



# **INVESTIGATION AND PROSECUTION OF CORRUPTION OFFENCES: MATERIALS FOR THE TRAINING COURSE**

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## FOREWORD

Fighting corruption and promoting good governance are among the main priorities of the OECD. The OECD has established anti-corruption standards and good governance principles, and has promoted their implementation by member countries through mutual reviews and elaboration of good practices. It also helps non-members to improve their domestic anti-corruption and good governance efforts by sharing of experience and analysis through regional programmes. The Anti-Corruption Network for Eastern Europe and Central Asia (ACN) is one such regional anti-corruption programme ([www.oecd.org/corruption/acn](http://www.oecd.org/corruption/acn)); over the decade it has been the main vehicle for promoting OECD standards and supporting anti-corruption programmes in this region.

The OECD/ACN project “Strengthening the Capacity for Investigation and Prosecution of Corruption in Ukraine” (OECD/ACN Project for Ukraine) aims to support national reforms, and focuses at promoting institutional and professional specialization in anti-corruption in Ukrainian law-enforcement system. To achieve this objective, the project pursues several activities, including strengthening professional capacity of investigators and prosecutors necessary to detect, investigate and prosecute corruption related crimes.

This manual was developed as a part of such efforts and is aimed for the primary use of the National Academy of Prosecutors of Ukraine. But it can also be useful for other teachers, professors and trainers who deliver academic education to university students and in-service training for operating investigators and prosecutors in Ukraine, and possibly in other countries with similar background conditions.

The manual covers all stages of investigation and prosecution of corruption cases and methods which can be applied by law-enforcement officers based on the Ukrainian legislation currently in force, as well as methods which could be recommended based on the best international and European practice. It consists of the following main parts:

1. International standards and Ukrainian laws on investigation and prosecution of corruption.
2. Practical guidelines for investigation and prosecution of corruption in Ukraine.
3. Methodology and description of the training course for teachers.
4. CD Rom with training materials for students and for teachers.

The manual was prepared jointly by the OECD/ACN Project for Ukraine, Basel Institute on Governance, Ukrainian National Prosecutor’s Academy, and in co-operation with the Council of Europe/European Commission ‘Support to Good Governance: Project against Corruption in Ukraine’ (UPAC). The OECD/ACN Project for Ukraine is funded by the Department of State of the United States of America.

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## **EXECUTIVE SUMMARY**

This Manual was developed for the use of the National Academy of Prosecutors of Ukraine which is the main body which provides professional training and development for prosecutors. But it can also be useful for other teachers, professors and trainers who deliver academic education to university students and in-service training for operating investigators and prosecutors in Ukraine, and possibly in other countries with similar background conditions. It consists of three parts.

The first part of the Manual provides an overview of international standards in the field of criminal liability for corruption and good practice regarding the role of prosecutors in investigating and prosecuting corruption offences. It provides a brief analysis of the Ukrainian legislation and clarifies which elements already comply with the international standards and best practice, and areas where further reforms are still needed. This analysis will inform Ukrainian investigators and prosecutors about current possibilities provided by the Ukrainian legislation, and about changes that may be expected as a result of ongoing reforms, to which they may want to prepare.

The second part of the Manual presents methods that can be used by investigators and prosecutors in criminal proceedings in corruption-related crimes. These methods are provided for each stage of investigation and prosecution, from initiating the proceedings and qualification of offences to gathering evidence, laying charges and presenting the case in court. Special attention is given to the use of special investigative techniques and financial investigations. Instruments of international co-operation in the investigation and prosecution of corruption offences are also presented in this part. This part includes methods provided by the existing legal system and tradition in Ukraine, as well as tools which are not yet available in Ukraine, but can be recommended on the basis of international standards and good practice from other countries.

The third part of the manual is intended for teachers who deliver training on investigation and prosecution of corruption offences. It includes description of the training methodology, which combines lectures and practical exercises based on a case study, a training plan and guidance on the use of the training materials. It further provides a set of lectures, which can be used by teachers in the delivery of this training. Finally, this part provides description of the practical exercises and the case study.

All training materials, including additional reference materials and materials for the practical exercise are provided on the attached CD-ROM. They are organized in two folders; one is for the use of teachers and one is for the use of students.



## **1. INTERNATIONAL STANDARDS, GOOD PRACTICE AND UKRAINIAN LEGISLATION**

The first part of the Manual provides an overview of international standards in the field of criminal liability for corruption and good practice regarding the role of prosecutors in investigating and prosecuting corruption offences. It provides a brief analysis of the Ukrainian legislation and clarifies which elements already comply with the international standards and best practice, and areas where further reforms are still needed. This analysis will inform Ukrainian investigators and prosecutors about current possibilities provided by the Ukrainian legislation, and about changes that may be expected as a result of ongoing reforms, to which they may want to prepare.

### **1.1. Corruption offences**

#### ***1.1.1. International Standards***

International standards on the criminalisation of corruption developed by international organisations such as the Organisation for Economic Co-operation and Development (OECD), the Council of Europe (CoE) and the United Nations (UN) do not define “corruption”; instead, they establish offences for a range of corrupt behaviour. The main international standards on the criminalisation of corruption thus prescribe the following specific offences<sup>1</sup>:

1. The United Nations Convention Against Corruption (UNCAC) contains mandatory offences, which include bribery of national public officials, bribery of foreign public officials and officials of public international organizations, embezzlement, misappropriation or other diversion of property by a public official and obstruction of justice; as well as optional offences, such as trading in influence, abuse of functions, illicit enrichment, bribery in the private sector, etc.
2. The CoE Criminal Convention on Corruption (CoE Convention) covers a broad range of offences, including active and passive bribery of domestic and foreign public officials, bribery in the private sector and trading in influence in its Chapter II. All these offences are mandatory under the CoE Convention.
3. The OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (OECD Anti-Bribery Convention) establishes the offence of bribery of foreign public officials in international business transactions in its Article 1.

The above-mentioned conventions are not self-executing and require enactment of domestic legislation to comply with their requirements. In order to implement these conventions, States must initially identify if and how their legislation falls short of the standards set by them.

#### ***1.1.2. Liability for Corruption Offences in Ukraine***

Ukraine signed the UNCAC in 2003, ratified it in 2006, and became a Party to the Convention in 2010. Ukraine signed the Council of Europe Criminal Law Convention on Corruption in 1999, and ratified this Convention in 2006; the Convention came into force for Ukraine in March 2010. Ukraine is not a party to the OECD Anti-Bribery Convention, but it participates in the OECD Anti-Corruption Network for Eastern Europe and Central Asia (ACN) and is subject to monitoring under the Istanbul Anti-

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<sup>1</sup> OECD Glossary of International Anti-Corruption Standards, 2008, p. 30, <http://www.oecd.org/dataoecd/59/38/41194428.pdf>.

Corruption Action Plan (IAP)<sup>2</sup> which is based on various international standards including the OECD Anti-Bribery Convention.

#### 1.1.2.1. Criminal liability

While Ukrainian legislation provides a wide range of corruption offences, there are major shortcomings in the criminalisation of corruption in Ukraine vis-a-vis international standards. GRECO and ACN reviews have identified the following shortcomings:

<b>Corruption offences established by the current Ukrainian legislation</b>	<b>Shortcomings in the current Ukrainian legislation</b>
<b>Bribery offences</b>	
<ul style="list-style-type: none"> <li>• Passive bribery (Articles 368, 368-3 § 3, 368-4 § 3 of the Criminal Code)</li> <li>• Active bribery (Articles 368-3, 368-4 and 369 of the Criminal Code)</li> </ul>	<ul style="list-style-type: none"> <li>• Promising and requesting of a bribe, acceptance of offer or promise of a bribe as completed offences</li> <li>• Non-pecuniary advantages</li> <li>• Bribery through a third party and for the benefit of the third person</li> <li>• Effective, proportionate and dissuasive sanctions for bribery offences</li> <li>• Liability of legal persons</li> </ul>
<b>Other corruption related offences</b>	
<ul style="list-style-type: none"> <li>• Money laundering (Articles 209, 209-1 of the Criminal Code)</li> <li>• Embezzlement, misappropriation or other diversion of property in public or private sector (Article 191 of the Criminal Code)</li> <li>• Trading in influence (Article 369-2 of the Criminal Code)</li> <li>• Obstruction of justice (Article 376 of the Criminal Code)</li> <li>• Abuse of office, exceeding of official powers (Articles 364, 364-1, 365, 365-1 and 365-2 of the Criminal Code)</li> <li>• Concealment (Article 396 of the Criminal Code)</li> <li>• Illicit enrichment (Article 368-2 of the Criminal Code)</li> </ul>	<ul style="list-style-type: none"> <li>• Liability of legal persons for money laundering offences</li> <li>• Illicit enrichment (offence is not in line with Article 20 of the UNCAC)</li> <li>• Abuse of office offences (offences do not include element of personal gain and are vaguely worded)</li> </ul>

#### 1.1.2.2. Administrative Liability

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<sup>2</sup> The ACN is one of the regional programmes implemented in the framework of the Global Relations Strategy of the OECD Working Group on Bribery. The ACN includes 23 countries in Central Europe and Central Asia, including Ukraine. The IAP is a voluntary initiative that includes 8 ACN countries, including Ukraine, which provides a mechanism for regular peer review of anti-corruption legislation and institutions, including those in the area of criminalization of corruption and law enforcement. The report on the second round of monitoring of Ukraine under the IAP was adopted in December 2010 and is available at the ACN web site: <http://www.oecd.org/dataoecd/31/55/46832397.pdf>.

While international instruments require that corruption behavior is prosecuted as criminal offences, since 1995 Ukraine, like some other former Soviet Union countries, has had a parallel system of administrative and criminal liability for corruption. In addition to the offences established by the Criminal Code, the Law of Ukraine on the Fight against Corruption established the offence of “Illegal acceptance by a person authorised to perform public functions... of material benefits, services, privileges or other advantages...” which were punished by administrative and disciplinary sanctions. The main criterion for distinguishing between criminal and administrative corruption offences is the degree of public danger of the said offences, which is hard to define in practice. Law enforcement or internal investigation authorities tend to use softer administrative sanctions, as criminal procedures require a higher threshold of proof and more complicated procedures, thus allowing offenders to escape stronger sanctions. After 2011 reform of the legislation on liability for corruption offences Ukrainian law still contains parallel administrative and criminal sanctions for corruption. For instance, Article 172-3 of the Code of Administrative Offences “Offer or giving of an undue advantage” and Article 369 of the Criminal Code “Offer or giving of a bribe”.

#### *1.1.2.3. Sanctions, Confiscation and Immunities*

Concerning sanctions, international anti-corruption conventions establish generic standards which require that sanctions be effective, proportionate and dissuasive. The ACN review of Ukraine identified specific shortcomings, in particular too low sanctions for bribery offences.<sup>3</sup> Amendments introduced in 2011 did not address this; on the contrary, they have further lowered sanctions for some bribery offences. No imprisonment is provided for basic offences of active and passive bribery (Article 368 § 1; Article 369 § 1 and 2). This appears to be in violation of Article 19 of the CoE Convention that requires effective, proportionate and dissuasive sanctions, including penalties involving deprivation of liberty which can give rise to extradition. Besides, the limitations period for some corruption offences – two years for basic offence of passive bribery (Article 368 § 1) and three years for basic offence of active bribery (Article 369 § 1) – remains too short.

All international conventions require their signatories to be able to confiscate the bribe and the proceeds of bribery, or the property the value of which corresponds to such proceeds. Available confiscation mechanisms in Ukraine are limited and do not provide for the possibility of confiscation of proceeds of all corruption and corruption-related offences. Such possibility is, however, contemplated in a draft law, "On amendments to the Criminal and Criminal-Procedural Codes on Improving the Procedures for Carrying out of Confiscation", which is pending in the parliament since 2009.

On immunities, the UN Convention against Corruption provides that a balance between the immunities and the possibility of effective investigation, prosecution and adjudication of corruption offences should be struck. The best practice further indicates that to meet this international standard, immunities should be functional in nature, *i.e.* apply only to acts carried out in the performance of official duties, and have limited duration; effective procedures for lifting immunities are also important. Period when person enjoys immunity should not be included in the statute of limitations period. To date, no measures were taken in Ukraine to ensure that immunities do not prevent investigation and prosecution of high level public officials; immunities remain absolute and not functional; procedures for lifting immunities are not sufficiently effective and transparent.<sup>4</sup>

#### *1.1.2.4. Continued Legal Reform*

On 7 April 2011, the Law No. 3206-VI "On the Principles of Preventing and Counteracting Corruption" and the Law No. 3207-VI "On Amendments to Several Legislative Acts concerning Liability for Corruption Offences" were adopted and entered into force on 1 July 2011. These laws introduced several important changes in the criminal legislation of Ukraine, including offences of trading in influence and illicit enrichment, changes in incriminations of active and passive bribery, etc. However, these changes failed to ensure full compliance with international standards. Despite remaining shortcomings of the legal basis for criminalisation of corruption of Ukraine, the country will eventually reform its legislation and will bring it in compliance with international standards. It is

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<sup>3</sup> OECD/ACN Istanbul Action Plan Second Round of Monitoring Report on Ukraine, adopted in December 2010, p.33, <http://www.oecd.org/dataoecd/31/55/46832397.pdf>.

<sup>4</sup> *Idem*, p.51.

therefore important for the practitioners, including investigators and prosecutors, to be aware of the international standards, which will eventually become legal norm in Ukraine, and which are currently used by other countries, and may be used as grounds for MLA and other requests for international co-operation.

## **1.2. Principles of prosecution and investigation of corruption cases**

There are no unified international standards on the role of prosecutors and investigators, including those involved in investigation and prosecution of corruption cases. Some international documents, such as the UN Convention Against Corruption and the Council of Europe Criminal Law Convention on Corruption, contain provisions relevant to investigation and prosecution of corruption. There is also a body of good practice developed in different countries around the world, which do not constitute legally binding international standards, but provide useful benchmarks for reforms at the national level.

### **1.2.1. Role of the prosecutor**

International standards and good practice emphasize the importance of prosecutors who play a *leading role* in initiation and pursuing of prosecution, conducting, directly or through investigators, corruption investigations and overseeing co-operation and exchange of information on specific cases.

Reminiscent of the Soviet-style *prosecutor's office (prokuratura)* model, the role of the prosecution service of Ukraine, as in several other countries in Eastern Europe and Central Asia, is dominated by the *supervisory functions* where the procuracy bores responsibility for supervising the legality in the public administration. Through the power of “general supervision” the procuracy has the power to supervise over the observance of human rights and freedoms and the observance of laws by bodies of state power, local self-government, their officials and functionaries. Moreover, the public prosecutor has power to enter premises of public authorities, citizens’ associations, enterprises, institutions, organisations and to have access to documents. The prosecutor can request that decisions, instructions, orders and other acts and documents be produced for verification. Given the comprehensive nature of the power to supervise the observance of laws, these powers are very far reaching indeed.<sup>5</sup>

Like in several countries in Eastern Europe and Central Asia, the role of prosecutors in Ukraine requires major reform, which should bring this service in line with international standards and good practice. The reform should aim to shift the main functions of prosecutors away from general supervision and general protection of human rights, and remove potential conflict of interest which exist when one part of service supervises another part of the same service. The reform should promote the leading role of prosecutors in investigating and prosecuting corruption, establish clear duty for prosecutors to lead the investigation and provide them with necessary rights and resources.

### **1.2.2. Mandatory versus discretionary prosecution**

There are two types of prosecution approaches within various legal systems around the world. First is the discretionary prosecution where the prosecutor has the discretion to decide whether or not to pursue the prosecution of a specific offence; this approach is often used in the common law countries, such as the US and the UK. Second is the mandatory prosecution, where criminal proceedings must be started in all cases when there is sufficient information to conclude that an offence has been committed; this approach is found in civil law countries, including many European countries. Both systems have certain advantages and disadvantages.<sup>6</sup> Main advantage of the discretionary system is that it allows the

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<sup>5</sup> When the 1996 Constitution of Ukraine was enacted, the functions of supervision over observance and application of the laws generally and the function of preliminary investigation were supposed to remain with the procuracy during short term. Furthermore, PACE Recommendation 1604 (2003) on the role of the Public Prosecutor's office in a democratic society emphasizes that it is essential for any role for the prosecutors in the general protection of human rights to not give rise to any conflict of interests or act as a deterrent to individuals seeking state protection of their rights. The general protection of human rights is not an appropriate sphere of activity for the prosecutor's office. It should be better realised by an ombudsman than by the prosecutor's office.

<sup>6</sup> CoE Committee of Ministers Recommendation 2000(19) offers in-depth analysis on the issue of mandatory vs. discretionary prosecution.

prosecutors to focus their resources on the most important cases and thus use the criminal justice system efficiently without overflowing it with minor cases. However, if left without proper regulation this can create the impression of arbitrariness in prosecution policy and room for abuse by prosecutors. Main advantage of the mandatory prosecution is in equal application of criminal law which precludes considerations of the political partisanship and any form of favouritism, as well as shields prosecution from undue outside pressure. However, this system may burden the criminal justice system with too many cases, cause delays and waste of resources. At the same time in most European countries with formally mandatory systems prosecutors do not prosecute each and every criminal offence. In Germany and Austria, for instance, the prosecutor can limit prosecution to the most serious charges and drop all others.<sup>7</sup> In addition, in Germany the exceptions to mandatory prosecution rule include “minor offences” (those with the statutory minimum of less than 1 year imprisonment), with respect to which the German prosecutor can refrain from filing charges<sup>8</sup>.

In Ukraine, like in many countries of the ACN region, mandatory prosecution is stipulated in the law with no room for exceptions. Like in other countries of the region mandatory requirement to investigate and prosecute all cases cannot be implemented in practice due to limited resources; as a result it leads to abuse, with preference given to “more easily verifiable facts” and simple cases, and use administrative rather than criminal sanctions. The ACN review of Ukraine recommends that rather than require prosecutors pursue criminal liability for corruption in every possible case, Ukraine may consider an approach that allows officials to use transparent, controlled discretion to decide whether to pursue particular kind of enforcement mechanisms – criminal, administrative, civil or disciplinary – in the light of all relevant circumstances. Such an approach could help ensure that limited resources are directed to the most important cases. To this end, the Ukrainian authorities could adopt criteria for prioritisation of cases, which could be used by investigators and prosecutors specialised in corruption offences.

### **1.2.3. Independence**

International standards on the role of prosecutors in combating corruption, including CoE<sup>9</sup> and UN<sup>10</sup> instruments, say that prosecutors must enjoy such independence or autonomy as is necessary for the exercise of their duties. They, in particular, should be able to act *without unjustified interference* from any other authority. While international standards do not provide for further details, best practice shows that appropriate safeguards to ensure independence of the prosecution bodies from political and other undue influence should be enshrined in the status of the institution, appointment/dismissal procedures of the Prosecutor General and his deputies, recruitment and promotion of prosecutors, budget allocation procedures.<sup>11</sup>

In addition to the independence of the prosecutorial service as a whole, independence of individual prosecutors should also be ensured; prosecutors should be enabled to perform their professional functions without intimidation, hindrance, harassment, improper interference or unjustified exposure to civil, penal or other liability. Best practice shows that this can be achieved through the following provisions, which must be stipulated by law:

- fair and impartial merit-based procedures for appointment and promotion/demotion mechanisms for individual prosecutors and investigators; safeguards against arbitrary dismissal of prosecutors;
- clear definition of powers and duties of the superior prosecutors, including with regard to assignment and transfer of cases;
- appropriate reporting mechanisms and transparent criteria for evaluation of work of individual prosecutors by their superiors.

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<sup>7</sup> German Code of Criminal Procedure (StPO), para 154; Austrian Code of Criminal Procedure (StPO), para 34.

<sup>8</sup> German Code of Criminal Procedure (StPO), para 153.

<sup>9</sup> PACE Rec 1604 [2003], CM Rec 19 [2000], CoE Criminal Law Convention on Corruption, Guiding Principles for the Fight against Corruption, etc.

<sup>10</sup> Guidelines on the Role of Prosecutors and UN Convention Against Corruption.

<sup>11</sup> For further guidance, please refer to "Specialised Anti-Corruption Institutions: Review of Models", OECD, 2008 and "Anti-Corruption Specialisation of Prosecutors in Selected European Countries", ACN/OECD, 2011.

Given the substantial powers that prosecutors enjoy and the consequences that they might have on individual liberties there should be mechanisms to prevent abuses of individual prosecutors and to ensure liability (disciplinary, administrative, civil and criminal) for actual violations of rules by them. This may include an accountability mechanism on institutional level in the form of reports (to the public/designated bodies) with information on performed work, statistics, impact, spent funds and priorities. Integrity of individual prosecutors should be based on clear and objective rules and ethical standards and supported by enforcement mechanisms.

The prosecution service in Ukraine is a unified centralised system which is neither part of the judiciary, nor of the executive. Institutional independence is ensured through appointment of the Prosecutor General of Ukraine by the President with consent of the Parliament. It is important to note that the Law of Ukraine on Prosecution Service was amended in 2010 and the list of grounds for dismissal of the Prosecutor General was made open-ended (by introducing an option of dismissal “for other reasons”), thus seriously curtailing his independence from the President.<sup>12</sup> The prosecution service of Ukraine is financed through a separate budget line with Prosecutor General being responsible for approval of the budget of the service; however preparation and submission of the budget for the prosecution service depends on the executive. Accountability of the prosecution service is ensured through annual reports made by the Prosecutor General to the Parliament vested with a right of the vote of non-confidence leading to dismissal of the Prosecutor General. While the law purports to guarantee procedural independence of the individual prosecutors<sup>13</sup>, a highly hierarchical structure under which the Prosecutor General can issue mandatory orders and instructions, assign and transfer cases, appoint and dismiss prosecutors is in place, thus undermining their actual independence. Moreover, all prosecutors serve for renewable 5-year terms and therefore are subject to arbitrary removal.

#### **1.2.4. Specialisation**

International standards, such as the UNCAC and CoE Criminal Law Convention on Corruption, establish the standard of specialisation. The UNCAC requires that parties to the Convention ensure that they have a body responsible for corruption prevention, and a body or persons responsible for combating corruption through law-enforcement. Good practice shows that anti-corruption specialisation in law-enforcement bodies and in the prosecutorial service is the main mechanism in this field. Specialisation of anti-corruption bodies implies the availability of specialised staff with special skills and a specific mandate for fighting corruption.<sup>14</sup> There is no one model which is required and specialisation can take various forms.

Concerning the role of prosecutors in investigation and prosecution of corruption in Ukraine, the prosecutor’s office performs the following functions: investigation of criminal offences, including corruption offences, by investigators of the prosecution’s office, oversight over work of investigative bodies (including investigators of the prosecution’s office, *i.e.* one group of prosecutors is supervising another) and law enforcement agencies that perform operative and search activities in corruption cases (relevant units of the Ministry of Interior of Ukraine, Security Service of Ukraine, etc.), and prosecution on behalf of the State in courts.

Thus, prosecutors in Ukraine do not specialise in specific types of crimes, such as corruption, but in different stages of investigation and prosecution procedure. Responsibility for corruption cases based on the “procedural specialisation” is divided among an investigator of the prosecution’s office who conducts pre-trial investigation, a prosecutor who oversees the legality of investigation, and another prosecutor who later supports accusation in court. According to the ACN monitoring report, lack of anti-corruption specialisation in the Ukrainian prosecutorial service is one of the factors which undermine the effectiveness of combating corruption through law-enforcement and should be addressed by legal and institutional reforms.

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<sup>12</sup> Amendments in Article 2 of the Law on Prosecution Service introduced on 7 October 2010.

<sup>13</sup> Article 7 of the Law on Prosecution Service of Ukraine guarantees non-interference in the work of prosecutors, including a ban to issue any guidelines or instructions regarding individual cases by representatives of other institutions.

<sup>14</sup> Specialised Anti-Corruption Institutions: Review of Models, OECD 2007, p.6.

### **1.2.5. Resources**

International standards also require that sufficient resources be provided to the specialised staff dealing with corruption offences in order to make their operation effective. Material resources include sufficient salaries, premises, equipment, and other necessary resources. Adequate human resources include sufficient staff, their respective qualification levels, training, and specialised expertise within the prosecution services. This may also include access to special expertise which is not available within the prosecution services through the use of external experts in specialised areas.

One of the main issues concerning human resources in the region and in Ukraine remains the lack of new types of expert knowledge necessary for financial investigation of corruption and other complex economic crime, including such skills as forensic accounting, audit, banking, information technology, procurement, engineering, use of various databases and other modern business technologies. These skills are still scarce in the region and may be available in the private sector, at high market prices. Lack of such skills inside law-enforcement and prosecutorial bodies, and often unaffordable market prices lead to insufficient involvement of outside experts.

Special professional training is one of the important elements of human resource development. Corruption is a complex and evolving phenomenon; prosecution of corruption requires highly specialised knowledge in a broad variety of subjects. Sound anti-corruption training system includes mandatory professional continuous training of prosecutors in general, as well as specialised courses on anti-corruption. In-service training should be a norm. International exchange of best practices is often a valuable source of know-how for newly established bodies. Training facilities, faculty and allocation of financial resources for training needs should be provided in sufficient amount.

The system of professional training and development for representatives of the agencies which are responsible for detection, investigation and prosecution of corruption in Ukraine is such that each criminal justice agency has its own educational institution through which such trainings are developed and organized. The National Academy of the Prosecutor's Office of Ukraine is the main body which provides professional training and development for prosecutors. Nevertheless, there are no formal anti-corruption courses, except for some *ad-hoc* courses on ethics, within the obligatory curriculum for the professional development of prosecutors.

## **2. PRACTICAL GUIDELINES ON INVESTIGATION AND PROSECUTION OF CORRUPTION CRIMES**

The second part of the Manual presents methods that can be used by investigators and prosecutors in criminal proceedings in corruption-related crimes. These methods are provided for each stage of investigation and prosecution, from initiating the proceedings and qualification of offences to gathering evidence, laying charges and presenting the case in court. Special attention is given to the use of special investigative techniques and financial investigations. Instruments of international co-operation in the investigation and prosecution of corruption offences are also presented in this part. This part includes methods provided by the existing legal system and tradition in Ukraine, as well as tools which are not yet available in Ukraine, but can be recommended on the basis of international standards and good practice from other countries.

### **2.1. Instituting criminal proceedings**

#### ***2.1.1. Sources of information to institute criminal proceedings***

##### *2.1.1.1. Grounds for instituting criminal proceedings*

A criminal case may be opened in Ukraine by a body of inquiry [organ diznannya], an investigator, a prosecutor, or court on the following grounds<sup>15</sup>:

- complaints or reports by public institutions, non-governmental organisations and other organisations or enterprises or individuals;
- statement or report by the same agencies or individuals who may have apprehended the suspect *in flagrante delicto* (at the scene of a crime);
- confession by the offender himself;
- information from the press;
- elements of crime detected by the body of inquiry, investigators, prosecutors or courts.

Complaints or reports can be oral or written. Oral reports are entered in the record signed by the applicant and the official who received it. Prior to instituting criminal proceedings, it is necessary to verify the identity of the applicant, warn about liability for submitting misleading information, and take the appropriate signed acknowledgment. Reports from enterprises, institutions, organisations and officials should be in writing.

International treaties stress the importance of encouraging reporting of corruption incidents by citizens, public institutions and the private sector for fighting corruption. Article 39 of the UNCAC requires from countries to consider how to encourage citizens to report corruption to national investigative and prosecutorial bodies. The international standards also require facilitating of reporting. According to Article 13 of the UNCAC, States shall ensure that the relevant anti-corruption bodies are known to the public and the public can report incidents of corruption.

According to Article 94.1.5) CPC direct detection of elements of a crime by bodies of inquiry, investigator, prosecutor, etc. is one of the grounds for opening a criminal case. In Ukrainian legal practice, investigators and prosecutors can use elements detected in this or other proceedings as grounds to start the case. Good practice from other countries suggests that prosecutors should have the legal right and practical possibility to use such information for pro-active detection and investigation.

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<sup>15</sup> Article 94 of the CPC



### 2.1.1.2. Treatment of anonymous reports

In Ukraine complaints or reports on incidents of corruption coming from an anonymous source do not constitute statutory basis for opening of the criminal case.<sup>16</sup>

According to international standards, including the UN Convention against Corruption, reports on incidents of corruption can be anonymous. “States must also allow for anonymous reporting of such incidents.”<sup>17</sup> In many countries anonymous reports on incidents of corruption are permitted, for example, in Belgium<sup>18</sup>, Germany<sup>19</sup>, Switzerland<sup>20</sup>. Acts that govern and regulate work of law enforcement agencies provide that anonymous reports which contain factual information about a possible crime should be acted upon. Even if not sufficient for opening a criminal case such information should be followed up (*e.g.* with the anonymous source) to obtain additional information.

The anonymous reports can be a basis for verification of the facts contained in such reports and then if elements of the crime are detected by the bodies carrying out the verification – those can be used to institute criminal proceedings. This avenue should be given due attention taking into account hidden nature of the corruption crimes, lack of trust in the law enforcement agencies and international requirements mentioned above.

### 2.1.2. Verification of the crime reports

The prosecutor, investigator, inquiry agency or judge is required, within three days, to take one of the following decisions in regard to the complaint or report of a crime<sup>21</sup>:

1. institute criminal proceedings;
2. refuse to institute criminal proceedings;
3. refer the complaint or report of crime to the appropriate authority.

If it is necessary to verify a crime report before instituting criminal proceedings, such verification is made by the prosecutor, investigator, or inquiry agency within ten days by taking explanations from particular persons or officials, or by reviewing relevant documents. The following operative and investigative activities can be conducted as a part of verification: examination of the place of a crime (Article 190 § 2 of the CPC), seizure of the correspondence and extraction of the information from the communication channels.<sup>22</sup> Due authorization process for these activities includes receipt of the court’s authorisation issued in response to the request from the chief (his/her deputy) of the operative unit with prior approval from the prosecutor. The judge passes a ruling on the issuance of such authorization, and such ruling may be challenged as prescribed in Articles 177, 178, and 190 of the CPC.<sup>23</sup>

The other methods of verification which can be especially useful in corruption-related crimes include inspections and audits. Both of these can be requested in the course of the verification, and can be followed up by the conduct of various types of expertise.

The criminal case may only be opened if sufficient information is available to support the conclusion that the established facts contain the elements of a criminal offence.<sup>24</sup> As soon as sufficient facts are established, the inquiry body, investigator, prosecutor or court may issue a written order to open the criminal case.

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<sup>16</sup> Article 95 of the CPC.

<sup>17</sup> Legislative Guide for the Implementation of the UNCAC, United Nations, 2006, p.26.

<sup>18</sup> [http://www.coe.int/t/dghl/monitoring/greco/evaluations/round1/GrecoEval1\(2000\)1\\_Belgium\\_EN.pdf](http://www.coe.int/t/dghl/monitoring/greco/evaluations/round1/GrecoEval1(2000)1_Belgium_EN.pdf).

<sup>19</sup> <http://www.oecd.org/dataoecd/5/45/47416623.pdf>.

<sup>20</sup> [http://www.coe.int/t/dghl/monitoring/greco/evaluations/round2/GrecoEval1-2\(2007\)1\\_Switzerland\\_EN.pdf](http://www.coe.int/t/dghl/monitoring/greco/evaluations/round2/GrecoEval1-2(2007)1_Switzerland_EN.pdf).

<sup>21</sup> Article 97 of the CPC.

<sup>22</sup> Article 187 § 3 of the CPC.

<sup>23</sup> Article 97 of the CPC.

<sup>24</sup> Article 94 of the CPC.

### **2.1.3. Decision on instituting criminal proceedings**

The prosecutor, investigator, inquiry agency or judge are required to take a decision to institute criminal proceedings, with such decision stating the reasons and grounds for instituting criminal proceedings, providing the criminal statute under which criminal proceedings are instituted, as well as noting the further course of action in respect of such proceedings<sup>25</sup>. A copy of this decision is to be sent to the prosecutor by an investigator within one day. The prosecutor ensures the legality of the contents of the document and of the actions taken in the framework of its preparation.

### **2.1.4. Instituting criminal proceedings against persons with immunity**

There is a number of persons who enjoy immunity from criminal prosecution and in some cases from investigation, and in regards to whom a special procedure on instituting criminal proceedings is applied. In the context of corruption it is important to be aware of such procedures and legal requirements attached to persons protected by immunity.

The scope of persons who are protected by immunity in Ukraine is very broad, the procedures for lifting immunities are not sufficiently effective.<sup>26</sup> No criminal proceedings can be instituted against the President while he/she is in office.

Members of the Parliament (people's deputies of Ukraine) cannot be charged with a crime<sup>27</sup>, detained or arrested without the consent of Parliament.<sup>28</sup> Moreover, certain criminal investigative techniques – such as office search and wiretap – cannot be undertaken against them without prior consent of the parliament.<sup>29</sup> Arrest and prosecution, as well as many aspects of investigation of crimes involving members of parliament require parliament's approval.

A judge cannot be arrested or detained before the issuance of a court sentence without the consent of Parliament of Ukraine, other investigative measures can be applied upon due court authorization of the intrusive methods. The investigation can be initiated by the Prosecutor General or his deputy.<sup>30</sup> Such procedure allows for investigation of the corruption within the judiciary and when appropriate should be pursued.

Criminal proceedings against the Head of the Chamber of Accounts, his deputies, chief controllers and Secretary of the Chamber of Accounts can be instituted only by the Prosecutor General of Ukraine.<sup>31</sup>

Criminal proceedings against an attorney can be instituted only by the Prosecutor General, his deputies, oblast prosecutors and by the prosecutor of the city of Kyiv, the same rule applies to the approval given for operative and investigative activities.<sup>32</sup>

### **2.1.5. Criteria to prioritise cases**

Given the extent of corruption and the limits imposed by human and financial resource constraints, it might be useful to prioritise corruption cases for investigation and prosecution. This is particularly effective in ensuring that serious corruption cases receive the necessary attention.

As discussed earlier, well regulated discretion can be a solution, especially for countries with limited resources. With such an approach criteria for selection of cases should be clearly identified in writing in the law, internal regulations, guidelines or policy papers and strictly followed.

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<sup>25</sup> Article 98 of the CPC.

<sup>26</sup> For more analysis on this issue see OECD/ACN Istanbul Action Plan Second Round of Monitoring Report on Ukraine, adopted in December 2010, pp.36-37.

<sup>27</sup> As interpreted by the Constitutional Court Decision from 1999.

<sup>28</sup> Article 80 §3 of the Constitution of Ukraine.

<sup>29</sup> Article 27 of the Law on the Status of People's Deputies of Ukraine.

<sup>30</sup> Article 126 of the Constitution of Ukraine, Article 48 of the Law of Ukraine on Judiciary and Status of Judges.

<sup>31</sup> Article 37 of the Law on Chamber of Accounts of Ukraine.

<sup>32</sup> Article 10 of the Law on the Bar of Ukraine.

Criteria for selection of cases could include the following<sup>33</sup>:

- Seriousness of corruption offence, for example, cases which involve high level public official or large amounts of bribes; additional criteria for assessing the seriousness of the offence could be its criminal nature, where prosecutors should focus on criminal offences only and other law-enforcement agencies should investigate other types of offences, such as administrative and civil;
- Prevalence of the type of corruption, for example, cases that involve the most common and widespread offences such as corruption in public procurement, tax, customs, traffic police and other risk sectors;
- Cases that are needed to set precedents in order to ‘test’ the prosecution of certain matters or establish legislative shortcomings. For example, new criminal offences, or offences where prosecution may change public perceptions, such as corruption cases that involve legal persons or bribery of foreign public officials;
- Availability of material and human resources. An assessment of costs and benefits can be made before a decision to investigate and prosecute a specific case. Investigation and prosecution of relatively small cases can consume a lot of resources, but not generate an important impact. At the same time cases of serious corruption can involve substantial costs and require a lot of time, but can lead to recovery of large proceeds of corruption and improve trust in government.

In many countries investigation and prosecution of the most serious corruption cases is entrusted to a specialised unit, while other law enforcement units focus on less grave cases involving corruption. For example, in Romania National Anti-Corruption Directorate (NAD) investigates cases of medium and high level corruption, falling into one of the three categories: (i) the public positions occupied by the persons suspected to have committed a corruption offence, (ii) the value of the caused damage, and (iii) the value of the bribe. Estonian Security Police (KAPO) is responsible for investigating high level officials only, similarly in Armenia Special Investigation Service conducts preliminary investigations of crimes committed by officials in managerial positions of all three branches of power.<sup>34</sup>

As discussed in section 1.2.4., there are no specialised units for investigation and prosecution of corruption in Ukraine yet. There is no mechanism for prioritisation of cases either. As a result, investigators and prosecutors may focus on administrative cases, rather than criminal, since they are easier to prove, and serious corruption cases may not receive the necessary attention.

## **2.2. Qualification of criminal offences**

### **2.2.1. Qualification of the corruption offences**

The qualification of any offence, including corruption offences, should be based on the correct matching of the circumstances of the committed actions with elements of the crime under a specific article of the Criminal Code. Investigators and prosecutors responsible for application of the criminal law have to analyze and compare circumstances and if all elements are found, then requisite article(s) is chosen for incrimination.

It is important to choose the provision that to the fullest degree describes the circumstances of the committed actions, which is often difficult in practice and results in mistakes. The Plenary of the Supreme Court’s Resolution on the court practice in bribery cases of 2002 and Compilation of the court practice on review of the cases on crimes committed by public officials (Article 364, 365 and 368), as well as cases of administrative liability for violations of the Anti-Corruption Law prepared by the Supreme Court in 2008 provide guidance to the investigators and prosecutors on correct qualification of cases.<sup>35</sup>

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<sup>33</sup> United Nations Handbook on Practical Anti-Corruption Measures for Prosecutors and Investigators, September 2004. <http://www.unodc.org/pdf/crime/corruption/Handbook.pdf>.

<sup>34</sup> Article 190 of the Criminal Procedure Code of Armenia.

<sup>35</sup> These documents can be found on the CD-ROM in the “Students folder”, Sub-folder “Ukrainian legislation”.

In addition to the corruption offences, experience in other countries shows that corruption related crimes can be prosecuted under a variety of offences and that it is often linked to other crimes. For example in Finland in June 2010, charges of accounting fraud, money-laundering and aggravated bribery of a foreign public official were brought against five individuals working for a subsidiary of the SOE, Patria Vammats Oy, in connection with a Howitzer project in Egypt between 1999-2007.<sup>36</sup> Thus, the prosecutor in the end may have to decide to prosecute other corruption-related criminal offences or go for offences which have a lower threshold of proof, e.g. violations of administrative legislation, such as on asset declarations, conflict of interest, etc., when there is not enough evidence to prove the criminal offence.

### **2.2.2. Corruption related offences**

Once the main facts about the alleged crime are established, the investigator has to determine which approach needs to be taken – criminal or administrative prosecution, disciplinary action or civil proceedings. Currently, the following offences from the Criminal Code of Ukraine would qualify as corruption offences under international standards:

- Article 191 – misappropriation of funds;
- Articles 364, 364-1 and 365-2 – abuse of authority or office in public and private sectors;
- Article 365 and 365-1 – excess of authority or official powers in public and private sectors;
- Articles 368, 368-3 § 3, 368-4 § 3 – receiving of a bribe/undue advantage in public and private sectors;
- Articles 368-3, 368-4, 369 – proposal/giving of a bribe/undue advantage in public and private sectors;
- Article 369-2 – trading in influence;
- Article 368-2 – illicit enrichment;
- Article 376 – interference with activities of judicial authorities.

Other related offences which could be potentially looked into as part of the investigation into corruption include:

- Articles 209 and 209-1 – money laundering;
- Articles 212 and 212-1 – tax-evasion;
- Article 159-1 – financing of political parties;
- Article 366 – compiling and providing inaccurate official documents, entering into them inaccurate data, other falsifications of official documents (forgery in office);
- Article 358 - forgery of documents, seals, stamps and stationery, and sales or use of forged documents, seals, stamps.

Offences under other types of liability (i.e.: administrative, disciplinary, civil) can be also effectively pursued as alternative or additional avenues in corruption investigations. To name a few from the Code of Ukraine on Administrative Offences<sup>37</sup>:

- Article 164-2 - breach of legislation on financial issues, which covers among other actions concealment in accounting of proceeds, entering fictitious data into the financial accounting, failure to submit financial reports, etc.;
- Article 172-4 – breach of ban to engage in other types of paid activities;
- Article 172-6 – breach of provisions on financial control.

According to the OECD/ACN and GRECO, Ukraine should criminalise promising and requesting a bribe, acceptance of an offer/promise of a bribe, bribery through and for the benefit of third person

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<sup>36</sup> Finland: Phase 3 report on the implementation and application of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and the 2009 Recommendations on further combating bribery, OECD 2010, p.6 and ‘Finnish defence firm in Egypt bribery case’, 23 June 2010, [http://www.business.maktoob.com/20090000483502/Finnish\\_defence\\_firm\\_in\\_Egypt\\_bribery\\_case/Article.htm](http://www.business.maktoob.com/20090000483502/Finnish_defence_firm_in_Egypt_bribery_case/Article.htm).

<sup>37</sup> See Chapter 13-A of the Code of Ukraine on Administrative Offences for the full list of corruption offences.

with a clear definition of the bribe explicitly covering non-pecuniary undue advantage. Illicit enrichment offence has been introduced into the Criminal Code, but its definition does not comply with that in the UNCAC. Liability of legal persons for corruption offences should also be introduced.

Practice in other countries shows that it takes some time before the new offences are used in practice, because practitioners, including investigators and prosecutors, do not have experience in these areas. Investigation and prosecution of these new crimes may require expertise that is missing or not developed in-house and use of external experts from the beginning of the case. Courts are also not experienced in these areas, and investigators and prosecutors may avoid cases which involve new offences, since they feel that they are 'hopeless'. Special training and access to expertise are therefore needed.

## **2.3. Gathering and use of evidence**

### ***2.3.1. Investigation plan and allocation of resources***

Development of the investigation plan in Ukraine is a responsibility of the investigator responsible for the case. There are some key steps which need to be considered and applied when appropriate:

#### *2.3.1.1. Identifying potential targets*

Specific targets may be identified with careful consideration of their credibility. The questions of whether the source has a motive to lie and whether there is sufficient evidence should be asked.

Sometimes actions/circumstances may be identified or appear suspicious without specific targets (i.e.: without a known perpetrator). In such cases it is necessary to identify the entities and individuals involved and make a preliminary assessment of the roles played by these individuals, such as decision makers, knowledgeable actors, unwitting participants and knowledgeable but uninvolved potential witnesses.

Taking into consideration that the corruption cases always involve personal gain and often bring benefits for both sides, it is important to follow the money or other forms of gain or benefits and to determine who profited from the corrupt act and how.

Also due to the hidden nature of the crime and the absence of the direct victims, it might be helpful to establish a person – “weak link” in the suspected corruption scheme and investigate around him/her creating incentives and putting on pressure for her/him to come forward and corroborate.

#### *2.3.1.2. Developing investigative theory*

Theory gives direction to the investigation, but it is important to remain flexible. The first step will always be making an initial assessment of whether the alleged corrupt conduct appears to be criminal, or whether it is civil or administrative in nature. The second step is identifying elements needed to prove the crimes, and, finally the third step is to try to anticipate possible factual and legal challenges and build your case to avoid them.

#### *2.3.1.3. Choosing investigative methods*

Determining which investigative tools to use depends on a variety of factors, including the nature of the alleged violations, the type of investigation conducted, and the resources available. It is a normal progression to go from simple to complex, with information from initial steps, such as standard investigative techniques including interviews with witnesses, and interrogation of suspects, searches and collection of documents and information, leading to more advanced steps, such as special investigative techniques, financial investigations and mutual legal assistance. Various methods should be mixed and used as appropriate.

#### *2.3.1.4. Ensuring adequate resources for the case*

It is important to properly evaluate and request necessary resources for the investigation, including involvement of the internal and external expertise; costs of the special investigative techniques; establishment of the joint investigative teams; ensuring interagency cooperation/coordination. Use of international legal/operational cooperation, information exchange and possible travel should also be factored in. As corruption crime often involves gains which the criminals wish to hide, it is important to consider involving expertise necessary to trace financial flows and other gains from the onset of the investigation.

### 2.3.2. Proactive investigation strategies

Ukrainian legislation allows for a number of sources to be used when gathering information in the course of investigation and prosecution of corruption, such as:

- Any public source information;
- Internet and mass media;
- Court decisions, criminal records, divorces and other lawsuits, bankruptcy records, administrative and disciplinary proceedings;
- Disclosed corporate information, information disclosed by insurance, banking and other regulators and commissions (for example, election commission);
- Private data banks collecting public information (Worldcheck, Factiva Spark, Integrum, and others, regularly used by compliance services of banks and corporations active on the international markets)<sup>38</sup>;
- Property, land, enterprises and other state registers;
- Reports from public audit, various inspections;
- Information from tax authorities on tax payments and income received;
- Information from State Service of Financial Monitoring (SSFM), as well as other financial intelligence units (FIUs) worldwide - suspicious transaction reports, other information sent by SSFM and another FIUs or information/a crime profile prepared by them, upon request of investigator or prosecutor;
- Asset declaration forms that public officials are obliged to file, political party campaign contribution records, statements of charity contributions;
- Mutual legal assistance requests, referrals from law enforcement partners in other countries;
- On-going investigations into another crime (money laundering, narcotics, etc.);
- On-going civil litigation or administrative proceedings involving the private sector, including testimonies, transcripts and court orders and any other information from such proceedings.

Ukrainian practice shows that sometimes the above-mentioned information sources are utilized, but not consistently so. While good international practice suggests that it is crucial to look into all of these sources of information as appropriate and cross and match them. In the end a combination of sources of information should be used in establishing sufficient grounds to initiate proceedings. For example, the “Siemens case” started in 2006 by an *anonymous* denunciation, but it was complemented by money laundering report and spontaneous information from foreign country, Switzerland.<sup>39</sup> In a “typical” corruption case in the German state of Baden-Wurtemberg first an anonymous complaint was received, then it was completed with “whistle-blower” reports and covert pre-investigation, involving gathering of information on the potential briber’s enterprise, gathering (confidential) information as to the functioning of the concerned administrative authority, hearing witnesses with no direct personal contact with the potential briber and/or the potential bribed person, and so on.<sup>40</sup>

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<sup>38</sup> For more information, see Proceedings from the Expert Seminar “Investigation and prosecution of corruption: financial investigations and links with money laundering”, Kyiv June 2011, pp. 11, 49 – 50; [http://www.oecd.org/document/39/0,3746,en\\_36595778\\_36595861\\_47810791\\_1\\_1\\_1\\_1,00.html](http://www.oecd.org/document/39/0,3746,en_36595778_36595861_47810791_1_1_1_1,00.html).

<sup>39</sup> For more information, see the Proceedings of the ACN Conference “Creating Conditions for Sustainable Economic and Social Development in Eastern Europe and Central Asia: Fighting Corruption and Promoting Good Governance”, which took place in Astana, Kazakhstan on 16-18 September, 2009, p. 33, <http://www.oecd.org/dataoecd/63/41/44620426.pdf>.

<sup>40</sup> For more detailed information, see Proceedings from the Expert seminar “Effective means of investigation and prosecution of corruption”, Bucharest 2010, p.47; <http://www.oecd.org/dataoecd/35/14/47588859.pdf>.

In conclusion, it should be underlined that the Ukrainian law allows to use both reactive complaint-based and pro-active approaches in getting evidence when starting a case: investigators, prosecutors and inquiry body can rely on complaints and other incoming information directly and specifically addressed to them. Investigators and prosecutors can also act proactively and collect information themselves when reviewing media reports and looking at other open information. Experience shows that valuable information is not very often communicated to prosecutors directly, but can be found in public sources or using proactive covert methods as described above. Nevertheless, current Ukrainian legislation requires a number of changes to promote effective investigation further, such as allowing anonymous reporting of corruption crimes for initiation of the criminal proceedings (see section 2.1.1.2.), providing incentives and protection to the whistle-blowers.

### **2.3.3. Investigative techniques**

Interviewing of witnesses. The Ukrainian legislation allows investigators and prosecutors to interview persons upon their consent and use their volunteer assistance without the knowledge of the suspected person.<sup>41</sup> Such actions may be performed openly and with notification of the accused within the criminal proceedings.

Search. The Ukrainian legislation allows the use of search to detect and fix traces of a grave crime, including corruption offences, documents and other items that may represent evidence of preparation or commitment of such a crime. Search involves penetration of an operative into premises, and land plots, vehicles, computers and other objects.<sup>42</sup> Within criminal proceedings such actions may be performed openly in the presence of the owner or secretly.

Experience shows that investigations of the corruption cases rely heavily on basic investigative techniques, such as interviewing of witnesses and conducting searches.<sup>43</sup> For example, Siemens case proved usefulness of simultaneous interrogations and searches of premises of suspects. In addition, good practice shows that more focus should be given to the use of special investigative techniques, financial investigations and international cooperation for the successful investigation and prosecution of complex and cross border corruption crimes.

Gathering information from open sources, various databases, audits and financial control inspections, etc, as described in the Section 2.3.2. is an important element of any corruption investigation and should be consistently used in practice.

### **2.3.4. Special investigative techniques**

According to Council of Europe, special investigative techniques (SITs) are techniques applied by competent judicial, prosecuting and investigating authorities in the context of criminal investigations for the purpose of detecting and investigating serious crimes and suspects, aiming at gathering information in such a way as not to alert the target persons.<sup>44</sup> According to UNCAC in order to combat corruption effectively SITs should be used, in particular, controlled delivery, electronic or other forms of surveillance and undercover operations, and evidence gathered through them should be admissible in court.

While most of these techniques are highly intrusive and should be used with great caution and consideration, it is widely recognised that SITs are a very effective tool to detect and investigate corruption, which is a latent crime and there are rarely witnesses or direct evidence that can be easily collected.

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<sup>41</sup> Article 8 (1) of the Law on Operative and Investigative Activities.

<sup>42</sup> Article 8(7) of the Law on Operative and Investigative Activities.

<sup>43</sup> The use of these same techniques covertly is described in the Section 2.3.3.2.

<sup>44</sup> Recommendation Rec(2005)10 of the Committee of Ministers of the Council of Europe to member states on “special investigation techniques” in relation to serious crimes including acts of terrorism.

In Ukraine the production of evidence gained from the use of special investigative techniques is permitted before courts and strict procedural rules governing the production and admissibility of such evidence are established by the Law on Operative and Investigative Activities, Criminal Procedure Code and internal instructions, such as Internal Instruction of the Ministry of Interior on the controlled purchase and Internal Instruction of the Border Guard's Service on controlled deliveries.

The following SITs are available for Ukrainian investigators:

Undercover operation – infiltration of an undercover officer or of a person cooperating with the competent authority under false identity into a criminal group.<sup>45</sup>

Undercover company – use of an enterprise or an organization created to disguise identity or affiliation of individuals, premises and vehicles of operative units.<sup>46</sup>

Informants – voluntary confidential cooperation with individuals to obtain information about crimes being plotted or already committed; informants can operate openly or secretly, free of charge or for a fee, can be hired as permanent or non-permanent staff.<sup>47</sup>

Electronic surveillance - use of visual surveillance in public places with the use of photography, video recording, optical and radio devices.<sup>48</sup>

Bugging/wiretapping - use of sound recording devices, including bugging of private or public premises in order to obtain data.<sup>49</sup>

Interception of communications - interception or seizure of information from communication channels, such as telephone, fax, e-mail, mail, public or private networks. It can be used for the purpose of crime prevention and before the initiation of the criminal case<sup>50</sup>.

Pseudo-purchases and controlled supply of goods (controlled delivery) are used to conduct controlled and operative purchases and supply of goods, including those prohibited from circulation, to individuals and legal entities, in order to detect and fix illegal actions.<sup>51</sup>

After ratification by Ukraine of the Second Additional Protocol to the European Convention on Mutual Legal Assistance in Criminal Matters and adoption of the relevant changes into the Criminal Procedure Code of Ukraine<sup>52</sup> a number of new investigative tools was made available which could be used in the investigation of the corruption cases. Among them there are also special investigative techniques:

Cross-border observation. Ukrainian investigators who within the framework of a criminal investigation are keeping under observation in Ukraine a person who is presumed to have taken part in a criminal offence to which extradition may apply, or a person who it is strongly believed will lead to the identification or location of the above-mentioned person, may continue their observation in the territory of another Party to the Convention where the latter has authorised such cross-border observation. Conditions may be attached to such type of authorization, with procedure described in detail in the newly added to the CPC Chapter 39.

Cross-border controlled delivery. Ukrainian customs authorities are permitted to allow, under their control, import, export or transit through Ukraine of illegal goods. Such cross-border controlled delivery could be performed in co-operation with customs and other authorities of foreign states or on

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<sup>45</sup> Article 8(8) of the Law on Operative and Investigative Activities.

<sup>46</sup> Article 8(16) of the Law on Operative and Investigative Activities.

<sup>47</sup> Articles 12 - 14 of the Law on Operative and Investigative Activities.

<sup>48</sup> Article 8(11) of the Law on Operative and Investigative Activities.

<sup>49</sup> Article 8(9) of the Law on Operative and Investigative Activities.

<sup>50</sup> Article 187 of the CPC.

<sup>51</sup> Article 8(2) of the Law on Operative and Investigative Activities. The procedure is established by internal instructions of the Ministry of Interior, Tax Police and Security Service, which are approved by the Prosecutor General's Office and registered by the Ministry of Justice.

<sup>52</sup> Law of Ukraine on Amendments into some legislative acts of Ukraine due to ratification of the Second Additional Protocol to the CoE Convention on Mutual Legal Assistance in Criminal Matters from 16.06.2011.



the basis of international agreements of Ukraine.<sup>53</sup> Controlled delivery can be carried in Ukraine in the framework of the criminal investigations into extraditable offences at the request of another Party in accordance with the procedural legislation of that Party, as well as can be requested by Ukrainian investigators and prosecutors as part of their investigation and then used as evidence in the corruption case.

Use of agent provocateur and integrity testing are not allowed under Ukrainian legislation and use of such technique in the bribery cases would fall under Article 370 (provocation of bribery) of the Criminal Code. This method is often used in the US, but is less common in Europe.

### **2.3.5. Financial investigations**

Experience shows that investigation of large-scale corruption cases should follow the money trail in order to establish links between the payment and receipt of the benefit. Ukrainian legislation permits the use of financial investigations as a part of criminal proceedings; however such investigations are rarely used in practice.<sup>54</sup> The financial investigation can be conducted in a variety of ways, depending on the circumstances of the case. The major methods that can be employed are summarized as follows:

- Analysis of a specific payment.
- Analysis of the income and expenditures.
- Analysis of fraudulent financial transactions.

#### *2.3.5.1. Analysis of a specific payment*

Analysis of a specific payment, known as "*Specific item method*", is used to trace a specific payment of a bribe from or to the suspect. A good example is a case investigated and prosecuted in Norway, where a company paid a kick-back to a local public official in order to receive a public procurement contract for the reconstruction of the city's water and sewage system. The kick-back as a percentage of the total contract value was paid to another company, associated with the public official.<sup>55</sup> The use of the 'specific item method' allowed the investigators to establish the direct paper trail of money transfer from the bribe-giver to the corrupt official, which could be used as evidence in court. It is important to note that in addition to the evidence of the receipt of undue advantage, investigators needed to provide evidence of the violation of the public procurement rules by the corrupt officials, which involves other investigative techniques.

#### *2.3.5.3. Analysis of income and expenditures*

This method, known also as "*indirect method for proving illegal income*" involves the analysis of lifestyle, income, assets and expenditures of the suspect. It can be used if the payment of a specific bribe cannot be traced directly to the suspect.

There are various models used in the determination of an individual's assets and expenditure. The following methods are most commonly used:

- Analysis of income, also known as "*Net-worth analysis method*", is used to establish if there has been an increase in the total income of the suspect over a specific time period. Known lawful income is subtracted from the total income and the remainder represents illicit proceeds. This is a very complex method as it is difficult to establish total income, property and other assets that a suspect owns and benefits from. The results of this analysis can be used as a part of the evidence in conjunction with other evidence that established the corrupt activity such as bid-rigging or misappropriation of funds.
- Analysis of expenditures, also known as "*Source and application of funds method*" or "*total expenditure analysis*", is used to establish the total amount of suspect's spending in a given period of time, and compare this amount to the income available from known lawful sources. The difference will also represent illicit proceeds. This method is easier to use than the

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<sup>53</sup> Internal Instruction of the Customs Service of Ukraine on Conduct of Controlled Delivery.

<sup>54</sup> Article 8(3, 4 and 17) of the Law on Operative and Investigative activities

<sup>55</sup> Phase 3 Report on implementing the OECD Anti-Bribery Convention in Norway, June 2011, p.8.

analysis of income since it is easier to establish the total amount of expenditures and of the legal income of the suspect. Like the analysis of income, the analysis of expenditures can generate only additional evidence for court. This analysis can be used to analyse both cash and non-cash expenditures:

- *Cash Expenditure Analysis* can be useful where the bribe or another form of illicit payment was provided in cash. By adding together all of the suspect's cash expenditures and subtracting all of his known sources of income, the amount of cash expenditure made in excess of legitimate sources of cash for a given period can be ascertained.
- *Bank Deposits Analysis* examines expenditures by the suspect made in the form of bank deposits. However, given the increasing sophistication of criminals and possibilities of transformation of bank deposits, this method is less reliable than cash expenditure analysis.

### 2.3.5.3. Analysis of fraudulent financial transactions

Analysis of the financial transactions of a suspect can be used to establish if any of the transactions which increased the wealth of the suspect are fraudulent and disguise the payment of bribes. The suspect may have received various payments which appear legitimate, for instance consultancy fees or payment for the sale of a house. In such cases, the investigation may analyze these transactions to establish their true nature and to detect if any of these transactions were fraudulent. For instance, the investigator can establish which consultancy services were provided by the suspect in reality, if the price for the services corresponds to the market prices, and who is the owner of the company paying the fees. In case of the sale of the house, the investigator may explore if the house exists in reality, what is its market value, who were its past owners, and other elements to establish if the suspect was indeed the legitimate owner and the sale price corresponds to market prices, if the sale was used to disguise the payment of bribe. It is important to bear in mind that such method would require serious resources and involvement of outside expertise in order to investigate and prepare evidence for presentation in the court.

### 2.3.6. Involvement of specialized experts during investigation

Specialized experts can play a significant role in the financial investigations. Involvement of various types of financial and other experts can be helpful when assessing evidence. Experts can explain transactions, how the industry or business functions, explain accounting standards, proper recording of transactions, assist in understanding different jurisdictions, using IT tools for tracking and analyzing data.

Best practice shows that there are various models of drawing on specialized expertise. In some countries anti-corruption investigation and prosecution offices try to build-up their own in-house expertise on various subject matters, like the US Department of Justice, which has its own staff forensic accountants. Other countries, often those with more limited resources, opt for involvement of the external expertise (for example, the Hungarian CPC foresees involvement of outside experts) or a combination of the two approaches. For instance, the Lithuanian Prosecutor's Department on combating organized crime and corruption and Poland's District and Appellate Prosecution Offices have a limited number of in-house financial and other specialized experts with the rest being commissioned on the *ad-hoc* basis.<sup>56</sup>

#### 2.3.5.1. Forensic accounting expertise

There is a broad range of assistance which can be received from forensic accountants at the investigative stage, such as assistance in tracing of transactions back to the money or assets, conducting full analytical review of the money flows, identify unexplained transactions and consultancy fees, establishing links between related parties, helping focus on likely areas of misconduct.

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<sup>56</sup> For more information, please see publication: Anti-Corruption Specialisation of Prosecutors in Selected European Countries, OECD/ACN 2011.

Specific forensic accounting tools would depend on the nature of allegations, known facts and the available sources of information and can include the following:

- Analyzing accounting and other records (electronic databases, general ledgers, accounting records, agreements, payment orders/bank statements, invoices, tax and other declarations, other primary documents);
- Interviewing employees (management, financial department and accounting, PR/IR/GR personnel, sales and marketing personnel, operations personnel, security personnel, etc.) including former employees;
- Interviewing agents, subcontractors, distributors and other counterparties;
- Examining of contracts, agreements, etc.;
- Analyzing periodicals and publications;
- Interviewing Chambers of Commerce (directly or via corporate databases (e.g. Spark, Integrum);
- Interviewing local industry associations;
- Use of IT systems in a broader sense;
- Other procedures (e.g. matching employees lifestyle with predicted income).

Currently in Ukraine the law-enforcement bodies have access to financial expertise in a number of ways: some staff members have financial and/or economic education and experience, they can employ financial experts in specific cases as required, and they can also request assistance or co-operation from other public agencies that may possess such expertise, e.g. financial inspections and audit units. Nevertheless, financial expertise is rarely utilized in practice. There is also a formal possibility to involve experts from the private sector but such approach is associated with high-costs, especially in the long-term investigations and is rarely utilized if ever. Therefore, there is a clear advantage to build up in-house expertise which can be used on a regular basis.

### ***2.3.7. Protection of witnesses, collaborators of justice and whistleblowers***

Witness protection is usually required in trials involving organised crime where law enforcement sees a risk for witnesses to be intimidated by associates of defendants. However, it can also be necessary in matters involving other serious crime such as corruption, where collection of legally useful evidence often requires the collaboration of parties directly involved in the corrupt pact or people external to this exchange. International anti-corruption instruments call upon introduction of appropriate measures to prevent intimidation and retaliation, coercion, corruption or bodily injury of witnesses and experts who give testimony, including, when appropriate their relatives and close persons, and to strengthen international co-operation in this regard.<sup>57</sup>

Numerous examples of good practice exist across the world. For instance, in Italy existing witness protection system was introduced in 1984, when protection of Sicilian Mafioso Tommaso Buscetta, the star witness in the so-called Maxi-Trial, led to almost 350 Mafia members being sent to prison. In exchange for his help, he was relocated under a new identity. Those events spurred more Mafia members to co-operate, with the result that by the end of the 1990s the Italian authorities had benefited from the services of more than 1,000 justice collaborators.<sup>58</sup>

The difference between witnesses and persons co-operating with law-enforcement authorities is that the first are external to the offence, while the latter are involved in the offence under investigation. Co-operating persons are protected and usually negotiate acquittal or reduced penalty in exchange for their help in uncovering the main offenders. In practice, victims and witnesses constitute the majority of persons who take part in protection programmes. However, there are also a small number of cases where judges, investigators, or prosecutors take part in such programmes, and defendants too are eligible for protection.

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<sup>57</sup> See Article 32 of the UN Convention against Corruption, Article 22 of the CoE Criminal Law Convention on Corruption.

<sup>58</sup> For more information on good practice in this area see United Nations Office on Drugs and Crime publication: Good Practices for the Protection of Witnesses in Criminal Proceedings Involving Organized Crime, Vienna 2008, <http://www.unodc.org/documents/organized-crime/Witness-protection-manual-Feb08.pdf>.

Whistleblower laws are just as important to effective detection and investigation of corruption offences. The possibility of concerned individuals who have witnessed a corruption deal or employees who learn about corruption, fraud or mismanagement inside their organisations to “blow the whistle” in order to stop wrongdoings that place the public interest, human rights and the rule of law at risk should be provided by the law and such persons should be protected against threats and reprisals.<sup>59</sup>

The OECD Working Group on Bribery recommended member countries to take the necessary steps to put in place easily accessible channels for the reporting of suspected acts of bribery of foreign public officials in international business transactions to the competent law enforcement authorities and to protect those who sound the alarm (in good faith and on reasonable grounds) from discriminatory or disciplinary action. These measures were aimed at both public and private sector employees. Similarly, both Council of Europe Criminal Law Convention on Corruption (Article 22)<sup>60</sup> and Civil Law Conventions on Corruption (Article 9)<sup>61</sup> recommend the adoption of whistleblower protection mechanisms. Article 33 of the United Nations Convention against Corruption deals specifically with the protection of reporting persons and recommends state parties to incorporate into its domestic legal system appropriate measures to provide protection against any unjustified treatment for any person who reports in good faith and on reasonable grounds to the competent authorities any facts concerning offences established in accordance with this Convention.

According to Article 20 of the Law of Ukraine on the Principles of Prevention and Countering of Corruption of 7 April 2011, persons who provide assistance in prevention and combating of corruption are protected by the state. The protection of such persons and their relatives should be carried out according to the Law of Ukraine On State Protection of Persons who Participate in Criminal Proceedings.

According to the Criminal Procedure Code of Ukraine<sup>62</sup> and the Law of Ukraine “On Ensuring of Security of Persons Who Take Part in Criminal Justice”<sup>63</sup>, all participants in criminal proceedings are entitled to protection measures if there is a real threat to their life, health, dwelling, or other property. Among them<sup>64</sup>:

- the person who reported the crime to the law enforcement agency or who in some other way took part or assisted in detection, prevention, stopping and solving of the crime;
- the victim and his representative in the criminal case;
- the suspect, the accused, the defense attorney and legal representatives;
- the civil claimant, or civil party pursuing a claim, and their representatives in cases on recovery of damages from the crime;
- witnesses;
- experts, specialists, translators and testifying witnesses;
- members of the family and close relatives of the persons listed above, if attempts are made to influence the parties to the criminal proceedings through threats or other illegal activities aimed against these persons.

There is no legislation in Ukraine that provides protection to whistleblowers. It should be noted that Article 11 of the Law of Ukraine on Access to Public Information of 13 January 2011 releases officials

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<sup>59</sup> For further guidance, please refer to "G-20 Anti-Corruption Action Plan, Action Point 7: Protection of Whistleblowers. Whistleblower Protection Frameworks, Compendium of Best Practices and Guiding Principles for Legislation", study prepared by OECD, 2010.

<sup>60</sup> Article 22 of the Criminal Law Convention on Corruption addresses the need to adopt such measures as may be necessary to provide effective and appropriate protection for those who report criminal offences or otherwise cooperate with the investigating or prosecuting authorities and witnesses who give testimony concerning these offences.

<sup>61</sup> Article 9 of the Civil Law Convention on Corruption asks state parties introduce the necessary changes to the internal law for appropriate protection against any unjustified sanction for employees who have reasonable grounds to suspect corruption and who report in good faith their suspicion to responsible persons or authorities.

<sup>62</sup> Article 52-1.

<sup>63</sup> Article 3.

<sup>64</sup> Article 52-1.

from liability for disclosure of restricted access information about offences if it was done *bona fide* and person had sound grounds to believe that information was accurate. However, there are no other specific measures to protect whistleblowers in the public or private sector, including measures to protect employees of state institutions and other legal entities who report suspicious practices inside their institutions from disciplinary actions, harassment and other retaliation available under Ukrainian legislation.

### **2.3.8. Freezing, seizure and confiscation**

In most cases the main goal of corruption offences is to obtain financial gain. Therefore provisional measures and confiscation become the main tools to hit such crime in the core. Accordingly, UNCAC requires that its signatories undertake measures which will support the tracing, freezing, seizure and confiscation of the proceeds of corruption. The CoE Criminal Law Convention on Corruption requires to adopt legislation and to put in place measures to identify, trace, freeze and seize instrumentalities and proceeds of corruption, or property the value of which corresponds to such proceeds. Moreover, it calls the parties to the Convention to empower its courts or other competent authorities to order that bank, financial or commercial records be made available or be seized in order to carry out the actions mentioned above and to ensure that the bank secrecy does not create obstacles for any of the above-mentioned measures.

In Ukraine, provisional measures, such as seizing or arrest of property, are applied on the basis of Articles 29, 125 and 126 of the CPC and are supplemented by Article 59 of the Law on Banks and Banking of Ukraine. The noted provisions of the CPC authorize the investigator to arrest property for the purposes of securing recovery of material damages, civil claim, or possible confiscation. Article 59 of the Law on Banks and Banking, in line with Article 126 of the CPC, specifies that funds and other values belonging to physical and legal persons deposited on a bank account can be arrested exclusively on the basis of a court decision.

The provisional measures may be carried out without prior notice. In practice, investigators take a decision (if a court decision is not required) to arrest relevant property. This decision is to be presented to the person holding or owning the property in question with a request to provide such property. If the person cannot be found or he/she impedes the execution of the action, arrest of property can be made without his/her knowledge or consent.

As described in the Section 2.3.3., in the course of pre-trial investigations, law enforcement authorities are authorized (except for actions to be conducted in personal premises when a substantiated court decision is needed) to search premises, objects, instruments and documents (according to Chapter 16 of the CPC), as well as inspect surrounding area, premises, objects, and documents (according to Chapter 17). These actions are also aimed at identifying and tracing property that may further be subject to confiscation or is suspected of being the proceeds of crime.

Current Ukrainian law prescribes two mechanisms for confiscation. First, Article 59 of the Criminal Code provides: “The punishment of confiscation consists in forceful seizure of all, or a part of, property of a convicted person without compensation in favour of the State.” Confiscation under Article 59 is not limited to proceeds of crime, and in that sense is potentially very broad, however, it does not permit confiscation of proceeds that are no longer in the possession or ownership of the convicted person. Article 59 also states that confiscation “shall be imposed for grave and utmost grave crimes and shall only be applied in cases specifically provided for in the Special Part of this Code. Several (but not all) articles on the corruption offences in the Criminal Code of Ukraine specifically provides for confiscation of property as set out in Article 59.

Second, Article 81 of the Criminal Procedure Code provides the possibility for public authorities to eventually confiscate or similarly obtain “material evidence,” which is defined in Article 78 of the CPC as objects which were instruments of crime, retained traces of crime or were a target for criminal actions, money, valuables, and other proceeds from crime, as well as all other objects which can help in investigating the case and identifying those guilty or denying charges or mitigating liability. Material evidence is disposed of in accordance with Article 81 of the CPC by a sentence, ruling or verdict by the court of law, or by resolution by the investigative agency, investigator, or a prosecutor on closing the case. Article 81 does not authorize any value-based confiscation, such as confiscation of property into which original criminal proceeds had been converted.

Both of the above-described mechanisms are limited and do not provide for the possibility of confiscation of proceeds of all corruption and corruption-related offences even in theory.<sup>65</sup>

## **2.4. Laying charges, presenting and supporting the case in court**

### ***2.4.1. Direct versus indirect or circumstantial evidence***

Direct evidence proves the existence of a particular fact without any inference or presumption being required. Indirect or circumstantial evidence relates to a fact or a matter, or a series of facts or matters, other than the particular fact that are sought to be proved. When offering indirect evidence it is necessary to argue that such evidence, by reason and experience, is so closely associated with the fact to be proved that this fact may be inferred from the existence of what is indirect or circumstantial. Indirect evidence is, of course, used in the full range of criminal cases. It is of particular importance in a corruption or another economic crime case where there may be no, or very little, direct material showing how the benefit was provided or received or the involvement of the parties to it.

Good practice shows that financial indirect evidence is regularly used in complex corruption cases. For example, the famous Siemens case<sup>66</sup> was almost entirely build on financial evidence. Sometimes an investigator may be able to link specific financial transactions directly to the criminal conduct that is being alleged; however, even when financial transactions cannot be directly linked, evidence of asset movement, of property purchases, or of unexplained wealth may in itself or with other evidence give grounds to believe that the asset or wealth concerned came from an illicit source. It should be noted that in its international meaning illicit enrichment is not an offence in Ukraine and the burden of proof of the illegal wealth will rest with the prosecutor.

Ukrainian legislation does not prohibit the use of circumstantial evidence in corruption cases, even more so such methods of proving are often used in other types of crimes (for instance in homicide cases, etc.). It is only the existing practice and especially the courts reluctance to take such evidence as serious enough that prevents from using this method more often. Nevertheless, cases when circumstantial evidence to prove a corruption case was used have been cited by the representatives of the Prosecutor General's Office. It means that this method should be encouraged by the senior prosecutors, and judicial perception would be changing overtime.

### ***2.4.2. Sources of indirect evidence***

In the corruption investigation the following sources can provide indirect evidence:

- Financial audit (private and public), including of assets, lifestyle and expenditures;
- Expert evidence/opinion, particularly from analysts or forensic accountants;
- Unlikelihood of legitimate origin of money or asset;
- Testimony given by an accomplice;
- Partial admissions by suspect of relevant financial dealing;
- Unusual or inexplicable business dealings (a good example would be conversion centers which have been widely investigated in Ukraine recently and have been targeted for the uncharacteristic activities);
- False identities, addresses and documentation;
- Association with other individuals, organisations, or locations (those who have been implicitly or explicitly involved in illegal conduct).

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<sup>65</sup> For more details see OECD/ACN Istanbul Action Plan Second Round of Monitoring Report on Ukraine, adopted in December 2010, p. 33 – 36.

<sup>66</sup> One of the biggest prosecuted cases on bribery of foreign public officials by German company Siemens, see for more information: <http://uk.reuters.com/article/2008/06/20/us-siemens-trial-idUKL2066610520080620>

### **2.4.3. How to involve forensic accountants at a trial stage**

At the trial stage the analysts and forensic accountants may be involved in two ways: (i) participation at the trial in the capacity of the expert witnesses with their testimony becoming evidence itself, and (ii) helping at the stage of the preparation to the trial in organizing, analysing and assisting with presentation of otherwise voluminous or complex financial/bank documents. It is important to remember though that the evidence remains the underlying documents such as formally received copies of documents from state registers, tax authorities, etc, not charts/graphs prepared by the analyst and forensic accountants.

In addition, they can be of help when assessing evidence by explaining of the transactions and understanding of the industry or business, explaining accounting standards, properly recording of transactions, assisting with understanding different jurisdictions.

Another important role of the forensic accountants can be in assisting to quantify benefit or proceeds from corruption. Quantifying loss is an established part of civil damages claims, the goal of which is to put the wronged party back in the position they would have been in, absent the wrongful act, loss of revenues and additional costs which have been acquired.

Quantifying benefits or profit gained due to corrupt acts can be done through the establishment of how the briber has benefited from the bribe. Benefits from the bribe would include additional profit; higher gross revenue – cash flow/working capital benefit; access to future contracts because of the benefit of one contract; higher market share; getting equipment through customs faster; paying less tax, customs duties; being able to hire more employees, etc. and can be estimated for the prosecutor by the forensic accountant.

## **2.5. International co-operation**

Gathering of evidence abroad is a key element in many money laundering and corruption investigations. In the investigations ending with asset recovery from another country, international co-operation will be of key importance. Both informal co-operation among law enforcement authorities and formal international co-operation, using mutual legal assistance requests, used in a combined manner has led to many successful corruption investigations worldwide.

### **2.5.1. Mutual legal assistance**

#### *2.5.1.1. Legal basis for mutual legal assistance*

There are four major multilateral treaties which encourage countries to co-operate in the fight against corruption by providing each other MLA in criminal matters and which are relevant for Ukraine:

- The *United Nations Convention Against Corruption (UNCAC)*, which encourages countries to afford one another the widest measures of MLA in the investigation, prosecution and judicial proceedings in respect of corruption matters.<sup>67</sup> It is innovative in two respects: (i) it can, in fact, be used as the legal basis for MLA<sup>68</sup>, and (ii) it refers to the recovery of assets as fundamental principle of the Convention.<sup>69</sup>
- The *Council of Europe Criminal Law Convention on Corruption (CoE Convention)*, which is wide-ranging in scope and provides for complementary criminal law measures and enhanced international co-operation in the investigation and prosecution of corruption offences. It also deals with spontaneous information which can often trigger an investigation abroad.<sup>70</sup>

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<sup>67</sup> Article 46

<sup>68</sup> This, however, must be done with precaution in view of the fact that for some countries ratification is not enough, and they will require domestication of the convention before it can be used for MLA.

<sup>69</sup> Article 51

<sup>70</sup> Article 28 states that without prejudice to its own investigations or proceedings, a Party may without prior request forward to another Party information on facts when it considers that the disclosure of such information might assist the receiving Party in initiating or carrying out investigations or proceedings concerning criminal offences established in accordance with this Convention or might lead to a request by that Party under this chapter.

- The *European Convention on Mutual Assistance in Criminal Matters (CETS No. 030) (MLA Convention)*, which stipulates a wide scope of mutual assistance measures with a view to gathering evidence, hearing witnesses, experts and prosecuted persons, etc. It sets out rules for the enforcement of letters rogatory by the authorities of the requested Party which aim to procure evidence (audition of witnesses, experts and prosecuted persons, service of writs and records of judicial verdicts) or to communicate the evidence (records or documents) in criminal proceedings undertaken by the judicial authorities of another requesting Party.
- The *Convention on Legal Assistance and Legal Relations in Civil, Family and Criminal Matters (Minsk Convention)*, which provides for a range of legal assistance rendered by the CIS Member States, including service and dispatch of documents, taking of evidence from litigants, witnesses and experts, making inspections, effecting prosecution, recognition and enforcement of judgments in civil matters, extradition, effecting other proceedings.

In addition, the legal basis for filing MLA requests is contained in bilateral treaties on MLA, which are concluded between the Ukraine and the country in question. Currently Ukraine signed such bi-lateral treaties with over sixty five States. More specifically, Ukraine has regulated relationships with regards to all or selected types of MLA with the majority of European States, Member States of the CIS, USA, Canada and Australia, as well as with some of the Asian, African and South American countries.

Information regarding existing international treaties in this area with any particular country can be found at the sites of the Verkhovna Rada of Ukraine (Parliament), General Prosecutor's Office of Ukraine, in the legal databases ("LIGA", NAU (National Academy of Ukraine)).

MLA can also be obtained in the absence of treaties, based on the principles of reciprocity. In such a case, the investigator and prosecutor should take into account that issues concerning the admissibility of obtained evidence is decided on by the court which reviews the criminal case in each individual instance.

#### *2.5.1.2. How to obtain mutual legal assistance*

Taking into consideration the lengthy nature of obtaining MLA and the application in this process of foreign legislation, it is important to note that this method of evidence-gathering should only be resorted to in those instances where such evidence cannot be obtained through the conduct of appropriate investigative or other procedural activities in the territory of Ukraine.

There are no specific requirements as to the content of the requests on MLA in criminal matters in regard to corruption offences, as opposed to requests in respect of other types of crimes. The only recommendation regarding the specific preparation of requests in the framework of such cases is that if more than one treaty is applicable (for example if there is an MLA treaty and an UNCAC) the request should name both treaties as a legal basis for such request.

Information and advice regarding the countries from which MLA may be received, the existence of appropriate treaties, the most advisable treaty to use and their application in the process of drafting a request can be obtained from the senior assistants of oblast prosecutors on international legal requests (all oblast prosecutors' offices have such a position), as well as from the International Legal Department of the General Prosecutor's Office of Ukraine.<sup>71</sup>

In addition, it may be helpful to use the Mutual Legal Assistance Request Writer Tool (MLA Tool) which has been developed by UNODC to assist States to draft requests with a view to facilitate and strengthen international cooperation. It guides through the request process for each type of mutual assistance, using a series of templates. Before progressing from one screen to the next, the drafter is prompted if essential information has been omitted. Finally the tool consolidates all data entered and automatically generates a correct, complete and effective request for final editing and signature. It is made available to investigators and prosecutors in Russian and English among other languages and can be found at <http://www.unodc.org/mla/index.html>.

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<sup>71</sup> Further information can be obtained from the International Legal Department of the General Prosecutor's Office of Ukraine using the following contact telephone numbers: + 380 (44) 254-31-80, 288-92-54, 288-83-15, 288-95-57 and in regards to issues of extradition using the following contact telephone numbers: 288-82-32, 288-83-15, 288-95-58, 288-91-79.



### **2.5.2. Extradition**

Extradition is a formal and, most frequently, treaty-based process, leading to the return or delivery of fugitives to the jurisdiction in which they are wanted. As indicated in the section on Mutual Legal Assistance (MLA) above, the United Nations Convention Against Corruption (UNCAC) promotes international co-operation, for example, through MLA and extradition. The Council of Europe Criminal Law Convention (CoE Convention) also deals with the subject of extradition. Extradition is also covered in the Convention on Legal Assistance and Legal Relations in Civil, Family and Criminal Matters (Minsk Convention).<sup>72</sup>

If the accused person has fled from investigation and justice, it is necessary to determine his possible location through investigative means or via requests for appropriate operative activities. Such a search can only be initiated in terms of current Ukrainian legislation under the following conditions<sup>73</sup>:

- when such a person has the procedural status of an accused (Articles 138 and 139 of the Criminal Procedure Code of Ukraine);
- when a precautionary measure for the person being sought was selected in the form of pre-trial detention, or when permission for his apprehension/detention and bringing to court under convoy was granted;
- only upon confirmation from the investigative body or the court of the intention to request the extradition of such person.

It is essential that all these conditions be met because existing international treaties only allow for the extradition of persons accused of committing so-called extraditable crimes (e.g. corruption offences under the UNCAC), and not all criminal offences.<sup>74</sup>

Following the apprehension/detention abroad of an accused person who is being sought for the commission of crimes on the territory of Ukraine and upon receipt of such notification, the body of crime detection has to request for extradition. The content of the request for extradition and obligatory list of additional documents is determined by the relevant international treaty applicable in each individual case. It is mandatory to attach copies of the rulings on granting of the status of the accused, on apprehension/detention, extracts from the Criminal Code of Ukraine on alleged offence and statute of limitations, documents on his/her citizenship and a certificate regarding evidence which supports allegations implicating the person in question.

### **2.5.3. Asset recovery**

When the court has ruled that the defendant is to be punished through the confiscation of assets (including bank deposits) which have been frozen abroad in the course of MLA, it is necessary to turn to the country in question with a request for the execution of the confiscation decision. As a rule such requests are sent by the courts as these requests deal with execution of court decisions and are filed through the Ministry of Justice of Ukraine.

The confiscation of assets which belong to a person convicted in Ukraine, but which are located abroad is carried out in accordance with the legislation of the foreign state concerned.

As it was stated before there is currently no liability of legal persons for corruption offences in Ukraine, but it is an international standard which Ukraine will have to introduce. Nevertheless, the international confiscation of assets and asset recovery as a result of such proceedings can be fully executed in accordance with the provisions of the above-mentioned conventions against corruption, organised crime and laundering of illegal proceeds.

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<sup>72</sup> Article 6. See also Articles 56 to 76.

<sup>73</sup> For more details see “Instruction on organisation of the search of the accused, defendants, convicted persons who fled from execution of the criminal punishment, of the missing persons and identification of the unknown bodies”, approved by the order of the Ministry of Interior of Ukraine # 3dsk from January 5 2005.

<sup>74</sup> Article 2 of the European Convention on Extradition, 1957; Article 56 of the Convention on Mutual Legal Assistance and Legal Relationships in Civil, Family and Criminal Matters, 1993; Article 2 of the Treaty on Extradition between Ukraine and People’s Republic of China, 1998; Article 2 of the Treaty on Extradition between Ukraine and Federative Republic of Brazil, 2003; Article 2 of the Treaty on Extradition between Ukraine and Islam Republic of Iran, 2004, and other respective provisions of international treaties.

Specific assets to which confiscation will be applied are identified for execution by the decision of the court of the country initiating asset recovery. Measures on the possible confiscation of assets belonging to the legal person through the freezing of assets are carried out by the court on its own initiative or on the request from the prosecutor.

#### ***2.5.4. Informal co-operation and Joint Investigative Teams***

Besides formal, legal co-operation mechanisms, it is important to develop working level co-operation and contacts with partner institutions in charge of investigation and prosecution of corruption in other countries. Article 48 of the UNCAC encourages law enforcement authorities in different countries to strengthen their co-operation in order to enhance the effectiveness of law enforcement action to combat corruption. The UNCAC promotes such forms of law enforcement co-operation as exchange of information and co-ordination of administrative actions for the purpose of early identification of the offence, as well as exchange of personnel and liaison officers.

Practice shows that good co-operation with authorities in foreign countries can be of great value starting from early identification of an offence throughout criminal and judicial proceedings. For example, in a complex trans-border corruption and money laundering case involving many countries contacts with police and judicial authorities in these countries and off-shore countries used for money-transfers helped to ensure effective and rapid exchange of information and conduct joint actions and thus became a key factor of success in investigating and prosecuting this case<sup>75</sup>. It also shows that information possessed by one institution or country usually is not enough to show an illegal scheme, but by proactively exchanging information a major international investigation can be triggered<sup>76</sup>.

It is increasingly recognized that joint investigation teams (JITs)<sup>77</sup> is an effective form of international co-operation in investigation and prosecution of trans-border corruption cases involving several countries. The JITs represent new resources and can offer an additional impetus in the form of external, international pressure to carry on an investigation.<sup>78</sup> JITs are increasingly used since this concept was introduced in 2000 in the EU countries, which use the European Union Council Framework Decision of 13 June 2002 on Joint Investigation Teams for setting up such teams, which can also involve countries beyond the European Union. Now also the UNCAC, in its Article 49, calls upon countries to conduct joint investigation and establish Joint investigative units. The Second Additional Protocol to the European Convention on Mutual Legal Assistance in Criminal Matters was adopted in 08.11.2001 supplementing the Convention by extending provision of the mutual legal assistance to the administrative authorities, as well as including a broad scope of new tools such as joint investigative tools, video and telephone conferences, spontaneous information exchange, temporary transfer of the detained persons, cross-border observation, controlled delivery and covert investigations on the territory of another state.

Besides, regular networking with other practitioners working in this area allows sharing experience and establishing contacts that can become useful at a given moment. This can be done through various regular anti-corruption initiatives and forums, for example, the Council of Europe Group of States against Corruption-GRECO, the OECD Working Group on Bribery and its Law Enforcement Officials meetings, the European Partners against Corruption<sup>79</sup>, the European Union Contact-point Network Against Corruption (EACN), the UNDP Anti-Corruption Practitioners Network<sup>80</sup>, the OECD Anti-

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<sup>75</sup> See a complex corruption and money-laundering investigation - experience in Italy, Cap. Francesco De Lellis, Italy, in Proceedings of the Seminar "Investigation and Prosecution of Corruption: Financial Investigations and Links with Money Laundering", 28 – 30 June 2011, Kyiv, Ukraine, p. 74; see seminar proceedings here.

<sup>76</sup> The working group discussion of a hypothetical complex case at ACN expert seminar in Kyiv in 2011 arrived to such conclusions.

<sup>77</sup> Further information on JITs: <https://www.europol.europa.eu/content/page/joint-investigation-teams-989>

<sup>78</sup> Proceedings of the Seminar "Effective Means of Investigation and Prosecution of Corruption", 20 – 22 October 2010; see seminar proceedings here.

<sup>79</sup> For further information visit [www.epac.at](http://www.epac.at)

<sup>80</sup> For further information visit <http://europeandcis.undp.org/anticorruption>

Corruption Network for Eastern Europe and Central Asia<sup>81</sup>. It is important for those investigators and prosecutors who on daily basis are involved in corruption cases to regularly attend various training events and seminars at regional or international level. For example, such events are organized by the International Anti-Corruption Academy<sup>82</sup> or by the OECD Anti-Corruption Network for Eastern Europe and Central Asia. Investigators and prosecutors can participate in study tours, which is another way to establish such contacts.

Ukraine ratified of the Second Additional Protocol to the European Convention on Mutual Legal Assistance in Criminal Matters in June of 2011 and introduced numerous new provisions into the Criminal Procedure Code to further facilitate various forms of both formal and informal co-operation, as well as the use of JITs. The Criminal Procedure Code was amended with Article 85-3 which provides for the use of the telephone and video conference for interviewing of the witnesses, experts, suspects, accused and defendants, as well as for the purposes of confrontation, identification, recreation of the circumstances of the crime. Newly introduced Article 97-1 requires to share information on the crime conducted abroad when such information becomes known to the investigators and prosecutors (with the exception of cases when it can hurt domestic investigations). And finally Article 119-1 introduces a notion of the International Investigative Team and Article 119-2 regulates functioning of such groups.

An International Investigative Team (equivalent of JIT under Ukrainian legislation) can be established in Ukraine or with the participation of Ukrainian prosecutors and investigators following authorization by the General Prosecutor's Office of Ukraine and competent authority of another state(s). Its purpose is to investigate a complex transborder crime which requires coordinated actions of several states and conduct of investigative activities on the territory of more than one state. Resolution on establishment of the International Investigative Team can be issued by the Prosecutor General or his deputy and should indicate time frame for the functioning of the International Investigative Team, its composition, as well as the person acting as its head.

Investigative actions are conducted by JIT in accordance with the rules of procedure on MLA but do not require MLA requests and can be conducted directly by the members of the team allowing for direct exchange of information. Information and other factual data collected by the Joint investigative team, as well as in the course of the transfer of the criminal proceedings does not require additional procedural verification and is recognized as evidence in Ukraine.<sup>83</sup> (Please see Section 2.3.4. for more information on Special Investigative Techniques which can be used in corruption investigation in Ukraine in the framework of the Protocol).

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<sup>81</sup> For further information visit [www.oecd.org/corruption/acn](http://www.oecd.org/corruption/acn)

<sup>82</sup> For further information visit <http://www.iaca.int>

<sup>83</sup> Article 65 of the Criminal Procedure Code of Ukraine, as amended by the LawN 3529-VI from 16.06.2012.

### **3. TRAINING COURSE**

The third part of the manual is intended for teachers who deliver training on investigation and prosecution of corruption offences. It includes description of the training methodology, which combines lectures and practical exercises based on a case study, a training plan and guidance on the use of the training materials. It further provides a set of lectures, which can be used by teachers in the delivery of this training. Finally, this part provides description of the practical exercises and the case study.

#### **3.1. Training methodology**

The training methodology is based on the combination of lectures and practical exercises. The lectures provide a theoretical introduction into the concepts and international standards on criminalization, investigation and prosecution of corruption, and an overview of corruption offences and procedural provisions for their investigation and prosecution established in the Ukrainian legislation. The lectures are accompanied by two workshops which allow the students to apply legislative and financial analysis in practice. The practical exercise constitutes the main part of the training course. It requires the students to undertake a real-life investigation and prosecution of a case of corruption and money laundering, using theoretical knowledge which was provided during the lectures and workshops.

The training course is intended for prosecutors; investigators can also take part in this training. The training can be provided for students of academic institutions who intend to become prosecutors and investigators upon the completion of their studies. However, it is more relevant for practicing prosecutors and investigators, who already have work experience and who intend to specialize in corruption offences. Training for practicing prosecutors can be a part of their in-service continued training, usually provided by the Prosecutorial Academies.

The training program is for the class of 25 participants. The course can be delivered in approximately 32.5 hours, conducted over 5 days. The conduct of the course would require a lead teacher and one or two assisting teachers. The teachers may require assistance of an IT specialist for the installation of the computers and CD-ROM files for students and teachers.

##### **3.1.1. Overview of the training course components**

###### *3.1.1.1. Introduction*

The lead teacher may wish to present the programme and the importance of active participation of each student. The teacher may explain that the certificates on successful completion of the course will be awarded at the end of the course. The teacher may set the rules, including with respect to timing, and may explain how to use training materials, including those contained in the hard copy of the manual and the CD-ROM.

###### *3.1.1.2. Lectures*

Lectures intend to provide an overview of legislative provisions and investigative methods which students will need to know in order to undertake the practical exercise. The sequencing of the lectures therefore follows the logic of the case study. The manual proposes the following six lectures:

- *Lecture 1: Corruption offences: Overview of International instruments and national legislation.* This lecture will provide an overview of corruption offences established in international anti-corruption instruments such as the UN and Council of Europe anti-corruption conventions, and the corruption offences established in the Ukrainian legislation. The lecture will also provide an

overview of special investigative techniques (SITs), and measures that can be used to trace, freeze and confiscate proceeds of corruption offences.

- *Lecture 2: Elements of the corruption offences.* This lecture will analyze elements of corruption offences, which are provided for by the international conventions, and those established in the Ukrainian legislation.
  - *A Workshop on the elements of corruption offences* will be conducted at the end of Lecture 3. The participants will be asked to analyse specific cases that involve corruption and other crimes, and to determine which criminal statute can be applied to qualify these crimes, including which elements of the offence can be established and which evidence can be used to prove each element.
- *Lecture 3: Money laundering.* This lecture will provide an overview of money laundering concept, various stages that money laundering involves in practice and links between money laundering and corruption. The lecture will further present legislative provisions related to money laundering established in the Ukrainian legislation.
- *Lecture 4: Financial investigative techniques.* This lecture will present an overview of financial investigative techniques which are commonly used for investigation of corruption offences and for proving the income that has been derived from a corruption offence.
  - *A Workshop on financial investigative techniques* will be conducted at the end of Lecture 4. Participants will be asked to analyse a specific case that involves corruption and other crimes and to determine the amount of illegal income derived from corruption activities using financial investigative techniques.
- *Lecture 5: Electronic tools for financial investigations.* This lecture will demonstrate the use of computers to organize, analyze, and present large volumes of financial and related evidence. It will present the use of an Excell programme, the design and the use of a spreadsheet for the analysis of data and presentation of results of financial investigations.
- *Lecture 6: International co-operation in investigating and prosecuting corruption.* This lecture will discuss the importance of international co-operation in corruption cases, legal basis for it, formal and informal mutual legal assistance, and practical steps to request or to provide such assistance, as well as issues of admissibility of obtained evidence.

This manual proposes that the above six lectures can be delivered in approximately 8 hours. The text of the lectures is provided further in this part of the manual together with slides that can be used by the teacher; CD-ROM provided together with the manual contains copies of international instruments and Ukrainian legislation referred to in the lectures. It is important to note that these lectures are provided only as a guidance; teachers are invited to further develop and modify their lectures taking into account the developments of the national legislation and law-enforcement practice.

### *3.1.1.3. Practical exercise*

The practical exercise will simulate the investigation of a realistic large scale corruption and money laundering case. The participants will be divided into 4 or 5 groups; each group will act as an autonomous investigative team.

Groups will be asked to investigate the report about the alleged crime, which will be provided to each group by the teacher. The groups will need to undertake various criminal investigative measures, including the use of SITs and financial investigations, in order to obtain necessary information and to gather evidence. When the group has taken investigative measures correctly, the teacher will provide them with the next piece of evidence, to allow for further investigative measures. When the group obtains necessary evidence to prove each element of offence, it will be asked to organize the evidence in electronic form and to prepare the case for presentation in the court; the groups will also be asked to prepare measures necessary for confiscation of proceeds of crime abroad.

In the best case scenario, all groups will succeed in collecting necessary evidence and preparing the case for the presentation in court. However, it is also possible that some groups will fail to complete the

investigation fully; in this case they will be asked to present their case only for those elements of offence that are supported by sufficient evidence, or to close their investigation.

At the conclusion of the practical exercise, each group will be asked to present the results of their investigation and prosecution of the case. Each member of the group will be required to prepare a portion of the case and make a detailed presentation to the entire class. The teacher will provide feedback to each group evaluating the way they handled the case.

The manual proposes break-down of the work on the practical exercise into the following 13 parts:

- *Exercise Part 1:* This part will provide an introduction to the whole exercise. It will launch an investigation with the first evidentiary items about alleged money-laundering and corruption committed by a high level public official in Ukraine. The use of software called "Investigative File Inventory (IFI)" will be demonstrated to the students. The students then will have to try it out on their own using further evidentiary piece.
- *Exercise Parts 2 -11:* During these parts of the exercise the groups will decide which investigative steps to take to obtain further evidentiary items, which will be provided to them by the teacher. They will analyse each item and will prepare the evidence for presentation in court using the IFI software.
- *Exercise Part 12:* This part of the exercise will be devoted to the preparation of presentations by the groups.
- *Exercise Part 13:* In this part of the exercise the groups will make their presentations and the students will be evaluated for their work.

The practical exercise can be delivered during 13 sessions in approximately 18 hours. The description of each session is provided further in this part of the manual. The teachers will need to use the computer to demonstrate the use of the Excel spreadsheet for the analysis and organisation of evidence; a copy is provided on the CD-ROM. All students, or at least each group of students, should also be equipped with a computer to participate in the practical exercise and to use the Excel spreadsheet. For each exercise session the teacher will provide several evidentiary pieces - in electronic form and/or as paper hand-outs; all pieces of evidence are available on the CD-ROM.

#### 3.1.1.4. Evaluation

The students of the training will be evaluated based on their overall participation in the course and on their performance in the group presentation of the case. The teacher will decide for each student if he or she “passed” or “failed” this course. The certificates on passing of this course can be prepared and issued to those participants who have completed it successfully.

### 3.1.2. Training plan

As noted above, the practical exercise is the main element of this training course, lectures aim to present theoretical knowledge necessary for the practical exercise, and will intersperse into the practical exercise. The following plan can be used for organization of the training course. This schedule provides only guidance for the teachers, who can further adapt it to their needs.

Time	Day 1	Day 2	Day 3	Day 4	Day 5
9:00	Welcome and opening remarks  <b>Lecture 1</b> Corruption offences: overview of international standards and national legislation	<b>Lecture 3</b> Money laundering	<b>Lecture 5</b> Electronic tools for financial investigations	<b>Lecture 6</b> International cooperation	<b>Exercise Part 12</b> Preparation of presentations by the groups
10:30	Break	Break	Break	Break	Break

10:45	<b>Exercise – Part 1</b>	<b>Exercise – Part 3</b>	<b>Exercise – Part 5</b>	<b>Exercise – Part 8</b>	<b>Exercise Part 13</b> Presentations by the groups
12:00	Lunch	Lunch	Lunch	Lunch	Lunch
13:00	<b>Lecture 2</b> Elements of the corruption offences	<b>Lecture 4</b> Financial investigations	<b>Exercise – Part 6</b>	<b>Exercise – Part 9</b>	<b>Exercise Part 13</b> (continued)
14:30	Break	Break	Break	Break	Break
14:45	<b>Exercise – Part 2</b>	<b>Workshop</b> on financial investigations	<b>Exercise – Part 7</b>	<b>Exercise – Part 10</b>	<b>Exercise Part 13</b> (continued)
16:00	<b>Workshop</b> on elements of the corruption offences	<b>Exercise – Part 4</b>		<b>Exercise – Part 11</b>	Wrap-up and Summary remarks
17:00					

### 3.1.3. Training materials

Parts 1 and 2 of this manual are destined for the use by both the students and the teachers; Part 3 is destined for the use of the teachers only. All training materials, including additional reference materials and materials for the practical exercise are provided on the attached CD-ROM. They are organized in two folders:

- The “*Student's Folder*” containing International Instruments and Ukrainian legislation discussed in Parts 1 and 2 of the manual as well as all practical exercise documents to be used by the students, including the Excel spreadsheet **Investigative File Inventory (IFI)**.<sup>84</sup>
- The “*Teacher's Folder*” containing lectures with PowerPoint presentations, materials for two workshops, and practical exercise documents to be used by the teacher, including the **Investigative File Inventory (IFI)** and **List of Practical Exercise documents**.

As noted earlier, this training course requires the use of computers by each student or by the groups of students, and by the teachers. The training materials provided in the "Student's Folder" should be installed on all computers for students in advance of the training course. The materials provided in the "Teacher's Folder" should be installed on the teacher's computer. In addition, all documents provided in the sub-folder 'Practical Exercise' (apart from **IFI**) should be printed out and distributed to the teams when required in addition to the electronic versions of these documents which will be made available on student's computers.

### 3.2. Evaluation

The students of the training should be evaluated on their performance in the framework of this course based on their overall participation in all of its elements and through a number of performance indicators. Criteria for such evaluation are to be developed by the teacher, and may include among others:

- student attendance of all of elements of the training course;
- level of student’s participation at the workshops and lectures;
- the role played by the student within his/her group (investigative team) in the course of the “simulated investigation”;
- number of leads gathered by each group through the simulated investigation;
- the scope of the offences with which each group will be prepared to charge “perpetrators of the simulated case-study” at the end of the exercise; etc.

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<sup>84</sup> Names of the files contained in the CD-Rom will be indicated in blue throughout the text of this Chapter for convenience of the instructors.

Performance in the group presentation of the case should be one of the performance indicators and its evaluation is described in the Section 3.3.3.12.

Having considered all of the results, the teacher will decide for each student if he or she “passed” or “failed” this course. The certificates on passing of this course can be prepared and issued to those participants who have completed it successfully.

Additionally, the teacher may wish to develop an entrance-and-exit test to assess the knowledge that the students possessed before they undergone the course and the level of knowledge they demonstrated upon the completion of the test. This could assist in further improvement of the course.



### 3.3. Lectures

As noted earlier, lectures will provide an overview of legislative provisions and investigative methods which the students will need to know in order to undertake the practical exercise. The sequencing of the lectures therefore follows the logic of the case study. The manual proposes the six lectures, presented below. The lectures can be illustrated with the PowerPoint slides, which are provided on the CD-Rom. The instructions below will take the teacher through the slides of each of the presentation with suggestions on how to involve the participants in discussions. Two of the lectures also include small workshops which allow the students to test newly acquired knowledge in practice. The descriptions of the workshops are provided under corresponding lectures, practical materials for the workshops are available on the CD-Rom.

#### 3.3.1. Lecture 1 – Corruption Offences: Overview of International Standards and National Legislation

Lecture 1 contains 10 slides and should be covered in approximately 60 minutes, including time for discussion. The instructors should refer the participants to the Chapter 1 of this Manual for additional information on this topic.

Involving the participants is always a good way to start. Asking questions in regards to the international instruments that they are aware of or have worked with will open the audience for discussion. The emphasis should be that the motivation for white-collar criminality is the financial gain, and that the goal of most criminals is to profit from their criminal activities. The best deterrent effect is achieved by obtaining a conviction and a confiscation order. Further on, growing importance of the asset recovery should be explained.

It is also important to explain at the very beginning of the lecture that although most of these instruments are in place and have been signed and ratified by Ukraine, they set international standards that should serve as a guide. However, when dealing with practical cases, practitioners should refer to their domestic legislation. International instruments can be used to fill gaps that national legislation may have, for example, in terms of mutual legal assistance or interpretation of general principles. But it is the national law that will be applied to the concrete case at hand, particularly regarding applicable offences.

## Anti-Corruption Instruments

- Council of Europe Criminal Law Convention on Corruption
- United Nations Convention Against Corruption
- OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions

With **Slide 1** the instructor should provide an overview of the main international instruments on corruption and explain how they apply to Ukraine. Namely the following three instruments should be covered:

1) The *Council of Europe Criminal Law Convention on Corruption* seeks to prevent and punish corruption through a broad range of offences, which include the active and passive bribery of domestic and foreign public officials, bribery in the private sector and trading in influence. It seeks to develop common standards concerning certain corruption offences, and deals with substantive and procedural law matters, which relate closely to corruption offences.

Its implementation is monitored by the Group of States against Corruption (GRECO), which Ukraine joined in January 2006; the joint report of the first and the second rounds of evaluation was adopted by GRECO in March 2007 and made public in October 2007, following authorisation by the Ukrainian authorities. Report of the third round of evaluation was adopted by GRECO in October 2011 and one of its topics covers Incriminations.<sup>85</sup>

2) The *United Nations Convention Against Corruption (UNCAC)* covers the broadest range of corruption offences. It addresses preventive measures to corruption, international co-operation, technical assistance and asset recovery, and is structured within its four main pillars: prevention, criminalisation, international co-operation and asset recovery – which are constituent elements of a comprehensive and multi-disciplinary anti-corruption strategy<sup>86</sup>. The UNCAC therefore seeks to emphasise every aspect of anti-corruption efforts, from prevention to the return of misappropriated funds. Ukraine has signed and ratified UNCAC.

3) The *OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions* is the most specialised treaty as it only covers the liability of the persons who offer undue advantage to foreign public officials (active bribery) but not foreign public officials who solicit or receive an undue advantage (passive bribery).

The OECD Anti-Bribery Convention requires functional equivalence among its Parties. This means that while the Parties are expected to fully comply with the standards of the Convention, they do not have to adopt uniform measures, nor change fundamental principles of their legal system. The Convention does not require the use of its precise terms in defining the offence under their domestic legislation: a Party may use various approaches to fulfil its obligations, provided that the conviction of a person for the offence does not require proof of elements beyond those which would be required to be proved if the offence were defined as in the Convention<sup>87</sup>.

The Working Group on Bribery administers a rigorous peer-review monitoring system which measures how well countries live up to their obligations under the Convention.

The instructor should note that while Ukraine is not a signatory to this Convention, its basic concept on liability of foreign public officials is a standard which was reiterated in both CoE and UN Conventions and applies to Ukraine.

In addition to the above-mentioned Conventions, Ukraine also participates in the Istanbul Anti-Corruption Action Plan (IAP); a voluntary sub-regional initiative of the OECD Anti-Corruption Network for Eastern Europe and Central Asia (ACN), a regional programme of the OECD Working Group on Bribery. The IAP conducts regular and comprehensive country reviews and addresses recommendations to the countries in three areas: anti-corruption policies; criminalization and law enforcement; and prevention of corruption in various sectors. The review, monitoring reports and regular progress updated on Ukraine are available on the ACN web site.<sup>88</sup>

The following **Slides 2** and **3** will focus on some of the general common concepts, as well as specific provisions of these Conventions which are of particular interest to corruption and money-laundering investigations. The offences will be divided into three groups: (i) bribery offences; (ii) other corruption-related offences; and (iii) responsibility of legal persons. The instructor should let the participants know that they will come back to this topic later on when discussing Elements of the Offences.

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<sup>85</sup> CoE Third Evaluation Round on Ukraine – Incriminations (ETS 173 and 191, GPC 2) (Theme I) can be found at [http://www.coe.int/t/dghl/monitoring/greco/evaluations/round3/GrecoEval3\(2011\)1\\_Ukraine\\_One\\_EN.pdf](http://www.coe.int/t/dghl/monitoring/greco/evaluations/round3/GrecoEval3(2011)1_Ukraine_One_EN.pdf).


<sup>86</sup> UN Technical Guide to the United Nations Convention against Corruption. New York, 2009. P. xviii.

<sup>87</sup> Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and Related Documents. OECD Document DAF/IME/BR(97)20, p. 12.

<sup>88</sup> [http://www.oecd.org/document/17/0,3746,en\\_36595778\\_36595861\\_37187921\\_1\\_1\\_1\\_1,00.html](http://www.oecd.org/document/17/0,3746,en_36595778_36595861_37187921_1_1_1_1,00.html)

**Slide 2** will provide a brief overview of the bribery offences under these Conventions. The instructor should explain how they are dealt with under each of the Convention in general terms, drawing attention to the main specificities:

Bribery Offences		
OECD Convention	CoE Convention	UNCAC
<ul style="list-style-type: none"> <li>Active bribery of a foreign and international public official (mandatory) – article 1(1)</li> </ul>	<ul style="list-style-type: none"> <li>Active and passive bribery of national public officials (mandatory) – article 2 (active bribery) and article 3 (passive bribery)</li> <li>Active bribery of a foreign and international public official (mandatory) – article 5 (remitting to article 2)</li> <li>Passive bribery of foreign and international public officials (reservation is possible) – article 5 (remitting to article 3)</li> <li>Active and passive bribing of judges and officials of international courts (mandatory) – article 11 (remitting to articles 2 and 3)</li> <li>Active and passive bribery in the private sector (reservation is possible for passive) – article 7 (active bribery) and article 8 (passive bribery)</li> </ul>	<ul style="list-style-type: none"> <li>Active and passive bribery of national public officials (mandatory) – article 15(a) (active bribery) and article 15(b) (passive bribery)</li> <li>Active bribery of a foreign and international public official (mandatory) – article 16(a)</li> <li>Passive bribery of foreign and international public officials (optional) – article 16(b)</li> <li>Active and passive bribery in the private sector (optional) – article 21(a) (active bribery) and article 21(b) (passive bribery)</li> </ul>

 – From "Corruption: A Glossary of International Standards in Criminal Law" (OECD, 2008)

*Council of Europe Convention* defines **active and passive bribery of public officials** as: the promising, offering or giving, directly or indirectly, of an undue advantage to a national or foreign public official, for himself or herself or for anyone else, is covered. The mere promise of an undue advantage consummates the offence. On the other end of the spectrum, the request, receipt or acceptance of an offer or promise of such an advantage by the public official is also criminalized. It is important to note that there are differences between “promising”, “offering” and “giving” a bribe. Whereas offering and giving do not require that the public official accepts the offer or gift, or even that he or she is aware of or has received the offer or gift (e.g. the gift is intercepted by the law enforcement authorities before it is delivered), promising deals with a briber who agrees with the official to provide a bribe. Convention requires that such offences are criminalized as complete offence; it is not sufficient to cover them by attempt/preparation of a crime.

The CoE Convention also criminalises bribery involving the following:

- members of a domestic or foreign public assembly exercising legislative or
- administrative powers;
- officials of international organisations or parliamentary assemblies;
- persons who work for private sector entities;
- domestic, foreign and international judges and officials of international courts.

Chapter III of the *UNCAC* deals with the criminalisation of corruption offences, including bribery, which is defined as: the promising, offering or giving of an undue advantage to a national, foreign or international public official is covered. The mere promise of an undue advantage consummates the offence. On the other end of the spectrum, the solicitation or acceptance by the public official is also criminalised.

Reflection of these concepts in Ukrainian legislation can be found under Section 1.1.2. and Section 2.2.1. of this Manual and should be presented to the participants to illustrate how these principles are applied in Ukrainian legislation and where gaps exist.

**Slide 3** will introduce other corruption related offences and how they are reflected in the Conventions.

## Other Corruption-Related Offences

OECD Convention	CoE Convention	UNCAC
<ul style="list-style-type: none"> <li>• Money laundering with bribery of a foreign public official as a predicate offence where bribery of a domestic official is a predicate offence (mandatory) – article 7</li> <li>• Accounting offences for the purpose of bribing foreign public officials or of hiding such bribery (mandatory) – article 8</li> </ul>	<ul style="list-style-type: none"> <li>• Money laundering (mandatory) – article 13</li> <li>• Accounting offences (reservation is possible) – article 14</li> <li>• Trading in influence (reservation is possible) – article 12</li> </ul>	<ul style="list-style-type: none"> <li>• Money laundering (mandatory) – article 23</li> <li>• Embezzlement, misappropriation or other diversion of property by a public official (mandatory) – article 17</li> <li>• Obstruction of justice (mandatory) – article 25</li> <li>• Trading in influence (optional) – article 18</li> <li>• Abuse of functions (optional) – article 19</li> <li>• Illicit enrichment, embezzlement of property in the private sector (optional) – article 20</li> <li>• Concealment (optional) – article 24</li> </ul>



– From "Corruption: A Glossary of International Standards in Criminal Law" (OECD, 2008)

1) Under the *Council of Europe Convention* other corruption-related offences include the following:

Money laundering of proceeds from corruption offences including:

- The conversion or transfer of property, knowing that such property is proceeds, for the purpose of concealing or disguising the illicit origin of the property or of assisting any person who is involved in the commission of the predicate offence to evade the legal consequences of his or her actions (the predicate offences in this regard refer to any of the criminal offences covered above);
- The concealment or disguise of the true nature, source, location, disposition, movement, rights with respect to, or ownership of, property, knowing that such property is proceeds of crime;
- The acquisition, possession or use of property, knowing, at the time of receipt, that such property was proceeds;
- Participation in, association or conspiracy to commit, attempts to commit and aiding, abetting, facilitating and counseling the commission of any of the offences established in accordance with this article.

Trading in influence: trading in influence consists of the promising, giving or offering, directly or indirectly, of an undue advantage to anyone who asserts or confirms that he or she is able to exert an improper influence over the decision-making of a national or foreign public official or any person mentioned in relation to bribery above in consideration thereof, whether the undue advantage is for himself or herself or for anyone else. It also includes the request, receipt or acceptance of the offer or the promise of such an advantage in return for exerting such influence whether or not the influence is exerted or the supposed influence leads to the intended result.

Although this offence has similar elements to that of bribery, there is one major exception: for trading in influence, the recipient of the advantage is not the decision-maker/official, nor is the recipient necessarily expected to act, refrain from acting, in breach of his/her duties. The recipient may or may not be a public official. The decision-maker/official may also be unaware of the offence. The offence thus targets not the decision-maker but those persons who are in the neighborhood of power and try to obtain advantages from their situation by influencing the decision-maker. The offence therefore addresses so-called "background corruption".

Accounting offences: the following acts or omissions, when committed intentionally, in order to commit, conceal or disguise bribery offences or trading in influence offences are considered to be offences:

- Creating or using an invoice or any other accounting document or record containing false or incomplete information (often referred to as off-the-books accounts or transactions);
- Unlawfully omitting to make a record of a payment.

As corporations and businesses often use false books to disguise bribe payments or to create slush funds for use in bribery, the Convention requires the prohibition of activities related to such false accounting.

2) Under the *UNCAC* other corruption-related offences include the following:

Laundering of proceeds of crime: the following conducts are considered money laundering, according to the *UNCAC*:

- The conversion or transfer of property, knowing that such property is the proceeds of crime, for the purpose of concealing or disguising the illicit origin of the property or of helping any person who is involved in the commission of the predicate offence to evade the legal consequences of his or her action;
- The concealment or disguise of the true nature, source, location, disposition, movement or ownership of or rights with respect to property, knowing that such property is the proceeds of crime.

Embezzlement and misappropriation: the Convention criminalizes the diversion of property committed by a public official for his or her benefit or the benefit of another person.

Trading in influence: trading in influence consists of the promise, offering or giving, and consequently the solicitation or acceptance by a public official or any other person, directly or indirectly, of an undue advantage in order that the public official or the person abuse his or her real or supposed influence in order to obtain an undue advantage from a public authority.

Abuse of functions: this offence consists of the performance of or failure to perform an act, in violation of laws, by a public official in the discharge of his or her functions, for the purpose of obtaining an undue advantage for himself or herself or for another person or entity.

Illicit enrichment: the offence of illicit enrichment or unexplained wealth consist of the significant increase in the assets of a public official that he or she cannot reasonably explain in relation to his or her lawful income.

Similarly to the previous slide, the instructor is invited to look at the Section 1.1.2. and Section 2.2.1. of this Manual and illustrate to the participants how these principles are applied in Ukrainian legislation and where gaps exist.

# Additional Instruments

1. Council of Europe Convention on Laundering, Search, Seizure and Confiscation of Proceeds of Crime 1990

2. Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds of Crime and on the Financing of Terrorism 2005

**Slide 4** the instructor should present two more additional instruments which could be of interest to participants of the training, especially in the context of financial investigations into the corruption offences.

1) The *Council of Europe Convention on Laundering, Search, Seizure and Confiscation of Proceeds of Crime 1990 (1990 Convention)* aims to facilitate international co-operation and mutual assistance in investigating crime and tracking down, seizing and confiscating the proceeds thereof. It is intended to assist States in attaining a similar degree of efficiency even in the absence of full legislative harmony.

Parties undertake in particular:

- to criminalise the laundering of the proceeds of crime;
- to confiscate instrumentalities and proceeds (or property the value of which corresponds to such proceeds).

For the purposes of international co-operation, the Convention provides for:

- forms of investigative assistance (for example, assistance in procuring evidence, transfer of information to another State without a request, adoption of common investigative techniques, lifting of bank secrecy etc.);
- provisional measures: freezing of bank accounts, seizure of property to prevent its removal;
- measures to confiscate the proceeds of crime: enforcement by the requested State of a confiscation order made abroad, institution by the requested State, of domestic proceedings leading to confiscation at the request of another State.

2) The *Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds of Crime and on the Financing of Terrorism 2005 (Warsaw Convention)* updates and widens the 1990 Convention to take into account the fact that not only could terrorism be financed through money laundering from criminal activity, but also through legitimate activities. It reinforces the arrangements of the 1990 Convention against money laundering, and is the first binding international legal instrument covering both the prevention and the control of money laundering and the financing of terrorism. This Convention also contains a monitoring mechanism which will ensure that the Convention is properly implemented.

After the main instruments have been introduced and their general concepts have been discussed, the instructor will shift the focus of the presentation to various investigative and prosecution tools available



under the presented international instruments. A selection of such tools from the Council of Europe Convention and UNCAC will be demonstrated to the participants with explanations on how these tools can be of use in the anti-corruption investigations.

## Special investigative techniques

– From UN Convention against corruption

*Article 50. Special investigative techniques*

1. In order to combat corruption effectively, each State Party shall, to the extent permitted by the basic principles of its domestic legal system and in accordance with the conditions prescribed by its domestic law, take such measures as may be necessary, within its means, to allow for the appropriate use by its competent authorities of controlled delivery and, where it deems appropriate, other special investigative techniques, such as electronic or other forms of surveillance and undercover operations, within its territory, and to allow for the admissibility in court of evidence derived therefrom.
2. For the purpose of investigating the offences covered by this Convention, States Parties are encouraged to conclude, when necessary, appropriate bilateral or multilateral agreements or arrangements for using such special investigative techniques in the context of cooperation at the international level. Such agreements or arrangements shall be concluded and implemented in full compliance with the principle of sovereign equality of States and shall be carried out strictly in accordance with the terms of those agreements or arrangements.
3. In the absence of an agreement or arrangement as set forth in paragraph 2 of this article, decisions to use such special investigative techniques at the international level shall be made on a case-by-case basis and may, when necessary, take into consideration financial arrangements and understandings with respect to the exercise of jurisdiction by the States Parties concerned.
4. Decisions to use controlled delivery at the international level may, with the consent of the States Parties concerned, include methods such as intercepting and allowing the goods or funds to continue intact or be removed or replaced in whole or in part.

**Electronic surveillance**

**Undercover operations**

**The use of informants**

**Integrity testing**

With **Slide 5** the instructor will talk about Special Investigative Techniques on the example of UNCAC Article 50.

The modern white-collar criminal is usually highly educated, knowledgeable in economics, finance, information technology (IT), etc. He has wide access to technology and specialised information. The means for committing crimes and concealing the proceeds thereof have become more and more complex. As a response, new investigative techniques must be put into practice, making use of new technology and knowledge. The investigations must be adapted to the kind of crime we are fighting if we ever intend to succeed.

Accordingly, the UNCAC provides in its Article 50 that in order to combat corruption effectively, special techniques should be used. The provision specifically mentions controlled delivery, electronic surveillance, and undercover operations. Some examples of innovative techniques may be:

- **Electronic surveillance:** The benefits of this technique are twofold. On the one hand, it provides the prosecutors with strong evidence to convict the targets. On the other hand, it enables law enforcers to learn of conspirators' plans beforehand in order to prevent them from happening. Constitutional issues limit electronic surveillance, as it may be in violation of a person's right to privacy. However, the right to privacy (as every other right) is not absolute and can be limited under certain circumstances. Most systems will only authorise electronic surveillance for the investigation of certain crimes, and always require a court order;
- **Undercover operations:** Better results are obtained when undercover operations go hand in hand with electronic surveillance. They can range from the simple controlled purchase of narcotics, contraband or illegal arms to the operation of an undercover business, such as a pub, where criminals meet and discuss their activities. The range will depend on the legislation as in common law systems there is more freedom regarding what an undercover agent can do, whereas in a civil system there is always the question of the *agent provocateur*. Under case-law of the European Court of Human Rights it is not allowed to instigate a crime if person had no predisposition to it; it means that law enforcement officer can join a crime after it was initiated by the offender but not provoke it himself;

- **The use of informants:** These are individuals who are often not willing to testify but who provide information or assistance to the authorities in return for a promise that his or her identity will be kept confidential. Usually, they are motivated to collaborate in exchange for money or lenient treatment regarding charges pending against them. In order to obtain better information from them, it is sometimes necessary to authorise them to participate in forms of non-violent criminal behaviour that would otherwise be illegal. For this reason it is recommended that their activities be closely monitored to prevent the informant from using his association with law enforcement to shield him from his own unauthorised criminal activities;
- **Integrity testing:** This method is especially helpful in the detection and eradication of public sector corruption. It is divided into two types: The first is sometimes called “random virtue” testing and is used by institutions to highlight the presence of issues or abuses which may not amount to criminal offences but which amount to concern about behavior. The second type consists of “intelligence-led” tests that arise when there is information or intelligence that a particular individual or group of individuals is committing criminal or serious disciplinary offences. Careful planning is required so as to avoid entrapment (provocation).

After providing the participants with the overview of the SITs under the Convention, the instructor needs to open the floor for discussion of the Ukrainian context and availability (or in some cases non-availability of these techniques under Ukrainian legislation). Relevant information can be found under Section 2.3.3. of this Manual.

**Confiscation and Seizure of the Proceeds and Instrumentalities of Corruption**

- FREEZING
- SEIZING

**Article 19 – Sanctions and measures**

1 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.

2 Each Party shall ensure that legal persons held liable in accordance with Article 18, paragraphs 1 and 2, shall be subject to effective, proportionate and dissuasive criminal or non-criminal sanctions, including monetary sanctions.

3 Each Party shall adopt such legislative and other measures as may be necessary to enable it to confiscate or otherwise deprive the instrumentalities and proceeds of criminal offences established in accordance with this Convention, or property the value of which corresponds to such proceeds.

**Article 23 – Measures to facilitate the gathering of evidence and the confiscation of proceeds**

1 Each Party shall adopt such legislative and other measures as may be necessary, including those permitting the use of special investigative techniques, in accordance with national law, to enable it to facilitate the gathering of evidence related to criminal offences established in accordance with Article 2 to 14 of this Convention and to identify, trace, freeze and seize instrumentalities and proceeds of corruption, or property the value of which corresponds to such proceeds, liable to measures set out in accordance with paragraph 3 of Article 19 of this Convention.

2 Each Party shall adopt such legislative and other measures as may be necessary to empower its courts or other competent authorities to order that bank, financial or commercial records be made available or be seized in order to carry out the actions referred to in paragraph 1 of this article.

3 Bank secrecy shall not be an obstacle to measures provided for in paragraphs 1 and 2 of this article.

- CONFISCATION
- RETURN

With the next **Slide 6**, the instructor will move to talk about the preventative measures, confiscation and return in the context of the corruption investigation on the example of the Articles 19 and 23 of the Council of Europe Criminal Law Convention on Corruption.

During the course of a financial investigation, preventive measures leading to the preservation of the assets in question are common. Article 19 of the CoE Convention deals with measures needed to enable a country to confiscate the instrumentalities and proceeds of criminal offences established in accordance with the Convention, or property the value of which corresponds to such proceeds.

In Article 23 the Convention deals with the tools needed to enable a country to identify, trace, freeze and seize instrumentalities and proceeds of corruption, or property the value of which corresponds to such proceeds. It requires, for the implementation of Article 19 dealing with confiscation, the adoption of legal instruments allowing Parties to take the necessary provisional steps, before measures leading to confiscation can be imposed. In addition to the relevant investigation which must be conducted as to



the quantity of the proceeds gained or the expenses saved and the way in which profits (openly or not) are deposited, it is necessary to ensure that the investigating authorities have the power to freeze located tangible and intangible property in order to prevent it disappearing before a decision on confiscation has been taken or executed.

It is important at this juncture to remind (discuss with them?) participants of the differences between freezing, seizing, confiscation and return:

- **Freezing** is a **preventive measure** applicable to bank accounts and other financial products that prevents the nominative owner of such products from moving, transferring or converting these assets. Accounts should be frozen through a judicial order limiting the ownership rights often until the end of the criminal process. Freezing is a measure that must be approached carefully to ensure that it is taken at the appropriate moment during the process. Once assets are frozen, the investigator or prosecutor runs the risk of alerting the target of the investigation, which could hinder the tracing of other assets. Also, following the movement of assets could lead the investigator to other accounts where further funds may be stashed, even proceeds from different offences. If assets are frozen prematurely the investigator may lose the opportunity to find other accounts. On the other hand, the transfer of money has become extremely easy. It can be done online, over the telephone, etc. This means, that while criminals can move their monies around very quickly and conceal them very effectively, law enforcement takes much longer to trace them, as investigators are bound by the law. This also means that if assets are frozen too late, we may lose our trail. Therefore, careful consideration as to when to freeze assets is required;
- **Seizing** is a **preventive measure** applicable to movable or immovable property that prevents the nominative owner of such property from selling or transferring it, ideally for the duration of the criminal process. Certain issues must be taken into account when dealing with the seizure of assets. The nature of the assets to be seized is of special consideration. Assets that depreciate easily, assets that require high maintenance costs, high-risk assets, perishable assets, living stock and precious woods must be carefully assessed before seizure. Alternatives to seizing might be necessary;
- **Confiscation** is a **definite measure**, ordered at the very end of the criminal process. Confiscation is the actual change of ownership from the current owner to the State. It is applicable to movable or immovable property, bank accounts and other financial products alike.
- **Return** is the process by which assets are returned to the country of origin. Sometimes sharing of assets will be required, depending on the concrete case.

After providing the participants with relevant information under the Convention, the instructor needs to initiate the discussion regarding what is allowed under the Ukrainian legislation and what is being applied in practice by the participants. Relevant information can be found under Section 2.3.8. of this Manual.

# Prevention and Detection

- *UNCAC Chapter II*
- *FATF 40 + 9 Recommendations*
- *Ukrainian Criminal and Criminal Procedure Codes*
- *Law of Ukraine on Prevention and Counteraction to the Legalisation of the Proceeds of Crime*



**Slide 7** will introduce the topic of prevention and detection of proceeds of crime. The participants will be explained that the instructor will be using requirements of the UNCAC Chapter II and FATF's 40+9 Recommendations as a basis to discuss what the Ukrainian law says and how it can be applied by investigators and prosecutors in practice.

As a way of general introduction of the topic, it should be mentioned that Chapter II of the UNCAC calls for the prevention and detection of transfers of the proceeds of crime. The preventive measures set forth in this chapter are of special relevance to prosecutors and investigators, as they provide important tools for efficient financial investigations.

If these measures are in place, they become an important source of information for the prosecutors and investigators. In an effective financial investigation it is always necessary to establish who received what and how much, as well as where it went, in order to determine a link between the assets and the criminal offence.

# Know-your-customer policy

- Requiring the casinos to verify the identities of gamblers – S4
- Requiring financial institutions to verify customers' identities – S5
- Requiring financial institutions to seek information from the customer as to the origin and destination of funds – S6



With **Slide 8** and **9** the instructor continues the topic of Preventative Measures with the focus on those which are required of financial institutions.

Namely, through **Slide 8** it should be noted that implementation of the UNCAC's Chapter II implies several actions; the first being the enhancement of scrutiny of high-risk clients and financial products. An effective customer due diligence (Know-your-Customer) policy must be applied. This means that financial institutions must verify the data provided by their clients and determine the beneficial owner of their accounts, with special regards to politically exposed persons (PEPs).

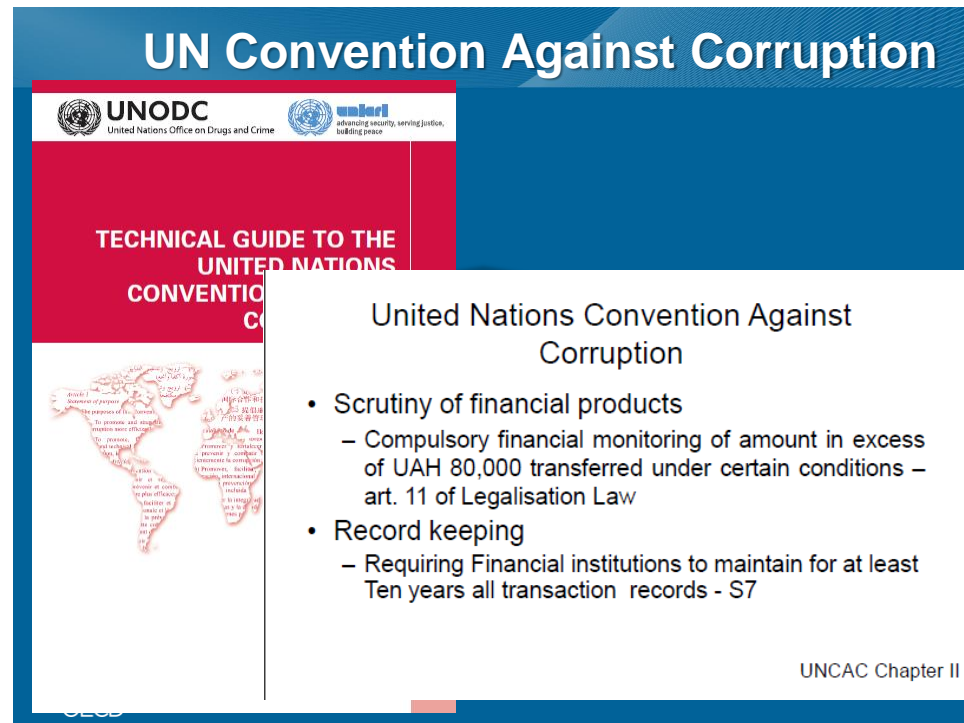
The FATF 40+9, recommends the following customer due diligence measures:

- Identifying the customer, and verifying that customer's identity using reliable, independent source documents, data or information;
- Identifying the beneficial owner, and taking reasonable measures to verify the identity of the beneficial owner to the extent that the financial institution is satisfied that it knows who the beneficial owner is. For legal persons and arrangements, this should include financial institutions, taking reasonable measures to understand the ownership and control structure of the customer;
- Obtaining information on the purpose and intended nature of the business relationship;
- Conducting ongoing due diligence on the business relationship and scrutiny of transactions undertaken throughout the course of that relationship to ensure that the transactions being conducted are consistent with the institution's knowledge of the customer, their business and risk profile, including, where necessary, the source of funds.

An example of the application of customer due diligence in Ukraine is found in Article 6 of the Legalisation Law, which requires an entity of initial financial monitoring to identify the person engaged in the financial transaction subject to financial monitoring pursuant to this Law; or the person who opens an account (including a deposit account) on the basis of documents submitted in accordance with the established procedure or if there are reasons to believe that the information regarding the person's identification should be clarified.

Casinos are extremely vulnerable to money laundering, as it is easy to introduce large amounts of currency on one hand, and take them out as gambling profits on the other without raising suspicions. Article 15 of the same Law establishes an obligation for gambling or pawn institutions and legal entities holding any kinds of lottery, as entities of initial financial monitoring, to verify the identity of their customers by requiring identification. All transactions must be recorded with detail to the nature

and amount of each transaction and the identity of the client. This information must be kept for a period of at least 5 years. Furthermore, in terms of Article 15, a financial transaction shall be subject to compulsory financial monitoring if its amount equals or exceeds UAH 150,000, or equals or exceeds the sum in foreign currency equivalent to UAH 150,000 if such financial transaction involves, for example, the transfer of funds to an anonymous (numbered) account abroad, or the payment of lottery, casino or other gambling winnings.



**Slide 9** will raise the need to pay special attention to financial products that raise suspicion by their very nature, such as when the client does not coincide with the beneficial owner (joint accounts, joint securities accounts, investment companies and other collective investments), offshore companies, clients holding assets without specific beneficial owners (e.g. discretionary trusts), or clients bound by professional confidentiality (attorneys or notaries holding accounts for specific professional purposes).

The FATF has said that financial institutions should pay special attention to complex, unusually large transactions, and all unusual patterns of transactions, with no apparent economic or visible lawful purpose. These transactions must be examined and all findings made available to the competent authorities.

In Ukraine, an example of transactions subject to enhanced scrutiny are to be found in Article 15 of the Legalisation Law where if its amount equals or exceeds UAH 150,000, or equals or exceeds the sum in foreign currency equivalent to UAH 150,000 and involves the transfer of funds in cash abroad with a request to give the recipient the funds in cash, it is subject to compulsory financial monitoring. The same applies to placement of funds to an account in cash with their subsequent transfer to another person during the same or the next trading day.

Record keeping is key to investigations. A strong banking system is essential. If financial institutions keep accurate records of their transactions for a sufficient amount of time, assets can always be traced. It is important to remember that money more often than not leaves a trail. This goes hand in hand with the requirement to share information with competent authorities in other state parties.

The FATF's Recommendation on record keeping, states that financial institutions should maintain all necessary records on domestic and international transactions for at least five years. These records must be sufficient to permit the reconstruction of individual transactions (including the amounts and types of currency involved) so as to provide, if necessary, evidence for prosecution of criminal activity. These records should be available to domestic competent authorities.

Article 6 of the Ukrainian Legalisation Law requires entities of initial financial monitoring to keep the documents in relation to the identification of the persons who carried out the financial transaction, as

well as all documents on financial transactions, for five years after conducting such financial transaction.

The instructor will then wrap up the topic of the Preventative Measures, as well as the overall presentation of the International Instruments with discussing the notion of “politically exposed persons” in [Slide 10](#).

**UN Convention Against Corruption**

UNODC United Nations Office on Drugs and Crime

UNICRI advancing security, serving justice, building peace

**TECHNICAL GUIDE TO THE UNITED NATIONS CONVENTION AGAINST CORRUPTION**

United Nations Convention Against Corruption

- Dealing with PEPs
  - Wolfberg Group: a person who performs important public functions for a state.
  - Swiss Federal Banking commission: a person occupying an important public function.
  - US interagency guidance: a senior foreign political figure.
  - The Bank for International Settlements: potentates.
- Relatives and close associates?

UNCAC Chapter II

It should be emphasized that special attention in international instruments and international co-operation in the area of fighting corruption and money laundering is paid to a special category of public officials **called politically exposed persons (PEPs)**. The FATF has recommended that financial institutions should:

- Have appropriate risk management systems to determine whether the customer is a PEP;
- Obtain senior management approval for establishing business relationships with such customers;
- Take reasonable measures to establish the source of wealth and source of funds;
- Conduct enhanced ongoing monitoring of the business relationship.

However, the problem that most countries face is the broadness of the definition. According to the Wolfsberg Group, PEPs are individuals who perform important public functions for a state, but the definition is still very broad and allows for interpretation. Several examples are provided. The Swiss Federal Banking Commission defines a PEP as a person occupying an important public function, the US Interagency Guidance defines such a person as a senior foreign political figure and the Bank for International Settlements has simply defined these people as “potentates”.

The precaution should also be extended to people who are close to PEPs, such as their families and associates. The question on how do we define “family” or “close associate”? should be addressed to the participants to open up the discussion on how PEPs are defined in Ukrainian legislation, what are strategies/tools can be applied to investigate them, etc.

In this context, it would be useful to bring up the issue of the **asset and income declarations of public officials** and how those can be used to track the income of the PEPs.

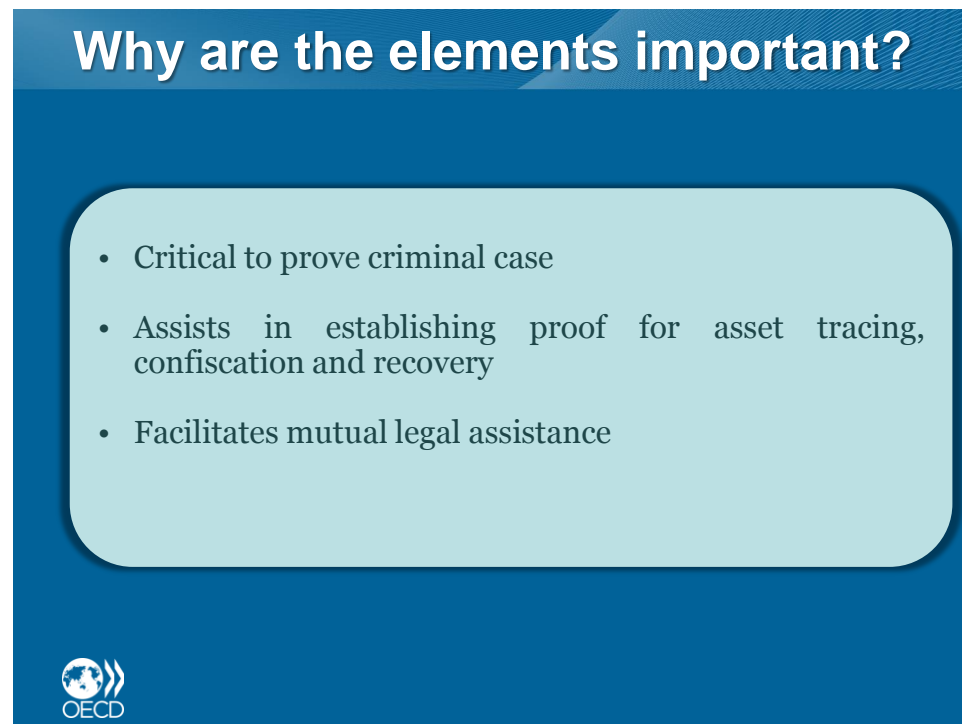
In conclusion it should be stressed that it is important to remember that most white-collar criminals will not keep assets under their own names. These criminals will do whatever it takes to conceal their illicitly acquired wealth, which means that they will use their close relatives and trusted associates for this purpose. When conducting an investigation, it is essential to always look at the target’s spouse, children and business associates. When bank records are requested, it may be helpful to also request the

bank records of the spouse, children, etc., to look at the properties they own and at their lifestyles. More often than not, they will be hiding assets for the main target, and could become themselves targets of the investigation as perpetrators or accomplices.

### 3.3.2. Lecture 2 – Elements of the offences


Lecture 2 contains 12 slides and should be covered in approximately 90 minutes, including time for discussion. This lecture is followed by the related workshop.

The theoretical portion of the presentation will remind participants of how to break down offences into the different elements of which they are composed. This lecture should be extremely interactive. Following the lecture portion of the class, the participants will conduct an analysis of specific Ukrainian statutes based on their understanding of the relevant Ukrainian legislation. The participants will make presentations summarizing their findings during the workshop portion which will be critiqued by the instructors and discussed by the plenary group.



## Why are the elements important?

- Critical to prove criminal case
- Assists in establishing proof for asset tracing, confiscation and recovery
- Facilitates mutual legal assistance



The lecture will start with **Slide 1** and a discussion of why the elements of the offence are crucial for an efficient investigation and a strong conviction that will withstand all appeals. An understanding of the elements not only ensures that one is able to prove a criminal case but it also assists the investigator in establishing the evidence required to identify, trace, confiscate and, ultimately, recover the proceeds of crime. This ensures that the criminal is touched where it hurts him most: namely, his pocket, and that he is prevented from enjoying the profits of his crime. A thorough knowledge of the elements of the crime, furthermore, facilitates effective mutual legal assistance with foreign jurisdictions, particularly in corruption and other serious economic crime cases where the offender very often conceals the proceeds of his crime abroad.

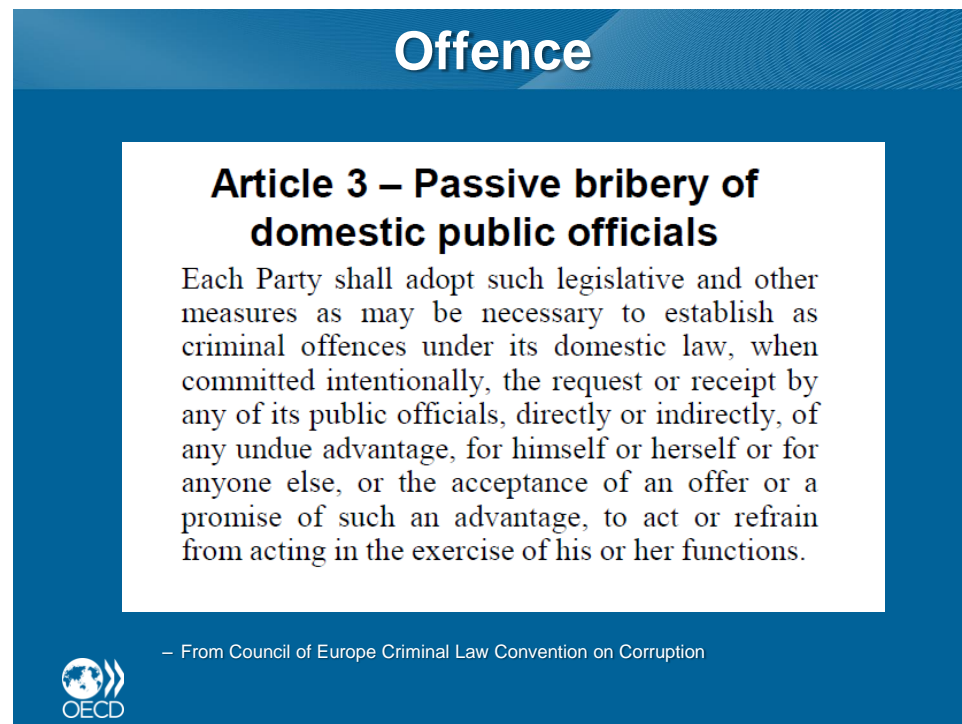
The effectiveness of any investigation is of the utmost importance as it determines the quality of the evidence to be presented in court at the end of the day. It is important to note that both the gathering of evidence in a manner which renders it admissible and the need to prove the elements of the crime are critical. For example, it is important to obtain the proper authorization to tap a telephone line, but equally important is the need to secure evidence which supports the charges to be brought against an individual. Where evidence is ruled inadmissible or irrelevant or fails to prove the elements of the crime in question, this can lead to an acquittal or the conviction being overturned on appeal.

Criminal systems of the civil law tradition distinguish between intention in the broad sense (*dolus directus* and *dolus eventualis*), and negligence. Negligence does not carry criminal responsibility unless a particular crime provides for its punishment.



In many if not most countries, a *mens rea* lower than *dolus directus*, or purpose and knowledge, warrants full criminal responsibility on the part of the accused. Common standards are recklessness and *dolus eventualis*. A person acts with *dolus eventualis* – as distinguished from *dolus directus* on the one hand and negligence on the other – if he is aware that a material element included in the definition of the crime (such as the death of a person) may result from his conduct and ‘reconciles himself’ or ‘makes peace’ with this fact. Recklessness, peculiar to the common law tradition, is also located somewhere between (direct) intention and negligence. Under this concept an accused is held liable for consciously creating a risk that is realized through the commission of the crime.

Two offences have been carefully selected for analysis in class: one being an offence from the Council of Europe Convention and another from Ukrainian Criminal Code to illustrate how the same principles apply and to involve the participants in identifying the elements of offences in Ukrainian legislation.




The slide features a blue background with a white rectangular box in the center. At the top, the word 'Offence' is written in white. Below it, the title 'Article 3 – Passive bribery of domestic public officials' is displayed in bold black text. The main text of the article is in a smaller black font. At the bottom left, there is the OECD logo, and at the bottom center, the text '- From Council of Europe Criminal Law Convention on Corruption' is written.

## Offence

### Article 3 – Passive bribery of domestic public officials

Each Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences under its domestic law, when committed intentionally, the request or receipt by any of its public officials, directly or indirectly, of any undue advantage, for himself or herself or for anyone else, or the acceptance of an offer or a promise of such an advantage, to act or refrain from acting in the exercise of his or her functions.

– From Council of Europe Criminal Law Convention on Corruption



The first offence that will be discussed during the lecture portion is the bribery provision in respect of domestic public officials, namely taking a bribe, contained in Article 3 of the Council of Europe Criminal Law Convention on Corruption (CoE Convention). Its text is demonstrated in the [Slide 2](#). It was selected because it is one of the simplest and most basic forms of corruption offences but at the same time, includes the concept of public official, which needs to be discussed in class.

Bribery offences under Article 3 fall into two broad categories: 1) when an official “requests” or “solicits” a bribe, and 2) when an official “receives” or “accepts” a bribe.

**Requesting** or **soliciting** a bribe occurs when an official indicates to another person that the latter must pay a bribe in order that the official act or refrain from acting. The offence is complete once the official requests or solicits the bribe; there need not be an **agreement** between the briber and the official. Moreover, the person solicited need not be aware of nor have received the solicitations (e.g., the solicitation is intercepted by the law enforcement authorities before it is delivered). By contrast, **receiving** or **accepting** a bribe occurs only when the official actually takes the bribe.

"Requesting" may, for example, refer to a unilateral act whereby the public official lets another person know, explicitly or implicitly, that he will have to "pay" to have some official act done or abstained from. It is immaterial whether the request was actually acted upon, the request itself being the core of the offence. Likewise, it does not matter whether the public official requested the undue advantage for himself or for anyone else.

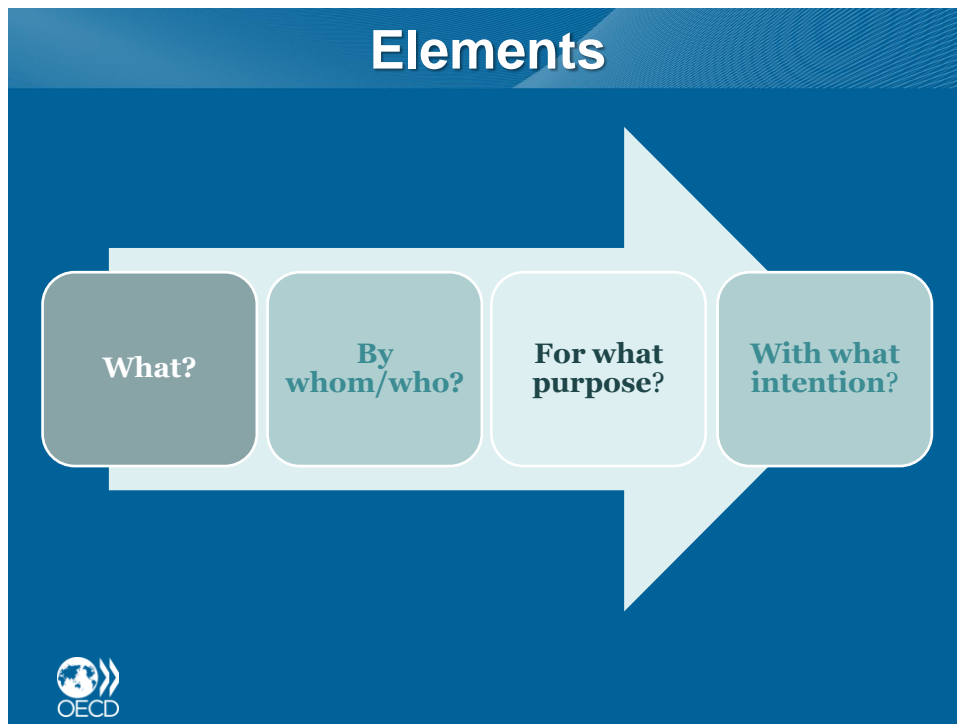
"Receiving" may, for example, mean the actual taking of the benefit, whether by the public official himself or by someone else (spouse, colleague, organisation, political party, etc) for himself or for someone else. The latter case supposes at least some kind of acceptance by the public official. Again,



intermediaries can be involved: the fact that an intermediary is involved, which would extend the scope of passive bribery to include indirect action by the official, necessarily entails identifying the criminal nature of the official's conduct, irrespective of the good or bad faith of the intermediary involved.

If there is a unilateral request or a corrupt act, it is essential that the act or the omission of acting by the public official takes place after the request or the pact, whereas it is immaterial in such a case at what point in time the undue advantage is actually received. Thus, it is not a criminal offence under the CoE Convention to receive a benefit after the act has been performed by the public official, without prior offer, request or acceptance.

This is the appropriate time to begin the analysis of article 3 of the CoE Convention; the instructor should move to the [Slide 3](#).



When seeking to understand and analyse the elements of a particular crime, it is often helpful to pose questions such as “What?”, “By whom/who?”, “For what purpose?” and “With what intention?” Such questions prompt participants to apply logical analysis to the wording of the relevant article, and to break down the elements in a systematic fashion. For example, by asking oneself what is prohibited by the provisions of the article, the participant is assisted in his or her identification of the criminal conduct or action which the legislator intends to criminalise.

## Offence – Conduct?

### Article 3 – Passive bribery of domestic public officials

Each Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences under its domestic law, when committed intentionally, the request or receipt by any of its public officials, directly or indirectly, of any undue advantage, for himself or herself or for anyone else, or the acceptance of an offer or a promise of such an advantage, to act or refrain from acting in the exercise of his or her functions.



– From Council of Europe Criminal Law Convention on Corruption

This **Slide 4** should be shown by itself, without the underline under the phrase “the request or receipt ...directly or indirectly, of any undue advantage, for himself or for anyone else, or the acceptance of an offer or a promise of such advantage”. The purpose is to allow the participants to read the entire text by themselves before asking them the question “What is the forbidden conduct in this text”?

The conduct which is forbidden includes the object of the request, receipt, acceptance or promise, i.e. the undue advantage. It is important to emphasize that the forbidden conduct does not exist in a vacuum but extends to the request, receipt, etc. specifically of an undue advantage. Once the participants have agreed that the first element of this offence is “the request or receipt ...directly or indirectly, of any undue advantage, for himself or for anyone else, or the acceptance of an offer or a promise of such advantage”, the facilitator may click on the slide to underline the phrase. The participants should briefly look at it in context before the next slide is brought out.

## Offence: Conduct

### Article 3 – Passive bribery of domestic public officials

Each Party shall adopt such legislative and other

[...the request or receipt..., directly or indirectly, of any undue advantage, for himself or herself or for anyone else, or the acceptance of an offer or a promise of such an advantage...]

promise of such an advantage, to act or refrain from acting in the exercise of his or her functions.



– From Council of Europe Criminal Law Convention on Corruption

The purpose of **Slide 5** is to show the action separately, for clarity. The instructor may want to use this opportunity to explain that by including the verb “to accept”, this offence is consummated by the mere acceptance of a promise and the payment is not necessary in order to obtain a conviction.

The instructor may also want to take the opportunity to explain that by including the word “advantage”, the legislator wanted to expand the idea of property and not limit the law to the concept of financial benefit or tangible property. Anything can be considered to be an advantage. The undue advantages received are usually of an economic nature but may also be of a non-material nature. What is important is that the offender (or any other person, for instance, a relative) is placed in a better position than he was in before the commission of the offence and that he was not entitled to the advantage or benefit. Such advantages may consist of, for instance, money, holidays, loans, food and drink, a case handled within a swifter time, better career prospects, etc.


Furthermore, the undue advantage need not necessarily be given to the public official himself: it can be given also to a third party, such as a relative, an organisation to which the official belongs, the political party of which he is a member. When the offer, promise or gift is addressed to a third party, the public official must at least have knowledge thereof at some point. Irrespective of whether the recipient or the beneficiary of the undue advantage is the public official himself or a third party, the transaction may be performed through intermediaries.

## Offence – Subject?

### Article 3 – Passive bribery of domestic public officials

Each Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences under its domestic law, when committed intentionally, the request or receipt by any of its public officials, directly or indirectly, of any undue advantage, for himself or herself or for anyone else, or the acceptance of an offer or a promise of such an advantage, to act or refrain from acting in the exercise of his or her functions.

– From Council of Europe Criminal Law Convention on Corruption



Next **Slide 6** refers to the “subject” element. The slide with the text should be shown by itself, without underlining the phrase “By any of its public officials”. The purpose is to allow the participants to read the entire text by themselves before asking them the question “Who is the person committing this action?”

The participants will most likely answer that the Article refers to “any public official”.

It is therefore clear that article 3 defines passive bribery in relation to public officials only. The “perpetrator” in Article 3 can only be a public official, within the meaning of article 1 of the CoE Convention which provides the definitions of relevant terms. The material elements of his or her act include requesting or receiving an undue advantage or accepting the offer or the promise thereof.

## Offence: Subject

[...any of its public officials...]

[...the request or receipt..., directly or indirectly, of any undue advantage, for himself or herself or for anyone else, or the acceptance of an offer or a promise of such an advantage...]

from acting in the exercise of his or her functions.



– From Council of Europe Criminal Law Convention on Corruption

Once the participants have agreed that the second element of this offence is “any of its public officials”, the facilitator may show the next [Slide 7](#).

The purpose of this slide is to show the elements separately, for clarity. The instructor may want to ask the participants for what they consider the definition of “public official” within the context of the CoE Convention.

In fact, according to article 1 of the CoE Convention, “public official” is defined in terms of an official or public officer, a mayor, a minister or judge as defined in the national law of the State, for the purposes of its own criminal law. The criminal law definition is therefore given priority. Where a public official of the prosecuting State is involved, this means that its national definition is applicable.

It is thus of paramount importance that participants understand the significance of identifying correctly the individual mentioned in the relevant legislation as a failure to do so can result in an acquittal on the basis that the prosecution failed to prove an element of the crime.

## Offence – Object?

### Article 3 – Passive bribery of domestic public officials

Each Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences under its domestic law, when committed intentionally, the request or receipt by any of its public officials, directly or indirectly, of any undue advantage, for himself or herself or for anyone else, or the acceptance of an offer or a promise of such an advantage, to act or refrain from acting in the exercise of his or her functions.



– From Council of Europe Criminal Law Convention on Corruption

Next [Slide 8](#) refers to the “purpose” element. The slide with the text should be shown by itself, without underlining the phrase “to act or refrain from acting in the exercise of his or her functions”. The purpose is to allow the participants to read the entire text by themselves before asking them the question “What is the purpose of the corrupt payment or undue advantage?”

As indicated above, “receiving”, or “accepting”, may, for example, mean the actual taking of the benefit, whether by the public official himself or by someone else for himself or for someone else. The latter case supposes at least some kind of acceptance by the public official.

It may be helpful at this stage to point out that if there is a unilateral request or a corrupt pact, it is essential that the act or the omission of acting by the public official takes place after the request or the pact, whereas it is immaterial in such a case at what point in time the undue advantage is actually received. Thus, it is not a criminal offence under the CoE Convention to receive a benefit after the act has been performed by the public official, without prior offer, request or acceptance.

## Offence: Object

[...any of its public officials...]

[...the request or receipt..., directly or indirectly, of any undue advantage, for himself or herself or for anyone else, or the acceptance of an offer or a promise of such an advantage...]

[... to act or refrain from acting in the exercise of his or her functions.]

– From Council of Europe Criminal Law Convention on Corruption



Once the participants have agreed that the third element of this offence is “to act or refrain from acting in the exercise of his or her functions”, the facilitator may click on the slide to underline the phrase. The participants should briefly look at it in context before the next slide is brought out.

The purpose of [Slide 9](#) is to show the elements separately, for clarity.

## Offence – *Mens Rea* - *Dolus*?

### Article 3 – Passive bribery of domestic public officials

Each Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences under its domestic law, when committed intentionally, the request or receipt by any of its public officials, directly or indirectly, of any undue advantage, for himself or herself or for anyone else, or the acceptance of an offer or a promise of such an advantage, to act or refrain from acting in the exercise of his or her functions.

– From Council of Europe Criminal Law Convention on Corruption



The next [Slide 10](#) refers to the “*mens rea*” or intention element. The slide with the text should be shown by itself, without the underlined words “when committed intentionally”. The purpose is to allow the participants to read the entire text by themselves before asking them the question “Where can we find the element of intent or mental element in this text?”



Once the participants have agreed that the fourth element of this offence is the term “when committed intentionally”, the facilitator may click on the slide to underline the word. The participants should briefly look at it in context.

The slide is titled "Offence: *Mens Rea - Dolus*". It features a blue header and a central grey box containing text from the Council of Europe Criminal Law Convention on Corruption. The text is broken down into four elements, each in a white box with a downward arrow pointing to the next one below it:

- Top box: [...any of its public officials...]
- Second box: [...the request or receipt..., directly or indirectly, of any undue advantage, for himself or herself or for anyone else, or the acceptance of an offer or a promise of such an advantage...]
- Third box: [... to act or refrain from acting in the exercise of his or her functions.]
- Bottom box: [... when committed intentionally...]

At the bottom left of the slide is the OECD logo. At the bottom center, it says: "– From Council of Europe Criminal Law Convention on Corruption".

At this point the facilitator may want to ask the participants what they consider facilitates proof of a guilty mind, and what is required to show that the offender’s mental state coincides with the mental state required by the law for the offence in question. As stated above, there are, in broad, four distinct states of mind which may require consideration within the context of any given criminal offence, i.e. purposefulness (direct intent), knowledge, recklessness or negligence.

Following any possible debate on this issue, the next slide can be brought out.

The purpose of this **Slide 11** is to show the elements separately, for clarity. The facilitator may want to finish the lecture by underlining that the “*mens rea*” must be inferred from the factual circumstances surrounding the offence.

For the next **Slide 12** the instructor may choose any corruption-related offence from the Criminal Code of Ukraine, for example Article 368 on Receiving of the Bribe and go through the same steps as above asking the participants to answer all of the questions and identify all of the elements in this offence.

# Criminal Code of Ukraine

For example:  
Article 368 – Receiving of the Bribe



## *Workshop on elements of the corruption offences*

During the workshop, participants will split in 4 or 5 teams. It is recommended to allocate approximately 60 minutes for the workshop.

The participants will be asked to analyse cases that involve corruption and other crimes, and to determine which criminal statute can be applied to qualify these crimes, including which elements of the offense can be established and which evidence can be used to prove each element. Each team will receive a description of one case, and will be asked to answer three questions:

1. What is the criminal offence that best suits the facts described?
2. What are the elements of this offence?
3. What evidence would you use to prove each one of those elements?

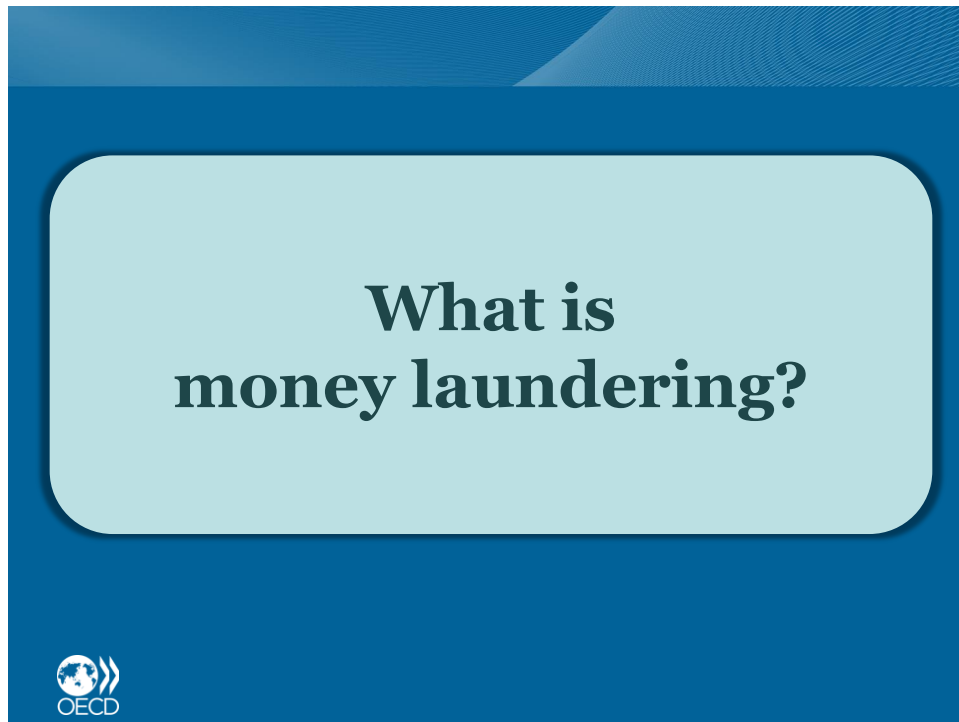
The teacher may guide the students to develop a hypothesis at the beginning of the investigation. This will allow them to prepare an investigative plan that will allow the gathering of all necessary evidence that prosecutors will use to prove each one of the elements in court. Each team will nominate one presenter who will present the findings of the team's investigation to the class. Members of other teams will be invited to discuss the presentation of each team. The teacher will provide feedback to each team.

3 Cases for this Workshop can be found on the CD Rom and should be printed out beforehand and handed out during the Workshop.



### 3.3.3. Lecture 3 – Money Laundering

This lecture will provide (1) an overview of money laundering concept, (2) various stages that money laundering involves in practice, (3) links between money laundering and corruption, and (4) legislative provisions related to money laundering established in the Ukrainian legislation. Lecture 3 contains 9 slides and should be covered in approximately 90 minutes, including time for discussion.



With **Slide 1** the instructor should begin by asking the participants to give their definition of money laundering. Most definitions will involve statements that money laundering is the process of taking illegally obtained funds and using various transactions to make the money appear to be legitimate. These definitions should be accepted and complimented. However the purpose of this is to set the stage for explaining later that money laundering is “what the law says it is”. This will be explained below.

## 205 million U.S. dollars



**Slide 2** shows a real picture of \$ 205 million U.S. dollars that was seized in a modest house in Mexico City. The source of these funds was from the sale of precursor chemicals that was used to manufacture illegal drugs. The purpose of this slide is to illustrate that the person who owned this money did not have a good money laundering scheme. This is evidenced by the fact that no one would want to keep this much cash in one place – it is at risk of being destroyed, stolen or confiscated by law enforcement. Additionally, such a large volume of money cannot be easily moved or even spent. It will draw suspicion if large amounts of cash are spent.

Therefore it is evident that this person did not have an efficient money laundering process allowing him to quickly move the funds into the financial system where it can be moved around the world in seconds with the click of a wire transfer and can be used to purchase assets with far less suspicion. The point should be made that large scale money laundering often requires a system to place the funds into the financial system.

# Movement of the money



**Slide 3** is a map of the world which indicates how money can be quickly moved around the world to key financial centers to be laundered and made available for immediate use to purchase assets. It is important to note each transfer of funds can be used as a piece of evidence to prove one of the elements of the money laundering charge.

# Money Laundering



**Slide 4** is the key issue in this presentation. At the beginning the question was asked, “What is money laundering?” Various definitions would have been given. However, for the purpose of law enforcement (investigation, prosecution and trial) the concern is not with generic definitions of money laundering but with the specific language of the law and the elements of the offence under national legislation. Therefore, for every country, money laundering is “what its national law says it is”. This is demonstrated in **Slide 5** showing specifics of Ukrainian ML offence.

# Money laundering

## Criminal Code of Ukraine

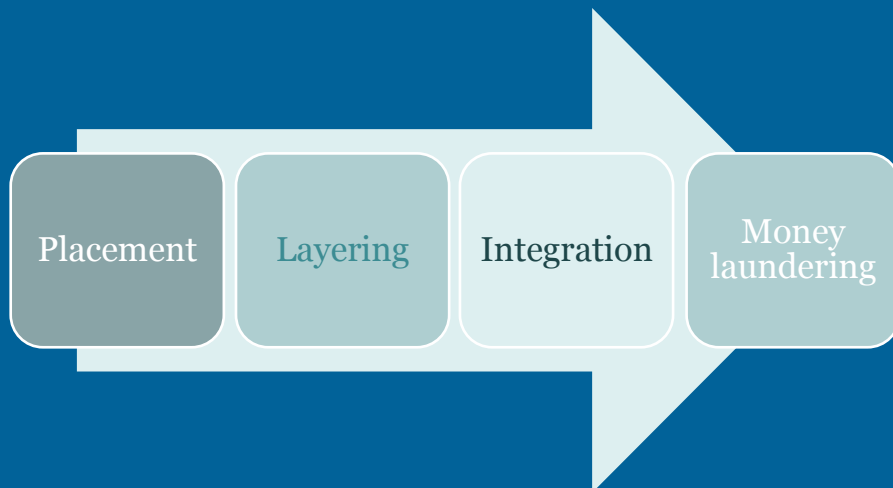
### Article 209. Legalization (laundering) of the proceeds from crime

1. Conducting financial transaction or concluding an agreement involving money or other property obtained as a result of committing a socially dangerous unlawful action which preceded legalisation (laundering) of profits, as well as carrying out actions aimed at concealing or masking illegal origin of such money or other property or possession thereof, rights to such money or property, source of their origin, location, displacement, and acquiring, owing, or disposing of money or other property obtained as a result of committing a publicly dangerous unlawful action which preceded legalisation (laundering) of profits



Slide 6 shows the three stages of money laundering. These stages should be discussed because these terms have been used for many years and the participants may have heard them. They are not being discussed in relation to the law. It is very important to emphasize that they are just general terms used to describe the money laundering process and have **no relation** to the law. These terms are not found in the language of the statutes and are therefore **not elements of the crime**.

## Stages



An explanation of these general terms can be found in the United Nations Office of Drugs and Crime (UNODC) website ([http://www.unodc.un.or.th/money\\_laundering/](http://www.unodc.un.or.th/money_laundering/)) as follows:

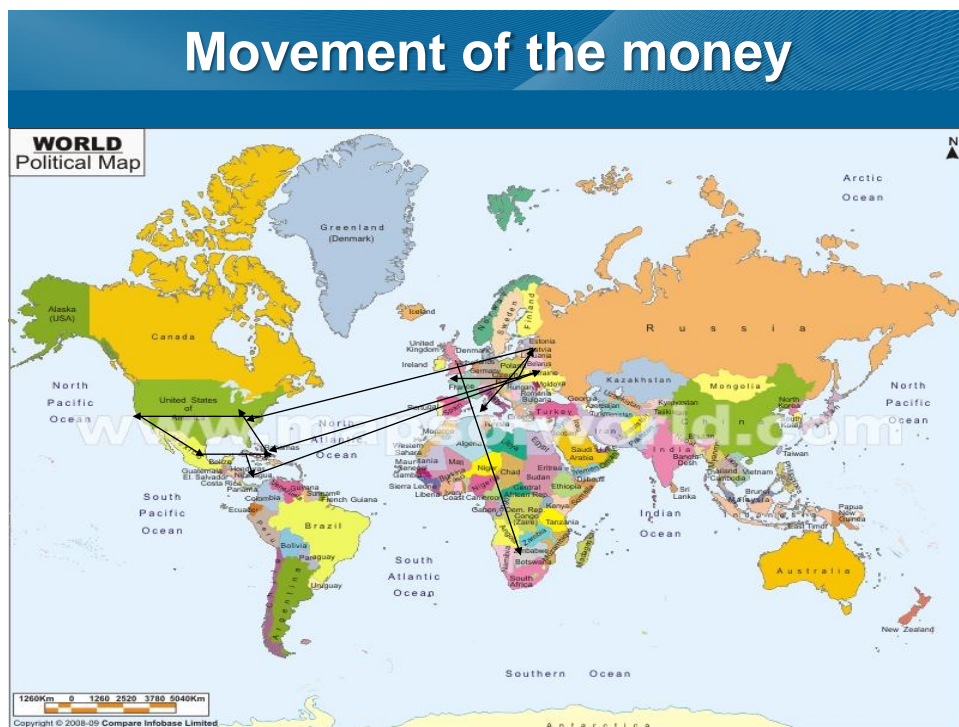
“The process of money laundering can be broken down into three stages - *placement, layering and integration*. These are best viewed as one process.

The *placement* stage represents the initial entry of the proceeds from crime into the financial system. This stage serves two purposes - it relieves the criminal of holding and guarding the large physical bulk of cash and it places the money in the legitimate financial stream. The placement stage is considered to be the riskiest, for it is then that the chances of raising suspicion are the greatest.

This first stage of transferring bulk cash proceeds from drugs or other crimes often involves smuggling from one to another country. The amount of cash being smuggled is growing as regulations are introduced to monitor cash moved through commercial and financial institutions.

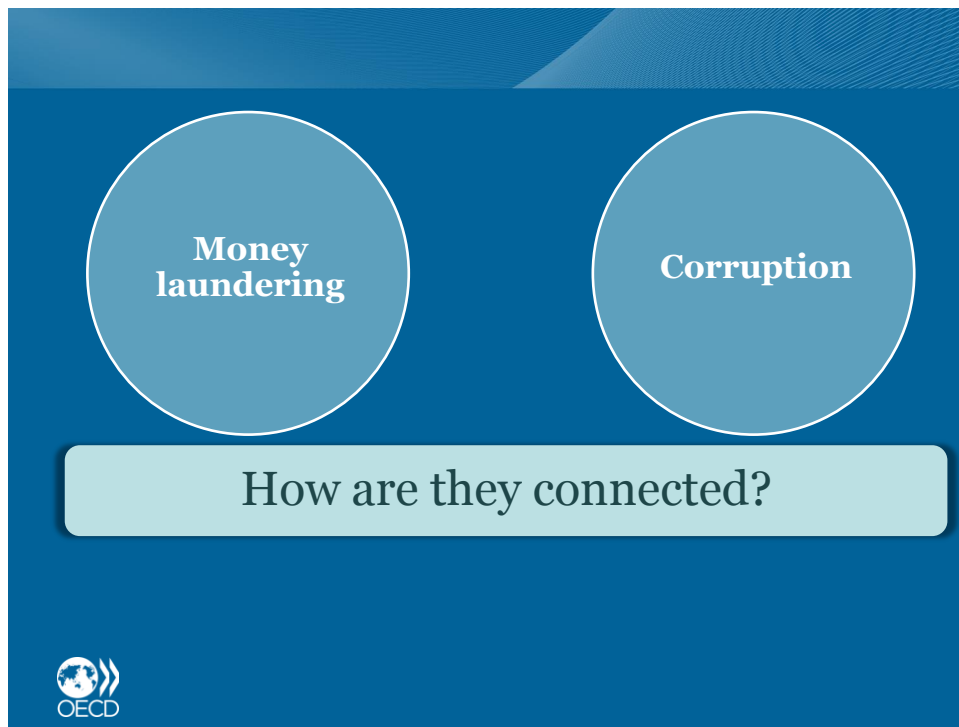
After placement comes the layering stage, which normally consists of a series of transactions designed to conceal the origin of the funds. The *layering* stage is the most complex and the most international in nature. During this stage for example, the money launderer may begin by moving funds electronically from one country to another, then divide them into investments placed in advanced financial options or overseas markets, moving them constantly to elude detection, each time exploiting loopholes or discrepancies in legislation, and taking advantage of delays in judicial or police cooperation. Countries without appropriate legislation can help money launderers by not allowing investigators to following the trail of illicit funds through their financial system.

The final stage of money laundering is termed the *integration* stage because it is at this point the funds return to the criminal appearing to have been obtained from legitimate sources. Having been placed initially as cash and layered through a number of financial operations the criminal proceeds are now fully integrated into the financial system and can be used for any purpose including the financing of more crime.”



**Slide 3** is used again to demonstrate the concept of placement, layering and integration in practice. The illegally obtained money may be initially deposited into a bank account in Ukraine and then moved many times around the world to layer the funds. The layering will make the funds more difficult to trace and is an attempt to hide the true illegal character of the money. The final stage, integration, would be when the money is brought back to Ukraine or used to purchase an asset in another country.





**Slide 7** is used to emphasize that these two activities are directly connected and should be investigated jointly. The proceeds obtained from corruption are often laundered for the purpose of hiding the money. The tracing of these proceeds will:

- Help to prove the beneficial owner of the money;
- Assist in proving the corrupt activity;
- Assist in proving the money laundering violation;
- Trace the assets;
- Lead to the eventual seizing and repatriation of the assets.

Therefore, the corruption activity and the money laundering are forever connected. The corruption investigation, the money laundering investigation, the asset tracing and the recovery of stolen state assets are all elements of the same case.

## Reasons to investigate Money laundering

- Tracing of assets for seizure
- Expand the investigation
- Ability to prosecute all participants
- Prosecute the leader



There are many benefits to conducting the money laundering investigation as indicated by [Slide 8](#) below. The money laundering investigation will involve the tracing of the money flows which will result in the tracing of the assets as a natural consequence. The investigation will also be expanded to identify other people involved in the corrupt activities and the laundering of the funds. Most of the corrupt parties will have a share in the proceeds and can therefore often be identified through the tracing process. Parties who knowingly assist in the laundering of the illegal proceeds may also be identified. This tracing exercise will not only identify these people but also assist in gathering much of the evidence that will be needed to prove the various elements of the criminal violations that can be charged. The money laundering investigation will lead to the beneficial owner of assets that have been traced. This will have effectively led you to the leader or the main perpetrators of the crime. The corrupt official may have insulated himself from the fraudulent contract or the misappropriated funds but the beneficial owner of the stolen assets will identify the true wrongdoer.

### The Scheme vs the Law

#### The Scheme

Placement, Layering and Integration are just terms that describe a process

#### The Law

Money Laundering is what the law says it is

The final **Slide 9** in this section is a reminder that the terms Placement, Layering and Integration are words that describe the process and can be useful to understand money laundering schemes. However, they are not elements of the crime and cannot be used in proving the case or presenting evidence. For prosecution purposes, money laundering is “what the law of Ukraine says it is.” The element of money laundering and corruption offenses will be closely analyzed in the Elements of the Crime section below.

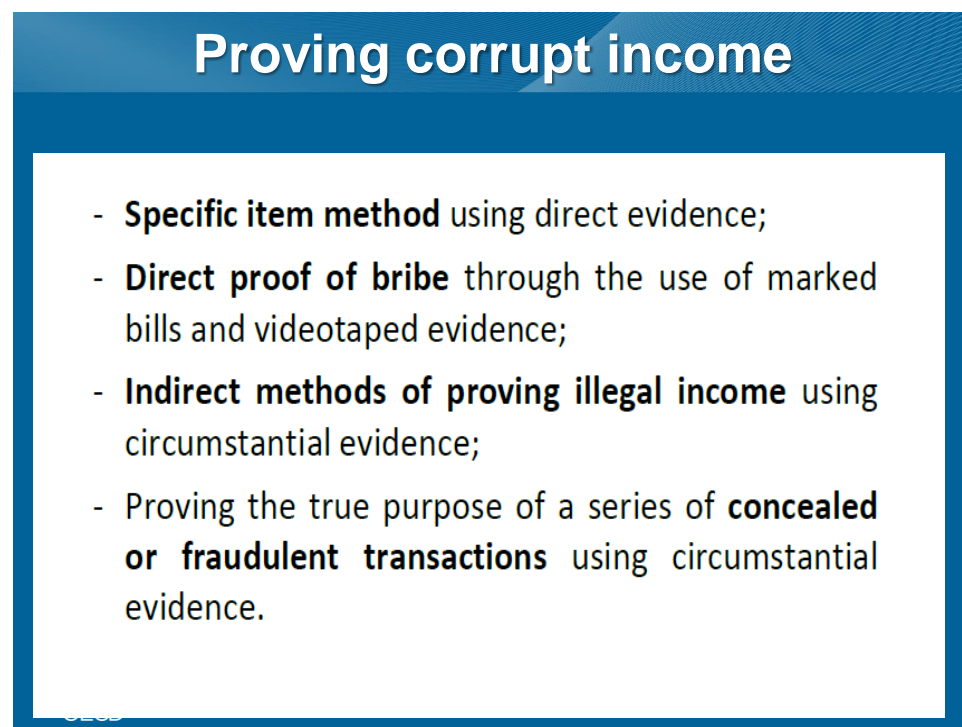


### 3.3.4. Lecture 4 – Financial investigative techniques and evidentiary requirements

Lecture 4 contains 11 slides and should be covered in approximately 90 minutes, including time for discussion. This lecture will be followed up by a relevant workshop. The instructors should refer the participants to the Section 2.3.5. and 2.4. of this Manual for additional information on this topic.

To introduce the lecture the instructor should stress that corruption cases generally involve the theft and misappropriation of funds by government officials or the receiving of external funds (private money) from individuals or companies as bribes. A small percentage of corruption cases deal with non-monetary rewards such as sexual favors or unauthorized promotions. These latter (non-monetary) types of corruption are not the subject of this training program.

The investigation of large-scale monetary corruption should always have a focus on how the money was paid and who received the benefit. This financial investigative aspect can be conducted in a variety of ways depending on the circumstances of the case and should be always targeted at proving of corrupt income.



## Proving corrupt income

- **Specific item method** using direct evidence;
- **Direct proof of bribe** through the use of marked bills and videotaped evidence;
- **Indirect methods of proving illegal income** using circumstantial evidence;
- Proving the true purpose of a series of **concealed or fraudulent transactions** using circumstantial evidence.

**Slide 1** presents the major types of financial investigation summarized as follows:

- **Specific item method** using direct evidence;
- **Direct proof of bribe** through the use of marked bills and videotaped evidence;
- **Indirect methods of proving illegal income** using circumstantial evidence;
- Proving the true purpose of a series of **concealed or fraudulent transactions** using circumstantial evidence.

What sort of cases or fact patterns would require the use of one of the above methods? Some examples of when each of these financial investigative techniques could be used to assist in proving the criminal violations.

#### ***Specific item method***

This method would be used when specific payments of bribery or misappropriated government funds can be traced to the official's direct benefit. The evidence would directly prove the linkage between the corrupt activity and the value received by the public official.

*Example:* The Director of Procurement Agency approved a valuable sole source contract to Advanced Technology Corporation in violation of the procurement guidelines. False documentation prepared by the director was discovered that authorized the awarding of the contract. Payments can be document directly from Advanced Technology for the purchase of a Mercedes which is owned by the Director of Procurement. This is direct evidence that proves the specific item purchase of an asset that was for the benefit of the public official who approved the fraudulently awarded contract. In this instance there is no need to use an indirect method of proving income (as described below) because the available evidence is specific and direct.

### ***Direct proof of bribe***

An undercover or covert operation may be able to develop direct evidence of a bribe. On rare occasions an informant or a representative of a private company may provide information to the government officials that a bribe has been solicited from him by a public official. In this instance it may be possible to set up surveillance video and audio equipment that will document the bribe transaction.

*Example:* A private company representative informs law enforcement that a government official has solicited a bribe from the company in order to secure a profitable contract. A covert operation is planned. A meeting in a hotel room is scheduled with the government official. The room is equipped with hidden cameras and audio equipment. The private company official is also provided with marked bills to give if the bribe is solicited. The meeting is held and the government official solicits a bribe in exchange for the contract award and the marked bills are given as the bribe. This conversation is successfully recorded by the video and audio equipment. Again in this instance there is no need to use an indirect method of proving income (as described below) because the available evidence is specific and direct.

### ***Indirect methods of proving illegal income***

If illegal income cannot be traced directly to the corrupt official then an indirect method of proof may be required to corroborate evidence of corrupt payments. For example, if it can be proven that the official spent money during a set period of time that was substantially in excess of his legal income this could be used as circumstantial evidence to prove the amount of illegal income that the person received. In a corruption or money laundering case this type of proof would be used in conjunction with other evidence that established the corrupt activity such as bid rigging or other misappropriation of funds.

There are two main methods for proving illegal income through an indirect method. These are the *Net Worth method* and the *Source and Application of Funds method* (also referred to as the *Expenditures method*). There are also two more methods called the *Cash Expenditure Analysis* and *Bank Deposits method* but they have been used less frequently.

The net worth method is considered to be somewhat confusing and is difficult to explain at trial if the judge is not familiar with it. Therefore this method will not be discussed here.

The concept of the *Source and Application method* is relatively simple and will be used in this program as the preferential indirect method of proving income. The basic theory for this method is that the person under investigation spent far more money during a set period of time that he had legally available to him. This concept expressed in a formula would appear as follows:

For the set period January 1, 2008 to December 31, 2008 the defendant had:

Total expenditures and other applications of money	3,100,000 UAH
Total of known and legal sources of income	<u>300,000 UAH</u>
Equals illegal or unexplained income	2,800,000 UAH

This is a circumstantial and indirect method of proving the person's true income from all sources, both legal and illegal. This evidence could then be used as corroborative evidence to prove certain elements of the crime that has been charged. A full explanation of the Source and Application method will be explained later in this presentation.

### ***Proving concealed or fraudulent transactions using circumstantial evidence***

There are some cases in which neither the specific item method or an indirect method such as the Source and Application of funds would be appropriate. The case may have no direct linkage between

the corrupt activity and the acquired wealth of the public official. Additionally, the increase in wealth attributed to the official may appear to have been legitimate. In cases such as this, the investigation may have to analyze the specific transactions that resulted in the official's increase in wealth. It may be necessary to trace the transactions through a series of prior property owners to arrive at the true nature of the operations.

## Proving corrupt income

- Use of circumstantial evidence
- Indirect method of proving income from corruption



*Example:* A public official who is suspected of awarding fraudulent contracts has raised his net worth significantly during the past 3 years. However the increase in wealth appears to have occurred through a series of legitimate business transactions. The investigation discloses that the official purchased 5 parcels of land 3 years ago for a total of 1,000,000 UAH and the property is currently worth 10,000,000 UAH. Further investigation reveals that the official purchased the parcels of land from ABC Company. This company is owned by 3 shell companies that are registered in Guernsey and the Isle of Man. ABC Company purchased the land one year earlier for 1,000,000 UAH from XYZ Company which is owned by 2 trusts in the isle of Jersey. XYZ Company purchased the land 6 months earlier for 800,000 UAH from a subsidiary of one of the companies that received a very lucrative contract from the government of Ukraine and was approved by the public official. Your investigation employed 3 independent experts who valued the property at the time of purchase by the official at 9,000,000 UAH. In this case the evidence indicates that the property was purchased by the official at a price that was approximately 8,000,000 UAH under the current market value. The property was originally owned by a subsidiary of the company that received a lucrative government contract and was sold through a series of shell companies and trusts before being sold far below market value to the public official.

With **Slide 2** the instructor will reiterate that proving corrupt income will often require the use of circumstantial evidence and an indirect method of proving the amount of income. It will not always be possible to trace the specific corruption income from the illegal activity directly to the receiver of the bribe or the one who benefited from the misappropriation of the government funds.

The next part of the presentation will explain in detail the *Source and Application method* and illustrate its use with the next 9 slides.

## What Is Source and Application

- **An indirect method of proving Income**
- **During a specific period of time**
- **Comparing money spent to legal money earned**

**Slide 3** will explain the Source and Application of Funds method as a method of proving illegal income by comparing income and expenditure analyzes all financial transactions of the subject of the investigation during a set period of time. For example, the set period may be a calendar year such as 1 January 2008 to 31 December 2008 or any other time frame such as 14 March 2008 to 21 April 2009. This set period can be any time that the investigator believes will demonstrate an increase in spending or wealth far above their legal means of the subject of the investigation. This method compares the money spent, saved and used in any manner (application) to the **known** and **legal** income that the person earned during the set time period.

When using the Source and Application, the total expenditures (and any other applications of money) for the set period of time are added together; the total known and legal source of income for the same period are added; and then the known and legal sources are subtracted from the total expenditures (applications). The simple formula is set forth in the **Slide 4**.

## Sources and Applications of Funds




### Total Expenditures

$$\begin{aligned}
 & - \text{Total Sources of Income} \\
 & \hline
 & = \text{Funds from Unknown Sources}
 \end{aligned}$$

Further on, the instructor should demonstrate [Slide 5](#) which contains the chart, which is a simple example of a completed Source and Application.

**Source & Application of Funds Analysis**



Sources of Funds	Amount 2006	Applications of Funds	Amount 2006
Checking - Beginning Balance	1,255,500	Checking - Ending Balance	5,877,000
Insurance Settlement	6,696,000	Savings - Ending Balance	30,420,000
Savings - Beginning Balance	0	Property Renovations for Mother	43,020,000
Interest on Savings Account	756,000	Lexus - Down Payment	29,902,500
Rebate Check	150,300	Lexus - Monthly Payments	6,525,000
Net Income - Furniture Store	12,996,000	Personal Living Expenses	22,842,000
Net Rental Income	20,160,000	Payments on Credit Cards	33,480,000
		Mortgage Payments for Zanzibar	8,478,000
		Homeowner's Fee	540,000
		Country Club Initiation Fee	2,790,000
		Country Club Monthly Dues	1,872,000
		Property Taxes - Dar es Salaam	4,320,000
		Property Taxes - Zanzibar	1,242,000
		Gold Piece	477,000
		<b>Total Applications</b>	<b>191,785,500</b>
<b>Total Sources</b>	<b>42,013,800</b>	Less: Total Sources	42,013,800
		<b>Unknown Sources</b>	<b>149,771,700</b>

[Slide 6](#) shows - what types of financial transactions would be included in the "Source of Funds" section and what transactions would be recorded in the "Application of Funds" section? The following 2 slides give examples of known and legal sources of funds that would be include in the "Source of Funds" section. Most of these are very straightforward: the person's salary, any business profits or income from other professional activities, the interest and dividends earned from bank accounts or investment accounts, income from selling or renting property, inheritance, insurance proceeds, bank loan, etc.

## Sources of Funds

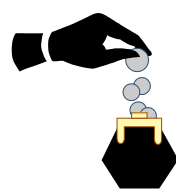
- Salary/Wages
- Net business profit
- Interest and dividend income
- Insurance Proceeds



And next [Slide 7](#) shows additional examples of legal sources of income such as the proceeds from the sale of an asset, loans, gifts, inheritances, awards and gambling winnings. **Loans** obtained by a person require an additional explanation. The loan should only be included in the computation if the person received the funds and had discretionary use of the money. For example, if the person received a personal loan from a bank and the money was given directly to the person to be used in any way, then this would be considered a source of funds. However if the bank gave the person a loan to purchase a house, these funds cannot be used by the borrower in a discretionary way. These funds will be paid directly from the bank to the seller of the house or to an escrow account. Therefore the borrower did not have discretionary use of the money. In this case the loan will not be shown as a source of income and the purchase price of the house would not be shown as an application. Only the actual amounts of money paid by the person (down or initial payment and the monthly loan payments) would be included in the “Application of Funds” section. Loans will only be shown as a source of funds if the borrower is given the money and has discretion to use it in any manner.

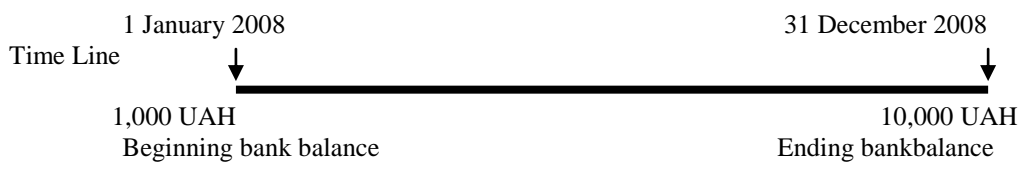
## Sources of Funds

- Sale of an asset
- Loans, gifts and inheritances, awards
- Gambling winnings
- Beginning bank balance
- Beginning cash on hand

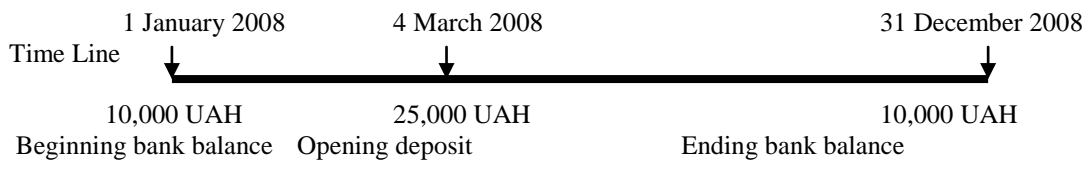


Also referring to the [Slide 7](#), all bank accounts owned or controlled by the person must be identified and the records obtained. In analyzing each bank account, three basic things must be done. First, all deposits must be analyzed in an attempt to identify the source and purpose of all funds received. Any deposits that can be identified (with evidence) as known and legal sources of income, will be included in the “Sources of Funds” section. Unidentified, deposits such as cash, will not be included in either the Sources or Applications sections. Second, all the withdrawals must be analyzed to determine the disposition of the funds. Any withdrawals that can be proven to be expenditure or other identifiable application of funds will be included in the Application section. Cash withdrawals will normally not be included as an Application because proof was not established as to how the money was used.

The third analysis that must be done with each bank account is simply to determine the balance of the account at the beginning of the period and the balance at the end of the period. The beginning balance will be included in the “Source of Funds” section and the ending balance will be included in the “Application of Funds” section. The drawing below is a time line that illustrates that the focus is on the beginning and ending dates of the period of investigation. The balances on these exact dates should be determined and included in the appropriate sections of the source and application analysis.



What if the bank account was opened in the middle of the period with a 25,000 UAH cash deposit? See the illustration below. What would be the beginning balance of this account that should be included in the “Source of Funds” section? The answer is: the balance at the beginning of the period is Zero since the account was not open on 1 January 2008. Also the opening deposit should not be included as a source because it is not a known and legal source of income – the source of the cash is undetermined.



## Bank Balances

- Place the ending bank balance in the Application section
- Place the beginning balance in the Sources section

Borysenko Source & Application of Funds Analysis					
Sources of Funds		Amount 2008	Applications of Funds		Amount 2008
Citibank - opening balance		159,900	Citibank - ending balance		342,900

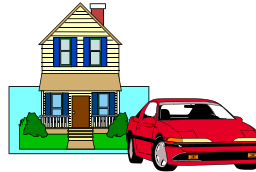
Next [Slide 8](#) indicates how the beginning and ending balances in a bank account should be recorded in Source and Application worksheet.

**Cash on hand** is an item that needs to be considered but may be very difficult to document or estimate. The amount of cash on hand that a person has on the date of the beginning of the Source and Application period will be included as a source of legitimate income. What is meant by cash on hand: this is the total amount of currency that a person has outside of any bank accounts or any other financial institution; this is actual currency that a person may have stored in their house, in a hole in the back yard or kept in any physical place. It will usually be almost impossible to establish an exact amount of cash on hand for the beginning and ending dates of the investigative period. However it is important to establish the best estimate possible for the cash on hand on these dates. This can be accomplished by interviewing the suspect, reviewing records such as statements to the tax authorities or income and property declarations filed by the suspect. Often from a review of this information an estimate of the maximum cash on hand can be determined.



## Applications of Funds

- **Asset purchases**



- **Personal living expenses**

- rent, mortgage, utilities, food, clothing

- **Insurance**

- **Credit Cards**

What type of items should be included in the Application section of the Source and Application worksheet? Some examples of these items are provided in the [Slide 9](#):

- The purchase of an asset is recorded as an Application. For example if a person purchases a car for 800,000 UAH with cash or a bank check then this amount would be included in the worksheet as an application. However if a person purchases an asset such as a house and obtains a loan for a portion of the purchase price, it is best to only include the actual amount that has been paid by the person. In other words, if a person purchases a new house for 3,000,000 UAH, but he only pays 300,000 UAH as a down payment from his own funds and obtains a loan at a bank for the remaining 2,700,000, then you would only include the 300,000 UAH in the Application section. The loan amount would not need to be included in the Source section since the person never had discretionary use of these funds. By recording this transaction in this manner, the true money flow would have been accurately included in the Source and Application worksheet;
- All personal living expenses that can be documented with evidence will be an Application. This would include the amounts paid for rent, insurance utilities and the purchase of clothes, food or any other personal item;
- Credit card payments should be recorded as an application. It is important to note that only the payment should be recorded, not the total purchases. For example, during a one month period the person may have made purchases totaling 25,000 UAH but only made a payment of 2,000 UAH. In this case only the 2,000 UAH would be an application and you would not record the total purchases or the balance owed on the credit card.

## Applications of Funds

- Investments
- Gifts to others
- Travel
- Ending bank balance
- Ending cash on hand
- Payments on loans



The next **Slide 10** gives additional examples of items to be included in the Application section:

- Money invested in stocks, bonds or any other type of investment should simply be included as an Application;
- Gifts to others, travel or any other expenditure that can be completely documented will be an application of funds;
- As mentioned above the ending balance of each bank account will be included as an application. This will be the exact balance in the last day of the investigative period;
- The best estimate, based on facts introduced into evidence, for cash on hand at the ending date of the period will be an application;
- Payments made on loans are also an application.

## Overcoming Defenses

- **Cash on hand defense**

- **Loans and gifts  
from family/friends**

- **Nominees**



The main defenses that are usually raised at trial to the results of the Source and Application computation are listed in the [Slide 11](#) and include the following:

- As previously mentioned cash on hand can be difficult to prove. Therefore this is often the first objection that the defense will have to the results of the Source and Application. The defense will claim that the person had a large amount of concealed cash at the beginning of the period and that is the source of cash that was used to make the expenditures that are enumerated in the computation. If the evidence submitted by the defense is credible then the burden will be on the prosecution to disprove that alleged amount of cash on hand;
- Loans or gifts are another defense often used to challenge the computation. The claim by the defense will be that the person obtained large amounts of undocumented loans or gifts from private sources such as friends or relatives and this is the source of the funds that was used to make the expenditures;
- Another common defense is that the assets allegedly purchased by the subject are actually owned by a different person. In fact the documented evidence may show that the assets are registered in the name of the other person. It will be the job of the prosecution to show that the money used to pay for these assets actually originated from the subject and the other person is simply a nominee holder.

### *Workshop on financial investigations*

Following the lecture, a practical exercise will be used to test the knowledge of the participants.

The participants should be given approximately 75 minutes to complete this workshop and members of a group can work together if needed.

This exercise is based on a case of investigation of a fictitious person. Participants will be asked to analyse a specific case that involves corruption and other crimes and to determine the amount of illegal income derived from corruption activities using financial investigative techniques.

Materials for this Workshop can be found on the CD Rom (Folder "Presentations", Sub-folder "Materials for Workshop for Lecture 4, a file called "Borysenko S and A worksheet" and The PowerPoint "Borysenko S and A – PE solution", materials include 15 items in total).

The participants will be asked to perform the following tasks:

- determine if there is financial information that should be included in the Source and Application computation.
- The participants should use the Excel spreadsheet **Investigative File Inventory (IFI)**<sup>89</sup> to enter the financial data into the appropriate source or application section (file: Borysenko S and A worksheet).

The PowerPoint "Borysenko S and A – PE solution" contains the answers for the workshop problem. Each slide of the PowerPoint shows the individual solution for each item with a number reference. Most of the answers are self explanatory; however, a few will require explanation and a discussion of common errors.

- Item 1: Only the amounts shown as the beginning (January 1, 2006) and ending (December 31, 2006) balances for the period of the investigation should be included in the Source and Application as indicated on the slide solution. The mid-year balances are not relevant and are only included in the problem to test the student's reaction to them;
- Item 2: Money obtained from an insurance company for a legitimate claim is a **known** and **legal** source of income. It should therefore be included as a Source of Funds;
- Item 3: None of these transactions occurred in 2006, which is the period of the investigation. Therefore, no action is necessary;
- Item 4: The beginning balance for this account on January 1, 2006 is zero because the account was not open on this date. A common error is the desire to include the initial deposit into the account on February 7 as the opening balance. This opening cash deposit has no relevance to the balance of the account on January 1, 2006 which is the beginning date for the investigative period. Additionally the cash deposit is not a known legal source of income. Therefore it would not be included as a Source of Funds in any situation. The interest earned on the account is a known legal source of income. Even if the money deposited to the account was all bribe money, the interest earned on the account is from a known and legal source. The interest is not bribe money. The formula will give us the total amount of illegal income earned by the subject during the period of the investigation;
- Item 5: Self explanatory;
- Item 6: None of these transactions occurred in 2006, which is the period of the investigation. Therefore, no action is necessary;
- Item 7: Self explanatory;
- Item 8: The amount for the cruise was charged on a credit card (not a debit card) therefore no money was actually paid. At this time, no money has yet been paid. When the credit card bill is paid, then an application of funds will be recorded;

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<sup>89</sup> See Section 3.3.1.4. for detailed explanation on what is IFI and how it can be used.

- Item 9-10: Self explanatory;
- Item 11: Only the actual payments are recorded. The down payment was made in 2001 so it will not be recorded;
- Item 12-15: Self explanatory.

### ***3.3.5. Lecture 5 – Use of electronic tools in financial investigations***

Lecture 5 is based on the illustration of the use of the Excel program and should be covered in approximately 90 minutes, including time for discussion.

The instructor should start the lecture by explaining that the software program Excel is an excellent electronic tool that can be used to facilitate the analysis of large volumes of data. An extensive PowerPoint has been provided that will describe the step by step processes needed to conduct the following types of analysis of data contained in an Excel spreadsheet:

- Sort by column heading;
- Filters and auto filters;
- Auto filter for payments to a specific entity;
- Subtotals by category and sub-divided by year;
- Combining multiple bank accounts to search for patterns such as cash deposit amounts;
- Pivot table for multiple types of analysis.

The slides below are an example of the detailed explanation that includes a picture of the actual Excel spreadsheet and step by step instructions of each computer command that is required to obtain the desired result.

Due to the time constraints in this program it is recommended that only slides 1 through 5 be included in the instruction. This will include explaining the layout of the spreadsheet, the theory of the spreadsheet design, the tab copy function and the sort by column heading function. If additional instruction is requested on the use of Excel, it should be done outside of the normal program hours such as at lunch or in the evening. To assist instructor in providing further instructions Lecture 5 contains additional 6 slides.

The layout of the spreadsheet includes column headings that reflect each aspect of the items contained on the documents that need to be analyzed. The example used in the PowerPoint presentation is a bank account analysis which includes a heading for each important data field (year, description of transaction, date of transaction, check number, check amount, etc).

The spreadsheet design is critical because once the data has been input into the spreadsheet it may be difficult or time consuming to change the basic layout. The first consideration in designing the spreadsheet is to consider all of the possible outputs (types of analysis) that are needed. For example, some of the desired outputs may be: to compare the data from multiple accounts, to arrange in chronological order, to obtain totals and subtotals, to analyze certain patterns (cash deposits amounts or dates) or to group by year. If multiple accounts are being analyzed it is usually desirable to format each spreadsheet with the same layout so that the accounts can later be merged into one spreadsheet to perform an overall analysis. It is best to obtain the opinions of various investigators, prosecutors and/or judges to be sure that all outputs are considered in the design.

**Slide 1** shows a spreadsheet which has not yet been analyzed. The first thing to do is to always make a copy of the spreadsheet. This can be done in multiple ways: make a tab copy, make a copy using a different file name or back up the original to a different computer or storage device. For the purposes of this program, we will make a tab copy.

# Raw Spreadsheet - No Analysis

The screenshot shows an Excel spreadsheet with the following data:

Год	Опис.	Дата	Чек №	Сумма чека	Сумма депозита	Источник и распред.	Примечания
2005	депозит	02 янв 05		0	84,950	Правительство Украины	Госуд. зарплата
2005	чек	04 янв 05	3246	2,196	0	Le Grand	ресторан
2005	чек	12 янв 05	3247	4,078	0	Банк Киев	Оплата за Тойоту
2005	чек	14 янв 05	3248	1,961	0	Энерг.компания Украины	электроэнергия
2005	банкомат	17 янв 05		1,882	0	Снятие денег с банкомата	Снятие денег с банкомата
2005	чек	17 янв 05	3250	863	0	Golden Telecom	телефон
2005	чек	21 янв 05	3251	2,667	0	Le Grand	ресторан
2005	чек	26 янв 05	3252	3,583	0	Escada	одежда
2005	чек	28 янв 05	3253	12,706	0	Банк Киев - ипотека	Ипотека на покупку дома
2005	депозит	01 фев 05		0	84,950	Правительство Украины	Госуд. зарплата
2005	чек	04 фев 05	3254	2,510	0	Le Grand	ресторан
2005	чек	08 фев 05	3255	1,490	0	Rixos Prykarpattya	массаж
2005	чек	12 фев 05	3256	4,078	0	Банк Киев	Оплата за Тойоту

Slide 2 illustrates the process that is required to make this tab copy.

# Make a Copy of the Original Spreadsheet

The screenshot shows the 'Move or Copy' dialog box open over the spreadsheet. A blue box contains the following instructions:

1. Right click on tab at bottom
2. Select Move or Copy
3. Check-"Create a Copy"
4. A Copy should appear on your bottom tab

The dialog box shows the 'Move or Copy' window with 'Dec 5 - rus.xls' selected in the 'To book:' field and 'Balance (sheet)' selected in the 'Before sheet:' field. The 'Create a copy' checkbox is checked.

Slide 3 shows the spreadsheet looking exactly the same except that there is an additional tab at the bottom which has been renamed "work copy".



## Working Copy of the Raw Spreadsheet

Год	Опис.	Дата	Чек №	Сумма чека	Сумма депозита	Источник и распред.	Примечания
2005	депозит	02 янв 05		0	84,950	Правительство Украины	Госуд. зарплата
2005	чек	04 янв 05	3246	2,196	0	Le Grand	ресторан
2005	чек	12 янв 05	3247	4,078	0	Банк Киев	Оплата за Тойоту
2005	чек	14 янв 05	3248	1,961	0	Энерг.компания Украины	электроэнергия
2005	банкомат	17 янв 05		1,882	0	Снятие денег с банкомата	Снятие денег с банкомата
2005	чек	17 янв 05	3250	863	0	Golden Telecom	телефон
2005	чек	21 янв 05	3251	2,667	0	Le Grand	ресторан
2005	чек	26 янв 05	3252	3,583	0	Escada	одежда
2005	чек	28 янв 05	3253	12,706	0	Банк Киев - ипотека	Ипотека на покупку дома
2005	депозит	01 фев 05		0	84,950	Правительство Украины	Госуд. зарплата
2005	чек	04 фев 05	3254	2,510	0	Le Grand	ресторан
2005	чек	08 фев 05	3255	1,490	0	Rixos Prykarpattya	массаж
2005	чек	12 фев 05	3256	4,078	0	Банк Киев	Оплата за Тойоту

The final operation that will be demonstrated is the “sort” function. Slide 4 demonstrates that process. The sort function is extremely easy to perform but extremely powerful and beneficial. For example, after the data has been input into the desired spreadsheet layout there may be 5000 lines of information which would be difficult to comprehend by just looking at each item. However by grouping (sorting) items by payee, source of deposit, date order or ascending amount order, the analysis of the data would be far more efficient.

## Sort by column heading

1. Highlight a cell under a column heading

2. Click on “Sort and Filter”

Slide 5 will demonstrate the results of a sort by column heading.



## Sorted in Ascending order by column heading

Bank Kiev №.5  
Анализ счетов  
Борис Майстренко - лицевой счет

Год	Опис.	Дата	Чек №	Сумма чека	Сумма депозита	Источник и распред.	Примечания
2006	чек	26 май 06	3373	1,725	0	Capuchin	ресторан
2006	чек	26 июл 06	3386	2,118	0	Capuchin	ресторан
2006	чек	26 сен 06	3401	2,275	0	Capuchin	ресторан
2005	чек					Escada	одежда
2005	чек					Escada	одежда
2005	чек					Escada	одежда
2006	чек					Escada	одежда
2006	чек					Escada	одежда
2007	чек					Escada	одежда
2005	чек					Golden Telecom	телефон
2005	чек	17 фев 05	3259	863	0	Golden Telecom	телефон
2005	чек	17 мар 05	3266	863	0	Golden Telecom	телефон
2005	чек	17 апр 05	3276	863	0	Golden Telecom	телефон

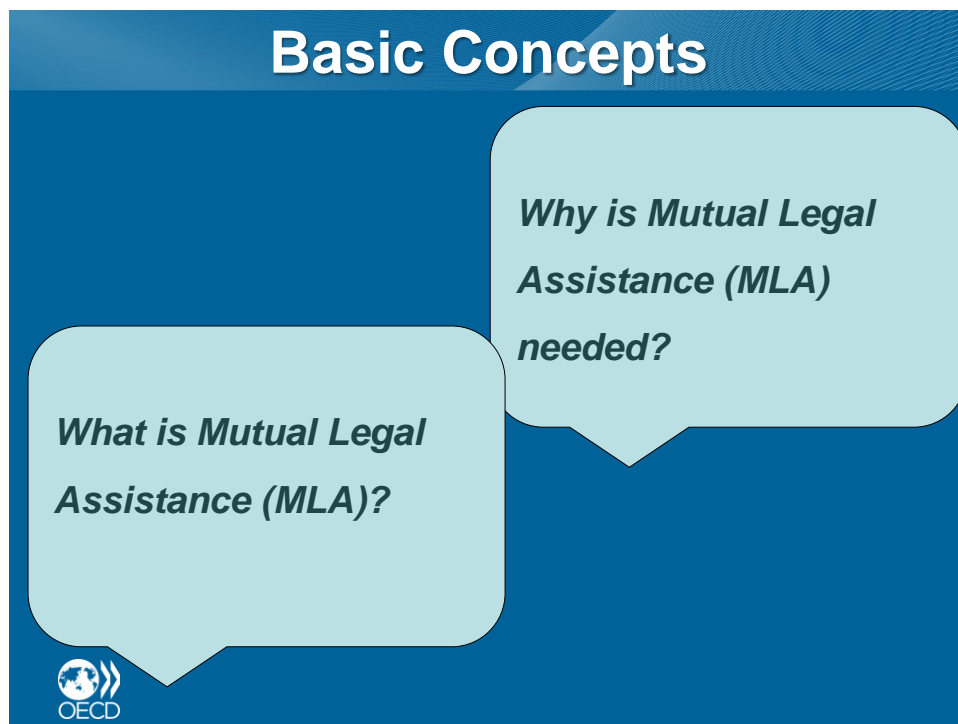
All data in the spreadsheet is now arranged alphabetically by the column heading that you selected

### 3.3.6. Lecture 6 – International cooperation in investigating and prosecuting corruption

Lecture 6 contains 10 slides and should be covered in approximately 90 minutes, including time for discussion. The instructors should refer the participants to the Section 2.5. of this Manual for additional information on this topic.

This lecture is of extreme importance during the program. The gathering of evidence abroad is a key element of modern money laundering and grand corruption investigations. Additionally, when the investigation ends in successful asset recovery, international co-operation will be essential.

The reason why many investigations are delayed, or even prove unsuccessful, is because of bad MLA. The purpose of this presentation is to teach participants about the very nature of MLA, the various types of MLA and the different sections that comprise an MLA request in order to acquire a better understanding of the process and its benefit to a global investigation.



With **Slide 1** the instructor first identifies that the reasons why we need to send MLA requests is precisely because we need to obtain evidence from another country but do not wish to violate the sovereignty of a country. In order to respect a country’s sovereignty but, at the same time, obtain the necessary evidence to prove a case, a special procedure was created under international public law, which is the essence of international co-operation. As a State has no right to pursue its own investigations or to engage in unorthodox enforcement practices in the territory of a foreign country, it must request and obtain authorization and assistance.

In many countries, police investigation is primarily directed towards the investigation of the underlying criminality, for example, drug trafficking. In many instances, it is still comparatively rare for investigators, as a routine part of the investigation of major proceeds-generating offences, to “*follow the money*” and establish what happened to the proceeds, especially when they are hidden abroad. Such investigations undoubtedly need resources, time and, almost inevitably, effective international co-operation. But investigating the proceeds and pursuing the investigation across borders can and does often lead to the money launderers or perpetrators of the predicate offence – whether they are the criminals involved in the original offence themselves or others acting on their behalf.

In general terms, MLA encompasses the process through which a law enforcement or judicial authority in one country requests a law enforcement or judicial authority from another country to gather evidence, serve documents or perform any other legal act. This allows the requesting country to carry out procedural acts overseas without violating the sovereignty of the requested country.

Some jurisdictions have in place very harsh measures to ensure respect for their sovereignty. Coming into a country's territory and gathering evidence without the support of an MLA request can lead to consequences as serious as arrest or even breach of diplomatic relations between countries.

**Types of Assistance Required**

**Formal**

- Letters rogatory
- Bilateral treaties
- Multilateral treaties
- Letters of request

**Informal**

- FIU/Egmont
- Embassy contacts
- Interpol
- Police to police
- Internet research
- Commercial databases
- Government databases
- Be creative

The slide also features images of several international legal instruments:

- Criminal Law Convention on Corruption (Strasbourg, 27.1.1999)
- Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and Related Documents (OECD)
- United Nations Office on Drugs and Crime
- United Nations Convention Against Corruption

Slide 2 illustrates that International Legal Assistance can be formal or informal, depending on the objective. If the information gathered will be used for evidentiary purposes, all evidence should be gathered through a formal MLA request. If the purpose is for mere information to discard or use to follow leads, informal methods can be utilised.

A good way of presenting this slide is by using practical examples and even linking the examples to the Practical Exercise (PE) documents. The answers should be written down on a flip chart with all the formal possibilities on one column and the informal possibilities on the other column. Some good questions to ask are as follows:

**Banking information**

Question: During the practical exercise, you found that one of the cheques used to pay for the house in Koncha Zaspá was drawn from a bank account in Switzerland. How would you obtain this information?

Answers: There are two possible avenues which could be pursued in this case – informal and formal.

- Contacting the Financial Intelligence Unit (FIU) (informal):

If it is merely for information purposes and to determine whether to follow leads, an FIU contact could be useful but keep in mind that this information can never be considered as evidence. This is also a good moment to explain to the class what an FIU is. The Egmont Group defines a FIU as “a central, national agency responsible for receiving (and, as permitted, requesting), analysing and disseminating to the competent authorities, disclosures of financial information: (i) concerning suspected proceeds of crime and potential financing of terrorism; or (ii) required by national legislation or regulation, in order to counter money laundering and terrorism financing.”

They have been established for the general purpose of combating money laundering, and given three core functions. In some countries, they function as an additional tool for law enforcement organisations in combating money laundering and related offences. Others have emphasised the need for a “buffer” between the financial institutions and the police, giving them an administrative nature.

A number of FIUs work together in an informal organisation known as the Egmont Group, after the Egmont-Arenberg Palace in Brussels, where they met for the first time on 9 June 1995. The Egmont Group has now over 100 members, and its goal is to provide a forum for FIUs to improve support to

their respective national anti-money laundering programmes, which includes expanding and systematising the exchange of financial intelligence information, improving expertise and the capabilities of their personnel, and improving the communication amongst them.

- Making a Mutual legal assistance request (formal):

If the information is required as evidence, to be introduced in court, then a formal MLA request is unavoidable. Formal letters of request are the only way in which evidence can be obtained from another country to be presented in the court.

The last decades have seen law enforcement struggle to solve the challenges posed by the elimination of borders. Traditionally, letters rogatory were the customary method for obtaining legal assistance from other countries in criminal matters. These are formal communications from the judiciary of one country to the judiciary of another country requesting the performance of an act typical of a criminal investigation. However, letters rogatory take a large amount of time. They are extremely formal which means that they must contain all official signs from the requesting country, such as stamps, signatures, etc. To guarantee their authenticity, they must be signed by a person whose signature has been registered, and transmitted through the diplomatic pouch from the Ministry of Foreign Affairs of the requesting country to its embassy or consulate in the requested country and then on to the national authorities. This process can take an extreme amount of time, and must be repeated on the way back in order to respect the chain of custody. Clearly, in modern day investigations, when money can be wire transferred at the click of a mouse, this system is becoming obsolete.

MLA treaties have addressed this problem to a large extent. They are based in either bilateral or multilateral treaties. They are more expeditious and require less formality, always bearing in mind due respect for the other country's sovereignty and for the chain of custody. Each country designates a Central Authority for direct communication. By eliminating the middleman (the Ministry of Foreign Affairs), requests can be transmitted more swiftly and the communication become clearer.

But what happens when two countries do not have in place an MLA treaty? It is worth going back and reviewing the provisions established by the United Nations Convention Against Corruption (UNCAC) regarding this topic in Article 46. UNCAC functions as a multilateral treaty for MLA. This is key as countries signatory to the UNCAC need not send letter rogatories through the diplomatic channels to the relevant authorities in a foreign jurisdiction. It is sufficient to send a MLA request to the Central Authority in accordance with the formal requirements listed within this instrument.

The UNCAC has established that MLA can be used for, apart from the traditional purposes, the recovery of assets. The MLA request is subject to some formality, according to Article 46. It must clearly establish the identity of the authority making the request and the subject matter, and nature of the investigation. It should also contain a summary of the relevant facts and a description of the assistance sought. It must also mention the identity of the people involved. Finally, it should establish the purpose for which the information will be used. The letter of request must be sent in a language acceptable to the authorities of the requested party. A lack of any of these requirements is reason enough to refuse assistance.

When dealing with MLA, there are several aspects that require emphasis. The first is the goal of the request. If the goal is to gather evidence that will later be incorporated into a criminal process and admitted in court, this evidence must be protected at all costs. This means that it should be gathered in accordance with the general principles of criminal law, and with due respect for the chain of evidence. Countries can, and should, include in their requests any special procedures needed for the gathering of evidence. This is especially challenging when it comes to interviewing witnesses. The principle of cross-examination should not be forgotten. The UNCAC is innovative in the sense that it suggests the use of technology to overcome this problem, and the use of video conferencing is presented as an option (see Article 32 of the UNCAC). The second aspect to be considered is dual criminality. Requesting countries must ensure that they qualify the conduct or activity being investigated in terms of conduct or activity that is considered a criminal offence in the requested country. Requested countries should also remember that if the fact pattern fits conduct or activity considered by it as a criminal offence, the nomenclature should not matter. Precious time is wasted when this is overlooked. Finally, the principle of specialty must be respected. This means that the evidence gathered can only be used for the purposes described.

Requests can also be sent based on the principle of reciprocity, and in this case they are called letters of request. However, these have become extremely obsolete over the years.

Finally, it is also possible to use executive agreements, which are put in place by the Executive Branch while the treaties are signed and ratified by the Legislative Branch.

### ***Information from public registries***

Question: During the investigation, you have found several enterprises that have been registered abroad, such as Island Fleets or Indian Ocean Factors CH. How would you obtain their statutes?

Answers: There are ways in which this information can be obtained informally in order to follow leads and many sources can be used, among them:

- Looking into the public databases (informal):

This information can be sometimes obtained in public databases established in respective countries by governments or private enterprises. In many countries, these databases are found on the Internet (e.g. Panama, <https://www.registro-publico.gob.pa>) and are easily accessible. In other cases (e.g. the British Virgin Islands, [comreg@vigilate.com](mailto:comreg@vigilate.com)), these databases are not available online. However, it is possible to request this information by post by sending forms that can be downloaded from the Internet and paying a small fee and by e-mail. For more information on the open sources of information see Section 2.3.2. of this Manual.

- Requesting information from Interpol (formal):

Interpol is the world's largest international police organisation, with 187 member countries. Created in 1923, it facilitates cross-border police co-operation, and supports and assists all organisations, authorities and services whose mission is to prevent or combat international crime. It aims to facilitate international police co-operation even where diplomatic relations do not exist between particular countries. Its four core functions are: (i) to maintain a secure global police communication services; (ii) to provide police with operational data services and databases; (iii) to offer operational police support services; (iv) training and development.

### ***Verification of the commercial activity abroad***

Question: During the investigation you have found documents that prove that a company called Island Fleets owns several assets. It is necessary to verify whether this company has a commercial activity to determine if it is a real company or nothing more than a shell company. To do this, you decide to verify its address in the British Virgin Islands (BVI).

Answers: This can be done **informally**, for information purposes. You may want to consider asking a colleague (cop to cop). By simply making a phone call and asking a colleague in the BVI to drive by the address and check whether there are, in fact, offices open to the public, you can save a substantial amount of time. If the company checks out, you may not want to continue following this lead. Even if you do decide to continue the lead and send a **formal MLA letter**, you will be able to provide the requested country with much more information that can be useful for them in aiding with your investigation.



When obtaining evidence through MLA, there are many important considerations, particularly when it comes to admissibility in court (Slide 3). The facilitator should remind the participants that the ultimate goal when requesting MLA is **to obtain evidence for use in trial**, which means that certain procedures must be respected. The evidence must be protected.

The UNCAC states in Article 17 that the rules of the requested country apply in gathering evidence. This is a nice parachute to have. However, the Convention also states that if it is necessary to follow specific procedures in order to make the evidence admissible in the requesting country, it should be specified in the request.

This becomes particularly relevant when dealing with certain types of evidence, such as witness statements. In order to respect due process – the fundamental principles of due process of law in criminal proceedings and in civil or administrative proceedings to adjudicate property rights is acknowledged in the preamble to the UNCAC – careful consideration must be given to the method for obtaining a witness statement. During the investigation stage this may not be problematic, as witness interviews provide mere information. However, during the trial stage, this poses a serious problem as the right to due process and the right to defence might be hindered if there is no cross-examination.

In Ukraine, evidence in a criminal case means factual information based on which the inquiry agency, investigator, and court establishes the presence or absence of a socially dangerous act, the guilt of the offender, and other circumstances of importance for a proper resolution of the case. Such information is established by testimonies given by a witness, victim, and suspect, accused, expert's opinion, exhibits, records of investigative and judicial actions, records with appropriate attachments drawn up by competent authorities as a result of operational-detective activities, and other documents (Article 65 of the Criminal Procedure Code of Ukraine (CPC)).

Although a witness may be summoned for questioning by the inquirer, investigator, prosecutor or court (Article 66 of the CPC), it is not mandatory for the witness to give oral evidence during the trial itself. A court may release a witness under protection from giving oral testimony in exceptional circumstances if the written confirmation of earlier testimonies he or she gave is available (Article 292 of the CPC). Furthermore, upon its own initiative or the motion of the prosecutor or petition of other participants to the trial, the court may announce in the court session testimonies a witness has given during the inquiry, pre-trial investigation or trial if, for example, the witness's appearance is impossible for one or another reason (Article 306 of the CPC). Therefore, it would appear that although it may be preferable and more usual to call a witness to provide oral evidence a witness statement – even if taken in written form during the investigation period through MLA – will be admissible.



The question would then be strategic. Even if a witness statement gathered through MLA, presented in writing and without allowing the defence to cross examine, were to be admissible in court, the weight attached to it would be very low. There are other alternatives that could remedy this problem. The best solution, of course, would be to bring the witness to Ukraine to testify. However, if this is not possible, there may be other alternatives depending on the budget, such as:

- Videoconferencing:  
Article 46, Paragraph 18 of the UNCAC establishes that when a witness or expert is in the territory of a State Party and has to be heard by the judicial authorities of another State Party, the requesting country may permit the hearing to take place by video conference if it is not possible for the witness to appear in the requested State Party. This is a cost efficient solution that would allow the Ukrainian judge, prosecutor and defense attorney to cross examine the witness in real time.
- Affidavit taken by the Ukrainian consul: according to Article 5 paragraph (f) of the Vienna Treaty on Consular Relations, consuls can act as notaries. Interview in the Ukrainian Embassy: other countries have had the experience of sending the judge, prosecutor and defence attorney overseas to cross-examine a witness in their embassy. In this way the interview can be conducted on Ukrainian territory and the witness would not have to travel.

In the case of documentary evidence, there are certain cases in which the legislation of certain countries requires special procedures to be followed. Banking evidence in particular requires some attention: when original evidence (primary evidence) is not available, e.g. bank documents, the copies cannot be received as evidence unless it is previously proved “that the book in which the entries were made was at the time of making one of the ordinary books of the bank, and that the entry was made in the usual and ordinary course of business, and that the book is in the custody and control of the bank, which proof may be given orally or by affidavit by a partner or officer of the bank, and that the copy has been examined with the original entry and is correct, which proof must be given by some person who has examined the copy with the original entry and may be given orally or by affidavit. This means that bank copies should be certified, a procedure that can be included in the MLA request according to Article 46 of the UNCAC.

**Who can ask for MLA?**

**Formal vs. Informal**

**Diplomatic channels**

**Central authority**

**Take into account the stage of investigation**



**Slide 4** is devoted to the considerations that should be taken into account before request for international assistance. The nature of the assistance required, the purpose for which the information is needed and the type of authority making the request will dictate whether a request should be formal or informal.

*Informal international cooperation:* If the purpose for which the information is requested is not evidentiary, informal assistance can be sought. As this type of assistance is merely intended for information gathering, any person can make the request (e.g. the investigator or the prosecutor). As explained before, this type of request will not require to be sent through diplomatic channels. A simple telephone call or e-mail is sufficient.

*Formal MLA:* when the assistance requires the use of coercive powers by the requested State or the information is sought for evidentiary purposes, a formal letter of request will be necessary. In this case the letter should be sent through the appropriate channels, depending on the type of formal international assistance requested.

If there is no treaty in place, it is usually only possible to send a letter rogatory or letter of request based on reciprocity. This means that the request will be forwarded to the Ministry of Foreign Affairs to be placed in the diplomatic pouch and sent to the Ukrainian Embassy in the requested country. The Embassy will send the request to the country's Ministry of Foreign Affairs, which will in turn forward to the Ministry of Justice for execution.

If there is a bilateral or multilateral treaty in place, the request can be sent through the Central Authority of the requesting State, and the evidence will be received by the Central Authority of the requested State. This will make the request valid and attest to the legitimacy and authenticity of the evidence.

The reason why these channels are in place is simple: the chain of custody must be respected.

**Getting ready**


**What do you need to make it official?**

**What does the other jurisdiction need to accept it?**

**Are there any MLA Treaties in place?**

- Bilateral
- Multilateral

**Make contact if needed**



Before sending a MLA request, there are several questions that must be addressed as outlined in [Slide 5](#).

The first step should be to contact your own Central Authority in order to determine what formalities must be met in your country in order to send the request and what the appropriate channel is. Your own Central Authority will be able to explain which treaties are in place with the requested country – if any – and which is the most advisable treaty to use.

More importantly, you should make contact with the appropriate authorities in the country to which the request will be sent. This could potentially save many months of delays and waiting for a response. The reason therefore is because the other jurisdiction will most likely have in place certain formalities that must be met in the request. If the requested country is not aware thereof, it risks sending an MLA to



which no response will be received. A counterpart in the requested country can be useful in explaining the necessary formalities, the language and kind of evidence that should be attached to the request.

## Available treaties

### Treaties Available

- United Nations Against Corruption (UNCAC)
- Criminal Law Convention on Corruption (CoE Convention)
- European Convention on Mutual Legal Assistance in Criminal Matters 1959 (MLA Convention), and subsequent Protocols (1978, 2001)
- 1993 (CIS) Minsk Convention on Legal Assistance and Legal Relations in Civil, Family and Criminal Matters (Minsk Convention)



In general terms, there are four major multilateral treaties which are applicable in Ukraine ([Slide 6](#)):

1) *The United Nations Convention Against Corruption (UNCAC) is innovative in two respects:*

- It is the first international instrument that aims to function as a multilateral MLA treaty. This means that the UNCAC can, in fact, be used as the legal basis for MLA. This, however, must be done with precaution in view of the fact that for some countries ratification is not enough, and they will require domestication of the convention before it can be used for MLA.
- It is the first convention to ever refer to the recovery of assets as a priority in the fight against corruption. This is stated throughout the instrument. In fact, Article 51 states that the return of assets is a fundamental principle of the convention, and States Parties should afford one another the widest measure of co-operation and assistance in this regard.

2) *The Council of Europe Criminal Law Convention on Corruption (CoE Convention)*

At this point, it would be helpful to refer to the specific requirements of this Convention which deal with MLA and the instructor should go to the [Slide 7](#).

# The Council of Europe Criminal Law Convention on Corruption

## Article 26 – Mutual assistance

- 1 The Parties shall afford one another the widest measure of mutual assistance by promptly processing requests from authorities that, in conformity with their domestic laws, have the power to investigate or prosecute criminal offences established in accordance with this Convention.
- 2 Mutual legal assistance under paragraph 1 of this article may be refused if the requested Party believes that compliance with the request would undermine its fundamental interests, national sovereignty, national security or *ordre public*.
- 3 Parties shall not invoke bank secrecy as a ground to refuse any co-operation under this chapter. Where its domestic law so requires, a Party may require that a request for co-operation which would involve the lifting of bank secrecy be authorised by either a judge or another judicial authority, including public prosecutors, any of these authorities acting in relation to criminal offences.

## Article 28 – Spontaneous information

Without prejudice to its own investigations or proceedings, a Party may without prior request forward to another Party information on facts when it considers that the disclosure of such information might assist the receiving Party in initiating or carrying out investigations or proceedings concerning criminal offences established in accordance with this Convention or might lead to a request by that Party under this chapter.

The CoE Convention states that countries shall afford one another the widest measure of mutual assistance by promptly processing requests from authorities that, in conformity with their domestic laws, have the power to investigate or prosecute criminal offences established in accordance with this Convention (Article 26).

This Convention also deals with Spontaneous Information, which can often provide the trigger to an investigation abroad (Article 28). Without prejudice to its own investigations or proceedings, a Party may without prior request forward to another Party information on facts when it considers that the disclosure of such information might assist the receiving Party in initiating or carrying out investigations or proceedings concerning criminal offences established in accordance with this Convention or might lead to a request by that Party under this chapter.

### 3) *European Convention on Mutual Assistance in Criminal Matters, 1959*

There have been various international conventions in regard to service of process and taking of evidence. **Slide 8** introduces on The European Convention on Mutual Assistance in Criminal Matters (CETS No. 030) (MLA Convention), open for signature by the Members of the Council of Europe, in Strasbourg, on 20 April 1959 and its protocols. This Convention stipulates that Parties agree to afford each other the widest measure of mutual assistance with a view to gathering evidence, hearing witnesses, experts and prosecuted persons, etc.

# Other MLA instruments

## European Convention on Mutual Assistance in Criminal Matters, 1959

European Convention on Mutual Assistance in Criminal Matters  
Strasbourg, 20. IV. 1959

## Additional Protocol, 1978

Additional Protocol to the European Convention on Mutual Assistance in Criminal Matters  
Strasbourg, 17. III. 1978

**Preamble**  
The governments signatory hereto, being members of the Council of Europe,  
Considering that the aim of the Council of Europe is to achieve greater unity among its members,  
Believing that the adoption of common rules in the field of mutual assistance in criminal matters will contribute to the attainment of this aim,  
Considering that such mutual assistance is related to the question of extradition, which has already formed the subject of a Convention signed on 13th December 1957,  
Have agreed as follows:

Second Additional Protocol to the European Convention on Mutual Assistance in Criminal Matters  
Strasbourg, 8. XI. 2001

The member States of the Council of Europe, signatory to this Protocol,  
Desiring to facilitate the application of the European Convention on Mutual Assistance in Criminal Matters opened for signature in Strasbourg on 20th April 1959 (hereinafter referred to as "the Convention") in the field of fiscal offences,  
Considering it also desirable to supplement the Convention in certain other respects,  
Have agreed as follows:

**Chapter I**

**Article 1**  
The Contracting Parties shall not exercise the right provided for in Article 2. a) of the Convention to refuse assistance solely on the ground that the request concerns an offence which the requested Party considers a fiscal offence.

**Article 2**

1. In the case where a Contracting Party has made the execution of letters rogatory for search or seizure of property dependent on the condition that the offence motivating the letters rogatory is punishable under both the law of the requesting Party and the law of the requested Party, this condition shall be fulfilled, as regards fiscal offences, if the offence is punishable under the law of the requesting Party and corresponds to an offence of the same nature under the law of the requested Party.

**Chapter I – General provisions**

**Article 1**

1. The Contracting Parties undertake to afford each other, in accordance with the provisions of this Convention, the widest measure of mutual assistance in proceedings in respect of offences the punishment of which, at the time of the request for assistance, falls within the jurisdiction of the judicial authorities of the requesting Party.
2. This Convention does not apply to arrests, the enforcement of verdicts or offences under military law which are not offences under ordinary criminal law.

**Article 2**  
Assistance may be refused:

The member States of the Council of Europe, signatory to this Protocol,  
Having regard to their undertakings under the Statute of the Council of Europe:  
Desiring to further contribute to safeguard human rights, uphold the rule of law and support the democratic fabric of society,  
Considering it desirable to that effect to strengthen their individual and collective ability to respond to crime,  
Decided to improve on and supplement in certain aspects the European Convention on Mutual Assistance in Criminal Matters done at Strasbourg on 20 April 1959 (hereinafter referred to as "the Convention"), as well as the Additional Protocol thereto, done at Strasbourg on 17 March 1978,  
Taking into consideration the Convention for the Protection of Human Rights and Fundamental Freedoms, done at Rome on 4 November 1950, as well as the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data, done at Strasbourg on 28 January 1981,  
Have agreed as follows:

**Chapter I – Scope**

**Article 1** of the Convention shall be replaced by the following provisions:  
"1. The Parties undertake promptly to afford each other, in accordance with the provisions of this Convention, the widest measure of mutual assistance in proceedings in

## Second Additional Protocol, 2001

The Convention sets out rules for the enforcement of letters rogatory by the authorities of a Party ("requested Party") which aim to procure evidence (audition of witnesses, experts and prosecuted persons, service of writs and records of judicial verdicts) or to communicate the evidence (records or documents) in criminal proceedings undertaken by the judicial authorities of another Party ("requesting Party").

Under the MLA Convention, Parties agree to afford each other the widest measure of mutual assistance with a view to gathering evidence, hearing witnesses, experts and prosecuted persons, etc. The Convention also specifies the requirements that requests for mutual assistance and letters rogatory have to meet (transmitting authorities, languages, refusal of mutual assistance).

The Convention sets out rules for the enforcement of letters rogatory by the authorities of a Party ("requested Party") which aim to procure evidence (examination of witnesses, experts and prosecuted persons, service of writs and records of judicial verdicts) or to communicate the evidence (records or documents) in criminal proceedings undertaken by the judicial authorities of another Party ("requesting Party").

The Convention also specifies the requirements that requests for mutual assistance and letters rogatory have to meet (transmitting authorities, languages, refusal of mutual assistance), indisputably of great value in corruption and money laundering investigations.

### ***Additional Protocol to the European Convention on Mutual Legal Assistance in Criminal Matters 1978 (Additional Protocol)***

The Additional Protocol to the European Convention on Mutual Legal Assistance in Criminal Matters (Additional Protocol) completes provisions contained in the MLA Convention. It withdraws the possibility offered by the MLA Convention to refuse assistance solely on the ground that the request concerns an offence which the requested Party considers a fiscal offence. It extends international co-operation to the service of documents concerning the enforcement of a sentence and similar measures (suspension of pronouncement of a sentence, conditional release, deferment of commencement of enforcement of a sentence or interruption of such enforcement). Finally, it adds provisions relating to the exchange of information on judicial records.

### ***Second Additional Protocol to the European Convention on Mutual Legal Assistance in Criminal Matters 2001 (Second Protocol)***

The Second Additional Protocol to the European Convention on Mutual Legal assistance in Criminal Matters (Second Protocol) is intended to improve States' ability to react to cross-border crime in the light of political and social developments in Europe and technological developments throughout the world. It, therefore, serves to improve and supplement the MLA Convention and the Additional Protocol to it, in particular by broadening the range of situations in which mutual assistance may be requested and making the provision of assistance easier, quicker and more flexible. It also takes account of the need to protect individual rights in the processing of personal data.

It is also important to note the provisions of Article 8 of the Second Protocol: where requests specify formalities or procedures which are necessary under the law of the requesting Party, even if unfamiliar to the requested Party, the latter shall comply with such requests to the extent that the action sought is not contrary to fundamental principles of its law, unless otherwise provided for in this Protocol.

4) *The Convention on Legal Assistance and Legal Relations in Civil, Family and Criminal Matters (22 January 1993, Minsk, as amended on 28 March 1997) (Minsk Convention)*

## Minsk Convention

The Minsk Convention of 1993 regulates issues regarding recognition and enforcement of decisions on civil or family matters within the scope of the Commonwealth of Independent States (CIS). Ukraine co-operates with CIS countries within the framework of the 1993 Minsk Convention (amended by Chisinau Convention in 2002).



With [Slide 9](#) another commonly applicable instrument is introduced. The Commonwealth of Independent States (CIS) Member States developed the Convention on Legal Assistance and Legal Relations in Civil, Family and Criminal Matters (Minsk Convention) that was adopted in Minsk on 22 January 1993, and amended by a Protocol of 28 March 1997. The Convention was signed by Armenia, Belarus, Kazakhstan, Kyrgyzstan, Moldova, Russia, Tajikistan, Turkmenistan, Uzbekistan and Ukraine. It entered into force on 19 May 1994. This comprehensive Convention regulates issues which were traditionally covered by Soviet / Russian bilateral legal aid treaties, such as legal assistance (i.e. taking of evidence, service of documents, etc.), conflict of law rules, jurisdiction and provisions on recognition and enforcement of judgments in the field of co-operation in civil and family matters, as well as legal assistance, criminal prosecution and extradition in the field of co-operation between competent authorities in the field of civil, family and criminal law.

Within the scope of the Convention judicial and other competent authorities of the Contracting Parties communicate with each other through their Central Authorities (Ministries of Justice) which undertake to receive requests for legal assistance in civil, family and criminal matters coming from other Contracting Parties.

The range of legal assistance rendered by the CIS Member States is fixed in Article 6 of the Convention. It includes service and dispatch of documents, taking of evidence from litigants, witnesses

and experts, making inspections, effecting prosecution, recognition and enforcement of judgments in civil matters, extradition, effecting other proceedings. This assistance is rendered by the judicial authorities of the requested Party on the basis of the letters rogatory coming from the requesting Party.

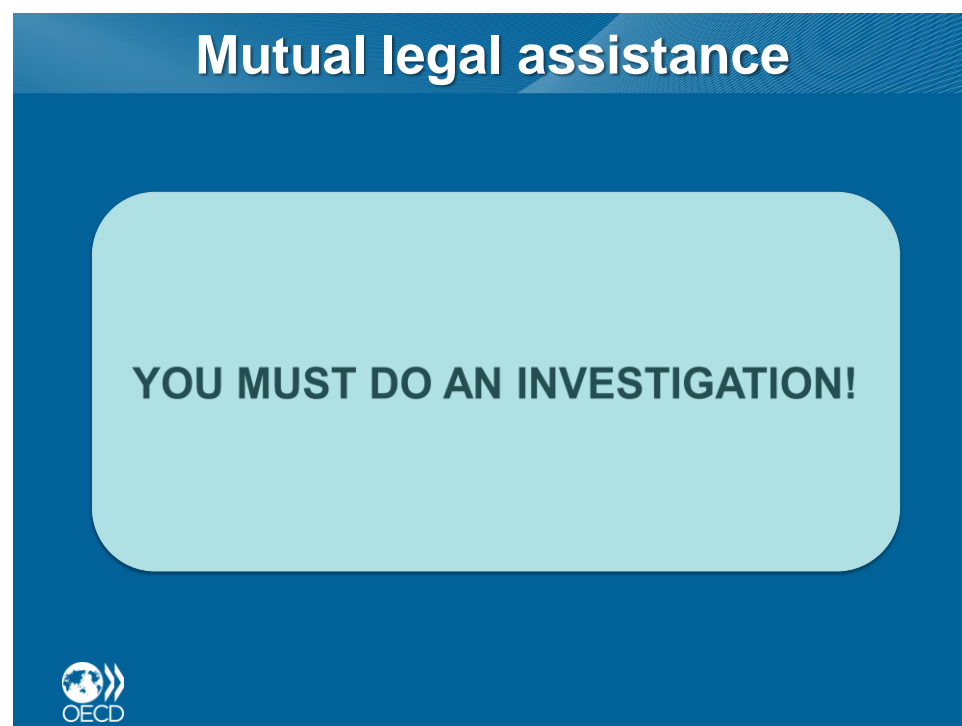
Article 7 of the Convention states that requests for legal assistance shall be made in writing and contain the following:

- designation of the requesting authority,
- the designation of the requested authority,
- the specification of the case in relation to which legal assistance is requested,
- names and surnames of persons related to the request for legal assistance, information of their citizenship, occupation and permanent or temporary residence (in case of legal persons, their names and addresses),
- names and addresses of the representatives of persons relating to the request,
- contents of the request.

In executing the request for legal assistance the requested authority applies its national legislation. However, upon request of the requesting authority, it may apply procedural rules of the requesting authority as far as they do not contradict the legislation of the requested Contracting Party.

It is important to mention that under the Convention the recognition of documents issued or certified in prescribed form and officially sealed by the competent authority or competent person in the territory of one Contracting Party do not require any form of authentication in the territories of the other Contracting Parties. The documents considered as official in the territory of one Contracting Party have the evidentiary force of official documents in the territories of the other Contracting Parties.

In conclusion the instructor should remind the participants that there are many ways in which evidence that will be admissible in court and carry weight can be obtained. MLA is one avenue but joint investigations are another. If the practitioner opts for a joint investigation as opposed to sending a letter of request, the Swiss authorities will be at liberty to conduct an entire investigation in Switzerland (e.g. money laundering). This means that all necessary information can be gathered without risking the possibility of allowing appeals, and breaching confidentiality at crucial stages during the process. This is an option that must be explored with the requested country prior to sending the MLA request. The facilitator should remind the participants that this is the reason why the importance of making prior contact with a representative of the requested State needs to be stressed.



With the **Slide 10** the instructors can give the participants the final and most important– and probably the most important lesson they should learn from this presentation – is that they must conduct an

investigation. If they expect the foreign authority to carry out their request, they must establish a factual basis. MLA requests cannot be done on the basis of suppositions or rumours: they must be done on the basis of facts, and facts must be established through a thorough investigation. Causality is the link: if assets must be seized, there must be a correlation between the assets and the criminal activity. The same goes for the evidence. The investigation is imperative.



### 3.4. Practical Exercise

As noted earlier, the practical exercise will simulate the investigation of a realistic large scale corruption and money laundering case. The participants will be divided into 4 or 5 groups; each group will act as an autonomous investigative team.

Groups will be asked to investigate the report about the alleged crime, which will be provided to each group by the teacher. The groups will need to undertake various criminal investigative measures, the teacher will provide them with the next piece of evidence. When the group obtains necessary evidence to prove each element of offence, it will be asked to organize the evidence for presentation in the court.

The idea behind this practical exercise is that the students will determine the course of the simulated investigation and, thus, it is not possible to identify the exact sequence of appearance of evidentiary pieces. The detailed description of the sessions and evidentiary pieces which can be possibly discussed and analyzed during these sessions is presented below as an example and describes a so-called ‘ideal’ course of the investigation for this case. However, this break-down can merely provide a general estimation of the course of events and can dramatically vary from group to group. It is only advisable that the teachers keep to the identified time limits for each session of work on the exercise to ensure the balance between theoretical and practical learning, and that each group is on average afforded 15 minutes per every piece of evidence.

In the best case scenario, all groups will succeed in collecting necessary evidence and preparing the case for the presentation in court. However, if they fail to complete the investigation, they will be asked to present their case only for those elements of offence that are supported by sufficient evidence, or to close their investigation.

At the conclusion of the practical exercise, each group will be asked to present the results of their investigation and prosecution of the case. Each member of the group will be required to prepare a portion of the case and make a detailed presentation to the entire class. The teacher will provide feedback to each group evaluating the way they handled the case.

#### 3.4.1. Preparation for the practical exercise

To prepare for the conduct of the practical exercise the teachers should:

- read Section 3.3. of this Manual;
- familiarize themselves with the documents used in the practical exercise;
- learn how to remove passwords;
- learn how to keep track of hand-outs using an Excel spreadsheet file;
- learn how to use Investigative File Inventory (IFI).

##### 3.4.1.1. Materials for the practical exercise

The documents in the “*Practical exercise*” Sub-folder of the “*Teacher’s folder*” are all potential pieces of evidence. They are all numbered and called “**Item #**” in order of their use in the exercise. All of them (except **Item 1**) should have a password which will only be revealed when the group has asked to follow a specific lead; the practical exercise document and the password should be then provided to the group.

The folder also contains two additional documents which will be used for organizational purposes:

- the **List of Practical Exercise documents and codes** will be used to track the hand-out materials by the teachers;
- the **Investigative File Inventory (IFI)** will be used for the organization of data on investigation by students.

### 3.4.1.2. How to remove the passwords

Each time a team receives a piece of evidence (a document) the password should be permanently removed. This is accomplished in different ways depending on the Microsoft software version that is being used. For computers installed with:

In Microsoft Office 2000 or 2003 the process to remove the password is as follows:

- click on Tools
- click on Options
- click on Security
- remove the password and click OK
- click on save

In Microsoft Office 2007 the process to remove the password is as follows:

- click on the Office Button (top left corner of the screen)
- click on Save As and choose “Excel 97 – 2003 Workbook”
- click on Tools (bottom left corner of the Save As dialog box)
- select General Options and remove password and click OK
- click Save (bottom right corner of the Save As dialog box)

### 3.4.1.3. How to keep track of the handouts/leads

To make the job of the teachers easier, a complete list of practical exercise documents has been created (with the corresponding name **List of Practical Exercise documents**) which contains the document number, a description of the document, the password and a guide to the tracking of the leads. See the sample below.

Lead source	Item #	Description	Password	Leads to follow
<b>Item 22a, Item 30</b>	26	Indian Ocean Factors	845	<b>Item 27</b>
<b>Item 22a, Item 26</b>	27		249	<b>Items 26,30,31</b>

The tracking guide refers to the 2 columns labeled “lead source” and “leads to follow”. “Lead source” indicates all documents that had leads to the document number on this line. For example, if we look at document **Item 26** the “lead source” column indicates that documents **Item 22a** and **Item 30** provided leads to this document. The “leads to follow” column shows all leads that could be followed from the document. For example, if we look at document **Item 26** the “leads to follow” column indicates that a careful analysis of document **Item 26** should lead the group to document **Item 27**.

### 3.4.1.4. How to use Investigative File Inventory (IFI)

**The IFI is an Excel spreadsheet that has been formatted to record each piece of evidence as it is received and can be also found in the “Student’s Folder”.**

Doc #	Witness	Key Word Description	Date Received	Hyperlink	Money Laundering	Asset Forfeiture	Corruption	Comments
3	Kuznetsova	Reporter	12 June 08	Doc 2	Yes	Yes	Yes	



--	--	--	--	--	--	--	--	--

The recording should be done as indicated above. The first four columns are self-explanatory. The fifth column is to hyperlink the document (evidence) to the spreadsheet. This process is completed with the following steps:

- In the excel spreadsheet (**IFI**) place the cursor in the cell under the hyperlink column;
- Right click on the cell and a menu will appear;
- Select hyperlink;
- From the list of documents in the “insert hyperlink” box, select the document to be linked – in the example above it would be document 2, then click OK.

The columns labeled “money laundering”, “asset forfeiture” and “corruption” are to be used to indicate if there is information in this piece of evidence that would relate to any of these items. For example, if the document contained evidence of a money laundering violation you can simply put a “yes” in this column. At the conclusion of a real investigation there may be 200 pieces of evidence that have been gathered. If you want to look at all evidence that relates to money laundering then simply perform a “sort” function on this column and it will give you all pieces of evidence that relate to money laundering. The column labeled “corruption can be used in a similar way. The “asset forfeiture” column could track the evidence that relates to specific assets. For example if there was evidence relating to the potential confiscation of a house, car and boat, you would just place one of these words in the column if that piece of evidence contained information that would be used to prove the asset was proceeds of corruption.

#### *3.4.1.5. Setting rules of the practical exercise*

The teacher will remind the students that each group will conduct the simulated investigation independently.

The teacher should remind the students that all program materials, including the practical exercise documents (pieces of evidence), have been electronically loaded on their computers in the folder titled “**Student’s Folder**” and ask them to examine the contents of this folder;

The teachers will hand out evidence pieces one by one to the students of their teams in the course of the simulated investigation. The students will be asked to review the evidence and determine the next investigative step. The team should make a list of all leads to be followed and fill out the Excel spreadsheet **IFI** for each of the evidentiary items in accordance with the instructions provided in Section 3.3.1.4.. Failure to do this will result in many critical leads (evidence) being overlooked.

When a team is ready to follow a lead they should inform the teacher about the specific investigative step that they wish to pursue. The teacher should only provide leads (give the team relevant item document) if the request is very specific. When a team asks to follow a specific lead that is provided in the exercise then their teacher will give them the appropriate item document. This should be done by telling them the document number and password. The teacher will also give the team one paper copy of the document which is to be filed in numerical order in a binder. The students should be advised not to change any of the document file names as this will create confusion for them.

Each time the team asks to follow a lead and receives a new document they should repeat the process of analyzing the document for additional leads.

### **3.4.2. Conduct of the practical exercise**

#### *3.4.2.1. Exercise Part 1: introduction and demonstration of software use*

Part 1 of the Exercise should be covered in approximately 75 minutes.

As a way of introduction into the practical exercise the students should be reminded that the goal of the exercise is to establish the evidence that will prove each element of the crime of corruption, to understand the money laundering process, trace the assets that have been acquired with the proceeds of the corrupt activity, determine the best legal means to gather evidence through mutual legal assistance

and organize the case for trial. Each of these steps requires a thorough understanding of the admissibility of evidence and the need to be organized at all phases of the investigation, trial preparation and the presentation of evidence at trial.

The case will begin after the presentation of **Lecture 1**. The teacher will give the following explanations and instructions to the students:

- The case will be initiated from information provided by the State Committee for Financial Monitoring in Ukraine and the Financial Intelligence Unit of Switzerland (Money Laundering Reporting Office – MROS). The students will be instructed to open **Item 1** which is not password protected and read the document. The information within this document indicates that the Ukrainian Minister of Internal Development appears to be living beyond his means and has an interest in a bank account held at the Credit Suisse Bank in Zurich.
- The students will be instructed to discuss the allegations among the group members and decide what specific investigative action should be taken.<sup>90</sup>
- It is very important to inform the students that the information from the State Committee for Financial Monitoring is sufficient to refer for investigation and prosecution and an official investigation has been authorized.

The lead teacher should now solicit from the students in the plenary format (addressing all of them together) ideas on what investigative action should be taken. The requests for investigative action must be specific and not general. In other words, the request should state specifically who they would like to interview, what bank they want to contact, the specific name of the bank account and the specific records to be reviewed. Request should not be overly general such as “we want to get all the bank records for all companies he may be involved with”.

While ideas for the specific requests for investigative action from the plenary are being solicited by the lead teacher, the assisting teacher/s should list these on the board. At least one of these requests should be *(1) to interview the author of the newspaper Article* and/or *(2) to obtain the Minister’s wealth declaration*. The teacher can now give all groups either the Minister’s wealth declaration (**Item 2**) or the interview with the author of the newspaper Article (**Item 3**).

The reason for addressing the entire group is to show the students how the investigation will progress in the classroom. The teacher will give all groups the first 2 documents as indicated above in the plenary session.

After they have received the first 2 documents the students should be instructed on how to use the electronic **Investigative File Inventory (IFI)** to record and organize each piece of evidence that is received. All students should be required to record the first 2 documents to learn the process and become a little familiar with Excel application. However, only one member of each team needs to record all of the evidence as the case progresses, if the team prefers this method.

The value of using the **IFI** in every day work when conducting investigation and prosecution of the cases should be explained to the students through the following:

- It is an extremely simple way of tracking all of the evidence;
- Any piece of evidence can be quickly found by using a key word search;
- The evidence can be quickly organized by violation or asset confiscation by using the sort function;
- All evidence can be linked to the Excel document for quick recall and can be transported on a flash drive;
- It provides a system for making notes or comments for each piece of evidence in one location.

**An expensive and complex case management system is not required. The IFI is completely free to use.**

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<sup>90</sup> An estimate of 15 minutes should be allocated for completion of this task.

After the **IFI** has been demonstrated and the participants have entered the first 2 documents into the IFI, the lead instructor should explain that from this point forward each team will work independently on the case.

The students should be given another 15 minutes to examine **Items 2** and **3** respectively, to make the list of possible leads and to make requests for the next investigative actions. The requests made by each team should be recorded by their assigned teachers and saved for discussion in the next session of work on the exercise.

#### 3.4.2.2. Exercise Part 2

Part 2 of the Exercise should be covered in approximately 75 minutes.

The work on the case will continue after the presentation of **Lecture 2**. The teacher will remind to his/her group/s of the requests for which investigative actions they have come up with upon examination of **Items 2** and **3** earlier.

Ideally analysis of the Minister's wealth declaration form (**Item 2**) should have led to the request *(1) to contact Kiev Bank and ask for information on all records relating to any and all accounts in the name of Boris and/or Natasha Maistrenko including bank statements, checks and other debits drawn on the account, deposits and credits, signature cards and the opening application; (2) to obtain the records of Minister Maistrenko's personal checking account; and (3) to obtain the records of his savings account.*

If such requests have been made by the group, the corresponding documents should be handed out to the group for thorough analysis and development of the strategy for the next steps of investigation. Such documents would include **Item 5a** containing the response to the official request on all records relating to Mr. Maistrenko's accounts from the representative of Kiev Bank; **Item 5** which is the records of the personal checking account of Minister Maistrenko and **Item 5b** the records of his savings accounts.

Another request which could have been made upon analysis of **Item 2** is *(4) to obtain a title record in regards to the residence as declared in the Minister's wealth declaration form* to establish who else it belongs to and if there is any additional information contained within it. In such a case **Item 8**, which contains a title deed registration from the state Notary office for the property at 35 Grygorenka str., should be similarly handed over to the group.

Among requests for other investigative actions there could also have been a request *(5) to look into the mortgage which has been declared in the form*, if the students request for such information – a next piece of evidence relating to the results of the interview of the Kiev city bank manager of the mortgage section should be handed over to the group (**Item 19**).

Similarly there are some leads which could have been discovered and followed up on by the students after they have analyzed **Item 3**. In the best case scenario this analysis would have resulted in a number of requests, including *(1) to obtain a title record in regards to the property in Koncha Zaspa* which was described by the reporter in order to establish who it belongs to and if there is any additional information contained within it and *(2) to obtain a title record in regards to the residence of the Minister* as reported by the journalist. **Item 6** containing a title deed registration from the state Notary office should be then handed over to the group, along with **Item 8**, which was already described earlier.

Other leads that might be followed include *(3) checking information in regards to company Almo Ltd.* which according to journalist's research owns the property used by Minister in Koncha Zaspa but the ownership of which raised some questions (looking into its ownership and management); *(4) establishing the identity of the Mercedes Benz* which according to the journalist has been used by the Minister's wife (for instance through surveillance of the properties used by the Minister to obtain a license plate number of the vehicle); and finally *(5) looking into the title record to another property mentioned by the journalist at Minskaya str.* and which allegedly belongs to the Minister. In response the teacher accordingly can provide, the certificate on Articles of General Incorporation for Almo Ltd (**Item 9**), report of surveillance to obtain Mercedes plates (**Item 10**), and a title deed registration for property at Minskaya str. (**Item 52**).

Ideally at least five requests would have been made by the groups resulting in their obtaining of **Items 5, 5a, 5b, 6** and **8**. In the process of handing out of these pieces the students should be allotted on average 15 minutes for analysis and discussion of each item. The session should be finalized with the groups drawing up a list of next leads and requests for further investigative measures. The requests

made by each team should be recorded by their assigned teachers and saved for discussion in the next session of work on the exercise.

#### 3.4.2.3. Exercise Part 3

Part 3 of the Exercise should be covered in approximately 75 minutes.

The work on the case will continue after the presentation of **Lecture 3** and conduct of the **Workshop on elements of the corruption offences**. The teacher will remind to his/her group/s of the requests for which investigative actions they have come up with upon examination of **Items 5, 5a, 5b, 6** and **8** earlier.

Ideally the students would have indicated that analysis of Minister Maistrenko's bank accounts and related information at Kiev Bank (**Items 5, 5a, and 5b**) revealed that a dividend check from the account of RG Horman Brokerage had been deposited to Maistrenko's account and requested (1) for a visit or interview to determine the purpose of this check. In addition, the students should have requested (2) to contact Kiev Bank Mortgage section for the purpose of obtaining information relating to the mortgage on the residence located at 35 Grygorenko str, Kyiv owned by Minister Maistrenko and his wife. Corresponding documents should be handed over to the students, including **Item 17** (results of the interview of the Manager of the RG Horman Brokage), and **Item 19** (results of the interview of the Kiev city bank manager of the mortgage section). They might have also requested (3) to obtain a title record in regards to the residence as declared in the Minister's wealth declaration form (Item 8) if it hasn't been done earlier during session 2 of work on the exercise. In such a case all of these documents should be handed out to the groups and the students should be given 15 minutes to analyze and discuss each new piece of evidence.

Analysis of a title deed registration for Koncha Zaspa property (**Item 6**) which identifies that the property was deeded to the Almo Ltd, in the name of Mr. Johnson, would have resulted in the request (1) to interview Mr. Johnson for the purpose of determining his relationship to Almo Ltd. and the ownership of the vacation home occupied by Minister Maistrenko and (2) to check information in regards to company Almo Ltd's ownership. Subsequently the results of the interview (**Item 7**) and certificate on Articles of General Incorporation for Almo Ltd (**Item 9**) should be handed out to the students for analysis and discussion, with allotting approximately 25 minutes on **Item 7** and 15 minutes on **Item 9**.

Analysis of a title deed registration from the state Notary office for the property at 35 Grygorenka str. (**Item 8**) would provide no new leads.

The session should be finalized with the groups drawing up a list of next leads and requests for further investigative measures. The requests made by each team should be recorded by their assigned teachers and saved for discussion in the next session of work on the exercise.

#### 3.4.2.4. Exercise Part 4

Part 4 of the Exercise should be covered in approximately 60 minutes.

The work on the case will continue after the presentation of **Lecture 4** and conduct of the **Workshop on financial investigations**. The teacher will remind to his/her group/s of the requests for which investigative actions they have come up with upon examination of **Items 7, 9, 17, and 19** earlier. He/she will then inform students that this part of the exercise will be devoted to following up on the leads derived from **Item 7**.

The results of the interview with Mr. Johnson (**Item 7**) revealed that he was a former owner of the Almo Ltd. and after accepting an offer from Minister Maistrenko, he filed an amended Article of Incorporation with the Business Regulation Authority which listed a new president and board of directors. The property at Koncha Zaspa was transferred to Maistrenko and his group when they purchased the stock of the ALMO company in bearer form as an asset of the company. This information would have ideally led the students to follow up on the payment for the company stock in the form of three checks and (1) to request all records relating to the purchase of the Bank of Kiev Cashier's check including but not limited to the name of the purchaser and the method of payment (information contained in **Item 21**); (2) to send an MLA request to Switzerland in relation to the tracing of bank records and the ownership of the Swiss corporation Indian Ocean Factors – CH, which

issued another check (the response to this request constitutes **Item 22** and **Item 22a**), and *(3) to request all records relating to the purchase of the Cashier's check issued by Nadra bank* including but not limited to the name of the purchaser and the method of payment (information contained in **Item 23**). Four items listed above should be handed over to the students for their analysis and discussion. On average 15 minutes should be allocated for work on **Items 21, 23, Items 22** and **22a**.

The session should be finalized with the groups drawing up a list of next leads and requests for further investigative measures derived from analysis of **Item 7**. The requests made by each team should be recorded by their assigned teachers and saved for discussion in the future session of work on the exercise.

#### 3.4.2.5. Exercise Part 5

Part 5 of the Exercise should be covered in approximately 75 minutes.

The work on the case will continue after the presentation of **Lecture 5**. The students should be reminded that the remaining leads identified when analyzing **Items 9, 17** and **19** need to be addressed and will be dealt with in this session. The teacher will also remind to his/her group/s of the requests for which investigative actions they have come up with upon examination of **Items 9, 17**, and **19** earlier.

Analysis of the certificate on Articles of General Incorporation for Almo Ltd (**Item 9**) should have led the students again to the request of the interview of Mr. Johnson (**Item 7**) who resigned as a President of Almo Ltd.. They also should have requested *to interview persons listed in the document as new President and board of directors*. Thus, results of the interview of the listed President Mr. Ivanenko regarding his involvement with ALMO Limited, the company that owns the vacation home occupied by Boris Maistrenko (**Item 24**); of the interview with Board Member Ms. Popova (**Item 34**), and of the interview with another Board Member Ms. Borysenko (**Item 35**) should have been handed out to the students for their analysis and discussion. The students should be given 15 minutes to work on each of the 3 new documents.

Analysis of the **Item 17** (results of the interview of the Manager of the RG Horman Brokage) would have revealed that it is an investment brokerage company which manages personal wealth of the brother of Minister's wife; that the brother is incapable to handle his financial affairs and his legal guardian is the Minister. It also would have shown that the check was the first dividend earned on the account of the brother. This information ideally would have triggered the *group to raise the question regarding the source of the deposits that were made to the account*. The answer to this inquiry can be found in **Item 18** and at this point should be handed out to the students and 15 minutes should be allowed to work on it.

Analysis of the **Item 19** (results of the interview of the Kiev city bank manager of the mortgage section) should have ideally triggered *a question on possibility to determine the method of payment for each return payment of the loan*. The answer to this question is contained in **Item 20** and at this point should be handed out to the student and 15 minutes should be allowed to work on it.

The session should be finalized with the groups drawing up a next list of leads and requests for further investigative measures derived from analysis of **Items 9, 17** and **19**. The requests made by each team should be recorded by their assigned teachers and saved for discussion in the next session of work on the exercise.

#### 3.4.2.6. Exercise Part 6

Part 6 of the Exercise should be covered in approximately 90 minutes.

The work on the case will continue after the lunch break. The teacher will remind to his/her group/s of the requests for which investigative actions they have come up with upon examination of **Items 21, 22, 22a** and **23** earlier. He/she will then inform the students that this part of the exercise will be devoted to following up on the leads derived from these items during session 4.

Analysis of information on the cashier's check contained in **Item 21** would have ideally led to making the same MLA request if it was not already done in session 4 of the work on the exercise (**Item 22**) and if the students request for such an action **Item 22** should be handed over to them.



Analysis of the MLA request and bank information provided with it (**Items 22** and **22a**) ideally would have triggered the same requests for **Items 23** and **24**, as well as new requests for information to determine the purpose *(1) of 10 payments to Nikopol Mining Services that were received from the Swiss company Indian Ocean Factors - CH* (interview of its President constitutes **Item 26**); *(2) of 10 payments made by LoadMasters Equipment to Indian Ocean Factors – CH* (interview of its representative is in **Item 27**); *(3) of payments that were made from the account of Donetsk Basin Mining to the account of Indian Ocean Factors – CH at Credit Suisse Bank in Zurich, Switzerland or to the ALMO Limited* (results of the interview of the accounting manager are in the **Item 28**); and finally *(4) of two payments that were made from the account of Kryviy Rih Ore to the account of Indian Ocean Factors – CH at Credit Suisse Bank in Zurich, Switzerland* (results of the interview of its Vice President are in the **Item 29**). If such requests have been made by the group the students should be given these 4 new items for their analysis and discussion.

Analysis of the results of the interview of the President of Almo Ltd (**Item 23**) would provide leads to the same MLA request (**Item 22**) with no additional new leads.

The teachers may wish to make a short break after follow-up to Session 4 has been completed.

The work on the case should continue after a short break. The teacher will remind to his/her group/s of the requests for which investigative actions they have come up with upon examination of **Items 18, 20, 24, 34** and **35** earlier. He/she will then inform the students that this part of the exercise will be devoted to following up on the leads derived from these items.

Ideally, the students after having analyzed results of the interview with the Manager of the RG Horman Brokerage (**Item 18**) would have requested *(1) to interview the brother of the Minister's wife who is the owner of an investment account at RG Horman Brokerage* in which large amounts of money had been invested and a dividend check had been deposited into Minister Maistrenko's personal bank account. Results of such interview are contained in **Item 38** and should be handed out to the students if they make an appropriate request. Taking into consideration that the students also learned from the interview that each of the deposits to the account, other than the opening cash deposit, originated from the account of Global Mining Incorporated at Barclays Bank in Kiev, they should have wished *(2) to determine the purpose of such payments*. In this case the results of the interview with the Accounting Manager of the Global Mining Incorporated (**Item 50**) should be handed out to the students for further analysis and discussion.

Analysis of the method of payment for each return payment of the loan by the Minister (**Item 20**) would have provided the students with no further leads.

The persons listed as the President and two Members of the Board of Directors of Almo Ltd. in their interviews (**Items 24, 34** and **35**) have denied their involvement with the Almo Ltd. and stated that they have been working in various capacities for or with Minister Maistrenko. This information should have made the students want to look again at the certificate on Articles of General Incorporation for Almo Ltd (**Item 9**). The listed President of Almo Ltd., who is the Director of Licensing for the Minister Maistrenko, also stated that he had no knowledge of any payments made to him, didn't know anything about cashing of these payments, as well as he knew nothing of the Swiss bank account. This information should have led the students to making the same request for an MLA from Switzerland in relation to the tracing of bank records and the ownership of the Swiss corporation Indian Ocean Factors – CH and to looking at the checks (**Item 22**).

The session should be finalized with the groups drawing up a list of next leads and requests for further investigative measures. The requests made by each team should be recorded by their assigned teachers and saved for discussion in the next session of work on the exercise.

#### 3.4.2.7. Exercise Part 7

Part 7 of the Exercise should be covered in approximately 135 minutes.

The work on the case will continue after the break. The teacher will remind to his/her group/s of the requests for which investigative actions they have come up with upon examination of **Items 26, 27, 28, 29, 38** and **50** earlier. He/she will then inform the students that this part of the exercise will be devoted to following up on the leads derived from these items.

Records of the interview of the President of Nikopol Mining Services (**Item 26**) revealed that it was the sole authorized representative for LoadMaster in Ukraine, which sold mining equipment to the Government of Ukraine, and as the receiving agent for LoadMaster, it was paid a fee of 5% of the purchase price for its services through an intermediary - called Indian Ocean Factors – CH (a subsidiary of the LoadMaster). This would have led the students to take a look again at the payments made by LoadMasters Equipment to Indian Ocean Factors – CH and other information provided by its representative (**Item 27**), which in turn would have provided a contradicting information stating that Indian Ocean Factors is the parent company of the Nikopol Mining Service and suggested to contact DFID for more details. As a result the students ideally would have requested *(1) for an interview of the representative of DFID* to determine the relationship between DFID and LoadMasters Equipment, and the purpose of 10 payments to Indian Ocean Factors – CH that were made by LoadMasters. Report of telephone interview with DFID representative should be handed out to the students if they make such a request (**Item 30**). The students should have also requested *(2) for and MLA request for an interview of the president of LoadMaster Equipment Company* in relation to a contract concerning the sale of mining equipment to the government of Ukraine, MLA response should be handed out to the students (**Item 31**) following this request and the students should be given 15 minutes to analyze and discuss these items.

Analysis of the report of the interview of the Accounting Manager of Donetsk Basin Mining (**Item 28**), which stated that no payments have been made to Minister Maistrenko or listed President of Almo Ltd, and only one payment to Indian Ocean Factors – CH has been made, should have ideally led the students *to additionally ask about other payments made using the same accounting code*. Then the response to this question should be provided to the students (**Item 45**) for its analysis and discussion.

Thorough analysis of the report of interview of the Vice President of Kryviy Rih Ore and records of payments (**Item 29**), which revealed allegations of extortion of payments to secure mining permits by the Director of Licensing, should have ideally led the students *to ask for information in regards to one more check* which has been omitted in explanations given by the Vice President of Kryviv Rih Ore. The explanation of this check should be provided to the students (**Item 36**) for analysis and discussion once they make such a request.

Analysis of the interview of the brother of the Minister’s wife and the owner of an investment account at RG Horman Brokerage (**Item 38**) would reveal that the brother had no knowledge of the investment account at RG Horman Brokerage, has never made a deposit to the account, has never been to the offices of RG Horman Brokerage and never made a withdrawal from the account. He also reported that Minister Maistrenko gave him a check to deposit it into his personal account and asked to write a check from his account to Pavel Ivanenko for the same amount. This should have made the students *ask for a copy of this check*, which can be handed over to them as **Item 39** for its analysis and discussion.

The results of the interview with the Accounting Manager of the Global Mining Incorporated (**Item 50**) would have provided the students with no immediate further leads.

The groups should then draw up a list of next leads and requests for further investigative measures. The requests made by each team should be recorded by their assigned teachers and saved for discussion in the next session of work on the exercise.

During the last hour of this session the groups should be invited to critically review the evidence they have collected so far and see if there are any leads missing, if the investigative strategy needs to be adjusted and decide on what allegations can be already pursued. The teachers can provide their advice and guidance on what can be improved. This would help teams to make an interim summary of evidence collected and to think of potential hypothesis for this case.

#### 3.4.2.8. Exercise Part 8

Part 8 of the Exercise should be covered in approximately 75 minutes.

The work on the case will continue after the presentation of **Lecture 6**. The teacher will remind to his/her group/s of the requests for which investigative actions they have come up with upon examination of **Items 30, 31, 36, 39** and **45** earlier. He/she will then inform the students that this part of the exercise will be devoted to following up on the leads derived from these items.

Through the response received from DFID representative (**Item 30**) it became known that Ukraine has participated in the interest-free loan program of DFID for obtaining funds to purchase mining equipment, and that Minister Maistrenko approved a sole source contract (a no competition bid) for its purchase with LoadMaster, with Nikopol Mining Services as a sole authorized representative for LoadMaster in Ukraine. This should have brought the students back to examining the records of the interview of the President of Nikopol Mining Services (**Item 26**).

The response to the MLA request for an interview of the President of the LoadMaster in regards to the contract with the Government of Ukraine (**Item 31**) would have ideally triggered the students to request for a copy of the contract between the LoadMaster and the Government of Ukraine. This request should be granted through handing out of the **Item 32** which contains the contract to the students. The students should be allotted approximately 15 minutes to work on this item.

**Item 36** provided an explanation to the omitted check among payments made by the Kryviy Rih Ore and revealed that this payment was made to the ALMO Limited account at the Forum Bank. This information should have ideally motivated the students to make a request to obtain all records relating to any and all accounts in the name of ALMO Limited including bank statements, checks and other debits drawn on the account, deposits and credits, signature cards and the opening application within the Forum Bank. At this point the teacher should hand out to the students **Items 37** and **37a** containing such information for their analysis and discussion.

Copy of the check obtained by brother of the wife of the Minister (**Item 39**) showed that it was written out to some Mr. Ivanenko. Based on this information the students should have requested to interview Mr. Ivanenko. Corresponding **Item 40** should be handed out to the students by the teacher for its analysis and discussion.

Based on the analysis of payments disclosed by the accounting records (**Item 45**) and information that Donetsk Basin Mining was pressured into paying Mr. Ivanenko to retain its mining rights, the students should have noticed that the biggest payment was given to unknown Mr. Harris and should have followed up on this fact by asking to provide a copy of the check that was paid to Malcolm Harris. The copy of the check (**Item 46**) should be handed over to the students by the teacher for analysis and discussion.

The session should be finalized with the groups drawing up a list of next leads and requests for further investigative measures. The requests made by each team should be recorded by their assigned teachers and saved for discussion in the next session of work on the exercise.

#### 3.4.2.9. Exercise Part 9

Part 9 of the Exercise should be covered in approximately 90 minutes.

The work on the case will continue after the lunch break. The teacher will remind to his/her group/s of the requests for which investigative actions they have come up with upon examination of **Items 32, 37, 37a, 40** and **46** earlier. He/she will then inform the students that this part of the exercise will be devoted to following up on the leads derived from these items.

Analysis of the Contract between the LoadMaster and the Government of Ukraine (**Item 32**) would have returned the students to examine records from the interview with the President of Nikopol Mining Services (**Item 26**) and report of the phone interview with the representative of the LoadMaster (**Item 27**) in order to obtain more details and corroborative evidence.

Ideally analysis of the bank records relating to all accounts in the name of ALMO Limited within Forum Bank (**Items 37 and 37a**) should have returned the students to examine again the report of interview of the Accounting Manager of Donetsk Basin Mining (**Item 28**), as well as the report of interview of the Vice President of Kryviy Rih Ore and the records of its payments (**Item 29**). The records of the ALMO Limited bank account maintained at the Forum Bank indicate that eleven payments have been made to Le Grande Apparel. To follow up on this information, the students should have requested that the manager of Le Grande Apparel was contacted to determine the details of the transactions and the name of the true customer. In such a case the teacher should provide the students with **Item 42** for its analysis and discussion.

Analysis of the interview of Mr. Ivanenko (**Item 40**) would not have provided students with any immediate new leads.



The students would have requested *to have Mr. Harris interviewed* after analyzing the check written out in his name (**Item 46**). In response to this request the report of an interview conducted by the London Metropolitan Police (**Item 47**) should be handed out to the students for analysis and discussion.

The teachers may wish to make a short break after follow-up to Session 8 has been discussed and dealt with.

The work on the case should continue after a short break. The teacher will remind to his/her group/s of the requests for which investigative actions they have come up with upon examination of **Items 42** and **47** before the break.

Thus, examination of the interview of the manager of Le Grande Apparel (**Item 42**) which revealed that Minister Maistrenko had been the customer related to these transactions and provided the students with the information on the customers account of Minister Maistrenko at the store, would have illustrated to the students that the Minister lives beyond his means. This document could also help build up evidence on excessive wealth of the Minister, however, in itself would not provide any further new leads.

The report of the interview of Mr. Harris (**Item 47**) would have revealed that Mr. Harris is a real estate agent and that the check has been written out to him by his client Minister Maistrenko to pay for the purchase of the parcel of land that was owned by Adam Welsley at the Suffolk coast area. At the interview Mr. Harris also stated that Mr. Welsley can be located through an appraiser named Alan Manchester. This information should have led the students *to request for an interview of Mr. Manchester and try establish the whereabouts of Mr. Welsley*. Once this request is made by the students, they should be handed out **Item 48**.

After the lead derived from analysis of **Item 47** has been handed out to the students, the teacher should generate the discussion on various possible outcomes of this interview and ask the following questions:

- How would we have to proceed if the witness was not willing to submit to an interview?
- Assume that the witness signed an affidavit documenting his testimony; would this affidavit be admissible in a Ukraine court?
- If not, how could we perfect this evidence?

The students should have been given approximately 15 minutes to analyze and discuss **Item 48**, which would provide them with the contact information for a former landowner Mr. Welsley. This should have made the students *request for an interview of Mr. Welsley to follow up on the information received earlier from Mr. Harris*. In response to such a request, the teacher should hand out **Item 49** containing the results of the interview with Mr. Welsley and allow approximately 15 minutes for its analysis and discussion. The results of the interview with Mr. Welsley would further support the testimony made by Mr. Harris and would help corroborate evidence in regards to financial transactions of the Minister Maistrenko. This document in itself would provide no further new leads on the case.

#### 3.4.2.10. Exercise Part 10

The work on the case will continue after the break. Part 10 of the Exercise should be covered in approximately 60 minutes.

The teachers should take a look at what pieces of evidence are still remaining and have not been handed out and stir the discussion towards those missing links.

For instance, in the course of the investigation as described above the teacher would still have **Items 10, 12, 13, 13a, 13b, 14, 15, 16, 51** and **52** remaining at his disposal.

**Items 10** and **52**, although could have been identified as potential leads during session 2, have not been followed up on during session 3. The teacher may suggest to return to these two items, which contain a report on surveillance of the vacation residence of Boris Maistrenko in Koncha Zaspa as described by the journalist Ms. Kuznetsova (**Item 10**) and the title deed for the property located at 15 Minskaya str (**Item 52**). The students should receive these two documents and be allowed 15 minutes for work on each.

Analysis of the **Item 10** would ideally lead the students to ask for more information regarding the Mercedes, driven by Minister's wife and which was purchased at Mercedes of Ukraine. The students should ask for an interview with the representative of the Mercedes of Ukraine to receive more details. Report on the interview should be handed over to them in such a case (**Item 16**).

Analysis of the **Item 52** would reveal that the property was deeded in the name of the Minister's daughter. This information should ideally make students want to follow up with the seller of the apartment and request for interviewing of the seller. **Item 14** containing results of such an interview should be handed out to the students for analysis and discussion.

The session should be finalized with the groups drawing up a list of next leads and requests for further investigative measures based on analysis of these additional pieces of evidence. The requests made by each team should be recorded by their assigned teachers and saved for discussion in the next session of work on the exercise.

#### *3.4.2.11. Exercise Part 11*

The work on the case will continue after the break. Part 11 of the Exercise should be covered in approximately 60 minutes.

The teacher will remind to the groups of the requests for which investigative actions they have come up with upon examination of **Items 14** and **16** earlier. He/she will then inform the students that this part of the exercise will be devoted to following up on the leads derived from these items.

Analysis of the **Item 16** would provide no further leads for the investigation, nevertheless, it will reinforce evidentiary basis of the case.

Analysis of the **Item 14** on the other hand would have revealed that the apartment was purchased by the Minister for his daughter and that the seller has agreed to take a large down payment and then accept the balance in monthly installments during the next year in cash. The Minister made one payment by bank check for installment of the new door. This information should have triggered the students to ask for a copy of the check, which should be then handed out to the students as **Item 51**.

After the students have spend around 15 minutes on analysis of the check (**Item 51**), the students should wish to look into the issuer of the check and should request all records relating to account in the name of Island Fleet including bank statements, checks and other debits drawn on the account, deposits and credits, signature cards and the opening application. All relevant information should be handed over to the students at this point. Corresponding **Items 13, 13a** and **13b** should be handed over to the students for further analysis and discussion.

Analysis of the handed over bank information would lead the students to the remaining pieces of evidence – namely a request information on the ownership of the Island Fleet Limited, which would be obtained from the BVI Registry of Companies concerning the incorporation of the company Island Fleet Limited through a MLA request and handed over to the students as Item 12 for their further analysis and discussion; it would also make the students ask for an interview with the manager of Southshore Apartments regarding payments received from the Island Fleets bank account. Results of this interview should be handed over to the students for analysis and discussion.

This would conclude the investigation by putting all of the pieces of evidence into the hands of the students.

#### *3.4.2.12. Exercise Part 12: preparation of presentations by the groups*

The students should be allowed approximately 90 minutes to work on the preparation of presentations by the groups. The groups will be asked to prepare presentations of the results of their independent investigation of the case, covering the following topics:

1. A flow chart summarizing the persons involved and the financial aspect of the scheme
2. An explanation of the specific evidence that will prove each element of the crimes of money laundering and corruption

3. A detailed Source and Application of Funds financial analysis based on circumstantial evidence indicating the total amount of corruptly obtained income
4. A financial analysis tracing the provable corruption income through direct evidence
5. Identify all assets to be recovered and the specific evidence that connects the property to the underlying criminal activity

The first presentation will provide an overview of the corruption scheme. The purpose of this is to organize the facts of the case in a manner that will allow the audience to understand the details of the corrupt activity, follow the flow of the corruptly obtained funds, clearly explain the laundering scheme and illustrate the method that will be used to prove the crime and the amount of the illegal income.

The second presentation will state the violation that has been charged, identify each element of the statute and specifically indicate each piece of evidence that will be used to prove each element. This should be done by making reference to the document numbers and briefly summarize how the evidence proves the specific element of the crime. The groups should be instructed that they should choose just **one person** to charge and just **one violation** to charge – either a money laundering or a corruption crime. It is clearly understood that the evidence obtained during the investigation would allow for the charging of multiple violations against various potential defendants. However, for the purposes of this training, there will only be enough time to analyze one violation and the evidence that proves each element.

The third presentation will be a financial analysis using the source and application of funds method to prove the total amount of illegal income. This method will rely of circumstantial evidence to prove that the defendant acquired assets and spent money that is far in excess of his legitimate income.

The fourth presentation will also be a financial analysis. However, this analysis will use direct evidence to prove any corrupt income that can be directly traced to the defendant. It should be noted that this method, if available based on the evidence obtained, will provide a very strong case of corruption against the defendant. However, it may not show the total amount of corrupt income because not all illegal income may be directly traceable. The source and application of funds method can be used in conjunction with the direct evidence to show the total amount of illegal income.

The fifth asset tracing portion will be a presentation by one of the team members that will clearly show the connection of the assets that have been located to the corrupt activity. This presentation will require a flow chart that will identify the asset and trace the funds that were used to purchase this asset back to the corrupt or illegal activity. This may require tracing the flow of funds through shell companies, nominees, numerous bank accounts and foreign jurisdictions. Each step of the money movements will be documented with specific evidence.

#### *3.4.2.13. Exercise Part 13: presentations by the groups and evaluation of students*

Up to 240 minutes should be allocated for completion of the Part 13 of the Exercise. Each group will be given 25 minutes to make their presentations. Each member of the group should make a part of the presentation (the members of the team may decide among themselves how to share the presentation). Each member of the group will be given about 5 minutes to make their part of the presentation.

Each presentation can be followed with the 15 minutes critical discussion of what was good and bad about the presentation, what could be improved and how, what mistakes in conduct of “investigation” could be identified through the presentation, etc. Such discussion should be facilitated by the teacher and all students should be encouraged to participate. This discussion should be concluded with the evaluation of each students’ performance in the framework of group presentation of the case which was just made (5 minutes per group).

The teacher may involve all of the participants of the course in evaluation of each student’s performance on the presentation. Such group evaluation could be conducted through asking all of the participants of the training to fill out evaluation forms on each of the students. In these forms the students will be asked to rank performance of their colleagues on the selected scale (i.e.: from 1 to 5) under selected criteria. Criteria for evaluation of such performance are to be developed by the teacher, and may include the following:

- Organization and structure of the presentation;
- Conciseness and clarity of the presentation;

- The scope and convincing nature of the facts and arguments presented;
- Presentational skills of the student;
- Team-work and overall team's success in investigation.

The results for each student's performance can be then calculated by the teacher based on the evaluation forms.

## CD ROM

The CD ROM which is attached to this Manual is organized in following two folders containing the following materials:

**“Student’s Folder”** is composed of the following 3 subfolders:

- Sub-folder: “Ukrainian Legislation” which contains relevant for this course national legislation;
- Sub-folder: “International Instruments” which contains relevant for this course international instruments;
- Sub-folder: “Practical Exercise” which contains 52 passworded evidentiary items and the blank **Investigative File Inventory (IFI)**.

**“Teacher’s Folder”** is composed of the following 3 subfolders:

- Sub-folder: “Lectures” which contains 6 PowerPoint presentations to be used as a basis for development of the lectures;
- Sub-folder: “Workshops” which contains materials for the two workshops;
- Sub-folder: “Practical Exercise” which contains **the List of Practical Exercise documents**, 52 password-free evidentiary items, and the filled out **Investigative File Inventory (IFI)**.

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