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Ensuring professionalism and integrity in the Ministry of Defence of Ukraine



CENTRE FOR INTEGRITY
IN THE DEFENCE SECTOR

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The Centre for Integrity in the Defence Sector (CIDS) is promoting integrity, anti-corruption measures and good governance in the defence sector. Working with Norwegian and international partners, the centre seeks to build competence, raise awareness and provide practical means to reduce risks of corruption. CIDS was established by the Norwegian Ministry of Defence in 2012.

ABBREVIATIONS AND ACRONYMS

ATO	Antiterrorist Operation
CIDS	Centre For Integrity in the Defence Sector
CoM	Cabinet of Ministers
CSA	Civil Service Agency
DPDC	Directorate for Prevention and Detection of Corruption
DPP	Department of Personnel Policy
EU	European Union
GS	General Staff
HRM	Human recourses management
ILO	International Labour Organisation
LCS	Law on Civil Service
MoD	Ministry of Defence
MP	Member of Parliament
NACA	National Anti-Corruption Agency
NGO	Non-Governmental Organisation
NISS	National Institute of Strategic Studies
NORAD	Norwegian Agency for Development Cooperation
NSDC	National Security and Defence Sector
OECD	Organisation for Economic Cooperation and Development
PA	Presidential Administration
R&D	Research and Development
RTI	Right to information
SBU	Security Service of Ukraine
SIGMA	Support for Improvement in Governance and Management
UNCAC	UN Convention against Corruption
USSR	Union of Soviet Socialist Republics, Soviet Union

PREFACE

The Centre for Integrity in the Defence Sector (CIDS) has prepared the present report in order to clarify the basis for and content of a three-year project on human resources management and integrity in the Ministry of Defence (MoD) of Ukraine. The data for the study has been collected in accordance with an assessment guideline including some 250 questions. Six principal types of data sources were used:

- Official documents/statutory texts;
- Written answers to the questions in the assessment guideline prepared by the MoD and the Civil Service Agency of Ukraine (CSA);
- Interviews with relevant decision-makers and other local experts, as well as representatives of international organisations;
- An anonymous survey among 145 MoD officials;
- Analyses especially prepared for this report;
- Analyses and studies already available.

International expert Francisco Cardona and Senior Adviser Svein Eriksen, who constitute the CIDS assessment team, have authored the report. HRM expert Damir Ahmetovic and CIDS' Kyiv staff, Roman Rukomeda, Viktor Solovyov, and Nadiya Vershygora have made valuable contributions. A draft version of the report has been submitted to the MoD and the CSA of Ukraine for any comments or proposed corrections. The answers received have largely been included in the final report. However, all evaluations, conclusions and recommendations contained in the reports are the sole responsibility of CIDS.

Oslo, September 2016



Per Christensen

Director

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Citizens of Ukraine have the right to obtain a position in the civil service regardless of their political views.

Summary

This report shows that the Ministry of Defence has yet to put in place an effective system for human resources management that is aligned with mainstream European practice and meets minimum requirements for staff professionalism. Because of i.a. low salaries and arbitrary HRM systems, the MoD may face difficulties in recruiting and retaining competent civilian personnel, especially in areas where there is strong competition from private employers.

Overall, current employment practices do not promote proper civilian and democratic control over the armed forces. Until recently, the right of civil servants to resist illegal orders from their superiors or to refuse compliance with ethically questionable instructions was limited. The new 2015 Law on Civil Service offers stronger protections and clearer complaints mechanisms. If implemented, this law could significantly promote expertise and integrity across the Ukrainian public administration. However, the Lustration¹ Law represents a weakening of the ability of civil servants to refuse compliance with illegal instructions and thus contributes to further politicisation of the civil service.

Citizens of Ukraine have the right to obtain a position in the civil service regardless of their political views. However, the civil service as well as defence institutions have traditionally been politicised and used as patronage instruments. Overall, arrangements for recruitment and promotion do not satisfy international standards. If the 2015 Law is soundly implemented, the situation is likely to change for the better, but such a change remains to be seen.

While the new Law on Civil Service provides more legal guarantees of a fair procedure for dismissal of civil servants,

the Law on Lustration and the way in which legal provisions on restructuring are applied may work in the opposite direction.

The lack of transparency, the excessive size of bonuses and the subjectivism and discretion used when awarding them threaten the rule of law and the principle of legality.

The system for training and competence building is in need of an overhaul. Although there have been a lot of donor-funded training activities, the overall effect has been limited. What is lacking is a systematic approach which enhances the professionalism of institutions and not only brings personal benefits for individual participants.

The legal framework for conflict of interests and asset declaration is adequate and generally in line with international standards, but its implementation still leaves a lot to be desired. While there are restrictions on post-employment activities for civil servants, no such restraints apply to military officers. Steps should be taken to limit "revolving doors" possibilities for members of the armed forces, especially in relation to the military industry. Likewise better legal and managerial protection to whistle-blowers is needed and the new and better complaint mechanisms developed in practice if a culture of integrity is to develop. The legislation on state secrets needs to be made more precise and better aligned with the law on access to information, and certain unclear administrative practices on classifying information need to be ended.

The MoD has taken several steps to introduce and strengthen mechanisms for monitoring and managing corruption risks, which, if effectively implemented, may enhance professional integrity in defence institutions. However, the limited capacity and lack of familiarity with modern audit methods, for example, as well as a

¹ "Lustration" is the process of making something clean or pure. It is also the purge of government officials once affiliated with the Communist or authoritarian systems of government in Central and Eastern Europe.

strict centralisation of authority reduce the impact of the new arrangements in support of integrity. The actual organisation of work within the MoD may compromise the professional independence of officials having control and oversight functions.

The findings can be summarised in two points: (a) The current arrangements of HRM do not sufficiently support merit-based management, integrity and the impartiality of civilian staff at the MoD and therefore they jeopardise professionalism, and (b) the Ministry of Defence is an organisation strongly influenced by the military, a fact which does not promote civilian and democratic control over the armed forces.

However, recent changes in the legal administrative framework, applicable to all public administration settings including the MoD, are largely in line with European principles, but the implementation remains uneven and some pieces of legislation are often ignored by public officials. Good legal frameworks are necessary but the preconditions are insufficient for good administrative practice and for realising the goal of a good administration as required by the European Union treaties. Implementing the recently adopted laws and policy frameworks would significantly improve the current state of affairs.

That said, the CIDS assessment team believes that there is a sufficient legal basis to guide MoD reforms. The team recommends that the Norwegian government fund a three-year project on human resources management in the Ministry of Defence of Ukraine, with the overall objective of enhancing professionalism and integrity. A major effort of this project should be to assist the MoD in implementing the legislation, in particular the new Law on Civil Service. At the same time the project should identify specific reform needs in the military legislation in order to make it consistent with the new administrative legal framework and possibly prepare reform options with the MoD.

The credibility of the public discourse on reform remains an open question. There are doubts about how deeply the reform spirit is rooted. Attitudes vary across the country's leadership. There seems to be increasing tensions between reform supporters and *status-quo* oriented actors. Given the armed conflict in parts of the country and the still precarious military situation, the recognition of the need for reform should probably be stronger in the MoD than in other ministries, but this remains an assumption, not an established fact. Nevertheless, a relatively large number of volunteers are involved in the MoD reform efforts. This group of people, who enjoy direct access to the minister of defence, represent a committed, reformist voice.

The first step in the needs analysis will be to identify the international standards, which may be legally binding requirements or simply recommendations developed by international bodies.

1. Introduction

The purpose of this study (hereafter the *needs analysis*) is to identify topics and challenges that may be addressed in a three-year project funded by the Norwegian Government concerning human resources management (HRM) and integrity for the Ministry of Defence (MoD) of Ukraine. The needs analysis will identify the gaps between on the one hand the current situation in this ministry as regards HRM and integrity, and on the other the desired future state based on meritocratic professionalism as demanded by a set of international, mainly European standards. In conclusion, the report will briefly outline measures that will help to bridge the identified gap and that should be included in the three-year project.

An overall aim of the Norwegian support to defence-related and security sector reform is to promote civil and democratic control of the armed forces of beneficiary countries. Given this objective, the needs analysis will almost exclusively focus on the civilian staff of the MoD of Ukraine, which amounts to some 80 percent of all MoD positions.

The first step in the needs analysis will be to identify the international standards, which may be legally binding requirements or simply recommendations developed by international bodies. Those standards will serve as benchmarks or baselines against which to measure the current situation of the MoD of Ukraine. Given the ambition of the Ukrainian government to establish closer ties with and ultimately join the European Union, the study attaches considerable weight to EU requirements and recommendations. Other international guidelines and standards are also taken into account, but they include less specific and less extensive provisions regarding HRM than the European ones. Having in mind Ukraine's European aspirations, the CIDS assessment team has not found it expedient to use purely national systems of HRM as

assessment benchmarks – be they Norwegian or those of other countries. That said, it must be added that there is a high degree of correlation between national Western European systems and the key elements of what can be termed as the common European standards.

Ukrainian legal frameworks including the new Law on Civil Service, which was adopted 10 December 2015 and entered into force on 1 May 2016, are increasingly aligned with international principles. However, these principles reflect Western administrative values and Western administrative traditions. Ukraine has only to a limited extent – if at all – shared these traditions. There is therefore a significant normative distance that must be covered for Ukraine to realise the international frameworks. Indeed, in the area of HRM, longstanding Ukrainian practices stand in stark contrast to EU recommendations and guidelines. While the latter emphasise civil servants' obligation to obey the principles of the rule of law, legality and professionalism, the Ukrainian traditions stress their duty to follow the instructions of state leaders without seriously questioning the content and nature of these instructions.

Ukrainian officials interviewed by the CIDS assessment team report that the international standards are little known among domestic decision-makers and recommend that the needs analysis give an in-depth description of key concepts. The CIDS assessment team has sought to comply with this recommendation, especially in chapter 3 below.

The needs analysis intends to find answers to *i.a.* the following questions: Are principles of civil service professionalism and integrity sufficiently supported by the Ukrainian legislation? To what extent do actual work processes/decision-making practices promote or hinder professionalism and integrity in the MoD? Are there identifiable units/institutions for HRM and what

responsibilities are assigned to them? Are task and job descriptions adequate to ensure orderly and high quality personnel management? Are officials working on HR issues sufficiently acquainted with and able to implement merit-based HR policies? The answers to *i.a.* these questions will be the basis for identifying the main content of a future 3-year project.

The report relies on the following data sources: official Ukrainian documents, legal and statutory texts; written answers provided by the Ministry of Defence and the Civil Service Agency respectively to questions prepared

by the CIDS assessment expert team; interviews with relevant decision-makers, local experts and international organisations' representatives; previous analyses and studies that are already publicly available; and reports on specific issues commissioned by the CIDS' assessment team from independent Ukrainian experts. In addition the report draws on preliminary findings from the functional review carried out in the MoD of Ukraine in early 2016. This review includes data from *i.a.* in-depth interviews with almost all MoD department heads and an anonymous survey among some 20 per cent of the MoD staff.

The Ministry of Defence is subjected to political pressure from many quarters and may have a vulnerable political position in defence and security decision-making, including HRM.

2. The system of defence and security decision-making

The MoD is part of a system of defence and security decision making, which apart from the ministry and the General Staff (GS), includes the President and the Presidential Administration (PA); the Cabinet of Ministers of Ukraine (CoM), including the Secretariat of the Cabinet of Ministers, especially the Department for Security Defence and Justice; the National Security and Defence Council (NSDC); the Ministry of Interior; the Ministry of Foreign Affairs; and the four bodies of the intelligence community (the foreign intelligence service, the intelligence body of the MoD, the intelligence body of the State Border Guard, and the Security Service of Ukraine).

The president is widely seen as the key figure in defence and security decision-making. He is the Commander-in-Chief of the Armed Forces and all key decision-makers in the defence and security area are either appointed by him – such as all heads of the intelligence services and the Chief of General Staff – or elected upon his proposal – for instance the minister of defence. The presidential administration includes a separate department with some 12 to 15 officials who prepare the president's security and defence policies. The presidential administration is said to exercise considerable influence on the MoD.

The National Security and Defence Council plays a key role in coordinating defence and security policies. It is chaired by the president. The minister of defence and other ministers and officials are *ex officio* NSDC members. The council staff is some 160-strong. The NSDC is mostly dependent on the president and the presidential administration. Proposals from the NSDC are given legal force by being formally adopted as presidential decrees. The NSDC Staff controls their implementation.

The Minister of Defence has double reporting lines: to the president and to the Cabinet of Ministers (CoM), of which he is a member. Control over the state budget is one of the main instruments the CoM may use to counterbalance the president's influence in the defence and security area. The legal ban on party political membership for military officers can make it difficult for defence ministers with a purely military background to assert themselves in party political fora such as the CoM. Former senior MoD officials argue that the longstanding practice of having officers as defence ministers may impact negatively on their political influence.

The MoD is responsible for the implementation of defence policies, for ensuring the mobilisation, the combat readiness, and the performance of the armed forces. The ministry is also obliged to promote the conditions necessary for civilian control of the armed forces. As of 2015 the MoD consisted of 27 main structural units, most often termed “departments”, but also “directorates” or “sections”. Nine units including the Personnel Policy Department, the Anti-corruption Department, and the Department for Internal Audit reported directly to the Minister. The other units were responsible to the First Deputy Minister or to one of the four Deputy Ministers.²

In accordance with the Warsaw Pact tradition, up to 2003 the MoD was completely militarised, save a small number of civilian employees. This situation has now changed, but only to a certain degree. Out of a total of 570³ positions

² An organisational chart of the Ministry of Defence is included in the Annex to this report.

³ According to information provided by the Civil Service Agency the total number of civil servants in Ukraine is 295 709, of whom 7750 work in the ministries.

The National Civil Service Agency of Ukraine, “Civil service in figures 2015” p. 6, Kyiv 2015. Available at: <http://www.center.gov.ua/en/press-center/articles/item/1358-civil-service-in-figures-2015>.

According to the Law no. 235 of 5 May 2015 “On the Strength of the Armed Forces of Ukraine”, the strength of the Armed Forces does not exceed 250,000 people, including 204,000 military personnel. In times of crisis the strength of the Armed Forces increases by the number of personnel drafted into the army in execution of the decrees of the President on mobilisation, as approved by the laws. Available at: <http://zakon0.rada.gov>.

in the MoD, the majority are civil service posts within the scope of the civil service law. The remaining positions are military under military legislation. However, there are almost no senior officials with civilian education and background. Some 50 per cent of the holders of civil service positions – in practice all officials on decision-making levels – are former uniformed personnel.

The armed forces are directly subordinated to the minister of defence through the Chief of the General Staff. The Chief of General Staff also has a direct reporting line to the president and may – according to some interviewees – develop policies without input from the MoD.⁴ Such a state of affairs may impact negatively on the influence

of the minister and the ministry. The distribution of tasks and responsibilities between the MoD and the GS are widely seen to be characterised by lack of clarity, gaps and duplications, which in turn weakens efficiency, professionalism and accountability of the defence sector institutions.

The Ministry of Defence is subjected to political pressure from many quarters and may have a vulnerable political position in defence and security decision-making, including HRM. Despite several attempts at reform, the relationships between the MoD and the General Staff remain problematic.

ua/laws/show/235-19.

⁴ Interviewees express differing opinions as to whether the Chief of the General Staff may develop policy proposals for the President without input by the MoD. Some say this is the case; others that it is not.

The main role of civil servants in security sector organisations is to uphold constitutional values, and to protect the general interests and security of the State as defined by law.

3. International standards and current reform aims of the Ukrainian Government

3.1. Civil service standards

3.1.1. The main content of the standards

The main role of civil servants in security sector organisations is to uphold constitutional values, and to protect the general interests and security of the State as defined by law. HRM arrangements will significantly influence the extent to which this role is fulfilled. Systems of HRM in the public service should be merit-based, i.e. they should be grounded on competitive selection, professionalism and integrity, and aimed at serving the public interest. The merit system is the opposite of a system in which civil service positions are obtained on the basis of, for example, political or personal loyalties, not professional merit.

The meritocratic HRM principle in public administration follows from a large number of international standards, *i.a.* the Universal Declaration of Human Rights of 1948; the 2003 UN Convention against Corruption (UNCAC); the UN International Covenant on Economic Social and Cultural Rights of 1966; the Council of Europe's Recommendation No. R (2000) 6 of the Committee of Ministers to member states on the status of public officials in Europe; the twenty Guiding Principles for the Fight against Corruption of the Council of Europe of 1997; and the OECD/SIGMA, Structural elements for improving public governance systems in EU candidate states (SIGMA baselines of 2009). We give only these as examples even though more could be cited.

Although the international instruments give wide latitude for national adaptations, several of them – not least by means of detailed monitoring and supervision arrangements and cooperation between representatives from different

countries in international professional fora – have resulted in de facto specifications of what "systems of meritocratic HRM" imply in practice. This is one reason why in this needs analysis we use these international standards as baselines for assessing the current state of affairs regarding HRM in the Ukrainian MoD and for recommending reform measures.

Ukraine has formally adopted most of these international legal instruments. Moreover, by signing the Association Agreement with the EU in 2014 Ukraine has taken the first formal step towards EU integration. Although the Agreement does not explicitly mention arrangements for HRM, it obliges Ukraine to provide effective and transparent administrative systems.

The ambition to join the EU⁵ means that the above-mentioned OECD/SIGMA baselines most probably will constitute the basis for EU assessments of the extent to which Ukraine is fulfilling the Copenhagen criteria for EU membership and is ready to take further steps towards increased European integration. As we shall see below (section 3.3), the Ukrainian government has recently adopted a number of reform programmes, both for the defence sector in particular and the public administration in general. These programmes commit Ukrainian authorities to base reforms in the area of HRM on European, i.e. SIGMA standards.

Although the SIGMA baselines were developed to support EU enlargement processes in Eastern Europe, they have had an impact beyond EU accession and can be said to have acquired the status of almost universally applicable

⁵ On signing the Ukraine-European Union Association Agreement on 27 June 2014 the Ukrainian President Petro Poroshenko described this as Ukraine's first but most decisive step towards EU membership. Available at: <http://www.dw.com/en/ukraine-ratifies-eu-association-agreement/a-17925681>

criteria for assessing the quality of civil service systems. Thus, the SIGMA notion of a European Administrative Space supporting the idea of cross-national baselines and standards, has contributed to a broad discussion on the nature of 'European values and principles' of public administration.⁶ They will thus be central to this needs analysis.

In order to understand better the notion of meritocratic professionalism, we need to distinguish as clearly as possible between two dimensions of civil service systems, namely their *institutional* and *managerial* aspects. The former concerns the constitutional role of the civil service in protecting fundamental values of the political system like democracy, individual rights, the rule of law, and the general interest. To promote these values, civil servants are obliged to be loyal to the government of the day but at the same time to be impartial, politically neutral and professionally independent. As concerns the managerial aspects, the focus shifts to mainly economic-related factors whereby the civil service is seen as a workforce, a major public capability that must be managed efficiently and effectively in order to achieve value for money for the public purse.

Both the institutional and managerial dimensions must be incorporated into the public service system in such a way that conflicting concerns are reconciled and internal consistency is achieved throughout the system. It is important to prevent overemphasising managerial efficiency, which should not dominate considerations of civil servants' impartiality and professional independence. A proper balance between the two is the approach cultivated by well-established democracies that have effective control mechanisms in place, including mechanisms to protect civil service professionalism. The institutionalisation of civil service professionalism is supported by a number of factors, which can be called the "pillars of professionalism". The main legal and institutional pillars underpinning professionalism can be summarised as follows:

1. A legal framework determining clearly the scope of the civil service (*i.e.* the delimitation of the civil service from politics and from those parts of public employment that fall under the general labour law);
2. Arrangements for selection (recruitment and promotion);
3. Regulation of the rights and obligations (especially those having to do with constitutional obligations);
4. The remuneration and compensation system;
5. The management system.

These pillars of professionalism require that civil service legal frameworks and administrative or managerial practices:

- Make sure that the best qualified candidates are appointed and promoted through pre-established transparent procedures, which are subject to judicial review (dealt with in chapters 5 and 6 in the present study);
- Ensure that, although the civil service shall loyally and efficiently serve the government of the day, it must first and foremost fulfil its constitutional and legal obligations (chapter 7);
- Encourage the utmost loyalty of civil servants to the law and the legal order of the country (chapter 7);
- Exempt civil servants from having to implement illegal or ethically improper or questionable orders (sections 7.1 and 7.6);
- Oblige civil servants to observe neutrality and impartiality in the execution of their duties through, *i.a.*, systems that regulate incompatibilities and prevention of conflicts of interest (section 7.1);
- Guarantee that civil servants cannot be arbitrarily dismissed or subject to arbitrary disciplinary decisions (sections 6.3 and 7.6);
- Ensure that the scope for political appointments and the rights and duties of appointees are adequately defined (chapter 5);
- Include external mechanisms to ensure the legality of executive decision-making and the accountability of civil servants as well as political appointees (this issue is touched upon throughout the report, especially chapter 7);
- Ascertain that the tasks of civil service posts as well as the requirements to be met by the position-holders are sufficiently specified (section 8.2);
- Encourage civil servants to use their professional

⁶ This argument is developed in a large number of professional studies, *i.a.* Dimitrova, Antoanetta (2002), "Enlargement, Institution-Building and the EU's Administrative Capacity Criteria", *West European Politics*, 25(4), 171–190; Heidbreder, Eva G. (2009): *Structuring the European Administrative Space. Channels of EU Penetration and Mechanisms of National Change*. KFG Working Paper Series N° 5, September 2009, Kolleg-Forschungsgruppe (KFG) "The Transformative Power of Europe", Free University Berlin, available at: http://www.polsoz.fu-berlin.de/en/v/transformeurope/publications/working_paper/WP_05_September_Heidbreder.pdf; Koprić, Ivan; Musa, Anamarija; and Novak, Goranka Lalić (2011): *Good Administration as a Ticket to the European Administrative Space*, in *Zbornik FZ*, 61, (5) 1515–1560 (2011), Harlow, Carol (2011): *Accountability as a Value in Global Governance and for Global Administrative Law*, in Anthony, Gordon et al (eds.): *Values in Global Administrative Law*. Hart Publishing, Ltd, Oxford, UK, 2011. Available at: <http://ejil.oxfordjournals.org/content/17/1/187.full.pdf+html>

expertise in the performance of their official duties (this issue is dealt with throughout the report, especially chapter 5);

- Make sure that civil servants are properly trained and their performance fairly and adequately monitored (sections 8.3 and 8.4);
- Balance centralisation and decentralisation in HRM by ensuring that HR is properly managed and homogeneous management standards applied across all public administration settings. The civil service as an institution should be centrally managed by the political authority in charge, whereas HRM tools should be used under the responsibility of managers at line ministries and agencies through the implementation of the standards set centrally (section 8.1);
- Ensure a fair, predictable and objective remuneration system established in law, where the discretion of managers to determine individuals' take-home pay is reduced to a minimum (section 8.5).

This needs analysis will ascertain factors that promote professionalism. All, or some of those factors may be either identical to or closely related to the above-mentioned international legal instruments.

3.1.2. Professional independence of civil servants

Public administration bodies, including ministries, are hierarchical organisations and civil servants are subordinate and accountable to the political leadership. Civil servants – and especially those working in ministries – must be sensitive and responsive to ministers' policy requests. However, observance only of the duty of loyalty is not sufficient to guarantee professionalism and fair cooperation between politicians and permanent officials. Professionalism requires that civil servants enjoy a certain degree of professional independence.

The existence of professional independence means that civil servants are regularly involved in policy making and administrative decision-making and that there is a degree of delegation of authority. Civil servants are expected to freely express their expert advice – without first having been instructed to do so – and they enjoy effective legal protection from negative reactions by the political leadership whenever their professional assessments may conflict with e.g. party political preferences. Under such ideal conditions civil servants can confidently “speak truth to power”.

Governments cannot effectively meet today's challenges without public officials enjoying a degree of professional independence. There are several weighty reasons for this argument and all of them are relevant for a country like Ukraine:

- A. The *volume and complexity of governments' workloads* make it impossible for the political leadership to be involved in all issues. A form of political loyalty, which means that all matters – important and less important are submitted to the top leader, entails major risks of inefficiency and politicisation and of blurring the lines between politics and administration.
- B. The *ability to deal with novel issues* is crucial to any modern government and its administrative apparatus. Innovation can only to a limited extent be promoted by top-down decision-making in the form of e.g. ministerial instructions. There is professional consensus that innovative organisations and particularly one faced with a complex and dynamic environment must avoid the trappings of a centralised bureaucratic structure limiting the creativity and motivation of its organisational members.⁷
- C. A distinguishing feature of our time is the the development and dissemination of knowledge *at an ever increasing pace through decentral, non-hierarchical networks*, such as the internet and international professional communities. Governments cannot – and should not try to – be shielded from such trends. On the contrary, these developments should be reflected in the way in which government bodies, including MoDs, are organised and work. Distinctly hierarchical systems – presupposing knowledge is developed centrally and spread downwards through the chain of command – work against the horizontal, decentral logic of the modern information society and cannot adequately deal with the challenges of the 21st century.
- D. International standards for good governance increasingly have the objective of promoting impartiality, transparency and expertise in public administration. In order to achieve this aim, effective control and monitoring mechanisms must be in place. Only mechanisms – e.g. for internal audit – *that enjoy a certain extent of independence* can provide objective, professional opinions which are necessary to ensure that public resources are properly spent and not used for corruptive purposes.

⁷ See for instance Crozier, Michel (1964) *The bureaucratic phenomenon*, Chicago: University of Chicago Press, and Mintzberg, Henry (1979) *The Structuring of Organizations*, Englewood Cliffs, NJ.: Prentice-Hall Inc.

- E. In some countries *highly professional and well-resourced private actors seriously challenge fundamental interests of society*, i.a. democratic governance and the idea of a sovereign state. These interests can only be defended by well-functioning state institutions where civil servants not only possess but are also encouraged and required to fully use their expertise and skills. In political systems which do not recognise or effectively protect the idea of professional independence, there is an increased risk that state resources, including the public administration, are hijacked by external actors – not only political parties, but also interest groups, and in a country like Ukraine, business oligarchs.
- F. A *liberal democracy is a state based on the rule of law*⁸, which means i.a. that the exercise of public authority, including administrative decision-making⁹ is subject to the principles of reliability and predictability.¹⁰ SIGMA emphasises that these principles rely upon the notions of civil servants' impartiality and professional independence.¹¹ Officials should be able to oppose illegal or questionable political instructions. Civil servants' allegiance to the constitution and the legal order takes precedence over their loyalty to the government of the day.
- G. International organisations such as NATO and the EU can only function adequately when officials in member states' administrative bodies are *authorised to exercise autonomous professional judgement* and have a certain freedom of action. Thus, it is a principle in Euro-Atlantic defence cooperation that decision-making powers should be delegated as far down as is possible and prudent.

The features of national systems of HRM may influence the extent to which civil servants enjoy professional autonomy or are trapped in unfortunate dependency relationships with their superiors, for instance. Crucial questions are whether civil servants owe their position to their professional merit or to close contacts with politicians or other influential people; whether their salaries and other rewards are determined on the basis of objective and transparent criteria or according to the discretion of managers; and whether they have confidence that the rule

of law prevails or feel they are at the mercy of arbitrariness and unpredictability.

To ensure that the notion of professional independence functions as it should – and is not misused – it must be balanced against and supported by other legal and institutional mechanisms. Thus, a number of *caveats* should be borne in mind.

What is required is an *appropriate* and not a *maximum* level of professional autonomy. As we have already indicated, the idea of civil servants' professional independence must be weighed against other, possibly conflicting considerations, especially their duty of loyalty to the government of the day, their constitutional and legal obligations, and their duty of impartiality and neutrality. Advanced Western democracies have found reasonable balances between these considerations and ways to manage tensions between them.

Giving wide latitude to civil servants who do not have necessary proficiency is uniquely problematic. And conversely: What is the purpose of recruiting highly qualified civil servants if they are only supposed to technically execute orders whose content they have had no opportunity to influence, or to deal with trivial matters requiring no professional judgement? It is only the combination of expertise and independence which makes sense. Civil service professionalism as defined in the present paper is largely a function of expertise and proper levels of autonomy. Indeed, some international experts use the two variables in an even wider sense as the key indicators of the overall quality of government.¹² HRM systems must therefore – in addition to appropriate degrees of independence – uphold the level of expertise of civil servants by arrangements for i.a. meritocratic recruitment and promotion and for training and performance appraisal.

Saying that civil servants enjoy a certain degree of professional autonomy does not mean that they are unaccountable. Whenever they act without prior instructions there should be *ex-post* control of their decisions, which could be the basis for defining more precise limits to their scope of discretion if need be. Conversely, there must be mechanisms that effectively prevent officials from having to perform illegal orders or become subject of unjustified disciplinary reactions.

⁸ *Ibid.*, note 21, p. 419.

⁹ Kalypso Nicolaïdes and Rachel Kleinfeld observe that "Such interpretative reductionism leaves outside the 'Rule of Law' framework a wider understanding of the concept, whereby the 'Rule of Law' would also embrace the activity and decisions of all those holding functions of authority, in both the public and the private sectors, including governments and public administrations, and their judicial control by the administrative and constitutional justice systems." See Nicolaïdis, Kalypso and Rachel Kleinfeld (2012), "Rethinking Europe's 'Rule of Law' and Enlargement Agenda: The Fundamental Dilemma", *SIGMA Papers* no. 49.

¹⁰ OECD (1999), "European Principles for Public Administration", *SIGMA Papers*, no. 27.

Available at: <http://dx.doi.org/10.1787/5kml60zwd7h-en>.

¹¹ *Ibid.*, note 8, p. 11.

¹² Fukuyama, Francis (2013), "What is Governance?", *Governance: An International Journal of Policy, Administration, and Institutions*, 26(3), pp. 347–368.

Our emphasis on professional autonomy must be seen in light of the fact that Ukraine was for seven decades under communist rule. A key tenet of communism was the notion of the public administration as a pliable instrument at the service of the ruling class, i.e. the Communist Party. This doctrine was clearly incompatible with the idea that the administrative apparatus should enjoy a certain extent of professional independence. (See textbox 1 below).

Textbox 1 Party-state relationships in former East Bloc countries¹³

According to Lenin, Stalin, and other leaders in the former Bloc, the *avant garde* of the proletariat was the Communist Party whose key weapon in enforcing the dictatorship of the proletariat was the State apparatus. Generally, a certain division of labour between the Party and the state administration characterised the systems of public administration of the communist states. The state bureaucracy did not have much in common with public administration in developed democracies providing support to the government on the basis of the principles of professionalism, impartiality and the rule of law. At all levels the state structures were subordinate to parallel structures of the party that were responsible for political decision-making, and that directed and controlled the executive. The latter provided limited professional input to processes of policy development. Moreover, the concept of Party supremacy has been seen to put the party leadership above the law and override all sense of constitutionality

Many researchers have noted that mind-sets and practices associated with communism continue to influence the behaviour of political leaders and civil servants in Eastern and South-eastern European countries several years after the communist regimes collapsed. The belief that civil servants have, first and foremost, a duty to obey orders from their superiors is strong. Far less developed is the idea that the role of the civil servant also involves taking initiatives and expressing disagreement with the political leadership when this is required.

The fact that ideas associated with communist authoritarianism still linger on makes it difficult to fully establish an administrative culture founded on established Western principles in former communist countries. This effect is also evident in defence sector reform. Writing about Georgia, Maka Petriashvili¹⁴ observes that, "Despite

the fact that Georgia did not have a large number of military officers serving in the USSR army, personnel management as well as institutional arrangements were heavily influenced by the Soviet legacy and [were] understood as centralised administration. Personnel management appeared hard to reform even after the change of system and eradication of corruption. Therefore it has been a subject of harsh critique for decades."¹⁵

3.2. International standards regarding civilian-military relationships

MoDs include military as well as civilian staff. This report is primarily concerned with the professionalism of the latter group, i.e. civil servants in charge of key ministerial functions such as policy preparation, planning, budgeting and procurement. Civilian control is a key tenet of Euro-Atlantic defense. In NATO member states civilians usually constitute by far the largest proportion of all MoD employees.¹⁶ We find similar patterns in ex-communist countries now seeking NATO membership.

The balance between the numbers of civilians and military may have significant impact on the functioning and performance of MoDs and hence the role and influence of the military in the political system. Three issues are particularly important:

Firstly, MoDs with a significant number of highly professional civilian experts may produce better policies than those with predominantly military staff.¹⁷ Civilian decision-makers may be less influenced by narrow corporatist biases, have a broader perspective on defence issues and possess key competencies that are not naturally conveyed through military education and experience.¹⁸ The argument is heard that in Eastern and Central European countries, poor civilian control in combination with financial difficulties has threatened to undermine all types of defence institutions, including the armed forces.¹⁹ Moreover, the existence of only a slight proportion of

13 The content of the textbox relies on Verheijen, Tony (2001), *Politico-administrative Relations*, NISPAcee (Network of Institutes and Schools of Public Administration in Central and Eastern Europe), the assessment "put the party leadership above the law and override all sense of constitutionality" is taken from, Davies, Norman (2001), *The Heart of Europe: The Past in Poland's Present*, Oxford University Press, p. 32.

14 Deputy Head of Human Resources and Professional Development Department of the Ministry of Defence of Georgia.

15 Petriashvili, Maka (2014), *Defense institution building: the dynamics of change in Georgia and the need for continuity of effort*, thesis, Naval Postgraduate School, Monterey, California, p. 28.

16 In the U.S. Department of Defence, which is obliged to use civil service personnel whenever possible, 84 per cent of all positions are occupied by civilians. In the French MoD this percentage is 70 per cent, see Ratchev, Valeri (2011), "Civilianisation of the Defence Ministry. A Functional Approach to a Modern Defence Institution", *DCAF Regional Programmes Series* no.7, The Geneva Centre for the Democratic Control of Armed Forces.

17 See for instance Raffetto, Shackley F. (2002), "Civilian Control over the Military in a Democracy: Defining and Analyzing the Civil-Military Gap and the U.S. Experience", Conference Paper, Geneva Centre for the Democratic Control of Armed Forces.

18 Ratchev (op.cit.), footnote 16, pp. 16 and 17.

19 Donnelly, Chris, (2002) "Reform Realities", in *Post-Cold War Defense Reform Lessons Learned in Europe and the United States*, edited by Gyarmati, Istvan and Winkler, Theodore, 36-44, Brassey's Inc., Washington, DC, pp. 37-38.

civilian expertise in MoDs may translate into a militarised system that will be more likely to produce a military answer for security problems, rather than a broader consideration of the full range of policy instruments.

Secondly, civilian experts may function as bridge-builders. They can help ensure that military concerns are explained to the wider public and that democratic procedures and political priorities are made clear to the armed forces. This may provide a more informed debate on defence issues and better defence decision-making.

Thirdly, the deeper the institutionalisation of merit-based HRM in ministries of defence (and across all civilian authorities), the better the civilian staff can maintain its professional credibility, not only vis-à-vis the military but also in relation to the political leadership.

All in all, having a civilian staff in the MoD that is competent and of sufficient size is a precondition for democratic and civilian control over the armed forces.²⁰ Here we should add, *appropriate* democratic and civilian control. In a number of post-communist countries attempts to establish civilian control cannot be said to deserve this designation. In these countries controlling the military is said to have meant little more than party political infiltration of the officer corps. Indeed, the extent of politicisation and lack of civilian expertise in defence matters have threatened democratic control in the sense e.g. NATO uses this concept.²¹ Even after NATO accession the defence establishments of new member states were characterised by weak understanding of military issues among civilian decision-makers, corruption, bribery and favouritism²²

This state of affairs is attributed to a Soviet and communist legacy.²³ In the Warsaw Pact member states, military establishments were distinctly militarised: "anyone who played a role [...] wore a uniform"²⁴. These traditions harmonise poorly with Euro-Atlantic standards for management of defence institutions. Therefore, defence experts in former communist countries – having achieved or seeking membership in the EU and NATO – have

strongly emphasised the need for institutional mechanisms that ensure adequate civilian expertise in MoDs.²⁵

3.3. Current reform aims of the Ukrainian Government

As we have already indicated the Ukrainian Government has announced far-reaching reforms that – if effectively implemented – will support key elements of the normative framework outlined above. Thus, the revised military doctrine of Ukraine²⁶ which was approved by President Poroshenko on 24 September 2015 states that the country will:

- "[Establish] a system of military security of the state that would [...] correspond to criteria needed for membership of Ukraine in the European Union and NATO"
- "[Improve] the system of democratic civilian control over the security sector and defence by the standards of the EU and NATO".

The National Security Strategy of Ukraine²⁷ points out that "institutional weakness" [...] "lack of professionalism" [...] "an outdated model of public institutions and degradation of the public service" constitute threats to the national security of Ukraine. To meet these threats the strategy proposes:

"[a] reform of the civil service, forming highly qualified, patriotic, politically neutral civil servants, reforming training, retraining and advanced training of public service, implementation of modern ethics for civil servants, military personnel, law enforcement officers."

In the same vein, the Concept of the development of the security and defence sector of Ukraine, adopted by presidential decree on 14 March 2016²⁸ states that reform of this sector will be based on *i.a.* the rule of law, expertise, depoliticisation, and democratic and civilian control over the armed forces. Moreover, the document announces the introduction of European principles of HRM in the defence and security personnel systems of Ukraine.

The Strategic Defence Bulletin which was adopted by presidential decree on 6 June 2016 outlines a plan for

20 Ratchev (*op.cit.*), footnote 16, p.10.

21 Epstein, Rachel A. (2008), *In Pursuit of Liberalism: International Institutions in Postcommunist Europe*, John Hopkins University Press, Baltimore, Maryland, p. 108.

22 Matei, Florina Cristiana (2012), "NATO, the Demand for Democratic Control, and Military Effectiveness Romania" in *The Routledge Handbook of Civil-Military Relations*, edited by Bruneau, Thomas C. and Matei, Florina Cristiana, 318–330, Routledge, New York, p. 327.

23 Petriashvili (*op.cit.*) footnote 15, p. 52.

24 Tagarev, Todor (2008), "Civilians in Defense Ministries", *The Quarterly Journal*, summer 2008, p. 112.

25 See Tagarev, (*op.cit.*), footnote 24, especially pp. 112 and 113.

26 Available at <http://www.president.gov.ua/documents/5552015-19443>

27 Decree of the President of Ukraine no. 287 of 26 May 2015 Available at: <http://zakon3.rada.gov.ua/laws/show/287/2015>

28 Presidential decree (№92/2016), available at <http://www.president.gov.ua/documents/922016-19832>

reform of the defence system. It proposes to establish democratic, civilian control over the defence forces through increasing the effectiveness of the ministry of defence. The bulletin emphasises the need to professionalise the civilian MoD staff, and announces that by the end of 2018, the minister of defence, the deputy ministers of defence, the state secretary, and heads of departments are civilian. Moreover, the bulletin proposes to “change the mentality of personnel working in defence institutions”, and to implement a new leadership style based on Western ideas about the relationship between managers and their subordinates.

An important measure to reform Ukrainian state institutions including the MoD is the new Law on Civil Service, which the Ukrainian Parliament, *the Verkhovna Rada*, adopted on 10 December 2015 and which entered into force on 1 May 2016. Although not perfect, the law represents a significant step towards realising a civil service system based on integrity and professional merit. The law is largely in line with the international standards outlined above, and should constitute a sound basis for HRM reforms in the ministry of defence as well as other Ukrainian state institutions. The NATO-Ukraine Commission emphasised the need for effective implementation of the new Law on Civil Service.²⁹ The MoD anti-corruption programme adopted in 2015 foresees an action plan for implementing this.

Another key document guiding reforms across the Ukrainian public administration is the public administration reform strategy covering the period 2016-2020, which the Cabinet of Ministers adopted on 24 June 2016.³⁰ The overall goal of the strategy is to reform the system of public administration, *i.a.* the civil service system in accordance with European standards. In order to achieve this aim the strategy claims that *i.a.* the following problems have to be addressed:

- Lack of capacity of state bodies to prepare and implement reforms;
- High level of corruption across the civil service;
- Inadequate arrangements for HRM in ministries and other central executive authorities.

Thus, the strategy focuses attention on *i.a.* measures to:

- prevent corruption among civil servants;
- ensure open competition to all civil service positions and promotion based on merit;
- improve and upgrade requirements for civil service positions;
- upgrade the HRM functions of state administrative bodies;
- strengthen the reform capacities of and establish reform teams in state administrative bodies.

²⁹ See annex 1 to notice by the NATO-Ukraine Commission, 8 December 2015, p. 5.

³⁰ The Strategy of reforming the public administration of Ukraine 2016 – 2020 is available at, <http://www.kmu.gov.ua/control/uk/cardnpd?docid=249175778>

Constitutional principles need to be institutionalised in order to govern the actual decision-making behaviour of state bodies.

4. The legal status of MoD civil servants and members of the Armed Forces

4.1. The Constitution

The Ukrainian Constitution was passed in 1996 and has been amended several times since. The last amendment took place in 2014. The Constitution includes guiding principles for the status of civil servants, by establishing that the fundamental elements of the state service shall be determined by law (article 92) and that Ukrainian citizens have a universal right to equal access to employment in the civil service (article 38). Thus, the Constitution provides a basis for developing a meritocratic civil service. Equal access implicitly requires fair, transparent and open competition among citizens to enter the civil service. Conversely, recruitment to civil service positions by means other than fair and open competition (such as patronage, nepotism, and clientelism) could be considered unconstitutional and should therefore be banned. The Constitution also outlines certain elements for the management of the civil service by stating that the cabinet of ministers is the supreme body responsible for the management of the state administration (article 113).

According to the Constitution (articles 36 and 39) the basic rights of *citizens*, such as the freedom of association in political parties or professional associations or the freedom to demonstrate can be limited by law for reason of national security, public order or other citizens' rights and freedoms. On these constitutional grounds, certain fundamental rights *civil servants* may have as citizens can be restricted for the sake of the public interest (or public order, as the Ukrainian constitution puts it). This limitation of rights could include participation in political parties or in trade unions (for example for members of military and security forces). The Constitution stipulates certain incompatibilities whereby

civil servants cannot be members of parliament (article 78) or perform a number of private activities (article 120).

Likewise, according to article 42 of the Constitution, the right to free exercise of business activities, which applies to all citizens, may be restricted by law for public officials (elected and non-elected, including civil servants) and officers (in the army, intelligence services or the police). This provision provides a basis for establishing an appropriately regulated integrity system in the civil and military services.

Constitutional principles need to be institutionalised in order to govern the actual decision-making behaviour of state bodies. While providing a basis for building a civil service system which is based on professional merit, integrity and the rule of law, the Ukrainian Constitution does not depict a model of public administration. Lack of constitutional guidance regarding the design and functioning of the public administration - especially when it comes to separation of politics and administration - may obstruct the development of a professional, efficient and effective civil service serving the general interest.

Moreover, the Constitution is imprecise concerning the attribution of responsibilities among various constitutional bodies, especially the president, the cabinet of ministers and the parliament, a fact that hampers the smooth functioning of the state and the administration (and therefore of the civil service). With a high degree of probability, such difficulties will be aggravated in periods when the president and the prime minister belong to different political parties. This is particularly true for the MoD, where - as we already have noted - the minister of

defence has double reporting obligations – to the president and to the cabinet of ministers.

In conclusion, the Constitution of Ukraine does not propound a model of public administration and is imprecise in the distribution of responsibilities among certain key state bodies. This may hamper the functioning of the state administration and should be revised. However, on the positive side, the Constitution enshrines the basic fundamental rights of citizens in a free society while at the same time authorising the possibility of restricting the exercise of such rights for the sake of the public interest. The limitations of fundamental rights to civil servants, as outlined in the Constitution of Ukraine, are commonplace in many democratic countries, in particular, in the EU and OECD countries. Moreover the Constitution provides a basis for the development of a meritocratic civil service.

4.2. Ordinary legislation

In the Soviet Union (USSR), a Civil Service Law did not exist. All state employees were under the general Labour Code which offered no particular regulation of positions in the state administration let alone protection of holders of these positions. Such employees were considered on a par with workers in the state-owned industries. The absence of legal protection of public servants made it easy for the communist leadership to politicise the bodies of the state administration. Patronage practices and patron-client relationships, which according to Marx should have been abolished under Communism, prevailed and a system of *nomenklatura* and 'cadre policy' was introduced. (See textbox 2 below).

Textbox 2 The USSR *nomenklatura* system³¹

Nomenklatura (Latin) means *list of names*. The concept referred to the Communist Party's practice to make appointments to key positions throughout the governmental system, as well as throughout the party's own hierarchy. Specifically, the *nomenklatura* consisted of two separate lists: one was for key positions, appointments to which were made by authorities within the party; the other was for persons who were potential candidates for appointment to those positions. Parallel with the *nomenklatura* were patron-client relations. Officials

who had the authority to appoint individuals to certain positions (patrons) cultivated loyalties among those whom they appointed. The patron (the official making the appointment) promoted the interests of clients (appointees) in return for their support.

Subsequent to the declaration of independence of Ukraine (1991) the *Verkhovna Rada* adopted the Law on Civil Service of 1993³² which covered all civil servants working at the ministry of defence. The decision to prepare this law was taken by the cabinet of ministers following a visit to France in March 1992.

The 1993 Law has been subject to many amendments; in some cases to align it with constitutional principles. However, as these amendments were adopted in an unsystematic way, they have produced gaps, overlaps and confusion. Moreover, the civil service is also covered by another piece of legislation, the Labour Code³³. For these reasons, the 1993 legal framework for the civil service lacked coherence and unity. As OECD/SIGMA put it in 2006, the 1993 Civil Service Law was not designed to serve a democratic state but an authoritarian, faulty and undemocratic political regime, where the bureaucracy was to be skilled at following orders and instructions from above, not at being accountable for shaping and implementing public policies and laws.³⁴

As already mentioned a new Civil Service Law³⁵ was passed by Parliament in late 2015 and entered into force on 1 May 2016. This new law still has flaws but, if effectively implemented, it will represent an important step towards professionalisation and de-politicisation of the civil service. Thus, regarding the final draft version of the law - which in all key areas was identical with the text adopted by the *Verkhovna Rada* - SIGMA observed that it " [...] largely complies with general EU standards. In general it must be underlined that – in comparison to current legislation – considerable progress has been made, especially in the following areas: introduction of state secretaries, competitive recruitment, well-regulated dismissals and disciplinary procedures [...]. The draft is also the attempt to bring the salary system in line with EU good practices."³⁶

32 Law no. 3723 on 16 December 1993. Available at: <http://zakon4.rada.gov.ua/laws/show/3723-12>

33 Law no. 322 on 10 December 1971. Available at: <http://zakon4.rada.gov.ua/laws/show/322-08/print1434392921471245>

34 <http://www.center.gov.ua/en/contacts?layout=edit&id=38>

35 Law no. 2490 on 10 December 2015. Available at: <http://zakon3.rada.gov.ua/laws/show/889-19>

36 SIGMA, *Comments on the Draft Law of Ukraine on Civil Service*, November 2015, p. 18.

31 The information in the textbox is based on Wikipedia's article on *Nomenklatura*, available at <https://en.wikipedia.org/wiki/Nomenklatura>.

The analysis made by the CIDS assessment team largely coincides with this appreciation by SIGMA. We will discuss in more detail the provisions of the new law in the ensuing sections of this report.

The Law on the Armed Forces³⁷, as amended, defines *i.a.* the functions, organisation, and leadership structure of the armed forces (the preamble of the Law). Article 16 provides legal and social protection for the military personnel, while article 17 bans members of the armed forces from being members of political parties and trade unions, as well as from striking. This provision also states that members of the armed forces may have their freedom to collect or disseminate information restricted. However, the Law does not define what kind of information is meant.

The Law on Military Duty and Military Service³⁸ of 1992, as amended, regulates in a detailed way the conscription of personnel into the armed forces. The Law also determines the various military ranks both in the Army and in the

Navy, and the procedure for appointment to military posts. Another law³⁹ of 1991 regulates the civilian public service, which is an alternative to military service recognised by the Constitution.

Overall, the legal framework for the armed forces shows signs of having been adopted without adequate prior consideration and planning regarding the functions and organisation of the military in post-Soviet Ukraine.

In conclusion, the current Constitution, even in an incomplete form, provides grounds for the development of a professional, meritocratic public service, but the 1993 Civil Service Law is insufficient and needs a thorough overhaul. The new legal text (Law № 2490) on the Civil Service could pave the way for a significant improvement of the situation of the civil service, including in the MoD. The legislation on military personnel needs to be better aligned with the Constitution.

Unpublished, but forwarded to CIDS experts by the Ukrainian Civil Service Agency.

37 Law no. 1934 of 6 December 1991. Available at: <http://zakon4.rada.gov.ua/laws/show/1934-12>

38 Law no. 2232 of 25 March 1992. Available at: <http://zakon4.rada.gov.ua/laws/show/2232-12>

39 Law no. 1975 of 12 December 1991. Available at: <http://zakon3.rada.gov.ua/laws/show/1975-12>

A number of positions in state institutions are distinctly political.

5. Separation of politics and administration and politicisation of the public service

5.1. The formal point of departure

A number of positions in state institutions are distinctly political. They are regulated by constitutional provisions: namely the positions of prime minister, first deputy prime minister, deputy prime ministers, ministers, first deputy minister and deputy ministers. The prime minister is appointed by the parliament on the proposal of the president, ministers on proposal of the prime minister. When it comes to the ministers of defence and foreign affairs, special rules apply. These ministers are appointed by the parliament but on the proposal of the president. They may be dismissed by the parliament with the president's consent.

First deputy and deputy ministers are appointed and dismissed by the cabinet of ministers except for the first deputy and deputy ministers of defence, and Chief of the General Staff, who are appointed and dismissed by the president.⁴⁰

Ministers are entitled to employ – without competition – advisors (or as they were also titled in Ukraine “employees of the patronage service”). Until 1 May 2016 these officials had status as civil servants and there was no upper limit on the number of advisors a minister may have. Now the maximum number is fixed at ten and the advisors are no longer civil servants.⁴¹

5.2. Politicisation and state capture

It is widely held that Ukrainian state institutions are heavily politicised⁴², that they are captured by political agents such as business elites (in Ukraine often referred to as “oligarchs”), political parties, or perhaps more appropriately: by political parties dominated by business oligarchs. Arguably, in Ukraine, political parties have become the main agents used by business elites to acquire influence and seize state assets. Oligarchs finance political parties⁴³ and oligarchs or people loyal to them predominate as members of parliament and government ministers.

The extent to which ministers may be subject to external pressure to give particular political groups control over appointments and economic flows in state institutions and enterprises, including the defence industry, became apparent when the Minister of Economic Development and Trade, Mr. Aivaras Abromavicius, tendered his resignation in early February 2016. In the minister's own words there were persistent attempts to have him serve as cover-up for corruption and act as a puppet for external political agents looking out for no other interests except their own profit. See textbox 3 below.

40 Presidential Decree no. 406 of 6 April 2011. Available at: <http://zakon4.rada.gov.ua/laws/show/406/2011>

41 See the Law of Ukraine “On Central Executive Authorities”, article 12 Available at: <http://zakon0.rada.gov.ua/laws/show/3166-17>.

42 We use the term “politicisation” in a way which is very close to the definition offered by Anna Grzymala-Busse, in “Political competition and politicisation of the state in East Central Europe”, *Comparative political studies*, 10/36 December 2003, p. 1125: “A politicised state's structures are captured by political competitors such as interest groups or political parties. Administration and regulations can then be shaped by the ad hoc needs of political agents rather than by a priori policy objectives aimed at providing public goods. Legal enforcement favors private interests, whereas policy favors resource extraction for private ends (rent seeking). Such rents can consist of jobs, contracts, or financial transfers. Political loyalty, rather than merit, is the criterion for obtaining them.”

43 However, in late 2015 the Verkhovna Rada adopted a Law on Amendments to certain Laws of Ukraine regarding prevention of and the fight against political corruption, available at: <http://zakon3.rada.gov.ua/laws/show/731-19>. The new law is seen as an instrument to break oligarchs' grip on political life in Ukraine. Among other things the law limits contributions to political parties from legal and physical persons, and introduces mechanisms for funding parties from the state budget and for stricter control of parties' financial activities

Textbox 3 Statement by a Ukrainian minister saying he refuses to bend to corruption pressure⁴⁴

"Today, I decided to tender my resignation as the Minister of Economic Development and Trade of Ukraine. Here is why. It has become clear that any kind of systemic reform is decisively blocked. It is more than the mere lack of support or political will. These are concrete actions aiming to paralyse our reform efforts, ranging from a sudden removal of my security detail to the pressure to appoint questionable individuals to my team or to key positions in state-owned enterprises.[...]

We learned how to overcome the resistance of the old system. It turns out that some of the "well-meaning newcomers" are much worse. Neither me, nor my team have any desire to serve as a cover-up for the covert corruption, or become puppets for those who, very much like the "old" government, are trying to exercise control over the flow of public funds. I am not willing to travel to Davos and talk about our successes to international investors and partners, all the while knowing that certain individuals are scheming to pursue their own interests behind my back. [...They ...] attempted to influence key appointments in state-owned [...] factories and the National Accreditation Agency.

This entire rampage culminated in [their] desire to have [their] personal deputy minister of economy – one responsible for Naftogaz and other state-owned companies. [Their] candidate simply showed up with a complete set of documentation, and told me: "I want to be your deputy. I'm part of [their] team and my appointment was approved upstairs." Following this conversation, I received a call [...] whereby it was emphatically suggested that I hire this individual, as well as another one, who would take the position of my deputy in charge of defence industry. I responded by declining to take part in this corrupt arrangement and by offering to resign my post."

In interviews with the CIDS assessment team expert observers of political developments in Ukraine stated that in all probability the experience of Mr. Abromavicius is not an isolated episode, but a symptom of a wider, systemic problem. According to Ukrainian studies, civil servants feel under constant pressure to engage in unconventional, even illegal activities.⁴⁵

Such problems also affect the MoD. In particular, analysts point to the 2012-2014 period when leading MoD officials had close links not only to business elites but allegedly also to the Russian secret services.⁴⁶ The analysts claim that as a result of these connections, decisions were made causing great harm to the MoD and the Ukrainian defence system. For instance one report argues that "Disorganisation of the Ministry of Defense of Ukraine under the guise of "reform" made the effective management of the Armed Forces of Ukraine impossible."⁴⁷ Both Ukrainian and international observers have tended to argue that these damages were intentionally inflicted in order to serve the interests of the external patron, the Russian government.⁴⁸

Information gathered during the preparation of this report shed light on the mechanisms that were used in the 2012-2014 period to apparently hijack the MoD for corruptive and other criminal purposes, and how *i.a.* the HRM system facilitated such actions. In line with widespread practice and – according to MoD officials – without violating legal provisions – the last two ministers of defence before the Revolution of Dignity in February 2014 brought a large number of their own people with them to the ministry. While some of these people had the status of assistants to the minister and thus were parts of the MoD, others, the so-called "*smotriashchykh*" or "watch-dogs", were operating without any formal basis and without being on the ministry payroll.

All MoD decision-making levels – and especially units managing money flows – were effectively controlled by the ministers' people. "Watch dogs" were present in all MoD departments and instructed department heads on the content of decisions to be taken. Inside the ministry, the activities of the ministers' political entourage were accepted or at least tolerated without protest, although it was clear that activities were, or at least *could be* illegal and harmful to the defence system.

44 The following extract is taken from a public letter of 3 February 2016 signed by the Minister of Economic Development and Trade of Ukraine, Mr. Alvaras Abromavicius and published on the official website of the ministry.

45 Афонін Е. А. Функціональна і компетентнісна готовність державних службовців України до здійснення публічного адміністрування в умовах демократії / Е. А. Афонін, О. М. Балакірева // Український соціум. - 2015. - № 1. - С. 7-22. (Afonin E. A. *The ability and willingness of Ukrainian civil servants to serve the public administration of a democracy*, Ukrainian society - 2015. - № 1, pp. 7-22, available at, http://nbuv.gov.ua/UJRN/Usoc_2015_1_3

46 See for instance, The national institute for strategic studies, proceedings, *To the second anniversary of the Russian aggression against Ukraine*, 20 February 2016, available at http://www.niss.gov.ua/public/File/2016_book/Eng_ru.pdf.

47 The National institute for strategic Studies, proceedings, referred to in footnote 49, p.8. Other Ukrainian sources arguing along the same lines are available at: <http://euromaidanpress.com/2014/07/16/who-destroyed-the-ukrainian-army/#arvlbdata>. <http://ukrainianweek.com/Politics/115444> <https://news.pn/en/RussiaInvadedUkraine/110615> <http://www.freerepublic.com/focus/chat/3136396/posts>

48 See interview with the former Ukrainian Minister of Foreign Affairs, Borys Tarasjuk, in the Vienna daily *Die Presse*, 6 June 2014, "Der Westen hilft uns nichts" (The West does not help us) and Malek, Martin, "Moskaus Schlachtpläne. Hintergründe zu Russlands Krieg in der Ukraine", *Osteuropa* 9-10/64, September-October 2014, p. 111.

MoD decision-makers interviewed by the CIDS assessment team point out several factors that may explain the absence of explicit disapproval and protest. Senior members of the MoD permanent staff, especially department heads, owed their positions primarily to their loyalty to the minister, only secondarily to their professional competence. According to CIDS' informants, their expert roles were further compromised by the fact that they were offered – and, as it seems, accepted money from corruptive schemes organised by the political leadership. Moreover, the MoD's strong emphasis on officials' duty of loyalty to the minister and the obligation to obey his orders and not question them, did its part to silence possible critical voices. The fact that the MoD was an almost completely closed organisation, effectively cut off from its environment made it difficult for the outside world to gain knowledge of, let alone react to, even gross and socially harmful mismanagement.

As we have indicated, in the 2012-2014 period the MoD political leadership may have been aware of and assisted possible Russian plans to acquire Ukrainian territory.⁴⁹ According to information received by the CIDS assessment team, in 2013 a leading member of the Ukrainian General Staff warned of suspicious Russian activities in the Crimea. Soon after the minister of defence dismissed him, allegedly because he had violated regulations on storage of classified material. At the same time, officers with Russian loyalties were appointed to senior positions in the defence and security establishment.

The CIDS assessment team made a brief study of the changes in permanent MoD positions that were made during one particular change of government well before the events described in the paragraph above.⁵⁰ On this occasion six out of a total of twelve MoD department heads, who all occupied permanent positions, were replaced by individuals who were supposed to be more competent or loyal to the minister. If the official whom the minister wants to replace is a military officer, the procedure for removal is simple. The official in question is ordered to take up another position in the military or in the MoD. If the relevant official is a civil servant, a common procedure is to introduce organisational changes, which in turn may justify replacement of staff members. The argument is heard that department heads at the MoD may be appointed and

removed quite freely. The fact that senior civil servants, especially heads of departments, are frequently replaced across the Ukrainian public service creates managerial instability to such an extent that it harms or precludes professionalism. Members of the Civil Service Agency consider this a major problem of the Ukrainian civil service.

Decision-makers in the Ukrainian public service, still use – or used until quite recently – *kompromat*⁵¹, i.e. “compromising material,” in order to conduct personnel reshuffles. *Kompromat* is a technique for domination and manipulation that was widespread in the Soviet Union and is still used in ex-Soviet republics.⁵² A previous senior MoD official reported to the CIDS assessment team that, “an official may be informed of the existence of incriminating evidence (genuine or fake) against him, and told that this material will be sent to the prosecution service or/and to the press with a request for further investigations unless he resigns voluntarily.”

As suggested above, the permanent MoD staff have limited professional independence. A formal expression of this state of affairs is the fact that largely it is only the minister or his (politically appointed) deputies who have the authority to make decisions.⁵³ Recently, the minister made a decision to delegate decision-making powers. However, heads of departments indicate that it is difficult to make this arrangement work properly, largely because the mentality of command and control is too ingrained for MoD officials to risk or allow decisions to be taken without the existence of prior instructions or approval.

One department head says that, “The mind-set of MoD officials has not changed in the past couple of years. The key slogan is “obey, do not think”. Officials do not take initiative; they are just busy with huge amounts of paperwork, which has no other destination than the archive”. He complains that conclusions are made and issued in the form of orders without preceding analysis or

⁴⁹ The question of whether Russian aggression against Ukraine in 2014 was the result of a long planned or a spontaneous decision is disputed. See Treisman, Daniel, *Why Putin took Crimea. The Gambler in the Kremlin*, Foreign Affairs June 2016.

⁵⁰ Although this particular case is some 9 years back, Ukrainian respondents argue that the key methods that were used are still relevant.

⁵¹ Wikipedia offers the following definition, “Kompromat (Russian: компромат, short for компрометирующий материал) is the Russian term for compromising materials about a politician or other public figure. Such materials can be used to create negative publicity, for blackmail, or for ensuring loyalty. Kompromat can be acquired from various security services, or outright forged, and then publicised by paying off a journalist. Widespread use of kompromat has been one of the characteristic features of politics in Russia and other post-Soviet states”, see, <https://en.wikipedia.org/wiki/Kompromat>.

⁵² On *kompromat* as a political method see Wilson, Andrew (2002): *The Ukrainians: Unexpected Nation*. Yale University Press, Yale Nota Bene Book, pages 182 and ff.

⁵³ In a public statement 30 March 2016 Defence Minister Stepan Poltorak, said that “There are 770 persons in the Ministry, 300 people support its activities, and only one person takes decisions.”, statement available at <http://www.mil.gov.ua/en/news/2016/03/30/minister-of-defence-we-must-start-reforms-from-the-ministry-of-defence-of-ukraine/>

discussion; the end result being poor decisions or decisions, which cannot be implemented at all.

The MoD climate of work does not seem to encourage or allow free exchange of opinions to an extent many MoD employees want. While a majority, 55 per cent of officials included in the anonymous survey agree with the statement that they have full freedom to express their own opinions, a significant minority, 39 per cent, disagree. The latter percentage is appreciably higher than those CIDS has found in studies of MoDs in Western Balkan countries.⁵⁴

5.3. Proposed reforms

A key goal of the civil service reform intended by the 2015 Law is to depoliticise and strengthen the meritocratic professionalism of the public service. The new Law on Civil service establishes three categories of civil servants – those included in the senior civil service (civil servants of category A), the middle management (civil servants of category B) and rank and file civil servants (category C). The various categories are associated with different recruitment procedures, job descriptions and qualification requirements. All three categories are to be filled through professional, merit-based competition, although the specific procedures may vary from one category to another.

This regulation represents a big step towards really separating politics and administration. From now on there will be a clear separation between civil service and political positions. The problem, however, will be the enforcement of the new arrangement. This will indeed be the litmus test to assess the credibility of the new meritocratic civil service system introduced by the 2015 law.

Events which took place during the preparation of this study and which are reported above (textbox 3) may give reasons for concern when it comes to the political willingness to effectively implement the new law. While leading members of the Ukrainian political elite apparently support the idea of a meritocratic civil service, their actual behaviour gives reason to doubt whether they have really internalised this idea. Among those who put pressure on the Minister of Economic Development and Trade to employ “questionable individuals” (see textbox 3 above),

was a senior member of parliament (MP). It is noteworthy that the MP in question – along with his entire party group – on 10 December 2015 voted for the new Law on Civil Service, which intends to put an end to the type of corruptive practices described above. Observers reprimand Ukrainian elites for hypocrisy, pointing out that they have no greater desire than to be seen as Westerners in the West while, simultaneously, unhindered doing business the “Eastern” way.⁵⁵ The argument is heard that the particular interests of business elites rather than concerns for the general good still shape the staffing and decision-making of state institutions.

However, reactions triggered *i.a.* by the disclosure of the attempts at political arm-twisting of Mr. Abramavicius suggest that there are also civic and political trends working against such practices. Observers point to growing tensions within the ruling elite of Ukraine, between on the one hand reform-oriented politicians recruited from *i.a.* civil society organisations and on the other long-standing members of the established elite wary of making major changes in the inherited, oligarch-based system. As we have mentioned (footnote 43), steps have recently been taken to break oligarchs’ financial grip over political parties.

Whatever the political constellations in Ukraine may be, a situation where the political leadership only pays lip service to legal principles is one of the main reasons why key elements of civil service legislation in several countries only remain laws on paper and not laws in action. This remains as a key lesson drawn from the experience of the EU accession process of Eastern and Southeastern European countries.

In conclusion, even if on paper there is now a fairly clear distinction between political and civil service positions, the government’s actual practice conveys a different impression. The political culture will continue to pervade the administrative culture, and most personnel decisions will continue to be based on political or managerial discretion or expediency unless the political will to establish a meritocratic civil service accompanies the new civil service legislation. The introduction of secretaries of state as the highest civil service position in ministries could palliate the politicisation problem, but its effectiveness remains to be seen.

⁵⁴ The corresponding percentages in CIDS studies in Bosnia and Herzegovina, Kosovo, and Montenegro, were respectively, 14, 11, and 16.

⁵⁵ Mackow, Jerzy (2016), *Die Ukraine- Krise ist eine Krise Europas*, TAPETA-Flugschrift, Berlin (Kindle edition loc. 1882).

Merit-based open competition was not mandatory to enter the MoD or the civil service under the 1993 Law on Civil Service.

6. Recruitment, promotion and termination of employment

6.1. Recruitment

Merit-based open competition was not mandatory to enter the MoD or the civil service under the 1993 Law on Civil Service. According to article 15 of this law, recruitment to civil service positions was based on competition unless otherwise provided for by law.⁵⁶

The 1993 LCS specified several exceptions to the competition principle. According to the Civil Service Agency, the exemption clause has been widely used. According to data in the agency, as of 1 January 2015 more than 60 per cent of incumbent civil servants were appointed on a non-competitive basis.⁵⁷ In addition, buying and selling government positions occurs or has occurred until recently in the Ukrainian public service. Apparently, the practice expanded significantly in the early 2000s and facilitated, according to some observers, the infiltration of government institutions by organised crime.⁵⁸

MoD vacancies are announced on the MoD website and in the Armed Forces Weekly, *Narodna Armija*, and not for instance in one or more major newspapers. The MoD does not seem to take steps to increase the number of applicants. This is especially true when it comes to potential applicants who are not former military servicemen or are already somehow connected to the defence sector. MoD officials express concern that there are few applicants for MoD vacancies.

The MoD uses a standard application form. Information about e.g. the candidates' education and work experience is provided in separate documents attached to this form. While there are no formal restrictions on the appointment of women to MoD positions, vacancy announcements include no affirmative action statements regarding female applicants.

In the case of competitive recruitment, a selection board prepares the employment decision in Ukrainian state agencies such as ministries. The MoD board has 10 permanent members. It includes a representative of the HR unit and the trade unions respectively, as well as MoD officials – mostly it seems – department heads selected by the senior management. A representative of the unit where the vacancy has arisen is invited to take part in the commission's work. A deputy minister chairs the board. Apart from procedural information, board members receive no training, for instance regarding interview skills.

The members of the selection board are provided with *i.a.* the job description of the vacancy, the job specification, and the received application forms. It is noteworthy that no agreed list of interview questions seems to be prepared or circulated among the board members. This appears to increase the risk that irrelevant or discriminatory questions are asked, and eventually given weight.

To assess the qualifications of the applicants, the selection board uses interviews and written tests. It seems that the board places particular emphasis on the candidates' ability to memorise knowledge, especially the Constitution, the Law on Civil Service and the Law on Combating Corruption, as well as legislation related to the tasks of agency in question.

⁵⁶ The details of the competition procedure for entering the civil service is laid down in the Resolution of the Cabinet of Ministers no. 169 of February 15, 2002. Available at: <http://zakon5.rada.gov.ua/laws/show/169-2002-%D0%BF/ed20120428>

⁵⁷ The National Civil Service Agency of Ukraine, "Civil service in figures 2015" p. 25, Kyiv 2015. Available at: <http://www.center.gov.ua/en/press-center/articles/item/1358-civil-service-in-figures-2015>.

⁵⁸ Victor Solovyyov, "State-capture as a form of grand corruption: how much do civil service and state positions cost in Ukraine", unpublished paper, Kyiv 2015.

The selection board takes decisions by majority vote by raising hands. In most cases the vote is unanimous. A protocol of the board's decision is prepared. The protocol includes the names and other personal data of the candidates, their score in the recruitment tests and the outcome of the board's vote. Within thirty days' of the board's vote the minister or the first deputy minister has to issue the appointment decision. Although the minister is not bound by the board's recommendation, he normally follows it. According to information received by the CIDS assessment team, in some 10 per cent of the cases the minister does not choose the candidate nominated by the board. The minister is not bound to give reasons for decisions when he departs from the proposal of the board – and normally does not.

Interviewees indicate to the CIDS assessment team that the system of making decisions by raising hands may induce board members to vote for the same candidate as the chairperson of the board, normally a deputy minister. To be seen casting a vote that differs from that of the chairperson may involve a risk – at least an element of uncertainty in the strictly hierarchical administrative system of Ukraine, where there are few mechanisms – if any at all – which effectively protect the professional independence of civil servants. (More about this in chapter 10 below). Nevertheless, the chairperson does not always feel that he controls the board's decision-making. A former chair interviewed by the CIDS assessment team stated that from his position it was difficult to adequately evaluate the quality of candidates. "If the personnel unit wanted to, it could hide a candidate in order to promote for example the son of a general". In the same vein another interviewee argues that "no mechanisms exist that can prevent applicants with connections to the members of the appointing authority from having an unfair advantage over their competitors."⁵⁹

Security clearance is considered a precondition for employment in the MoD. There are concerns that security clearance may be denied for extraneous reasons or on politically motivated grounds.⁶⁰ However, MoD officials argue that such a risk hardly exists. Regardless of such assessments it is problematic that article 25 of the 2015

Civil Service Law refers to criteria stipulated in article 1 of the Law on Cleaning Power (the Lustration Law)⁶¹. The Venice Commission of the Council of Europe has seriously criticised this law for not being in conformity with international standards, notably those issued by the European Court of Human Rights.⁶² (More about the assessment of the Venice Commission in section 6.3 below).

All applicants to managerial positions and generally to MoD positions which may be vulnerable to corruption, for example in the area of public procurement, have to undergo a polygraph test. A person who refuses to be tested is no longer considered as a candidate to the vacant position.

The use of polygraph has a number of problematic aspects. A report, which CIDS has prepared at request of the Ministry of Defence of Ukraine, argues that the mainstream scientific community take a sceptical view of the validity and utility of polygraph testing in employment situations including in security agencies.⁶³ Overconfidence in polygraphs may create a false sense of security; safety could be neglected, creating situations that might increase the risk of security lapses.

According to the CIDS report, even if there are no European standards on the use of polygraphs in the public service, their use may be considered inimical to human dignity as defined in international treaties, including the UN Universal Declaration of Human Rights and the European Charter of Fundamental Rights incorporated into the Treaty of Lisbon and used in international and national jurisprudence on human rights. This explains why major international bodies, including the International Labour Organisation (ILO), specifically discourage the use of polygraphs in human resource management and in general in employment-related legal relationships. Serious legal analyses, including court case-law, conclude that in Ukraine the use of polygraphs may be considered as lacking a statutory legal basis and therefore illegal if used by state authorities.

The Ukrainian Civil Service Agency (CSA) is responsible for reviewing the implementation of civil service policies by

⁵⁹ The DPP does not agree with these statements. In a written communication to the CIDS assessment team, the department states that, "The Personnel Service is unable to hide a candidate. All applications are recorded. Lists of candidates are provided to the members of the Commission. Commission members freely express their position during the voting procedure".

⁶⁰ See for instance <http://www.khpg.org/en/index.php?id=1431813678>

⁶¹ Law no. 1682 of 16 September 2014. Available at: <http://zakon4.rada.gov.ua/laws/show/1682-18>

⁶² Venice Commission: CDL-AD(2014)044-e: "Interim Opinion on the Law on Government Cleansing (Lustration Law) of Ukraine, adopted by the Venice Commission at its 101st Plenary Session (Venice, 12-13 December 2014)", available at: [http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD\(2014\)044-e](http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2014)044-e)

⁶³ Francisco Cardona, *Polygraphs in the public service*, August 2016.

assessing state agencies' recruitment practices, especially their compliance with the constitutional provision regarding citizens' right to enter the civil service. Recruitment-related decisions can be appealed before the courts, but this possibility is practically never used, arguably because of lack of trust in the impartiality and objectivity of the court system.

The anonymous survey, which CIDS has completed among 145 MoD officials, suggests these have only limited trust in the MoD employment system. While 38 per cent of the respondents say they agree with the statement that the MoD selection process is fully based on applicants' expertise and competence, an almost equally large percentage, 34, disagree. 32 per cent say they have no opinion on this matter. A majority, 43 per cent, concur with the argument that the recruitment process relies too much on formal qualifications, 33 percent disagree. 24 per cent indicate no opinion.

When asked by the CIDS assessment team, members of the MoD personnel department state that the current system allows the best qualified to be recruited, but add that board members may not possess sufficient knowledge to properly assess the suitability of the candidates. A minority of interviewed department heads (8 out of 21) say they are satisfied with the current recruitment system. The majority (13 out of 21) are dissatisfied. They mention several types of problems.

A recurrent complaint is that officials are not recruited on the grounds of professional merit but because of relations with key decision makers. Arguably, given the large number of military personnel in the MoD, the Soviet principle of *yedinonachaliye*⁶⁴ (Russian, meaning single command) which is still practiced in the Ukrainian Armed Forces, also makes itself felt in the ministry of defence. The principle gives individual military commanders wide decision-making powers, i.e. to recruit, promote and dismiss officers. The argument is heard that these powers are used arbitrarily without concerns for meritocratic professionalism.⁶⁵ Officers working in leading positions in the MoD are said to use their influence to give friends and acquaintances from

the armed forces employment in the ministry. Given the large number of MoD officials with a military background, it is difficult for people with purely civilian education to gain entry into and assert themselves in the MoD. .

Interviewees mention that "telephone justice" (see textbox 4 below) is used. The minister may receive telephone requests from influential politicians that a particular person is to be appointed. Candidates may be given provisional appointments for a period of 6 months anticipating that the ministry will receive a communication from the outside confirming that the appointment is accepted. If such confirmation is not received before the expiry of the 6 month-period, the candidate in question risks having to leave.

Textbox 4 Telephone justice⁶⁶

"Telephone justice" (or in Ukrainian *telefonne pravo*) is a practice whereby the outcome of cases being dealt with by a public authority – a court of justice or an administrative body – allegedly comes from orders issued over the telephone by people with political power, rather than through the application of law. "Telephone justice" was widely practiced in the USSR and has been slow to disappear in Soviet successor states. The more widespread its use the more the reliance on formal law and legal institutions becomes a pious hope.

Department heads criticise the recruitment process for being long-drawn-out, normally lasting a couple of months. Although this may not seem particularly lengthy compared to the situation in the MoDs of other countries, interviewees argue that often it is not possible to wait so long for a new employee given the way in which the MoD decision-making system works. Often, ministers' orders seem to have short deadlines, and to have been prepared without much involvement of the affected departments let alone any assessment of the staffing situation in these units. Therefore, any decision to increase the number of employees in order to implement an order of the minister, must be improvised, e.g. by transferring personnel from the GS.

The system of security clearance creates its own peculiar problems. A large number of candidates for vacant MoD positions have been educated at Russian military institutions. In order to verify information about candidates' education, the MoD of Ukraine has to request confirmation from the MoD of the Russian Federation. Such requests

⁶⁴ On 9 October 1942 the USSR Politbureau decided to adopt the principle of *yedinonachaliye*. The purpose was to concentrate powers in and enhance the prestige of military commanders and to abolish the system of commissars who had played a key role in ensuring government control of the armed forces. During the military operations in 1941 and 1942 the political commissars had proved less than effective. See, Chlewnjuk, Oleg (2015), *Stalin. Eine Biographie*. Siedler Verlag, Munich.

⁶⁵ Polyakov, Leonid (2015), *Human Resources Management Project in the Ministry of Defence of Ukraine*, p.13.

⁶⁶ The information offered in the textbox is taken from Kathryn Hendley (2009), "Telephone Law' and the Rule of Law: The Russian Case", *The Hague Journal on the Rule of Law*, pp. 241-262, especially p. 241.

may remain unanswered or only be answered after half a year or more. However, interviewees also say that such cases are becoming increasingly rare.

The 2015 Law on Civil Service introduces a more meritocratic approach to the selection and recruitment into the Ukrainian civil service. As already mentioned, on paper it seems adequate and aligned with European principles. The Law reduces the scope of ministers' discretion and, thus, also the possibility of arbitrary decisions. Ministers and other heads of state institutions will be obliged to appoint the first ranked candidate (article 31) for positions of categories B and C, while the Minister retains his free choice among the candidates proposed by the Commission (or board) for civil servants of category A.

A regulation adopted by the Cabinet of Ministers of Ukraine in February 2016 contains a provision aiming to discourage the practice of "telephone justice". It obliges senior civil servants both to register "telephone conversations and personal meetings with the representatives of political parties, members of parliament [... and] business entities" and to provide information on such contacts according to the provisions of the law on access to public information.⁶⁷ However, whether this regulation will achieve the intended effect remains an open question.

The 1993 Law stated that in order to verify the professional skills and qualifications of employees applying for a civil service post, they may be requested to do a traineeship at the state agency in question. During their traineeship, trainees must fulfil an individual training plan. Upon completion of the traineeship, trainees submit a traineeship memorandum to the management of the state agency. In this document the head of the organisational unit where the trainee has worked gives a recommendation as to whether the trainee should be given employment in the civil service or not. The head of the institution may offer the trainee permanent employment without any prior job advertisement or competition. This system of appointing trainees without competition is no longer an option according to the 2015 Law on Civil Service, which establishes (article 35) a six-month mandatory probation period when entering the civil service for the first time.

6.2. Promotion

Promotion of a civil servant occurs on the basis of competition unless otherwise provided by the laws and decisions of the cabinet of ministers. All civil servants have the right to participate in a competition to fill a vacancy.

Civil servants may be given a higher rank within the position they are holding. For such promotion to occur, civil servants must have worked successfully (i.e. without being the object of a disciplinary action) for two years. A civil servant may be awarded a higher rank ahead of schedule if he or she has achieved especially good results. Moreover, one of the requirements for being appointed to senior posts is a certain length of service. The MoD Department of Personnel Policy reports that promotions may be given without competition and that there is no appeals procedure.

Overall, however, we find the same problematic circumstances in connection with promotions that we discussed above with regard to recruitment. While six out of 21 interviewed department heads indicate satisfaction with the current promotion system, a majority – 13 out of 21 – express dissatisfaction.⁶⁸ Department heads argue that the MoD offers no career prospects for civilian experts, that the narrow specialisation of work makes it difficult to promote highly qualified officials, and that criteria for promotion only exist on paper, while in reality everything depends on the manager.⁶⁹

6.3. Termination of employment

The 1993 LCS lists (article 30) the situations in which civil servants may be dismissed (e.g. when they are unable to fulfil their tasks or give false information about incomes). In addition there are provisions about termination of employment in the Labour Code, which applies indiscriminately to civil servants as well as to all other employees in the private and public sectors. The Labour Code guarantees able-bodied citizens legal protection against unfair denial of access to work, unlawful dismissal, as well as assistance in finding work (Article 51). An employer may terminate an employment contract only in specific cases enumerated in the Labour Code.

⁶⁸ Two department heads give no clear opinion.

⁶⁹ However, the DPP emphasise that the MoD has repeatedly announced competition for managerial positions where civil servants and/or civilians could apply on an equal basis with uniformed personnel.

⁶⁷ Rules on ethical conduct of civil servants, article 9.2, approved by regulation of the Cabinet of Ministers of Ukraine 11 February 2016, No. 65.

While civil servants' employment security may seem high on paper, experts on the Ukrainian civil service argue in interviews with the CIDS assessment team that in reality things may look different. "Civil servants are illegally dismissed, [...] politicians do not feel constrained by the law [...] one of our major problems is the absence of the rule of law [...] the judiciary is prone to political pressure". However, interviewees also point out that such blatant breaches of the law – at least for the time being – may seem to be practices from the past – albeit the recent past. As we have noted above (paragraph 5.2) it is possible for the political leadership to neutralise civil servants – or remove them from their positions without having to resort to unlawful measures.

Arguably, it is especially holders of senior positions with responsibility for politically sensitive or otherwise high priority issues who are most at risk of being reassigned or dismissed in irregular ways. This does not apply to the same extent to people on lower levels. Leading MoD decision makers interviewed by the CIDS assessment team claim it is almost impossible to dismiss staff who are not performing well enough. It is not fully clear to the CIDS assessment team to what extent this situation may be due to officials' strong legal claim to employment security or to managers' failure to adequately use the instruments available to them, such as job performance assessment and disciplinary procedures.

The new Civil Service Law of 2015 introduces a completely new regulation of the termination of civil service employment. Articles 83-88 give more legal guarantees of a fair dismissal procedure for civil servants, except when it comes to the application of the Lustration Law (article 83-8).

In October 2014 the *Verkhovna Rada* adopted this law (the Law on Lustration in the public service), according to which dismissed officials are barred from employment in government agencies for a period of ten years. The Venice Commission of the Council of Europe considers the law questionable. A key objection is the possibility of political abuse. (See textbox 5.)

Textbox 5 The Venice Commission on the 2014 Ukrainian Lustration Law⁷⁰

"In view of the extensive scope of lustration and its decentralised implementation, imprecise formulations could give rise to non-uniform application of the Law and could also facilitate its misuse for personal or political purposes. [...] (T)he establishment of individual guilt by an independent body is not required. The ban on access to public functions [...] is based on the mere fact of having held a certain position, with an ensuing presumption of guilt. While this approach might be acceptable with respect to the holders of high positions during the communist period and holders of some of the crucial government offices during Mr. Yanukovich's reign (senior offices), in all other cases guilt should be proved on the basis of individual conduct. If the mere fact of belonging to a party, an organisation or an administrative body of the old regime is a ground for banning from public office, then such a ban amounts to a form of collective and discriminatory punishment which is incompatible with human rights standards. Lustration then risks becoming a political instrument to oppress opponents."

The MoD has established a special unit for lustration. It checks candidates for vacant positions and more generally attends to the ministry's duties under the Lustration Law. In early 2015 all MoD personnel files were sent to the Ministry of Justice and the Security Service (SBU) for scrutiny as required by the Lustration Law. The examination shall be completed by the end of 2016 and will determine whether an official can continue in his position or will have to be dismissed.

However, there is a provision in the Law on Lustration making it possible for officials to escape lustration if they go to an Anti-terrorist Operation (ATO) zone and receive the status of "participant in the ATO". By the end of September 2015 some 100 000 individuals had been awarded such status. But there are allegations that the status of ATO-participant is achieved in irregular ways.⁷¹

The legal regulation of collective lay-offs is confusing. There is no requirement that such measures must be economically necessary, a state of affairs that may make downsizing decisions arbitrary. Such decisions do not even

⁷⁰ Venice Commission: CDL-AD(2014)044-e : "Interim Opinion on the Law on Government Cleansing (Lustration Law) of Ukraine, adopted by the Venice Commission at its 101st Plenary Session (Venice, 12-13 December 2014)", available at: [http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD\(2014\)044-e](http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2014)044-e)

⁷¹ See for instance <http://fakty.ictv.ua/ru/index/read-news/id/1540938>, <http://tsn.ua/ato/viyskoviy-turizm-u-zoni-ato-yak-posadovci-otrimuyut-status-uchasnikiv-boyovih-diy-na-donbasi-492019.html>, [http://www.ukrinform.ua/rubric-society/1806999-prokuror_donechchini_hoche_vtekti_vid_lyustratsii_prikrivayuchis_statusom_uchasnika_ato_2013689.html](http://www.ukrinform.ua/rubric-society/1806999-prokuror-donechchini_hoche_vtekti_vid_lyustratsii_prikrivayuchis_statusom_uchasnika_ato_2013689.html)

need to affect groups of civil servants, but may include only one single official. This makes the regulation strange, given the fact that “restructuring” in common parlance implies reshuffling a plurality of individuals. While article 43 of the 2015 Law outlines the procedures to be followed in downsizing processes, article 83 refers this issue to the labour legislation. Thus, there is some confusion about what rules actually apply.

The decision to include a civil servant in a downsizing initiative may be appealed to a complaints’ commission formed by the director of the Civil Service Agency (article 11 LCS).

According to the 2015 Law attestation is no longer possible. Attestation was formerly a procedure to determine officials’ continued suitability for their civil service positions (see paragraph 8.3 below). It has been replaced by a performance appraisal scheme regulated in article 44 in the 2015 Law on Civil Service. This regulatory amendment makes it doubtful whether dismissal of civil servants by means of testing *i.e.* through attestation is legally possible after 1 May 2016 when the new LCS enters into force.

Not long before the conflict with Russia started in 2014, the MoD conducted an extensive downsizing process reducing the number of officials from 1221 to 770. However, the methods used to identify the officials who had to leave were entirely inadequate, if the purpose was to enhance the professionalism and efficiency of the Ministry. According to senior MoD decision-makers, the result of the downsizing was exactly the opposite: the remaining 770 officials were not the best; on the contrary, the quality of MoD performance is seen to have decreased significantly. Several departments were unable to perform their tasks the moment Russian aggression started (see chapter 10).

In early 2016, the MoD announced plans to further reduce the number of staff, this time by some 200. The deadline for completing the process was 15 July 2016. Several challenges are associated with implementing workforce reductions. In order to make informed decisions about who can stay and who must go, the employer must develop a clear idea of what functions are to be maintained in the downsized organisation and the types of competencies and skills that are necessary to implement them.

As far as the CIDS assessment team has been able to establish, no such criteria exist, or have been communicated to MoD managers whose involvement will be crucial for the implementation of the workforce reduction process. Moreover, even if such criteria had been in place, current MoD procedures for applying them when selecting people for recruitment or dismissal - are hardly sufficiently correct to say the least (see paragraphs 6.1 and 6.2). Thus, there are reasons to doubt whether the ongoing workforce reduction will result in the MoD having a more qualified staff than to-day. The experience from the previous round of downsizing gives reason for concern.

Moreover, the ongoing downsizing process raises legal issues. As far as the CIDS assessment team has established, the ongoing workforce reduction will to some extent be based on *attestation* (see paragraph 8.3) of MoD officials and not preliminarily on elimination of tasks and responsibilities. As we have already indicated, such a procedure may no longer be legally possible after 1 May 2016.

6.4. Ability to recruit and retain competent personnel

In the anonymous survey CIDS implemented in early 2016, 79 per cent of the respondents state that they are satisfied with their MoD jobs while 17 per cent are dissatisfied. This may indicate that working conditions in the ministry are good. However, the data collected by the CIDS assessment team also suggests that there are problematic aspects of the working environment that may make it difficult for the ministry to recruit and retain highly qualified personnel, especially areas where the public administration is meeting strong competition for well-educated staff from private businesses.

As in other state institutions, MoD salaries are low. This is especially the case for civilian staff, whose salaries may be only one third or one fourth of those of military personnel. 79 per cent of the respondents in the CIDS survey state that they would leave the MoD if they were offered better salaries elsewhere. Nor can the MoD offer attractive career opportunities – quite the contrary. As we noted above, actual career prospects for civilians are strictly limited – in some areas almost non-existent, regardless of how much such possibilities may be found on paper.

In countries in Western Europe, public administration bodies such as ministries offer highly qualified personnel

the opportunity to work professionally with interesting tasks. In many cases, this is an important competitive advantage in relation to private employers. However, as we shall see in this paper, in the Ministry of Defence of Ukraine, civil servants hardly enjoy any appreciable professional independence. For a large part, the work consists of bureaucratic routine tasks or the implementation of orders which civil servants have had little opportunity to influence.

The situation may be further aggravated by a system of HRM, which according to department heads rewards loyalty to superiors – not demonstrated professional competence. While especially personnel on lower level may enjoy employment safety, there seems to be little to effectively protect them from marginalisation and unfair treatment in the workplace. Perhaps partly for this reason, a substantial share of MoD officials – almost one third (31 per cent) according to the CIDS survey find that interpersonal working relationships in the ministry are not good.⁷² This share is higher or significantly higher than in MoDs of other transition countries where CIDS has implemented the same type of survey.⁷³

In summary, citizens of Ukraine have the right to obtain a position in the civil service regardless of their political views.⁷⁴ However, as we have already noted there is a widespread opinion that the civil service as well as defence institutions are politicised and used as patronage instruments. Overall, current arrangements for recruitment and promotion do not satisfy international standards. The idea of civilian and democratic control over the armed forces can hardly be realised. If the 2015 Law is soundly implemented, the situation is likely to change, but such a change remains to be seen. While the new Law on Civil Service provides more legal guarantees of a fair procedure for dismissal of civil servants the Law on Lustration may work in the opposite direction and become an instrument of those in power to oppress political opponents. Due to i.a. low salaries and arbitrary HRM systems, the MoD may face difficulties in recruiting and retaining highly competent civilian personnel, especially in areas where there is strong competition from private employers.

72 62 per cent say that interpersonal relationships are good. 7 per cent say they have no opinion.

73 Bosnia and Herzegovina 22 per cent, Kosovo 9 per cent, and Montenegro 16 per cent.

74 According to the Constitution of Ukraine, any direct or indirect restriction of rights or establishment of direct or indirect advantages at the conclusion, modification and termination of an employment contract based on the origin, social or property status, race and nationality, sex, language, political views, religious beliefs, membership in trade union or other association of citizens, occupation, place of residence are unacceptable.

The existing problematic situation regarding the main obligations of civil servants may improve with the implementation of the 2015 Law on Civil Service.

7. Rights and obligations, especially the integrity and impartiality of the civil service

7.1. Main obligations of public officials

The 1993 civil service legislation does not contain any provision regarding civil servants' duty to act impartially and objectively, but makes a reference to the 1995 Law on Fighting Corruption, as amended. However, this latter piece of legislation was unevenly implemented and did not contribute significantly to the integrity of the public service or the armed forces.⁷⁵ The existing problematic situation regarding the main obligations of civil servants may improve with the implementation of the 2015 Law on Civil Service.

Article 7 of this law lists the main rights of civil servants. Most of them are labour-related rights. However, the article also includes provisions (article 7-11) protecting civil servants from unlawful prosecution should they disclose information indicating that state bodies have violated the civil service legislation. Article 11 of the law outlines the procedure for dealing with grievances, and also foresees a complaints mechanism managed by a commission which is to be established within the Civil Service Agency.

Article 8 lists the obligations of civil servants. This article, apart from determining the usual labour-related obligations, puts a special emphasis on the constitutional obligations of civil servants, in particular the obligation to prevent the violation of human and civil rights and freedoms of citizens; to protect the use of minority languages; and to prevent and counteract corruption and conflicts of interest.

Civil servants' duty of hierarchical subordination established in article 9 of the new law is limited to situations where they receive lawful orders and instructions. The article

explains the steps a civil servant must take when he/she claims to have received an illegal order and intends to refuse compliance. If a civil servant follows the procedure outlined in the law, he/she will be exempted from any personal liability. Criminal instructions are not to be complied with at any time. If a civil servant does not follow the procedure and executes an illegal order, he/she will be held personally liable, as his/her obligation was to warn superiors about the unlawfulness of the behaviour he/she was requested to display.

Article 10 establishes political impartiality as an obligation for civil servants. Political party membership as well as public manifestations of political preferences are banned. The status of civil servant is incompatible with being a member of parliament or of a local self-government council. Civil servants wanting to participate as candidates in electoral campaigns must take leave of absence during the election process. Moreover, they are banned from striking.

The 1993 Law (article 10) obliged civil servants to be creative and take initiatives. The draft civil service law submitted to the *Verkhovna Rada* in 2015 contained a similar provision requiring civil servants to take initiatives without explicitly having been instructed to do so. While this clause was excluded from the version of the law finally adopted, a similar provision is now included in the Rules on Ethical Conduct of civil servants adopted by the Cabinet of Ministers of Ukraine in February 2016.⁷⁶ However, this and other regulations regarding initiatives run counter to deep-seated traditions in the Ukrainian civil service⁷⁷, and

⁷⁵ The 2015 country joint report by Transparency International and the Government Defence Anti-Corruption Index places Ukraine in Band D, indicating a high risk of corruption. See the report at <http://government.defenceindex.org/countries/ukraine/>

⁷⁶ Rules on the ethical conduct of civil servants article 10.1, approved by regulation of the Cabinet of Ministers of Ukraine 11 February 2016, No. 65, "Good faith entails: [...] display of initiative and creativity". The regulation is available at <http://www.kmu.gov.ua/control/uk/cardnpd?docid=248839311>

⁷⁷ According to Ukrainian studies civil servants see no point in taking initiatives and offering

we may add, informal social norms well-reflected in public witticisms⁷⁸. It will therefore be interesting to see whether the said provision will have any practical significance or not.

The MoD can initiate a disciplinary process against civil servants who violate their service obligations. A disciplinary action is taken by the minister after the civil servant in questions first has received an oral, then a written warning. Disciplinary measures include written warnings recorded on file, suspension with or without payment, demotion, and dismissal.

MoD department heads indicate that it is particularly difficult to take disciplinary action against military personnel. This may especially be the case if the manager of the officer in question is civilian. The officer may mobilise friends and colleagues and possibly “protectors” in high places in the military; and it may be the case that the attention of the MoD leadership instead turns to the competent manager, e.g. by subjecting him/her to investigation by a control commission. MoD department heads report that they are reluctant to take action against military personnel not performing according to expectations.

During the past 12 months the MoD implemented 4 disciplinary processes, involving violation of working hours, improper behaviour, low productivity and inadequate performance. According to the DPP, the disciplinary system is not effective.

Overall, the rights and obligations of civil servants established by the 2015 Law on Civil Service are in line with international standards and thus represent a positive development. There are doubts about the adequacy of the existing disciplinary system

7.2. Main obligations of military personnel

The rights and duties of the armed forces are defined mainly by the Law on Armed Forces of Ukraine 1991, as amended. Article 17 prohibits military personnel from involvement and membership in political parties and trade unions. Going on strike is strictly forbidden. Article 11 imposes certain general obligations and principles of

behaviour on members of the armed forces. The main ones are the duty to act in accordance with the Constitution and the rule of law, to promote transparency, to facilitate democratic and civilian control over the armed forces, to protect state secrets, to ensure constant combat readiness and show impartiality regarding political parties.

The legislation on the armed forces will need an overhaul in order to align it with the recent developments in the civil service legislation, especially as regards the right to refuse compliance with illegal orders, a right which should also be considered as an obligation. The current article 37 of the Statute on Internal Service of the Armed Forces⁷⁹ dealing with the procedure for the Issuance and Execution of Orders should be clarified in the light of the new civil service legislation.

7.3. Conflicts of Interest

The road to the current conflict of interest regulation has been bumpy and taken a long time to cover. Originally, regulations were mainly found in two legal instruments: 1) The Law on Principles for Preventing and Counteracting Corruption (for short “Law on Principles”), adopted in 2011; and 2) the General Rules of Civil Servant's Ethical Conduct, adopted in 2010 by the National Agency of Civil Service.

Both pieces of legislation were amended several times. However, the definition of a “conflict of interest” stipulated by the Law on Principles still did not comply with international standards, i.e. the Council of Europe Recommendations⁸⁰ and the OECD Guidelines⁸¹. Both legal instruments were abolished and superseded by the new

⁷⁹ Law no. 548 of 24 May 1999. Available at: <http://zakon5.rada.gov.ua/laws/show/548-14>

⁸⁰ Article 8 of the Council of Europe Model Code of Conduct for Public Officials (Committee of Ministers Recommendation no. R (2000) 10) states that the public official should not allow his or her private interests to conflict with his or her public position. It is his or her responsibility to avoid such conflicts of interest, whether real, potential or apparent. Article 13 stipulates that conflict of interest arises from a situation in which the public official has a private interest which is such as to influence, or appear to influence, the impartial and objective performance of his or her official duties. The public official's private interest includes any advantage to himself or herself, to his or her family, close relatives, friends and persons or organisations with whom he or she has or has had business or political relations. It includes also any liability, whether financial or civil, relating thereto. Article 14 also states that the public should, as lawfully required, declare upon appointment, at regular intervals thereafter and whenever any changes occur, the nature and extent of his or her personal or private interests.

⁸¹ The OECD Guidelines for Managing Conflict of Interest in the Public Service (approved by the OECD Council in 2003), in addition to actual conflict of interests, which was covered by the current definition in the Ukrainian Law on Principles, also define “the apparent conflict of interest”, which exists “where it appears that a public official's private interests could improperly influence the performance of their duties but this is not in fact the case”, and “a potential conflict of interest”, which arises “where a public official has private interests which are such that a conflict of interest would arise if the official were to become involved in relevant (i.e. conflicting) official responsibilities in the future”.

new ideas, see Afonin, footnote 45 above.

⁷⁸ For example, in Soviet time there was a saying that “there is only one thing worse than a fool and that is a person with an initiative”. Regarding the military it was said that “initiative is punishable”

Law on Prevention of Corruption of 14 October 2014, which entered into force on 26 April 2015.⁸²

While the 2015 Law on Civil Service (article 8-11) states that the civil servants have the obligation to prevent any conflict of interest while performing civil service duties, the detailed regulations are found in the Law on Prevention of Corruption and some other pieces of legislation. The Code of Administrative Offences establishes liability for failure to notify the direct superior of a conflict of interests.⁸³ According to the official statistics for 2015, a total of 1720 officials (of whom 44 are officials or employees of the armed forces) were found administratively liable, 727 (42 per cent) because of failure to report conflicts of interests.

The current legal framework is largely aligned with international standards, although with a few exceptions:

1. The notion of “apparent conflict of interest” is still missing in the regulation.
2. The Law covers a wide variety of public officials with different levels of seniority and exposure to different levels and types of corruption risks. The inclusion of such a variety of situations and risks into a single regulatory instrument may make it difficult to enforce the law effectively. Certainly, it would make the implementation more effective if there were specific regulations for individual sectors.
3. The implementation of the policy on avoidance of conflict of interests is not seen as a specific responsibility for civil service managers, a fact which may weaken the conflict of interest regime. Nevertheless, in an indirect way, article 17 of the 2015 Law on Civil Service obliges state secretaries at ministries and managers of other state bodies to “monitor observance and service discipline in the state body” and “adopt disciplinary actions against civil servants of categories B and C”.

The National Anti-Corruption Agency (NACA) will be responsible for monitoring and controlling the legislation on conflicts of interest. The agency can require the head of a state institution or a state enterprise to take steps to correct violations of the law, to conduct internal investigations and to ensure that misconduct is sanctioned. Instructions given by the national agency are legally

binding. The agency is also in charge of anti-corruption training for civil servants with special emphasis on prevention of corruption. Hopefully, these training activities will focus on measures to identify and prevent conflicts of interest.

The National Anti-Corruption Agency was established in March 2016. In accordance with the previous legislation, there are special anti-corruption units in ministries. Among other things these units are responsible for detecting and helping to resolve conflicts of interests. In the MoD this function is performed by the Directorate for Prevention and Detection of Corruption (DPDC). According to information collected by the CIDS assessment team, conflicts of interest may remain unresolved in the MoD. The argument is heard that procurement contracts, for instance, are negotiated by MoD officials who have longstanding relationships with state-owned suppliers. This is a practice constituting a clear risk of corruption.

The Law on Prevention of Corruption (Article 45) obliges public officials, including civil servants and military officers, to submit declarations disclosing their personal assets and income. This obligation also covers close relatives of public officials, their spouse and children. It applies to an estimated total of 700 000 people. Intentional submission of incorrect information or intentional failure to submit the declaration are now considered a criminal offences, punishable with imprisonment of up to two years.⁸⁴ Until recently violations of the reporting obligations were only administrative offences.⁸⁵

In 2015, each state institution was responsible for verifying the content of the asset declarations submitted by their own employees. However, this arrangement was not effective, because the internal units charged with control lacked sufficient independence as well as access to databases containing information on income and assets. According to the new law, asset declarations will be verified by the NACA. Declarations of high-ranking officials and those of persons holding positions associated with substantial corruption risks are subject to a particularly extensive examination.⁸⁶

⁸² Law no. 1700 of 14 October 2014. Available at: <http://zakon4.rada.gov.ua/laws/show/1700-18>

⁸³ A fine of 10 to 150 untaxed minimum personal incomes amounts to some EUR 7 to 100

⁸⁴ Article 336 of the Penal Code. Available at: <http://zakon5.rada.gov.ua/laws/show/2341-14>

⁸⁵ Article 172-6 Code of Administrative Offences. Available at: <http://zakon5.rada.gov.ua/laws/show/80731-10>

⁸⁶ Article 50 of the Law on Corruption. In the MOD a head of department was dismissed after having declared false information.

In addition to the verification of declarations, the NACA shall selectively monitor the lifestyle of declarants in order to establish the correspondence between their actual living standards on the one hand and the property and income they have formally declared on the other. Possession of unexplained wealth is now a criminal liability and the definition of “illicit enrichment” in the Ukrainian Penal Code is aligned with the United Nations Convention against corruption (UNCAC). Arguably, asset declarations are valuable instruments for the public prosecution in its efforts to detect cases of unexplained wealth. However, it remains to be seen how the new legal provisions will be used in practice.

Through the website of the NACA the public has free access to the asset declarations of public officials. The freedom of access includes the right to view, copy and print out information. However, citizens have often faced difficulties when trying to make use of their rights. Authorities often deny access by reference to legal provisions on protection on personal data. In March 2014, parliament amended⁸⁷ a number of laws, including the Personal Data Protection Law in order to align them with the Access to Public Information Law and particularly to better ensure public access to asset declarations.

According to the Law on Prevention of Corruption, public officials are – with some exceptions⁸⁸ – prohibited from engaging in any other paid activity or business, including membership in supervisory bodies of companies.⁸⁹ Violations of these provisions are punishable by fines of 300 to 500 untaxed minimum personal incomes (at the time of writing, the equivalent of some € 180-300). Income from illegal, concurrent employment will be confiscated.

Article 23 of the Law on Prevention of Corruption establishes that public officials shall be prohibited from demanding or receiving gifts while carrying out official duties. Hospitality gifts may be accepted if their value does not exceed one minimum wage and the aggregate value of gifts received from one source within one year does not exceed two living wages. Gifts above such values are considered state or municipal property. Public officials

are obliged to report suspicions to their superiors that colleagues may have received illegal gifts.

According to the Law on Prevention of Corruption (article 26), public officials are restricted in performing post-employment activities for business enterprises if they have taken part in the exercise of public authority over these enterprises. The Law stipulates a one-year “cooling off” period. For military officers there are no restrictions on continued employment after their service in the armed forces has ceased. Retired officers often find employment in the public sector. As we already noted this is frequently the case in the MoD. There is no moratorium on employment in the defence industry.

Overall, while, the legal framework for asset declaration is adequate and in line with international standards, the implementation still leaves a lot to be desired. While there are restrictions on post-employment activities for civil servants, no such restraints apply to military officers. Steps should be taken to limit “revolving doors” possibilities for members of the armed forces, especially in relation to the military industry.

7.4. Transparency, access to information and state secrets

Civil service professionalism can hardly thrive in a culture of secrecy, or where the label “state secret” may be used arbitrarily.⁹⁰ The Law on Access to Information was passed by Parliament in January 2011 and entered into force in May that year. This Law is well aligned with international standards. It has been awarded 102 points out of a possible maximum of 150, placing it among the best 20 laws on access to information in the world. Ukraine occupies position 19 in the Global Rights to Information Rating (RTI), a rating which assesses the quality of legislation, not its actual implementation.⁹¹

However, ever after the 2011 Law on Access to Information entered into force, old, opaque practices still remain, not only concerning the classification of information,⁹² but also concerning state secrets. The 1994

87 Law no. 1170 of 27 March 2014. Available at: <http://zakon3.rada.gov.ua/laws/show/1170-18/page>

88 I.e. teaching, research and creative activity, medical practice, coaching and referee practice in sport.

89 Article 172-4 Code of Administrative Offenses. Available at: <http://zakon5.rada.gov.ua/laws/show/80731-10>

90 The existence of Freedom of Access to Information Agencies (FOIA) is positively associated with a lower level of corruption and a significant positive trend in controlling corruption. See Alina Mungiu-Pippidi (ed.) 2011, *Contextual choices in fighting corruption: Lessons learned*, Norwegian Agency for Development Cooperation (NORAD), p. 54.

91 See Global Right to Information Rating at: http://www.rti-rating.org/view_country?country_name=Ukraine

92 Some information, notably legal instruments in the presidential administration in particular, appears labelled as “not for publication”, which is not in conformity with the 2011 Law.

Law on State Secrets has not been aligned with the 2011 Law on Access to Information. The Law on Access to Information applies to all kind of information. However, state authorities use the Law on State Secrets to classify information without carrying out any harm test or public interest test, as required by the access to information legislation.

A law passed in 2014⁹³ and entering into force in April that year introduces a cut-off date (19 April 2015) after which all restriction marks on documents concerning their disclosure are no longer valid. All documents will be open unless they were classified according to the criteria established by the 2011 Law on Access to Information. The practice of classifying information, however, still remains problematic, as reported by the Ombudsman and some NGOs.⁹⁴ The notion of state secrets is broad and imprecise since according to the Law On State Secrets (1994) such a secret includes information in the spheres of “defence, economy, science and techniques, external relations, state security, protection of law and order, the unauthorised disclosure of which can cause damage to the national security of Ukraine [...]”

The legislation on state secrets needs to be made more precise and better aligned with the law on access to information, and certain unclear administrative practices on classifying information need to be ended.

7.5. Whistleblower protection

The Law on Prevention Corruption opens the possibility that government officials may anonymously report suspicions of corruption. Reports containing data that can be verified are to be processed within 15 days after they have been received.

If the information contained in the report is confirmed, the head of the relevant agency is obliged to take measures to terminate the infringement, and take steps to initiate disciplinary or possibly criminal proceedings. The NACA is required to continuously monitor the state of affairs as regards the protection of whistle-blowers. Civil society organisations have taken a number of steps to encourage

and facilitate reporting on suspicion of corruption and to protect whistle-blowers. However, it is still a fact that real protection cannot be ensured. As we have seen, almost 40 per cent of MoD officials do not feel free to express their opinions. Moreover, the MoD department for personnel policy reports that in the ministry there is no mechanism for employees to come forward with information on *i.a.* bribery, misuse of resources or other kinds of corrupt behaviour. Disclosure of such information is dealt with as an ordinary grievance, *i.e.* without protection of the anonymity of the person giving the information.

In Ukraine whistleblowing may violate informal norms and not be well regarded by society. It may be seen as form of denunciation and evoke Soviet time memories when people ended up in jails or prison camps because neighbours and colleagues had betrayed them to the state authorities. So far, no training programmes have been implemented.

Legislation and actual practice regarding whistleblower protection should be improved and complemented with public awareness campaigns and strengthened civic education. Overall, it seems reasonable to assume that in the foreseeable future, whistleblowing will not be of any appreciable scale in the MoD.

7.6. Grievances

The 1993 Civil Service Law gave few opportunities to hear complaints from civil servants over service-related matters, including illegal instructions. Article 10 *in fine* of the 1993 Law stipulated that “each and every civil servant shall act within his/her competence. When assigned a task contradicting legal provisions, a civil servant is obliged to immediately notify the instructing official in writing, and if pressed to comply, to notify that official's superior.”

The 2015 Civil Service Law offers a far better system for dealing with complaints and illegal instructions from superiors than the 1993 Law. According to Article 9-1 of the new Law, civil servants have to act within their powers as prescribed by law. The Law clearly states that civil servants shall be obliged to execute lawful orders (article 9-2), which conversely means that they are not obliged to abide by unlawful orders.

⁹³ Law no. 1170 of 27 March 2014. Available at: <http://zakon3.rada.gov.ua/laws/show/1170-18/page>

⁹⁴ See the Ombudsman: www1.ombudsman.gov.ua/index.php?option=com_content&view=article&id=4049:2014-10-01-07-37-36&catid=239:2014&Itemid=256 See also: Centre for Political Studies and Analytics, 2014, <http://cpsa.org.ua/vydannya/posibnyk-sluzhbova-informatsiya-poryadok-vidnesennya-ta-dostupu>.

The 2015 Law makes a distinction between orders (which are in written form) and instructions (which are given orally). In this context it introduces an interesting provision aimed at reducing politicisation and strengthening the separation between politics and administration. Article 9-2 forbids political advisors from issuing both instructions and orders to civil servants. The latter shall consequently ignore such directives, which are challengeable if they are unlawful.

Article 9-6 establishes the means of legal protections and the procedure to be followed in the case that a civil servant receives an illegal order or instruction. He/she can request a written confirmation of the order or instruction in question before executing it. The confirmation shall be given no later than one day after the order or instruction has been given (article 9-8). If the confirmation is not issued, the order is deemed cancelled by power of law. If the confirmation is issued, the civil servant is obliged to comply with it (except if it means committing crime, according to article 9-9) and subsequently he/she shall inform a higher superior. Acquainting the higher superior with the matter precludes any administrative liability of the civil servant in question. If the civil servant does not protest the legality of the instruction he/she will incur administrative liability.

The mechanisms mentioned here offer better legal protections to civil servants protesting illegal orders or instructions from superiors, but they are still insufficient to protect them from possible future retaliations by superiors. This could be achieved through a sound law on whistle blowers' protection.

The 1993 Law (article 11) gave civil servant a vague right to "demand internal inquiry to be acquitted of what could be considered groundless charges or suspicion", but the Law outlined no mechanism to realise that right, other than the general recourse to trial before a court of law (article 32).

Article 11 of the 2015 Law introduces a mechanism where the National Civil Service Agency may intervene to protect the right of civil servants to have their rights and entitlements respected by superiors. A civil servant filing a complaint can request that the CSA establishes a commission to deal with the complaint and that the

commission submits a conclusion no later than twenty days after the complaint was lodged. The decision of the commission may be appealed to the Director of the CSA. In any case, the opportunity to have the case heard before a court of law remains open (article 11-8).

The mechanisms included in the new Law can be more effective than those included in the previous legal framework. However, given the lingering politicisation of the Ukrainian civil service and the significant number of discretionary powers wielded by civil service managers,⁹⁵ civil servants have been reluctant to use the mechanisms open to them. There is no guarantee that this situation will change even if the new law is much better.

Trade Unions could also represent a way to deal with grievances. In accordance with Article 243 of the Labour Code,⁹⁶ citizens have the right to form trade unions to protect their interests. However, trade unions are typically concerned with ensuring the social welfare of their members, and not helping to resolve issues between managers and civil servants.

During the past 12 months four complaints were submitted to the MoD. In the ministry, there is no mediation process whenever an employee has a grievance. This seems to mean that there are limited possibilities for dealing with workplace controversy; it is either brought into the formal complaints system, or not dealt with at all. A question that should be addressed is to what extent the apparent lack of mechanisms for conflict prevention and resolution may explain the relatively high proportion of MoD employees reporting unsatisfactory, interpersonal working relationships (see p. 30).

In summary, given the lingering politicisation and the significant number of discretionary powers wielded by civil service managers, civil servants rarely used the complaints mechanisms in the past. The new Law on Civil Service is largely aligned with international standards and offers a far better system for dealing with complaints and illegal instructions. To what extent civil servants will be convinced of the benefit of using the new mechanisms open to them remains to be seen.

⁹⁵ Such powers include the access to determine salaries, i.e. determine the size of salary increments and bonuses, give instructions which may go beyond the duties set forth in the job description, make changes in the structure and the staffing pattern of an agency which can lead to a substantial change in working conditions or even to dismissal of officials.

⁹⁶ Law no. 1045 of 15 September 1999. Available at: <http://zakon4.rada.gov.ua/laws/show/1045-14>

Broadly speaking, the system for human resources management in the state administration has two levels.

8. HRM systems and tools

8.1. HRM systems

Broadly speaking, the system for human resources management in the state administration has two levels. The upper level comprises the entire state administration, whilst the lower level includes each individual state agency. The Law on Civil Service establishes the respective responsibilities of units on both levels when it comes to HRM.

The key institution at the state level is the Civil Service Agency, which is in charge of ensuring homogeneity across the whole civil service and public employment system. The CSA provides professional support to the HR services of ministries and other public bodies and organises training for civil servants and local government officials. It can also review and remedy HRM related decisions of other public bodies. The main responsibilities of HRM units at ministry or agency level are to implement state civil service policies, carry out analytical and organisational work, help to meet the need for qualified personnel, and ensure that staff members have regular access to training and development opportunities.

The 2015 Law on Civil Service introduces major changes in the civil service management system. The key bodies responsible for civil service policies and civil service management are now the Cabinet of Ministries, the CSA, the Senior Civil Service Commission and other competition commissions as well as the heads of personnel at ministries and agencies. Article 13 regulates the powers and responsibilities of the CSA, a body dependent on and reporting to the Cabinet of Ministries through the prime minister. Its head is appointed by the cabinet for a five-year term renewable for another term of equal duration, totalling a maximum of 10 years. The new law endows the CSA with wider powers than the previous legislation. The

2015 Law on Civil Service gives the agency not only have advisory and coordinating functions, but also key executive responsibilities.⁹⁷

The establishment of the Civil Service Commission is an attempt to depoliticise the civil service. Its members are appointed by a wide range of state authorities and other organisations.⁹⁸ The head of the CSA is a member of the commission *ex officio*. The commission is in charge of making the choice of candidates for category 'A' civil service positions.

In ministries the head of personnel is the state secretary, which is a new civil service position established by the 2015 LCS. In other state agencies, the head of the institution (article 17) has the main responsibility for personnel issues. Articles 17 and 18 of the LCS list the main tasks of personnel units and heads of personnel in ministries and state agencies. These tasks include personnel planning, recruitment of candidates to civil service positions of categories B and C, organisation of in-house training, handling of complaints from civil servants of categories B and C, and implementation of disciplinary measures.

The Department of Personnel Policy (DPP) of the MoD reports directly to the Minister of Defence. It includes 60 positions, two of which are currently vacant. The department is divided into a unit for civil service positions and a unit for military personnel.

⁹⁷ Some of those executive responsibilities include drafting regulatory proposals to be adopted by the Cabinet of Ministries and issuing regulatory acts on its own to implement certain matters contained in the new Law as well as issuing binding interpretation of the legal text. It is required to monitor compliance with the new Law, including the redress of wrong personnel decisions made by ministries and agencies. It will perform as a secretariat for the Senior Civil Service Commission.

⁹⁸ Among others the parliament, the president, the Cabinet of Ministers, the courts administration, the all-trade unions of Ukraine, civil society organisations, and universities.

The DPP keeps personnel files for each employee, which include his or her personal data, copies of identity documents, details on education, job description, leave record, details of any disciplinary measures, and details of performance appraisals. It is noteworthy, however, that the file contains no information on salaries. Only employees of the DPP and the employee him-/herself have access to the personnel file. The line manager of the employee and senior managers enjoy no access.

While the DPP collects and circulates various types of personnel data on MoD staff, regarding e.g. turnover, age profile, gender profile, disciplinary actions, trainings completed, incidence of staff grievances, there are some striking gaps. Most notably, no data is collected on manpower costs and overtime levels and costs. Moreover, the MoD has no system of exit interviews.

Few or no data regarding MoD staff seem to be electronically stored or readily available for electronic processing. This state of affairs limits the MoD's ability to quickly produce personnel data reports and make decisions and prepare plans, which would profit from such information.

Although they are critical to several aspects of the system of MoD human resources management, a majority of MoD officials – 52 per cent – say they have full confidence in the competence of officials working in the Department for Personnel Policy.⁹⁹ A total of 42 per cent report that the information provided by the DPP is timely and accurate while 28 per cent disagree with this statement and 30 per cent have no opinion.

The 2015 Law on Civil Service introduces major changes in the civil service management system. If properly implemented, the changes may bring about a clearer distinction between politics and administration and reduce the politicisation of the civil service.

8.2. Job classifications, job descriptions and human resources planning

Job descriptions for the MoD are prepared by heads of departments. Generally, the job description for individual work posts is arrived at by allocating the tasks of each

departmental unit among the work posts belonging to the relevant unit. In addition to the job description, there is an annual work programme for each position holder based on the job description. A draft work programme is prepared by the position holder and approved by the immediate superior.

A sample job description document made available to the CIDS assessment team, which presumably is typical for the MoD, includes competency requirements, reporting lines, tasks and duties and official relations and contacts. The content and organisation of the job description seems to follow closely an order adopted by the Civil Service Agency in 2011.¹⁰⁰ The order offers general guidelines regarding the content and organisation of job descriptions. The job descriptions in the sample studied by the CIDS assessment team are very detailed and contain a lot of text, some of which seems redundant. Interviewees mention that such a detailed explanation of tasks limits the professional autonomy of civil servants and thus exacerbates one the dysfunctional features of the Ukrainian civil service, namely the extent of hierarchy and centralisation of authority.

A system of job analysis is not practiced in the MoD. A job analysis consist in documenting the requirements of a job and the work actually performed. The purpose of this exercise is *i.a.* to prepare job descriptions and job specifications which in turn helps the recruitment of the right quality of workforce into an organisation.

While heads of departments who approve job descriptions are generally satisfied with the current practice,¹⁰¹ their subordinates point to shortcomings in the existing system. A majority of survey respondents, 64 per cent, report that there are gaps between the content of the work actually done and what is foreseen by the job description.¹⁰² If this assessment is close to describing the actual situation, one may ask whether anybody in the MoD has a full overview of the tasks that are actually performed. To bring greater clarity to the situation a comprehensive job analysis should be conducted.

⁹⁹ 24 per cent of the interviewed officials disagree with the statement that they have full confidence in the competence of the colleagues in the human resources unit. The same percentage report they have no opinion on the matter.

¹⁰⁰ Order of the National Agency of Ukraine on Civil Service (CSA) no.11 of 13 September 2011 "On the Reference Book of Typical Professional and Qualification Profiles of Civil Servants". Available at: <http://zakon.golovbukh.ua/regulations/2341/8341/8342/464822/>.

¹⁰¹ 19 department heads say they are satisfied with job descriptions in their organisational units. Two are dissatisfied.

¹⁰² 19 per cent disagrees with the statement that there are discrepancies between the job actually done and the content of the job description. 17 per cent have no opinion on the matter.

The ministry practices a system of short-term personnel planning. The plan covers one year. Mid-term (1-3 years) or long-term plans (3-5 years) are not prepared.

The annual plan is made according to a pre-determined format with inputs from MoD managers (section heads, department heads and senior managers). Non-managerial staff are not involved nor are representatives of the MoD financial unit. The plan deals with *i.a.* changes in staffing structure and work positions. It does not include issues such as the need for new posts, training and development and perhaps most noteworthy, staff costs or staffing budgets. The apparently complete absence of economic considerations is striking *i.a.* in light of the general recognition – also internally in the MoD – that one of the main personnel-related problems in the MoD is of economic nature – low salaries.

Moreover, as we have already suggested, there are reasons to doubt if the existing personnel data system is of sufficient quality for planning purposes.

Even when the MoD political leadership has had clear reform ambitions and recognised the need for extensive HRM reforms, it has not tried or seen itself capable of actually carrying out a systematic plan-based approach. Measures to bring about personnel changes have mostly been characterised by short term improvisations, such as transfer of officials from the General Staff to the ministry and initiatives to let officials receive training abroad. As we have already noted, some of these measures have been implemented in a discretionary, even arbitrary way, with calamitous effects in the 2012-2014 period.

A clear majority of MoD department heads (15 out of 21) find the current practice of HR planning inadequate¹⁰³ and a majority (12 out of 21) a mere formality that is not particularly useful to the MoD.¹⁰⁴ 68 per cent of the respondents in the MoD survey agree with the statement that a more serious approach to HR planning would lead to vacancies being filled faster.

The 2015 Law does not directly address the issues of job descriptions and human resource planning. However, some form of staff planning is mentioned as one of

the responsibilities of the head of personnel. New job descriptions aligned with the requirements of the new Law on Civil Service and adapted to the structure and tasks of the downsized MoD will need to be developed.

8.3. Performance Appraisal

According to the CSA, annual appraisals are conducted throughout the Ukrainian civil service in order to improve the selection and appointment of personnel, to promote pro-activeness and creativity of civil servants, to determine their potential and the needs for professional and personal development. The CSA also emphasises the role of performance appraisal in career planning of civil servants and more generally in the management of state institutions. According to the MoD, the appraisal system is fairly uniform for all MoD civil service positions and largely follows the general guidelines for the Ukrainian civil service. However, it seems to be practiced in ways which occasionally deviate from the general description provided by the CSA.

As stated by the CSA the performance appraisal consists of the following steps: 1) Preparatory stage. The personnel department explains to the civil servant the procedure of appraisal and provides him/her with the necessary standardised forms; 2) Appraisal stage; 3) Appraisal interview and signing of the appraisal scheme, by the appraisee and his/her immediate superior; 4) Approval of the appraisal results by a senior manager; and 5) Analysis and decisions on follow-up measures, regarding for instance training activities.

For the most part, the performance appraisal system currently in place in the MoD follows the steps outlined by the CSA. The key elements are: appraisals are conducted annually; self-appraisal by civil servants is encouraged; immediate superiors review the self-appraisal made by the appraisee; there are four possible marks, namely "excellent", "good", "satisfactory" and "insufficient".¹⁰⁵

The manager sends his/her appraisal proposal to his/her immediate supervisor for approval and then has interviews with the appraisees. The result of the performance appraisal may be appealed to the minister of defence. However, the appeal opportunity is hardly ever used. After

¹⁰³ Six department heads agree with the statement that the current practice of HR planning is sufficiently developed, 15 disagree.

¹⁰⁴ 12 department heads agree with the statement that HR planning is reduced to a mere formality that is of no particular use to the MoD, 8 disagree and one states no view on the question.

¹⁰⁵ In the latest appraisal 40 per cent of the appraises were given the score "excellent", 30 per cent "good", 25 per cent "satisfactory", and 5 per cent "insufficient".

the completion of the annual assessment, civil servants normally get a bonus which may amount to one month's salary. Moreover, assessments may result in proposals that civil servants be promoted, demoted or given opportunities for training.

In addition to the annual performance appraisals, once every three years there used to be a so-called "attestation", an arrangement taken over from the USSR where it was first introduced in 1968. While the annual performance appraisal assesses civil servants' performance during the preceding year, the main purpose of the attestation was to establish whether an official was qualified for his/her position or not. The 2015 Law on Civil Service includes no legal basis for attestations, which means that this arrangement must cease from the moment the new law entered into force.

Some aspects of the performance system are in line with accepted international practice such as the existence of periodic appraisals, and the fact that appraisals include an interview and a written report. However, there is some doubt as to whether the current arrangements are sufficiently objective and performance oriented: The four-item rating scale includes three positive categories ("excellent", "good", and "satisfactory"), and only one negative ("insufficient"). It may be doubtful whether this system ensures sufficiently nuanced appraisals. There is a risk (resulting from the strong dependency of civil servants on their managers) that officials are evaluated more against ad hoc instructions by their superiors than against their attainment of objectives. Interviewees argue that performance appraisals are mainly formalistic exercises. The argument is heard that until recently there has been a practice in military institutions where service members themselves have filled in their evaluation reports.

Whereas department heads are of the opinion that current performance evaluation arrangements contribute to staff motivation, MoD employees seem to take a more sceptical attitude. Relatively large proportions of respondents in the survey say that "the current performance assessment practice failed to meet expectations" and disagree with the statement that "the assessment I get helps me in advancing my career".

The current arrangements for performance appraisal raise some questions. It seems doubtful whether the

objectives of the performance appraisal system specified by the CSA (promotion of pro-activeness, creativity, and professionalism) can be realised within the current legal and institutional frameworks and management practice within the civil service. A key point of this report is that some of these frameworks (regarding for example recruitment, remuneration, and disciplinary matters) do not promote the professional independence of civil servants or a performance culture.

8.4. Training

Civil servants are provided with opportunities for training in educational institutions and for self-education. One of the key training institutions for advanced studies is the Presidential National Academy of Public Administration (Article 29 of the Law on Civil Service). According to the CSA, some 23 per cent of civil servants received training in 2014.¹⁰⁶ However, interviewees indicate that trainings may not be of sufficient quality.

The DPP is responsible for training and development in MoD and holds and spends the training budget. The department reports that there is an annual staff development procedure where line managers identify and report the training needs of their subordinates. Moreover, the DPP assesses the need to train officials based on the information contained in the personnel files.

However, MoD officials interviewed for this study say that competency building is not managed in a systematic way or given high priority. According to almost one third of MoD department heads (6 out of 21), the need for training and development is not analysed at all. Four department heads say this is done informally, and 11 formally. One department head says, "I do not send people to training, because the work of the department would stop", and another argues that "training only inflicts damage, no improvements".

During the past two decades both the Ukrainian Armed Forces and MoD have received Western support for competency building. For military officers, training activities have included opportunities to study abroad and to serve in NATO member states. In addition, Ukrainian participation in the Iraqi campaign 2003-2006 meant exposure to what is considered "advanced Western practices". In 2014 a

¹⁰⁶ See the National Agency of Civil Service (op.cit), footnote 57, p. 20.

total of 137 – or some 20 per cent of all MoD officials – participated in training activities organised as international projects. A substantial share of the trainings consisted of English language courses. In 2005, NATO introduced its Professional Development Programme (PDP) to provide training for Ukrainian civilian security officials and to some extent also military personnel. By the end of 2012 some 600-700 officials had been trained annually at long-term courses and internships abroad or taken part in various short-term activities, e.g. seminars and study visits to other countries. During the period January - November 2015 a total of 164 MoD officials participated in PDP training activities.¹⁰⁷

However, in spite of extensive foreign support, efforts to build a pool of civilian experts at the MoD have not fully succeeded. Several factors seem to have contributed to the alleged limited effect of foreign supported training. One issue is the relatively high age of civil servants and hence of (potential) participants in trainings. Another factor is the lack of personnel employment stability, i.e. the frequent replacement of officials at senior levels.

A further issue is the alleged lack of a transparent and systematic approach to training in the MoD not least when it comes to the selection of candidates for training. In this regard, previous Deputy Defence Minister Leonid Polyakov observes that “[...] “smart” individuals exploited [the] selection system’s inherited problems of [...] lack of transparency [...] individual decisions were driven by availability of course[s], rather than a clear set of requirements and systemic planning. [Furthermore], the lack of systemic planning for education abroad significantly reduced the effect of foreign experience in Ukrainian military realities, when effective utilisation of acquired Western experience was a matter of the individual’s choice rather than institutional policy.”¹⁰⁸ Similar arguments are made in the 2015 annual report of the NATO-Ukraine Professional Development Programme.¹⁰⁹

The non-managerial staff of the MoD have divided opinions on how well training is organised. Whereas 51 per cent say that training opportunities are good, 39 per cent hold the opposite view. Ten per cent have no opinion. A total of 41 per cent disagree with the statement that training is used to reward those loyal to the boss, 31 per cent agree, while 27 per cent report no opinion.

The overall system for training and competence building is in need of overhaul. Although there have been plenty of trainings on offer, the overall effect has been limited. What is lacking is a systematic approach which enhances the professionalism of institutions and not only brings personal benefits for individual participants.

8.5. The rewards and remuneration system

The salary structure for public officials and public employees is regulated by the 2015 Law on Civil Service. Articles 50-54 of the new law describe the remuneration system and social benefits.

The remuneration scheme is uniform for all state institutions, including the MoD. It is divided into nine remuneration groups or hierarchical levels (article 51) ranging from the senior civil servants (group 1) to the rank-and-file civil servants (group 9). However, in terms of remuneration, state agencies are ranged in three groups (article 51): group 1 (agencies with jurisdiction over the whole national territory); group 2 (those having jurisdiction over several regions or the cities of Kiev and Sebastopol); and group 3 (those having jurisdiction over one or several districts and cities of regional importance). The division of state agencies into three groups is done in order to vary pay levels, with the highest remuneration in agencies belonging to group one and lowest in those which are in group three. This arrangement creates imbalances and unhealthy competition for talented people employed by public authorities. It may harm the overall performance of the public service. Instead, the salary system should be organised so as to guarantee a uniform quality throughout the whole country.

An important difference between the 1993 Law and the one adopted in 2015 regards the variable part of the salary. According to the system established by the former law, variable benefits could amount to 70 per cent of the total

¹⁰⁷ The trainings included the following activities: (1) English language courses – MoD and other security sector representatives – 41 participants; (2) Course on mass media work in crisis situations, Oberammergau, Germany, - 1 participant; (3) Regional seminar “Internal audit and its role in the integrity building and reduction of corruption risks in the defence sector” – 30 participants; (4) Conference “Modernisation of the state governance system and its influence on the sector of security and defence” – 52 participants; (5) Course of strategic leadership, Georgia, - 2 participants; (6) Seminar on issue of public relations in defence sector, Georgia, - 6 participants; (7) Course in “Management of the defence sphere in the wider security context”, Georgia, - 6 participants; (8) Strategic leadership course, Albania, - 1 participant; and (9) Course in “NATO structures and procedures” – 25 participants.

¹⁰⁸ See Polyakov (op.cit.) footnote 65, p. 13

¹⁰⁹ See annex 1 to notice by the NATO-Ukraine Commission, 8 December 2015, p. 5.

salary. In the 2015 law this percentage is reduced to 30 per cent. The scope of the variable pay and the arbitrary way it may be determined, creates serious problems (see below) and may undermine the salary predictability principle.

Salary levels in the public sector are low. They make it difficult to recruit and retain qualified staff and pose serious risks of corruption. Regarding the military, a former senior defence official observes that as a consequence of low salaries “[...] in early 2000s, many senior commanding and General Staff officers often had their “in kind” businesses. This looked especially bad in departments related to appropriation of scarce budgetary funding: logistics, acquisition, medical support, disposal of redundant ammunition and equipment, demilitarising of surplus land and infrastructure, R&D orders, communication, maintenance, construction, etc. Corruption was felt in all types of distribution and personnel management selection processes: education, career promotion (for “good” positions or “good” places of service), distribution of housing, even in training and selection for peacekeeping missions and in education abroad.”¹¹⁰

The MoD salary system is skewed strongly in favour of military personnel whose salaries may be three to four times higher than those of civil servants in comparable positions.

As already mentioned, the amount of bonuses is very high. In addition to the official salary, officials' wages may include (LCS article 50): long-service premium, rank-related premium, and additional payments for replacing temporarily absent civil servants (up to 50 per cent of the salary). Funds derived from payroll budget savings due to vacancies may be used to top-up officials' salaries. When such savings are available, unit managers submit proposals for salary supplements to the head of the state agency

who determines the amounts of premiums and issues a corresponding order.

In addition civil servants may be paid performance-related bonuses (no upper limit is fixed by the law) and for an unspecified “personal contribution of the civil servant to the achievement of the overall results of the government's agency performance”. In the latter case the law fixes an upper limit at 30 per cent of the total annual official salary.

A resolution of the cabinet of ministers gave only cursory criteria for the award of salary supplements.¹¹¹ In practice, heads of individual state institutions determine – at their own discretion – the procedures for applying bonuses.

As we have noted earlier, information on salaries (in individual cases and overall) seems to be absent from HRM routines and practices in the MoD. There is no information about salaries in personnel files, in the MoD personnel data system, in job descriptions or in the annual HRM plans. The lack of transparency constitutes a risk of arbitrariness, abuse, and corruption.

The 2015 Law introduces more elaborate control mechanisms in the management of salary supplements. The Civil Service Agency is given the responsibility to determine the procedure for awarding bonuses – both those based on performance appraisal and those resulting from payroll savings. As already mentioned, the new Law sets a global upper limit for the bonus fund. Time will tell how the new arrangements will work and whether or not they will reduce the extent of arbitrariness in the remuneration system.

For the time being, the lack of transparency, size of bonuses and the subjectivism and discretion used when awarding them may threaten the rule of law and the principle of legality.

¹¹⁰ Polyakov (op.cit.) footnote 65, p. 12.

¹¹¹ Resolution of the Cabinet of Ministers no.268 of 9 March 2006. Available at: <http://zakon2.rada.gov.ua/laws/show/268-2006-%D0%BF/print1443512243054358>

The main responsibilities of the DPDC are preparation and implementation of various types of measures to detect and prevent corruption.

9. Corruption risk monitoring and management

By “corruption risk monitoring and management” we mean “the systematic and continuous efforts to identify and mitigate corruption risks within an organisation.”

9.1. The internal control framework

The first MoD anti-corruption unit was established in 2009, first as a section (3 employees), then as a division (5 employees) within the Directorate for Internal Audit. Since 2014 the anti-corruption unit is a separate directorate – the Directorate for Prevention and Detection of Corruption (DPDC) reporting directly to the Minister of Defence. It has a total of 11 employees and is organised in two units, respectively for prevention of corruption (5 employees) and for detection of corruption (5 employees). The main problem of the DPDC is its lack of personnel. There is a need to establish four territorial units (each with a minimum of 11 employees) as well as to strengthen the capacity of the DPDC. Moreover, the directorate suffers from a lack of modern equipment.

However, the prospects of solving these problems seem limited. The current plan to cut MoD staff foresees that the DPDC will lose four positions and have its organisational status reduced from “directorate” to subordinate “unit”

The main responsibilities of the DPDC are preparation and implementation of various types of measures to detect and prevent corruption.¹¹² It is obliged to report to the National Agency for Corruption Prevention, but this latter institution has only recently started its work.

In 2015, the DPDC prioritised efforts to develop a planning system covering the MoD and the armed forces, strengthen the cooperation with law enforcement agencies, and to detect corruption in the ATO and in military recruitment offices. Moreover, the results of investigations of possible corruption cases have been submitted to the relevant law enforcement agencies. Since late 2014 180 cases of corruption or corruption-related offences have been registered. While it is too early to fully assess the effectiveness of the DPDC, the lack of personnel and equipment limits its reach and impact.

In Ukraine there is a law ‘On Principles of State Anti-Corruption Policy (Anti-Corruption Strategy) for 2014 – 2017’.¹¹³ This document does not specifically mention the defence sector. However, according to the latest Military Doctrine of Ukraine, counteracting corruption is a key objective of the defence and security policies. Moreover, the Law on National Security¹¹⁴ (article 7) defines corruption as a one of the key threats to national interests and security.

The Research Centre for Humanitarian Problems of the Armed Forces conducts annual studies on the perceptions of military personnel on the extent and nature of corruption in the armed forces.¹¹⁵ According to the most recent of these studies, 84 per cent of the respondents considered the level of corruption in Ukraine generally as “high” or “very high”. The corresponding percentage regarding the incidence of corruption in the armed forces was 46 per cent. Overall, the respondents have a negative view of the efficiency of measures to counteract corruption.

¹¹² These measures include, provision of methodological assistance to other parts of the defence establishment, participation in information and research activities, participation in international cooperation, participation in organisational and awareness raising activities, and implementation of activities to ensure compliance with the legislation on conflicts of interest.

¹¹³ Adopted on 14 October 2014, enacted on 26 October 2014. Law no. 1699 of 14 October 2014. Available at: <http://zakon0.rada.gov.ua/laws/show/1699-18>

¹¹⁴ Law no. 964 of 19 June 2003. Available at: <http://zakon3.rada.gov.ua/laws/show/964-15>

¹¹⁵ “The state of implementation of anti-corruption policy and the efficiency of commanders (chiefs) in the enforcement of anti-corruption legislation in the AFU.”

As already noted, in 2015, the MoD adopted an anti-corruption programme containing a large number of measures as well as deadlines for their implementation. Several of the proposed activities include arrangements for human resource management in the ministry, such as developing an action plan for the implementing the new Law on Civil Service, developing and implementing a project for mitigation of corruption risks in the system of HRM (the proposed Norwegian project), taking action to reduce the turnover of staff especially among senior MoD staff and conducting inspections regarding the protection of whistle-blowers.

It seems that no particular methods are used to prevent and detect corruption or used systematically in the areas which are especially prone to corruption. Regarding public procurement, the CIDS assessment team heard allegations that contracts are negotiated by military representatives who tend to have long-standing relationships with state-owned suppliers. Some requirements in MoD tenders appear to be tightly set to favour specific companies, precluding bids from competing suppliers. There is no guarantee that tender committees include procurement professionals. Apparently, MoD officials with ties to the defence industry can guide contracts to favoured suppliers without taking responsibility for the decision.

While we have repeatedly noted that the current anti-corruption legislation of Ukraine is largely in line with international standards, it seems that the new legal concepts and provisions are not well known in the MoD and that little has been done to systematically adapt internal procedures and regulations to the new legislation. However, the MoD anti-corruption programme includes provisions that may rectify this situation. For the fourth quarter of 2016 the programme foresees the preparation of a code of professional ethics for MoD officials. The drawing up of such a document gives the opportunity to make sure that MoD decision-making practices are fully in line with the anti-corruption legislation. The MoD has requested CIDS to provide professional assistance to draft the code of ethics.

The National Anti-Corruption Agency of Ukraine (NACA) is given the task of developing criteria to identify positions that are particularly vulnerable to corruption. This mission covers the entire public administration in Ukraine – including the MoD. The NACA is under establishment and the employees have only limited expertise and experience when it comes

to fighting corruption in the civil service. The NACA has suggested that CIDS provide professional assistance to establish criteria for determining the risk of corruption in civil service positions and use the MoD as a pilot case.

9.2. The internal audit and the inspector general

The MoD Department for Internal Audit was established in 2012. It reports directly to the minister of defence and includes 38 officials. Some 160 internal auditors are working in the units of the armed forces across the country. According to the MoD regulations, internal audit units are to inform the minister of defence of indications of fraud, corruption or misuse of budget funds, waste, abuse of power or other violation of fiscal discipline which lead to loss or damage.¹¹⁶ However, leading officials at the MoD Department for Internal Audit say that they are not responsible for corruption-related issues, “It is not my duty to look for corruption. If we find something suspicious, we submit the issue to the Anti-corruption Directorate.” In spite of this, seven MoD auditors received anti-fraud and anti-corruption training in the years 2014-2015.

The formal regulations of the MoD directorate for internal audit are based on international standards.¹¹⁷ Altogether 95 per cent of all internal audits are compliance audits. The remaining 5 per cent are performance audits. This means that the focus is mainly on accounting errors in individual cases and not on the functioning of systems and how systemic failures may create *i.a.* risks of corruption.

The Directorate for Internal Audit prepares an annual work plan. It is agreed with the State Financial Inspection of the Ministry of Finance and approved by the Minister of Finance. However, internal auditors have to perform extra functions, such as participating in procurement committees. This combination of functions may compromise the auditors' independence and cause conflicts of interest.

Only a few officials working in the Directorate for Internal Audit of the MoD are auditors. Clearly, the number of fully qualified staff is too low. Arguably, this state of affairs will be aggravated by the ongoing MoD downsizing process which foresees a reduction of 13 positions in the audit department.

¹¹⁶ Order of the Ministry of Defence on 19.11.2013 and the Procedure of internal audit by the units of internal audit of the Armed Forces approved by the Order of the Ministry of Defence on 14.11.2012 №753 (as amended). Available at: http://www.mil.gov.ua/content/other/MOU134_2015.pdf

¹¹⁷ Order of the Ministry of Finance adopted on 04.10.2000 №1247

The Harmonisation Unit of the State Financial Inspectorate of the Ministry of Finance is responsible for providing professional support to and assessing the quality of internal audit units' production. However, domestic training opportunities in this field are limited. Some auditors are being trained with foreign support.

For financial management arrangements and control to be properly implemented, including in ministries of defence, delegation of decision making on budgetary resources is necessary. In a system with absolute, or nearly absolute centralisation of decision-making authority – and the MoD of Ukraine seems to represent such a system or has represented it until quite recently – it is not possible to carry out internal audits according to international standards.¹¹⁸ It is also not possible to have internal control arrangements for procurement work carried out by the administrative bodies. For controls to be effective, those who implement them must have a minimum level of professional independence.

There is no position of Inspector General, but a position of Chief Inspector. The main function of the Chief Inspector is ensuring the combat readiness of the armed forces. His remit does not include investigation of fraud and corruption.

The MoD has taken several steps to introduce and strengthen mechanisms for monitoring and managing corruption risks, which, if effectively implemented may enhance professionalism and integrity in defence institutions. However, currently limited capacity and lack of familiarity with e.g. modern audit methods as well as strict centralisation of authority reduce the impact of the new arrangements. The actual organisation of work within the MoD may compromise the professional independence of officials having control and oversight functions.

¹¹⁸ See the discussion about recent attempts to delegate authority in the MoD, section 5.2 above.

The task of the CIDS assessment team has been to describe and explain the current system of HRM, not to identify its effects. However, the question of consequences has arisen from time to time during the preparation of this report.

10. Possible consequences of the current system of HRM

The task of the CIDS assessment team has been to describe and explain the current system of HRM, not to identify its effects. However, the question of consequences has arisen from time to time during the preparation of this report. The assessment team will briefly outline some of its own reflections regarding this topic as well points of view which have been put forward by Ukrainian experts and decision-makers.

Lack of expertise

We have described a system which is not fully geared to or fully capable of recruiting civil servants on the basis of merit. Traditionally, loyalty has seemed to be more important than professionalism. Thus, people with in-depth knowledge of the Ukrainian defence system argue that the professional level of MoD officials does not meet the high job requirements. In 2011, former military prosecutor, Mr Mykola Holomsha, stated that "[...] during recent years senior defence positions were occupied many times by people who do not have relevant education/training nor experience [...]."¹¹⁹ According to insiders, a major workforce reduction after 2011 aggravated the situation further and failed to ensure even a minimum of professionalism in key MoD areas. In broad terms, risk factors creating this state of affairs are still prevailing. The situation cannot be expected to be significantly changed before the new Law on Civil Service has been properly implemented and been in force for some time.

No proper democratic and civilian control over the armed forces

In the MoD there is a lack of civilian expertise. People with military, and only military background are the most numerous and, arguably, most influential group of MoD officials. The ministry is not seen as an attractive place of

work for well-qualified civilians, *i.a.* because salaries are low, significantly lower than for military personnel, and there are few if any career opportunities.

This state of affairs raises questions about the ability of the MoD to ensure proper democratic and civilian control over the armed forces. Without civilian MoD experts who can function as an intermediary between the military on the one hand and the government and the civil society on the other, it is difficult to have a well-informed public and political debate on defence issues, and hence a balanced understanding of the role and needs of the military.

Moreover there is a risk that the MoD is not adequately equipped with necessary civilian expertise, *e.g.* in policy planning and international negotiations and that security issues are one-sidedly viewed from a military perspective.

Bureaucracy and arbitrariness

The MoD is a centralised bureaucracy, with tight regulation and standardisation, or put differently, bureaucratisation, even excessive bureaucratisation of work¹²⁰, and with emphasis on control, and top-down decision-making. All power and authority are possessed and mostly exercised by the minister. For civil servants, formal regulations may serve as a protective shield in ambiguous and potentially threatening situations. This is especially because the political situation in Ukraine is unstable, because changes of government and individual ministers may entail major personnel changes, and since the rights of civil servants are not properly protected, officials may find it best to stick to what is formally prescribed and avoid developing potentially

¹¹⁹ Mykola Holomsha, "Proceedings of the international conference "Improving integrity and reducing corruption in defence sector of Ukraine". NISS, Kyiv 2011, p.21.

¹²⁰ In a public statement on 30 March 2016 the Minister of Defence of Ukraine said that, "The great number of regulatory documents does not allow the normal activities." Statement available at, <http://www.mil.gov.ua/en/news/2016/03/30/minister-of-defence-we-must-start-reforms-from-the-ministry-of-defence-of-ukraine/>

controversial ideas of their own. This, of course, makes it difficult to develop and implement future-oriented policies.

At the same time the public administration of Ukraine, including the MoD, has an employment system where there is a clear risk of arbitrariness, and in which traditionally, contacts to influential people have meant more for civil servants' career than their professional qualifications.

Absence of professional autonomy

The recruitment system outlined in this study – with more emphasis on loyalty than expertise – entails the risk that civil servants are reluctant to assert professional independence in the sense we have outlined earlier (section 3.1.2). On the contrary, the system may reinforce the idea that civil servants would do well to obey orders from superiors or even wishes of political agents outside the public service.

Arguably, the civil servants' lack of professional independence may be further aggravated by other aspects of the HRM system derived from the 1993 Law on Civil Service, which was in force until 1 May 2016. Traditionally, civil servants are not well protected from having to execute improper or illegal orders, as major portions of civil servants' salaries and other rewards are at the discretion of the MoD management. Moreover, arrangements for dealing with civil servants' complaints are still ineffective and enjoy little trust. Appeal bodies and courts are often weak and there is a view that they may bend to political pressure.

This state of affairs seems to create a situation where politicians do not need to fear the consequences of providing questionable instructions, and civil servants do not feel compelled to oppose these, let alone take professionally based initiatives.

Penetration by external agents

Not least experience of the 2011-2014 period suggests that the MoD may be hijacked by external agents, not only representing business interests, but arguably, also those of foreign powers. Arbitrary systems of HRM and weak, or almost non-existent accountability mechanisms are risk factors that may promote these forms of capture. While such risks may be reduced by effective implementation of the new Law on Civil Servants and other recent pieces of legislation promoting professionalism and integrity in the

Ukrainian public service, their impact still remains to be seen.

The real possibility that people outside the executive – or outside the relevant ministry – shape executive decisions through pressure on ministers and other officials means that the link between authority and accountability is broken, that power is exercised without the sobering influence of responsibility. The end result is high risk of corruption¹²¹ and inadequate performance by state institutions. Almost needless to say, such a system is a far cry from the international standards outlined at the beginning of this report.

Inadequate performance by military institutions

Although causal relationships may be difficult to establish, inadequate HRM, such as lack of professionalism, staff instability, and politicisation of defence institutions have been seen as sources of poor military performance in recent armed conflicts. (See textbox 6 below)

Textbox 6 HRM practices and military performance¹²²

(1) A Pentagon study argues that the suboptimal performance of the Georgian military in the war with Russia in 2008 was due to widespread mismanagement, unqualified leadership and, more generally, the absence of a professional system of human resource management. Georgia's military establishment, the report says, is highly centralised, prone to impulsive rather than deliberative decision-making, undermined by unclear lines of command and led by senior officials who were selected on the basis of personal relationships rather than professional qualifications.

(2) "The 2008 August War demonstrated important features of defence institutional deficiencies, such as political interference by incompetent senior civilian leadership and lack of defence and military expertise. The "strategic miscalculations" [...] during the war were partially caused by the lack of experience and expertise of the senior civilian leadership (who were personally close to the President) and appeared directly involved in the commanding of military and humanitarian operations. [...] the frequent changes of political leadership in the Ministry of Defence [of Georgia], which counts eight ministers of defence from 2004 to 2012, had a negative influence on institutional developments. Very commonly, the change of minister was followed by "turbulent personnel changes" as ministers were accompanied by a

¹²¹ See Balázs Jarábik: *Reform and Resistance: Ukraine's Selective State*, in New Eastern Europe 20 January 2016. Available at: <http://neweasterneurope.eu/articles-and-commentary/1867-reform-and-resistance-ukraine-s-selective-state>.

¹²² The content of the textbox is based on the following sources (1) *New York Times* 17 December, 2008, J. Chivers and T. Shanker, "Georgia Lags in Its Bid to Fix Army," available at http://www.nytimes.com/2008/12/18/world/europe/18georgia.html?pagewanted=all&_r=0 (2) Petriashvili (*op.cit.*) footnote 13, pp. 66 and 67.

'trusted team' of civil servants who, in the most cases, were "oriented to gain protection and patronage in exchange for subordination, obedience loyalty, and supervisor dependency." Changes in leadership and personnel were negatively influencing the reform implementations. [...] The knowledge and skills related to the security field were deficient, and the loss of skills and experience was not easily recovered. Also, the feeling of instability and the job insecurity were affecting performance and initiatives."

As we have demonstrated in this paper, and as is evident from Ukrainian official papers such as the National Security Strategy quoted above (section 3.3), the types of institutional deficiencies mentioned in the textbox also seem to be present in Ukraine. In all likelihood, they have negatively influenced the performance of defence institutions.

For instance, official statistics indicate that 30 per cent of ATO personnel losses occur outside of combat, a situation which is usually caused by mismanagement and poor leadership. MoD insiders point to such a connection. In particular, they highlight the calamitous effect of the downsizing process which was completed immediately before the Russian aggression in 2014, on the level of expertise and the performance of the MoD and the armed forces. The effects were particularly felt in the medical area. Soldiers were sent to the front without access to adequate medical expertise or equipment. According to publicly available information, the armed forces have been equipped with *i.a.* bulletproof vests and tourniquets, which do not measure up to normal standards. These and other cases have been associated with corruption and negligence.¹²³

While the 2012-2014 workforce reduction may have aggravated this situation, the mismanagement of the medical area seems to have gone on for a long period of time. Thus, for instance, when the war started it was discovered that stockpiles of medical equipment only included damaged and unusable supplies from the 1960s.

Ukrainian defence experts go a long way towards asserting that the high costs involved in the current struggle against Russia in human life, and in material and territorial terms, could have been avoided with more adequate methods of *i.a.* civilian control over the armed forces and of personnel management, "Lessons learnt, very loudly cry for urgent repair of the system of democratic civilian control over the military and HRM [...]"¹²⁴

Finally, it should also be emphasised that civil service professionalism or the lack of it influences not only the course and outcomes of war and other types of social performance. Several studies highlight the importance of state institutions for the spread and development of democracy.¹²⁵ A 2010 review of such studies observes that "A sufficiently strong state – which in contrast to a neo-patrimonial state is not a prey to special interests or nests of corruption, abuse and repression – is a precondition [for a successful transition from a non-democratic to a democratic system of government]".¹²⁶ Conversely, we may assume that a civil service system which significantly violates the principles of professionalism discussed in this paper – *i.a.* neutrality, impartiality, and expertise – reduces the chances that a country will be democratic.

Overall, current employment practices do not promote the development of adequate civilian expertise at the MoD or proper civilian and democratic control over the armed forces. Currently, the ability of civil servants to resist illegal orders from their superiors or to refuse compliance with ethically questionable instructions remains almost zero. The new 2015 Law offers stronger protections and clearer complaints mechanisms. If effectively implemented, this law will significantly promote expertise and integrity across the Ukrainian public administration. However, the Lustration Law represents a weakening of the ability of civil servants to refuse compliance with illegal instructions and thus contributes to further politicisation of the civil service.

¹²³ Regarding tourniquets see [http://www.mil.gov.ua/en/news/2016/05/27/briefing-of-ukrainian-mod-spokesperson-at-the-ukraine-media-crisis-centre-\(video\)/](http://www.mil.gov.ua/en/news/2016/05/27/briefing-of-ukrainian-mod-spokesperson-at-the-ukraine-media-crisis-centre-(video)/) <http://obozrevatel.com/crime/94152-ubijstvennyij-sabotazh-volonteryi-raskryli-gromkuyu-korrupcionnyu-shemu-v-minoboronyi.htm>, <http://lastnews.com.ua/articles/478243-kak-minoborony-kupilo-brakovannye-zhguty.htm>
Regarding bulletproof vests, see Aleksandr Lapko in New York Times, 8 August 2014, "Ukraine's Own Worst Enemy. In War Time, Corruption in Ukraine Can Be Deadly", available at <http://www.nytimes.com/2014/10/08/opinion/in-war-time-corruption-in-ukraine-can-be-deadly.html>. See also the official web-page of Prosecutor General's Office of Ukraine http://www.gp.gov.ua/ua/news.html?_m=publications&_t=rec&id=142501

¹²⁴ Polyakov (op.cit.) footnote 65, p 10.

¹²⁵ MoD note of 26 July 2016 addressed to the defence attaché at the Norwegian Embassy in Kyiv.

¹²⁶ MoD note of 26 July 2016 addressed to the defence attaché at the Norwegian Embassy in Kyiv.

The needs analysis shows that the Ministry of Defence has yet to put in place an effective system for human resources management that is aligned with mainstream European practice and meets internationally accepted standards of professionalism.

11. Recommendations

The needs analysis shows that the Ministry of Defence has yet to put in place an effective system for human resources management that is aligned with mainstream European practice and meets internationally accepted standards of professionalism. The findings of the needs analysis can be summarised in two points:

- A. Current HRM arrangements do not sufficiently support professionalism based on merit and integrity, and
- B. The Ministry of Defence needs additional and more professional civil servants in order to be able to realise the goal of civilian and democratic control over the armed forces as required by NATO standards.

Ukrainian authorities seem to agree with key elements of the above diagnosis. In fact, the National Security Strategy of Ukraine points out that “institutional weakness” [...] “lack of professionalism” [...] “an outdated model of public institutions and degradation of the public service” constitute threats to the national security of Ukraine.

Furthermore, Ukrainian authorities have taken practical steps in addressing the mentioned problems by adopting

- A. A number of policy documents, and
- B. A series of legal frameworks.

The former category (policy documents), consists of a series of doctrinal frameworks on defence and security, e.g. the revised military doctrine of Ukraine (2015), the National Security Strategy of Ukraine (2015), and the Concept of Development of Security and Defence Sector of Ukraine (2016). The former group also includes the public administration reform strategy. In the latter category of documents (legal frameworks) we find *i.a.* the Law on Civil Service (2015), the Law on Prevention of Corruption (2014), and the Law on Access to Information (2011).

The doctrinal frameworks on defence and security propose to establish democratic, civilian control over the armed forces through increasing the effectiveness of the ministry of defence and emphasising the need to professionalise the civilian MoD staff. It is announced that by the end of 2018, all senior MoD managers will be civilian.

The enacted legal acts – although not perfect – are largely in line with the EU standards used as an assessment basis in the needs analysis. In fact, they are of higher quality than corresponding frameworks in some other countries in Eastern and South-eastern Europe, including countries, which are already members of the EU and NATO.

However, sound legal frameworks, though necessary, are not sufficient for good functioning of an administrative system. Implementation of legal provisions requires the undivided commitment of the leadership at every level. In that sense, there may be doubts about how deeply the reform spirit of Ukrainian decision-makers is rooted. As we have shown in the needs analysis, there seem to be increasing tensions between reform supporters and *status-quo* oriented actors. Given the still precarious military situation, the recognition of the need for reform is probably stronger in the MoD than in other ministries. Here we should also add that a relatively large number of volunteers are involved in the MoD reform efforts. This group of people, who enjoy direct access to the minister of defence, represent a voice for reform.

In Eastern and South-eastern Europe, the perspective of Euro Atlantic, especially EU integration, has driven the reform process forward. In the same vein, the Ukrainian reform agenda included in the doctrinal documents, laws and regulations mentioned above, has been encouraged and influenced by EU and NATO representatives. While Ukraine's membership ambitions in these two organisations

have not been met with the level of support in Western capitals Ukrainian leaders may have hoped for, the extent to which Ukraine's Euro Atlantic aspirations will be realised, largely depends on the country's own efforts and performance.

Overall, CIDS believes that there is a sufficient political, legal and doctrinal basis to guide MoD reform efforts in the area of HRM. However, as we have already noted, these bases reflect Western standards and traditions, which may be alien to longstanding Ukrainian practices and be little known among Ukrainian decision-makers. Thus it may be helpful, perhaps even necessary, that Western experts guide and assist MoD reforms, while they at the same time support local ownership of these efforts.

Given its experience from similar cooperative efforts with MoDs across Eastern and South-eastern Europe, and its access to all relevant types of expertise, CIDS should be well-placed to assist Ukrainian reform efforts. Here we should add, that during the work with this needs analysis, a good working relationship has evolved between CIDS and the MoD, especially the project group appointed by the Ukrainian defence minister. The MoD has showed openness to CIDS and invited CIDS to participate in the key ministerial reform committees working in the areas of HRM, civilian control over the armed forces, and anti-corruption efforts.¹²⁷

Likewise, CIDS have signed a memorandum of understanding with the CSA, which will bear a major responsibility for implementing the new Civil Service Law (CSL).

The CIDS assessment team will propose that Norway funds a three-year project regarding HRM in the Ministry of Defence of Ukraine. The overall objective of the project should be:

"Enhanced professionalism and integrity in the Ministry of Defence of Ukraine".

The objective addresses the key findings of the needs analysis summarised above: (a) Current HRM arrangements do not sufficiently support professionalism based on merit and integrity, and (b) the Ministry of Defence is

an organisation strongly influenced by the military or by current or former military personnel, a situation that does not promote civilian and democratic control over the armed forces. As we have already noted, the overall objective is in line with priorities of the Ukrainian government and recommendations in Euro Atlantic integration processes.

The project should primarily focus on the civilian part of the ministry, *i.e.* the work posts covered by the Law on Civil Service, which make up the majority of all MoD positions. However, the project may also need to deal with personnel issues primarily regulated by the military legislation, to the extent this legal framework may be relevant to the project objectives.

The goal of most donors, like that of the Norwegian Government is to strengthen civilian control of the military. However, it seems that international assistance to the Ukrainian defence sector is skewed in favour of military actors and topics that are especially relevant for members of the armed forces. One purpose of the proposed project should be to help correct any such imbalance.

The CIDS assessment team will propose two specific objectives directly related to the overall project objective:

1. Legal frameworks, organisational set-ups, and procedures and practices more conducive to professionalism
2. Levels of competence among MoD officials more conducive to professionalism

Civil service professionalism in the MoD but also in the public administration more widely is a key precondition for democratic control of the armed forces (see section 3.2 above in particular). Thus both specific objectives will contribute to the achievement of the overall project objective.

The choice of the two specific objectives reflects a key concern of the CIDS assessment team. MoD capacities are enhanced through improvement of both staff competence (specific objective 2) and the staff's legal and administrative environment (specific objective 1). Enhancement of staff competence is necessary to realise legal and administrative reform. At the same time, improvement of staff competence without adjustments of the wider decision-making framework may mean inefficient use of resources if

¹²⁷ MoD note of 26 July 2016 addressed to the defence attaché at the Norwegian Embassy in Kyiv.

the framework is dysfunctional and the weaknesses remain unaddressed.

As we have noted repeatedly throughout this report, legal frameworks applying to the civil service, including the MoD are largely in line with European standards. Thus, the main effort of the project should be to assist the MoD in implementing this legislation, in particular the new Law on Civil Service. However, as previously indicated, the project should document needs for changes in the military legislation and possibly prepare reform options with the MoD.

The CIDS assessment team will propose seven project results under specific project objective (1) – Legal frameworks, organisational set-ups, and procedures and practices more conducive to professionalism:

- *Needs for changes in legal frameworks documented and reform options prepared.* This result concerns military pieces of legislation, but could also cover other types of legislation applying to the MoD.
- *Proposals for a proper system for HR planning developed.* This result addresses the finding of the needs analysis that current planning arrangements are not adequate to support major HRM related reforms (see section 8.2).
- *Proposals for an improved system of job descriptions developed.* This result addresses the finding of the needs analysis that there is reason to ask whether anybody in the MoD has a full overview of the tasks actually performed. To achieve greater clarity, a comprehensive job analysis should be conducted. As a minimum, current job descriptions should be aligned with the requirements of the new Law on Civil Service (see section 8.2).
- *Proposals for improved recruitment and promotion procedures developed.* This result addresses the findings of the needs analysis that current arrangements for recruitment and promotion do not satisfy international standards. The idea of civilian and democratic control over the armed forces can hardly be realised. Due to *i.a.* low salaries and arbitrary systems of HRM, the MoD may face difficulties in recruiting and retaining highly competent civilian personnel, especially in areas where there is strong competition from private employers. If the 2015 Law on Civil Servants is soundly implemented, the situation regarding recruitment and promotion is likely to change for the better (see chapter 6).
- *Proposals for a more objective and predictable salary system developed.* This result addresses the finding of the needs analysis that the lack of transparency, size of bonuses and the subjectivism and discretion used when awarding them may threaten the rule of law and the principle of legality. The MoD salary system is skewed strongly in favour of military personnel. The 2015 Law on Civil Service, while not perfect, could introduce more objectivity and predictability into the management of the salary system (see section 8.5)
- *Proposals for amendment of the complaints procedure developed.* This result addresses the finding of the needs analysis that given the lingering politicisation and the significant number of discretionary measures wielded by civil service managers, civil servants rarely use the complaints mechanism. This situation may improve with the new Law on Civil Service where articles 9 and following offer better legal protection for civil servants protesting illegal orders or instructions by superiors. One way of dealing with the problems identified in the needs analysis could be to encourage whistle-blower disclosures, so that staff members are inclined to unveil misbehaviour or malpractice internally. If incentives to disclose internally are weak, non-existent or too risky (e.g. because of low trust in the institution or fear of retaliation) the staffer will end up by either not disclosing at all or doing it externally (e.g. through the media or other means). A mechanism such as an internal ombudsman could be helpful along with clearly established rules and procedures for channelling grievances and good faith disclosures.
- *Proposals for a code of professional ethics for MoD officials prepared.* This result addresses the finding of the needs analysis that while the current anti-corruption legislation of Ukraine is largely in line with international standards, it seems that the new legal concepts and provisions are not well known in the MoD and that little has been done to systematically adapt internal procedures and regulations to the new legislation. The drawing up of a code of professional ethics for MoD officials gives the opportunity to make sure that MoD decision-making practices are fully in line with the anti-corruption legislation (see section 9.1). The code of professional ethics should include specific guidelines to deal with *i.a.* lobbying by suppliers of military and non-military goods and services, revolving doors between military industries and the public service, incompatibilities and conflicts of interest at the MoD level.

- *Proposals for improvement of the system for corruption risk monitoring and management developed.* This result addresses the observation in the needs analysis that apparently no particular methods are used to prevent and detect corruption or are used systematically in the areas which are especially prone to corruption. The needs analysis also notes that the National Anti-Corruption Agency of Ukraine (NACA) is given the task of developing criteria to identify positions that are particularly vulnerable for corruption. This mission covers the entire public administration in Ukraine - also the MoD. The NACA is under establishment and the employees have only limited expertise and experience when it comes to fighting corruption in the civil service. The NACA has suggested that CIDS provide professional assistance to establish criteria for determining the risk of corruption in civil service positions and use the MoD as a pilot case (see section 9.1 of the needs analysis). To meet this suggestion, CIDS proposes to assist in the development of a methodology to identify work posts particularly vulnerable to corruption, and to identify such positions in the MoD. Furthermore, CIDS will also assist the MoD in devising managerial instruments (e.g. arrangements for personnel rotation, specific guidelines for holders of vulnerable positions, training for managers and jobholders) to address the identified problems and minimise the risk of corruption in the organisation.
- *Proposals for a modernised system of HRM in the Ministry of Defence developed.* This project result concerns i.a. the way in which HRM issues are organised and managed in the MoD, including the collection processing, and use of personnel data. It addresses the observation in the needs analysis that the new Law on Civil Service implies a major transformation of the Ukrainian civil service system and that the new LCS introduces changes in the civil service management system, including in individual state institutions. Moreover, this proposal focuses on the finding that the current MoD personnel data system is in need of reform.
- *Proposals for a strategy for modern HRM practices developed.* This result addresses the finding of the needs analysis that key HRM functions are not performed adequately in the MoD. Overall, it is difficult to free oneself from the impression that the MoD system of human resources is more a bureaucratic administration of personnel than a proactive HR facility.

The CIDS assessment team will propose two project results under specific project objective (2) – Levels of competence among MoD officials more conducive to professionalism:

- *Competency building measures for HRM staff implemented.* This result addresses the finding in the needs analysis that concepts and norms on which new legal frameworks and doctrinal documents are based are little known among MoD staff. The project should provide training and other competency building measures for all MoD staff working in the area of human resources management. The aim of the activities should be to provide the MoD with the necessary expertise to implement the new Law on Civil Service and the proposed HRM strategy (see above). In other words, the proposed competency building activities should be closely related to the preparation of improved legislation, procedures and practices.
- *Competency building measures for the MoD team of reform experts.* This result addresses the observation in the needs analysis that reform teams will be established in state administrative bodies, including the MoD (section 3.3). The trainings will include activities to improve the participants' ability to analyse and prepare proposals for the solution of policy problems.
- *A plan to develop competency building for MoD staff prepared.* This proposal addresses the finding of the needs analysis that the wider system for training and competence building is in need of overhaul. Although a large number of training programmes have been offered, the overall effect has been limited. What is lacking is a systematic approach, which enhances the professionalism of institutions and not only brings personal benefits for individual participants (see section 8.4).
- *Knowledge and advice transferred through participation in various reform committees and other MoD fora.* This result addresses the proposal mentioned above that CIDS experts participate in key ministerial committees.

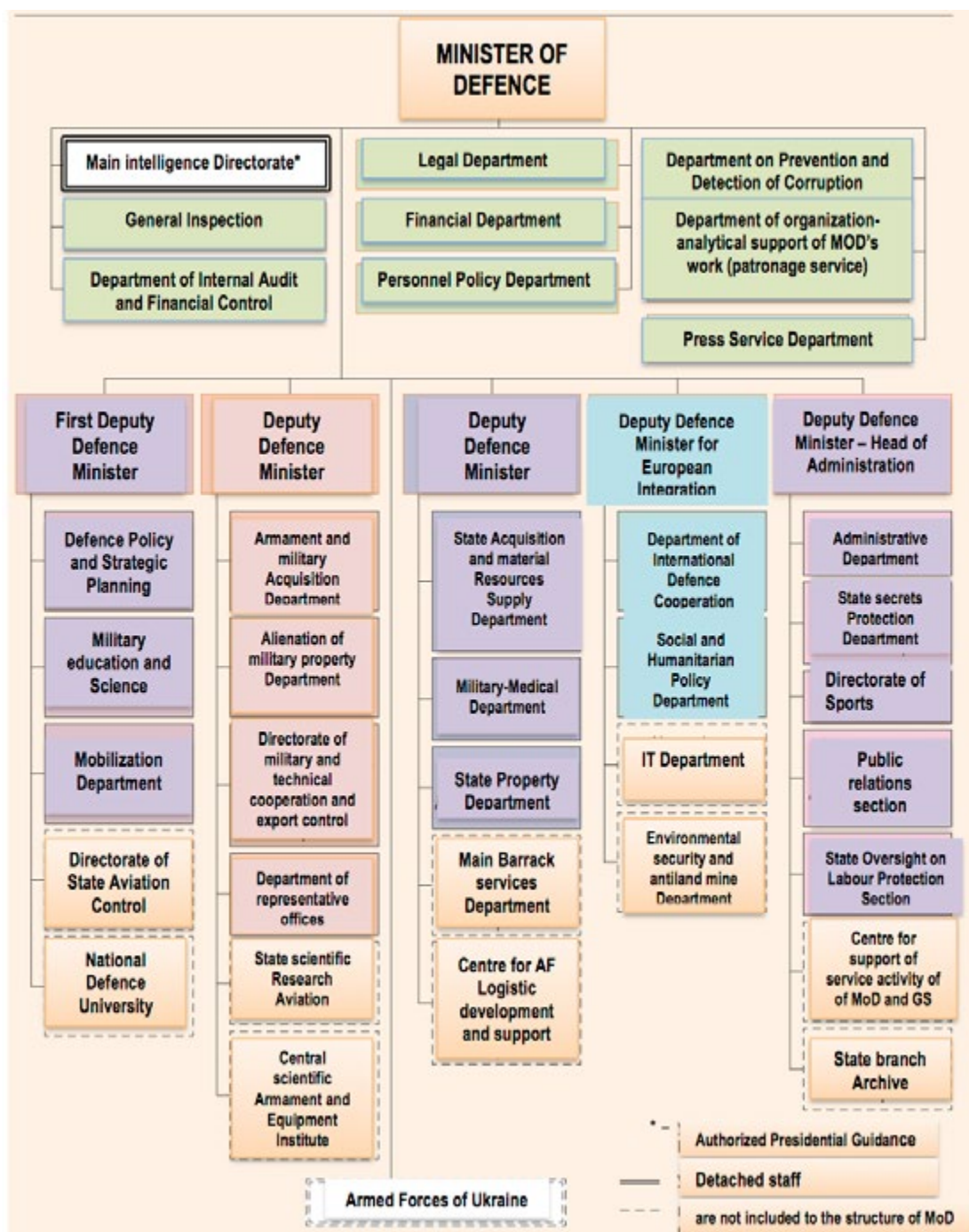
In addition to the two specific objectives dealt with above, the CIDS assessment team will propose a third specific objective that is more indirectly linked to the overall project objective:

3. Systematisation of project-related experience that may be conducive to reforms in other parts of the Ukrainian public administration.

Arguably, in few other Ukrainian ministries can one find an initiative similar to the current project proposal with the same potential to generate knowledge and expertise that is applicable and of great value to other parts of the public administration. The project will directly and indirectly provide knowledge that is vital in Euro Atlantic integration processes and assist in addressing administrative deficiencies that will have to be corrected in the course

of these processes. For the Ukrainian government, which has limited resources for the development of its public administration, it is important that the lessons learnt from the proposed project can be used as a basis for wider reforms of the state public administration. In key respects the MoD could become a role model for other Ukrainian institutions.

12. Annex The structure of the Ministry of Defence, 2015





CENTRE FOR INTEGRITY
IN THE DEFENCE SECTOR