to be effective and proportionate (with "dissuasive" being in fact a synonym for "effective").[2] The UNCAC Implementation Review Mechanism has therefore pointed out that its

> "recommendations [on sanctions] are understandably not standardized, nor always aligned with one another, given the **different needs** of each State party and the different conditions prevailing therein."[3]

Nonetheless, a variety of international sources and good practices clearly point to the necessity of sanctions for corruption offences to be particularly deterring.

1.1.1 Council of Europe

Article 19 "Sanctions and measures" of the Council of Europe Criminal Law Convention on Corruption[4] states:

> "Having regard to the serious nature of the criminal offences established in accordance with this Convention, each Party shall provide, in respect of those criminal offences established in accordance with Articles 2 to 14, effective, proportionate and **dissuasive** sanctions and measures, including, when committed by natural persons, penalties involving deprivation of liberty which can give rise to extradition."[5]

1.1.2 European Union

The Convention on the fight against corruption states in its "Article 5 Penalties" in para. 1:

> "Each Member State shall take the necessary measures to ensure that the conduct referred to in Articles 2 and 3 [active and passive corruption], and

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[2] For the similar wording of the OECD-Convention: Mark Pieth, Lucinda A. Low, Peter J. Cullen, The OECD Convention on Bribery: A Commentary, 652 pages, 2007, page 229.

[3] UNODC, State of implementation of the United Nations Convention against Corruption (2017), page 105, https://www.unodc.org/documents/treaties/UNCAC/COSP/session7/V.17-04679_E-book.pdf (emphasis by author).

[4] ETS 173, of 27 January 1999, https://www.coe.int/en/web/impact-convention-human-rights/criminal-law-convention-on-corruption.

[5] The Explanatory Report to Council of Europe Convention ETS 173 does not give any guidance on this question http://conventions.coe.int/Treaty/EN/Reports/Html/173.htm (emphasis by author).

participating in and instigating the conduct in question, is punishable by effective, proportionate and **dissuasive** criminal penalties, including, at least in serious cases, penalties involving deprivation of liberty which can give rise to extradition."[6]

A **Green paper** "on the approximation, mutual recognition and enforcement of criminal sanctions in the European Union" gives some general indications on custodial sentences, fines, and disqualifications.[7]

In its monitoring reports, the EU continuously criticizes sanctions for corruption offences, if they appear too low: "Sufficiently **dissuasive** sanctions for incompatibility and conflict of interests are an important element in the prevention of corruption";[8] "the sentences applied by courts in corruption cases do not have a **dissuasive** effect and fail to fulfil their preventive function";[9] "the courts fall short in demonstrating that they understand their essential role in the efforts to **curb corruption**".[10]

1.1.3 UNCAC

The United Nations Convention against Corruption (UNCAC)[11] does not set out any minimum or maximum sentences for corruption offences. Article 12 para. 1 provides that "each State Party shall take measures, in accordance with […] its domestic law […] to provide effective, proportionate and **dissuasive** civil, administrative or criminal penalties" for violation of corruption prevention standards and offences involving the private sector. Article 30 para. 1 provides that "each State Party shall make the commission of [corruption] offences […] liable to sanctions that take into account the **gravity** of that offence." It should also be noted that

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[6] Convention drawn up on the basis of Article K.3 (2) (c) of the Treaty on European Union on the fight against corruption involving officials of the European Communities or officials of Member States of the European Union, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:41997A0625(01).

[7] Green Paper on the approximation, mutual recognition and enforcement of criminal sanctions in the European Union, COM(2004)334 final, at no. 2.1.5 page 17, https://ec.europa.eu/transparency/regdoc/rep/1/2004/EN/1-2004-334-EN-F1-1.Pdf.

[8] Report by the European Commission to the European Parliament and Council on Progress in Romania under the Cooperation and Verification Mechanism, Brussels, COM(2019) 499 final, 22 October 2019, page 13, https://ec.europa.eu/info/sites/info/files/progress-report-romania-2019-com-2019-499_en.pdf (emphasis by author).

[9] Report by the European Commission to the European Parliament and Council on Romania's progress on accompanying measures following Accession, COM (2007) 378 final, 27 June 2007, page 16, http://ec.europa.eu/dgs/secretariat_general/cvm/progress_re-ports_en.htm (emphasis by author).

[10] Report by the European Commission to the European Parliament and Council on Romania's progress on accompanying measures following Accession, COM (2007) 378 final, 27 June 2007, page 16, http://ec.europa.eu/dgs/secretariat_general/cvm/progress_re-ports_en.htm (emphasis by author).

[11] Of 2003, https://www.unodc.org/unodc/en/treaties/CAC/ (emphasis by author).

the UNCAC Implementation Review Mechanism has incidentally supported "higher penalties to **passive bribery**":

> "Having **more severe** penalties in place for the act of receiving a bribe than for giving a bribe was felt to be appropriate in principle, in order to discourage the solicitation of bribes by public officials and to encourage the reporting of bribery incidents."[12]

1.1.4 OECD

Article 3 para. 1 of the OECD Anti-Bribery Convention[13] provides that bribery of foreign officials "shall be punishable by **effective**, proportionate and **dissuasive** criminal penalties comparable to the penalties for corruption of domestic officials." Paragraph 4 states that each Party shall consider imposing additional civil or administrative sanctions in addition to criminal penalties. Furthermore, in "Corruption: Glossary of International Criminal Standards", the OECD notes:

> "The legislation of most countries in the region provide for very severe maximum penalties for corruption offences. In practice, the sentences imposed by the courts are much lower. **Fines** are much more common than jail sentences. Hence, to assess whether sanctions are **effective** in these countries, it is important to look at **statistics** on the **actual** sanctions imposed and not only the maximum penalties prescribed by statute."[14]

1.1.5 OSCE

The OSCE Handbook on Combating Corruption issues the following recommendation regarding sanctions:

> "The level of sentencing must take into account the gravity of the offence and be '**effective, proportionate** and **dissuasive**'; the sanctions must address the natural and legal person and the range of sentencing options should include imprisonment, monetary and non-monetary penalties, confiscation, suspension, removal or disqualification from public office and debarment as well as disciplinary measures."[15]

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[12] UNODC, State of implementation of the United Nations Convention against Corruption (2017), page 105, https://www.unodc.org/documents/treaties/UNCAC/COSP/session7/V.17-04679_E-book.pdf (emphasis by author).

[13] OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, 1997, http://www.oecd.org/corruption/oecdantibriberyconvention.htm (emphasis by author).

[14] Of 2007, page 40, http://www.oecd.org/corruption/anti-bribery/39532693.pdf (emphasis by author).

[15] OSCE, Handbook on Combating Corruption (2016), page 196, https://www.osce.org/secretariat/232761 (emphasis by author).

1.1.6 GRECO

In summing up its findings from the Round III evaluation on incriminations, GRECO has observed:

> "Some GRECO states have legal systems that favour detailed structured hierarchical penalty systems that **limit** the margin of **discretion** left to the court while the traditions of others dictate reliance on rather high global maximum penalties, with the final sentence from low to very high entirely within the discretion of the sentencing court. There are within GRECO states more examples of the former than of the latter, of which the most obvious examples are the common law jurisdictions of the United Kingdom and Ireland."[16]

1.1.7 Venice Commission

In its "Rule of Law Checklist", the Venice Commission states under "Effective compliance with, and implementation of preventive and repressive measures":

> "Are effective, proportionate and **dissuasive** criminal and administrative sanctions provided for corruption-related acts and non-compliance with preventive mechanisms?"[17]

1.2 Moldova

1.2.1 Prevention as a principle

There is no explicit statement in the Moldovan Criminal Code or CAO that sanctions have to be "dissuasive". However, in general, Article 2 para. 2 CC states: "The criminal law is also aimed at **preventing** the commission of new offences." A similar statement is contained in Article 2 of the CAO: "The purpose of the contravention law consists […] in preventing the commission of new contraventions".

1.2.2 Relevance of fines and disqualification

Article 75 para. 2 CC states:

> "If alternative punishments for the committed offence are provided, the **imprisonment** should be **exceptional** and applicable only when the gravity of the offence and the offender's character require the imprisonment as

[16] GRECO, Incriminations – Thematic review of GRECO's Third Evaluation Round (undated, pdf-file as of 2012), page 52, https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016806cbf86 (emphasis by author).

[17] Venice Commission, Rule of Law Checklist, CDL-AD(2016)007, page 29, https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2016)007-e (emphasis by author).

punishment, and another punishment is insufficient and would not achieve its purpose. A harsher punishment, among the alternative ones provided for the commission of the offence, should be imposed only if a milder punishment, from the list of those provisioned for, would not ensure the fulfilment of the punishment purpose. The court shall give reasons for application of the imprisonment as an exceptional punishment."

According to studies by NAC relying on judicial statistics, courts apply "real" prison sentences in no more than 16 % of all cases, and in 71 % apply fines. This puts the focus on **fines** and their dissuasiveness for Moldova to be in line with international standards. Similar is true for **disqualification** from public office as the other alternative sanction to imprisonment.

It is thus the purpose of this Study to examine the dissuasiveness of **fines** and **disqualification** from public office. Both, international standards and good practices as well as Moldovan law contain further details in this regard, which the following chapters illustrate.

The following table shows all offences punishable by imprisonment, where **fines** are in general possible as an **alternative** (offenses with minimum sanction = "0" are not punishable by imprisonment while a fine is the principal sanction). In six instances, **fines** appear as a punishment cumulative with imprisonment (marked in grey).

Offence	Form	Article	Imprisonment (years)	
			Min	Max.
Passive bribery	Alleviated	324 § 4	0	0
Bribery taking	Alleviated	333 § 4	0	0
Receipt of illicit rewards	Plain	256 § 1	0	0
Ultra vires	Aggravated 1	328 § 1^1	0	0.5
Receipt of illicit rewards	Aggravated 1	256 § 2	0	2
Ultra vires	Plain	328 § 1	0	3
Bribery taking	Plain	333 § 1	0	3
Bribery giving	Plain	334 § 1	0	3
Abuse of office	Plain	335 § 1	0	3
Trading in influence	Aggravated 1	326 § 1^1	0	3
Conflict of interests	Plain	326^1 § 1	0	3
Bribery giving	Aggravated 1	334 § 2	0	5
Active bribery	Plain	325 § 1	0	6
Active bribery	Aggravated 1	325 § 2	3	6
Trading in influence	Plain	326 § 1	0	6
Abuse of authority	Plain	327 § 1	0	6
Ultra vires	Aggravated 2	328 § 2	2	6
Abuse of office	Aggravated 1	335 § 2	2	6
Conflict of interests	Aggravated 1	326^1 § 2	2	6

Appropriation by using public office	Plain	191 § 2 d)	2	6
Passive bribery	Plain	324 § 1	3	7
Trading in influence	Aggravated 2	326 § 2	2	7
Abuse of authority	Aggravated 1	327 § 2	2	7
Bribery taking	Aggravated 1	333 § 2	2	7
Bribery giving	Aggravated 2	334 § 3	3	7
Abuse of office	Aggravated 2	335 § 3	3	7
Unlawful enrichment	Plain	330^2 § 1	3	7
Trading in influence	Aggravated 3	326 § 3	3	8
Abuse of authority	Aggravated 2	327 § 3	3	8
Passive bribery	Aggravated 1	324 § 2	5	10
Ultra vires	Aggravated 3	328 § 3	6	10
Bribery taking	Aggravated 2	333 § 3	3	10
Active bribery	Aggravated 2	325 § 3	6	12
Appropriation by using public office	Aggravated 1	191 § 4	7	12
Passive bribery	Aggravated 2	324 § 3	7	15
Unlawful enrichment	Aggravated 1	330^2 § 2	7	15
Appropriation by using public office	Aggravated 2	191 § 5	8	15

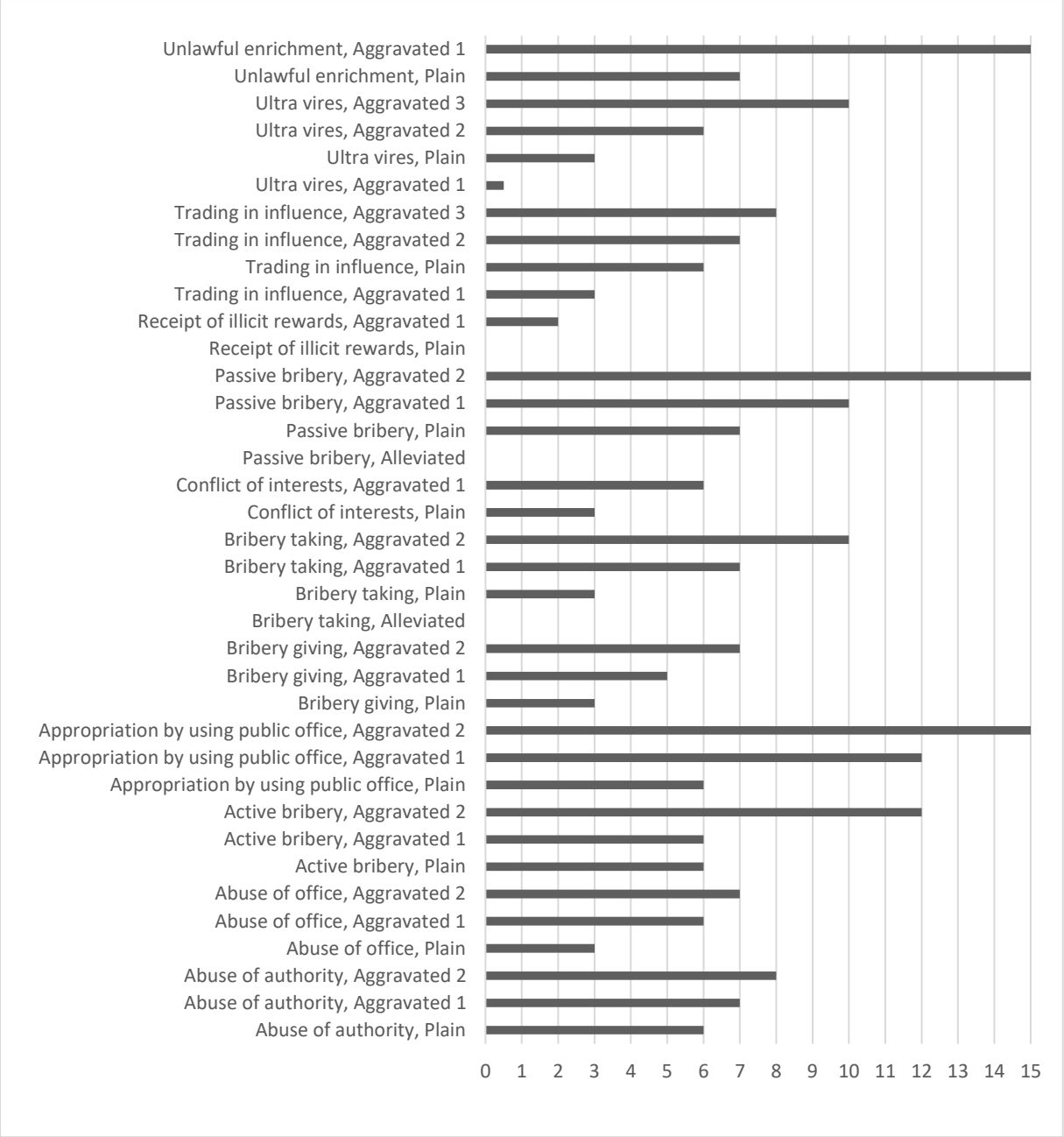
In addition, courts can apply fines as an alternative by using **mitigation measures**, for example in cases of plea bargaining (Article 80 CC) or simplified trial procedure (Article 364/1 para. 8 CCP), for all corruption offences, except the following three aggravated forms classified as "particularly serious" (marked in grey):

Offence	Form	Article	Type
Receipt of illicit rewards	Plain	256 § 1	Minor
Passive bribery	Alleviated	324 § 4	
Bribery taking	Alleviated	333 § 4	
Ultra vires	Aggravated 1	$328 § 1^1$	
Receipt of illicit rewards	Aggravated 1	256 § 2	
Trading in influence	Aggravated 1	$326 § 1^1$	Less serious
Conflict of interests	Plain	326^1 § 1	
Ultra vires	Plain	328 § 1	
Bribery taking	Plain	333 § 1	
Bribery giving	Plain	334 § 1	
Abuse of office	Plain	335 § 1	
Bribery giving	Aggravated 1	334 § 2	
Appropriation by using public office	Plain	191 § 2d)	Serious
Active bribery	Plain	325 § 1	
Active bribery	Aggravated 1	325 § 2	
Trading in influence	Plain	326 § 1	
Conflict of interests	Aggravated 1	326^1 § 2	
Abuse of authority	Plain	327 § 1	

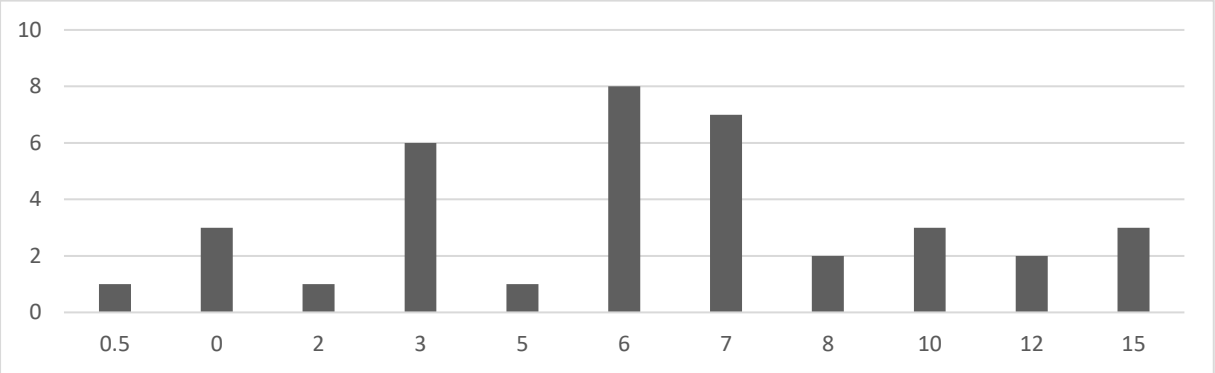
Ultra vires	Aggravated 2	328 § 2	
Abuse of office	Aggravated 1	335 § 2	
Passive bribery	Plain	324 § 1	
Trading in influence	Aggravated 2	326 § 2	
Abuse of authority	Aggravated 1	327 § 2	
Unlawful enrichment	Plain	330^2 § 1	
Bribery taking	Aggravated 1	333 § 2	
Bribery giving	Aggravated 2	334 § 3	
Abuse of office	Aggravated 2	335 § 3	
Trading in influence	Aggravated 3	326 § 3	
Abuse of authority	Aggravated 2	327 § 3	
Passive bribery	Aggravated 1	324 § 2	
Ultra vires	Aggravated 3	328 § 3	
Bribery taking	Aggravated 2	333 § 3	
Appropriation by using public office	Aggravated 1	191 § 4	
Active bribery	Aggravated 2	325 § 3	
Appropriation by using public office	Aggravated 2	191 § 5	Particularly serious
Passive bribery	Aggravated 2	324 § 3	
Unlawful enrichment	Aggravated 1	330^2 § 2	

1.2.3 Imprisonment: not the focus of this Study

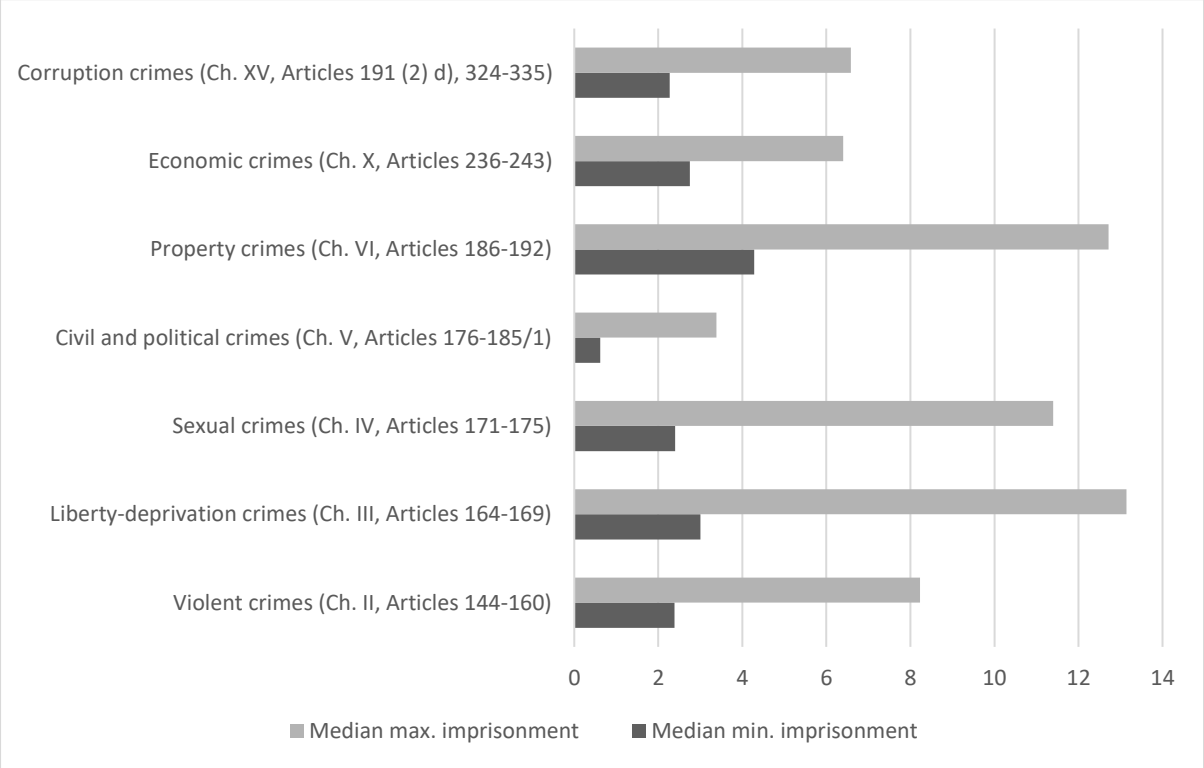
In light of the rather low statistical relevance, **imprisonment** falls **outside** of the scope of this Study. In addition to the lesser practical usage, the following tables in general confirm that there seems to be no apparent need for legislative reforms in the area of prison terms foreseen by corruption offences:



As a result, the legislative **frequency** of various maximum prison terms for corruption crimes is as follows:



A comparison with other types of crimes provides the following figure:



Prima facie, the level of prison terms seems sufficiently deterrent. Law no. 165 of 10/09/2020 on reclassified a number of corruption crimes from minor to serious offences.[18] However, for all these crimes it is still an option to significantly reduce punishments by mitigation schemes and individualisation of sentences (see further on this point below at Section 2.2.1 g).[19]

[18] Ministry of Justice of the Republic of Moldova, Draft Law on amendments of criminal punishments for corruption acts; adopted in the 2nd reading by the Parliament of Moldova (9 October 2020), http://www.justice.gov.md/libview.php?l=ro&idc=4&id=5017.

[19] Even in the opinion of the Ministry of Justice, expressed at the drafting stage, these amendments will not be sufficient to ultimately make the corruption crimes "particularly serious" by exempting them from the common regime of individualization and suspension of imprisonment (quote): "The ultimate aim of the given draft law is to provide a legal classification for the given offences from the category of less severe crimes to the category of severe crimes, but the proposals of increasing the sanctions for offences envisaged in art. 328 para. (l) and (2), and 329 para. (l) and (2) do not fulfill this goal, hence we consider them to be inappropriate for the given draft." – Synthesis of objections and proposals to the draft Law on amending the Criminal Code of the Republic of Moldova No. 985/2002 (adjusting the criminal sanction for corruption crimes), http://www.parlament.md/LegislationDocument.aspx?Id=c8803d64-2059-49b5-8474-353dcd7b094d.

1.2.4 Sanctions: only the tip of the iceberg

There is a number of significant **shortcomings** in the Moldovan justice system regarding accountability for corruption offences, for example:

- Inefficiencies and obstacles in investigations and prosecutions;
- Excessively short statutes of limitations for administrative offences;
- An excessive burden of proof set up by case law, thus making it difficult to prove even rather obvious corruption cases;
- Questionable (or rather inexplicable) court decisions requalifying corruption crimes into administrative offences, allowing impunity, as the much shorter statutes of limitations in administrative legislation will have usually run out at that time.

Thus, the dissuasiveness of sanctions is in the end not only a matter of severity or types of sanctions. In this sense, the dissuasiveness of fines is a "luxury" that only **few cases** enjoy: the ones that actually see the light of sentencing in court. Still, it is a necessary "luxury", and in combination with other justice reforms could unfold its full potential in the future.

2 Fines

2.1 International standards and good practices

2.1.1 Fine ≠ fine

It is important to distinguish **criminal** fines for offences such as bribery, from fines for **administrative** offences such as late declaration of assets:

Aspect	Criminal fines	Administrative fines
Offences	Bribery, embezzlement, trading in influence, abuse of office	Violating administrative rules of integrity, such as declaring assets on time, or following conflicts of interest procedures
Prime deterrent?	No, imprisonment; fines are only an auxiliary deterrent	Yes, in addition to disqualification
Asset forfeiture?	Usually applicable	Usually not applicable

In line with the first two lines of above table, **international conventions** focus on criminal offences and as such on imprisonment. For example, Art. 30 para. 5 UNCAC states:[20]

[20] www.unodc.org/documents/brussels/UN_Convention_Against_Corruption.pdf.

> "Each State Party shall take into account the gravity of the offences concerned when considering the eventuality of early release or parole of persons convicted of such offences."

This provision presumes imprisonment as a **standard response**. Similar is true for Western European and Northern American countries. There, corruption offences are often concentrated on criminal offences such as bribery, where imprisonment is the main deterrent and asset forfeiture somewhat reduces the financial necessity of fines. At the same time, corruption related administrative offences are rather rare in Western European and Northern American countries.

Still, **many rationales** that apply to determining prison terms for corruption cases apply to fines as well. For example, the high position of an official, the outstanding size of the bribe, or the seriousness of the damage are all factors that can increase both, a prison term as well as a fine. Therefore, the following principles are not limited to fines, but also defer principles applicable to fines from the general sanction rationale of international standards and good practices.

2.1.2 Income of offender

Fines should reflect the economic situation at hands. On a larger perspective, the Commentary on the **OECD** Convention states:[21]

> "For poorer countries, account is taken of the economic situation of the country concerned, including the average income of the working population, so that fines for these countries may legitimately be set at a significantly lower level than for **richer** states."

This not only concerns the overall economic situation in a country, but also the wealth of the offender. To this end, **GRECO** noted in one case that

> "fine levels are likely not to be proportionate and dissuasive **against wealthy** bribers or bribees (the highest amount is **11 400 €** for passive bribery offences under Article 225 CC, 3 800 € for bribery of intermediaries / trading in influence under Article 226 CC, and 7 600 € for active bribery offences under Article 227 CC). […] As the Lithuanian authorities pointed out, projects exist to review the level and categories of sanctions in order to make the anti-corruption legislation more robust and the sanctions **more dissuasive**. These efforts deserve to be supported."[22]

[21] Mark Pieth, Lucinda A. Low, Peter J. Cullen, The OECD Convention on Bribery: A Commentary, 652 pages, 2007, page 235 (emphasis by author).

[22] Greco Eval III Rep (2008) 10E, § 78, https://www.coe.int/en/web/greco/evaluations (emphasis by author).

By comparison, GRECO took note of the practice in Germany, where fines are

> "determined in accordance with the **daily rates** system of section 40 CC [Criminal Code]: the range is 5 to 360 daily rates and the amount of each such rate, to be determined by the judge in accordance with the **personal situation** of the offender, is from 1 to 30,000 € […]; the amount of the fine can thus vary between 5 € and **10,800,000 €**."[23]

The daily rates system is part of an international trend:

> "The first country to introduce day-fines was Finland in 1921. Other Scandinavian countries followed this practice (e.g., Sweden in 1931 and Denmark in 1939). However, only several decades later did other **European countries** adopt the day-fine: Germany and Austria in 1975; Hungary in 1978; France and Portugal in 1983; Spain in 1995; Poland in 1997; and lastly, Switzerland in 2007. […] [T]here is an ongoing discussion in the UK to reintroduce the day-fine […]. Day-fines are used in the United States as well, but not in all jurisdictions […]."[24]

There is a strong equal justice argument to be made for daily rate fines:

> "This type of a penalty system prevents **wealthy people** from appearing to 'purchase' the right to commit offences because the relative costs imposed on them are the same as on low-income offenders. For instance, in 1999, a **116,000 € fine** was imposed on a driver who exceeded the permitted **speed limit** in Finland. Similarly, in 2001, the Finnish criminal justice system imposed a fine of around **35,300 €** on a driver who drove through **a red light**. Although at first glance those sanctions seem excessive, in practice, the daily unit (the proportion of income) of the fine and the number of the imposed days were the same as for low-income offenders. However, the yearly income of these two drivers was assessed in millions; thus, the nominal fine was high."[25]

In addition, daily rate fines can be advantageous for the budget:

> "In the law-and-economics literature, a fine is an important form of sanction and is often treated as superior to imprisonment. The reasons are the **low enforcement** cost of fines and the fact that the perpetrator transfers the fine

[23] Greco Eval III Rep (2009) 3E § 30, https://www.coe.int/en/web/greco/evaluations (emphasis by author).

[24] Kantorowicz-Reznichenko, Day-Fines: Should the Rich Pay More?, Review of Law & Economics, 2015, page 481 (485), https://www.researchgate.net/publication/279276936_Day-Fines_Should_the_Rich_Pay_More (emphasis by author).

[25] Kantorowicz-Reznichenko, Day-Fines: Should the Rich Pay More?, Review of Law & Economics, 2015, page 481 (482), https://www.researchgate.net/publication/279276936_Day-Fines_Should_the_Rich_Pay_More.

> proceeds back to society. On the other hand, prison imposes high costs both on the offender and on the state […]."[26]

This aside, daily rate fines make the calculation of fines more **transparent**, as there is a clear distinction between the culpability (≈number of rates) and the wealth (≈size of one rate). There is also more transparency in **comparing** fines: If two similar cases lead to a different number of daily rates, the inconsistency in jurisprudence is evident. With fixed fines, and the wealth of the offender being just one factor in a pool of other factors, it is hard if not impossible to compare two judgments. The procedure of day-fines consists of two simple steps:

> "The court **first** decides upon the **severity** of the offence and based on this ranking, it sets the number of day-fines to be imposed on the offender. In the **second** stage, the court sets the daily unit based on the **income** of the offender and multiplies this amount by the previously defined number of days […]. It should be noted that certain basic expenses and financial support for dependents are usually deducted from the imposed daily unit. Consequently, two offenders who committed the same crime would be sentenced to the **same** relative **punishment**, yet, to a **different** nominal amount of **fine**. Thus, the relative burden imposed by the sentence is the same for all criminals committing similar crimes regardless of their wealth."[27]

The range of daily units (in €) and the calculation basis (scope of wealth) are as follows:[28]

[26] Kantorowicz-Reznichenko, Day-Fines: Should the Rich Pay More?, Review of Law & Economics, 2015, page 481 (482), https://www.researchgate.net/publication/279276936_Day-Fines_Should_the_Rich_Pay_More (emphasis by author).

[27] Kantorowicz-Reznichenko, Day-Fines: Should the Rich Pay More?, Review of Law & Economics, 2015, page 481 (484), https://www.researchgate.net/publication/279276936_Day-Fines_Should_the_Rich_Pay_More (emphasis by author).

[28] Kantorowicz-Reznichenko, Day-Fines: Should the Rich Pay More?, Review of Law & Economics, 2015, page 481 (486), https://www.researchgate.net/publication/279276936_Day-Fines_Should_the_Rich_Pay_More.

Count.	Year	Max. no. days	Min. no. days	The daily unit limit	Result of default	Ratio Fines to prison[b]	Scope of wealth
Finland	1921	120	1	–	Prison	3:1	Income
Sweden	1931	150	30	3.50–117	Prison	–	Wealth and income
Denmark	1939	60	1	0.27–	Prison	1:1	Income and wealth
Germany	1975	360	5	1–30,000	Prison	1:1	Income and assets
Austria	1975	360	4	4–5,000	Prison	2:1	Economic capacity
Hungary	1978	540	30	0.30–69	Prison	1:1	Income and "financial situation"
France	1983	360	1	–1,000	Prison	1:1	Income
Portugal	1983	360	10	1–490	Prison	1:2/3	Economic and financial conditions
Lichtenstein	1988	360	2	9.35–935	Prison	2:1	Economic capacity
Spain[c]	1995	730	10	2–400	Prison	2:1	Financial situation incl. assets
Poland[d]	1997	540	10	2.38–477	Prison[e]	2:1	Income and assets
Croatia[f]	1998	360	30	2.6–1,309	Prison[g]	1:1	Income and assets
Switzerland	2007	360	1	–2,410	Prison	1:1	Income and capital

2.1.3 Size of bribe

The size of the bribe is a usual aggravating factor in determining punishments. Hence, the Technical Guide on the UNCAC even calls for basing penalties not only on the size of the bribe:

> "While not stipulating any particular form of sanctions, the Convention emphasizes that there should be appropriate measures in place to ensure that, whether through fines, imprisonment or other penalties, the punishment reflects the level of the offence. The gravity of the offence may not be determined only by the **value** of […] an undue advantage, but by taking into account other factors […]."[29]

Similarly, the UNCAC Implementation Review Mechanism has reported the following

> "Successes and good practices
>
> An innovative approach followed by some States involves the imposition as a sanction for bribery and commercial corruption of a fine calculated on the basis of either the **value** of the **gratification** offered or received or of the **proceeds** of the offence or the **intended benefit** therefrom. Similarly, the law of another country provides that any person committing bribery shall be subject to three layers of aggravated punishment, depending on the amount that he or she receives or promises. The review teams of four of the abovementioned States considered these to be flexible and balanced approaches that are likely to deter

[29] UNODC, Technical Guide to the UNCAC (2009), page 83, https://www.unodc.org/documents/corruption/Technical_Guide_UNCAC.pdf (emphasis by author).

> large bribery deals and highlighted them emphatically as good practices for international anti-bribery efforts. Nevertheless, as noted in other reviews, the quantification and calculation of the multiple or the imposition of the aggravated punishment may prove difficult in cases where it is not possible to attach an exact monetary value to the benefits involved or to the illicit advantages acquired by the corrupt act. Accordingly, a recommendation was made for one of these States to consider drafting the relevant provision in a way that determines more specifically the **method** for **calculating** the applicable fines."[30]

Examples for are largely found in the context of imprisonment, while sometimes, as in the following first example,[31] fines are not even foreseen for bribery:

> "Bribe-taking […] b) in **large quantities**; […] shall be punished by imprisonment for a term of seven to eleven years."[32]

> "In both cases, a fine shall also be imposed, ranging from the value to **triple** the value of the gift."[33]

The underlying assumption is apparently the following: The higher the bribe, the higher the benefit intended by the offender, which in turn corresponds to the **damage** to society, either financially or in terms of rule of law. Economists have since long identified this correlation:

> "If the penalty is high, officials must receive a high return in order to be willing to engage in bribery. Thus, the expected penalty should **increase by more** than a dollar for every dollar increase in the size of the bribe […]. Suppose, for example, that the benefits to bribery are an increasing function [≈multitude] of the size of the bribe so that, say, a bribe of $1000 provides benefits of $1500, but a bribe of $5000 provides benefits of $20,000. Then expected penalties that

[30] UNODC, State of implementation of the United Nations Convention against Corruption (2017), pages 103-104 (emphasis by author), https://www.unodc.org/documents/treaties/UNCAC/COSP/session7/V.17-04679_E-book.pdf (emphasis by author).

[31] Same in Malta: GRECO, Incriminations – Thematic review of GRECO's Third Evaluation Round (undated, pdf-file as of 2012), page 53, https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016806cbf86.

[32] Georgia, Criminal Code, Article 338 Bribe-taking, para. 2, https://matsne.gov.ge/en/document/download/16426/157/en/pdf (emphasis by author).

[33] Spain, Article 420 Criminal Code, Greco Eval IV Rep (2013) 5E, https://www.coe.int/en/web/greco/evaluations (emphasis by author).

are set at twice the size of the bribe will deter the smaller bribe but not the larger one."[34]

In this context it is worth mentioning the **United States** Federal Sentencing Guidelines.[35] They were adopted in 1984 and were originally mandatory.[36] Because of the specifics of the U.S. jury system, the U.S. Supreme Court held that the mandatory nature of the Guidelines violated the right of citizens to a trial by a jury, as the Guidelines allowed a judge to enhance a sentence using facts not reviewed by the jury.[37] Ever since, sentencing courts treated the Guidelines as advisory, rather than mandatory.[38] However, in a Civil Law system, such as in most European countries including Moldova, such Guidelines could be mandatory or part of the criminal code. The Guidelines foresee the following instruction regarding the size of bribe:

> "If the **value** of the **payment**, the benefit received or to be received in return for the payment, the value of anything obtained or to be obtained by a public official or others acting with a public official, or the loss to the government from the offense, whichever is greatest, exceeded $6,500, increase by the number of levels from the table in §2B1.1 (Theft, Property Destruction, and Fraud) corresponding to that amount."[39]

The respective table foresees the following:

> "If the loss exceeded $6,500, increase the offense level as follows:

Loss (Apply the Greatest)		Increase in Level
(A)	$6,500 or less	no increase
(B)	More than $6,500	add 2
(C)	More than $15,000	add 4
(D)	More than $40,000	add 6

[34] Susan Rose-Ackerman, The Law and Economics of Bribery and Extortion, 2010, 6 Annual Rev Law Soc Sci 217 at 225, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1646975.

[35] United States Sentencing Commission, Guidelines, 2018, https://www.ussc.gov/sites/default/files/pdf/guidelines-manual/2014/GLMFull.pdf.

[36] Ferguson, Global Corruption, 2018, page 648, https://commentary.canlii.org/w/canlii/2018CanLIIDocs28.pdf.

[37] United States v Booker, 125 S Ct 738 (2005), https://www.casebriefs.com/blog/law/criminal-procedure/criminal-procedure-keyed-to-weinreb/sentence/united-states-v-booker-2/.

[38] But see United States Supreme Court, Gall v. United States, 128 S. Ct. 586 (2007): "As a matter of administration and to secure nationwide consistency, the Guidelines should be the starting point and initial benchmark" at sentencing, https://www.lexisnexis.com/community/casebrief/p/casebrief-gall-v-united-states.

[39] United States Sentencing Commission, Guidelines, 2018, page 131, §2C1.1, https://www.ussc.gov/sites/default/files/pdf/guidelines-manual/2014/GLMFull.pdf (emphasis by author); it should be noted though, that these guidelines are for prison terms and not for the calculation of fines, which are governed by 18 U.S. Code § 3571, https://www.law.cornell.edu/uscode/text/18; for further details see Ferguson, Global Corruption, 2018, page 658, https://commentary.canlii.org/w/canlii/2018CanLIIDocs28.pdf.

(E)	More than $95,000	add 8
(F)	More than $150,000	add 10
(G)	More than $250,000	add 12
(H)	More than $550,000	add 14
(I)	More than $1,500,000	add 16
(J)	More than $3,500,000	add 18
(K)	More than $9,500,000	add 20
(L)	More than $25,000,000	add 22
(M)	More than $65,000,000	add 24
(N)	More than $150,000,000	add 26
(O)	More than $250,000,000	add 28
(P)	More than $550,000,000	add 30"[40]

In total, the sentencing guidelines provide 43 levels of offense seriousness — the more serious the crime, the higher the offense level.[41]

2.1.4 Financial damage

The Model Code for Post-Conflict Criminal Justice increases the maximum imprisonment term in its Article 142.2 by five years in case of high-level damage:

> "1. The applicable penalty range for the criminal offense of embezzlement, mis-appropriation, or other diversion of property by a public official is two to ten years' imprisonment.
>
> 2. The applicable penalty range for the criminal offense of embezzlement, misappropriation, or other diversion of property by a public official is three to **fifteen years'** imprisonment when the embezzlement, misappropriation, or other diversion involves property of **high value**."[42]

In Northern Macedonia, the Criminal Code foresees a minimum imprisonment of 3 years if the offender "causes a **significant damage**".[43] This is in line with the Model Criminal Code.

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[40] United States Sentencing Commission, Guidelines Manual, 2018, page 82, §2B1.1.(b)(1), https://www.ussc.gov/sites/default/files/pdf/guidelines-manual/2014/GLMFull.pdf.

[41] See for further explanations: United States Sentencing Commission, An Overview of the Federal Sentencing Guidelines, https://www.ussc.gov/sites/default/files/pdf/about/overview/Overview_Federal_Sentencing_Guidelines.pdf

[42] United States Institute of Peace, Model Code for Post-Conflict Criminal Justice (2007), https://www.usip.org/files/MC1/MC1-Part2Section10.pdf (emphasis by author).

[43] Art. 353 para. 3 Criminal Code "Abuse of official position and authorization", https://www.legislationline.org/download/id/8145/file/fYROM_CC_2009_am2018_en.pdf (emphasis by author).

The consideration of the damage is a **standard** feature in criminal jurisprudence. For example, the **German** Supreme Court has decided that the damage to the public budget that "has arisen or at least could have arisen, determines the extent of the breach of duty" and thus the severity of the sanction.[44] In the above-mentioned Sentencing Guidelines,[45] the **United States** make the "loss to the government from the offense" a decisive factor in increasing the severity of the sanction by up to 30 levels (out of 43).[46]

2.1.5 Non-financial damage

The United States consider the damage not only in financial terms, but also underline that certain **immaterial harm** merits increasing the sanction:

> "If the defendant was a public official who facilitated (A) **entry** into the United States for a person, a vehicle, or cargo; (B) the obtaining of a **passport** or a document relating to naturalization, citizenship, legal entry, or legal resident status; or (C) the obtaining of a government **identification** document, increase by 2 levels."[47]

As the judge stated on the conviction of former Illinois Governor Rod Blagojevich (14 years imprisonment for accounts of corruption):

> "The harm here is not measured in the value of property or money. The harm is the **erosion** of public **trust** in government."[48]

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[44] German Supreme Court, Decision of 20 August 2002, 5 StR 212/02, http://juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/document.py?Gericht=bgh&Art=en&nr=24890&pos=0&anz=1 (in German).

[45] See above at note 35.

[46] United States Sentencing Commission, Guidelines, 2018, page 131, §2C1.1, https://www.ussc.gov/sites/default/files/pdf/guidelines-manual/2014/GLMFull.pdf; it should be noted though, that these guidelines are for prison terms and not for the calculation of fines, which are governed by 18 U.S. Code § 3571, https://www.law.cornell.edu/uscode/text/18.

[47] See above at note 46 (emphasis by author).

[48] The New York Times (7 December 2011), Blagojevich Sentenced to 14 Years in Prison, http://www.nytimes.com/2011/12/08/us/blagojevich-expresses-remorse-in-courtroom-speech.html?_r=0 (emphasis by author); President Trump granted executive clemency in 2020, Chicago Tribune (18 February 2020), Rod Blagojevich released from prison after Trump commutes ex-Illinois governor's 14-year sentence, https://www.chicagotribune.com/politics/ct-illinois-governor-rod-blagojevich-trump-commute-20200218-ktpeijxjmjavzldz43k4pbnp4q-story.html.

2.1.6 Position of official

The position of the public official is also a decisive factor in determining punishments. Hence, the Technical Guide on the UNCAC calls for "taking into account other factors, such as the **seniority** of those involved".[49] Examples are largely found in the context of imprisonment:

> "Bribe-taking a) by a public **political official** […] shall be punished by imprisonment for a term of seven to eleven years."[50]

The UNCAC Implementation Review Mechanism makes a distinction between public and non-public officials:

> "[I]t was suggested that the differentiation of sanctions between persons carrying out public and non-public functions be considered, in the light of the **heightened** obligation of **trust** of public officials. Such differentiation could be achieved by, for example, providing for **aggravated forms** of the relevant offences. In one of these countries, as well as in other States facing similar problems, the reviewing experts suggested, as a possible alternative, issuing and monitoring the application of sentencing guidelines for corruption offences, which, as already mentioned, would reduce the uncertainty surrounding the range of applicable penalties and ensure greater overall consistency in this matter, while at the same time maintaining the basic discretion of the courts."[51]

This thought can be transposed to the distinction of lower-level and higher-level officials, or to the distinction of positions depending on a lower or higher level of **trust** (e.g. doctors and policemen regarding their particular protection obligation towards citizens; or judges regarding their higher level of discretion, which can only work if they "can be trusted"; etc.).

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[49] UNODC, Technical Guide to the UNCAC (2009), page 83, https://www.unodc.org/documents/corruption/Technical_Guide_UNCAC.pdf (emphasis by author).

[50] Georgia, Criminal Code, Article 338 Bribe-taking, para. 2, https://matsne.gov.ge/en/document/download/16426/157/en/pdf (emphasis by author); Law on Public Service, Article 3 – Definitions, https://matsne.gov.ge/en/document/download/3031098/1/en/pdf: "h) public political official – the President of Georgia, Members of Parliament of Georgia, the Prime Minister and other members of the Government of Georgia and their deputies, members of the Supreme Representative Bodies of the Autonomous Republic of Abkhazia and the Autonomous Republic of Ajara, members of the Governments of the Autonomous Republic of Abkhazia and the Autonomous Republic of Ajara and their deputies".

[51] UNODC, State of implementation of the United Nations Convention against Corruption (2017), page 106, https://www.unodc.org/documents/treaties/UNCAC/COSP/session7/V.17-04679_E-book.pdf (emphasis by author).

In this regard, the **UNCAC** Technical Guide sees it as a factor for determining the sanction to take "into account […] the level of trust attached to the public official […]."[52]

Thus, for example in **Germany**, taking bribes by a "normal" public official is an offence with a penalty of imprisonment for a term of between six months and 5 years, while by a judge, it is a crime with a penalty of imprisonment for a term of between one year and 10 years.[53] Similarly, in the above-mentioned Sentencing Guidelines,[54] the **United States** consider the level of the public official an increasing factor as follows:

> "If the offense involved an **elected** public official or any public official in a **high-level** decision-making or **sensitive** position, increase by 4 levels. If the resulting offense level is less than level 18, increase to level 18 [out of 43]."[55]

A **Canadian** court struck a similar chord in sentencing a case of passive bribery:

> "All Canadians, and our **society** as a whole, are victims when public officials breach the **trust** placed in them."[56]

2.1.7 Detection risk

An additional factor in the level of fines is the detection risk of offenders:

> "There is a growing literature on the lack of consistency between the actual **probability** of detection and the **severity** of punishment, and the perceived probability […]."[57]

The lower the actual or perceived risk is, the higher is their **return-on-investment** per corruption offence. For example, if an offender will estimate to get caught every 5th incident, it will need a much lower fine to deter the offender, than if the rate of detection is only every 50th incident. Simply put, in the first case he/she needs to pay a fine of 1,000 € every 5th incident, in the latter only every 50th time. In both cases, the same fine of for example 1,000 €

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[52] UNODC, Technical Guide to the UNCAC (2009), page 83, https://www.unodc.org/documents/corruption/Technical_Guide_UNCAC.pdf.

[53] § 332 Penal Code, https://www.gesetze-im-internet.de/englisch_stgb/englisch_stgb.html#p3179 (in English).

[54] See above at note 35.

[55] United States Sentencing Commission, Guidelines, 2018, page 131, §2C1.1, https://www.ussc.gov/sites/default/files/pdf/guidelines-manual/2014/GLMFull.pdf; it should be noted though, that these guidelines are for prison terms and not for the calculation of fines, which are governed by 18 U.S. Code § 3571, https://www.law.cornell.edu/uscode/text/18 (emphasis by author).

[56] R v Serre, 2013 ONSC 1732, 105 W.C.B. (2d) 769, at para. 29, quoted in https://www.thelitigator.ca/wp-content/uploads/Karigar-Sentencing-Decision.pdf (emphasis by author).

[57] UNODC, Manual on Corruption Surveys (2018), page 22, https://www.unodc.org/documents/data-and-analysis/Crime-statistics/CorruptionManual_2018_web.pdf (emphasis by author).

will have a different effect. In this regard, one should take note of the following statement by the UNODC:

> "Data on reported cases of corruption suffer from a very **high 'dark figure'**, i.e., the share of bribery that is not reported to or detected by criminal justice institutions. This is because victims or witnesses of corruption are usually less likely to report such cases than other types of crime."[58]

This factor of detection risk is relevant for setting the general **minimum** fine for corruption offences. As a court in the United States noted:

> "Bribery, by its very nature, is a **difficult** crime **to detect**. Like prostitution, it occurs only between consenting parties both of whom have a strong interest in **concealing** their actions. And often, when it involves public corruption as in this case, one of the parties occupies a position of public trust that makes him, or her, an unlikely suspect. In light of these facts, it is **unusual** to **uncover** even one instance of bribery by a public official, let alone twenty-two. This fact takes the case outside of the heartland […]."[59]

2.1.8 Unlimited fines

The above-mentioned factors for increasing fines lead to the question, whether fines should be capped or not. If the cap is rather high, as in Germany (10.8 million €), there might be no need for unlimited fines. However, it is worth noting that the **UK** Bribery Act 2010 foresees even **unlimited** fines for any indictable offence (Section 11(1)b).[60] In the United States, fines are in principle unlimited, but are still tied to a **multiple** (triple) of the bribe, while in practice imprisonment sentencing is the standard response.[61]

2.1.9 "Whichever is greatest"

The United States Sentencing Guidelines foresee the "whichever is greatest"-approach – whether it is the bribe or the damage, the highest value is the determining factor in increasing the sanction:

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[58] UNODC/UNDP, Manual on Corruption Surveys, 2018, page 22, https://www.unodc.org/documents/data-and-analysis/Crime-statistics/CorruptionManual_2018_web.pdf (emphasis by author).

[59] United States of America v Joseph Paulus, 331 F Supp (2d) 727 (E.D. Wis. 2004) 28, at para 16, https://law.justia.com/cases/federal/district-courts/FSupp2/331/727/2421655/ (emphasis by author).

[60] Ferguson, Global Corruption, 2018, page 673, https://commentary.canlii.org/w/canlii/2018CanLIIDocs28.pdf.

[61] So for example the United States, 18 U.S. Code § 3571, https://www.law.cornell.edu/uscode/text/18; for further details see Ferguson, Global Corruption, 2018, page 658, https://commentary.canlii.org/w/canlii/2018CanLIIDocs28.pdf; see critically in this regard Rose-Ackermann, above note 34.

"If the value of the payment, the benefit received or to be received in return for the payment, the value of anything obtained or to be obtained by a public official or others acting with a public official, or the loss to the government from the offense, **whichever is greatest**, exceeded $6,500, increase by the number of levels from the table in §2B1.1 (Theft, Property Destruction, and Fraud) corresponding to that amount."[62]

2.2 Moldova

2.2.1 Criminal fines

a. General level of deterrence

Fines are calculated in **conventional units**, which is a fixed amount equal to 50 MLD (≈2.5 € as per October 2020). The basic minimum of 550 units corresponds to about 1,370 €, while the absolute maximum corresponds to about 50,000 €:

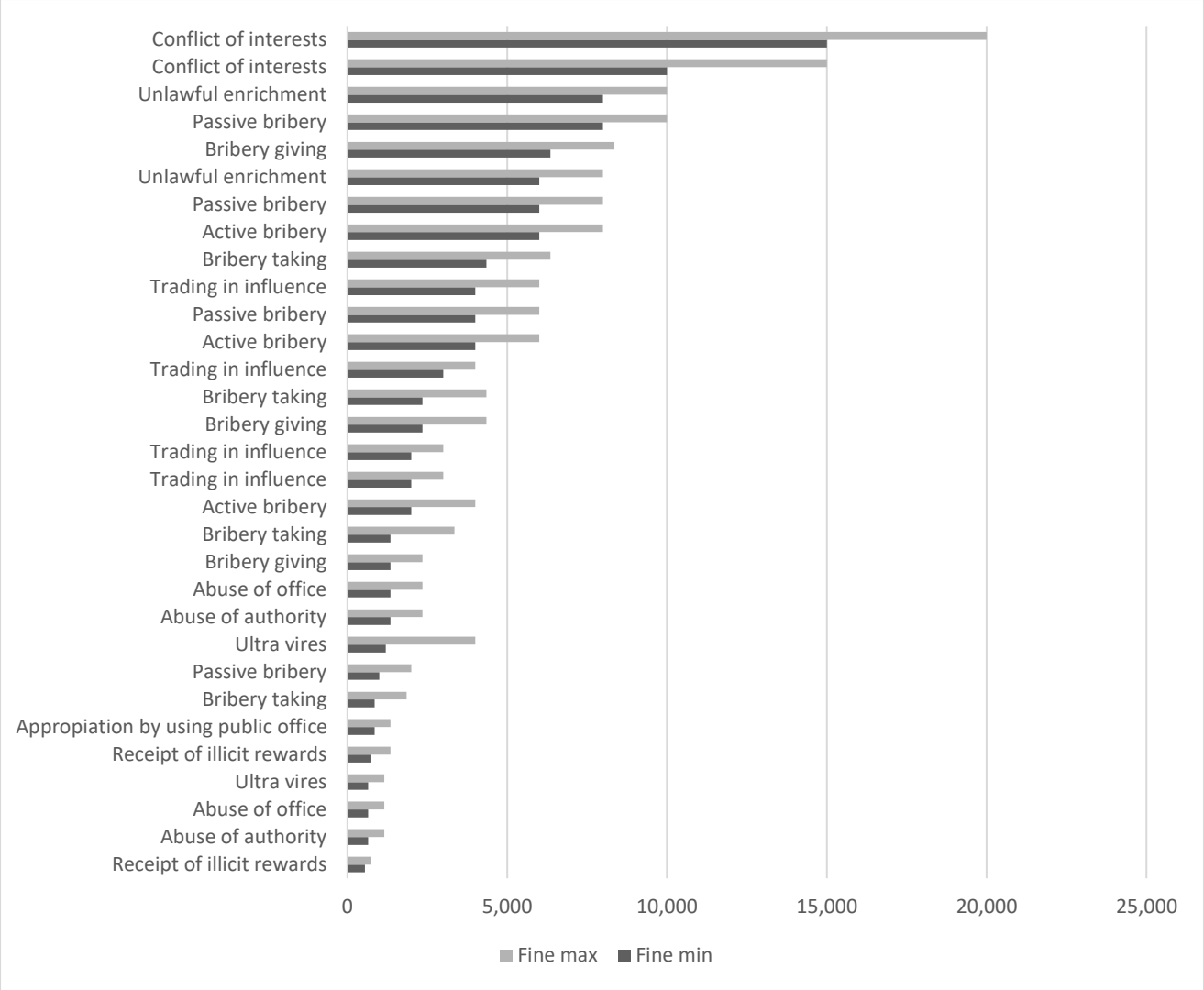
Offence	Form	Article	Fine	
			Min	Max
Ultra vires	Aggravated 2	328 § 2	0	0
Abuse of office	Aggravated 2	335 § 3	0	0
Abuse of authority	Aggravated 2	327 § 3	0	0
Ultra vires	Aggravated 3	328 § 3	0	0
Appropriation by using public office	Aggravated 1	191 § 4	0	0
Appropriation by using public office	Aggravated 2	191 § 5	0	0
Receipt of illicit rewards	Plain	256 § 1	550	750
Ultra vires	Plain	328 § 1	650	1,150
Abuse of office	Plain	335 § 1	650	1,150
Abuse of authority	Plain	327 § 1	650	1,150
Receipt of illicit rewards	Aggravated 1	256 § 2	750	1350
Appropriation by using public office	Plain	191 § 2 d)	850	1350
Bribery taking	Alleviated	333 § 4	850	1,850
Passive bribery	Alleviated	324 § 4	1,000	2,000
Bribery giving	Plain	334 § 1	1,350	2,350
Abuse of office	Aggravated 1	335 § 2	1,350	2,350
Abuse of authority	Aggravated 1	327 § 2	1,350	2,350
Trading in influence	Aggravated 1	326 § 1^1	2,000	3,000
Trading in influence	Plain	326 § 1	2,000	3,000
Bribery taking	Plain	333 § 1	1,350	3,350
Active bribery	Plain	325 § 1	2,000	4,000

[62] United States Sentencing Commission, Guidelines, 2018, page 131, §2C1.1, https://www.ussc.gov/sites/default/files/pdf/guidelines-manual/2014/GLMFull.pdf (emphasis by author); it should be noted though, that these guidelines are for prison terms and not for the calculation of fines, which are governed by 18 U.S. Code § 3571, https://www.law.cornell.edu/uscode/text/18; for further details see Ferguson, Global Corruption, 2018, page 658, https://commentary.canlii.org/w/canlii/2018CanLIIDocs28.pdf.

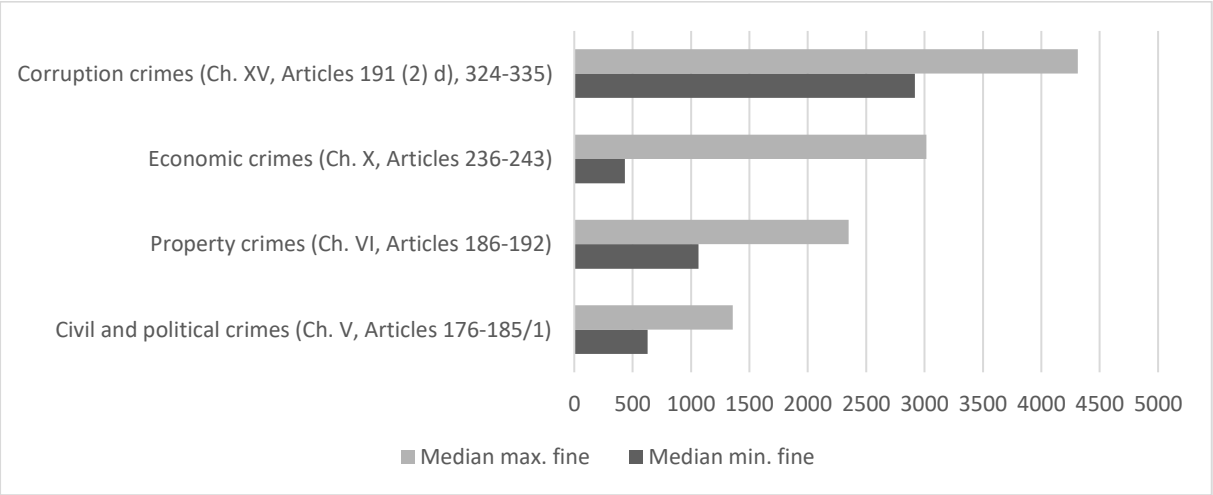
Trading in influence	Aggravated 2	326 § 2	3,000	4,000
Ultra vires	Aggravated 1	328 § 1^{1}	1,200	4,000
Bribery giving	Aggravated 1	334 § 2	2,350	4,350
Bribery taking	Aggravated 1	333 § 2	2,350	4,350
Active bribery	Aggravated 1	325 § 2	4,000	6,000
Passive bribery	Plain	324 § 1	4,000	6,000
Trading in influence	Aggravated 3	326 § 3	4,000	6,000
Bribery taking	Aggravated 2	333 § 3	4,350	6,350
Unlawful enrichment	Plain	330^{2} § 1	6,000	8,000
Passive bribery	Aggravated 1	324 § 2	6,000	8,000
Active bribery	Aggravated 2	325 § 3	6,000	8,000
Bribery giving	Aggravated 2	334 § 3	6,350	8,350
Passive bribery	Aggravated 2	324 § 3	8,000	10,000
Unlawful enrichment	Aggravated 1	330^{2} § 2	8,000	10,000
Conflict of interests	Plain	326^{1} § 1	10,000	15,000
Conflict of interests	Aggravated 1	326^{1} § 2	15,000	20,000

This already shows strong **limits** in **deterrence**: The fines are not linked to the wealth of the offender, nor the benefit intended. Would this seem fair in a case where the intended benefit is higher than the fine? Would this be fair where the offender is wealthy and has large income from capital or assets? Would this really deter an offender, who constantly accumulates wealth from corruption?

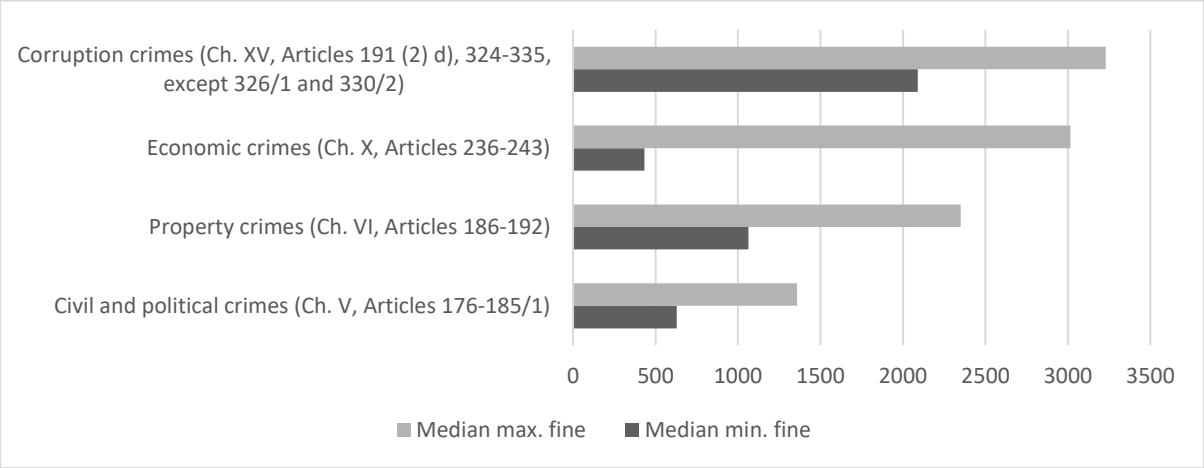
It is important to keep in mind, that the minimum can be even **lowered further** when judges apply mitigating measures (e.g., Articles 79, 80 CC or 364^{1} (8) CPC). Under these provisions, it is possible to lower the sentences below the absolute minimum of 500 units (Article 64 (3) CC). Graphically, shown top down the picture for fines is as follows:



Again, this graph makes the lack of deterrence for most corruption offences visible. Compared with other crimes, fines for corruption offences rank as follows:



However, this picture is misleading: The medium level for all group of corruption crimes is pushed higher due to two outliers – "unlawful enrichment" and "conflict of interests". Their maximum fines are significantly higher within the group of corruption offences. For example, the fines for the classic corruption crime of "passive bribery" in its most aggravated form are only half of this maximum (compare fines set in Articles 324 § 3 and 326[1] § 2 CC). If one takes out the two outliers, the figure is as follows:



The maximum level of fines for corruption hardly exceeds the maximum level of fines for economic crimes. First, one has to wonder if fines for economic crimes are not way too low. Second, corruption offences are primarily committed or involve public officials, and they damage the essence of society: rule of law. This calls for a higher level of fines for corruption offences.

b. Complementing fines

Six corruption crimes foresee only imprisonment (marked in bold) while further six establish fines as complementary sanction (marked in grey). The fines for the remaining crimes are either principal punishments or alternative to imprisonment:

Offence	Form	Article	Fine	
			Min	Max
Ultra vires	Aggravated 2	328 § 2	0	0
Abuse of office	Aggravated 2	335 § 3	0	0
Abuse of authority	Aggravated 2	327 § 3	0	0
Ultra vires	Aggravated 3	328 § 3	0	0
Appropriation by using public office	Aggravated 1	191 § 4	0	0
Appropriation by using public office	Aggravated 2	191 § 5	0	0
Receipt of illicit rewards	Plain	256 § 1	550	750
Ultra vires	Plain	328 § 1	650	1,150
Abuse of office	Plain	335 § 1	650	1,150
Abuse of authority	Plain	327 § 1	650	1,150
Receipt of illicit rewards	Aggravated 1	256 § 2	750	1350

Appropriation by using public office	Plain	191 § 2 d)	850	1350
Bribery taking	Alleviated	333 § 4	850	1,850
Passive bribery	Alleviated	324 § 4	1,000	2,000
Bribery giving	Plain	334 § 1	1,350	2,350
Abuse of office	Aggravated 1	335 § 2	1,350	2,350
Abuse of authority	Aggravated 1	327 § 2	1,350	2,350
Trading in influence	Aggravated 1	326 § 1^1	2,000	3,000
Trading in influence	Plain	326 § 1	2,000	3,000
Bribery taking	Plain	333 § 1	1,350	3,350
Active bribery	Plain	325 § 1	2,000	4,000
Trading in influence	Aggravated 2	326 § 2	3,000	4,000
Ultra vires	Aggravated 1	328 § 1^1	1,200	4,000
Bribery giving	Aggravated 1	334 § 2	2,350	4,350
Bribery taking	Aggravated 1	333 § 2	2,350	4,350
Active bribery	Aggravated 1	325 § 2	4,000	6,000
Passive bribery	Plain	324 § 1	4,000	6,000
Trading in influence	Aggravated 3	326 § 3	4,000	6,000
Bribery taking	Aggravated 2	333 § 3	4,350	6,350
Unlawful enrichment	Plain	330^2 § 1	6,000	8,000
Passive bribery	Aggravated 1	324 § 2	6,000	8,000
Active bribery	Aggravated 2	325 § 3	6,000	8,000
Bribery giving	Aggravated 2	334 § 3	6,350	8,350
Passive bribery	Aggravated 2	324 § 3	8,000	10,000
Unlawful enrichment	Aggravated 1	330^2 § 2	8,000	10,000
Conflict of interests	Plain	326^1 § 1	10,000	15,000
Conflict of interests	Aggravated 1	326^1 § 2	15,000	20,000

All in all, there is incoherence in the overall system, which can only be explained by new offences being added to the Criminal Code with different sanctions (e.g., "unlawful enrichment" and "conflict of interests"). In principle, fines should be available as a complementing sanction for all corruption offences.

c. Intended benefit or damage

To some extent, the Moldovan Criminal Code already measures the level bribes to qualify conduct as criminal or not (Article 324 (4) CC) and to identify aggravated circumstances (Articles 324 (2) d) and 324 (3) b) CC). However, questions remain, whether this approach is comprehensive.

Studies by NAC found that sanctions handed down in the past were **disproportionate** to the benefit. Thus, on average, it was better to take/give higher bribes because one would risk lower fines; and the higher the bribe the lower the fine. For example, in 2015, offenders who took / gave a bribe worth up to 50,000 MLD (2,300 Euros) were fined, on average, 4 times higher than in cases where the bribe was higher. The average value of the bribe was 55,032 MLD, while the average fine applied was lower, i.e., only 43,236 MLD.

This practice is **not** in line with **international standards** (see above at 2.1.3, 2.1.4, 2.1.5). It is thus important for the legislator to limit the discretion of courts and ensure that the intended benefit is proportional in principle to an increase of the fine. The same is true where there is no personal benefit, but still there is an intended or real pecuniary damage from the crime. The higher that damage, the higher the fine should be. In case of both, benefit and damage being relevant, the highest value should count (see above at 2.1.9).

d. Seniority

The Criminal Code already takes into account seniority of the offenders through aggravated forms of the crimes. This is an approach based on two levels of public officials (public person and high-ranking public person, Article 123 (2) and (3), respectively). There could be a much more nuanced approach, as it is found in many criminal codes of other countries. In the particular Moldovan context, one could consider for example the level of decision-making power and managerial level of the public officials as criteria for higher fines.

e. Income and assets

A reform from conventional units towards day fines (see above 2.1.2) seems at the moment a step too big to take. However, income and assets of public officials should be taken into account for determining the fine. Article 64 para. 3 CC states in this regard:

> "The amount of the fine is established depending on the gravity of the offence committed and on the **material status** of the **offender** and its **family**."

There are no statistical indications that this provision is not applied adequately. However, in light of questionable judicial practice, it seems that the Criminal Code should ensure that **higher-income offenders** pay higher fines (above 2.1.2). Thus, where extra income (including potential income from assets) exceeds the average national income, a proportional factor should be deduced and the minimum fine multiplied by the respective factor (for example 1.5 if the individual income is 150% of the national average income). Real incomes should be the basis for such calculations and not declaratory average salaries.

f. Fast payment reduction

Article 64 para. 3^1 CC states:

> "In the case of minor or less serious offences, the convicted person is entitled to pay half of the set fine if it pays it within maximum 72 hours as of the date when the judgment becomes enforceable. […]"

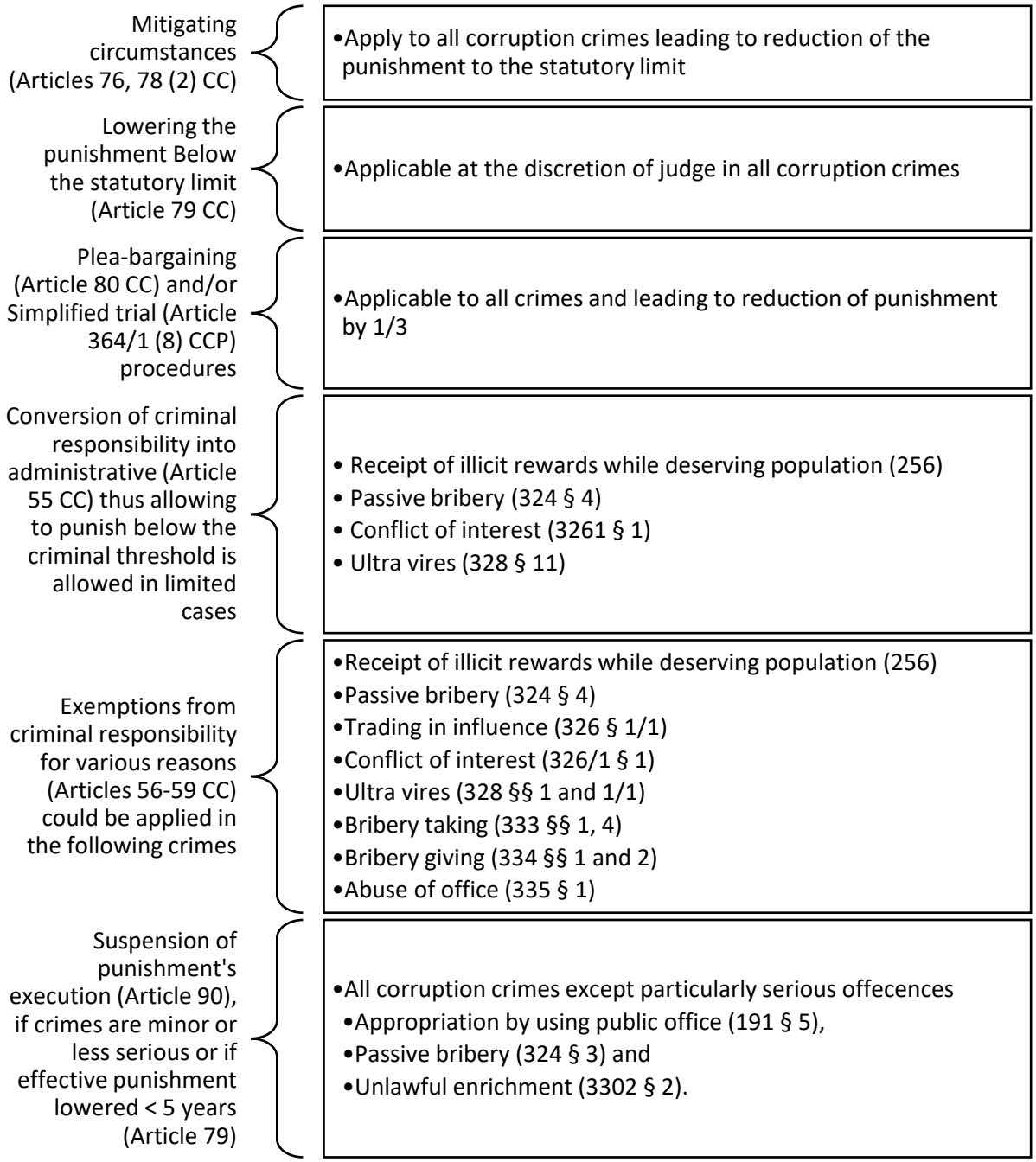
This "cut in half" mitigation technique applies to the following minor and less serious offences:

Offence	Form	Article	**Fine** (uncut)	
			Min.	Max.
Receipt of illicit rewards	Plain	256 § 1	550	750
Ultra vires	Plain	328 § 1	650	1,150
Abuse of office	Plain	335 § 1	650	1,150
Receipt of illicit rewards	Aggravated 1	256 § 2	750	1,350
Bribery taking	Alleviated	333 § 4	850	1,850
Passive bribery	Alleviated	324 § 4	1,000	2,000
Bribery giving	Plain	334 § 1	1,350	2,350
Trading in influence	Aggravated 1	326 § 1^1	2,000	3,000
Bribery taking	Plain	333 § 1	1,350	3,350
Ultra vires	Aggravated 1	328 § 1^1	1,200	4,000
Bribery giving	Aggravated 1	334 § 2	2,350	4,350
Conflict of interests	Plain	326^1 § 1	10,000	15,000

This reduction of 50 % is excessive, in the context of fighting corruption. It sends the message: "If you have to pay a fine for getting rich on corruption, you get a discount for paying it quickly" (which usually is not a problem the "corruption business" is run effectively). Furthermore, there are sufficient mechanisms for the enforcement of fines: The Criminal Code allows payment of a fine in instalments for a period up to 5 years. Unpaid fines can be converted into imprisonment (one-month-detention replaces 100 units). An alternative is community work (60 hours equal 100 units).

g. Mitigation measures

The Criminal Code regulates the individualisation of punishments in Chapter VIII and their alleviated execution in Chapter IX. The below figure illustrates how the mitigation measures could apply in determining the punishment for corruption crimes:



Only three aggravated forms are classified as particularly serious and thus, are exempt from mitigation measures:

Offence	Form	Article	Type
Appropriation by using public office	Aggravated 2	191 § 5	Particularly serious
Passive bribery	Aggravated 2	324 § 3	
Unlawful enrichment	Aggravated 1	330^2 § 2	

In all its studies of judicial practice since 2010,[63] the NAC identified ways by which judges mitigated sanctions for corruption crimes, both imprisonment and fines:

- Excessive use of mitigating circumstances;
- Exemption from criminal responsibility, applying sanctions for corelated administrative offence;
- Exemption from criminal responsibility or lowering the punishment when the situation has changed;
- Reduction of punishments below the limits provided by law;
- Postponing the execution of sentence;
- Use of special simplified procedure of adjudication and plea-bargaining.

The legislator should prevent abuse of these mitigation schemes to some extent by either **capping** the reduction of fines at the minimum or even **excluding** fines for corruption offences from the mitigation scheme altogether (while leaving mitigation schemes applicable for imprisonment sanctions).

2.2.2 Administrative fines

a. General level of deterrence

The domestic legislation draws a clear distinction between the prejudicial character of a crime and an administrative misdemeanour. The latter have less prejudicial character in comparison with the criminal offences.

Offence	Form	Article	**Fine** (units)	
			Max.	**Min.**
Non-disclosure of corruption act	Plain	314	30	90
Disclosure of a whistle-blower identity	Plain	314[1]	30	90
Receipt of illicit rewards	Plain	315	60	300
Abuse of authority	Plain	312	60	300
Ultra vires	Plain	313	60	300
Protectionism	Plain	313[1]	72	150

[63] NAC, Studies of criminal case-files in corruption cases from 1 January 2010 to 30 June 2012 (2013), https://cna.md/libview.php?l=ro&idc=117&id=205&t=/Studii-si-analize/Studii-despre-coruptie/Studiu-privind-dosarele-de-coruptie; NAC, Study on court decisions on corruption offenses, adopted in 2013-2017 (2017), https://cna.md/doc.php?l=ro&idc=117&id=1817&t=/Studii-si-analize/Studii-despre-coruptie/Studiu-privind-hotararile-judecatoresti-pe-infractiunile-de-coruptie-adoptate-in-anii-2013-2017; NAC, Study on the sentences on corruption acts adopted by the courts during 2018 (2019), https://cna.md/public/files/Studiu_privind_sentintele_pe_actele_de_corupie_adoptate_de_instantele_de_judecat_in_perioada_2018_1.pdf; NAC, Strategic analysis of the sentences adopted by the courts in 2019 on criminal cases for corruption and corruption related offences and on the profile of the subject of corruption offenses (2020), https://cna.md/public/files/Studiu_sentinte2019.pdf.

Conflict of interest	Plain	313^2	120	180
Incompatibilities	Plain	313^4	120	180
Non-enforcement of Law on Declaration of assets	Plain	313^5	120	180
Wrongful Declaration of revenues	Aggravated	330^2	60	90

As the Criminal Code, the CAO sets up conventional units for calculation of the fines, which is equal with the amount provisioned by the criminal legislation (50 MLD). The minimum fine thus corresponds to about 75 €, the maximum fine to about 750 €. In light of some of the rather serious offences, such as receipt of illicit rewards or wrongful declaration, it seems apparent that a cap equalling 750 € is strikingly **low**.

In comparison with the criminal provisions, the fines in the CAO distinguish between ordinary **citizens** and **public servants**. The CAO increases the maximum sum of a fine for public servants up to 1,500 units, while any other physical person might be fined with no more than 500 units (Article 34 (2) CAO).

However, the fines for **corruption** offences are significantly below the maximum of 1,500 conventional units for public servants. Only one misdemeanour committed by public official carries this maximum sentence – "the payment of salaries without their inclusion in accounting documents" (Article 55^2 CAO). Given the highly detrimental nature of corruption offences, the general level of fines is evidently too low.

b. Intended benefit or damage

In this regard, the same rationale applies as with criminal fines: The fine needs to **correlate** to the size of the benefit and/or the damage intended or occurred.

c. Fast payment reduction

The only mitigation applicable to administrative fines is the option to pay it in 3 days after getting notified of the administrative decision. In this case, the fine is cut in half (Article 34 (3) CAO). In case of failing to pay, irrespective of whether in good or bad faith, the enforceability of administrative fines is guaranteed by a range of options. The first is doubling the sum but not exceeding the maximum amount set up by punishment in the special part of CAO. The second option is to convert the fine into a prohibition of certain activities for at least 6 months. And, lastly, the CAO provides for the same system of converting unpaid fines into either community work (1 day per 1 unpaid unit) or administrative arrest (1 day per 2 unpaid units). These provisions mirror the mechanism of the Criminal Code, except that the CAO is more flexible: The Criminal Code draws a clear line between *mala* and *bona fides* failures of paying fines and thus offers greater deterrence. As noted with the criminal mitigation schemes, the cut-in-half reduction is **excessive** and should be abolished for full deterrence of the fines.

2.2.3 Proposal

The following recommendations are specifically drafted for corruption and corruption-related offences. Whether these or similar recommendations should apply to other criminal offences is beyond the scope of this Study.

a. Criminal

Recommendation 1: *The **maximum** of fines for all corruption crimes should be increased to the level of the crimes of unlawful enrichment and conflict interests (Articles 326[1] and 330[2] CC).*

Recommendation 2: ***Aggravated forms** of corruption crimes, currently punished only by imprisonment, should include fines as complementing punishments, up to the level as per Recommendation 1 (Articles 328 § 2, 335 § 3, 327 § 3, 328 § 3, 191 § 4, 191 § 5 CC).*

Recommendation 3: *Criminal fines should be **proportional** to the intended or received **benefit**. They should reflect the principle "the higher the amount, the higher the fine" and rely on the value of anything obtained or to be obtained by a public official or others acting with or on their behalf, or the potential or real loss from the offense, whichever is greatest. To this end, a special provision in the General Part of the Criminal Code (Article 64) applying to respective corruption offences could foresee that minimum fines be set as a multiple of the previous greatest value, or sequenced by a larger number of thresholds as is currently foreseen (mostly 1 or 2 alternative thresholds only). If no such value can be ascertained because of the specifics of the case, the fine is assessed by the general criteria within the bandwidth foreseen in the special part.*

Recommendation 4: *Criminal fines should be **proportional** to the **income** of the public official, according to the principle "the higher the income of the official, the higher the fine". Income should not be limited to the official or declared salary, but take into account real wealth and other benefits received by the offender through third parties. To this end, a special provision in the General Part of the Criminal Code (Article 64) applying to corruption offences could foresee that minimum fines should be multiplied by a factor depending on the extra income of the official. Furthermore, procedural law should foresee a mandatory step for prosecution to collect evidences and for judges to assess the real income*

of the offender. The mechanism under this Recommendation 4 should apply cumulatively to the one in Recommendation 3.

<u>Recommendation 5:</u> *The reduction for **fast payment** of fines ("cut in half", Article 64 (3)[1] CC) should be abolished.*

<u>Recommendation 6:</u> *In cases of **plea-bargaining** and special simplified trial procedures (Article 80 CC and Article 364/1 (8) CCP), the optional reduction of punishment by third should be capped by the minimum levels of fines provided by the Special Part of the Criminal Code. In the alternative, any reduction of fines should be excluded at all from corruption offences, while it may still remain applicable to imprisonment.*

<u>Recommendation 7:</u> *The option of **lowering any punishment below the minimum limits** (Article 79 CC), including fines, should not extend to corruption offences, as it gives judge excessive discretion undermining dissuasive effect.*

b. Administrative

<u>Recommendation 8:</u> *The **maximum** of fines for all corruption administrative offences should be increased, at least, to the level of general administrative fine threshold – 1500 conventional units for public officials (Article 34 (2) CAO). It would be useful to elevate them to the minimum level of criminal fines for corresponding criminal offences (for example, "conflict of interests" in CAO would be sanctioned by maximum fine that is the minimum in the Criminal Code for the offence with similar elements).*

<u>Recommendation 9:</u> *Administrative fines should be **proportional** to the intended or received **benefit.** The model proposed in Recommendation 3 can be applicable mutatis mutandis to the CAO (Article 34 CAO would follow the reasoning of new Article 64 CC).*

<u>Recommendation 10:</u> *The reduction for **fast payment** of fines ("cut in half", Article 34 (3) CAO), should be abolished for corruption administrative offences. Recommendation 5 applies mutatis mutandis.*

3 Disqualification from public service

3.1 International standards

3.1.1 Scope of "public service"

The **UNCAC** indicates in Article 30 para. 7 that State Parties should consider disqualification of persons convicted of corruption from holding public office for a period of time (emphasis by author):

> "Where warranted by the gravity of the offence, each State Party, to the extent consistent with the fundamental principles of its legal system, shall consider establishing procedures for the **disqualification**, by court order or any other appropriate means, for a period of time determined by its domestic law, of persons convicted of offences established in accordance with this Convention from: (a) **Holding public office**; and (b) Holding office in an enterprise owned in whole or in part by the State."

The Technical Guide on the UNCAC explains the policy rationale of this sanction:

> "States Parties may take into account that the measures are appropriate ancillary sanctions as an essential component of public office is **trust** and **integrity**. States Parties may also bear in mind that such measures may be effective means to deter corrupt behaviour and prevent corruption in the future by **sending a clear signal** of determination in fighting corruption to other public officials and to the public."[64]

The UNCAC Implementation Review Mechanism reports as "successes and good practices":

> "It was noted with appreciation that one State party undertakes positive efforts to ensure severe consequences for public officials who engage in corruption, including the possible **forfeiture** of the public sector contribution to the convicted official's pension fund."[65]

Furthermore, in "Corruption: Glossary of International Criminal Standards", the **OECD** notes:

> "Corrupt officials could be sanctioned through disciplinary penalties, and removal or **suspension** from office."[66]

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[64] UNODC, Technical Guide to the UNCAC (2009), page 90, https://www.unodc.org/documents/corruption/Technical_Guide_UNCAC.pdf (emphasis by author).

[65] UNODC, State of implementation of the United Nations Convention against Corruption (2017), page 107, https://www.unodc.org/documents/treaties/UNCAC/COSP/session7/V.17-04679_E-book.pdf (emphasis by author).

[66] Of 2007, page 40, http://www.oecd.org/corruption/anti-bribery/39532693.pdf (emphasis by author).

Jurisprudence by the **European Court of Human Rights** is utterly strict on disqualifying corruption offenders. The Court even includes the **highest office** a democratic society can offer into disqualification: being an elected member of parliament. According to the Court,

> "the disenfranchisement of a person barred from public office as an ancillary penalty pursues the **legitimate aim** of the proper functioning and preservation of the democratic regime."[67]

The **OSCE** points out the following good example for "Building and Maintaining an Ethical Public Administration":

> "In Lithuania, the 1995 Law on Civil Service sets out the rights, duties and main principles of the civil service as well as provisions for the prevention of corruption. It **disqualifies** those convicted of major crimes or crimes against the civil service and those who have been dismissed from the civil service for misconduct in office within the last 10 years."[68]

All in all, it would be wrong under international standards to limit the disqualification of corruption offenders to **certain** public **positions**: The gap in disqualification would harm the "trust and integrity" which are an "essential component of public office".[69] Thus, the wording in various criminal codes is "all-inclusive":

> Spain: "specific disqualification from **any** public employment or post for a period of three to six years".[70]
>
> United Kingdom: "be liable to be adjudged incapable of being elected or appointed to **any** public office for seven years from the date of his conviction, and to forfeit any such office held by him at the time of his conviction [...]; and in the event of a second conviction for a like offence he shall, in addition to the foregoing penalties, be liable to be adjudged to be **for ever incapable** of holding **any** public office."[71]

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[67] Venice Commission, Opinion No. 807/2015, CDL-AD(2015)036, Report on Exclusion of Offenders from Parliament, § 20, referencing ECtHR M.D.U. contre l'Italie, 58540/00, Decision of 28 January 2003, http://hudoc.echr.coe.int/eng?i=001-44046 (French; emphasis by author).

[68] OSCE, Best practices in combating corruption (2004), page 64, https://www.osce.org/eea/13738 (emphasis by author).

[69] UNODC, Technical Guide to the UNCAC (2009), page 90, https://www.unodc.org/documents/corruption/Technical_Guide_UNCAC.pdf.

[70] Spain, Article 420 Criminal Code, Greco Eval IV Rep (2013) 5E, https://www.coe.int/en/web/greco/evaluations (emphasis by author).

[71] Public Bodies Corrupt Practices Act 1889, Section 2, https://www.legislation.gov.uk/ukpga/Vict/52-53/69/section/2/enacted (emphasis by author).

> United States, Federal level: "disqualified from holding **any** office of honor, trust, or profit under the United States."[72]
>
> United States, California: "Every executive or ministerial officer, employee, or appointee of the State of California, a county or city therein, or a political subdivision thereof, who asks, receives, or agrees to receive, any bribe, [...] in addition thereto [fine/imprisonment], forfeits his or her office, employment, or appointment, and is **forever** disqualified from holding **any** office, employment, or appointment, in this state."[73]

As for the **European Union**, it should be noted that it supports through its mutual recognition programme "to recognise and enforce disqualification throughout the Union".[74]

3.1.2 Administrative offences

Prohibition from public service is not limited to classic criminal offences such as bribery. The Council of Europe's **Venice Commission** calls for dismissal of public officials in the case of even only violating administrative asset declaration obligations:

> "In the opinion of the Venice Commission the requirement to disclose assets and revenues should be associated with a sanction which is serious enough to serve the purpose of deterrence. While an exception may be made for minor or unintended omissions in the declarations, in principle the **failure to declare** assets is a sufficiently serious violation to give rise to a **dismissal**."[75]

It should be noted that the Commission made this observation in the context of judges who hold – aside from lawmakers – the most protected public office a democracy can offer.[76] It is also worth noting, that **GRECO** recommended in one case

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[72] http://www.law.cornell.edu/uscode/text/18/201 (emphasis by author).

[73] California Penal code article 68, http://www.leginfo.ca.gov/cgi-bin/calawquery?codesection=pen (emphasis by author).

[74] Green Paper on the approximation, mutual recognition and enforcement of criminal sanctions in the European Union, COM(2004)334 final, https://ec.europa.eu/transparency/regdoc/rep/1/2004/EN/1-2004-334-EN-F1-1.Pdf, page 52.

[75] CDL-AD(2015)042 at no. 39, https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2015)042-e (emphasis by author).

[76] See only UN Basic Principles on the Independence of the Judiciary of 1985, no. 11 and 12, https://www.ohchr.org/en/professionalinterest/pages/independencejudiciary.aspx: "11. The term of office of judges, their independence, security, adequate remuneration, conditions of service, pensions and the age of retirement shall be adequately secured by law. 12. Judges, whether appointed or elected, shall have guaranteed tenure until a mandatory retirement age or the expiry of their term of office, where such exists."

> "to take the necessary steps to ensure that various additional penalties, particularly ineligibility, can be applied in corruption cases even as regards **lesser offences** and circumstances […]."[77]

Therefore, as an example from European Union, in **France** a court can order a ban from public function ("fonction publique") in case of violating asset declaration obligations.[78]

3.1.3 Mandatory nature

One has to distinguish two aspects:

- A mandatory ban on exercising public functions as a **penalty**;
- The absence of a corruption related conviction as a prerequisite for entering **public service**.

In essence, both have the **same effect**: The respective person cannot work in the public sector. However, the penalty usually has a wider reach: It also concerns electoral functions or even participation in public tenders.[79]

As noted above, the **Venice Commission** and **GRECO** particularly emphasise the necessity of dismissal and disqualification even in case of "lesser offences" (see above at 3.1.2). As for country examples, the **United States** legislation is particularly strict on the ban from public functions being an automatic and mandatory sanction for corruption (see above at 3.1.1). In **Ukraine**, the ban is mandatory, if there is more than one corruption related administrative offence within one year:

> "The actions provided for in part one or two, committed by a person who during **one year** was subjected to an administrative penalty for the **same violations**, – entail […] deprivation of the right to hold certain positions or engage in certain activities for a period of one year."[80]

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[77] Greco Eval III Rep (2007) 6E, GRECO Luxembourg III Recommendation vi, https://www.coe.int/en/web/greco/evaluations (emphasis by author).

[78] Art. 26 para. 1 Law 2013-907, https://www.legifrance.gouv.fr/loda/id/JORFTEXT000028056315/2020-10-04/ (in French); the ban can be up to 5 years or indefinitely, Art. 131-27 Code penal, https://www.legifrance.gouv.fr/loda/article_lc/LEGIARTI000028311887/2020-10-04/ (in French).

[79] See above at 3.1.1.

[80] Standard formulation for all "Administrative Offenses Related to Corruption" of Chapter 13-A, Code of Ukraine on Administrative Offenses, https://zakon.rada.gov.ua/laws/show/80731-10#Text (in Ukrainian; emphasis by author). The offences are in particular: Article 172-4; Violation of restrictions on combination and combination with other activities, Article 172-5. Violation of statutory restrictions on receiving gifts; Article 172-6. Violation of financial control requirements; Article 172-7. Violation of the requirements for the prevention and settlement of conflicts of interest; Article 172-8. Illegal use of information that has become known to a person in connection with the performance of official or other statutory powers; Article 172-8-1. Violation of the restrictions

As for entering the civil service, the absence of corruption related convictions is a standard feature of legislation. For example, in **Germany**, civil servants lose their status as such and all related benefits, and – without any explicit prohibition time period – would de facto be banned for life once being convicted of (simple) bribery: A corruption conviction would regularly render candidates "unworthy" of another appointment under federal statutes.[81] As a regional example, one can note that in **Ukraine**, any person may not enter public service,

> "if he/she has been subjected to an **administrative** penalty for an offense related to corruption – within **three years** from the date of entry into force of the relevant court decision".[82]

3.2 Moldova

3.2.1 General level of deterrence

Both legislations, criminal and administrative, include the disqualification as a complementary form of punishment. The highest time of prohibition is set to be no more than 15 years for aggravated forms of corruption offences (Article 65 (2) CC) and the lowest is no less than 3 months in administrative misdemeanours (Article 35 (3) CAO). Its calculation starts from the time of full execution of imprisonment or the day when the conviction with fines becomes final. In case the imprisonment is suspended, the disqualification could be ordered to apply during the probation period (Article 90 (5) CC). In cases of administrative punishments, while the CAO is silent, it is the general understanding that disqualification starts once the judicial decision becomes final.

The following table illustrates the levels of disqualifications in both criminal and administrative offences. It is striking to note that a high number of criminal and administrative offences do not carry the disqualification punishment (marked in bold):

Offence	Form	Article	Disqualification	
			Min.	Max.
Criminal				
Appropriation by using public office	Aggravated 1	191 § 4	0	0
Appropriation by using public office	Aggravated 2	191 § 5	0	0

established by law after the termination of the powers of a member of the National Commission for State Regulation of Energy and Utilities.

[81] § 41 and § 7 Federal Civil Service Law, http://www.gesetze-im-internet.de/bbg_2009/BJNR016010009.html (German).

[82] Article 19 para. 2 no. 5 of the Law of Ukraine of December 10, 2015 No. 889-VIII About public service (as amended on 4 March 2020), https://zakon.rada.gov.ua/laws/show/889-19#Text (in Ukrainian; emphasis by author).

Receipt of illicit rewards	Plain	256 § 1	0	0
Receipt of illicit rewards	Aggravated 1	256 § 2	0	0
Active bribery	Plain	325 § 1	0	0
Active bribery	Aggravated 1	325 § 2	0	0
Active bribery	Aggravated 2	325 § 3	0	0
Trading in influence	Plain	326 § 1	0	0
Trading in influence	Aggravated 1	326 § 1^1	0	0
Trading in influence	Aggravated 2	326 § 2	0	0
Trading in influence	Aggravated 3	326 § 3	0	0
Bribery giving	Plain	334 § 1	0	0
Bribery giving	Aggravated 1	334 § 2	0	0
Bribery giving	Aggravated 2	334 § 3	0	0
Bribery taking	Alleviated	333 § 4	0	3
Appropriation by using public office	Plain	191 § 2d)	0	5
Passive bribery	Alleviated	324 § 4	0	5
Abuse of authority	Plain	327 § 1	2	5
Ultra vires	Plain	328 § 1	2	5
Ultra vires	Aggravated 1	328 § 1^1	2	5
Bribery taking	Plain	333 § 1	2	5
Abuse of office	Plain	335 § 1	2	5
Abuse of office	Aggravated 1	335 § 2	2	5
Conflict of interests	Plain	326^1 § 1	5	7
Bribery taking	Aggravated 1	333 § 2	5	7
Bribery taking	Aggravated 2	333 § 3	5	7
Passive bribery	Plain	324 § 1	5	10
Passive bribery	Aggravated 1	324 § 2	7	10
Conflict of interests	Aggravated 1	326^1 § 2	5	10
Abuse of authority	Aggravated 1	327 § 2	5	10
Ultra vires	Aggravated 2	328 § 2	5	10
Passive bribery	Aggravated 2	324 § 3	10	15
Abuse of authority	Aggravated 2	327 § 3	10	15
Ultra vires	Aggravated 3	328 § 3	10	15
Unlawful enrichment	Plain	330^2 § 1	10	15
Unlawful enrichment	Aggravated 1	330^2 § 2	10	15
Abuse of office	Aggravated 2	335 § 3	10	15
Administrative				
Non-disclosure of corruption act	Plain	314	0	0
Disclosure of whistle-blower identity	Plain	314^1	0	0
Protectionism	Plain	313^1	0	0
Wrongful revenue declaration	Aggravated	330^2	0	0
Receipt of illicit rewards	Plain	315	0.3	1
Abuse of authority	Plain	312	0.3	1
Ultra vires	Plain	313	0.3	1
Conflict of interest	Plain	313^2	0.3	1
Incompatibilities	Plain	313/4	0.6	1
Non-enforcement of Law on Declaration of assets	Plain	313/5	0.6	1

It is simply inacceptable by international standards that someone who commits aggravated criminal offences of corruption, or, who on an administrative level does not disclose a corruption act, or exposes a whistle-blower would be considered for continuing in public service.

3.2.2 Scope of "public service"

The disqualification is strictly limited to the position in which the offender perpetrated a corruptive act. The criminal and administrative legislation prohibit to hold a particular position or to exercise a specific activity that has been used in criminal activity or misdemeanour. Articles 65 (1) CC and 35 (1) CAO, respectively, read as follows (emphasis by author):

> "Deprivation of the right to hold certain positions or to exercise a certain activity is a prohibition to hold a position or to exercise an activity of the **nature** of the one **used** by the convicted person **to commit the crime**."

> "Deprivation of the right to carry out a certain activity consists in temporary prohibition imposed to a physical person to carry out a particular activity. The sanction of deprivation of the right to carry out a certain activity may be applied if the **activity** was **used** to **commit the contravention** or if the contravention was in itself a violation of the rules to carry out this activity."

It appears that the legislation construes this type of punishment narrowly. As a result, the disqualified offender could claim his/her right to apply to other, unrelated public positions.

This is **not** in line with international standards. The prevention of corruption presupposes exclusion from holding any public service, at large. This aside, it is simply inacceptable to the public, that someone accepting bribes, say as a "policeman" or a "judge", would be able to re-enter public service in another capacity, say as a "tax inspector" or a "teacher".

3.3 Proposal

The following recommendations are designed specifically for corruption and corruption-related offences. Whether these or similar recommendations should apply to other criminal offences is beyond the scope of this Study.

3.3.1 Criminal

Recommendation 11: *As a basic principle, the prohibition from public service should be comprehensive. To this end, in all corruption offences, the expression*

*"the deprivation of the right to hold **certain** public positions" should be replaced by "the deprivation of the right to hold **any** public position". The term should be defined in the General Part of the Criminal Code, in a new paragraph, say to Article 65 (1)[1] CC, so as to include special prohibition in corruption offences. It could be worded as prohibition to hold "any public office, public employment, or public appointment in the Republic of Moldova, including holding office in an enterprise owned in whole or in part by the State".*

Recommendation 12: Disqualification should apply to all corruption offences, regardless of aggravated or specific forms of corruption (e.g., appropriation by using public office, Article 191 (4) and (5) CC or trading in influence (Article 326 CC)).

Recommendation 13: In order to underpin the effectiveness of enforcement of fines and restitution, the disqualification – starting immediately once the judgment is final – should only begin to be counted against the minimum period for disqualification once all possible damages and the entire fine are paid to the State.

3.3.2 Administrative

*Recommendation 14: As a basic principle, the prohibition from public service should be comprehensive. To this end, in so far as the Recommendation 11 can be applicable to the administrative offences, the disqualification should refer to "**any** public position". The term could be defined mutatis mutandis in the General Part of the CAO (Article 35), in a new paragraph, in the way recommended for the Criminal Code.*

Recommendation 15: Disqualification should apply to all corruption administrative offences provisioned by Special part of CAO (see mutatis mutandis recommendation 12).

Recommendation 16: In order to underpin the effectiveness of enforcement of fines and restitution, the period for disqualification should start to count only once all possible damages and the entire fine is paid to the State (while the disqualification as such would begin immediately once the judgment is final).

Part 2: Anti-corruption courts/chambers

4 International standards

4.1 UNCAC

The UNCAC as such contains no explicit provision on anti-corruption courts. The obvious reason is the following:

> "Specialised anti-corruption courts are a relatively **new phenomenon**. Although the oldest such court, that of the Philippines, was established in the 1970s, none of the other specialised anti-corruption courts identified in this study began operation prior to 1999, and most of them were established within the **last decade** (often concurrently with, or following, the establishment of a specialised anti-corruption agency)."[83]

However, the UNCAC Implementation Review Mechanism has commanded anti-corruption courts as follows:

> "A further measure **favoured** by reviewers was the appointment of judges specialized in handling corruption and financial and economic crimes and the establishment of special anti-corruption courts. For example, in one State with a specialized court that has jurisdiction over one particular corruption-related offence (illicit enrichment) only, it was recommended that its **jurisdiction** be **expanded** in order to cover all offences established in accordance with the Convention. Indeed, such courts can serve as a way of reducing a backlog of cases and provide a **good opportunity** for judicial officers to familiarize themselves with the technical details of corruption cases and deal with their intricacies promptly, effectively and efficiently."[84]

Under "Successes and good practices", the UNCAC Implementation Review Mechanism underlines that anti-corruption courts can be an effective complement to anti-corruption agencies:

> "In one State party, the establishment and operation of a dedicated agency was specifically noted as the primary reason for success in addressing corruption in the country. […] In the same State party, the creation of a separate **anti-**

[83] U4 Issue 2016:7, Specialised anti-corruption courts: A comparative mapping, page 7, https://www.u4.no/publications/specialised-anti-corruption-courts-a-comparative-mapping.pdf (emphasis by author).

[84] UNODC, State of implementation of the United Nations Convention against Corruption (2017), page 166, https://www.unodc.org/documents/treaties/UNCAC/COSP/session7/V.17-04679_E-book.pdf (emphasis by author).

> **corruption court**, which has proved an **effective partner** for the agency, in addition to specialized judges in the supreme court, was noted as a further **positive measure**. Plans for additional courts, one for each region of the country, are currently under way."[85]

4.2 GRECO

GRECO noted in the case of Slovakia the success of the Special Court for Corruption and other Serious Crimes:

> "During the on-site visit, it was repeatedly stressed that the existence of a chain of specialist institutions and practitioners in the police, prosecution and judiciary (who are subjected to **particular screening measures**) has greatly reduced 'leaks' at the various stages of criminal proceedings […]. The GET [GRECO Evaluation Team] noted with interest the existence of a **Special Court for Corruption** and other Serious Crimes, which had reportedly led to an **increase** in the number of cases processed and a more **harmonised** approach in dealing with corruption cases."[86]

4.3 Venice Commission

There have been various opinions by the Venice Commission pointing into the direction of anti-corruption courts. According to the Commission

> "a State is under a positive obligation to ensure that its **criminal system** is **effective** in the fight against serious forms of crime, that criminal law constitutes a strong deterrent to commit such offences, and that perpetrators of such offences do not enjoy impunity".[87]

The Commission had to review for the first time a draft law on an anti-corruption court with regard to Ukraine. All in all, the Commission welcomed the establishment of such a court as follows:

> "The key components of draft law No. 6011 should be maintained, namely the establishment of an independent HACC [**High Anti-Corruption Court**] and appeal instance whose judges are of **impeccable reputation** and are selected

[85] UNODC, State of implementation of the United Nations Convention against Corruption (2017), page 166, https://www.unodc.org/documents/treaties/UNCAC/COSP/session7/V.17-04679_E-book.pdf (emphasis by author).

[86] Greco Eval III Rep (2007) 4E, at § 101, https://www.coe.int/en/web/greco/evaluations (emphasis by author).

[87] Venice Commission, Opinion on amendments to the criminal code and the criminal procedure code of Romania, CDL-AD(2018)021, para. 31, https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2018)021-e (emphasis by author).

> on a competitive basis in a transparent manner; temporarily, **international organisations** and donors active in providing support for anti-corruption programmes in Ukraine should be given a crucial role in the body which is competent for **selecting** specialised anti-corruption **judges**, similar to the role envisaged for them indraft law No. 6011; the **jurisdiction** of the HACC and of the appeal instance should correspond to that of the National Anti-Corruption Bureau (NABU) and of the Special Anti-Corruption Prosecutor's Office (SAPO), subject to the requirement that the courts' jurisdiction be precisely defined by law."[88]

The Commission acknowledged that anti-corruption courts can be a **legitimate exception** to the principle by the Consultative Council of European Judges (**CCEJ**) that

> "specialist judges and courts should only be introduced when necessary because of the complexity or specificity of the law or facts and thus for the proper administration of justice."[89]

In this context, the Commission underlined the recommendation by **GRECO** to entrust

> "the handling of high-profile corruption cases – which often imply complex financial transactions or elaborate schemes – to specialised judges […]."[90]

However, in contrast to welcoming a separate anti-corruption court (consisting of such specialised judges), the Commission was quite critical of the introduction of **specialised judges** being embedded into the ordinary court structure:

> "The Commission cannot see how the appointment of specialised judges at all **general** local **courts**, courts of appeal and the Supreme Court could be justified and be implemented in practice. […] [T]he absence of any specific safeguards in the selection procedure and of any specific measures to protect the judges' independence and safety is highly unsatisfactory."[91]

The International Monetary Fund (**IMF**), relying on the proposal in the Venice Commission report, made the participation of international experts in the process of selecting judges to

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[88] Opinion No. 896/2017, CDL-AD(2017)020, on the Draft Law on Anti-Corruption Courts, page 20, https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2017)020-e (emphasis by author).

[89] Consultative Council of European Judges (CCEJ), Opinion (2012) No. 15 on the Specialisation of Judges, Conclusion iii, https://rm.coe.int/ccje-opinion-2012-no-15-on-the-specialisation-of-judges/16809f0078 (emphasis by author).

[90] Greco Eval 4 Rep (2016) 9 (Ukraine), at § 120, https://www.coe.int/en/web/greco/evaluations (emphasis by author).

[91] Opinion No. 896/2017, CDL-AD(2017)020, on the Draft Law on Anti-Corruption Courts, page 20, https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2017)020-e (emphasis by author).

the anti-corruption court a condition for the release of assistance funds.[92] The integrity of judges is key to the Venice Commission, thus it supports extraordinary measures such as to vet judges and prosecutors: Measures that are "not only justified" but are "necessary [...] to protect itself [the State] from the scourge of corruption which, if not addressed, could completely destroy its judicial system".[93]

4.4 OSCE

As early as 2004, the OSCE identified anti-corruption courts as an effective remedy for largely corrupt judiciaries. In the context of the success story of Hong Kong, the OSCE notes:

> "Another major feature has been that, from the outset, Hong Kong had a **judiciary of integrity**, which meant that cases were properly heard and processed. In the absence of the rule of law, the experiment would almost certainly have had very different results. This provides the caution that a country intending to follow the Hong Kong path needs also to focus very sharply on the integrity needs of its judiciary. […] The creation of specialized 'anti-corruption courts' or 'integrity courts' would be another possibility. Judges and support staff **carefully selected** for their **integrity** would be selected for such courts."[94]

5 Foreign examples

5.1 Overview

As stated earlier, specialised anti-corruption courts are a relatively new phenomenon. With the exception of the court of the Philippines, none began operation prior to 1999, and most of them were established within the **last decade**.[95] U4 identified the following models of anti-

[92] U4 Brief 2020:3, Ukraine's High Anti-Corruption Court – Innovation for impartial justice, page 2, https://www.u4.no/publications/ukraines-high-anti-corruption-court.pdf.

[93] CDL-AD(2019)020-10, para. 39, https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2019)020-e, with reference to CDL-AD(2015)045, Interim Opinion on the Draft Constitutional Amendments on the Judiciary of Albania, para. 8, https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2015)045-e.

[94] OSCE, Best practices in combating corruption (2004), page 166, https://www.osce.org/eea/13738 (emphasis by author).

[95] For a timeline see U4 Issue 2016:7, Specialised anti-corruption courts: A comparative mapping, page 8, https://www.u4.no/publications/specialised-anti-corruption-courts-a-comparative-mapping.pdf.

corruption courts[96] in 2015, as amended by further developments until August 2020 (amendments marked by year of introduction):

Model	Countries	∑
Individual judges: Judges are designated or appointed as special anti-corruption judges on general trial courts; the usual appeals process remains in place.	Bangladesh, Kenya, Mexico (2019),[97] Serbia (2018),[98] Sierra Leone (2019)	5
First instance court: Specialised anti-corruption court has original jurisdiction over anticorruption cases, with appeals to the supreme court.	Albania (2018),[99] Burundi, Cameroon, Croatia, Nepal, Pakistan, Senegal, Sri Lanka (2018), Slovakia, Tanzania (2016),[100] Thailand (2016)[101]	11
Hybrid court: May serve as a court of first instance for some (more important) corruption cases, and serves as an intermediate appellate court for other corruption cases that are heard in the first instance by generalist trial courts. Appeals go to the supreme court.	Botswana (only appellate function), Philippines, Uganda	3
Comprehensive parallel court: Anti-corruption court system includes both first instance trial courts and appellate courts.	Afghanistan, Armenia (draft law 2020),[102] Bulgaria, Indonesia, Malaysia, Madagascar (2016), Palestine (2013),[103] Ukraine (2018)	8
	Total	25

[96] Table taken from U4 Issue 2016:7, Specialised anti-corruption courts: A comparative mapping, page 20, https://www.u4.no/publications/specialised-anti-corruption-courts-a-comparative-mapping.pdf („For purposes of this paper, we define an ‚anti-corruption court' as a judge, court, division of a court, or tribunal that specialises substantially (though not necessarily exclusively) in corruption cases"); see also for an update as of 2019 and for a reference to respective laws: https://www.u4.no/anti-corruption-court-legislation-for-23-countries.

[97] https://www.wola.org/analysis/five-years-anti-corruption-system-mexico/.

[98] https://www.lexology.com/library/detail.aspx?g=beefd6be-2c19-498b-97d8-cc3d930b720a.

[99] https://www.rai-see.org/albania-special-anti-corruption-court-hjc-starts-candidate-selections/.

[100] https://www.africanews.com/2016/07/04/14-judges-to-preside-over-tanzania-s-new-anti-corruption-court//.

[101] https://www.loc.gov/law/foreign-news/article/thailand-corruption-court-established/.

[102] https://www.azatutyun.am/a/30783372.html; https://www.civilnet.am/news/2020/08/06/Armenia-Proposes-Establishing-Specialized-Anti-Corruption-Courts/392133.

[103] Art. 9 bis Anti-Corruption Law No (1) 2005 as amended in 2018 by Article 16, https://cdn.sanity.io/files/1f1lcoov/production/CDwR6nTXrees_FbhPVnpkta1YODHEg1ddqlWe.pdf.

For the sake of completeness, it should be noted that there are also calls for creating a specialised anti-corruption court on the **international** level to deal with cases of grand corruption:

> "Among the ideas being floated, the Government of Colombia and US Judge Mark Wolf have proposed creation of an international anti-corruption court with jurisdiction over **grand corruption cases** where countries themselves are unable or unwilling to pursue them."[104]

The following country examples will focus on separate anti-corruption courts for the following three reasons:

- The **Venice Commission** has been critical of the "individual judges" option, while favouring the establishing of a separate anti-corruption court; at the same time, the hybrid court-solution does not appear relevant for the European region.
- For the two most prominent examples of anti-corruption courts, one from the EU-country Slovakia, and one from neighbouring Ukraine, **detailed analysis** is available.
- Conclusions on the **advantages** and **risks** of establishing individual anti-corruption judges will still be drawn from the comparative assessments available (see below at 6).

5.2 Slovakia

5.2.1 Summary

The "anti-corruption court" in Slovakia is in fact not specialised only on corruption offences, but adjudicates other **economic** and organised **crimes** as well. The court operates since 2005. The integrity checks of candidates and judges of the court are done by the **executive** sector, a mechanism which ultimately was rendered unconstitutional in 2019. While the court is mostly seen as a success story, a track record of **high-level cases** is perceived to be still lacking.

5.2.2 Timeline

The main stages of establishing the Court are the following:[105]

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[104] Gillian Dell, 2 March 2020, Addressing impunity for grand corruption: what are the options?, https://uncaccoalition.org/addressing-impunity-for-grand-corruption-what-are-the-options/ (emphasis by author); Remarks of Judge Mark L. Wolf, Chair of Integrity Initiatives International, to the Global Expert Group Meeting on Corruption Involving Vast Quantities of Assets (13 June 2019: "An International Anti-Corruption Court ('IACC') would be an invaluable innovation", https://www.unodc.org/documents/corruption/meetings/OsloEGM2019/Presentations/Mark_Wolf_-_USA.pdf; see also U4 Brief 2019:5, An International Anti-Corruption Court? A synopsis of the debate, https://www.u4.no/publications/an-international-anti-corruption-court-a-synopsis-of-the-debate.pdf.

[105] Taken largely verbatim from USAID, Report on Establishing the Anti-Corruption Court in Ukraine: Key Issues to Solve and Recommendations Based on Slovak Experience (2017), https://newjustice.org.ua/wp-

- In 2003, Slovakia's **parliament** established a Special Court with jurisdiction over corruption and organised crime cases.
- In 2005, the court began **operating** in 2005.
- The same reform package created an Office of the **Special Prosecutor** (OSP) with exclusive jurisdiction to bring cases before the Special Court.
- In 2009, Slovakia's **Constitutional Court** held that the Special Court was unconstitutional.[106] Parliament responded with a new law that re-established the court, addressing the constitutional infirmities and making a few additional changes.[107]
- The court, **renamed** the Special Criminal Court (SCC), continued to operate without significant disruption.

5.2.3 Selection of judges

The procedures for appointing and removing SCC judges are the same as those used for the **regular courts** (inter alia passing of the judicial exam, selection by a committee appointed by the Judicial Council – a body consisting of nine judges and nine members selected by the other branches of government).

In terms of integrity, candidates had to obtain a **security clearance** from the National Security Bureau (NSB) before being appointed. The NSB could also revoke existing security clearances. In 2009, the Constitutional Court held that this requirement violated the separation of powers: The executive branch had the abusive power to remove judges under the pretext of a security issue. The legislator responded by a constitutional amendment in 2014 requiring judges in the entire judiciary to obtain security clearances:

> "A **modified version** of the security clearances was re-introduced, a narrower scope of information is collected on the sitting judges as well as judge-candidates, and the power of the NSB was modified as well: The NSB only

content/uploads/2017/09/NJ_Anticorruption_Court_Report_Zilincik_Apr_2017_ENG.pdf, and from U4 Brief 2016:2, Specialised anti-corruption courts: Slovakia, https://www.u4.no/publications/specialised-anti-corruption-courts-slovakia.pdf.

[106] Constitutional Court decision No. PL. ÚS 17/08, https://www.ustavnysud.sk/documents/10182/992376/4_09a.pdf/56fb3a16-d03e-471b-b158-b8ed4de5a6b5 (in English).

[107] https://spectator.sme.sk/c/20033131/slovakia-to-get-new-court.html.

provides a review of the candidate but the **final decision** is made by the **Judicial Council**."[108]

U4 notes on this point:

> "On the one hand, many believe that the security clearance procedure helped ensure the **court's integrity**, and there is no evidence that the procedure was ever abused to influence the court. On the other hand, the Constitutional Court's concern appears to be legitimate, at least in the abstract: the power of the executive branch to remove a sitting judge by revoking his or her security clearance, without well-specified rules, could be a tool that an unscrupulous **executive** could **abuse**. Under the new constitutional rule, as noted above, all judges now must get a security clearance – but the underlying **controversy** remains."[109]

In **2019**, the Constitutional Court ruled that the mandatory security clearances for judges that were introduced in 2014 are **unconstitutional**. The Court referred to the principles of democracy, rule of law and the principle of power distribution linked to the independence of the judiciary: "Constitutional laws cannot contradict the implicit material core of the Constitution of the Slovak Republic",[110] declared the Constitutional Court.[111]

5.2.4 Status of judges

The higher security risks of working at an anti-corruption and organised crimes court are mainly dealt with through **higher salaries**. Initially, the government found it difficult to recruit enough judges. The amended law provided salaries substantially higher than those of regular judges (SCC-judges receive 1.3 times the salary of a Parliamentarian).[112] Each judge is responsible for approximately **15-16 cases per year**. The Constitutional Court responded to a challenge by judges from ordinary courts and deemed the pay difference unconstitutional in

[108] USAID, Report on Establishing the Anti-Corruption Court in Ukraine: Key Issues to Solve and Recommendations Based on Slovak Experience (2017), page 12, note 15, https://newjustice.org.ua/wp-content/uploads/2017/09/NJ_Anticorruption_Court_Report_Zilincik_Apr_2017_ENG.pdf (emphasis by author).

[109] U4 Brief 2016:2, Specialised anti-corruption courts: Slovakia, page 3, https://www.u4.no/publications/specialised-anti-corruption-courts-slovakia.pdf (emphasis by author).

[110] See in depth about this argument: https://verfassungsblog.de/a-part-of-the-constitution-is-unconstitutional-the-slovak-constitutional-court-has-ruled/.

[111] https://spectator.sme.sk/c/22042187/demanding-security-clearance-of-judges-is-unconstitutional.html.

[112] As of 2012, UNODC, Country Review Report of Slovak Republic (2012), page 97, https://www.unodc.org/documents/treaties/UNCAC/CountryVisitFinalReports/2013_07_11_Slovakia_Final_Country_Report.pdf.

the same judgement of 2009. After the 2009 amendments, the pay difference is smaller and "does not seem to have attracted significant criticism".[113]

5.2.5 Jurisdiction

The jurisdiction is defined by **offences** as opposed to defendants or thresholds. The offences fall into six groups: [114]

- Corruption-related offences – active bribery, passive bribery, abuse of power by a public official, deceitful practices in public procurement and public auction;
- Organized crime and terrorism – Establishing, masterminding and supporting a criminal or a terrorist group, particularly serious crimes committed by a criminal group or a terrorist group;
- Economic offenses – when a damage caused reaches at least 6.6 million EUR;
- Criminal offenses against financial interests of the European Communities;
- Pre-meditated murder;
- Other offences – forgery, fraudulent alteration and illicit manufacturing of money and securities and crimes of extremism.

Initially, the Special Court also had personal jurisdiction over all crimes committed by **high public officials**. After the 2009 Constitutional Court ruling, this competence was removed:

> "The reasoning of the Constitutional Court when dealing with personal competence of the Special Court is **not** particularly **convincing**. A vague reference to 'personal competence being used in feudal systems' as an 'extraordinary feature of the Special Court' had a peripheral importance in the verdict, and was quite strongly condemned by the dissenting judges."[115]

It should be noted that the verdict "was perceived as extremely **controversial** and passed by the majority of 7 against 6 Constitutional Court judges".[116]

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[113] U4 Brief 2016:2, Specialised anti-corruption courts: Slovakia, page 3, https://www.u4.no/publications/specialised-anti-corruption-courts-slovakia.pdf.

[114] U4 Brief 2016:2, Specialised anti-corruption courts: Slovakia, page 3, https://www.u4.no/publications/specialised-anti-corruption-courts-slovakia.pdf; see also as of 2020: https://e-justice.europa.eu/content_specialised_courts-19-sk-en.do?member=1.

[115] USAID, Report on Establishing the Anti-Corruption Court in Ukraine: Key Issues to Solve and Recommendations Based on Slovak Experience (2017), page 8, https://newjustice.org.ua/wp-content/uploads/2017/09/NJ_Anticorruption_Court_Report_Zilincik_Apr_2017_ENG.pdf (emphasis by author).

[116] USAID, Report on Establishing the Anti-Corruption Court in Ukraine: Key Issues to Solve and Recommendations Based on Slovak Experience (2017), page 8, note 6, https://newjustice.org.ua/wp-

5.2.6 Basic structure

The number of judges of the SCC has increased gradually since 2005. As of 2020, there are 14 judges.[117] During the last years, they have been dealing with 160-180 indictments per year.[118]

5.2.7 Stages of appeal

Decisions of the SCC are appealed at the Supreme Court level. This poses a similar challenge as in Ukraine:[119]

> "As opposed to the judges of the SCC, who were carefully selected from the very beginning as the first-instance judges, the appellate judges served with the Supreme Court for years and the **reputation** of some of them is sometimes **questioned** internationally. Therefore, it is important to ensure that judges deciding on all stages will be selected by procedures securing a high level of **integrity**."[120]

5.2.8 Impact

GRECO noted already in 2007

> "with interest the existence of a Special Court for Corruption and other Serious Crimes, which had reportedly led to an **increase** in the number of cases processed and a more **harmonised** approach in dealing with corruption cases."[121]

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content/uploads/2017/09/NJ_Anticorruption_Court_Report_Zilincik_Apr_2017_ENG.pdf (emphasis by author).

[117] Webpage of the SCC (in Slovakian): https://obcan.justice.sk/infosud/-/infosud/reg-detail/sud/sud_170; of the total of 16 judges, two are not active.

[118] As of 2017: USAID, Report on Establishing the Anti-Corruption Court in Ukraine: Key Issues to Solve and Recommendations Based on Slovak Experience (2017), page 9, https://newjustice.org.ua/wp-content/uploads/2017/09/NJ_Anticorruption_Court_Report_Zilincik_Apr_2017_ENG.pdf.

[119] See below at 5.3.

[120] USAID, Report on Establishing the Anti-Corruption Court in Ukraine: Key Issues to Solve and Recommendations Based on Slovak Experience (2017), page 9, https://newjustice.org.ua/wp-content/uploads/2017/09/NJ_Anticorruption_Court_Report_Zilincik_Apr_2017_ENG.pdf (emphasis by author), with reference to Open Society Foundation, The Slovak Judiciary: Its current state and challenges (2011), http://www.inpris.pl/fileadmin/user_upload/slovak_judiciary_state_challenges.pdf.

[121] Greco Eval III Rep (2007) 4E, at § 101, https://www.coe.int/en/web/greco/evaluations (emphasis by author).

As of 2020, the SCC rendered 1,253 decisions.[122] Between 2005 and 2015, the Special Court/SCC convicted **1,107 persons**.[123] The judges approved 476 plea bargain agreements and 92 persons were acquitted,[124] with an **acquittal rate** of only **7%**:[125]

> "Comparing the average number of convictions before and after the establishment of the court provides an interesting perspective. Between 1999 and 2003 there were about **23** convictions for corruption offences per year, between 2010 and 2014 the total number of these offences reached **123**."[126]

Looking at the entire number of corruption convictions before establishing the SCC, the difference is still striking:

> "[P]rior to the establishment of the Specialised Criminal Court, **254** corruption-related had been considered by the common court system. However, since the establishment of the Specialised Criminal Court and the Special Prosecution Office, **790** corruption-related cases have been considered [until 2012)]."[127]

U4 also noted that the SCC "has been **effective** in addressing organised crime and local-level corruption cases", as did the European Commission in its anti-corruption report:

> "In an effort to fight serious crime more effectively, Slovakia created a specialised criminal court (SCC) with exclusive jurisdiction to hear corruption cases, including domestic and foreign bribery. […] It appears that the SCC is equipped with the necessary **resources**, its judges and auxiliary staff are

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[122] Webpage of the SCC (in Slovakian): https://obcan.justice.sk/infosud/-/infosud/reg-detail/sud/sud_170.

[123] USAID, Report on Establishing the Anti-Corruption Court in Ukraine: Key Issues to Solve and Recommendations Based on Slovak Experience (2017), page 9, https://newjustice.org.ua/wp-content/uploads/2017/09/NJ_Anticorruption_Court_Report_Zilincik_Apr_2017_ENG.pdf.

[124] USAID, Report on Establishing the Anti-Corruption Court in Ukraine: Key Issues to Solve and Recommendations Based on Slovak Experience (2017), page 9, https://newjustice.org.ua/wp-content/uploads/2017/09/NJ_Anticorruption_Court_Report_Zilincik_Apr_2017_ENG.pdf.

[125] As of 2012, UNODC, Country Review Report of Slovak Republic (2012), page 98, https://www.unodc.org/documents/treaties/UNCAC/CountryVisitFinalReports/2013_07_11_Slovakia_Final_Country_Report.pdf.

[126] USAID, Report on Establishing the Anti-Corruption Court in Ukraine: Key Issues to Solve and Recommendations Based on Slovak Experience (2017), page 9, https://newjustice.org.ua/wp-content/uploads/2017/09/NJ_Anticorruption_Court_Report_Zilincik_Apr_2017_ENG.pdf (emphasis by author).

[127] UNODC, Country Review Report of Slovak Republic (2012), page 98, https://www.unodc.org/documents/treaties/UNCAC/CountryVisitFinalReports/2013_07_11_Slovakia_Final_Country_Report.pdf (emphasis by author).

adequately **trained**, and the proceedings are concluded within a sufficiently **short timeframe**."[128]

There has been criticism for the lack of convictions of high-level officials:

> "On a less positive side, about 48 percent of half of bribery convictions by the SCC after 2012 have involved bribes of **20 €** or less."[129]

However, this does not appear to be necessarily the SCC's fault, as "[m]any lay the blame for this situation on the **prosecutors** rather than on the SCC itself".[130]

5.3 Ukraine

5.3.1 Summary

U4 summarises the establishing of the High Anti-Corruption Court (HACC) as follows:

> "The HACC was established through the combined efforts of Ukrainian **civil society** organisations and the **international donor** community.
>
> The main arguments for creation of the HACC were the need for greater judicial **efficiency**, **integrity**, and **independence** in addressing corruption cases, especially those involving political elites, and the apparent inability of the regular courts to deliver swift and impartial justice in such cases.
>
> The HACC's most distinctive feature is the involvement in the judicial selection process of a body called the **Public Council of International Experts**, which has the power to block judicial candidates if members of the Council have 'reasonable doubt' about a candidate's integrity.
>
> While the HACC is off to a **promising start**, its success will depend on a number of factors, including the quality of work conducted by the investigative bureau and the prosecutor's office."[131]

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[128] Annex Slovakia to the EU Anti-Corruption Report, Brussels, 3 February 2014 COM(2014) 38 final ANNEX 25, https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/organized-crime-and-human-trafficking/corruption/anti-corruption-report/docs/2014_acr_slovakia_chapter_en.pdf (emphasis by author), with reference to Transparency International, National Integrity System, Executive Summary: http://www.transparency.org/whatwedo/nisarticle/slovakia_2012.

[129] USAID, Report on Establishing the Anti-Corruption Court in Ukraine: Key Issues to Solve and Recommendations Based on Slovak Experience (2017), page 9, https://newjustice.org.ua/wp-content/uploads/2017/09/NJ_Anticorruption_Court_Report_Zilincik_Apr_2017_ENG.pdf (emphasis by author).

[130] U4 Brief 2016:2, Specialised anti-corruption courts: Slovakia, page 1, https://www.u4.no/publications/specialised-anti-corruption-courts-slovakia.pdf (emphasis by author).

[131] U4 Brief 2020:3, Ukraine's High Anti-Corruption Court – Innovation for impartial justice, page 2 of the pdf-document, https://www.u4.no/publications/ukraines-high-anti-corruption-court.pdf (emphasis by author).

5.3.2 Legislative timeline

The main stages of establishing the HACC are the following:[132]

- On 21 December 2017, the Verkhovna Rada (**Parliament**) withdrew draft law No. 6011 [about individual anti-corruption judges] and on 22 December, the President of Ukraine submitted his own "draft law on the high anti-corruption court" (No. 7740) to Parliament.
- The international community commented that the submission of the new draft law was welcome in principle but that the draft failed to meet some of the main requirements set by the **Venice Commission**. The draft was passed by Parliament at first reading on 1 March 2018. Numerous amendments proposed by MPs were examined by the parliamentary Committee on Legal Policy and Rule of Law. International organisations, in particular the IMF and also the Venice Commission were involved in the process.
- The law was finally **adopted** on 7 June 2018. This was welcomed by many national and international stakeholders including the Venice Commission.
- That said, it was a serious challenge that under the law adopted all the **pending cases** were still be dealt with by ordinary courts (both 1st and 2nd instance) – for further details see below at "jurisdiction".
- Furthermore, a second law necessary to effectively establish the High Anti-Corruption Court (HACC) was adopted on 21 June 2018.

5.3.3 Implementation timeline

- The High Qualification Commission of Judges of Ukraine (HQCJ) launched the **vacancy notice** for HACC judges on 2 August 2018.
- **Selection** of the first set of HACC judges took place between September 2018 and April 2019, with the Public Council of International Experts (PCIE) most active in January 2019.
- The members of the **PCIE** were appointed in November 2018 and took part in the selection of judges (for further details, see below at "Selection of judges").
- On April 11, 2019 the President of Ukraine Petro Poroshenko appointed **38 judges** to the High Anti-Corruption Court and to the court's Chamber of Appeal.
- On July 6, 2019 the High Anti-Corruption Court was assigned a **building** in Kyiv.

[132] Taken largely verbatim from Venice Commission, CDL-AD(2017)020, Follow-up, Measures taken by the State, https://www.venice.coe.int/WebForms/followup/?index=1, and Ukraine Crisis Media Centre, High Anti-Corruption Court starts work in Ukraine: how will it operate? (6 September 2019), https://uacrisis.org/en/73207-high-anti-corruption-court.

- In September 2019, the High Anti-Corruption Court began **operations**.

5.3.4 Special requirements for judges

In essence, candidates have to have at least **7 years** of professional experience and "possess knowledge and practical skills necessary for performing judicial functions in corruption-related cases" (Art. 7 Law on HACC). There are several criteria **excluding** candidates, in sum:

- If the candidate worked in certain **security agencies** or for a body of **judicial self-governance** under governments before the Maidan revolution;
- If the candidate had certain relations with a **political party**;
- If the candidate is convicted for certain **violations**.

In addition, candidates need to fulfil "the criteria of **integrity** (moral, honesty, incorruptibility) […], namely in terms of lawfulness of the origin of sources of the candidate's property, correspondence of the standard of living of the candidate or his or her family members with the declared income, correspondence of the candidate's **lifestyle** to his or her status" (Article 8 Law on HACC).

5.3.5 Selection of judges

International experts are involved in the appointment procedure, for a total period of 6 years, through the **Public Council of International Experts** (PCIE).[133] The PCIE is composed of 6 experts selected by the HQCJ [High Qualification Commission of Judges] for a one term period of two years from a list of candidates nominated by international organisations.

334 candidates competed for the 39 seats at the High Anti-Corruption Court in 2019.

During the selection procedure of judges, the PCIE **vetoed 42 candidates** due to doubts about their integrity and professional ethics. In particular, candidates were unable to explain the source of their income, had committed procedural violations while in office, had committed acts unacceptable for a judge or had delivered unlawful judgments sentencing the participants of the "Revolution of Dignity".

38 candidates passed the tests, completed practical tasks, were interviewed by the High Qualification Commission and by international experts. 27 of them will work as judges at the High Anti-Corruption Court, 11 took theirs seats in the court's Chamber of Appeal.

[133] Taken largely verbatim from Venice Commission, CDL-AD(2017)020, Follow-up, Measures taken by the State, https://www.venice.coe.int/WebForms/followup/?index=1, and Ukraine Crisis Media Centre, High Anti-Corruption Court starts work in Ukraine: how will it operate? (6 September 2019), https://uacrisis.org/en/73207-high-anti-corruption-court.

5.3.6 Public Council of International Experts (PCIE)

For any ordinary judicial selection, Ukraine had established already a civil society based advisory council in 2016, the **PIC**:

> "The 2016 Law on the Judiciary and Status of Judges created an additional body, the Public Integrity Council (PIC), to assist the HQCJ [High Qualification Commission of Judges] in determining the eligibility of a judicial candidate through an evaluation of the candidate's professional ethics and integrity.5 The PIC is a 20-member body that includes civil society representatives, scholars, journalists, and other professionals. The HQCJ may invite the PIC to participate in interviewing judicial candidates, though this is not obligatory. The PIC can object to a candidate on ethical grounds, but the HQCJ can disregard the PIC's objection if 11 of the 16 HQCJ members support the candidate."[134]

In addition, Ukraine foresaw for the selection of judges to the anti-corruption court an even more intense scrutiny, based on a new body, the Public Council of International Experts (PCIE). The PCIE is composed as follows:

> "[T]he PCIE's six members are **foreigners** recommended by international organisations with which Ukraine has agreements concerning anti-corruption initiatives. […] The PCIE was initially established for a six-year term; individual PCIE members are selected for two-year terms without the possibility of reappointment."[135]

Members were selected as follows:

> "In July 2018, the HQCJ sent a letter to the 14 international organisations identified as eligible by the Ministry of Foreign Affairs, inviting them each to nominate two or more candidates for the PCIE. In September 2018, five of these organisations – the EU, Council of Europe, European Anti-Fraud Office, European Bank for Reconstruction and Development, and Organisation for Economic Co-operation and Development) – acted in concert, jointly providing the HQCJ [High Qualification Commission of Judges] with a **consolidated list** of 12 candidates. Submitting a joint list **prevented** the HQCJ from **discriminating** among PCIE candidates based on which organisation had recommended them. No other organisations appear to have provided additional nominees."[136]

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[134] U4 Brief 2020:3, Ukraine's High Anti-Corruption Court – Innovation for impartial justice, page 5, https://www.u4.no/publications/ukraines-high-anti-corruption-court.pdf (emphasis by author).

[135] U4 Brief 2020:3, Ukraine's High Anti-Corruption Court – Innovation for impartial justice, page 6, https://www.u4.no/publications/ukraines-high-anti-corruption-court.pdf (emphasis by author).

[136] U4 Brief 2020:3, Ukraine's High Anti-Corruption Court – Innovation for impartial justice, page 7, https://www.u4.no/publications/ukraines-high-anti-corruption-court.pdf (emphasis by author).

From this list, the HQCJ selected six names, who became members at the PCIE. The PCIE's **main role** in the selection is

> "to screen HACC candidates for integrity and ethics. The HQCJ provides the PCIE with a dossier on each candidate who makes it through the initial screening; this dossier includes the candidate's **income and asset declarations**, memos from NABU [National Anti-Corruption Bureau of Ukraine], and other relevant materials. The PCIE may request additional documentary **evidence** and hear witnesses. If at least three PCIE members have doubts about a candidate's integrity, the PCIE can initiate a joint meeting with the HQCJ. At this meeting, the 22 participants (the 16 HQCJ members plus the six PCIE members) may solicit additional information and bring the candidates in for additional questioning. The HQCJ and PCIE members then vote on whether to approve the candidate, applying a '**reasonable doubt**' standard. (That is, each member should vote to advance the candidate only if there is no reasonable doubt about the candidate's integrity or ethics.)"[137]

The **vetoing power** of the PCIE is considerable:

> "To pass this stage, a candidate must receive at least 12 'yes' votes, with at least three of those votes coming from the PCIE members and nine from the HQCJ (the so called '3+9 formula'). So, if **four** of the six **PCIE members oppose** a candidate, the HQCJ cannot forward that candidate's name to the HCJ. Alternatively, if a combination of three or fewer PCIE members and a minimum of nine HQCJ members oppose a candidate, the candidate is also blocked. The formula might change if the number of HQCJ members changes. […]
>
> The PCIE called for **joint meetings** [with the HQCJ] to discuss 49 of the 113 candidates who made it past the preliminary assessments. Six meetings were held; 39 candidates were **eliminated**, and three more withdrew."[138]

All in all, the PCIE has been noted as an experience with **positive impact**:

> "Most of the 38 judges selected to serve on the HACC are viewed as **honourable** and **competent**, though civil society did express concerns about eight of the selected candidates. Many experts contrast the HACC selection process favourably with the process for the Supreme Court. While the PIC was unable

[137] U4 Brief 2020:3, Ukraine's High Anti-Corruption Court – Innovation for impartial justice, page 7, https://www.u4.no/publications/ukraines-high-anti-corruption-court.pdf (emphasis by author).

[138] U4 Brief 2020:3, Ukraine's High Anti-Corruption Court – Innovation for impartial justice, page 7, https://www.u4.no/publications/ukraines-high-anti-corruption-court.pdf (emphasis by author).

to prevent the appointment to the Supreme Court of questionable candidates, the PCIE apparently helped **prevent** several **inappropriate appointments**."[139]

International assistance was key to this success:

> "[T]he PCIE had to act under short notice and **excessively tight deadlines**. PCIE members were not appointed until early November 2018 but were expected to complete their work by the end of January 2019; they had only 30 days in Kyiv to review dossiers, question candidates, and make decisions. With such a compressed schedule, and the fact that PCIE members neither spoke Ukrainian nor had much prior knowledge about Ukraine, the council faced a daunting task. Fortunately, the International Development Law Organization (IDLO) and the EU Anti-Corruption Initiative (EUACI) established a **Secretariat** – composed of legal analysts, interpreters, and other support personnel – that proved crucial to the PCIE's performance. EUACI and other donors also supported **civil society** in performing integrity checks on the candidates, the results of which were provided to the PCIE."[140]

5.3.7 Status of judges

Judges enjoy several rights to **security** in their homes and offices (Art. 10 Law on HACC). They are subject to regular special **screening** of their asset declarations and of their lifestyle (Art. 11 Law on HACC). Furthermore, judges have to regularly undergo **training** in the area of combatting corruption (Art. 12 Law on HACC). The salary is fifty minimum wages,[141] corresponding to about 3,180 € per months – a high salary in Ukraine, and about four times the average in the public sector.[142]

5.3.8 Jurisdiction

The High Anti-Corruption Court exerts jurisdiction over criminal cases that regard corruption crimes.[143] It covers 23 Articles of the Criminal Code that mostly fall within the area of responsibility of the **National Anti-Corruption Bureau**.

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[139] U4 Brief 2020:3, Ukraine's High Anti-Corruption Court – Innovation for impartial justice, page 8, https://www.u4.no/publications/ukraines-high-anti-corruption-court.pdf (emphasis by author).

[140] U4 Brief 2020:3, Ukraine's High Anti-Corruption Court – Innovation for impartial justice, page 8, https://www.u4.no/publications/ukraines-high-anti-corruption-court.pdf (emphasis by author).

[141] One minimum wage being 2,118 UAH as of July 2020, https://ukrainepravo.com/ukrainian_law/legal-news-in-ukraine-05-01/.

[142] Compare with the average of 25,100 UAH ≈ 755 € in the public sector, http://www.salaryexplorer.com/salary-survey.php?loc=226&loctype=1&job=30&jobtype=1.

[143] Largely taken from: Ukraine Crisis Media Centre, High Anti-Corruption Court starts work in Ukraine: how will it operate? (6 September 2019), https://uacrisis.org/en/73207-high-anti-corruption-court.

Initially, the legislation stipulated that on the first working day the High Anti-Corruption Court had to accept all **pending indictments** within its competence. As per the preliminary assessment, these "corruption cases" were over 3,500 and could have blocked the Court's work for long.

As a consequence, President Zelenskyi introduced a draft law (No. 1025) to the Parliament suggesting that the High Anti-Corruption Court would only process the cases introduced into the registry of pretrial investigations after the **key date** of September 5, 2019 (the day of beginning of its operations) as well as the cases started earlier if the pretrial investigation was conducted by NABU and SAPO. On September 18, 2019, Parliament passed draft law No. 1025. As a consequence, HACC will handle criminal cases registered from the moment when the court came into operation, as well as criminal proceedings investigated by the NABU and the SAPO.[144]

5.3.9 Basic structure

The HACC's trial chamber has 27 judges. Of these, 18 have trial functions and 9 investigative functions. The trial judges sit in three-judge panels, while investigative judges sit alone.[145]

5.3.10 Stages of appeal

Parties may appeal rulings from the HACC trial chamber to the HACC appellate chamber. The appellate chamber is an independent body of 11 judges who sit in three-judge panels. Both the trial and appellate chambers are part of a single legal entity with the chief judge of the trial chamber as its head.[146] The appellate chamber's decisions can be appealed to a panel of the Criminal Cassation Court specially established to hear anti-corruption cases. However, this still leaves an opening in terms of integrity:

> "[T]he fact that parties can appeal HACC decisions to the Supreme Court's Criminal Cassation Court may be a concern. Supreme Court judges have **not** gone through the same **vetting process** as have HACC judges."[147]

[144] TI Ukraine, Best-Known Cases of the High Anti-Corruption Court (18 September 2019), https://ti-ukraine.org/en/news/best-known-cases-of-the-high-anti-corruption-court/.

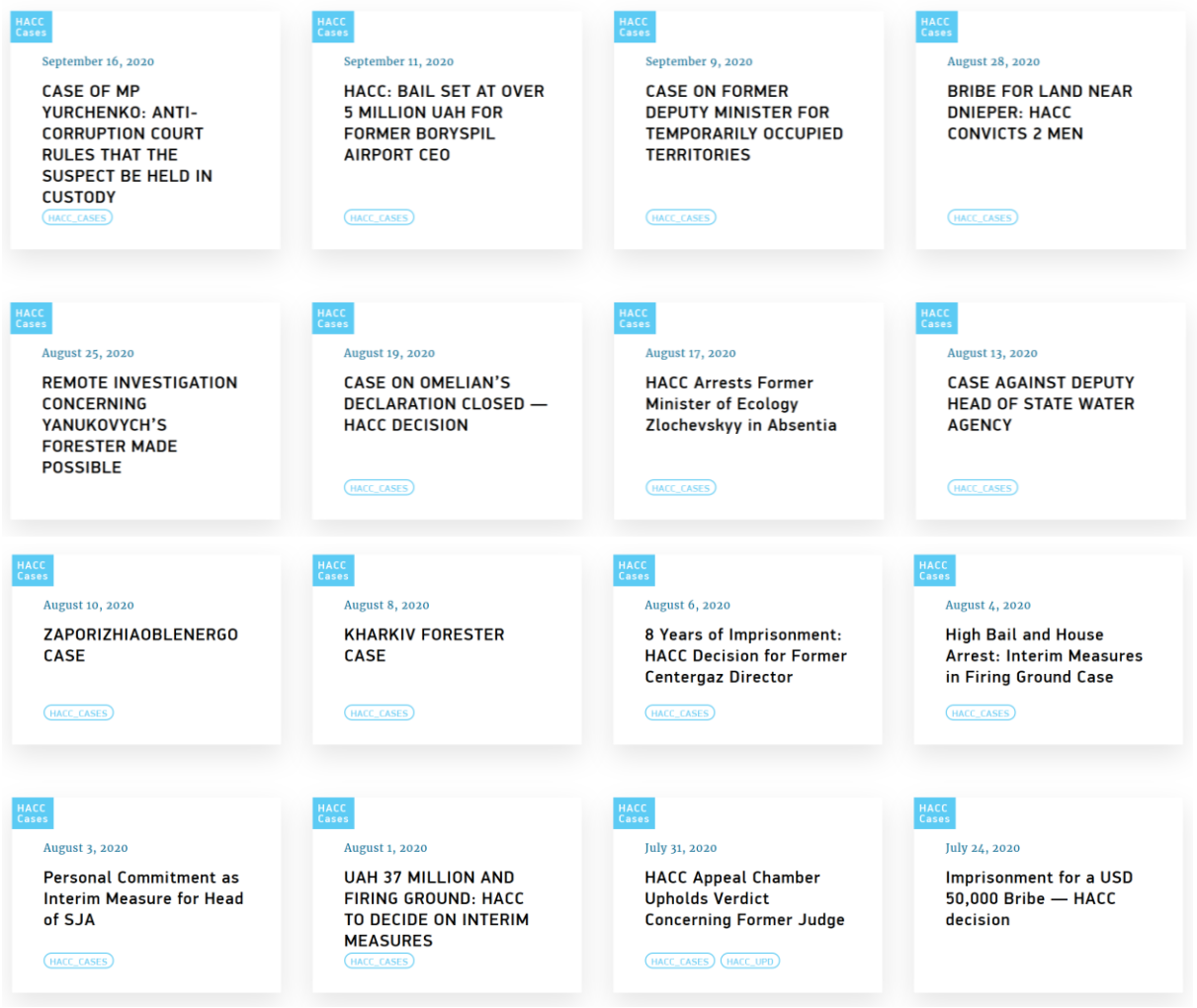
[145] U4 Brief 2020:3, Ukraine's High Anti-Corruption Court – Innovation for impartial justice, page 3, https://www.u4.no/publications/ukraines-high-anti-corruption-court.pdf.

[146] U4 Brief 2020:3, Ukraine's High Anti-Corruption Court – Innovation for impartial justice, page 3, https://www.u4.no/publications/ukraines-high-anti-corruption-court.pdf.

[147] U4 Brief 2020:3, Ukraine's High Anti-Corruption Court – Innovation for impartial justice, page 9, https://www.u4.no/publications/ukraines-high-anti-corruption-court.pdf (emphasis by author).

5.3.11 Impact

It is probably too early for a substantiated evaluation of the court's performance. However, a precursory review of cases dealt with by the HACC draws the tentative picture of a success story. The rather young case history so far shows arrests and convictions in cases of high-level officials as well as cases of large bribes or large embezzlements:[148]



[148] TI Ukraine, HACC Cases, https://ti-ukraine.org/en/ti_format/news/hacc-cases/.

5.4 Comparison Slovakia-Ukraine

	Slovakia	Ukraine
First operational	2005	2019
Selection of judges	Judicial self-administration	Judicial self-administration with veto by "Public Council of International Experts"
Integrity review	Executive branch (intelligence service)	Judicial self-administration, Public Council of International Experts, Public Integrity Council (civil society)
Status of judges	Higher salaries	Higher salaries, security measures
Jurisdiction	Corruption, organised and economic crimes	Higher level corruption
Stages of appeal	Direct appeal to Supreme Court	Appellate Chamber at the Anti-Corruption court; subsequently to Supreme Court
Impact	More than 1,000 convictions; acquittal rate 7%; rather absent or low figure of high-level convictions.	Several high-level convictions despite short operational time

6 Advantages

The comparative literature summarises the advantages of anti-corruption courts as follows:[149]

Motivation	Mechanisms	Institutional design considerations
Efficiency	Favourable judge-to-case ratio Efficiency gains through expertise Streamlined procedures Deadlines	Number of judges Scope of jurisdiction: • type of offence • magnitude of offence

[149] Table taken from: U4 Issue 2016:7, Specialised anti-corruption courts: A comparative mapping, page 20, https://www.u4.no/publications/specialised-anti-corruption-courts-a-comparative-mapping.pdf.

		• identity of defendants Specialisation only at some levels (first instance or appellate) or throughout, depending on where the bottlenecks are found Relationship to prosecutorial authorities
Integrity	Insulation from existing court system, e.g., location of court; special selection and recruitment mechanisms	Number of judges and recruitment pool Geographic expansion (the larger and more decentralised the court network, the more difficult it is to ensure integrity)
Expertise	Selection of judges with special expertise and capacity to understand complex financial cases (regular rotation can be an obstacle unless there is a pool of such specialists) Targeted training	Scope of jurisdiction Human resources Management: establishment and maintenance of expert pool

6.1 Efficiency

The comparative literature summarises the potential of anti-corruption courts to increase efficiency as follows:

> "Perhaps the most common rationale for the creation of specialised anti-corruption courts is the desire to increase the efficiency with which the judicial system resolves corruption cases. Indeed, in most of the jurisdictions that have adopted a specialised anti-corruption court, the **desire to speed up** the processing of cases has been one of the main public justifications. […]
>
> This is understandable: many countries – particularly, though not exclusively, developing or transition countries – face substantial **backlogs** and delays throughout the judicial system. And while judicial inefficiency is undesirable in all cases, it may be especially pernicious with respect to anti-corruption cases, for two reasons.
>
> First, the **urgency of making progress** in the fight against corruption means that extensive judicial delays in dealing with corruption cases are particularly problematic, especially since such delays threaten to undermine public confidence in the government's commitment and capacity to combat corruption effectively.

> Second, substantial delays in processing cases increase the **risk** that defendants or their allies may exert undue influence on witnesses, **tamper with evidence**, or take other action to interfere with the ordinary and impartial operation of the justice system; while such concerns are not unique to corruption cases, they are especially acute with respect to such cases."[150]

The three mechanisms proposed to achieve this efficiency are the following:

- A more favourable **ratio** of judges to cases which will allow courts to process cases more quickly.
- **Selection** of judges most capable to deal with corruption cases, and/or being continuously specially trained.
- In order to speed up the processing of corruption cases, many jurisdictions impose special **deadlines** (with the focus of this practice being outside Europe).

GRECO noted in the case of Slovakia the increase in efficiency through the Special Court for Corruption and other Serious Crimes:

> "The GET [GRECO Evaluation Team] noted with interest the existence of a **Special Court for Corruption** and other Serious Crimes, which had reportedly led to an **increase** in the number of cases processed […]."[151]

6.2 Expertise

Another justification for creating a specialised anti-corruption court is the desire to create a tribunal with greater expertise:

> "After all, many corruption cases, especially those involving **complex financial** transactions or elaborate schemes, may be more complicated than the run-of-the-mill cases that make up many generalist judges' criminal dockets."[152]

To this end, one could invest more targeted in better **training** for judges on anti-corruption courts, particularly regarding financial matters, forensic accounting, and anti-money laundering rules. GRECO noted in the case of Slovakia the apparent increase in expertise through the Special Court for Corruption and other Serious Crimes:

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[150] U4 Issue 2016:7, Specialised anti-corruption courts: A comparative mapping, page 10, https://www.u4.no/publications/specialised-anti-corruption-courts-a-comparative-mapping.pdf (emphasis by author).

[151] Greco Eval III Rep (2007) 4E (Slovakia), at § 101, https://www.coe.int/en/web/greco/evaluations (emphasis by author).

[152] U4 Issue 2016:7, Specialised anti-corruption courts: A comparative mapping, page 14, https://www.u4.no/publications/specialised-anti-corruption-courts-a-comparative-mapping.pdf (emphasis by author).

> "The GET [GRECO Evaluation Team] noted with interest the existence of a **Special Court for Corruption** and other Serious Crimes, which had reportedly led to […] a more **harmonised** approach in dealing with corruption cases."[153]

6.3 Integrity

The integrity aspect is of particular importance. It is possible to increase efficiency and expertise within general courts, for example by assigning corruption cases to judges with special training, or to provide them with additional expert staff, or to impose deadlines on corruption cases. However, only in a separate anti-corruption court it is possible to **ring-fence** anti-corruption judges from an environment that is actually or by perception highly corrupt.

GRECO noted in the case of Slovakia the increase in integrity of proceedings through the Special Court for Corruption and other Serious Crimes:

> "During the on-site visit, it was repeatedly stressed that the existence of a chain of specialist institutions and practitioners in the police, prosecution and judiciary (who are subjected to **particular screening measures**) has greatly reduced 'leaks' at the various stages of criminal proceedings […]."[154]

Furthermore, a central motive for creating the Special Criminal Court

> "was the concern that **local networks of elites** (and criminal elements) could interfere with or otherwise distort judicial decision making in the regional courts; the SCC, as a national court located in the capital, was thought to be less susceptible to this problem […]."[155]

Correspondingly, the comparative literature quotes as a "**standard justification**"[156] for creating anti-corruption courts that they provide

[153] Greco Eval III Rep (2007) 4E, at § 101, https://www.coe.int/en/web/greco/evaluations (emphasis by author).

[154] Greco Eval III Rep (2007) 4E (Slovakia), at § 101, https://www.coe.int/en/web/greco/evaluations (emphasis by author).

[155] U4 Issue 2016:7, Specialised anti-corruption courts: A comparative mapping, page 13, https://www.u4.no/publications/specialised-anti-corruption-courts-a-comparative-mapping.pdf (emphasis by author).

[156] U4 Issue 2016:7, Specialised anti-corruption courts: A comparative mapping, page 12, https://www.u4.no/publications/specialised-anti-corruption-courts-a-comparative-mapping.pdf (emphasis by author).

"an impartial and independent tribunal, free of both corruption and undue influence by politicians or other powerful actors."[157]

7 Conclusions on institutional set-up

7.1 Jurisdiction

The following options for defining the jurisdiction exist:

Type of offence	- Corruption (as defined in the UNCAC). - Corruption related crimes (e.g., false or non-declaration of assets). - Organised crime, as it is typically related to corruption and corrupt networks, as well as often poses similar challenges in financial complexity. - Money laundering.
Magnitude of offence	- Monetary thresholds (regarding the bribe and/or the damage).
Identity of defendant	- Senior public officials. - Selected high-level officials (ministers, MPs, judges, etc.).

The following pros and cons apply to exclude some corruption cases and to **limit** the jurisdiction:[158]

Pro	Contra
Decrease the number of **cases** improves the judge-to-case ratio.	One could also increase the number of **judges** to improve the judge-to-case ratio.
The public at large might want to expect a focus of impunity on **high-level officials**.	Even "minor" corruption cases may be important, e.g., because they cumulatively have a large **impact** on the society. If **all cases** – minor and big ones – are dealt with effectively, the public will be even more satisfied.

[157] U4 Issue 2016:7, Specialised anti-corruption courts: A comparative mapping, page 12, https://www.u4.no/publications/specialised-anti-corruption-courts-a-comparative-mapping.pdf.

[158] Based on the above-mentioned international standards and literature, as well as both country examples.

	Dividing anti-corruption cases into smaller and bigger wants might create **case assignment** and management problems where divisions are not clear.
Statistics might be artificially blown up with lots of small cases and deceive about the true success of the court.	Statistics can **distinguish** smaller and bigger cases. Even small bribes can be part of a larger corrupt or organized crime **networks**.
The higher **expenditures** for an anti-corruption court (such as higher salaries and/or security) are only justified for higher-level cases.	**Too few** cases might make it hard to justify the maintenance of the institution at all.

7.2 Number of judges

The jurisdiction can only be as wide as the personnel budget allows for an appropriate number of judges to work on these cases. The positions can be created by financing new, additional judge positions, or by reallocating existing judge positions from general courts, corresponding to the respective reduction in case load by carving out corruption cases from the jurisdiction of general courts. A lesson learned from Ukraine is that the design of jurisdiction and the number of judges go hand in glove:

> "The number of judges necessary for an anti-corruption court needs to be carefully calculated against the current caseload within the future jurisdiction of the anti-corruption court. A lesson learned from Ukraine is the initial **overload** by cases which had to be corrected by the legislator right after creating the High Anti-Corruption Court."[159]

7.3 Selection of judges

7.3.1 Integrity standard

A frequent misunderstanding in judicial selection proceedings is the following: A candidate is presumed to have integrity "until proven guilty". This is a perverted myth created by corrupt candidates and their corrupt peers in judicial self-administrative bodies. Under jurisprudence by the **European Court of Human rights**, only **doubts** or the **appearance** of a lack of integrity are enough to exclude a candidate, who has the **burden of proof**:

[159] U4 Brief 2020:3, Ukraine's High Anti-Corruption Court – Innovation for impartial justice, page 9, https://www.u4.no/publications/ukraines-high-anti-corruption-court.pdf (emphasis by author).

> "Criminal proceedings were never brought against the applicant. If this had been the case, she would have benefited from safeguards such as the presumption of innocence and the resolution of doubts in her favour in respect of such proceedings. The disqualification imposed under section 5(6) of the 1995 Act constitutes a special public-law measure regulating access to the political process at the highest level. In the context of such a procedure, **doubts** could be interpreted against a person wishing to be a candidate, the **burden of proof** could be shifted onto him or her, and **appearances** could be considered of importance. As observed above, the Court is of the opinion that the Latvian authorities were entitled, within their margin of appreciation, to presume that a person in the applicant's position had held opinions incompatible with the need to ensure the integrity of the democratic process, and to declare that person ineligible to stand for election. The applicant **has not disproved** the validity of those **appearances** before the domestic courts; nor has she done so in the context of the instant proceedings."[160]

Holders of any judicial office should have **impeccable reputation** and **public trust**. Such reputation and trust will be undermined not only by actual violations of formal integrity or ethics rules but even by the appearance or perception of wrongdoing. Judicial positions in a corruption environment require even a higher standard of personal integrity as courts will be the final decision makers on corruption cases. There should be no doubt in the public eye as to the integrity, trustworthiness and other personal qualities of judges. Judges should abide by the high standards of integrity, standards that are higher than for most other public officials. It is especially so in contexts where the trust in the judiciary and judicial reforms remains very low. Therefore, international standards refer to the "trust" in candidates and their "appearance":

> "Judges, who are part of the society they serve, cannot effectively administer justice without public **confidence**".[161]

With judges who give the wrong appearance or perception such public confidence in the judiciary is impossible, let alone in a specialised anti-corruption court. Therefore, "appearance" and "perception" are the leitmotif of international standards on judicial integrity. For example, the Bangalore Principles of Judicial Conduct (2002)[162] use the word "appear" or "appearance" seven times (e.g. Value 4 "Propriety, and the **appearance** of propriety, are essential to the performance of all of the activities of a judge"). Similarly,

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[160] Zdanoka v. Latvia [Grand Chamber], no. 58278/00, of 16 March 2006, http://hudoc.echr.coe.int/eng?i=001-72794 (emphasis by author).

[161] Council of Europe Recommendation CM/Rec (2010) 12, at no. 20; see also no. 18, 30, 72 (emphasis by author).

[162] https://www.unodc.org/documents/ji/training/bangalorepriniciples.pdf (emphasis by author).

Opinion no. 3 (2002) of the Consultative Council of European Judges (CCJE)[163] states at no. 50 iii and xii that judges "should at all times adopt an approach which both is and **appears** impartial"; "they should refrain from any political activity which could […] cause detriment to their **image** of impartiality". The Committee of Ministers of the Council of Europe "Recommendation CM/Rec (2010) 12 on judges: independence, efficiency and responsibilities"[164] calls on judges to "avoid actual or **perceived** conflicts of interest" (at no. 21). The Venice Commission recommends recusal if there is "a reasonable perception of bias or conflict of interest, irrespective of whether the judge is in practice biased".[165] The European Network of Councils for the Judiciary views "people's perception of impartiality" as "essential to a fair trial" (London Declaration on Judicial Ethics).[166] Furthermore, the European Court of Human Rights' Resolution on Judicial Ethics (2008)[167] states: "Judges shall exercise their function impartially and ensure the **appearance** of impartiality. They shall take care to avoid conflicts of interest as well as situations that may be reasonably **perceived** as giving rise to a conflict of interest" (at no. II).

To this end, the Guidelines by the Ukrainian Public Council of International Experts (PCIE) stated:

> "A candidate does not meet an indicator where the non-compliance is proven or where **reasonable doubts** exist about the compliance."[168]

7.3.2 Involvement of internationals

In highly corrupt environment, no matter whether real or perceived, trust by the public at large in the integrity of the judges is key for an anti-corruption court to succeed. In this regard, the selection procedure for judges is the most crucial issue, in particular regarding integrity. The usual crux in such situations is: Who should be part of the selection panel, if there is **no** (full) **trust** in the integrity of any of the three pillars of power, the government, the judiciary, or parliament? Ukraine solved this challenge by involving internationals, who by nature stand outside all the domestic networks of corruption, influence, and dependencies. In 2019, the Venice Commission welcomed this approach:

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[163] https://rm.coe.int/168070098d (emphasis by author).

[164] https://rm.coe.int/cmrec-2010-12-on-independence-efficiency-responsibilites-of-judges/16809f007d (emphasis by author).

[165] CDL-AD(2010)004 at no. 63, https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2010)004-e.

[166] https://www.encj.eu/node/258.

[167] https://www.echr.coe.int/Documents/Resolution_Judicial_Ethics_ENG.pdf (emphasis by author).

[168] Compare https://globalanticorruptionblog.com/2020/03/02/ukraines-bold-experiment-the-role-of-foreign-experts-in-selecting-judges-for-the-new-anticorruption-court/; see also above chapter 5.3.6 (emphasis by author).

> "This new body consists of three persons elected by the Council of Judges of Ukraine from among its members and three persons from among the **international experts** proposed by the **international organisations** with which Ukraine cooperates in the field of preventing and combating corruption. As such, the composition of the Selection Board would seem to build on earlier opinions by the Venice Commission, especially as concerns the participation of international experts. In its opinion on the anti-corruption court in Ukraine the Commission had stated that 'temporarily, international organisations and donors active in providing support for anticorruption programmes in Ukraine should be given a crucial role in the body which is competent for selecting specialised anti-corruption judges...'."[169]

U4 has welcomed "the role of foreign experts in the judicial selection process" of Ukraine a "**most innovative** feature".[170]

7.3.3 National sovereignty

An honest – or even only abusive – argument against such a selection procedure could be the issue of **national sovereignty**. An objection could sound as follows: "How could any sovereign nation delegate the nomination of one of the most powerful positions in a democracy of rule of law, judgeships, to foreigners?" However, such an objection would rather not carry through:

- The involvement of foreigners would have the approval of the highest organ in a democracy, **parliament** (through respective legislation);
- The **selection criteria** are all foreseen in the law, again, determined by parliament;
- The foreigners are members of a **national selection body**, not members of an international selection body;
- As such they act as any national citizen would do – as **independent members**, not as ambassadors for their home countries or any other interest group;
- The Venice Commission has supported the constitutionality of furnishing a national selection body with members of international origin, as long as such a body is not permanent:

[169] CDL-AD(2019)027, Opinion On Amendments to the Legal Framework Governing the Supreme Court and Judicial Governance Bodies, at no. 23-24 (footnotes and no. omitted), https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2019)027-e (emphasis by author).

[170] U4 Brief 2020:3, Ukraine's High Anti-Corruption Court – Innovation for impartial justice, page 4, https://www.u4.no/publications/ukraines-high-anti-corruption-court.pdf (emphasis by author).

> "It is important to note that such bodies should be established for a **transitional period** until the envisaged results are achieved. A permanent system might raise issues of constitutional sovereignty."[171]

The Venice Commission apparently had no objection to the 6-year term of the PCIE in Ukraine.

7.4 Procedure

It is possible to envision certain procedural rules for anti-corruption cases at anti-corruption courts.[172] However, such rules are not a particular feature of anti-corruption courts (including anti-corruption panels at ordinary courts), but could also simply apply to anti-corruption cases at **ordinary courts**. They are thus not an aspect of this paper. Foreseeing a minimum number of judges in each chamber of an anti-corruption court,[173] in the end, is no such special rule either – it could apply in a general court as well. The rationale behind such a minimum number is the following: While it is statistically easier to bribe a single judge presiding a corruption case, it is less likely to be successful in a **3-judge-panel**.

7.5 Status of judges

It goes without saying that the status of judges should include all guarantees any **ordinary judge** has with regard to "appointing, removing, and overseeing them, as well as their terms and conditions of service, are the same as those for other judges at a comparable level of the judicial hierarchy."[174] Depending on the **security risk**, it is advisable to furnish judges at anti-corruption courts with additional security guarantees.[175]

7.6 Appeal and cassation

Where a real and/or perceived lack of integrity in the judiciary is one of the prime motives for establishing an anti-corruption court, a separate, **ring-fenced appeals** and cassation unit

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[171] CDL-AD(2019)027, Opinion On Amendments to the Legal Framework Governing the Supreme Court and Judicial Governance Bodies, at no. 23-24 (footnotes and no. omitted), https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2019)027-e (emphasis by author).

[172] For examples of such rules, see in detail U4 Issue 2016:7, Specialised anti-corruption courts: A comparative mapping, page 11, https://www.u4.no/publications/specialised-anti-corruption-courts-a-comparative-mapping.pdf.

[173] See for an example of such a rule above section 5.3 (Ukraine).

[174] U4 Issue 2016:7, Specialised anti-corruption courts: A comparative mapping, page 22, https://www.u4.no/publications/specialised-anti-corruption-courts-a-comparative-mapping.pdf.

[175] See above for Ukraine section 5.3.

seems without alternative. There is little point in facilitating adequate and robust first instance convictions, if these successes are annulled upon appeal. All arguments for establishing an anti-corruption at first instance, in the end, apply also to the next level.[176]

8 Pros and cons

8.1 Anti-corruption specialisation

The following are arguments pro and con for anti-corruption specialisation in general, whether in the sense of anti-corruption chambers within ordinary courts, or whether as a separate anti-corruption court:

Contra	Pro
The more elaborate and extensive the anti-corruption court is, the more **expensive** it is likely to be.	More effective adjudication of corruption can ultimately **save** a multiple of the extra **costs** of an anti-corruption court. International donors may cover a large part of the costs.
Close relationships between specialised judges and other actors (lawyers, experts) may lead to dependencies, conflicts of interest, or even facilitate **targeted bribery**.	The careful selection of judges and other institutional design choices can create an **island of integrity** within a highly corrupt environment. Without an anti-corruption court, the impunity of corrupt offenders, in particular within the judiciary will not stop.
Higher salary may lead to social envy among judges.	Salary discrepancies within the judiciary are common (e.g. between different levels of instances). The competition for posts at the anti-corruption court is open for all judges. The increased **expertise** and **security exposure** are rationales acceptable to the public at large for higher salaries.
There is a risk that an anti-corruption court will be found in parts or its entirety **unconstitutional**.	This risk exists in principle with all anti-corruption reforms. Input by international organisations could provide a corrective against any **unfounded** or **abusive attacks**

[176] See above for Slovakia and Ukraine sections5.2 and 5.3.

	on the constitutionality of an anti-corruption court.
There is a risk that the creation of an integrity island within the judiciary fails and that at least some judges of the anti-corruption court will be perceived as **corruptible** and **inefficient**.	This risk exists in principle with all anti-corruption reforms. If this risk is real, it is all the more **necessary** to try to create an island of integrity as apparently the larger environment is highly corruption prone.
An anti-corruption court is **no silver bullet**: Without effective investigations and prosecutions, there will be no meaningful results.	Without effective investigations and prosecutions, there will be no meaningful results in **general courts** (without an anti-corruption court) either.
An anti-corruption court my create **unrealistic expectations** to deliver swift convictions of powerful figures ("the public wants to see blood"). However, the role of a court is to do justice.[177]	In the end, the public at large will be already satisfied if **only justice** is done (without convicting every suspect no matter the case).
An excessive focus on an anti-corruption court could **distract** from the need to implement reforms in other institutions, like the police and the Prosecutor General's Office, and in the judiciary as a whole.[178]	The creation of an anti-corruption court **complements** all other reform efforts and in fact can facilitate them by ending impunity for corruption.
Anti-corruption specialisations at the judicial level will not work if **law enforcement** authorities or **prosecutors** will not "feed" the new system with well-processed cases, including high-profile ones.	An introduction of anti-corruption courts can build on or come **hands in glove** with the introduction of specialised law enforcement and/or prosecutorial authorities. This aside, the existence of a well-functioning judiciary could end the blame-game among stakeholders at least with regards to the judicial level.

[177] U4 Brief 2020:3, Ukraine's High Anti-Corruption Court – Innovation for impartial justice, page 2, https://www.u4.no/publications/ukraines-high-anti-corruption-court.pdf.

[178] U4 Brief 2020:3, Ukraine's High Anti-Corruption Court – Innovation for impartial justice, page 2, https://www.u4.no/publications/ukraines-high-anti-corruption-court.pdf.

8.2 Panel vs. court

The advantages of an anti-corruption specialisation through a chamber or a separate court are as follows:

Chamber	Court
The establishment of distinct anti-corruption chambers requires **less effort** and is less costly than an entire anti-corruption court.	The possible **higher effectiveness** of a separate court could (over)compensate for any extra costs.
Chambers could more easily be established throughout all **regions**.	A separate court at one central or very few regional locations will disrupt the typical problematic close **relationships** between judges and lawyers or local elites.
Close relationships between specialised judges and other actors (lawyers, experts) may lead to dependencies, conflicts of interest, or even facilitate **targeted bribery**.	The careful selection of judges and other institutional design choices can create an **island of integrity** within a highly corrupt environment. Without an anti-corruption court, the impunity of corrupt offenders, in particular within the judiciary will not stop.
Higher salary may lead to social envy among judges.	Salary discrepancies within the judiciary are common (e.g. between different levels of instances). The competition for posts at the anti-corruption court is open for all judges. The increased **expertise** and **security exposure** are rationales acceptable to the public at large for higher salaries.
There is a risk that an anti-corruption court will be found in parts or its entirety **unconstitutional**.	This risk exists in principle with all anti-corruption reforms. Input by international organisations could provide a corrective against any **unfounded** or **abusive attacks** on the constitutionality of an anti-corruption court.
There is a risk that the creation of an integrity island within the judiciary fails and that at least some judges of the anti-corruption court will be perceived as **corruptible** and **inefficient**.	This risk exists in principle with all anti-corruption reforms. If this risk is real, it is all the more **necessary** to try to create an island of integrity as apparently the larger environment is highly corruption prone.

An anti-corruption court is **no silver bullet**: Without effective investigations and prosecutions, there will be no meaningful results.	Without effective investigations and prosecutions, there will be no meaningful results in **general courts** (without an anti-corruption court) either.
An anti-corruption court my create **unrealistic expectations** to deliver swift convictions of powerful figures ("the public wants to see blood"). However, the role of a court is to do justice.[179]	In the end, the public at large will be already satisfied if **only justice** is done (without convicting every suspect no matter the case).
An excessive focus on an anti-corruption court could **distract** from the need to implement reforms in other institutions, like the police and the Prosecutor General's Office, and in the judiciary as a whole.[180]	The creation of an anti-corruption court **complements** all other reform efforts and in fact can facilitate them by ending impunity for corruption.

[179] Compare U4 Brief 2020:3, Ukraine's High Anti-Corruption Court – Innovation for impartial justice, page 9, https://www.u4.no/publications/ukraines-high-anti-corruption-court.pdf.

[180] U4 Brief 2020:3, Ukraine's High Anti-Corruption Court – Innovation for impartial justice, page 9, https://www.u4.no/publications/ukraines-high-anti-corruption-court.pdf.

9 Moldovan judiciary

The potential necessity of an anti-corruption court in Moldova is subject to an ongoing debate, where opposing positions are voiced whether the judiciary should foresee any specialisation in anti-corruption matters, whether specialised judges or chambers at general courts should be established, or whether a separate anti-corruption court would be preferable.[181] The majority of experts and practitioners interviewed[182] while drafting this Study were skeptical about or opposed to the idea of a separate anti-corruption court. A recent survey among legal professionals came to the following finding: "Asked about the recently announced initiative to set up anticorruption courts, **75% of judges**, 65% of prosecutors, and 61% of lawyers **don't support** this initiative."[183] An equivalent survey in other sectors or among the public at large has not been conducted or published yet.

9.1 Challenges

9.1.1 Efficiency

The recent reform of the judicial system[184] merged some courts, including the most overburdened courts from Chisinau Municipality. The idea was to distribute the workload and the make the administration of cases efficient. Whether the reform was successful has not yet been assessed.

Thus, there is **no** conclusive **statistical data** so far proving that corruption trials take longer than other trials. In any case, it would seem questionable to compare trials just by their duration – some offences by nature take longer to adjudicate than others.

However, there is at least one **qualitative** aspect that general courts are overwhelmed in particular with prominent corruption cases: Prominent defendants in corruption cases hire on average 6 different lawyers. They use any possible way of delaying and obstructing a

[181] See most recently the critique in this regard by LRCM/Daniel Goinic/Sorina Macrinici, The Anticorruption Court: Does the Republic of Moldova Really Need It? (2020), https://crjm.org/wp-content/uploads/2020/11/CRJM-Oportunit-Instanta-anticoruptie-2020-En.pdf.

[182] See above page 7, Fn. 1.

[183] LRCM, Survey concerning the perception of judges, prosecutors and lawyers on justice reform and fight against corruption – Summary, 16 December 2020, https://crjm.org/en/sondaj2020-judecatori-procurori-si-avocati-reformare-anticoruptie-autoadministrare/ (emphasis by author).

[184] Law no. 76 of 21 April 2016 on restructuring of the judiciary (Lege nr. 76 din 21 aprilie 2016 cu privire la reorganizarea instanțelor judecătorești).

trial.[185] It is evident, that a general court with an overload of cases and a tight trial schedule is quickly overwhelmed and possibly inclined to give in to at least some of the tactics of the "army" of lawyers of defendants.

This aside, **general inefficiency** of the courts is even less tolerable in corruption cases as many other crimes. The World Bank notes in this regard:

> "Perceptions of the performance of Moldova's courts differ between citizens and businesses on the one hand, and professional users of court services and justice employees on the other. Respondents who have actual experience with courts have different views about court performance: 76 percent of the general public and 76 percent of the business community expressed negative views. Most respondents across groups tend to state there have been no changes on the ground during 2015-2017."[186]

9.1.2 Expertise

Moldova enjoys a **specialisation** along the **law enforcement chain**: There are the NAC as well as an anti-corruption prosecutor's office. Apparently, the legislator sees a clear need for tackling this type of offences by a group of highly specialised professionals. This raises the question why this line of specialisation is cut off at the judiciary? Understanding all evidence properly, putting it in the procedural context, is equally challenging as investigating or prosecuting corruption. One must rather doubt that general courts can improvise this specialisation in between cases of animal cruelty, car accidents and shoplifting.

This aside, as mentioned earlier, in all its studies of judicial practice since 2010,[187] NAC identified a number of ways by which the judges made inter alia **excessive use** of mitigating circumstances and other measures. If these are not due to bribery or favouritism, they must be due to a lack of expertise. Furthermore, the national strategies on fighting corruption have continuously underlined the lack of specialisation of judges in corruption cases.[188]

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[185] See for example Mariana Rață and Cristina Țărnă, Report on Monitoring the Selectivity of Criminal Justice, pages 59-60, https://freedomhouse.org/sites/default/files/2020-02/Judicial_Integrity_Selective-Criminal_Justice_ENGLISH_FINAL.pdf.

[186] http://documents1.worldbank.org/curated/en/683491537501435060/pdf/Moldova-JSPEIR-English-Version-Sep-13-2018.pdf.

[187] See above footnote 63.

[188] The Republic of Moldova Parliament, Decision No. 56 of 30.03.2017 approving the National Integrity and Anticorruption Strategy for 2017-2020: "Lack of specialization of judges and/or courts in dealing with corruption acts, corruption-assimilated or corruption-related acts does not allow rapid improvement of case-law regarding such casefiles, as notorious corruption cases are not tackled with celerity because the ordinary courts are overloaded, and the punishments applied in case of convictions very seldom may be considered to be dissuasive.

9.1.3 Integrity

There is probably no monitoring stakeholder in- or outside Moldova, who does not perceive the judiciary as highly corrupt. For example:

- **Venice Commission**: "In the end, it falls ultimately within the competence of the Moldovan authorities to decide whether or not the **high level** of corruption in the Moldovan judiciary creates sufficient basis for subjecting all the sitting Supreme Court judges to extraordinary re-evaluation as provided by the draft law. […] Moldova is one of the countries where actual and/or perceived corruption in the judiciary is a matter of **major concern** among the public […]."[189]
- **International Commission of Jurists**: "The ICJ considers that, in Moldova […] the perception of corruption in the judiciary is **extremely high** […]."[190]
- **Bertelsmann Foundation**: "The judiciary in Moldova is **prone** to corruption and **servility** toward business and political groups. In recent years, a number of decisions taken by the **Constitutional Court** have proven to be **politically motivated**. […]

  The judiciary remains one of the least reformed sectors in Moldova. It's **highly corrupt** and servile toward the ruling political and business groups. […]

  By the end of 2017, the **level of distrust** toward the justice system among Moldovans reached **80%**, and only 14% of the population considered judges and prosecutors to be independent."[191]
- **Legal Resources Centre from Moldova (LRCM)**, December 2020: "22% of judges, 40% of prosecutors, and 61% of lawyers considered that, during this period [2011 until now], the **corruption** in the justice sector had **not changed** or had **increased**.

  With reference to the presence of corruption in various institutions, judges have the following opinions: […] 21%, that it is present in the **justice system** to a very great or great extent; […]. Prosecutors' opinions about this subject are as follows: […] 45% consider that it is present in the justice system to a very great or great extent; […]. Lawyers have the following opinions about this subject: […] **69%** consider that it is

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The society loses its interest for notorious corruption cases, which are so slowly examined, getting the perception of impunity for offenders from such cases, and qualifying the action undertaken at the criminal investigation stage as 'media shows' without any final outcome of judicial proceedings."

[189] CDL-AD(2019)020, at no. 46 and 76, https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2019)020-e (emphasis by author).

[190] https://www.icj.org/wp-content/uploads/2019/03/Moldova-Only-an-empty-shell-Publications-Reports-Mission-reports-2019-ENG.pdf, page 22 (emphasis by author).

[191] https://www.bti-project.org/en/reports/country-report-MDA-2020.html (emphasis by author).

present in the justice system and in the prosecution system to a very great or great extent […].”[192]

The need for creating an “island of integrity”, ring-fenced from this rather questionable if not poisonous environment is evident.

9.1.4 Lack of trust

Most importantly: Even “only” a perceived lack of integrity and effectiveness in the judiciary will harm the trust of ordinary **citizens**. If ordinary citizens do not trust the judiciary, they will rather **not report** about corruption. Without people reporting corruption, there is not even a chance of **accountability**. And without accountability, corruption will thrive. Only a separate anti-corruption court could make such a **“fresh start”** on integrity and effectiveness visible: People need to see that accountability works, and for this they need a clear reference point to look at. Trying to build this trust with a new anti-corruption court would certainly be an experiment, as would trying to build this trust without one, and leaving it to the general judiciary. However, there is the potential of creating an “island of credibility” with such an anti-corruption court, which could in mid- and long-term radiate across the entire judicial system. Credibility is not only achieved by high **convictions rates**, which already fare pretty good in corruption cases. For credibility, it is also necessary that justice is achieved in **swift**, consolidated **trials**. An anti-corruption court would have the advantage that it could focus on the corruption procedures, and schedule trials with the necessary flexibility, not being cornered in by the procedural necessities of all the trials concerning the wide range of all other offences as in general courts.

9.1.5 Conclusion

There are strong indications that **integrity** deficiencies in the Moldovan judiciary are a key factor supporting establishing an anti-corruption court. In addition, there are some concerns regarding efficiency or expertise of courts. The most effective way to ring-fence a judicial body from a highly corrupt environment would be to set up a separate anti-corruption court.

Establishing **anti-corruption chambers** or anti-corruption **judges** within existing courts might address any possible efficiency and expertise challenge. It would also be comparatively easy to set up by brief legal amendments specialised anti-corruption judges and/or chambers at all levels of judicial jurisdictions. However, the key issue of **integrity** would not be significantly changed with such a model. Furthermore, the Venice Commission was highly critical of this model in its opinion on Ukraine (see above at section 4 lit. 4.3).

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[192] https://crjm.org/en/sondaj2020-judecatori-procurori-si-avocati-reformare-anticoruptie-autoadministrare/ (emphasis by author).

9.2 Risks regarding an anti-corruption court

9.2.1 Trend of general courts

As of 2016, **reforms** have optimised the current judiciary system of the Republic of Moldova by merging a number 1st tier level courts and abolishing specialised military and commercial courts.[193] It was the result of a quite burdensome process aimed at improving the overall efficiency of the judiciary. Moreover, this reform was made in the background of public debates over the role of commercial courts and economic appeal courts. Creating a separate anti-corruption court might be perceived as contradicting this trend.

9.2.2 Appeal and supreme level

The Moldovan **Constitution** allows specialised courts only at the 1st tier level.[194] Their existence is not mandatory and compelling reasons would be needed to cut out again a specialised court from the recently unified general courts.[195]

Should a specialised anti-corruption court be introduced, the 2nd and 3rd tier levels can rather not uphold the same idea of anti-corruption specialisation. Moldova has a tree-tier level courts, where the Supreme Court and the Appeal courts retain jurisdiction to overrule any decision of the first instance courts. Thus, it is rather not an option for Moldova to have an anti-corruption court only at the 1st tier level. Introducing such a separate court at least on the 2nd **appeal level** could be done with constitutional amendments.[196]

An anti-corruption specialization at the **Supreme-court**-level would be even more controversial. Currently, the role and the place of the Supreme court in the Moldovan judiciary is widely disputed and rather undefined. It is subject to strategic visions and attempts of reformation, to which the Supreme court resisted successfully in the past. It is the principal focus for the current judicial reform.[197] In a strict sense, the Supreme Court in Moldova is a

[193] Article 1 Law no. 76 of 21 April 2016 on restructuring courts.

[194] Judgement No. 5 of 26 January 1998 about constitutionality control of the legislation in force regarding the economic courts; Judgment No. 3 of 9 February 2012 about constitutionality control of certain provisions from Law No. 163 of 22 July 2011 for amending and supplementing certain legislative acts.

[195] Critical in this regard: LRCM/Daniel Goinic/Sorina Macrinici, The Anticorruption Court: Does the Republic of Moldova Really Need It? (2020), https://crjm.org/wp-content/uploads/2020/11/CRJM-Oportunit-Instanta-anticoruptie-2020-En.pdf.

[196] Article 115 (2) Constitution of the Republic of Moldova.

[197] The draft law approving the Strategy for Ensuring Independence and Integrity in Justice Sector for 2021-2024 and the Action Plan for its implementation: "The quality of the judicial process is determined also by the existence of a unified and predictable case-law, which represents a goal generated by the need to ensure security of legal relations by avoiding divergent judgements for identical issues. The lack of uniform case-law

court with a limited jurisdiction in the cassation matters and extraordinary appeals. In reality, however, it is a court often retaining jurisdiction to rule on the facts of the cases, acting with rather appellate functions overriding decisions by appeal and trial courts.

9.2.3 Random distribution of cases

One should be aware, that for a small anti-corruption court, possibly with only between one to three chambers of first instance random allocation of cases would play rather no or only little role.[198] However, the Moldovan system of random case-allocation practically eliminates human involvement.[199] The system was recently updated, incorporating recommendations by NAC.[200] In **Slovenia** for example, this issue did not appear to be a problem because to the similar level of computerisation.[201]

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solutions continues to persist in the judgements delivered by courts. Although the Supreme Court of Justice should be the last-instance forum to remediate the illegalities admitted by inferior courts, unfortunately, the arbitrarily delivered judgments are not an exception for this court either, and generation or acceptance of non-unified case-law – a fact confirmed also through European Court judgments versus the Republic of Moldova, conditions an inconsistence in the system […]".

[198] LRCM/Daniel Goinic/Sorina Macrinici, The Anticorruption Court: Does the Republic of Moldova Really Need It? (2020), https://crjm.org/wp-content/uploads/2020/11/CRJM-Oportunit-Instanta-anticoruptie-2020-En.pdf, page 16: "The initiative could also compromise the benefits of the randomized assignment of corruption cases, which is an important measure to prevent corruption in the judiciary. The fewer judges have the power to try cases of a certain category, the more predictable are the outcomes of the randomized case assignment, which makes it easier to put pressure on them."

[199] See Ministry of Justice, http://www.justice.gov.md/libview.php?l=ro&idc=4&id=4092: "A new version of the ICMP, launched to be tested in 3 courts" ("O nouă versiune a PIGD-ului, lansată pentru testare în 3 instanțe"); Informational portal on the Justice sector, "The New Integrated Case Management System is Making the Moldovan Judiciary More Efficient and Transparent", 31 December 2019, https://www.justitietransparenta.md/en/noul-program-integrat-de-gestionare-dosarelor-asigura-cresterea-transparentei-si-eficientei-sistemului-judecatoresc/.

[200] NAC, Analytical study on deficiencies registered in the system for random distribution of casefiles "Integrated Case Management Program (ICMP)" (2016), https://www.cna.md/public/files/studiu_pigd.pdf.

[201] GRECO, Corruption prevention, Members of Parliament, Judges and Prosecutors, Conclusions and Trends (2017), page 19, https://rm.coe.int/corruption-prevention-members-of-parliament-judges-and-prosecutors-con/16807638e7: "The Supreme Court of Slovenia is in charge of the computerisation of the judicial system and has introduced new technologies in the courts, to implement the rules on case assignment and on publicity, among others. Court registers are entirely computerised and publicly available. About 95% of cases are registered and allocated electronically. The annual schedules of all courts are published on the website of the judiciary. This positive feature of the system guarantees that no one can tamper with the random case assignment to judges. Computerisation has visibly increased public trust in the case allocation system – complaints from parties have almost completely ceased."

9.2.4 Integrity

One could argue that concentrating corruption cases in a **small number of judges** would create another integrity risk, as this would make them a high target for bribery.[202] However, if it is possible to bribe these carefully selected judges in a specially set-up environment and who have high visibility, how much easier is it to bribe the "everyday judge" in some corner of the justice system, as corrupt as it already is? Figuratively speaking: Is it rationale to stay on a sinking ship, because the lifeboat might sink in the future too? With this kind of reasoning no reform could ever be accomplished.

9.2.5 Support by other state bodies

It is obvious that the level of cooperation, capacity, supportiveness, or, on the negative side, of **obstruction** by other stakeholders greatly influences the effectiveness of an anti-corruption court. To name a few, this is true for law enforcement bodies, the prosecution sector, the Constitutional Court, and the ministry of finance (as the budgetary planner).

9.2.6 Jurisdiction

Moldova (3.5 million inhabitants) cannot be compared one to one with much bigger countries, such as Ukraine (42 million inhabitants), where the total number of corruption cases is much higher. It is thus probably harder to justify the extra costs of setting up a specialised court if the number of corruption cases would only justify one or two chambers of such a court. A way out could be an extended special jurisdiction for corelated crimes, as in Slovakia for organised crime and corruption (5.5 million inhabitants). One could mirror the jurisdiction of NAC and anti-corruption prosecutors which includes money laundering offences. In any case, the jurisdiction should be strictly defined by law and without any unnecessary discretion for prosecutors to channel cases outside the jurisdiction of the anti-corruption court.

[202] LRCM/Daniel Goinic/Sorina Macrinici, The Anticorruption Court: Does the Republic of Moldova Really Need It? (2020), page 18, https://crjm.org/wp-content/uploads/2020/11/CRJM-Oportunit-Instanta-anticoruptie-2020-En.pdf: "The specialization of judges in a narrow branch of the law may expose them to the real risk of hidden influence and orientation of their judgments, particularly because of excessive proximity between judges, lawyers, and prosecutors".

10 Proposal

Recommendation 17: *Ideally, a separate **anti-corruption court** should be set up that is organisationally separate from the (perceivably) highly corrupt main judiciary. For the set-up of such a separate court, the following caveats need to be considered:*

a) *In light of the high rate of 2nd instance appeals, an anti-corruption court only has an impact if at least the **second instance** is also ring-fenced from the main judiciary. To this end, in light of jurisprudence by the Constitutional Court, a constitutional amendment might be necessary to allow creation of specialised courts at the appeal level. In Article 115 (2) of the Constitution, the word "judecătorii" ("courts in a narrow sense" in Romanian) could be changed into "instanțe" (a more inclusive term in Romanian).*

b) *In light of the high rate of 3rd instance appeals, risks remain for successful adequate convictions to hold up in the last instance, the **Supreme Court**, assuming that the integrity deficiencies at this instance might remain even after the current reform. For example, the Supreme Court could establish, or maintain, unrealistically high thresholds for evidence of corruption. A limited mitigation of this risk could be the establishment of an anti-corruption chamber at the Supreme Court. A separate "Anti-Corruption Supreme Court" would appear a somewhat desirable move, yet unheard of and highly speculative.*

c) *In any case, even in a next step, risks from finding convictions unconstitutional by an arguably independent and sometimes perceivably obstructive **Constitutional Court** would always remain. A similar risk exists if the Constitutional Court would make investigations and prosecutions more difficult to a level, where effective convictions become unlikely for any court, including a future anti-corruption court.*

d) *The **price tag** of a separate anti-corruption court is considerable: months of policy discussion and legal formulations, selection of judges, organisational setup, possibly higher salary of judges, security, etc. One would expect such an endeavour only to work*

with considerable financial support from the international community.

e) *The **jurisdiction** of such an anti-corruption court would probably need to go beyond corruption cases.*

f) *The success of such a court would mostly depend on the **selection** of the "right" judges, in particular regarding their current integrity, and in maintaining their future integrity. A risk for that selection process could be that the Constitutional Court would "happily jump" on the opportunity to find any involvement of international representatives, if only advisory, in the selection process to be unconstitutional.*

g) *An anti-corruption court could only make a difference with the cases that reach this court and in a state that facilitates adequate adjudication. Therefore, as in any jurisdiction, such a reform move would need to go hand in glove with all necessary reform steps along the **law enforcement** and criminal procedure chain. Still, even for the presentable cases that make it to this stage, such a separate anti-corruption court could make a significant difference.*

h) *One has to be aware of the fact that such a court would be an **experiment** in itself. However, abstaining from a separate anti-corruption is also an experiment in itself – years or even decades of systemic and unbearable human rights violations towards citizens through a significant number of corrupt judges in the Republic of Moldova in all instances.*

i) *A positive opinion by the **Venice Commission** on the respective two-instances anti-corruption court in Ukraine would underpin such an experiment with some legal certainty, not least since the Constitutional Court of Moldova has somewhat of a habit of "copy-pasting" opinions by the Venice Commission (sometimes with perceived manipulations).*[203]

[203] Parliamentary Assembly of the Council of Europe, Committee on the Honouring of Obligations and Commitments by Member States of the Council of Europe "Monitoring Committee" (May 2015), Honouring of obligations and commitments by the Republic of Moldova, Information note by the co-rapporteurs on their fact-finding visit to Chisinau and Comrat, AS/Mon(2015)20 rev, at no. 37/footnote 27, http://assembly.coe.int/CommitteeDocs/2015/amondoc20rev_2015.pdf: "Transparency International Moldova

j) *One should expect the **obstruction** by various powerful stakeholders interested in the current status quo to be strong and creative – at the stage of setting up such a court as well as when cooperating (or not) with such a court in practice.*

incriminated a bad translation of the amicus curiae brief and a 'manipulation' by the Constitutional Court to dismiss the law."