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Department of Information Society and Action Against Crime  
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Directorate General of Human Rights and Legal Affairs  
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# **CORRUPTION RISKS IN CRIMINAL PROCESS AND JUDICIARY**

**Analytical part prepared by  
Institute of Applied Humanitarian Research**

**Sociological part prepared by  
Company MAConsulting**

Views contained in this paper are those of authors and do not necessarily reflect official position of the Council of Europe

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# I. EXECUTIVE SUMMARY

This report contains results of the corruption risks research in the four basic court proceedings and in the activities of criminal investigation bodies: criminal process (pre-trial investigation and trial), civil process, economic process and administrative process. With the aim of securing quality and objectiveness of the research the concept of the research was developed. The concept contained: definition of corruption and its main manifestations, a theoretical model of corruption behavior (subjects, conditions, corruption benefits, beneficiaries etc.), determinations and typology of corruption risks. The empirical research was conducted in three stages: (1) Preparatory which included focus groups and in-depth interviews, results of which were used for preparation of the concept and instruments for the research; (2) Basic research with the accent on reception of information about the real situations, in which respondents face corruption in courts and law enforcement agencies which included all-Ukraine representative survey among public representatives by method of face-to-face interview and interviews with target groups (experts – respondents, who have proper level of legal education and practical experience in corresponding proceedings in law enforcement agencies and courts); (3) Quality research based on the results of basic surveys/interviews which included focus groups and in-depth interviews with experts (defence attorneys, judges, practicing lawyers, entrepreneurs, human rights defenders, academics, citizens with experience of being a party to criminal, civil, economic and administrative proceedings).

Sociological part of the research was conducted by consulting company *MAConsulting* in February – April 2009. Analytical part of the research was conducted by Kharkiv city non-governmental organization “*Institute of Applied Humanitarian Research*”. The research is conducted in the framework of the anticorruption project *UPAC* implemented by the Council of Europe and financed to the most part by the European Union (Support to Good Governance: Project Against Corruption in Ukraine).

Taking into account results of the sociological research the main corruption risk in the situations of **contacts by representatives of public with judicial and law enforcement agencies** is “disposition” to corruption behavior:

- 1) Orienting of representatives of public to the application of corruption models of behavior;
- 2) Corruption demands from the side of related officials;
- 3) Activity of middleman who participate in solving of certain issues and orientate for corruption behavior.

The main conclusions regarding corruption risks which take place in **all kinds of court proceedings** are the following:

- 1) A condition of legislation (both procedural and material) doesn't belong to determinative factors for forming corruption risks, but there are some provisions which produce corruption;
- 2) Existence of a complicated web of informal connections of judges (inside of the judicial system, in certain courts, informal relations with lawyers, social and personal relations of judges) is one of the main corruption risks, because neither ethic nor legal mechanisms of prevention of conflict of interests work;
- 3) A system of administrative relations in the courts contains some corruption risks in the part of producing conditions for different forms of judges' dependence upon managers of the courts;
- 4) It makes sense to add to the factors producing corruption the way in which the courts functioning is organized (document flow, case assignment etc.);
- 5) It's necessary to note that only insignificant part of the respondents connected appearance and development of corruption practices in judicial proceedings with low salaries of judges.

The main conclusions regarding corruption risks in **criminal proceedings at the stage of pre-trial investigation** are the following:

- 1) The main factor causing flourishing of corruption in activities of law enforcement agencies is performance evaluation of their service by "statistical indicators";
- 2) Low level of salary of law enforcement officers is significant;
- 3) Quite low level of the effectiveness of internal and external (first of all by Prosecution Service) control over activities of law enforcement agencies is significant factor for development of corruption practices;
- 4) Occurrence of informal contacts between different layers and participants of criminal proceedings (for instance between chief of investigative unit and prosecutor);
- 5) The following provisions of the criminal material and procedural laws were named as those, which produce corruption: improper regulation of the procedure for checking out information about crime and institution of criminal case; deficiency of provisions regulating release from criminal liability on the grounds of conciliation between victim and suspect and circumstances excluding proceedings in criminal case; procedure of choosing preventative measures, especially pre-trial detention; deficiencies of legislation regulating application of special investigative methods; unclear terms for application and conduct of forensic examination; improper guarantees for preventing instances of producing false expert's conclusions by the forensic experts.

At the **trial stage of criminal proceedings** the following main corruption risks were detected:

- 1) “Impunity” of judges for corruption abuses;
- 2) Occurrence of informal contacts of judges, defence attorneys, law enforcement officers;
- 3) Absence of proper internal control over abidance of professional ethics and moral rules of a judge;
- 4) Existence of non-procedural dependence of judges inside and outside the judicial system upon corresponding heads of courts and politicians, MPs etc.;
- 5) Existence of steady arrangement between judges of first instance and appellate courts regarding upholding rulings of the first instance courts, which were issued based on the corruption agreements;
- 6) Low level of professional education of judges.

The main corruption risks in **civil proceedings** are the following:

- 1) Improper system of case assignment and possibilities for assigning a case to a “necessary judge”;
- 2) Deformations or ignoring of ethical standards of the profession of a judge;
- 3) Existence of non-procedural dependence of judges inside and outside the judicial system upon corresponding heads of courts and politicians, MPs etc.;
- 4) The following provisions of the civil material and procedural laws were named as those, which produce corruption: procedures for application of measures of securing a claim; provisions of the procedural legislation in force regarding consideration of the case at appeal and cassation instances exclusively within the arguments of the lodged complaints; provision on the possibility of supplementing or changing of an appellate or a cassation complaint only during the term for appellation; introduction of the procedure, according to which a court may limit itself by drawing of only the introductory and the resolution parts of the court decision; introduction of the procedure of appealing of decisions, which do not interfere with consideration of a case, only in the order of appeal; absence of obligation of invocation of parties in hearings at the cassation court; “excessive formalism” in requirement to procedural documents and in some procedures; unclear regulation of the issues of evaluation of evidence.

The main corruption risks in **economic proceedings** are the following:

- 1) Deformations or ignoring of ethical standards of the profession of a judge;
- 2) Existence of steady “informal” alliances between judges and defence attorneys;
- 3) Involvement of judges in certain “legal technologies applied by attorneys and juridical firms”. In this field the most latent mechanisms of dependence of judges are formed;

- 4) Existence of non-procedural dependence of judges inside and outside the judicial system upon corresponding heads of courts and politicians, MPs etc. Especially high indicator of “external” dependence is notable in this kind of proceedings, for instance some financial and production groups have “own” judges;
- 5) The following provisions of the economic and related material and procedural laws were named as those, which produce corruption: regulation of the judge disqualification and disqualification of self and replacement of judges or the members of a panel; introduction of procedure, according to which parties to the process have the right to lodge objections to the acts of the presiding judge with acceptance or waiving of them by court ruling; norms regarding leaving of a suit claim by an economic court without movement; introduction of the procedure of appealing of decisions, which do not affect consideration of a case, only in the appellate procedure; limitation the powers of the Supreme Court with revision of decisions only under exclusive circumstances; “excessive formalism” in requirement to procedural documents and in some procedures; unclear regulation of the issues of evaluation of evidence; absence of proper independence of forensic experts and improper guarantees for preventing instances of producing false expert’s conclusions by the forensic experts.

The major corruption risks in the **administrative proceedings** are the following:

- 1) Deficiencies of the legislation regulating activities of public servants and the corresponding administrative procedures;
- 2) Existence of steady “informal” alliances between judges and defence attorneys, what in fact means participation of judges in certain “legal technologies applied by attorneys and juridical firms”;
- 3) Existence of non-procedural dependence of judges inside and outside the judicial system upon corresponding heads of courts and politicians, MPs etc.;
- 4) Low level of professional education of judges;
- 5) The following provisions of the Code of Administrative Justice of Ukraine were named as those, which produce corruption: provisions regulating issues of territorial jurisdiction; distinguishing of public-juridical and private-juridical disputes; procedures for application of measures of securing a claim; improper following of the principle of official clearing up of circumstances in a case; “excessive formalism” in requirement to procedural documents and in some procedures; unclear regulation of the issues of evaluation of evidence; absence of proper independence of forensic experts and improper guarantees for preventing instances of producing false expert’s conclusions by the forensic experts.

# II. INTRODUCTION

The Report contains results of empirical research which was conducted by the company MAConsulting in February-April of the year 2009 by an order of the Council of Europe.

## 2.1 Methodology of the Research

**Field of application of the methodology:** analysis of the procedures of the law-application activity. Within the framework of our research this approach will be applied to the following procedures: criminal proceedings (pre-trial investigation), criminal proceedings (trial), economic proceedings, administrative proceedings, civil proceedings.

**Legal grounds** – the conceptual framework of the methodology is not connected with the current anti-corruption legislation (the Law of Ukraine “On Fight Against Corruption”), but it is grounded on the interpretations of corruption in the international anticorruption acts (Council of Europe and the UN Conventions) and it considers the forms of their implementation in the Ukrainian perspective anti-corruption legislation (“anti-corruption package of draft laws of year 2006”). At the same time the analysis of the procedures is based on the provisions of the current criminal procedural, civil procedural, economic procedural and administrative procedural legislation including separate provisions of the respective material law, which influence the process, and by laws which determine or regulate separate procedures.

### Basic Definitions:

**Corruption** – illegal usage by a person of his/her powers and opportunities, connected with it, with the aim to obtain benefits for himself, other persons, and correspondingly unlawful promise, offer or provision of such benefits (*from the draft of the Law of Ukraine “On Basics of Prevention and Counteraction to Corruption”*)

**Corruption practice** – types of behavior which has a shape of united activity of certain subjects in certain circumstances and with a certain aim where (in all or in certain acts forming the respective practice) signs of a corruption offence are present. Corruption practices can be general (for example, a bribe as payment for a certain service or benefit) or specific (possible only in certain spheres or only in connection with certain subjects).

**Corruption offence** – an intentional act, which has signs of corruption, committed by a subject of the corruption offence, for commission of which criminal, administrative,

disciplinary and/or civil liability is established the law (*from the draft of the Law of Ukraine “On the Basics of Prevention and Counteraction to Corruption”*). Corruption offences are: *crimes of corruption* – abuse of power; overstepping of powers; commercial bribery; illegal enrichment; trade of influence; bribery (obtainment, offer or giving of a bribe, as well as – intermediation in such actions); *administrative offence of corruption*: illegal obtainment of benefits; small bribery; illegal favoring to physical persons or legal entities; violation of order of entrepreneurship and terms of second employment; illegal participation in administration bodies of enterprises; illegal intrusion into the activity of the state bodies, enterprises, institutions, organizations; violations of the requirements of financial control; non-taking of measures against corruption; violation of the established by the legislation order of financing of the political parties and election campaigns for the state bodies and local self-government bodies; illegal use of information, which was discovered within the framework of performance of duties; illegal obtainment of a present; violation of the requirements of declaration of personal interests (conflict of interests).

***Subjects of corruption offences*** – persons, authorized to perform the functions of the state or local self-government bodies and persons, equated with them; persons, who constantly or temporarily hold positions, connected with performance of organizational-and-managerial or administrative-and-economical duties, or who are specially authorized to perform such duties, in legal entities; physical persons-entrepreneurs; legal entities (*from the draft of the Law of Ukraine “On the Basics of Prevention and Counteraction to Corruption”*).

***Beneficiaries of corruption practices*** – persons who in the result of corruption contributions obtain objects of corruption exchange or rent.

***Subjects of corruption practices*** – participants of legal relations, in which the circumstances (conditions, means, etc.), containing corruption risks, are used. Such subjects may be either subjects of corruption offences and beneficiaries of corruption practices, or other physical persons and legal entities, who in one or other way contributed to the appearance, development and realization of corruption practices or took a direct participation in them but at the same time from the point of view of the law they are not the subjects of corruption offences and practically are not the beneficiaries of the object of corruption exchange or rent (intermediaries).

***Object of corruption exchange or rent*** – material or immaterial benefits, which are obtained by the beneficiary of the corruption practice as a result of handing of a corruption contribution over to the subject of the corruption offence.

***Corruption contribution*** – material or immaterial benefits which are obtained by the subject of a corruption offence for providing the beneficiary of the corruption practice with the object of corruption exchange or rent.

***Corruption risk*** – conditions of performance of duties (functions) by the participants of respective procedures (subjects of the law-application activity), who have a real or

potential capability to influence the appearance of practices, that is circumstances, which have (or under certain conditions may obtain) character favoring corruption.

**Corruption risk** – conditions favoring appearance, development, realization and spreading of corruption practices in service and professional activity of the subjects of corruption offences, which have arisen: (a) as a result of application of the procedures, which are determined in the respective procedural laws and other regulatory norms, including regulatory bylaws, administration orders of the authorized government bodies, internal regulative documents of the legal entities; (b) as a result of undue performance or ignoring of certain provisions of the procedural laws and regulative norms under the condition of absence of control over the activity of the subjects of corruption offences; (c) during formation of *common practices* in the activity of the subjects of corruption offences: informal service relations between the subjects of the law-application process, habits, traditions, rules and other elements of corporate culture, which are not determined by the procedural laws or regulatory documents; (d) as a result of application of the procedures and *common practices* in the activity of other subjects of the law-application process, which indirectly influence the corruption practices in the determined spheres of the procedural activity (pre-trial investigation and trial in criminal cases, economic, civil and administrative court proceedings).

### **Forms of the Corruption Risks Manifestation**

The aim of the research is detection of the corruption risks which are real or potential reasons for appearance of the corruption practices. There are three types of corruption risks:

**A. Basic formal law application procedures or its elements.** For instance to this category the procedure of the preventive measures application in criminal proceedings, procedure of court consideration of a case, the procedure of realization of control powers, the procedure of issuance an authorization for certain types of activities realization, etc. can belong. Such risks could be detected by the analysis of texts of respective regulations or practices of their application. *Methods of the research:* expert (in-office) analysis of the normative acts, analysis of court or administration practice, case study, expert assessments, focus-group.

**B. Informal but socially institutionalized norms and standards of performance of certain types of law application activities.** Such risks can appear as habits, traditions, informal rules, informal contacts (interactions) of subjects, elements of corporate culture, or other elements of real practice, which are not formally regulated, but which exist as *common practice*. It is worth mentioning, that such factors may be blank spaces in the normative legal regulation. For example, absence of strict ethical standards of behavior in certain situations of high risks (conflict of interests, etc).

*Methods of the research:* expert assessment, in-depth interviews, focus-groups, analysis of court or administration practice, case study.

**C. Elements of closely related procedures, which have direct or indirect influence on the basic procedures.** Such risks may be connected with either formal or informal

factors in the procedures and types of activity where subjects of certain corruption practices can be involved directly or indirectly. For instance in respect of the court proceedings it could be administration in courts (assignment of cases, etc.), procedures of judges appointment, bringing judges to liability, procedures of execution of judicial decisions, rules of documents flow in courts (in the part, which is not regulated by the procedural legislation), etc. In respect of pre-trial investigation it could be the procedures and practice of forensic expertise application and conduct, application of the special investigative methods, procedures of the prosecutor's supervision, rules (either formal or informal) of cooperation of different law enforcement bodies, terms of interaction of different types of law-application activities (for instance initiation of criminal investigation as a result of case consideration by economic court) etc.

*Methods of the research:* expert (in-office) analysis of the normative acts, analysis of the court or administration practice, in-depth interviews, focus-groups, case study.

### **Algorithm (Theoretical Model) of the Corruption Risks Research**

The object of the research is the legal procedure. Respectively the analysis is to be performed with the consideration of the specifics of certain stages of the process. Generally, the algorithm of the research includes the following stages:

**1. Determination of the stage of the process.** A stage may be determined in the document, which regulates the respective procedure. In separate cases the stages may be identified analytically (by expert) or on the basis of a common practice of identified of stages in the everyday practice.

**2. Construction of the theoretical model of a certain stage of the process is precondition for the analysis.** A theoretical model involves the following steps:

- *identification of the subjects of legal relations:* in such case all the subjects which have relation to this stage, must be identified including both: those that have a formal procedural status (which are the participants of certain procedural actions according to the law) and those, who do not have a procedural status, but who can directly or indirectly influence the decision, actions, consequences of actions of the participants of the procedural relations. For instance in the judicial proceedings such a status may be possessed by the head of a court, court personnel etc. The status of such subjects should be analyzed according to the following criteria: scope of powers and form of their regulation, the procedure of the appointment to a position, subordination at service or in the professional activity, the mechanism of control and reporting, etc.;

In such a case *real and potential subjects of corruption practices* must be identified. *Possible methods:* expert (in-office) analysis of the normative acts, analysis of court or administration practice, in-depth interviews, focus-groups, case study, analysis of the information published in mass media. For example, the court verdict about bribery may provide information about what kind of persons were involved in the "bribery chain" under certain circumstances.

- *identification of internal and external (in relation to the process) contacts of the subjects of legal relations.* It is necessary to analyze both: procedural interactions, which are directly determined by the respective procedures i.e. internal formal (procedural) contacts and external informal (technical) contacts, which appear as a result of performance of a certain procedure. The significance of such an analysis is to determine further, **to what degree such relations exist, and if they can be channels of corruption exchange.** *Possible methods:* analysis of court or administration practice, in-depth interviews, focus-groups, case study, analysis of the mass media publications.

**3. Identification and description of corruption practices.** Practically, this is the key element of the research, which must contain description of concrete real and potential corruption situations. A corruption practice should be described as an independent object, which is an element of real practice in a certain sphere. This description should include:

- *Identification of the subjects of a corruption practice.* They can be physical persons or legal entities, as well as persons, who have the formal procedural status or who are not participants of the formal procedure at all, although who obtain certain benefits as the result of a corruption interaction (subjects of corruption offences and intermediaries) or pass these benefits as corruption contributions (beneficiaries of corruption practices);
- *Identification of an object of corruption exchange or corruption rent and corruption contribution,* which means material or immaterial benefits, which are obtained or may be obtained by the subject of corruption actions in the result of corruption interaction. In case of an absence of such an object or impossibility of its identification there are no reasons to determine such a situation as a corruption one;
- *Identification of activities (inactivity), which intend to ensure obtainment of the object of corruption exchange or corruption rent.* Such activities are not always illegal, as legal activities in certain conditions may have corruption character (motives and consequences);
- *Identification of corruption risks* meaning that the task of the analysis is to describe the corruption risks **as elements of certain situations, which occur during application of the respective procedures.**

## 2.2 Methods of Empirical Research

A comprehensive approach, which is grounded on the combination of the two groups of methods – sociological and legal analysis based on a uniform conceptual approach was applied for the research.

*The legal analysis* included: a) doctrinal analysis of theoretical and practical problems of the respective fields of law; b) analysis of the statistical data and other reports of the law-enforcement agencies as well as court statistics; c) analysis of court practice (courts decisions and generalizations of the court practice), d) analysis of official information

announcements of judicial and law-enforcement bodies. Mass media information (electronic and paper editions) was used as an additional source of information.

*The empirical sociological research* was conducted in three stages:

### 1) Preparatory.

The focus group was conducted (with a mixed structure – judges, defence attorneys, participants of judicial proceedings, legal experts) and 4 in-depth interviews (law professor M., defence attorney Sh., pensioner B., prosecutor M.). The received information was used for preparation of the concept instruments for the research.

### 2) Conduct of basic research.

When identifying basic principles of the methodology of empirical research the critical point was *refusal from indicators and methodological instruments, which dominantly fix particularities of subjective perception of the phenomenon of corruption* regardless personal experience of direct or indirect participation in particular corruption practices.

Such approach is the most widespread in national empirical research of corruption, which quite often deliver “sociological artifacts” based on the phenomena of social consciousness formed relying more on massive communications (first of all – activities of mass media) rather than on real conditions of the respondents but not the real level of corruption relations and their manifestations. There are no doubts, that such information is important as one of the indicators of public perception of corruption, but its usefulness in research of specific problems of corruption deformations in the procedures and institutions of legal field is questionable.

Taking this into account in our research, **the accent was made on reception of information about the real situations, in which respondents face corruption in courts and law enforcement agencies**. In other words the subjective information (assessment, motivation, particularities of perception of other aspects of the phenomenon of corruption, behavior in projected situations etc.) was an addition to data about particularities of real behavior in concrete situations.

In connection with provision of more statistical reliability and clearness during interviews, filter questions were used with the aim of stratification of the whole massive according to having contacts with law enforcement agencies and courts “*during the last three years*” (but not “the last 12 months” as it is usually done in similar research).

**In the capacity of basic research an all-Ukraine representative survey among the population and interviews with target groups (experts) were conducted.**

**Interviews with target groups (“experts”).** Respondents, who have proper level of legal education and practical experience in corresponding proceedings in law enforcement agencies and courts were selected as target groups. The target groups include: defence attorneys, corporate lawyers, law enforcement officials, law professors (dominantly those who have practical experience in the field). The following questionnaires were used: a) about general problems in judiciary (were used in interviewing of all respondents); b) about criminal proceedings; c) about civil proceedings; d) about economic

proceedings; e) about administrative proceedings. These four questionnaires were used during interviews with the target groups of experts, who are well informed about specific proceedings.

We refused to use *the technique of “exit pole”* meaning interviewing those, who participate in the on-going proceedings and in the majority of cases are present immediately in the premises of courts or law enforcement agencies. Such technique has its own unquestionable advantages, but they work only with objective indicators of behavior (“a claim has been submitted – a claim has not been submitted” etc.), at the same time in the evaluations of the respondents there is always certain prejudice (they are a party in a case and can’t be fully objective). Quite often such respondents are under emotional and psychological influence of specific situations, decisions, actions etc. and this make their answers predictable.

In total 624 respondents in 16 regions of Ukraine which represent East, West, South and North of Ukraine were interviewed.

**All-Ukraine representative survey among public representatives.** With method of a “face to face” interview 1 589 respondents were interviewed. The survey was conducted by standard three-step scheme of sample with quote selection at the last stage of the selection. The sample is represented for adult population of Ukraine. The inaccuracy of the sample is not more than 1.5 %.

### 3) Quality research based on the results of basic surveys/interviews.

Based on the preliminary analysis of the results of interviews of representatives of public and the focus groups a task for quality research was developed, on the basis of which the following have been conducted:

- 7 focus groups (with similar structure in terms of participants – defence attorneys (practicing lawyers), judges, law enforcement officers, representatives of public with “experience in the courts”, entrepreneurs, human rights activists, academics);
- 52 in-depth interviews (defence attorneys – 7, judges – 4, militia (police) officers – 3, prosecutors – 4, corporate lawyers – 4, entrepreneurs – 4, experts (academics, human rights activists etc.) – 7, participants of criminal proceedings (a victim, a defendant, a witness) – 8, participants of civil proceedings – 5, participants of administrative proceedings – 5).

The results of the quality research were used in the analysis of the results.

# III. ANALYTICAL PART

## CHAPTER 1. CORRUPTION RISKS IN SITUATIONS OF CONTACT WITH JUDICIAL AND LAW ENFORCEMENT BODIES ACCORDING TO PUBLIC AND EXPERT ASSESSMENT

### 3.1.1 Orientation to the Use of Corruption Models of Behavior in Situations of Contact with Judicial and Law Enforcement Bodies: Public Assessment

One of the tasks of this research was the evaluation of tendency to corruption models of behavior. The reception of such evaluation is methodically quite difficult because there's always difference between verbal and real behavior, especially concerning such delicate issues as corruption.

We have already paid attention to the existence of such a layer of respondents (which is about 20%) and which is characterized by “functional attitude” to corruption, i.e. those who are potentially capable to use corruption forms of behavior for solving some personal problems.

To receive a more complete idea about the occurrence of a “corruption acceptability” model, we have used in the research a method of “projected situations” for respondents in situations of contact with judicial and law enforcement bodies. Interviewed people were offered two situations:

1. *Detention (arrest) of a respondent or his/her relatives by law enforcement officers;*
2. *Submitting a claim to a court about acts of state authorities or local self-administration.*

Main behavior aims and orientations of the interviewed people in these project situations will be analyzed below.

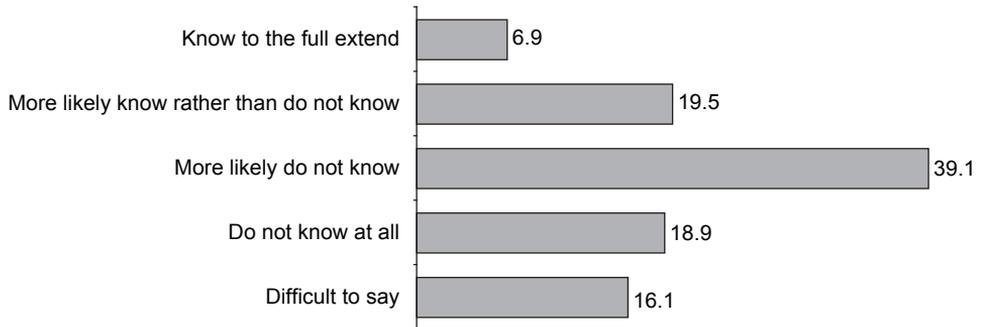
**First projected situation “Detention (arrest)”**. A choice of such situation was conditioned by the fact that situations like this are quite common, and representatives of all main social-demographic and status groups get into them.

Understanding of such a situation, i.e. capability of its adequate legal evaluation, is very important for behavior in it.

Level of the respondents' self-evaluation as for the level of their legal knowledge regarding such situation is shown in **Diagram 1**.

*Diagram 1.***Projected situation “Detention (Arrest)”**

Self-evaluation of the level of legal knowledge regarding such situation

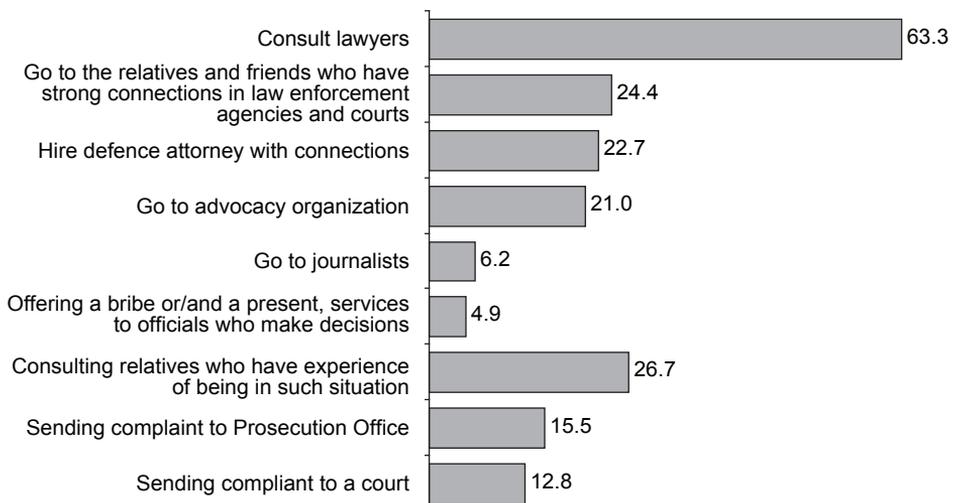


The presented data show, that only a quarter of the interviewees has certain legal knowledge (those, who are sure of it, are much less numerous – 6.9 %) which allows orienting in this situation.

**Diagram 2** gives the evaluations of a probability of certain actions in a suggested projected situation. Since the task of this research was to determine attractiveness of corruption models for solving of problems, in the construction of the questions different models of answers were suggested. Together with classic legal models of behavior they included both direct corruption (a bribe), and more complex forms, which potentially could get corruption content (“influential relatives”, “connections”).

*Diagram 2.***Self-evaluation of possibility for the following actions**

(% of those who would act in the following way)



When analyzing the presented data it is worth paying attention to the following:

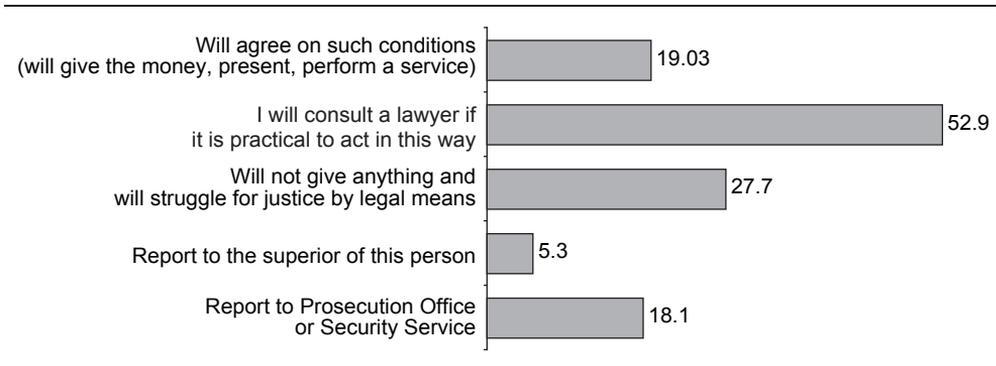
- Only 4.9% of interviewees are ready to give a bribe immediately, even irrespective of the context of the situation;
- Though quite a big part of the interviewees orientate to more indirect forms of corruption behavior: 24% prefer to use “profitable connections”, 22.7 % will “look for a lawyer, who has profitable connections”.

The next step was the determination of the *interviewees’ attitude to the extortion of a bribe*. The respondents’ evaluations are given in **Diagram 3**.

*Diagram 3.*

**Projected situation “Detention (Arrest)”**

Possible behavior in situation of extortion of a bribe



19.0% of the interviewees show clear acceptability of the “bribe” model of behavior, which in general corresponds to the specific weight of those, who admit the functionality of corruption. However, there is no such connection, because among those people, who assess the instrumental value of corruption, only 30.0% are ready to give a bribe in such situation immediately.

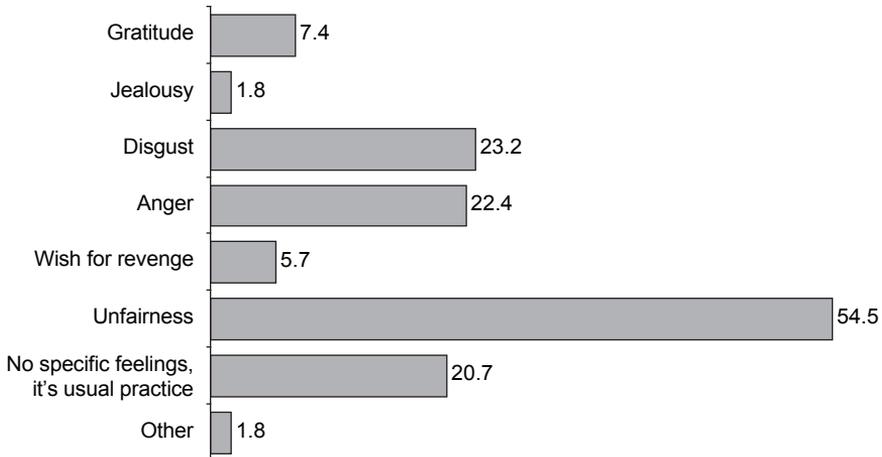
Orientation to the “bribe” model of behavior is typical to all social groups (by gender, age, place of residence etc.). The only exception is the fact, that a bribe is more acceptable for persons, who contact public authorities more frequently (managers, entrepreneurs, salesmen and others). It was somewhat surprising, that a bribe is more acceptable for “poor persons” than for persons with “average income”.

Besides that, it is worth to draw attention to the fact, that 52.9% of the interviewees don’t have quite certain positions, since they “will consult, if it’s worth doing” and only 27.7% clearly determined the inadmissibility of a bribe in such situations.

*Assessment of a possible ethical and emotional condition of a person, who gives a bribe*, is very important for description of the attitudes of respondents to the corruption model of behavior (see **Diagram 4**).

*Diagram 4.***Projected situation “Detention (Arrest)”**

Opinion of respondents about emotional condition of a person who agreed to give a bribe upon extortion (% of those who thinks that a person would feel the following)



**Diagram 4** Dominative mood is “unfairness” (54.5%), “anger” is also important – 22.4%, “disgust” – 23.2%. But this situation did not provoke any emotions from 20.0% of persons since “it is a usual practice” (it is important to mention, that in the research of 2006 such situation didn’t raise “any emotions” from 32% of interviewees). It can serve as a proof of a fact that the level of corruption inadmissibility in emotional and psychological level is gradually growing.

Tolerance to corruption is more typical for middle age persons; it explains the gain of negative “social experience”. Such attitude is also typical for social groups, who have more frequent contacts with representatives of public authorities.

World experience shows that percentage of persons (**whistle-blowers**) who disclose facts of corruption behavior (or are ready to do it under particular life circumstances) are important characteristics of anticorruption potential of the society. **Diagram 3** shows that almost a quarter of interviewees (23.4%) are ready to inform about facts of corruption. In the research of 2006 percentage of such persons made about 15.0%.

Among main social characteristics of such persons it is worth drawing attention to the following:

- Men formulate their readiness to inform law enforcement bodies clearer (men – 22.4%, women – 15.0%);
- There are certain differences in behavior depending on the age: youth is more oriented to “inform law enforcement bodies”, and representatives of senior groups trust less to this way of informing about corrupt behavior;
- Residents of rural areas show more caution: only 14.7% of interviewees are ready to provide such information to law enforcement bodies;

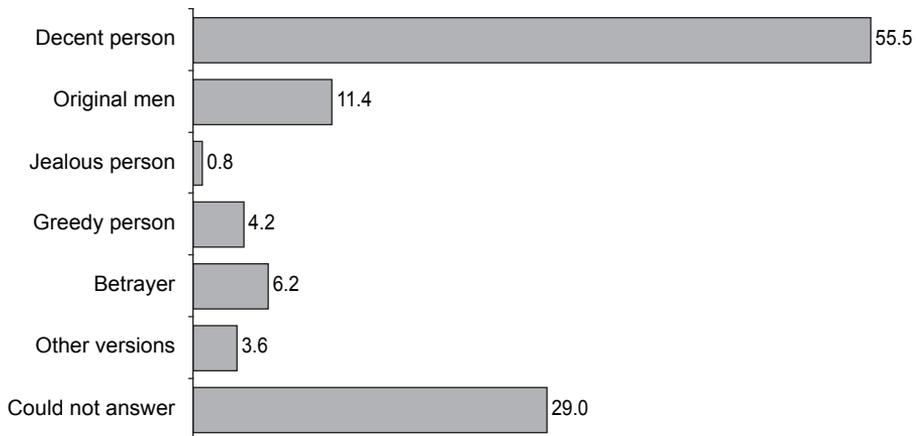
- Persons who identify themselves as “poor” or “not rich” in one third seldom show their readiness to inform about corruption behavior in comparison to other categories. The assessment level of persons who consider themselves “rich” is almost the same;
- There is some differentiation depending on social and economic capacity. For example, 28.0% of interviewees are ready to accept this way of behavior among entrepreneurs; among students (pupils) – 26.0 %, farmers -14.0 %, workers – 20.0 %;
- Region distinctions appeared to be quite unexpected: persons ready to inform law enforcement bodies in the Centre – 14.9 %, in the West -22.0%, in the East -20.5 %, in the South -22.1 %.

*Public attitude to “informants” (whistle-blowers)* was also clarified during the interview. It’s quite important, especially because of a spread stereotype of a negative attitude to such phenomenon as a “snitch” in a post soviet society. Assessment structure is presented in **Diagram 5**.

*Diagram 5.*

**Projected situation “Detention (Arrest)”**

Attitude to a person who report to law enforcement agencies on extortion of a bribe  
(% of those who label such a person as)



Comparison of these results with data of the year of 2006 gives interesting results. In 2009 percentage of those who couldn’t determine their attitude to such persons and also those who judge them as “betrayers”, “greedy persons”, “jealous persons” has not almost changed but at the same time a number of those who consider such person as “decent person” has grown (from 45.0 % to 55.0 %). In general, the structure of the assessments should be rated as stable; it proves the fact of public stereotypes which are formed in this area. These public stereotypes are hard to identify as fully favorable for extensive public role in informing about corrupt actions.

**The second projected situation is “Production before the court”.** The probability of such situation is quite considerable. According to the results of the research taken place

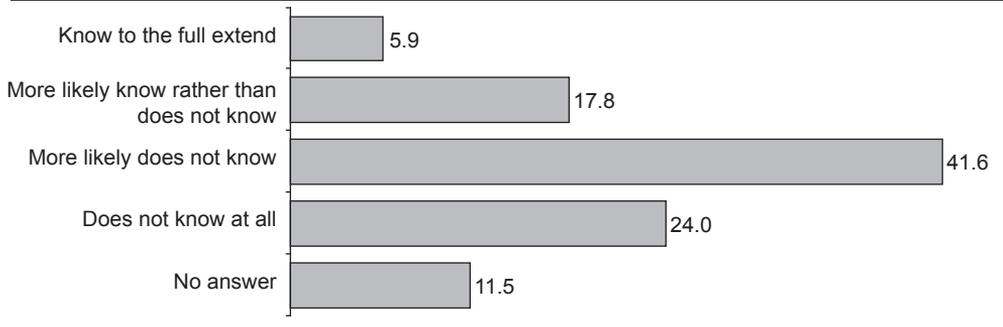
in Ukraine in 2006-2009, about 4.0 – 5.0 % of citizens get into such situation during a year.

The interviewees' self-evaluation of their level of knowledge about judicial procedures is presented in **Diagram 6**.

*Diagram 6.*

**Projected situation “Production before the court”**

Self-evaluation regarding level of legal knowledge about such situation  
(% of those who know their rights)



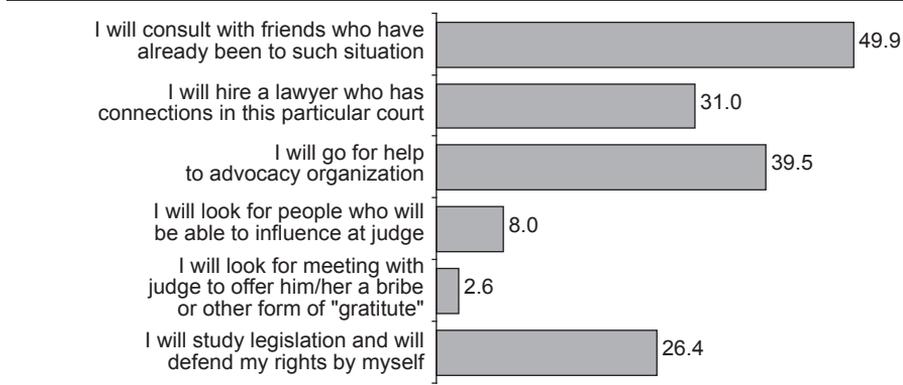
Provided data shows that less than a quarter of the interviewees has some legal knowledge (or is sure about it), which allow them orienting in this situation. In other words, the respondents assess the level of knowledge about judicial procedures quite lower in comparison to the situation of contacts with law enforcement agencies.

In **Diagram 7** you can see the assessments of probability of certain actions in the offered projected situation. Since our task was to determine attractiveness of corruption models for solving of problems, in the construction of the questions different models of answers were suggested. Together with classic legal models of behavior they included both direct corruption (a bribe), and more complex forms, which potentially could get corruption content.

*Diagram 7.*

**Projected situation “Production before the court”**

Self-evaluation of probability for the following actions (% of those who will do it)



Almost one third of the interviewees (26.4 %) were not able to determine their possible actions, and in a certain way it can be explained by the difficultness of the situation for the respondents as well as by lack of quite full information. Considerable part of the interviewees (39.0 %) is ready to contact advocacy organizations. Although in this situation it's quite a "romantic" assessment, because the respondents are persons who don't have real experience of contacts with judicial or law enforcement bodies.

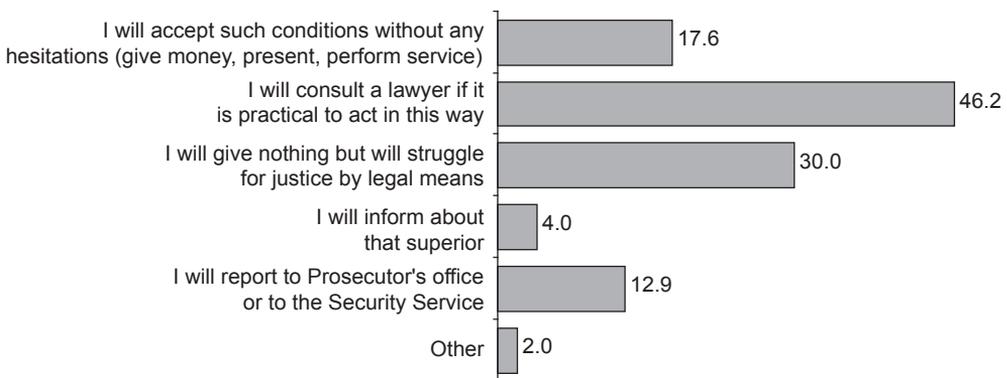
Only 2.6 % of the interviewees choose immediate corruption model of behavior (they will offer a bribe), and one third of the interviewees (31.0 %) will look for a "lawyer with connections in this particular court"; and 8.0 % will look for a persons who have influence upon a judge.

The next step is to determine a possible *attitude of the interviewees to the situation of bribe extortion*. The respondents' assessment is given in **Diagram 8**.

*Diagram 8.*

**Projected situation "Production before the court"**

Possible behavior in case of a bribe extortion



**Diagram 8** 17.6 % of the interviewees show a clear determination of the acceptance of the behavior model "bribe", it practically coincide with the first projected situation. Though there are some certain differences in other answers. Percentage of persons, who will fight for their rights by themselves, will grow (30.0 %). Possibly in this situation there is an influence of existing in mass consciousness hope for a possibility of justified solution of a case in courts; such attitude is less typical for the situations of a contact with law enforcement agencies. Besides that, in this situation the percentage of persons, who are ready to inform competent authorities on bribe extortion will abate. It can be explained by the lack of a clear understanding of how to proceed (whom and how to report, what are the security blankets etc.).

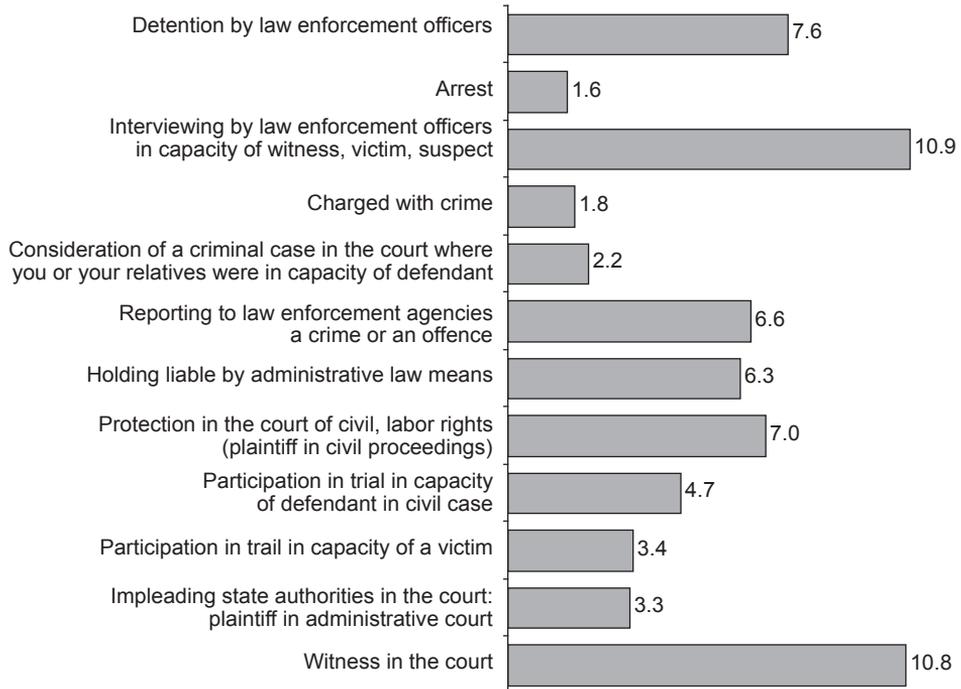
### 3.1.2 Basic Empiric Characteristics of Corruption Practice in Situations of Contact with Judicial Bodies and Law Enforcement Agencies

Generally, during the last three years 45.4 % of the interviewees had contacts with judicial and law enforcement bodies. The character of the contacts is shown in **Diagram 9**.

*Diagram 9.*

#### Character of contacts with judicial and law enforcement agencies

*(% of those who during last three years had experience of being in the following situations)*



Situations described in the interviews applied only to the most commonly used contacts, which have different level of probability for corruption practices. Approximately 25.0 % of the interviewees had two or more of such contacts, which were quite often connected by certain procedures (for example, arrest – pressed charges – judicial trial).

Empiric research concept provided the receiving of information about **real public involvement into corruption relations** in such situations at two levels: *a) in general, contacts with judicial bodies and law enforcement agencies and b) in situation which was “the most difficult and unpleasant” for the interviewees.*

Since it is impossible to give an exhaustive description of even the most common forms of corruption practice, we distinguished three main sorts of corruption behavior:

- An offer of a bribe by the respondents (and an adequate reaction of officials);
- An extortion of a bribe by officials (and an adequate reaction of the interviewees or their relatives);
- The use of “profitable connections”.

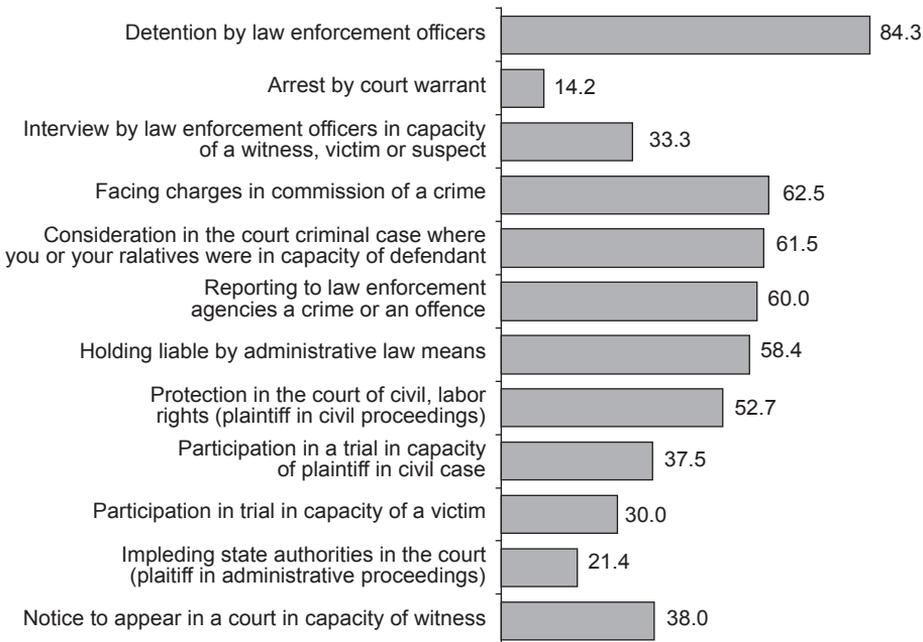
In real life situations such sorts of behavior rather often can combine. In other words, it’s impossible to argue, for example, what comes first: either “the offer” or “the extortion”. Middleman in corruption relations complicate it all, due to the fact that rather often they have their own independent interests and motives.

A) According to the research results, an **offer of a bribe by the respondents** was typical for almost 40.0 % of the respondents who got into situations of contact with judicial and law enforcement bodies. There are some differences in such offers prevalence in certain situations. See the details in **Diagram 10**.

Diagram 10.

**Propositions of corruption agreement**

(% of those who offered directly or indirectly a bribe or other benefits, services etc. in the following situations)



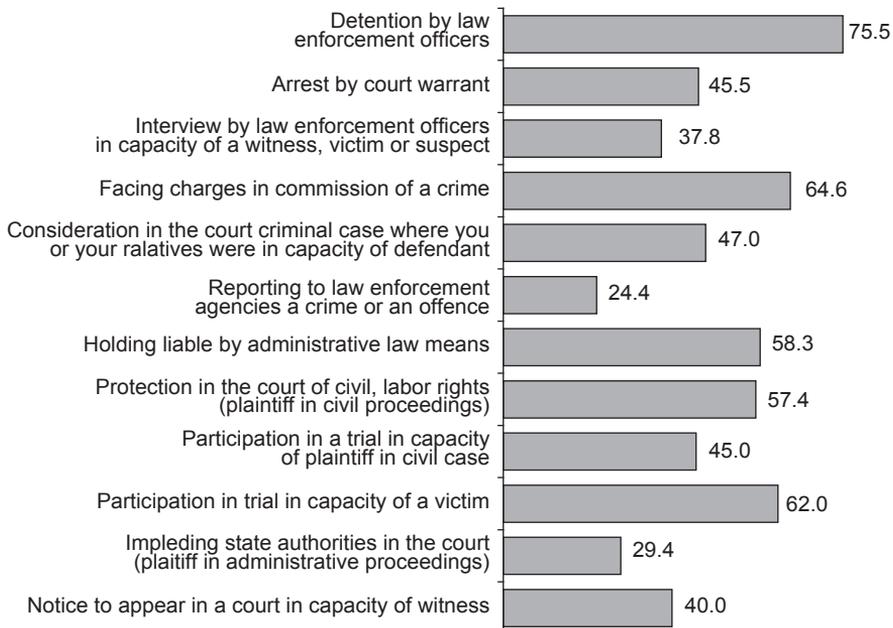
In more than a half of the instances (63.5 %) an offer of a bribe was accepted by officials who took decisions in these situations.

Almost 50.0 % of the respondents who had contacts with judicial and law enforcement bodies faced an extortion of a bribe. The spread of such demands in certain situations is shown in **Diagram 11**.

*Diagram 11.*

**Extortion of a bribe or other corruption benefit**

*(% of those from whom a bribe or other corruption benefit was extorted in the following situations)*

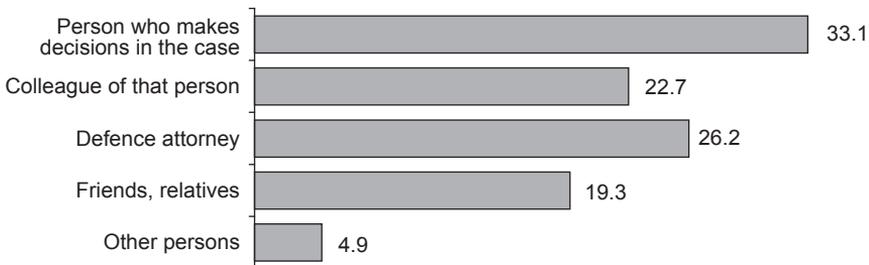


Corruption agreement based on an extortion of a bribe, usually has a quite complicated structure where **middleman** play a special role. It is clearly shown in **Diagram 12**.

According to the presented data only in a half of the instances (55.8%) initiators of corruption agreements are immediate officials of certain judicial or law enforcement bodies. In other cases corruption agreements were initiated by middlemen.

In this respect, **a role of defence attorneys (lawyers)**, who are in more than a quarter (26.2%) of instances are immediate initiators of corruption agreements, has special importance.

Diagram 12.

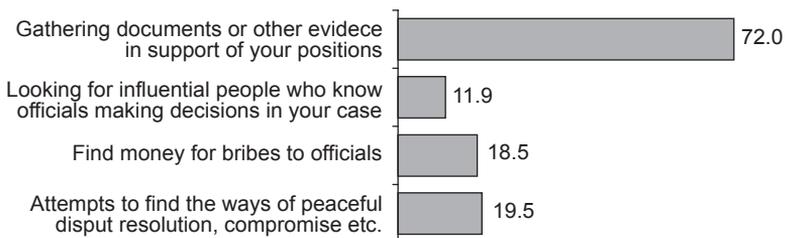
**Initiator of corruption agreement***(% of those who received such an offer from the following persons)*

Defence attorneys (lawyers), play a special role in contacts with judicial and law enforcement bodies, since the level of legal knowledge of the majority of the interviewees is insufficient for self-reliant protection of their rights. According to the interview results only 9.6 % of the interviewees stated that they know their rights and methods of their protection “to the full extent”, 27.4 % know them just “partially”, and 38.4 % of the interviewees “don’t know them at all”.

About 40.0 % of the interviewees apply for lawyers. But measures and scope of legal assistance could be quite different: from a complete set of services related to the representation of the client to providing recommendations about certain situations. The main factor which put some limits on the issue of representation by lawyers is property and social status of respondents, because a considerable part of them can’t afford a lawyer. Actions of lawyers, which the respondents think to be *clue recommendations* of their lawyers, were determined during the interview (see **Diagram 13**).

These assessments proof the fact that a considerable part of lawyers is oriented to corruption models of solving legal issues: 18.5% of the interviewees states that their

Diagram 13.

**Recommendations of defence attorney (lawyer)****in situations of contact with judicial or law enforcement bodies**

lawyers suggested them “to collect money for a bribe”, 11.9% was suggested “to look for influential persons” (“profitable connections”).

These recommendations became the subject of discussions during interviews with lawyers. The attitude to these data is distinct. A part of the interviewees find this position of lawyers “*realistic and effective since certain procedures are based on corruption and a client will be at risk if they follow the legal way*” (lawyer Z.). “*Other lawyers concentrate on a fact that corruption becomes a norm of the profession (mediation in corruption)*”, it doesn’t require any special skills, it’s just enough to have a good system of connections and to know “*whom and how much to give*” (lawyer B.).

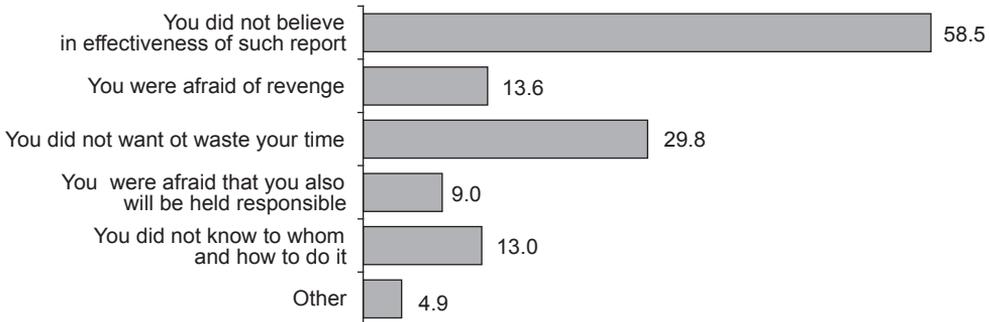
While interviewing defence attorneys (lawyers) the respondents were offered to determine their possible behavior in a situation, when a judge trying the case, offered “to solve the problem” with the help of a bribe. The majority of lawyers (65.2 %) are ready to play a role of “a middleman” without any doubt, 27.2% would refuse, 10.2 % will inform law enforcement bodies and 4.5% will report to the qualification commission of judges. It means that for the majority of lawyers, mediation in corruption relations is a common element of their professional activity. It can’t influence some moral values, emotional and psychological aspects of their attitude to corruption practices provoking moral bifurcation and conflict. The situation of corruption bargain and handing a bribe doesn’t cause any specific fillings for 38.4% of interviewed lawyers who explain this saying “this is life” (among lay persons this figure is 20.3%). At the same time, both lawyers and lay persons had no any considerable differences in judging “informants” (*whistle-blowers*), i.e. persons who inform about corruption abuses: 55.0% of lay persons and 53.8% of lawyers find such persons to be “decent”, it was quite unexpected.

Having faced the corruption extortion (a bribe) the respondents chose different ways of behavior. **More than a half of the interviewees (55.9%) agreed to give a bribe or to follow any other corruption conditions.** Such choice has certain factors: women agree with such conditions quite seldom, young people more inclined to the satisfaction of corruption conditions, residents of rural areas agree with such conditions more seldom, socially active persons agree with such conditions more often (managers, entrepreneurs and others). There are some region differences: citizens of East and South agree with corruption conditions a little bit rarely (the difference is 7-8 %).

**A minor part of the interviewees (10.0 %) reported to supervises or law enforcement agencies about corruption extortion.** Since in the research of 2006 this question was formulated quite differently, it is not possible to conduct methodically correct comparison. But we can assume that the percentage of selection of this way of behavior has grown to some extent. It may possibly be explained by the growth of trust to law enforcement agencies.

At the same time the majority of respondents deliberately conceal facts of corruption extortion. Motives of such decisions are given in **Diagram 14.**

Diagram 14.

**Motivation for refusal of possibility to report to authorities about corruption extortion**

The majority of the interviewees (58.3%) explained their decision to conceal the fact of extortion as distrust to certain bodies and impossibility to achieve the result. But during interviews with entrepreneurs who belong to one of the most “corruption vulnerable category”, we found out some clarifying circumstances. It happens quite often when “*corruption extortion satisfies the needs of a person who is interested in an easy solving of an issue even with some corruption costs*” (an entrepreneur C.). In some cases discretionary powers of officials allows “*to balance on the verge of law but in the interests of a person from whom a bribe is extorted*” (an entrepreneur H.), or in general “*to take a deliberately unlawful decision (for example, to “lock a competitor” (put into custody for some period of time without any grounds) in order to succeed in the market or make impossible the victory in tender etc.)*” (an entrepreneur S.).

**A model of “profitable connections” as a form of corruption behavior** has strong roots in Ukrainian society since it was the most widespread form of corruption during Soviet times. According to research from post Soviet countries this form of corruption behavior remains exclusively important. For example, in Azerbaijan “tapsh” (profitable connections, connections) in some areas is more important than corruption benefit in monetary form (“just a bribe”).

**Diagram 15** shows the level of “profitable connections” usage in main situations of contacts with judicial and law enforcement bodies.

Respondents also assessed the effectiveness of “profitable connections”. A quarter of them admitted that they had been effective “always and completely”, one third considered them “effective in some extent”, 15.9% – “ineffective” at all, and 27.5% could not determine the answer. During interviews lay persons (students, entrepreneurs, farmers, engineers, retirees) drawn attention to the fact that “*profitable connections are not as*

Diagram 15.  
Using of “profitable” and other connections  
in the following situations



*effective as a bribe but they don't require considerable monetary costs, besides that, there is much less risks (it's not a bribe, you should not be afraid and you will not also be cheated here)". But it is possible if profitable connections are based on some relative connections. Other connections (studied together, fellow countrymen, etc.) don't give any assurance in results (an engineer B).*

**B)** To get an impression of the situation of contact with judicial and law enforcement bodies the respondents were offered a **question about the most complicated and unpleasant situation they faced while contacting these bodies.**

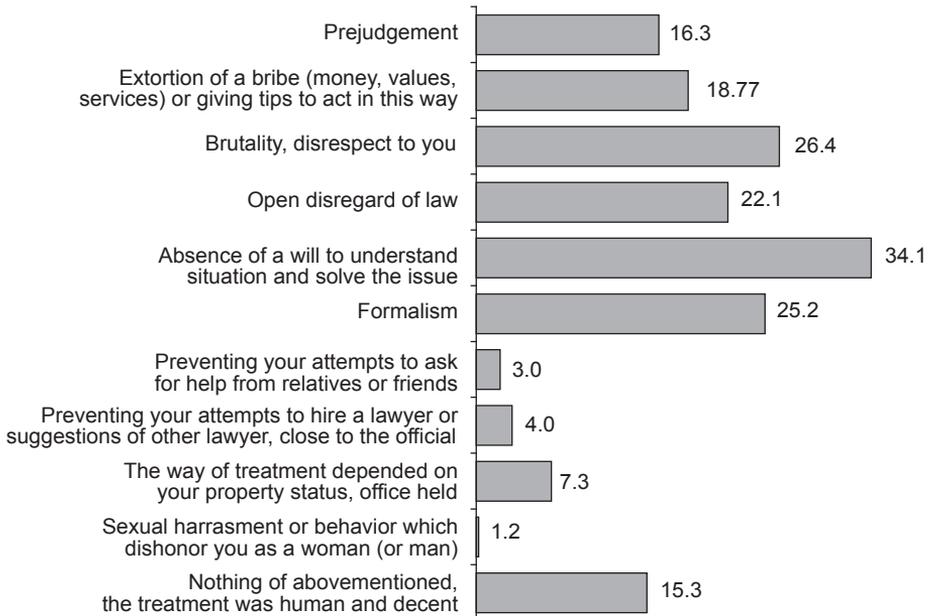
Approximately 40.0 % of the interviewees said that they have experienced a difficult situation. To our opinion such situation enables to see clearer and illustrate the problems, which are typical for contacts with judicial and law enforcement bodies. Taking into account sample scope it is not possible to conduct methodically correct analysis of each situation. That is why we'll analyze a generalized object – “difficult situation”.

**“First impression” Diagram 16** shows what the respondents paid their attention to in such situations at the first place, i.e. what kind of actions by the officials impressed them most of all and influenced their general acceptance of the situation.

Diagram 16.

**Particularities of officials’ behavior in situations of the contact with judicial and law enforcement bodies**

(% of those who thinks that the following sings were first indicators they paid attention to in “difficult and unplesent” situations)



It is worth paying attention to the fact that 18.7% of respondents faced the extortion of corruption agreement at the initial stage of proceedings. During in-depth interview the respondents said: *“it (bribe extortion) was the first meaningful phrase I’ve heard from law enforcement officers”* (student R.), *“they did not start explaining anything, just said how much it would cost me”* (an entrepreneur C.). Interviewees drawn attention to the specific situation when *“a criminal investigation is initiated or (it happens more often) a pre-investigative checking out of information about crime is started in order to set up a situation for making corruption demands to a person, since it becomes one of the most “profitable businesses” for law enforcement officers”* (an entrepreneur Sh.).

**Level of legal knowledge** is an important factor, which determines behavior in difficult situations. According to the respondents’ self-assessments, level of legal knowledge which could be helpful in such situations is even lower in comparison to the level of knowledge which could be helpful in general situation of contact with judicial and law enforcement

bodies. The results of in-depth interviews with persons who participated in criminal proceedings were quite demonstrative. According to the statement of unemployed G. (a victim) “*even knowledge of Criminal Procedural Code didn’t help me to understand, what I had to do in order to protect my rights. They (judges and investigators) know something else, that I couldn’t find anywhere by myself. Even half a year later after the verdict, I don’t understand why the defendant managed to avoid real imprisonment. And the most unpleasant part is that I still can’t find what to say*”.

**The assessment of different models of behavior effectiveness in difficult situations.** **Diagram 17** gives the respondents’ assessments of the effectiveness of basic measures taken by them or their relatives in such situations.

*Diagram 17.*

**Assessment by respondents of behavior chosen by them or their relatives or close friends in situations of a contact with judicial and law enforcement agencies which were admitted as “difficult for themselves”**



The questionnaire is constructed in the way which allows us to compare these assessments with orientations for taking certain measures, i.e. *to determine how much respondents’ expectations were justified*. Such analysis leads us to the following conclusions:

- Expectations of effectiveness of the following measures were completely justified: a) entering into agreement with a lawyer (21.3% admitted the effectiveness of such a measure); b) searching for people who can influence the decisions (15.3%);

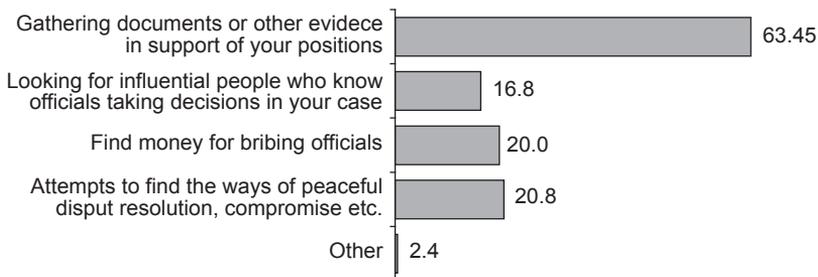
c) usage of “profitable connections”, i.e. existing connections (12.0%);  
d) immediate offer of a bribe (10.3 %).

- Expectations of effectiveness of the following measures were partially justified:  
a) consultations with lawyers in order to protect their rights independently (about 20.0% of respondents who took this measure were not satisfied); b) report to law enforcement bodies (30.0 %); c) inform mass media (20-22 %); d) consultations with people who have been to similar situations (30 %).

**A role of a lawyer.** As it has already been mentioned, in many cases an agreement with a lawyer had even a better effectiveness that it was expected. Obviously, it concerned mainly professional solution of certain legal issues (drafting of claims, providing consultations etc.). But **corruption component** has also affected this result greatly. A character of lawyers’ recommendations to the respondents is given in **Diagram 18**.

*Diagram 18.*

**Recommendations by lawyers in the situations which were admitted by the respondents as “difficult and unpleasent”**



About one third of lawyers at the stage of case strategy determination usually orient their clients to the corruption way of solving a problem.

**Corruption demands: proposition, middleman, acceptance of demands.** Almost a half of the respondents (48.0%) said that they received an offer to solve their problem under condition of complying with some corruption demands (giving a bribe or meeting some other conditions). Occurrence of corruption demands in certain situations is illustrated in **Diagram 19**.

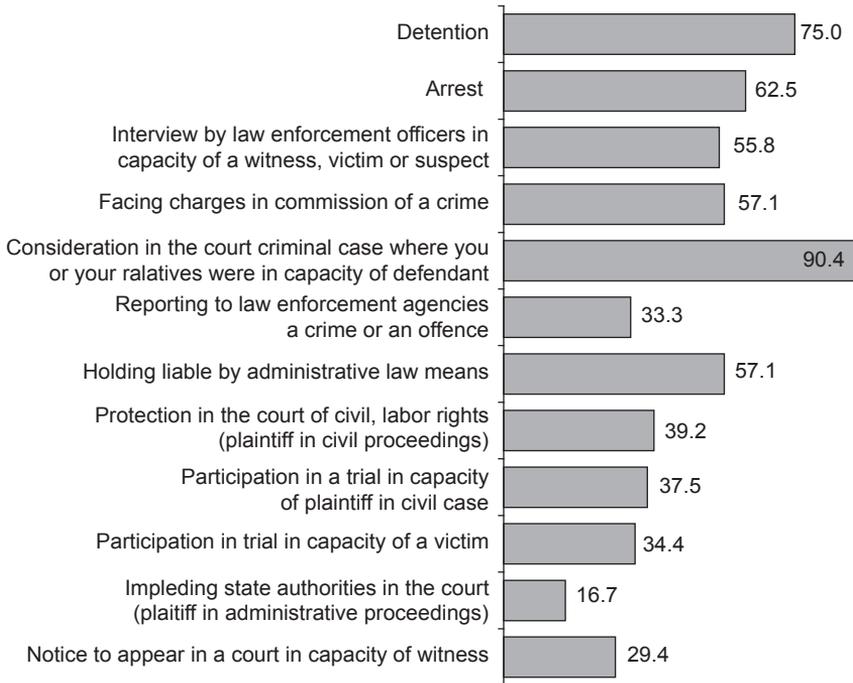
During in-depth interviews some circumstances were clarified, under which such demands are formed. The respondents stated that most often immediate officials, who conduct a case, at the first place “hint” and later on formulate clear demands. If an offer comes from a middleman, this offer is clear, they name sums of bribes or other demands.

In general, officials lay dawn corruption demands directly in 28.0 % of instances, and in other cases it is done by middleman (25.8 % – colleagues of the official; 18.9 % – lawyers; 27.7 % – relatives and close friends of respondents). In situations concerning law enforcement agencies, middleman are often lawyers and colleagues of the officials

Diagram 19.

**Extortion of a bribe or demand of meeting some other corruption conditions in the situations of contacts with judicial and law enforcement bodies**

(% of those who admitted presence of corruption demands)



(playing the game “good policeman – bad policeman”). In judicial bodies role of middleman is played by lawyers and relatives or close friends (including “profitable connections” model).

In-depth interviews provide quite striking information that there are different “scenarios for laying down corruption demands” and their differentiation depends on a situation, participants of relations, level of “outer risks”, etc. According to some respondents, a role of middleman has significantly been growing recently, since there are more “risks to be recorded”.

For almost half of persons (49.4%) who received corruption offers, these demands were quite acceptable. The motivation of such decisions is quite complicated and depends on certain situations. But based on the results of in-depth interviews we can assume that in the considerable part of the cases, factors of functional attitude to corruption have “worked out”. In other words, respondents could get the same result without involvement into corruption relations but the value of the matter in such a case could be higher (it required more time, emotional feelings etc.). Besides that, about a quarter of situations

were connected with a kind of “procedural compromise”, meaning situations when legal issue is uncertain (law is not precise or facts are controversial). In situations like this the officials had wide discretion regarding the legal ways on solving the issue and, accordingly a range of legal decisions, which could be taken either in benefit of particular person or against it. The respondents noted that *it’s very difficult to refuse such demands when the situation is artificially set up, i.e. specially created with sole aim to lay down demand of a bribe or some other kind of corruption payment*” (an unemployed G.).

Effectiveness of a bribe in solving a legal issue was assessed by the respondents differently. Less than a half of interviewees (48.8 %) is sure that “it (a bribe) helped them in solving their problem completely”, 36.9 % of the interviewees stated that “it has partially solved the problem.” Quite a big percentage of respondents (10.5 %) claimed that they have been “cheated”. Some attention was also drawn to this circumstance during in-depth interviews. Respondents noted that *“you can’t be absolutely sure that money (bribe) has already solved everything. My lawyer gave money to a judge and he decided the case in my opponent’s benefit. He returned the part of the sum referring to overhead expenses”* (an entrepreneur T.). Other respondents said that very often it is a middleman who “cheats”.

While summing up, we can make some conclusions as for corruption practice occurrence in the contacts of public with judicial and law enforcement bodies. Such practices varied and depend on kind of procedure and structure of participants. Since in this issue we regarded to “lay persons” without distinguishing any “target groups”, data on corruption practices occurrence could be resulted from “overlap” of three situations: a) orienting of respondents to the usage of corruption models of behavior; b) officials’ corruption demands; c) activity of middleman who participate in solving of certain issues and orientate for corruption behavior.

Taking that into account and grounding on the results of the research analysis we can assume that *not less than 60 % of situations of contacts with judicial and law enforcement bodies have “a corruption undertone.”*

### **3.1.3 Particular Characteristics of Corruption Practices in Courts: Based on the Results of Interviews with Experts**

Differentiation of characteristics, which are common for all kinds of proceedings and specific ones, which reflect particularity of certain kinds of proceedings is very important for research of corruption practices in judicial bodies. In this section of the research only common characteristics will be analyzed, that is what describes fundamental features of corruption practices in all judicial proceedings in general.

*Empirical foundation* of the analyses is the results of *experts’ interviews* (lawyers who have an experience in participating in all or the majority of the proceedings which were the subject of the research), *focus-groups and in-depth interviews materials*. In particular cases these results are compared with results of *interviews with public*.

**Occurrence of corruption practices.** In experts' interviews we have found the following assessments structure of corruption practices occurrence level in different kinds of proceedings, which were the subject of the research (see **Diagram 20**).

*Diagram 20.*

**Assessment of corruption practices occurrence by experts**  
(% of those who considers such practices to be widespread)



Experts' assessments of a situation in judicial system at emotional and psychological level are quite significant. Percentage of answers to question "How often do you have a feeling of corruption agreements between a judge and party to the case during the trial?" was the following: "almost always" – 12.1 %, "in most cases" – 37.6 %, "in minority of cases" – 26.3 %, "seldom" – 9.7 %, "never happens" – 12.7 %. If we compare these data with the results of interviews with public, which we have examined in the previous chapter of the issue, we can assume that there is a similarity of experts' and "lay persons" assessments of a situation.

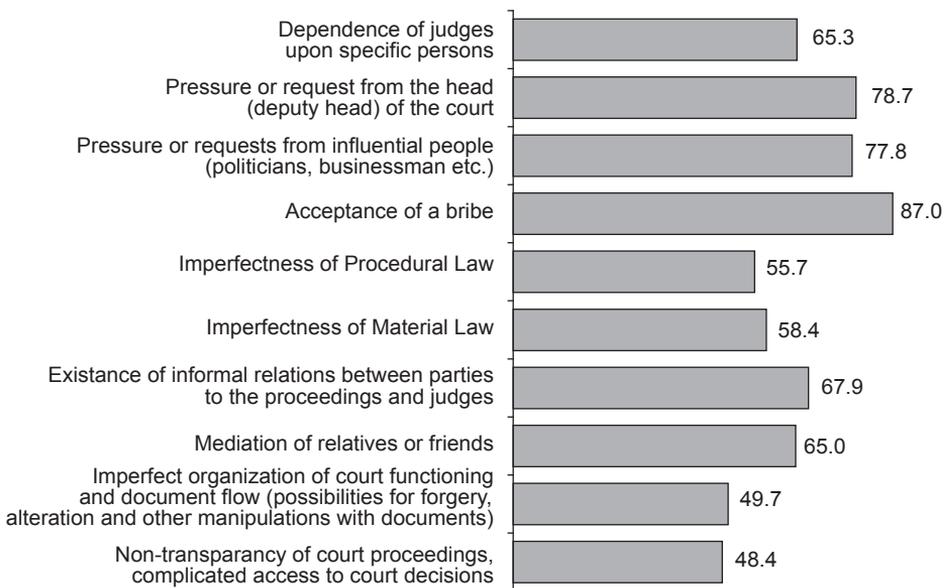
There are also assessments of dynamics of the situation for the last two years. A general tendency for all kinds of proceedings is the lack of positive changes. Only 3.5 % of the interviewees agreed with the fact that level of corruption has decreased during the last two years. The respondents didn't find a higher level of positive changes in any other of judicial procedures. A considerable part of the interviewees couldn't determine the answer (from 22.0 % to 37.2 %, depending on the kind of proceedings). In general, one third of the interviewees think that the extent of corruption practices has grown, especially in economic proceedings (38.4 % of the interviewees) and administrative proceedings (34.1 %, though in this case we should take into count the stage of formation of administrative courts system). The rest of the interviewees (about one third) think that there's certain stability in the situation, i.e. the extent of corruption practices doesn't change.

**Factors for forming corruption practices.** First of all in this research dominating kinds of corruption practices were defined, and they can be conditionally divided into several categories (which have certain differences regarding participants and character of relations), these categories are: a) a model of “a bribe” (bribing judges); b) a model of “profitable connections” which could have no “lucrative impulses of a judge”; c) a model of “administrative dependence” which is based on informal or formal mechanisms of personal dependence of judges (this model may have both independent and instrumental character toward the previous two). Approximate presentation of these models allocation can be received from the analysis of experts’ answers to questions of circumstances which cause the corruption behavior of participants in corruption agreements, first of all judges (see the details in **Diagram 21**).

*Diagram 21.*

**Importance of particular circumstances for forming corruption agreements in the courts: experts’ assessment**

*(% of those whp consider such circumstances to be important)*



Analyzing these data we can get an insight into both: kinds of corruption practices and the presence of influence by certain aspects of conditions for performance of justice to their origin:

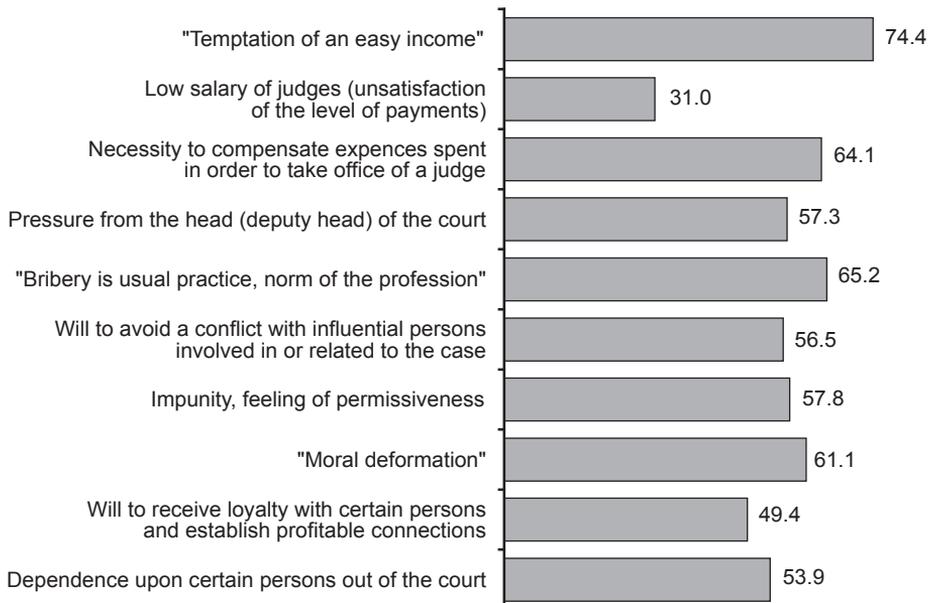
- The main model of corruption practices is those models which are based on a bribing of judges (both direct and indirect by other persons);
- A model of “profitable conditions” and a model of “administrative dependence” have less importance;

- A condition of legislation (both procedural and material) doesn't belong to determinative factors for forming corruption risks, but there are some provisions which produce corruption;
- Existence of a complicated web of informal connections of judges (inside of the judicial system, in certain courts, informal relations with lawyers, social and personal relations of judges) is one of the main corruption risks, because neither ethic nor legal mechanisms of prevention of conflict of interests work;
- A system of administrative relations in the courts contains some corruption risks in the part of producing conditions for different forms of judges' dependence upon managers of the courts;
- It makes sense to add to the factors producing corruption the way in which the courts functioning is organized (document flow, case assignment etc.).

These data has received further clarification in the context of determination of conditioning of the **judges' motivation for corruption behavior** by the experts' assessments (see **Diagram 22**).

*Diagram 22.*

**Subjective factors of corruption behavior by judges:  
experts' assessment of motivation and circumstances**  
(% of those who considers such motivation to be significant)



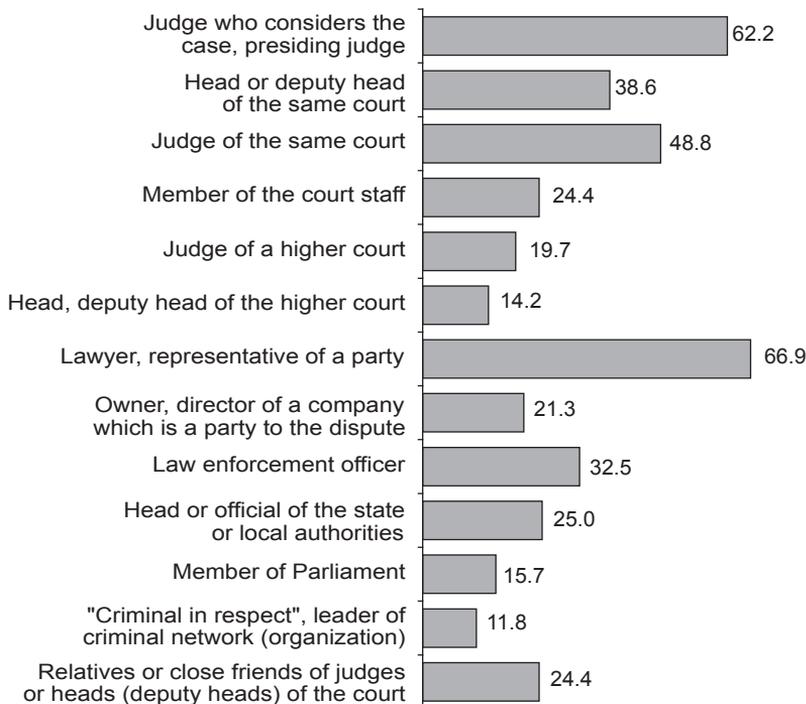
**Corruption agreements: participants, corruption benefits, corruption abuses.**

In this case the task of the research was to determine general features of corruption agreements, which exist in judicial proceedings. The key question was to identify persons who are involved in the corruption relations. Experts' assessments of the involvement of the main procedural and non-procedural (but related to them) participants to the judicial proceedings are presented in the **Diagram 23**.

*Diagram 23.*

**Participants of corruption relations: experts' assessments**

*(% of those who considers that such persons directly or indirectly involved into corruption agreements)*



In these assessment we should draw attention to the domination of two key participants: judges and lawyers (representatives of the parties). Some difficulties in understanding of the situation are caused by the fact that only 62.0 % of the interviewees considers judges as participants to corruption agreements. The explanations of this situation were received during in-depth interviews where respondents drawn attention to situations when judges played a role of a kind of a “mute”, meaning situations when the judge follows “*a task, an order or a request of other persons with no personal benefits*”. The interviewees also consider other situation to be quite widespread, when middleman (lawyers, relatives or close friends of law enforcement officers, other judges of this court, etc.) “*imitate a*

*corruption agreement using citizens' lack of legal knowledge to receive a benefit as it was for a judge*".

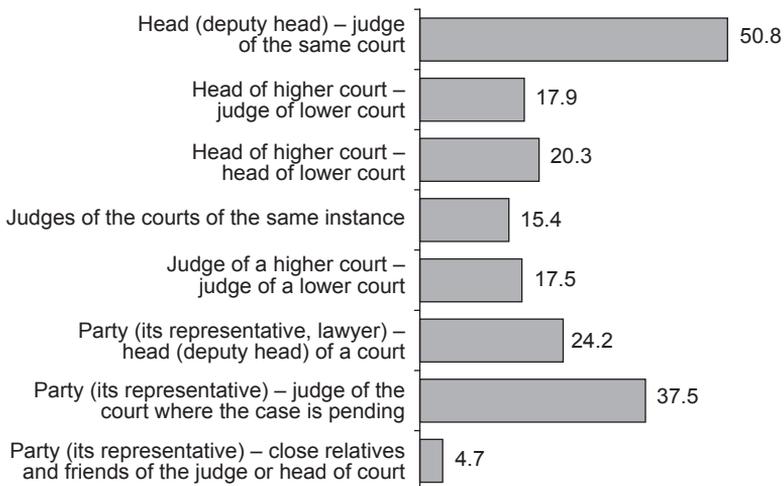
In in-depth interviews and during the focus-groups an issue of correlation between forming of corruption practices and **informal relations in judicial system** was suggested for discussion, since a mechanism of corruption agreements execution in concrete cases is originated on the basis of existing informal relationship.

A notion of quantitative characteristics of significance of such "informal alliances" was received during interviews with experts (see **Diagram 24**).

*Diagram 24.*

**Influence of "informal alliances" on origin of corruption agreements: experts' assessment**

*(% of those who considers such type of informal relations to be significant for forming of corruption agreements)*



These data show that two types of "alliances" – "a head of a court – a judge of the same court" and "a judge – a party (its representative, a lawyer)" are most effective for achieving corruption agreements in concrete cases. Informal connections of the higher and lower levels of judicial system also have a very important significance.

Corruption relations have quite a difficult character not only because of a structure of their participants but also over different corruption benefits (rewards) included to these relations. **Diagram 25** shows experts' assessments of frequency of usage of different types of corruption benefits in such relations.

According to these data the main type of corruption benefits is money. Very often such benefits as material values and corporate rights are used. In in-depth interviews these results were clarified. Usage of material values (goods, etc.) very often provides for existence of difficult schemes where both parties use middleman. In a case of

Diagram 25.

**Corruption payment: experts' assessment of using the following values in capacity of payments according to corruption agreements**

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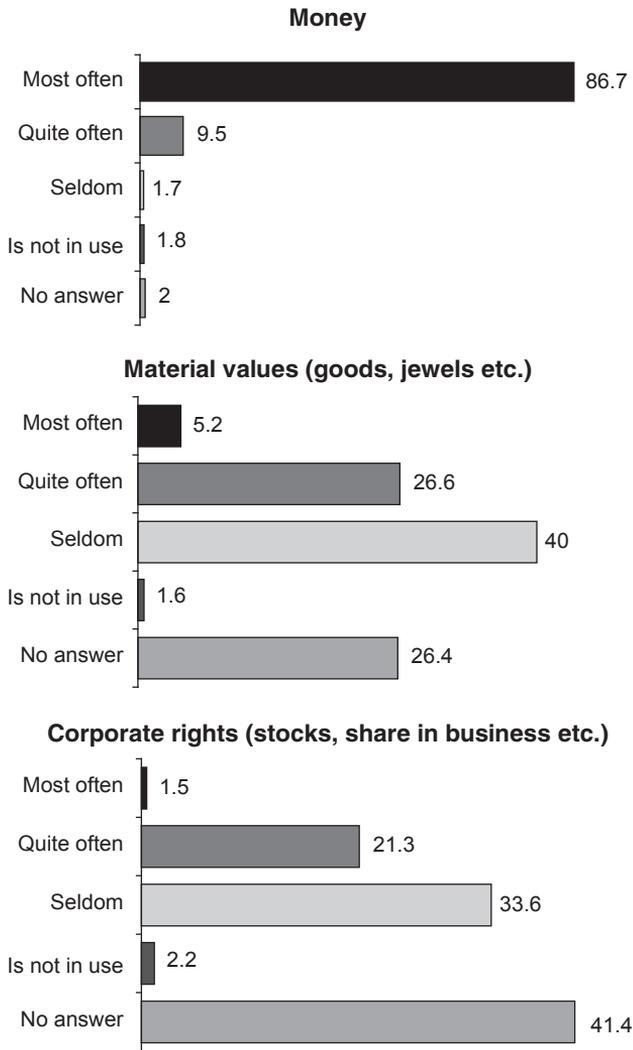
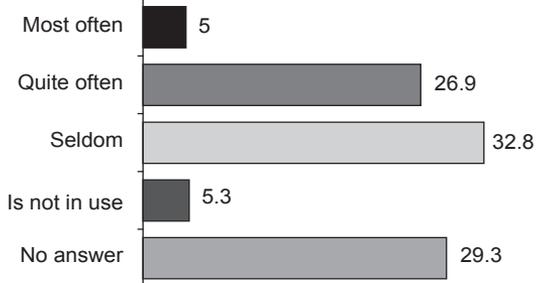
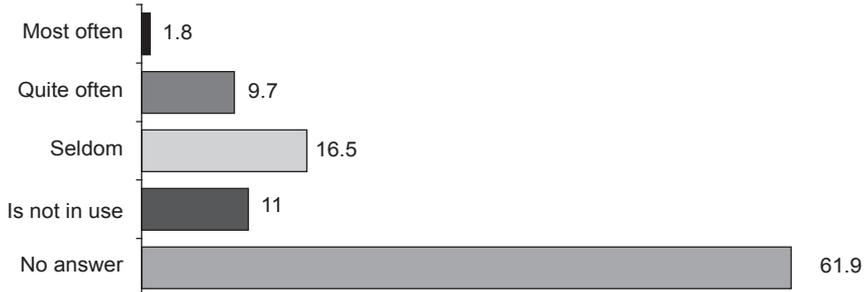


Diagram 25 (continuation).

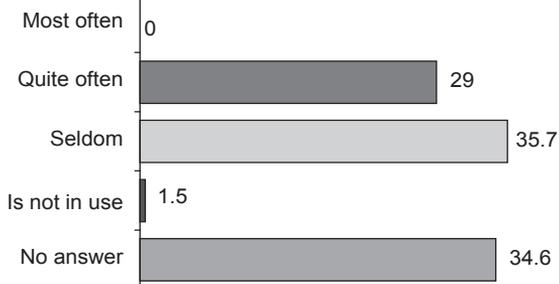
**Services (renovation of accomodation, studies of children and relatives, payments for medical treatment or vocation etc.)**



**Sexual services**



**Granting or providing assistance in granting priveledges, benefits, permissions, licenses (exchange of services)**



**Immaterial values (receiving honors, medals etc.)**



corporate rights usage there is also a necessity of involvement of middleman, though it is fundamentally important that such benefit is usually used in situations when “a cost of a claim“ is “big or very big”.

Along with the above experts also drawn attention to the occurrence of practices when in capacity of corruption benefits immaterial values or services are used. In such cases corruption relations have quite a latent character.

Usage of money as the main type of corruption benefits provides the existence of certain ways of their transfer, which allow get additional characteristics of corruption relations system since they explain the significance of different participants involved in corruption agreements (see **Diagram 26**).

*Diagram 26.*  
**Channels of a bribe delivery: experts' assessments of the frequency of different channels application**

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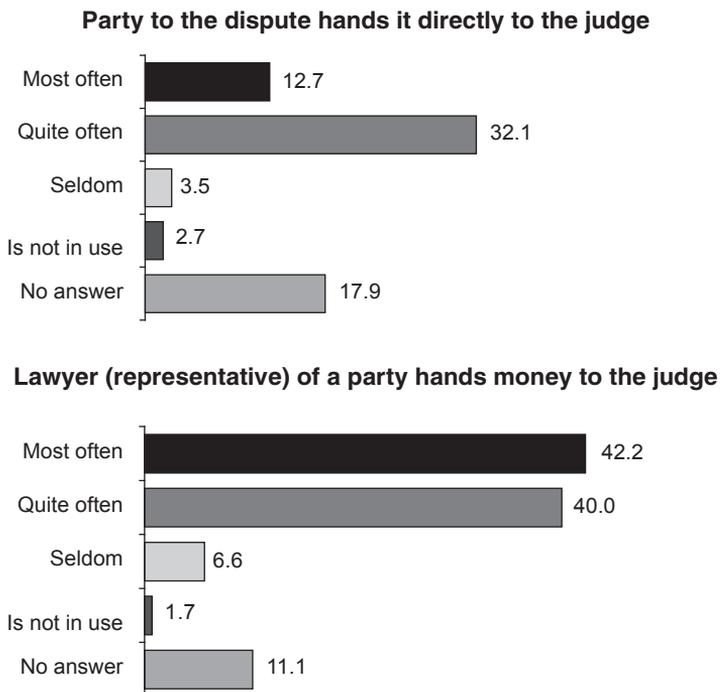
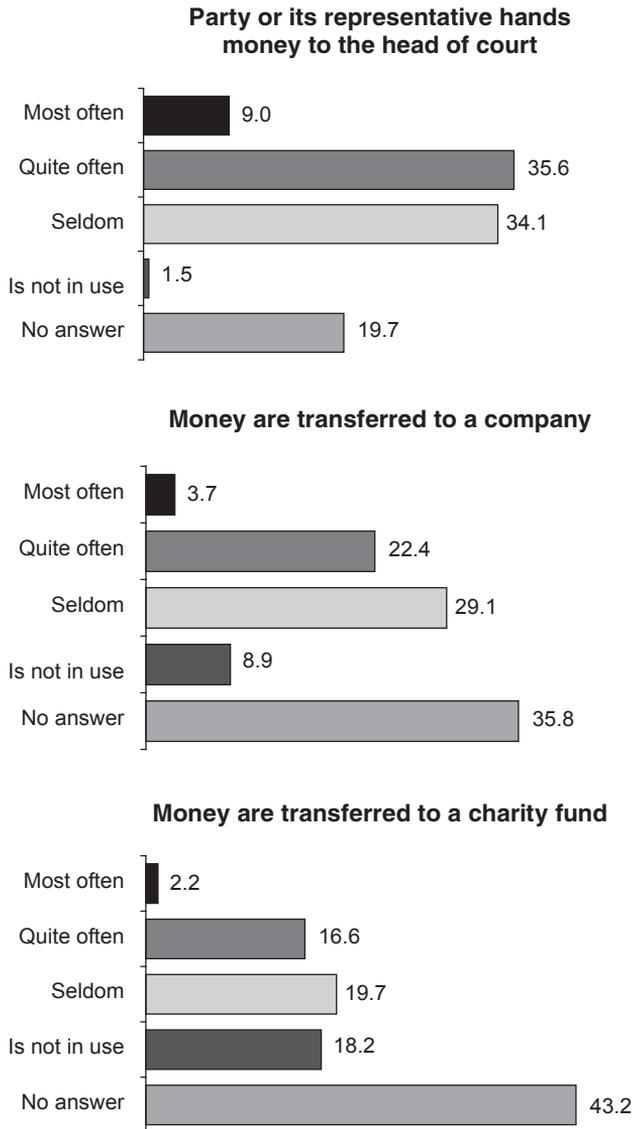


Diagram 26 (continuation).



Experts stated that lawyers (representatives of parties) are main middleman in corruption benefits transfer, a person who is a direct part in a case does it itself more seldom. Some experts paid attention to a quite high level of participation in such relationships heads of courts and their deputies.

An evidence of using card accounts (plastic debit cards) as well as money transfers was provided during the questioning and in-depth interviews. In such instances law firms

or charity funds and in some rare instances entrepreneurs or companies were used as middleman in transferring corruption payments.

Defence attorney Sh.: *“Money in envelop is almost exotic, it is easier and more secure to transfer money to a law firm for any kind of services”*. Ms. P. (party to a civil suite): *“I was advised to provide financial assistance to a charity fund with beautiful name in order to speed up consideration of my case”*.

A judge entering into corruption agreement acts in particular way which secure reaching the aim of such agreements. These ways are not always formally illegal but they are chain in corruption behavior of a judge who abuses procedural rights.

Experts’ assessment regarding frequency of particular types of judges’ behavior are shown in the **Diagram 27**.

Diagram 27.

**Actions of a judge who enters into corruption agreements: experts’ assessment of frequency of such actions use in corruption practices**

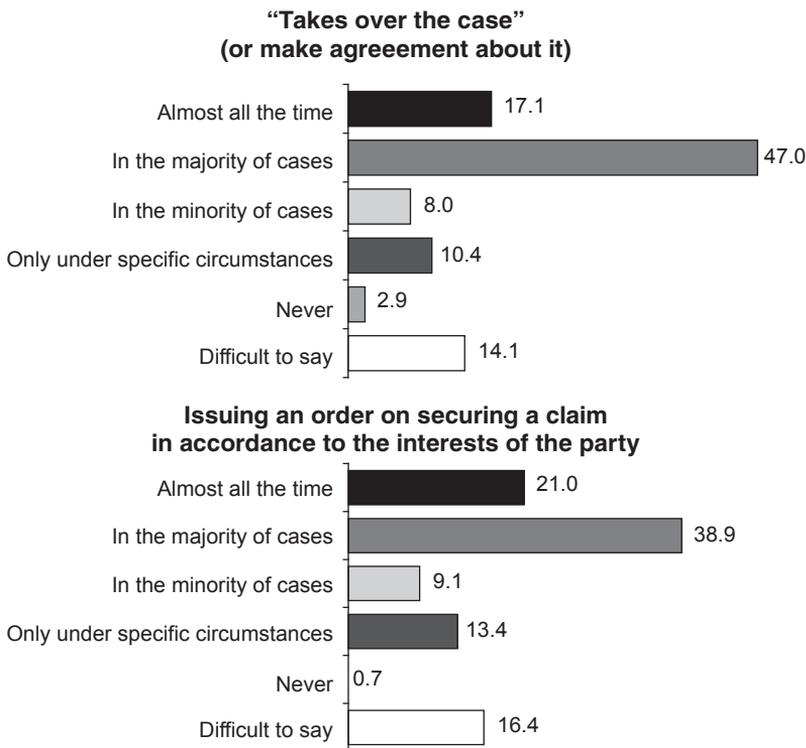
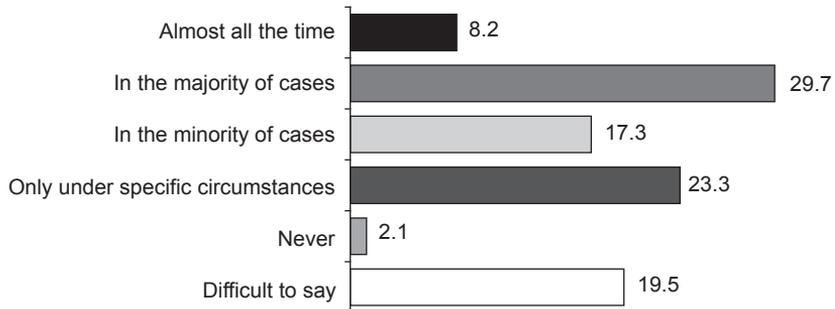
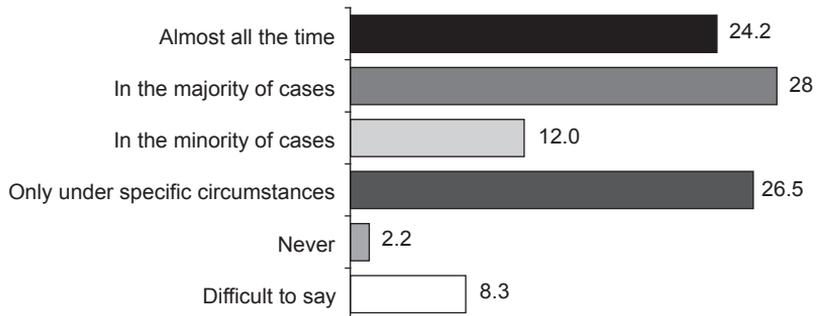


Diagram 27 (continuation).

**Without any grounds or based on the strained grounds refuses to receive statement of claim, write of appeal or cassation appeal**



**Delay hearings**

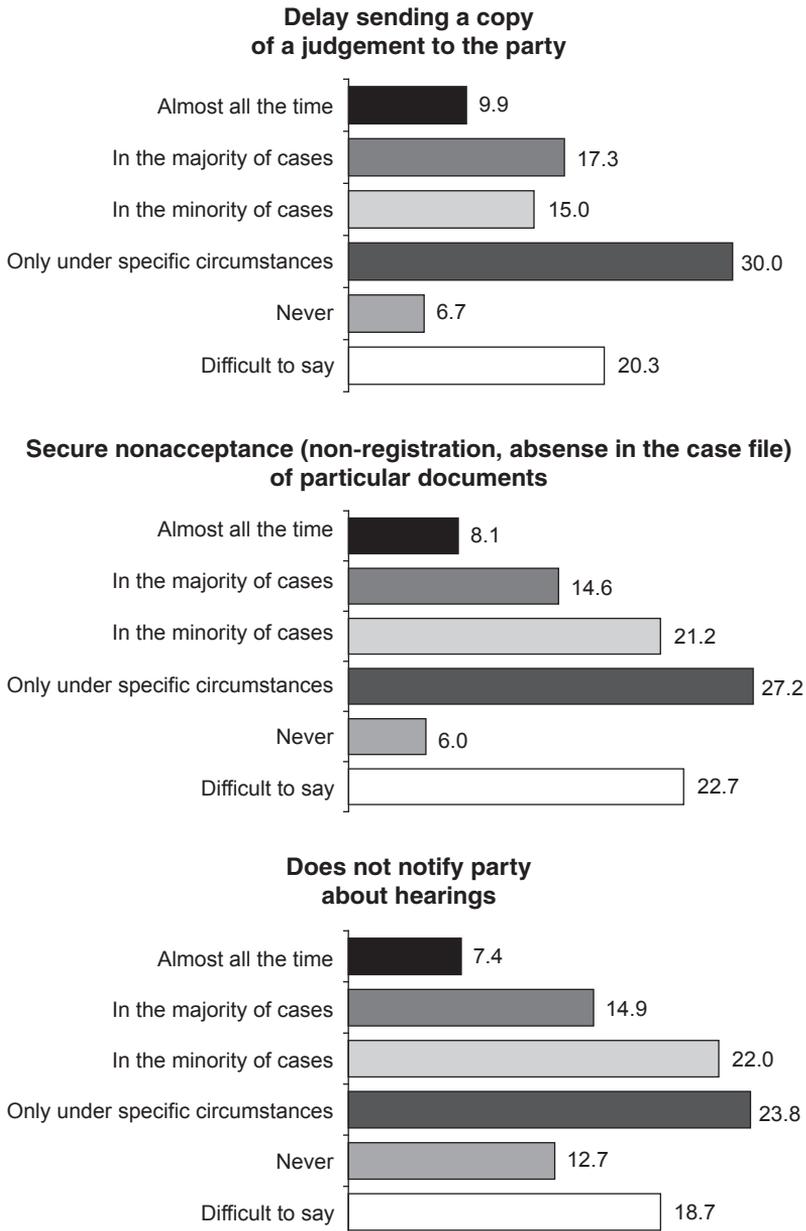


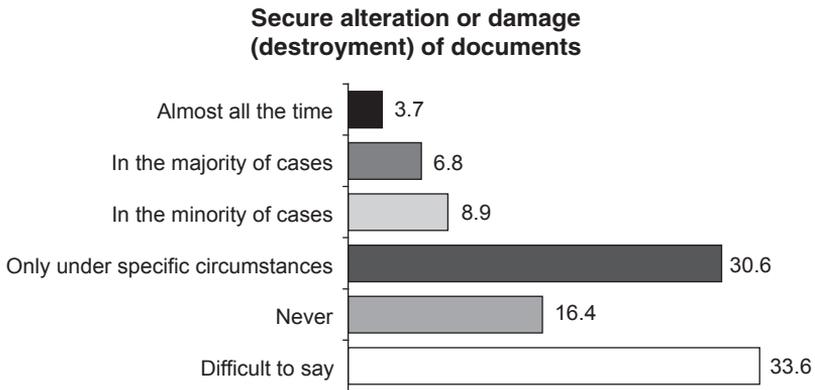
**Pass a judgement within the shortest possible period of time (for instance at very first session of hearing)**



Diagram 27 (continuation).

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*Diagram 27 (continuation).*

These data show that according to the opinion of the interviewed experts, the most effective ways in reaching the aim of corruption agreement are:

- a) “manipulations with case assignment”, when the judge takes for consideration particular case or reach an agreement about it;
- б) making decision on securing a claim in accordance to the interests of the interested party;
- В) violation of the time frames for consideration of the case (delay of the hearings or delay at other stages). It’s important to note that manipulations with time frames for case consideration are considered by experts to be the most wide spread in cases with corruption undertone.

## **CHAPTER 2. CORRUPTION RISKS IN CRIMINAL PROCEEDINGS: PRE-TRIAL AND TRIAL STAGES**

Criminal proceedings are one of the spheres, which are considered to be the most corrupted in Ukraine. Conducted and published research concerning assessment and perception of the corruption level in activities of the bodies, responsible for conduct of criminal proceedings witness rather high level of mistrust from public to these bodies. For example, according to the research of analytical centre “Academy”, which in the years 2003-2004 conducted a sociological research “Corruption Through the Eyes of Entrepreneurs”, 54% of respondents named the State Tax Service among the most corrupted bodies, and 29% – bodies of the Ministry of Internal Affairs. Also 53 % of respondents have noted that officers of the Ministry of Internal Affairs apply methods of extortion of a bribe, such as artificial creation of “a problem situation”. Other 38% of respondents consider that tax militia officers are also inclined to such actions<sup>1</sup>. The research conducted by the Institute of Applied Humanitarian Research in 2003 also testifies about low level of public trust to the law-enforcement bodies in the context of their struggle against corruption. Only 12.4% of the public trust militia bodies, 15 % – the Public Prosecution Service, 23.4 % – the Security Service of Ukraine, 14.1 % – the State Tax Service, 17.7 % – the courts<sup>2</sup>.

Public opinion surveys, which were conducted later, in 2007, by the Kyiv Gorshenin Institute of the Problems of Management, and the national-wide research “State of Corruption in Ukraine”, which was conducted by the “Management Systems International” together with the Kyiv International Institute of Sociology with support of USAID and Millennium Challenge Corporation confirmed the tendency of mistrust of the public to the bodies executing criminal proceedings. According to the data of the Gorshenin Institute in Ukraine the following agencies are considered by public to be the most corrupted: police (51.7%), courts (49.4%), the Public Prosecution Service (37.9%), the Customs Service (36.7%), the Security Service of Ukraine (15.4%)<sup>3</sup>.

According to the data of the national-wide research on the state of corruption in Ukraine, the following agencies have the highest indexes of corruption: the Traffic Police – 57.5%; the police – 54.2%; the judicial system – 49%; the Public Prosecution Service – 42.9%; the Customs Service – 42.8%; the Tax Service – 40.3%<sup>4</sup>.

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<sup>1</sup> D. Klepachevsky. Who is the most expensive in the world // Contracts. – 2004. – № 18. - Kyiv: ТзОВ “Publishing house “Galytski contracty”. – p. 56-57; internet–page of the Analytical centre “Academy”- <http://www.academia.org.ua/?p=256> (30.04.2009)

<sup>2</sup> Corruption in Ukraine: the year 2004 (view from the year 2008) / edited by M. V. Buromensky, A. V. Serdyuk. – Kharkiv: Yashma, 2008. – p. 154 -155.

<sup>3</sup> Internet–page of Gorshenin Kyiv institute of the problems of management [http://www.kipu.com.ua/Sotsyolog\\_research\\_03.html](http://www.kipu.com.ua/Sotsyolog_research_03.html) (30.04.2009)

<sup>4</sup> The state of corruption in Ukraine. May 2007. Project “Assistance to active participation of the citizens in counteraction to corruption in Ukraine “Ukraine with dignity” // Internet–page of project “Assistance to active participation of the citizens in counteraction to corruption in Ukraine “Ukraine with dignity” [http://www.pace.org.ua/images/survey/full\\_report\\_ukr\\_final.pdf](http://www.pace.org.ua/images/survey/full_report_ukr_final.pdf) (30.04.2009.)

Each of the mentioned above state bodies, in addition to the certain rights and duties in sphere of criminal proceedings also has a set of rights and duties, which are connected with administrative procedures and services. The information, which is shared from time to time by the Ministry of Internal Affairs, the Security Service of Ukraine and the Public Prosecution Service concerning fight against corruption inside law-enforcement bodies do not always allocate separately investigators and inquirers or operative-authorized officers, who acted within the frameworks of the criminal-procedural code, giving general statistical information concerning the condition of fight against corruption inside a certain law-enforcement body and the facts of revelation of corruption actions from the side of the employees of this body. The information concerning detention of judges for bribery, which is more often appears in mass media recently, in particular on official Web-pages of the SSU, the Ministry of internal affairs and the General public prosecutor's office, concerns not only judges, who abused the power and their power position in pronouncement of unreasonable decisions or sentences in criminal cases, but also judges, who pronounced premeditated unjust decisions in economic, land and administrative disputes. Analysis of messages concerning starting of criminal cases, direction to the court of criminal cases concerning judges and impleading of judges to criminal responsibility for bribery and pronouncement of deliberately unjust judgements on official Internet-pages of the SSU, the MIA and the General public prosecutor's office testifies, that in nearly 50 % of cases of impleading judges to criminal responsibility for bribery the reason and the grounds of starting of a criminal case were pronouncements by judges of unjust decisions in civil and economic cases. Other 50 % concerned pronouncement of unjust sentences in criminal cases or making of decisions about changing of a preventive measure in the form of taking into custody to alternative measures of criminal-procedural coercion.

Thus we can draw a conclusion, that researches, conducted before, which touched certain aspects of activity of the bodies, which have certain, different by the nature and capacity, powers concerning criminal proceedings, cannot be considered such, which display an objective situation, which has developed, with nature and volume of manifestations of corruption within the frameworks of just criminal proceedings. The issue of corruption during criminal proceedings is the least studied in Ukraine and it requires separate consideration. First of all from the point of view of the regulations of the operating criminal-procedural legislation and separate internal procedures and practices of bodies of inquiry and pre-judicial investigation, as well as the court, which create conditions for perpetration of corruption offences and crimes.

### **3.2.1 General Characteristic of Criminal Proceedings in Ukraine**

The system of the criminal process of criminal proceedings of Ukraine represents a set of stages, connected between themselves with common tasks and principles of legal proceedings. Criminal proceedings in Ukraine can be divided into three stages: (1) verification of information about a crime; (2) pre-judicial investigation and (3) judicial

proceedings. Each stage differs with tasks, subjects and volumes of powers of these subjects.

Verification of information about a crime consists in verification of the crime report and establishment of the fact of commitment of a crime. It begins from the moment of reception of information about a crime and ends with institution of a criminal case or refusal to institute it. At this stage an inquire body, an inspector or a public prosecutor, can claim documents, conduct an interrogation, take operational search measures and conduct an examination. The peculiarity of this stage is that the amount of actions, which can be taken by the authorized state bodies, is limited. Taking of investigative actions, which are directly oriented towards reception of proofs, is possible only after institution of a criminal case. At this stage activity of the authorized bodies is regulated by article 97 of the Criminal-procedural code, the Law “About Operational Search Activity” and the statutory laws. At the stage of verification of information about a crime the main subject, which carries out criminal proceedings, is an inquiry body. According to article 101, to the inquiry bodies belong: militia (inquirers and operative authorized officers); tax militia (inquirers and operative authorized officers); the security service (operative authorized officers of the SSU); heads of control bodies of the Military law-enforcement service in the Armed forces of Ukraine and their assistants on issues of conduction of inquiry; commanders of ships; customs bodies; heads of punishment execution establishments, investigatory isolation prisons, labour-therapy centers; bodies of the state fire-fighting supervision service; bodies of the border service; captains of sea ships, which are in ocean navigation. According to article 103, of the CPC, inquiry bodies are charged with use of necessary operative-search measures for the purpose of revelation of signs of a crime and the persons, involved in it. Functions of an inquiry body also cover investigation of crimes in the form of inquiry; reception and verification of claims about a crime (articles 94-100 of the CPC); conduction of pre-judicial preparation of materials in the protocol form (articles 425-429 of the CPC). Active participants at this stage are lawyers and specialists – experts in a certain field of knowledge, which is necessary for establishment of signs of a crime (experts in technical study of documents, weapons, narcotic substances and so on).

The stage of pre-judicial investigation consists in impartial, universal and disinterested investigation of a criminal case by gathering, fixation and evaluation of proofs by means of conduction of investigative actions and operative search measures. The given stage begins from the moment of institution of a criminal case and ends with pronouncement of an indictment, transfer of the case to a public prosecutor who, in turn, transfers it to a court. Activity of the authorized state bodies at this stage is regulated by the CPC of Ukraine and the Law of Ukraine “About Operative Search Activity”. Pre-trial investigation bodies are the main subjects at a stage of pre-judicial investigation. According to article 102 of the CPC they are: investigators of the public prosecutor’s office, investigators of the internal affairs bodies, investigators of tax militia and investigators of the security service (SSU). At this stage an inquiry body also has certain functions; it takes operative search measures and can conduct separate investigative actions by order of the investigator. At this stage an active role is played also by lawyers and court experts. A public prosecutor

plays a special and universal role during verification of information about a crime and pretrial investigation. According to article 25 of the CPC, a public prosecutor carries out supervision over observance of laws by the bodies, which conduct operative search activity, inquiry and pretrial investigation. The supervision activity consists in monitoring the validity of institution of a criminal case, approval of the basic resolutions, which are taken by an investigator or an inquiry body (concerning selection of a preventive measure in the form of a taking into custody, carrying out of searches, the indictment and so forth), the public prosecutor also has the right to countermand the resolutions of an investigator, take part in conduction of separate investigative actions, accept cases to his own proceeding, give to investigators and an inquiry body instructions concerning investigation of a criminal case. A judge plays his own role at the stage of pre-trial investigation by means of execution of judicial control over an investigation, which consists in passing of resolutions about conduction of investigative actions, which encroach upon or restrict human rights: conduction of reviews and searches in a person's lodging, selection of a preventive measure in the form of taking into custody, seizure of post-and-telegraph correspondence and taking of information from the communication channels, seizure of documents, which contain banking and commercial secrets and so forth.

The stage of judicial examination of a case consists in judicial examination and investigation of a crime; it begins from the moment of reception of a criminal case by a judge and ends with gaining of validity in law by the verdict in a case. The activity of judges and authorized state bodies at this stage is regulated by the CPC of Ukraine. The main subject at this stage is a judge and a prosecutor, to the functions of which belongs support of accusation in a court.

At each of the indicated stages, which differ by tasks, subjects and volumes of the powers of those subjects, exist corruption risks, which are inherent to each stage.

### **3.2.2 Character and Spreading of Corruption Practices in Criminal Proceedings of Ukraine**

Polls and in-depth interviews show, that almost half of the polled experts (the totality of experts, which included not only specialists in criminal proceedings) acknowledges spreading of corruption practices in criminal proceedings. It is a rather high index, since the experts acknowledge only the economic process to be more corrupt. 49.0 % of the polled experts point at spreading of such practices at the pre-trial stage, to which the stage of verification of information about a crime was included, somewhat less – 47.3 % – at the trial stage.

The poll of experts in the sphere of the criminal process (it is important to indicate, that at choosing of experts the main criterion was practical experience) allows to concretize the evaluations, presented above, of the main stages of criminal proceedings. These results are shown on the **Diagram 28**.

Diagram 28.

**Experts' evaluations of the level of corruptogenic conditions at the main stages of criminal proceedings***(% of those, who acknowledge existence of more favourable conditions for corruption)*

Besides, in the in-depth interviews detailing data were received about, in what types of proceedings (by the object) corruption agreements are met most often. The polled experts point at the following objects:

- *“economic crimes” are named most often, experts draw special attention to “tax crimes” (article 212 of the CPC), appropriation, embezzlement of property or taking possession of it by way of abuse of one’s service powers (article 191 of the CC of Ukraine);*
- *“bribery” is separated, with an accent on the pre-trial stage;*
- *“crimes in office” (articles 364, 365, 366 of the CC of Ukraine);*
- *“road-transport accidents”;*
- *“cases, connected with narcotics” (articles 307-309 of the CC of Ukraine);*
- *“crimes against property” (robbery, theft, banditism);*
- *somewhat more seldom experts indicate murders (article 115), infliction of bodily injuries (especially article 122 of the CC of Ukraine).*

The main objects of corruption exchange or corruption agreements in criminal proceedings are the following, depending on a stage of a process and the position of a person under investigation, a suspect or an accused person:

- avoidance of institution of a criminal case against a person;
- avoidance of bringing of a certain person to criminal responsibility in cases, when a criminal case has been instituted by the fact of commitment of a crime;
- avoidance of bringing to criminal responsibility for a grave crime or change of criminal-juridical qualification from a more grave crime to a less grave one, and also institution of a criminal case for a less grave crime;
- avoidance of application to a suspect or an accused person of a preventive measure in the form of taking into custody or replacement of a preventive measure in the form of taking into custody with another preventive measure, not connected with staying in places of pre-trial imprisonment;

- avoidance of application of measures, directed at provision of a civil claim and possible confiscation of property (imposition of arrest on property, bank accounts) or removal of arrest from property, bank accounts and so on;
- termination of investigation (closing of a criminal case) on the basis of vindicating or non-vindicating circumstances;
- reception of a verdict of acquittal of a court;
- reception of punishment, not connected with deprivation of freedom and/or confiscation of property;
- reception of punishment with a delay of the verdict;
- reception of the maximum possible minimal punishment or term of deprivation of freedom.

Subjects of corruption practices in criminal proceedings are inquiry bodies (the head of a respective body of militia, tax militia, the Security service and other), officers of an inquiry body (operative officers, senior operative officers of criminal search departments, departments of fight against illegal circulation of narcotics, fight against economic crimes and other), of pre-trial investigation bodies (investigators), court experts (specialists), public prosecutors and judges. They can act both independently and in conspiracy with other subjects of criminal proceedings. In certain cases an attorney or legal representatives of a suspect or an accused person act as intermediaries in corruption practices.

Formation of corruption relations in criminal proceedings happens on the basis of unification of *formal (processual) and informal relations*. In **Diagram 29** are presented experts' evaluations of inclusion into corruption relations of the main participants of criminal proceedings, who represent judicial and law-enforcement bodies.

*Diagram 29.*

**Inclusion of the main processual subjects of criminal proceedings into corruption agreements**

*(% of those, who consider, that such subjects are often included into such practices)*

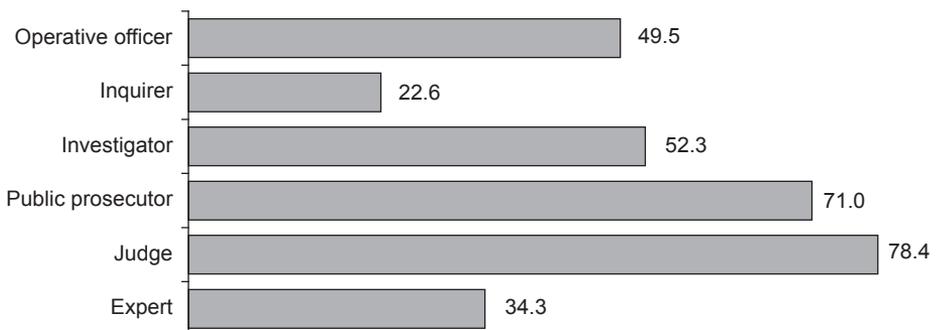
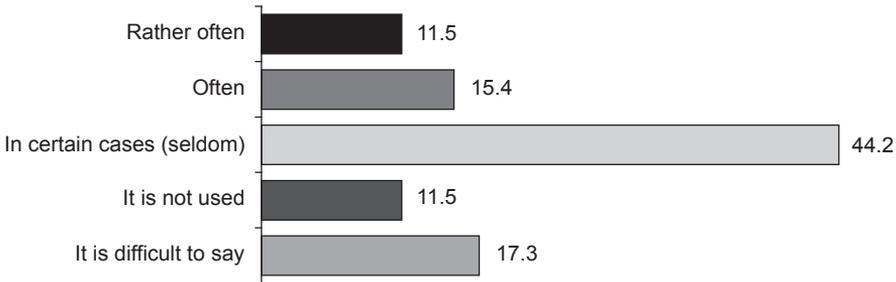


Diagram 30.

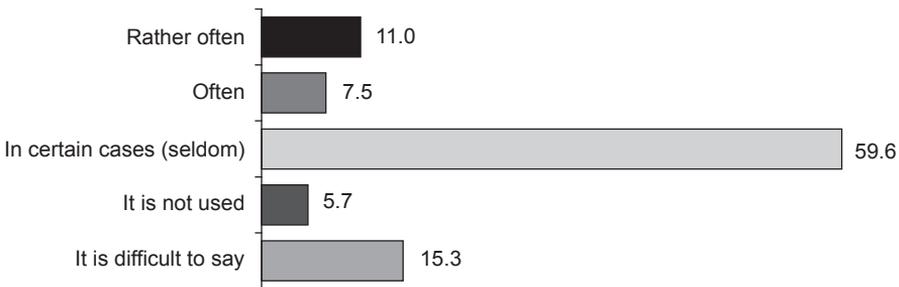
**Frequency of use contacts for corruption purpose in criminal process:  
expert assessments**

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**An inquirer (operative officer) – an investigator  
is used:**



**An investigator – an expert  
is used:**



**An investigator – a public prosecutor  
is used:**

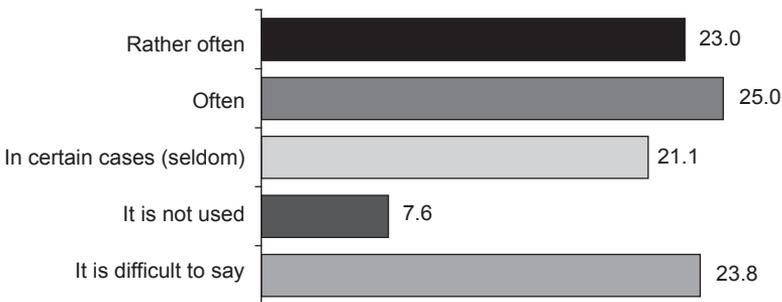
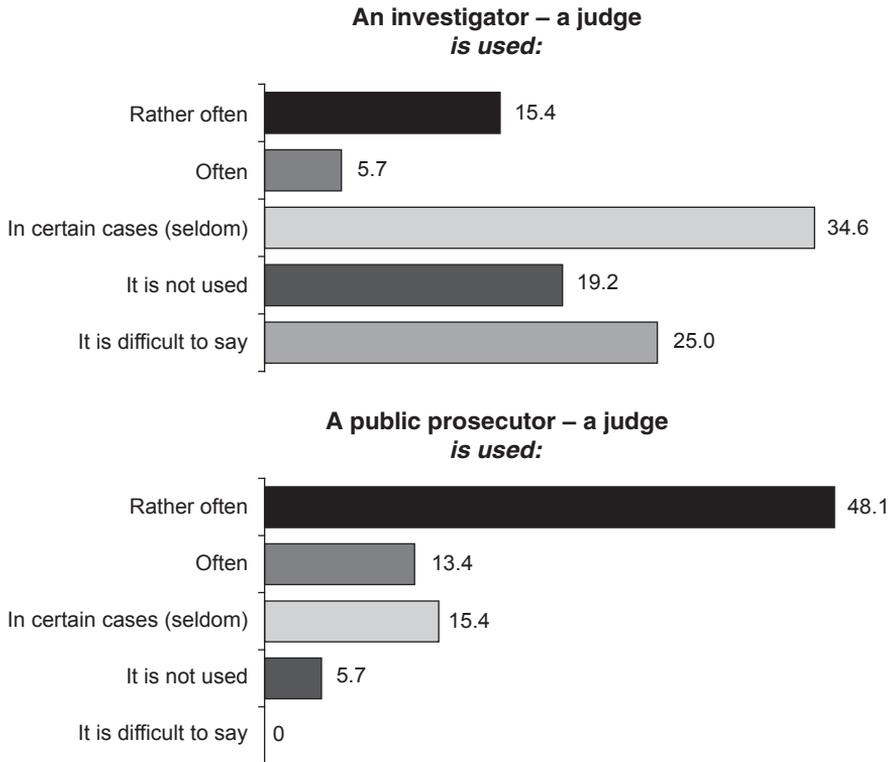


Diagram 30 (continuation).



As one can see from the above given diagrams, in the opinion of experts, among the subjects of criminal proceedings most often part in corruption relations is taken by judges (78.4 %), prosecutors (71 %), investigators (52.3 %), operative officers (49.5 %). The most widely spread informal alliances, which lead to appearance and existence of corruption practices in criminal proceedings, are informal relations between judges and public prosecutors. Such alliances are used in the opinion of 61.5 % of the experts (“very often – ” 48.1 %, “often” – 13.4 %). Also rather widely spread are informal relations between investigators (probably, in most cases the heads of investigation departments) and public prosecutors. 48 % of the respondents consider such an alliance spread (“very often” – 23 %, “often” – 25 %).

It is worth to pay attention in these data to the fact, that the experts indicate a rather high level of spreading of corruption practices with participation of a public prosecutor, who has a specific status in criminal proceedings, since he is given a significant volume of control powers. These powers, in particular, allow to counteract actively corruption manifestations in other law-enforcement bodies. However, corruption relations too

can be formed on the basis of such powers. The respondents drew attention during the polls exactly to this. The majority of experts (70.6 %) agree with the statement, that “a public prosecutor, compared to the other processual subjects (investigator, inquirer and other), has more favourable conditions for corruption abuses”. During the in-depth interviews in some cases attention was drawn to the fact, that *“the possibilities of a public prosecutor for arrangement of corruption agreements are bigger, than of a judge”*. It is rather important, that the experts draw attention to the *“internal corruption”* in the procedures of criminal proceedings and in the respective bodies. A significant part of the experts (49.0 %) agree with the statement, that “public prosecutors receive corruption remunerations for signing of the statistical reporting forms (in particular, form № 4, the statistical ticket for a crime, for commitment of which an accusation is arraigned to a person)”, which are the main index in the activity of investigation departments. These data cannot be *a proof of the scale* of this phenomenon, however they are an indisputable *proof of the fact of existence* of such a type of relations.

The beneficiaries of such practices are persons, in respect of whom a decision about institution of a criminal case is taken, suspects, accused persons, their relatives or close people. Inclusion of witnesses and sufferers into corruption relations was revealed in the research too. It is especially characteristic for the pre-trial stage, when these relations are rather complex.

More than one fourth of the polled experts (26.9 %) acknowledge existence of bribery by witnesses of public prosecutors and investigators with the aim of “removal from a case”. A witness is a quite sensitive procedural figure. Rather often, as the in-depth interviews and focus groups testify, engagement of certain persons into a case in the capacity of witnesses happens with the goal of pressure onto them (in particular, for reception of corruption remunerations from them too).

About one third of the experts (31.0%) acknowledges existence of facts of bribery of prosecutors and investigators by the sufferers. Most often it happens in the cases, where the “property interest” is present. Sufferers decide to pay a bribe with the aim of getting guarantees of receiving back or keeping safe of their property, compensation of the damage, caused by a crime, etc.

*A criminal case has been instituted in Kyiv against the head of one of the departments of the Organized Crime Fighting Administration (OCFA) of the MA of MIA of Ukraine in Kyiv region by the fact of extortion and reception of a bribe in the sum of 6 thousand US dollars from citizen A. for assistance in acceptance and positive decision in respect of his application about a crime, committed by citizen K<sup>5</sup>.*

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<sup>5</sup> A criminal case has been instituted against the head of one of the departments of FOCA of the MA of the MIA of Ukraine in Kyiv region by a fact of extortion and reception of a bribe // Information by the press–service of the General Prosecutor’s Office of Ukraine of 29.12.2008 [http://www.gpu.gov.ua/ua/news.html?\\_m=publications&t=rec&\\_c=view&id=21685](http://www.gpu.gov.ua/ua/news.html?_m=publications&t=rec&_c=view&id=21685)

The majority of the interviewed experts (67.3%) agree with existence of the practice, when witnesses and victims are bribed by the participants of the process (suspects and accused persons).

Money, valuable gifts, employment of relative on profitable conditions, payment of services for an investigator and his relatives: travel tours, mobile communication accounts and car repairs, serve as means of corruption payments. It is characteristic, that in many cases, in the modern conditions of material-technical provision of the investigation departments, investigators have to enter corruption relations with other participants of criminal proceedings for provision of fulfillment of their functional duties. In such cases the objects of corruption payments are computer equipment, paper, expandable materials for printers, copying machines, use of the personal automobiles of other persons, payment for fuel, which are used not only in the interests of an investigator, but for rides to the places of examination of accidents, conduction of investigation actions and other.

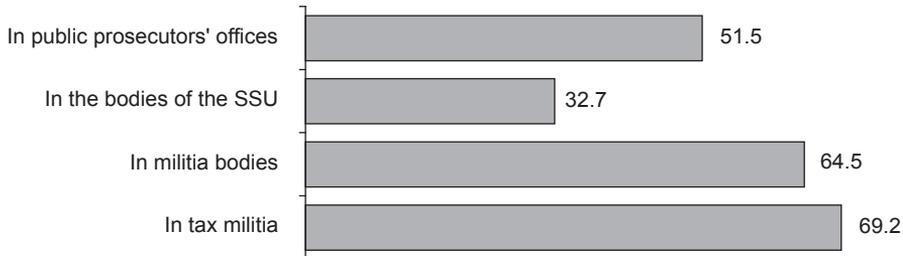
In the following chapters corruption risks and corruption practices, inherent in each of the above presented stages of criminal proceedings.

### **3.2.3 Corruption Risks and Practices at the Stage of Verification of Information about a Crime**

As it has been remarked above, verification of information about a crime includes the activity of the authorized law-enforcement bodies on verification of information about a crime, which these authorities get from any source, according to article 94 of the CPC of Ukraine; and it ends with making of a decision in relation to initiation of a criminal case, refusal to initiate a criminal case or to process a case under investigative jurisdiction.

According to the data, illustrated in **Diagram 28**, corruption practices more often appear at the stage of pre-investigation verification of information about a crime (62.5 %). Experts also point out the fact, that the corruption level in different law-enforcement bodies differs at different stages of criminal proceedings, depending on a role, the capacity of powers of a law-enforcement body and other factors of both juridical and organizational character.

In particular, 69.2 % of respondents consider, that corruption practices most often occur at the stage of verification of information about a crime in tax militia bodies; a bit less – 64.5 % of experts believe, that corruption practices at this stage are most widely spread in militia; 51.5 % of the experts consider, that corruption practices during verification of information about a crime are most widely spread in public prosecutors' bodies and 32.7 % – consider, that such practices are most widely spread in the Security Service of Ukraine (see **Diagram 31**).

*Diagram 31.***Spreading of corruption practices (pre-trial stage of criminal proceedings): experts' evaluations***(% of those, who think, that such practices are widely spread)*

During the in-depth interviews some explanations for such a situation were received. In particular, the experts point out that:

- *“it is “a grey zone” of the law-enforcement activities, which is practically functioning without any formal control”;*
- *“corruption is based on discretionary powers of law-enforcement officers, which is objectively necessary and unavoidable”;*
- *“persons, who become “victims” of corruption at this stage are less protected, their possibility to involve a defence attorney (lawyer) is considerably limited and their own level of legal knowledge in the majority of cases is not enough for sufficient counteraction to corruption abuses”.*

Most often the experts pointed at “imperfection of Article 97 of the CC of Ukraine, which is a key article, which regulates the procedure of pre-investigation verification of information about a crime, among the conditions, which favour appearance and spreading of corruption practices at the stage of verification of information about a crime. Besides that the respondents draw attention to the following: “deficiencies of the legislation create conditions for insufficient and ineffective control over institution of criminal cases from the side of the public prosecutors’ offices”, “Article 6 of the CPC requires considerable changes, because its imperfection is used for corruption abuses”, “in some instances imperfection of Article 8 of the CPC leads to corruption agreements”.

These results of empiric research require additional explanation. According to the CC of Ukraine, a criminal case can be instituted at presence of a cause and grounds for institution of a criminal case. If the comprehensive list of grounds for a criminal case institution is explicitly defined in Part 1 of Article 94 of the CC of Ukraine: (1) applications of enterprises, agencies, organisations, officials, representatives of the authorities, the public or separate citizens; (2) reports from representatives of the authorities, the public or separate citizens who have detained the suspected person at locus delicti or guilty; (3) surrender; (4) report, published in the press; (5) direct revealing

by a inquiry agency, case investigators, a prosecutor or a court of the signs of a crime, then a ground for a criminal case institution, defined in Part 2 of the article 94 is presented rather vaguely, as “sufficient data, which indicate presence of signs of a crime”. Such a broad law formulation creates conditions for abuses from the persons authorised for carrying out of verification of information about a crime and for making a decision about institution of a criminal case, who have wide enough discretionary powers concerning an estimation of completeness and quality of primary material.

The activities of law-enforcement bodies at the stage of verification of information about a crime is not properly regulated. The CPC of Ukraine only specifies three types of measures, which can be used by an inquiry body with the purpose of verification of information about a crime and which are regulated by article 97 of the CPC of Ukraine: gathering of explanations from separate citizens or public officials, obtaining of necessary documents on demand (P. 4, st. 97 CPC) and conduction of operative and search measures (P. 5 st. 97 CPC). Such actions are only named in the CPC, rather than defined and regulated by the latter. This activity is regulated by the Law of Ukraine “About investigation and search activities.”, the Law of Ukraine “About Police”, About “the Security Service of Ukraine”, “About State Tax Service of Ukraine”, “About State Boundary Service of Ukraine”, as well as department orders of the proper inquest agencies. However, orders of administrations and ministries, which are directed at execution of these laws, often contradict the provisions of the current legislation, and laws themselves determine the rights of respective agencies in a general view.

The experts in their answers also point at the deficiencies of article 6 and 8 CPC, which create conditions for occurrence and development of corruption practices. Article 6 CPC provides a list of circumstances, which exclude proceedings in a criminal case. In particular, among the mentioned circumstances are the following: absence of an event of a crime and absence of crime components (*corpus delicti*) in operation. These two concepts are not accurately defined in the Law and can be interpreted in different ways by different subjects of criminal proceedings. Besides, the adjudication of the *corpus delicti* in operation can be subjective enough, decision-making concerning either presence or absence of *corpus delicti* has especially a discretionary and estimating character from the side of an inquiry agency (more rare – from the side of an investigator) and the public prosecutor. Thus, the ambiguity of article 6 CPC creates certain conditions for abuse from the chief of the inquiry agency, the investigator and the prosecutor.

Article 8 of CC of Ukraine regulates the procedure of release from the criminal responsibility in connection with reconciliation of an accused, a defendant with a sufferer. The question of release from the criminal responsibility in connection with reconciliation is considered by court according to the prosecutor’s decision or the investigator’s decision under the prosecutor’s consent. The implementation of this norm of the CC of Ukraine extends only on persons, who have committed a crime for the first time, for which punishment in the form of imprisonment for the term of no more than two years is provided, or another, softer punishment or persons who have committed for the first time a careless crime for which punishment in the form of imprisonment for term of

no more than five years is provided, in case they have reconciled with the victim, both have repaid caused damages and have discharged the done harm. On the one hand, the provisions of this article contribute to humanisation of criminal implementation and allow to prevent a superfluous criminalization of society. On the other hand, they create certain possibilities for corruption practices. In particular, as long as the given norm gives lawful possibilities for achievement of the major purpose for the accused or justifiable persons, which is release of criminal liability, its implementation can be success for a corruptive arrangement. Besides, implementation of the given article is not obligatory, and taking a corresponding decision concerns an interior belief of the prosecutor or the investigator, i.e. it has a subjective character, which, in case of legal ignorance of the majority of the accused and justifiable persons, allows to create conditions for corruptive payments. The provision also contributes to bribes of sufferers or leads to the exercise of pressure on them, as well as to realisation of corruptive payments by the investigator with the purpose of change of criminal-juridical qualification of action from a more aggravating crime to a less aggravating one for creating conditions for implementation of the given article of the CC of Ukraine. Besides, as one can notice from the provisions of this norm, the question concerning application of the given article of the CC of Ukraine is taken, as a rule, by a prosecutor and a judge, whose informal alliance for carrying out corruptive actions between each other is considered the most widespread by experts.

Another condition, which carries the stage of verification of information about a crime to the “grey area” of a criminal proceeding and favours the appearance of corruption practices, is a necessity to conduct preliminary expert research of objects, which presence at a suspected person serves as the basis for institution of a criminal case and impossibility of setting a legal expertise at this stage. For institution of a criminal case on the illegal traffic of drugs, carrying and storage of arms, counterfeiting of documents and some other crimes, it is necessary to conduct research of the proper objects, which could confirm whether that matter is a drug, the things withdrawn from a suspect is arms, and the documents bear the signs of counterfeit. It concerns also debatable situations about the establishment of reasons of death of a person, when obvious signs of violent death and determination of bodily injury severity level are absent. Without such conclusion of a specialist, a criminal case can not be instituted. Conduction of such researches is not regulated by acting legislation and in such cases, unlike conducting of legal expertise, a specialist, who conducts preliminary research, does not bear criminal responsibility for causing deliberately wrong conclusion. That is why a specialist for a corruption payment can issue such a conclusion, which will not provide the grounds for institution of a criminal case with a minimum risk for himself.

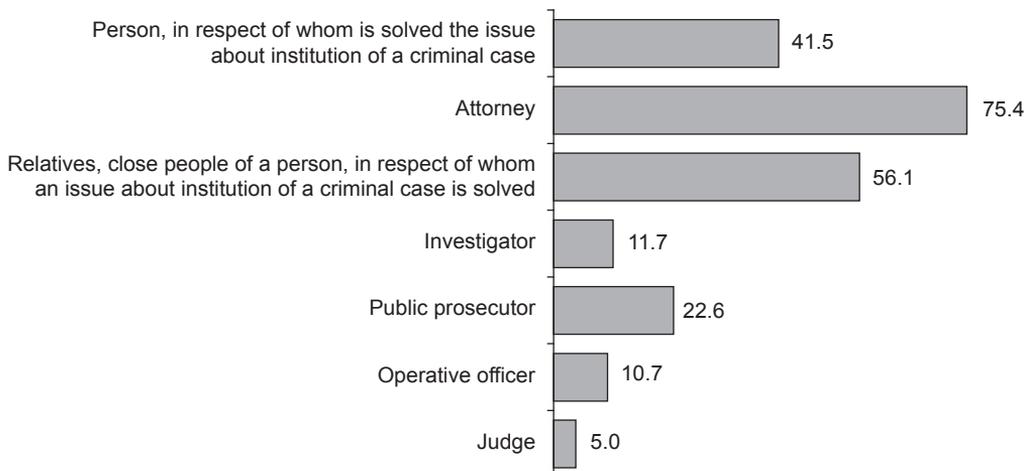
Characteristic of this stage of criminal proceedings is also the fact, that at this stage the rights of a person, in relation to which verification is carried out in connection with suspicion in commitment of crime, are considerably limited. If this person is not detained, which happens in the overwhelming amount of cases of verification of information on economic crimes, before this person’s detention or selection a preventive measure towards this person, such person legally has no right for an attorney, and in some situations does

not even know that he is within the sight of law enforcement bodies. At the same time in relation to this person the operative-searching measures, questioning of citizens and demanding of documents can be conducted. As long as at this stage such person does not have status of a suspect, a criminal-procedural law does not provide granting to such a person of the rights, which a suspect has – to know what he is suspected of, to have a defender and appointment with him prior to the first interrogation. Moreover, the CPC of Ukraine does not contain in general such a concept as a person suspected of commitment of a crime. There is only a suspect, who is considered a person detained on suspicion of commitment a crime, or towards whom a preventive measure was selected.

At the same time, when it becomes known to a person, that verification of information about a crime is conducted towards it, the person addresses an attorney for help, in spite of absence of formal grounds for this. However, as the results of empiric research show, attorneys are addressed not so much for legal help, as for help to solve the issue of how to avoid bringing to criminal responsibility by means of corruption agreements. By the results of polls of experts, in 75.4 % of cases the negotiations about achieving the corruption agreement at the stage of verification of information about a crime are conducted exactly by an attorney. Based on experience of 41.5 % of the polees the initiators of corruption agreements are the persons under verification, and by the data of 56.1 % of the pollees – the relatives of such persons. Insignificant quantity of the polees (compared to the shown data) point at the initiative on the part of the representatives of law-enforcement bodies: investigators – 11.7 %; public prosecutor – 22.6 %, operative officer (inquiry officer) – 10.7 % and judge – 5 % (see **Diagram 32**).

*Diagram 32.*

**Persons, who conduct the main negotiations for achieving corruption agreements at the stage of pre-trial verification: experts' evaluations**



The polled experts repeatedly pointed at absence of the proper control over the activity of body of inquiry, both on the part of direct leaders and legal control on the part of public prosecutor's office, which creates certain conditions for abuses on the part of officers of body of inquiry. In particular, this enables the conclusion of corruption agreements and groundless refusal to institute a criminal case or to institute a criminal case without any legal bases. Abuses on the part of the officers of body of inquiry can consist both in putting illegal pressure upon a suspect, groundless withdrawn of documents and in counterfeiting the materials of operative-searching activity, in particular, by making up reports about reception of information from non-existing informants or not documenting the fact of commitment of crime as a result of a corruption agreement. Later, on the basis of such illegally received or faked documents a criminal case can be instituted or a decision is taken about a refusal to institute a criminal case for certain corruption payment.

During the interviews the experts paid attention to existence of such specific phenomenon, as the "ordered criminal institution". The situations are meant, when certain processual actions, in particular, institution of a criminal case in relation to a particular person, are executed exceptionally for the purpose of reception of corruption remuneration (in part of the cases – from the "victims" of such actions, in other cases – from third persons, who "order" such actions for the purpose of putting pressure upon competitors and so on).

### **Kinds of corruption practices.**

The named gaps in legislation, imperfection of its implementation and drawbacks in activity of law-enforcement bodies create terms for appearance, existence and spreading of corruption practices, which are characteristic of the stage of verifications of information about a crime. The objects of corruption exchange, which are laid in the basis of corruption practices at this stage of criminal proceedings, are: (1) avoidance of institution of a criminal case about a person; (2) avoidance of bringing to criminal responsibility of a particular person in the situations, when a criminal case was instituted based on the fact of commitment of crime; (3) avoidance of bringing to criminal responsibility for a grave or especially grave crime with substitution of criminal-juridical qualification for less grave crime and (4) putting pressure upon certain persons.

Based on the above-mentioned analysis and questioning and interviewing of experts, it is possible to mark out two basic corruption practices at this stage of criminal proceedings:

1. Solution of issue about avoidance of bringing to criminal responsibility of a particular person;
2. Solution of issue about illegal institution of a criminal case in relation to a certain person for the purpose of putting pressure upon a particular person or on a certain business.

**Corruption practice.** Solution of issue about avoidance of bringing to criminal responsibility of a particular person.

In accordance with article 4 of the CPC a court, a public prosecutor, an investigator and an inquiry body are obliged within their competence to institute a criminal case in every situation of revealing of signs of crime, take all statutory measures for establishment of the crime event, persons, guilty of commitment of crime, and for their punishment. Thus, a decision about institution of a criminal case or refusal to institute a criminal case is taken by a body of inquiry, an investigator, a public prosecutor or a judge. If a criminal case is instituted by body of inquiry, it is reported to public prosecutor. A judge can take a decision about institution of a criminal case about a concrete person only in a situation, when the signs of a crime were established during the judicial trial of any case (civil, administrative or criminal).

A person, who committed a crime can avoid bringing him to criminal responsibility at the stage of verification of information about a crime by two methods: (1) by not drawing to himself attention on the part of law-enforcement bodies and (2) by avoiding institution of a criminal case in relation to a person in case the law-enforcement bodies reveal their personal interest. If the first method depends exceptionally on the behaviour of such person and professionalism of law-enforcement officers, the second method depends on ability and opportunity to enter into corruption relations with the representative of law-enforcement body.

The decision about institution or refusal to institute a criminal case is taken on the basis of the collected primary material by the results of verification of information about a crime.

The essence of the given corruption practice is that an official person, who is authorized to conduct verification of information about a crime or take a decision about institution of a criminal case, by taking advantage of absence of proper control or his own discretionary authorities, creates conditions for taking a decision of refusal to institute a criminal case or makes such decision independently.

The subjects of the given corruption practice are an inquiry body (the chief of a corresponding body of militia), an investigator, a public prosecutor or a judge, who can operate both independently and by means of the officers of an inquiry body, comprising operative officers of a certain department of criminal militia, depending on the type of a crime, in commitment of which a person is suspected (department of fight against illegal narcotics traffic, department of criminal search, department of fight against economic crimes and so on), and also specialists, who are involved for preliminary investigation of objects relating to crime.

The beneficiaries of such practice are persons, about which a decision is taken to institute a criminal case, their relatives or close people. A person, about whom an issue is considered to institute a criminal case, tries by all means to stop verification, or in extreme situation to attain, that the result of verification is not institution of a criminal case, but, at least, application of article 6 of the CPC of Ukraine, that is termination of verification in connection with the presence of the basis, which excludes proceedings in a criminal case.

Types of corruption payments can take various forms: money (in most cases), valuables, the rights for real estate ownership, services, payment of credit in place of subject of corruption practice and so on.

Solution of an issue about avoidance of bringing to criminal responsibility can take the followings forms:

- creation of conditions for taking a decision to refuse institution of a criminal case;
- counterfeiting or destroying materials of pre-trial verification;
- taking a decision to refuse institution of a criminal case by abuse of official authorities.

Each of the above named forms will be considered individually.

Creation of conditions for taking a decision about refusal of institution of a criminal case takes place in several methods. General for all methods of this corruption practice is a subject – an officer of body of inquiry, who is entrusted to conduct verification of information about a crime. As a rule, they are district inspectors of militia and operative officers of departments of criminal search, departments of fight against the illegal drugs traffic, departments of Government service of fight against economic crimes and departments of tax militia. In such cases, an object of corruption agreement is refusal of subject of conduct of pre-trial verification to carry out such verification in general or termination of its subsequent conduct, which is accomplished on the basis of reception of corruption payment by the subject. The initiator of corruption relations in such situation, as a rule, is a subject authorized to conduct verification prior to such verification or a citizen, in case such verification about him has started. The most wide-spread are the following types of verifications in the field of the fight against economic and tax crimes.

The most banal way to create conditions for taking a decision about a refusal to institute a criminal case is intentional breaking of order of conducting a pre-trial verification. Intentional breaking of order of conducting a pre-trial verification consists, first of all, in a refusal to conduct pre-trial verification without commitment of any actions, directed at verification of information about a crime.

*For example, in Kharkiv region a criminal case was instituted on the basis of reception of a bribe by a captain of militia and out-of-staff officer of the department of government service of fight against economic crimes, who extorted from a director of one of the local enterprises 3 thousand US dollars for non-conduction of a verification of this enterprise<sup>6</sup>.*

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<sup>6</sup> The Public Prosecutor's office of Ukraine strengthens fight against corruption // Report of the Press-Service of the General Public Prosecutor's office of Ukraine of 31.03.2004 [http://www.gpu.gov.ua/ua/news.html?\\_m=publications&\\_t=rec&\\_c=view&id=65247](http://www.gpu.gov.ua/ua/news.html?_m=publications&_t=rec&_c=view&id=65247) (30.01.2009)

In such situations, which, as a rule, occur in the field of economics and taxation, there can be actually no legal and reasonable grounds for conducting of verification. A fact of conducting of verification itself is an instrument of pressure for extortion of a bribe. Another foundation for reception of a corruption payment can be a promise to terminate the conduction of a pre-trial verification.

*The public prosecutor's office of Kyiv instituted a criminal case against the first deputy chief of the main department of tax militia of the State Tax Administration of one of the capital districts for reception of a bribe in the amount of 37 thousand US dollars for termination of a pre-trial verification of an enterprise, working in the field of construction<sup>7</sup>.*

Termination of pre-trial verification, especially in situations, when verification is conducted about economic crimes, is very desired for persons, towards whom such verification is conducted, because this person can interfere with realization of legal economic activity and result in financial losses. That is why the entrepreneurs and the businessman take all possible measures to avoid such a verification or terminate it as quickly as possible, which is sometimes used by the corrupted law-enforcement officers. Another method of intentional breaking of the order of verification of information about a crime is non-registration of the results of the conducted verification.

*For example, the Public Prosecutor's office of Kirovograd region instituted a criminal case in relation to a district inspector of the Administration of the Ministry of Internal Affairs of Ukraine in the region, who extorted and received a bribe from the detained person's mother for not registering the materials about bringing her son to criminal responsibility<sup>8</sup>.*

Another method of creation of conditions for refusal of institution of a criminal case is the **intentional conduction of low-quality verification of information about a crime**. Due to the improper regulation of activity on conducting the verifications of information about a crime and absence of proper control over activity of the officers of body of inquiry, who conduct such verifications, it is possible to collect such primary material, which is deliberately not enough for institution of a criminal case. In such situations an officer of body of inquiry, who is authorized to conduct comprehensive and objective verification of information about a crime, for the proper payment from the party of beneficiary of corruption practice, conducts such verification superficially or formally.

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<sup>7</sup> A criminal case has been instituted against a tax officer for reception of a bribe // Report of the Press-Service of the Public Prosecutor's office of Kyiv of March 04, 2008 <http://www.prokuror.kiev.ua/ua/media/statements?start=110> (30.01.2009)

<sup>8</sup> The Public Prosecutor's office of Kirovograd region has instituted a criminal case against a district inspector of the Administration of the MIA of Ukraine // Report of the Press-Service of the General public prosecutor's office of Ukraine of 26.09.2008 <http://www.gpu.gov.ua/ua/search.html?sq=00xa6ap%20&src=&sort=1&pg=3>

As a result of such actions a person, who is authorized to take decision about institution of a criminal case attains material, which is not enough for taking reasonable decision about institution of a criminal case, due to a low-quality verification of information about a crime. Such actions are carried out by the highly skilled and experienced officers of body of inquiry, because, in the first place, it is very difficult to expose such facts, and secondly, even if such facts are established, proving the fact, that it was done intentionally is practically impossible. The maximum punishment expected for such officer of body of inquiry is a disciplinary penalty for unconscientious attitude towards the official duties. Possibility of application of such corruption practice can also be defined by the fact and to the degree of unofficial relations between an operative officer or a district inspector with the leader of body of inquiry (chief of municipal regional department of internal affairs), an investigator or a public prosecutor, who actually takes a judicial decision to institute a criminal case or to refuse its institution. The quality of verification of primary material on the part of the mentioned persons can be influenced also by other external factors – indices in a certain sphere of activity (for example, percent of solution of certain type of crime), taking of crime, which was subject to verification, to a category of first-priority on certain territory or in certain time range and so on. By the conditions of existence of informal relations, these factors can also influence the amount of a bribe.

Another way for creation of conditions for a refusal to institute a criminal case is the intentional conduction of low-quality preliminary research of the objects – potential material proofs or making up of preliminary untruthful note by a specialist. The essence of such actions consists in conducting of low-quality preliminary research of the objects for corruption payment or making up of preliminary untruthful note based on the results of research of the objects by a specialist, who was engaged for this purpose at the stage of verification of information about a crime, in such a way, that excludes possibility of institution of a criminal case. Such actions are possible during the investigation of individual types of crimes, towards which a criminal case about their investigation can be instituted only under condition of preliminary research of the objects, which related to the committed crime with the use of special knowledge. In particular, the question is about crimes, related to the illegal drugs traffic, where institution of a criminal case requires establishment, by means of special knowledge, an issue of attributing the found matter to the category of drugs; counterfeiting of documents, where it is necessary to establish the fact of making alterations to the document; illegal carrying and storage of arms, where it is necessary to establish that an object is exactly the arms, rather than domestic items; infliction of bodily harms, where it is necessary to define the level of their gravity and so on. As long as conducting of legal expertise prior to institution of a criminal case is formally impossible, in such cases a research of the objects is conducted by a specialist. A specialist for a certain corruption payment can make intentionally false note about the proper object and, thus, deprive body of inquiry of the grounds for institution of a criminal case. A specialist can act and receive corruption payments independently or in agreement with an officer of body of inquiry. It is worthy of note that such actions are latent enough and occur quite rarely in practice of law-enforcement bodies.

Counterfeiting or destruction of the materials of pre-investigation verification. Such action takes place in two situations: (1) pre-investigation verification is conducted based on a statement or report of citizens, representatives of institutions, enterprises and organizations, by it results the signs of a crime and a person, who committed crime, have been established; (2) the signs of crime and a person, who committed it were established during the conduct of operative-searching measures, that is the reason for institution of a criminal case is the direct exposure of signs of crime by the body of inquiry. In the first situation counterfeiting of materials of pre-investigation verification takes place, in the second situation – their elimination or not registration. The subjects of commitment of corruption actions under the given circumstances are an officer of body of inquiry, who conducted pre-investigation verification, and a chief of body of inquiry, who takes a decision about transfer of materials about institution of a criminal case or institution of a criminal case independently, far less often – the investigators, who independently conduct verification of information about a crime. In the shown situations verification of information about a crime or operative-searching measures were conducted with high quality and with establishment of persons who committed crime. The object of corruption agreement is a promise to solve an issue about not bringing to criminal responsibility by means of counterfeiting the materials of pre-investigation verification, that is transfer of materials to a chief of body of inquiry, an investigator or a public prosecutor not in full or with distorted facts pointing at certain persons.

*For example, in Poltava region a criminal case was instituted in relation to the district inspector of militia of one of the municipal departments of Central Administration of Ministry of Internal Affairs of Ukraine in the region, who received a bribe for not bringing to criminal responsibility of persons, engaged in the illegal fishing<sup>9</sup>.*

Counterfeiting can concern not only the subjects of verification, but also the actual data, which were verified, such as, for example, accounting treatment and economic activity.

*For example, in the Odessa Region a criminal case was instituted against an operative officer of the main department of tax militia based on the fact of reception of a bribe in the amount of 800 US dollars for a positive solution of the issue of verification and returning of an excisable commodity in the total amount of 8 thousand hryvnas, which he preliminary withdrew from a businessman<sup>10</sup>.*

The content and essence of materials of the pre-investigation verification can change also by influencing the sufferers on the part of a person, who conducts such verification or examines its materials.

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<sup>9</sup> Report of the Press-Service of the General Public Prosecutor's office of Ukraine dated 06.05.2009 [http://www.gp.gov.ua/ua/news.html?\\_m=publications&\\_c=view&\\_t=rec&id=25566](http://www.gp.gov.ua/ua/news.html?_m=publications&_c=view&_t=rec&id=25566)

<sup>10</sup> A tax collector was caught at the reception of a bribe // Report of the Press-Service of the General Public Prosecutor's office of Ukraine dated 31.03.2004 [http://www.gpu.gov.ua/ua/news.html?\\_m=publications&\\_t=rec&\\_c=view&id=65255](http://www.gpu.gov.ua/ua/news.html?_m=publications&_t=rec&_c=view&id=65255)

*For example, the senior investigator of the Public Prosecutor's office of Lviv region has plotted a plan of receiving the corruption payments for not bringing to criminal responsibility for rape. The essence of the plan consisted in persuasion of a victim to write the waiver of prosecution, guaranteeing, that she will receive a share of money, given as a bribe by a person suspected of commitment of a rape.*

*An indirect confirmation of such practice was a fact that during the year 1996, when this senior investigator worked in the given public prosecutor's office, in 10 cases of rape not a single accusation has been pronounced<sup>11</sup>.*

In the case of elimination or not making up of materials of operative-searching activity, generally, such materials are not registered, and the fact of commitment of crime is concealed.

*Thus, in Khmelnytsk region a criminal case was instituted in relation to two operative officers of one of the departments of Administration of Ministry of Internal Affairs of Ukraine in the region, who extorted a bribe in the amount of 11 thousand hryvnias from the leader of an enterprise for release from responsibility for application of unlicensed software<sup>12</sup>.*

*The Public Prosecutor's office of Kirovograd region a criminal case was instituted in relation to an operative officer of the department of fight against the illegal drugs traffic of Administration of Ministry of Internal Affairs of Ukraine in the region for extortion and reception of a bribe by this officer from a citizen for not registering the fact of illegal storage of drugs<sup>13</sup>.*

Such actions can take a systematic form, when an officer of law-enforcement bodies is interested in permanent reception of bribes from criminals and is able to hide illegal activity.

*For example, illegal activity of a public officer of the line post of militia at the railway station "Pologi" of the Prydniprovsk railway was terminated. This officer, for weekly corruption payments intentionally did not institute*

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<sup>11</sup> Z. Ilenko. Officers of a Public Prosecutor's office extorted money, but received several years of imprisonment. Postup, the Lvov daily newspaper, issue of May 11, 2000. [http://postup.brama.com/000511/82\\_2\\_6.html](http://postup.brama.com/000511/82_2_6.html)

<sup>12</sup> The Public Prosecutor's office of Khmelnytsk region instituted a criminal case in relation to two militia officers // Report of the Press-Service of the General Public Prosecutor's office of Ukraine dated 14.04.2009 [http://www.gp.gov.ua/ua/news.html?\\_m=publications&\\_t=rec&\\_c=view&id=24866](http://www.gp.gov.ua/ua/news.html?_m=publications&_t=rec&_c=view&id=24866)

<sup>13</sup> Report of the Press-Service of the General Public Prosecutor's office of Ukraine dated 09.12.2008 [http://www.gpu.gov.ua/ua/news.html?\\_m=publications&\\_t=rec&id=19268&fp=61](http://www.gpu.gov.ua/ua/news.html?_m=publications&_t=rec&id=19268&fp=61)

<sup>14</sup> A militia captain was sentenced for 5 years of imprisonment for swindling and abuse of power, three more militia officers were detained "red-handed" // Report of the Press-Centre of Security Service of Ukraine dated December 16, 2005 [http://www.sbu.gov.ua/sbu/control/uk/publish/article;jsessionid=FA8DF922016B3284B6B51FFEAC7926FB?art\\_id=47017&cat\\_id=46440](http://www.sbu.gov.ua/sbu/control/uk/publish/article;jsessionid=FA8DF922016B3284B6B51FFEAC7926FB?art_id=47017&cat_id=46440)

*criminal cases about the criminals, who carried out illegal operations with a scrap-metal at the railroad*<sup>14</sup>.

*The Public Prosecutor's office of Lviv region instituted a criminal case in relation to the operative officers of the department of fight against the human traffic of the Central Administration of Ministry of Internal Affairs of Ukraine in Lviv region. These officers extorted and received a bribe from local habitants, involved in prostituted, for not bringing of them to responsibility*<sup>15</sup>.

It is worthy of note, that this corruption practice can equally be resorted to by all the above named subjects and each of them can operate independently. That is an investigator or a public prosecutor may not know about the real reasons of conducting of low-quality verification, but operative officers can conduct it with low-quality for a certain corruption payment, counting on total formally founded decision to refuse institution of a criminal case in connection with absence of signs of crime in the act.

Taking a decision about the refusal to institute a criminal case by means of abuse of official authorities is the most wide-spread form of corruption practices at the stage of verification of information about a crime. The main difference of this practice from the previous one is that a subject of this practice is a person authorized by the CPC to take a decision to institute a criminal case or to refuse the institution of a criminal case – chief of body of inquiry, investigator, public prosecutor and judge. The essence of this corruption practice is such a behaviour of an authorized person, when this person in the presence of the cause and the grounds for institution of a criminal case takes a decision to refuse institution of a criminal case against a particular person for certain corruption payment.

As the criminal-processual law does not clearly define, what signs of a crime and in what volume must be established for reasonable institution of a criminal case, an authorized person, using his own discretionary authorities on this occasion, can formally acknowledge the list of primary material insufficient for institution of a criminal case. A public prosecutor by his power can also abolish the decision of an investigator about institution of a criminal case, giving reasons for insufficiency of the grounds for institution of a criminal case. Thus, his idea and arguments can be subjective. The analysis of investigation and judicial practice, which can be found in mass media, shows that overwhelming amount of criminal cases, instituted in relation to investigators for bribery, were connected exactly with taking a decision to refuse institution of a criminal case.

As a rule, such actions of an authorized person can be accompanied by counterfeiting or destruction of the documents, received by officers of an inquiry body during the

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<sup>15</sup> A criminal case was instituted in relation to operative officers of department of fight against trade in people of the Main Administration of the MIA of Ukraine in the Lviv Region // Report of the Press-Service of the General Public Prosecutor's office of Ukraine dated 23.03.2009 [http://www.gp.gov.ua/ua/news.html?\\_m=publications&\\_t=rec&\\_c=view&id=24113](http://www.gp.gov.ua/ua/news.html?_m=publications&_t=rec&_c=view&id=24113)

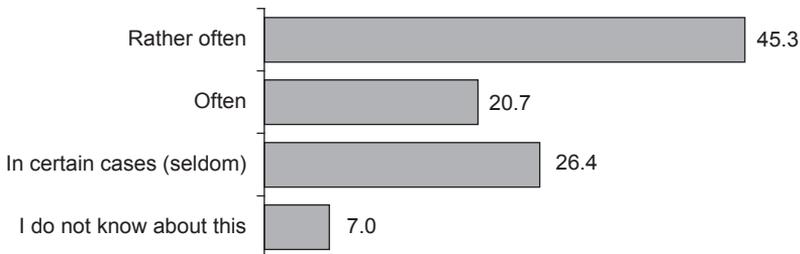
conduction of verification of information about a crime. An authorized person can also, using the official status towards the officers of body of inquiry, who conduct verification or friendly or other relations, to order, to ask or encourage the conduct of low-quality verification and not in full volume, to collect material, which would not be enough for institution of a criminal case.

All the above presented forms and methods of actions, carried out within the bounds of corruption practice of a 3.1. “Solution of issue about avoidance of bringing to criminal responsibility of a particular person”, which were described above, have the only goal – to influence taking a decision about institution of a criminal case and take one processual form – ruling about the refusal to institute a criminal case.

In opinion of the polled experts, most of corruption practices appear exactly at taking of a decision about institution of a criminal case. In particular, 66 % of experts consider corruption practices wide-spread at taking of exactly this judicial decision: 45.3 % of the polled experts acknowledge them “quite frequent”, and 20.7 % – “frequent” – (see **Diagram 33**).

*Diagram 33.*

**Spreading of corruption actions at taking a decision about institution of a criminal case: expert’s assessments**



The indirect confirmation of existence of corruption practices at taking of a decision about institution of a criminal case can also be statistical information of the General Public Prosecutor’s office of Ukraine.

*In particular, by the results of work of the Public Prosecutors’ offices of Ukraine in 2008, during this period in connection with execution of supervision over the activity of law-enforcement bodies, over 18 thousand of illegal decisions about refusal to institute criminal cases were cancelled by public prosecutors with their simultaneous institution<sup>16</sup>.*

<sup>16</sup> Information of the Press-Service of the General Public Prosecutor’s office of Ukraine dated 13.01.2009. Results of work of public prosecutor’s offices of Ukraine for 2008 // [http://www.gpu.gov.ua/ua/news.html?\\_m=publications&c=view&\\_t=rec&id=21872](http://www.gpu.gov.ua/ua/news.html?_m=publications&c=view&_t=rec&id=21872) (30.04.2009).

Certainly, these data do not testify, that in every case an institution of a criminal case was refused in connection with reception of certain corruption payments, especially taking into account a not very high professional level of investigators and inquiry officers, which, unfortunately, is talked about more frequently in professional circles. However, taking into account the data about spreading of corruption practices exactly at this stage of criminal proceedings, it is possible to assume, that a certain percent of decisions about the refusal to institute a criminal case had corruption nature.

**Corruption practice.** Solution of an issue about illegal institution of a criminal case in relation to a particular person for the purpose of putting a certain pressure upon this person or upon a certain business.

Institution of a criminal case provides a wide range of possibilities for putting pressure upon a person and on this person's entrepreneurial and economic activity with application of means of criminal-processual compulsion. In particular, within the bounds of criminal investigation it is possible to conduct such actions in respect of a physical and a juridical person: imposition of arrest on property, termination of operations with bank accounts, taking of a person into custody, limit possibilities of a person to move freely, in particular, to go abroad, application of other means of judicial compulsion, which creates conditions for paralyzing of economic activity and putting of psychological pressure upon a person.

The essence of this practice is that a person, who is authorized to institute a criminal case and obliged to examine information about a crime comprehensively and objectively, intentionally, for a corruption payment, takes a decision about institution of a criminal case about a person, who did not commit a crime, for the purpose of extortion from this person of a corruption payment or putting pressure upon this person on the part of third persons for ensuring their business interests, as a rule.

The specific character and difference of the given corruption practice from other practices, which take place in criminal proceedings, consist in the subjects, beneficiaries and the purpose. The subjects of such practice, as well as in other practices, are the persons, authorized to take a decision about institution of a criminal case (officers of body of inquiry, in particular, chiefs of body of inquiry and investigators). However, unlike other practices in this situation they operate with the opposite purpose – not to solve an issue about avoidance from bringing to criminal responsibility, but, on the contrary, solve an issue about institution of a criminal case or create a visible picture of possibility to take such a decision. The beneficiaries of such practices, unlike other practices, are not persons in relation to whom a decision is taken to institute a case, but the subjects of verification themselves or third persons, who are not generally the participants of process.

The given corruption practice includes two types of actions:

- institution of a criminal case or creation of picture of institution of a case by the authorized persons for the purpose of reception of a corruption payment;
- institution of a criminal case for a corruption payment “by order” of a third party, which is not a participant of a criminal process.

Institution of a criminal case or creation of picture of institution of a case by the authorized persons for the purpose of reception of a corruption payment. In this situation, persons authorized to institute a criminal case, use the authority, given to them by the CPC for putting pressure upon citizens, creation of provocations for the purpose of reception of a corruption or another payment, remuneration, benefits and so on.

*For example, a Public Prosecutor's office of Lviv region investigated a criminal case about a senior operative officer and two operative officers of the operative-searching department of Administration of Fight Against the Illegal Drugs Traffic of Central Administration of Ministry of Internal Affairs of Ukraine in Lviv region, who by a preliminary agreement among themselves, groundlessly, as though for illegal storage of drugs, detained a local habitant for the purpose of reception of a bribe in the amount of 15 000 US dollars for his liberation and non-bringing to criminal responsibility. Besides this, they extorted money from a relative of the detained person for non-conduction of verifications of the network of pharmacies, owned by his family<sup>17</sup>.*

In such situations the law-enforcement officers can resort also to a banal swindle, that is to promise the solution of issues, which are not in their authority or misinform citizens about a fact or reality of institution of a criminal case against them.

*An investigator was detained in Kharkiv, who received 5 thousand hryvnias for not bringing a person to criminal responsibility for traffic accident he committed. At the same time, an investigator knew exactly, that a criminal case has not been instituted yet, and he was not authorized to conduct verification and approve a decision in the order provided by Article 97 of the CPC<sup>18</sup>.*

Such examples were also given during the in-depth interviews. Entrepreneur K.: “Two years ago in relation to me and my partner a criminal case was instituted absolutely groundlessly and we spent two months in detention facility. Our attorney told us about the “conditions” of law-enforcement officers – 100 thousand dollars and the case is “closed”. After “bargaining” they agreed to 30 thousand. Such actions of law-enforcement officers were more wide-spread earlier, now they are encountered less often”.

***Institution of a criminal case is for corruption payment “by order” of the third party, which is not a participant of criminal process, but tries to use possibilities of***

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<sup>17</sup> Lviv law-enforcement officers “failed” at a bribery of 15 thousand US dollars of // News of the Internet-resource “Commentator” dated December 25, 2008 <http://testukr.obozrevatel.com/news/2008/12/25/205677.htm> (30.04.2009).

<sup>18</sup> A militia lieutenant received 5 thousand grn bribe // News of the Internet-resource “Commentator” dated September 10, 2008 <http://oglyadach.com/news/2008/9/10/200871.htm> (30.04.2009).

*state structures for achieving their own goals.* In most cases it concerns business, professional sphere of activity of entrepreneurs, who act for the purpose of receiving victory in competitive activity, putting pressure upon entrepreneurs and businessman, towards the directors, proprietors, chief accountants of business and economic entities. As a rule, such corruption practices are wide-spread during the investigation of taxation crimes and crimes in the field of economic activity.

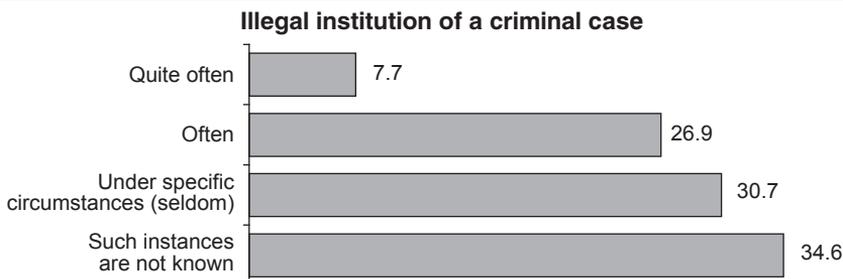
As a rule, in such cases false statement is done deliberately about a crime, committed by a competitor in an economic sphere. Using the unclear defined spheres of interests between administration on the fight against economic crimes and administration on the fight against the organized crime, these statements are addressed to both bodies, which leads to certain pressure on competitors, who, instead of conducting business, have to waste time communicating with law-enforcement bodies or have no possibility to carry out economic activity in connection with the withdrawal of economic documents, freezing of accounts and so on. In the given case law-enforcement bodies can be used both consciously and “blindfold”. These situations were repeatedly illustrated in the in-depth interviews of representatives of some social groups of population.

For example, an entrepreneur Ya.: *“I had problems with repaying a bank credit. The bank security manager used to be an officer of Security Service of Ukraine in the past. He, presumably, promised something his former colleagues, who started pressing me. At first, I was called to give explanations in a bank. Then a tax service conducted verification of my firm. They found some trifle and after that started to call me to the tax militia. And then they instituted a criminal case for avoidance of taxation. Most interesting is that during a talk “in a corridor” an investigator gave a hint, that “the credit needs repaying”.*

The empiric research and analysis of investigation-judicial practice is conducted confirm the fact of existence of such corruption practices and testify its certain spreading. Almost one third of experts point at the fact, that a criminal case is instituted on the basis of corruption motivation: it takes place “quite often” in opinion of 7.7 % of the pollees, “often” – 26.9 % (see **Diagram 34**).

*Diagram 34.*

**Spreading of situations, when individual processual actions are executed exceptionally for the purpose of reception of a corruption remuneration: experts’ evaluations**



A certain index of existence of such practices is the statistical information about the activity of the public prosecutor's offices, which cancelled in 2008 more than 4.4 thousand decisions about institution of criminal cases<sup>19</sup>. These facts testify that this amount of cases was instituted without proper or sufficient grounds, however, they do not testify, that all of them were instituted exactly as a result of corruption agreements. At the same time, taking into account presence of corruption practices in the public prosecutor's offices at this stage of the criminal process, it is possible to assume, that a certain quantity of resolutions about institution of criminal cases could be cancelled by the public prosecutors on the basis of corruption agreements.

The described corruption practices are not exhaustive at this stage of criminal proceedings. It is impossible to exclude existence of other practices, which have not become known or have not become wide-spread. At the same time, the given data can not testify about spreading of such practices. The fact, that one or another practice has occurred at a certain place, does not testify, that they happen all over Ukraine.

The next stage of criminal proceedings is a stage of prejudicial investigation.

### **3.2.4 Corruption Risks and Practices at the Stage of Prejudicial Investigation of a Crime**

**Prejudicial investigation** is activity of the bodies of inquiry and prejudicial investigation, regulated by the criminal-processual law, on establishment of circumstances of a crime (a publicly dangerous act), the persons participating in its accomplishment, and also activity on termination and prevention of commitment of crimes. This stage is a key phase of criminal proceedings, during which the basic evidential base is collected for establishment by a court of guiltiness or not guiltiness of a person, which is suspected in commitment of a crime.

The phases of a prejudicial investigation are: 1) reception of a case by an investigator or an inquiry body for its proceeding and conduction of urgent, and also other, actions of investigation for the purpose of exposure and preservation of the elements of a crime, establishment of the persons, who have committed it; 2) bringing of a person in the capacity of an accused one, bringing an accusation against the person, interrogation in essence of the accusation, brought against the person, application of criminal-processual compulsion measures to the person; 3) carrying out of investigation and other actions for collection and verification of the proofs, which confirm or deny the charge, establishment of circumstances, which burden or mitigate the criminal responsibility of the accused person; 4) accomplishment of processual actions, related to completion of investigation, with drawing up of a proper resulting processual document and an appropriate direction of a case. Thus, the stage of the prejudicial investigation begins from the moment of

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<sup>19</sup> The results of work of Public Prosecutors' offices of Ukraine for the year 2008 // Information of the press-service of the General public prosecutor's offices of Ukraine of 13.01.2009 [http://www.gpu.gov.ua/ua/news.html?\\_m=publications&\\_c=view&\\_t=rec&id=21872](http://www.gpu.gov.ua/ua/news.html?_m=publications&_c=view&_t=rec&id=21872) (30.04.2009)

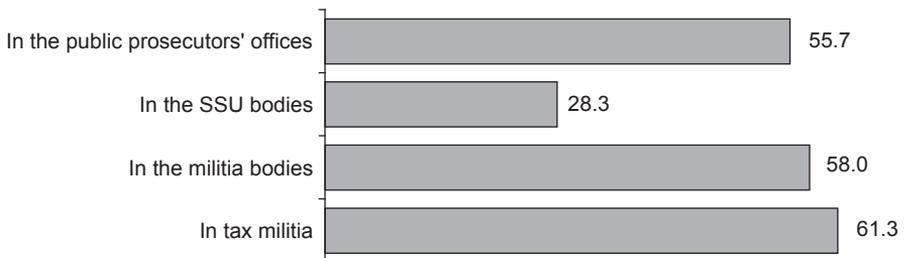
passing of a resolution about institution of a criminal case and ends with drawing up of an accusatory conclusion and passing of the criminal case to a public prosecutor for preparation of the state accusation in a court.

By the data of the empirical research, the results of which are shown above in a **Diagram 28**, the stage of the prejudicial investigation is the second after the stage of verification of information about a crime as for the spreading of corruption practices. In opinion of 38.4 % of the experts, corruption practices are the most wide-spread exactly at this stage of criminal proceedings. As in the situation with the stage of pre-investigation verification, the spreading of corruption practices at the stage of prejudicial investigation is different in different bodies, authorized to conduct it. By the data of polls of the experts at this stage of criminal proceedings most of corruption practices take place in the tax militia – 61.3 %, in militia (bodies of internal affairs) – 58 % in the public prosecutor's offices – 55.7 %. Prejudicial investigation in the bodies of the Security Service of Ukraine, in opinion of the experts, is considered the least corrupted, only 28.3 % of the experts believe, that corruption practices are wide-spread in these structures (see **Diagram 35**).

*Diagram 35.*

**Spreading of corruption practices (prejudicial stage of criminal proceedings): experts' evaluations**

*(% of those, who consider such practices "wide-spread")*



The basic objects of corruption agreements at this stage of criminal proceedings are the following:

- avoidance of bringing of a certain person to criminal responsibility in the cases, when a criminal case has been instituted by the fact of commitment of a crime;
- avoidance of bringing to criminal responsibility for a grave crime or change of criminal-legal qualification from a more grave crime to a less grave one, and also institution of a criminal case for a less grave crime;
- avoidance of application to a suspect or an accused person of a preventive measure in the form of taking into custody or replacement of a preventive measure in the form of taking into custody with another preventive measure, unconnected with staying in places of pre-trial imprisonment;

- avoidance of application of measures, directed at provision of a civil claim and possible confiscation of property (imposition of arrest on property, bank accounts) or removal of arrest from property, bank accounts and so on;
- termination of investigation (closing of a criminal case) on the basis of vindicating or non-vindicating circumstances.

Unlike the stage of verification of information about a crime, at the stage of prejudicial investigation a decision about institution of a criminal case has been taken and an investigator or a public prosecutor, who investigate a criminal case, have at their disposal all the arsenal of the criminal-processual measures, related to investigation of a criminal case. For the persons, in relation to whom an inquiry is being carried out, the primary purpose is to terminate the criminal pursuit, that is to close a criminal case or, when it is impossible, to take measures for reception of an accusation for a less grave crime, provided by the CC of Ukraine, as it will substantially influence the kind and the degree of punishment. Besides these global goals other goals can also stand before the suspects and accused persons, which can be named intermediate: they are to remain at large (choosing for a suspect or a defendant of a preventive measure, alternative to taking into custody) or saving his own property.

The subjects of corruption practices at this stage of criminal proceedings are an investigator, the chief of an investigation department, a public prosecutor, a judge, less often – the chief and the officers of an inquiry body and judicial experts. The activity of an investigator, the chief of an investigation subdivision and a public prosecutor at this stage is clearly limited and regulated by a criminal-processual law. An investigator has the right to conduct investigation actions, the exhaustive list of which is contained in the CPC, and to take decisions about criminal-juridical qualification of a suspect's and an accused person's actions, necessity and sequence of conduction of investigation actions, application of measures of judicial compulsion, stopping of prejudicial investigation and closing of the criminal case. Besides, an investigator draws up an accusatory conclusion and acquaints the accused person with the materials of the criminal case. An investigator carries out his activity under organizational and processual guidance of the chief of an investigation division and under processual control and supervision of a public prosecutor. An investigator can take certain procedural decisions only on the consent of a public prosecutor – choosing of a preventive measure in the form of taking into custody, conduction of searches, carrying out of a survey in a person's apartment, seizure of the post-and-telegraph correspondence and retrieval of information from communication channels, bringing of a person as an accused one and so on. The role of a judge at the stage of prejudicial investigation consists in passing resolutions about conduction of investigation actions, which limit the human rights: taking into custody, conduction of a survey of a habitation and a search inside it, imposition of arrest on correspondence and retrieval of information from the communication channels, and also carrying out of operative search measures, directed at intrusion into the private life of citizens. Prior to a trial, a resolution about institution of a criminal case can also be appealed.

The beneficiaries of corruption practices at this stage of criminal proceedings are a suspect, an accused person and his representatives – relatives, close people and so on. The

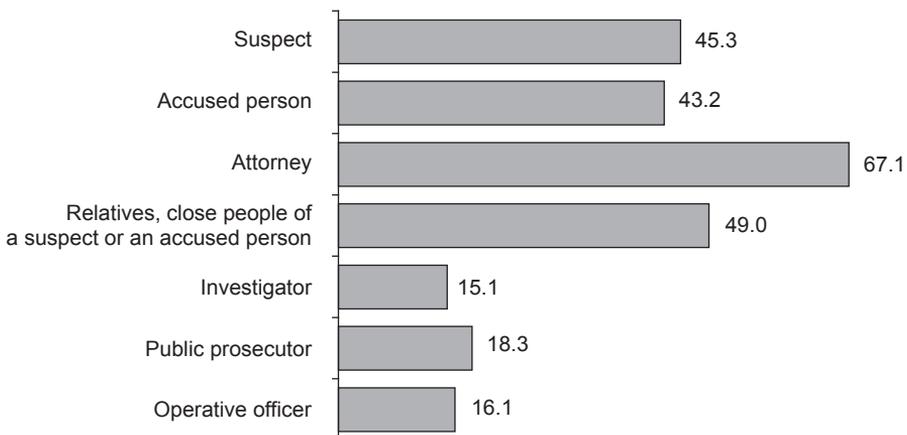
role of a mediator during realization of corruption agreements at this stage of criminal proceedings can be played by an attorney.

The subjects and the beneficiaries of corruption practices at the stage of prejudicial investigation have different degrees of personal interest in participation in corruption practices and reveal different degrees of activity on initiation and realization of corruption practices, and also they play different roles during their realization. The data, shown below, give a certain idea of the nature and the degrees of participation of different subjects of criminal proceedings and the persons, having some relation to it, in corruption practices.

**Diagram 36** shows the experts' evaluations of a situation of initiation of corruption agreements at the prejudicial stage (the experts pointed at the fact, who is the first to "pronounce" the possibility and the conditions of a corruption agreement).

*Diagram 36.*

**Initiator of corruption agreements in criminal proceedings: pre-trial stage**



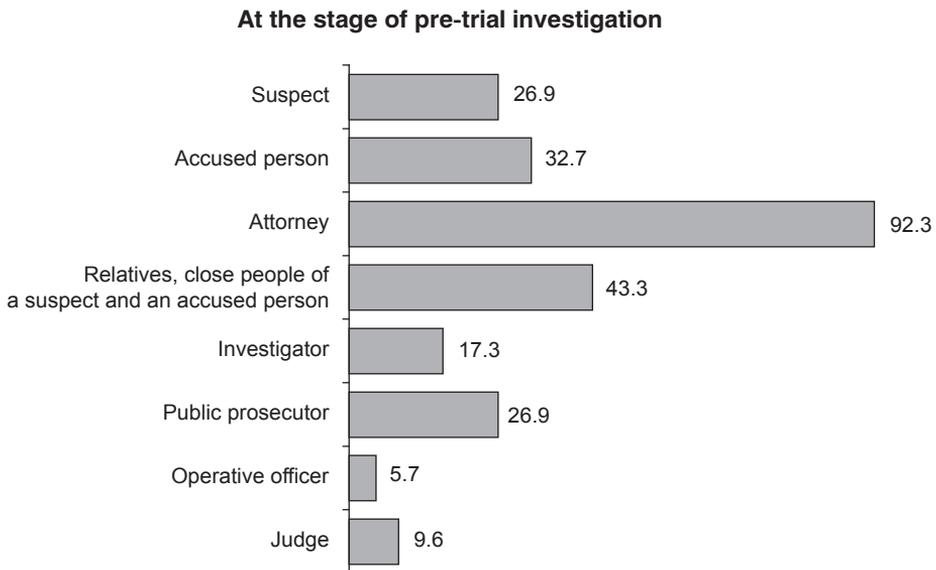
As the given data show, corruption relations are most actively initiated by the beneficiaries – a suspect (45.3 %) and an accused person (43.2 %). However, the majority of the experts pay attention to the fact, that they act mostly through mediators, instead of acting independently. 49 % of the polled experts point at the fact, that the initiators of the corruption practices are the relatives and close people of a suspect or an accused person, and 67.9 % of the pollees have reported, that, based on their experience, the initiator of corruption relations is an attorney. Approximately equal numbers of experts point at the sufficiently low level of activity in initiation of the corruption relations on the part of the subjects, authorized for conduction of the prejudicial investigation: 18.3 % – a public prosecutor; 16.1 % – an operative officer (an inquirer) and 15.1 % – an investigator.

The obtained results are worth comparing to the results of public opinion about the situations of contact of the population with the law-enforcement bodies. In the population evaluations, most often the initiators of corruption agreements are officers of the law-enforcement bodies (directly a person, who takes decisions or his colleague). In the evaluations of the experts, these categories of persons far more rarely become the initiators of such agreements, in contrast to attorneys relatives and close people of suspects and accused persons. Special attention in the evaluations of the experts is drawn by the activity of attorneys, which is a key element in corruption agreements, especially at the stage of prejudicial investigation. This difference requires additional analysis. However, by the results of analysis of the in-depth interviews and the focus-groups, it is possible to express supposition, that it is explained by the specific role and motives of attorneys, who quite often “ascribe” to the officers of the law-enforcement bodies their own corruption initiatives.

These results acquire certain specification in the evaluations of involvement of certain persons in direct negotiations about corruption agreements, and also of execution by these persons of functions of a mediator in transferring of corruption remunerations (see **Diagram 37** and **Diagram 38**).

*Diagram 37.*

**Persons, who conduct the main negotiations for achievement of a corruption agreement at the prejudicial stage of criminal proceedings: experts’ evaluations**

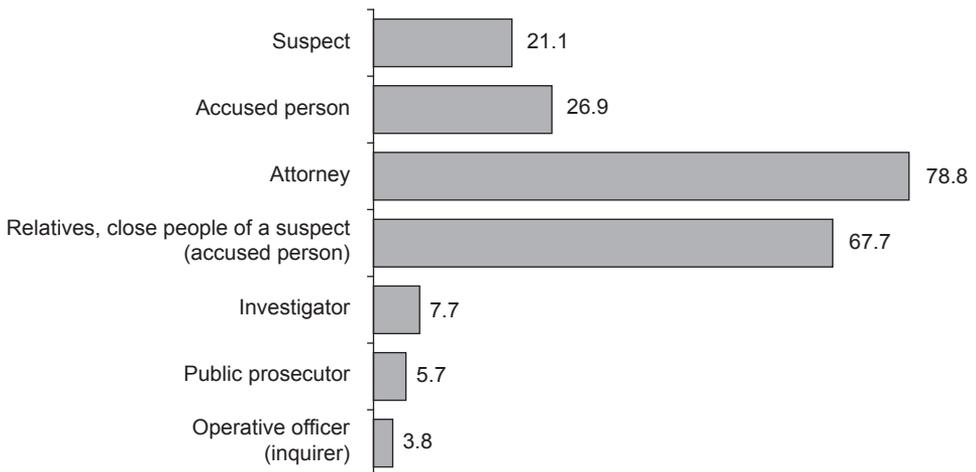


As one can see from the given diagram, the ratio of the distribution of activity of participation in the corruption practices remains. The role of the attorneys seems to be considerably bigger during the negotiations compared to the initiation of corruption practices – their active participation in conduction of main negotiations for achievement

of a corruption agreement at the stage of prejudicial investigation is indicated by 92.3 % of the experts. At the same time, the activity of a suspect (26.9 %), an accused person (32.7 %) and their relatives and close people (43.3 %) diminishes a little. Based on these data, it is possible to draw a conclusion, that a certain part of the suspects or accused persons and their relatives after the initiation of corruption relations trust the conduction of the main negotiations to an attorney. Rather low activity of operative officers (5.7 %) and judges (9.6 %) and increased, compared to the initiation of corruption agreements, activity of investigators (17.3 %) and public prosecutors (26.9 %) is explained by the fact, that in this case the negotiations with the colleagues, who are, actually, authorized to take decision, are meant here. Certainly, an investigator and a public prosecutor by their own authority can more effectively conduct such negotiations, compared to operative officers. Judges, instead of negotiations with investigators or public prosecutors, can solve such issues by their own power at the stage of judicial examination of a case and receive a corruption payment independently. However, sometimes, especially if a suspect or an accused person is in custody, time has a critical value and beneficiaries are interested in resolution of questions, essential for them as, quickly as possible.

*Diagram 38.*

**Subjects of criminal proceedings, who transfer a corruption remuneration to persons, who take decisions at the pre-trial stage: experts' evaluations**

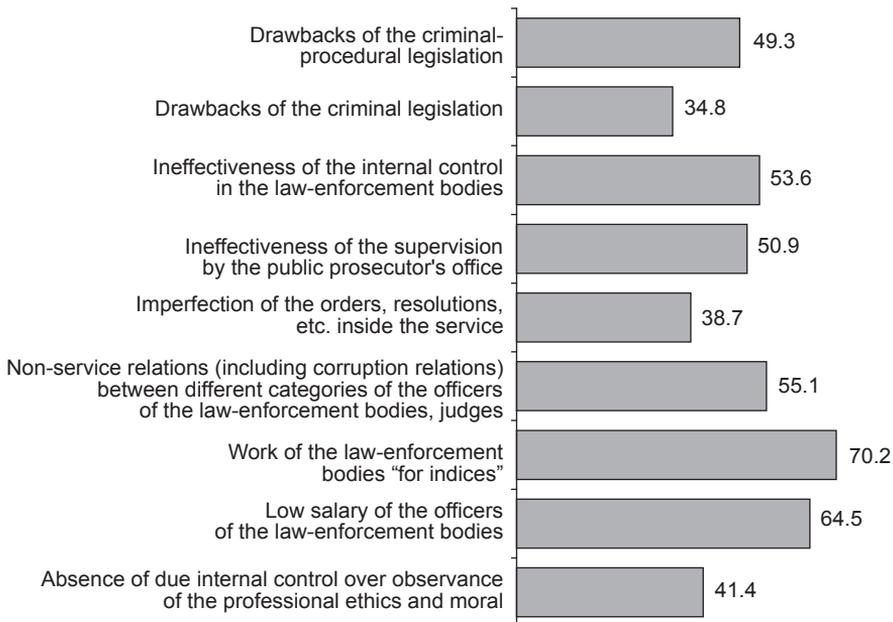


As on can see from **Diagram 38** the ratio of the participation in corruption practices between the subjects and the beneficiaries of such practices at the transfer of a corruption remuneration remain the same, taking into account the same reasons and conditions, as mentioned above.

The content of the corruption practices at the stage of prejudicial investigation depends on many factors of objective and subjective nature, caused by the factors of legal and organizational nature. An important task of the research was to reveal the influence of different by nature factors on formation of corruption practices at the prejudicial stage. **Diagram 39** shows the expert evaluations about the factors themselves and their influence on origination and development of corruption practices in the activity of the subjects, authorized to conduct the prejudicial investigation.

*Diagram 39.*

**Significance of individual circumstances for the formation of corruption agreements: experts' evaluations at the prejudicial stage of criminal proceedings**  
(% of those, who consider such circumstances "significant")



The analysis of the obtained results allows to select several key problems, which characterize conditions, favouring appearance and development of corruption practices at the stage of prejudicial investigation.

**Drawbacks of the legislation** (both processual and material) compared to other circumstances are not the main corruptogenic factor, although almost half of the polled experts (49.3 %) acknowledge existence of such shortcomings of the processual law and a little more than one third of the experts (34.8 %) tell about presence of drawbacks in the criminal financial law, which favour corruption.

In particular, the experts paid attention to **connection of corruption practices with the drawbacks of the current legislation (both the CPC and the allied legislation)**. During the conduct of the in-depth interviews, the experts paid attention to the following investigative actions, during conduction of which existence of corruption practices is possible. The general drawback of the operating CPC of Ukraine is its moral and ideological obsolescence. Many of the operating provisions of the CPC of Ukraine were laid as early as in the Soviet times and are based on the presumption of socialistic consciousness of an investigator, a public prosecutor or a judge, and thus, create certain conditions for corruption abuses on the part of the authorized persons: an investigator, a head of an investigation department, a public prosecutor and a judge.

***Selection of a preventive measure.*** The experts acknowledge, that in the legislation these questions have not been regulated sufficiently, which causes the possibility of corruption abuses: “*Article 148 of the CPC and the articles, related to it, require improvement*”. The experts estimate rather sceptically the effectiveness of judicial control over the application of such preventive measure as taking into custody.

More than one third of the experts (34.9 %) consider, that “without corruption payments a judge will never decline an investigator’s submission about application of taking into custody”<sup>20</sup>. Among the drawbacks of the CPC, which influence the appearance and development of corruption practices, when taking into custody a person, who is suspected of commitment of a crime, a suspect and an accused person, it is possible to mark out the two basic moments: (1) too general formation of the grounds for selection of a preventive measure in the form of taking into custody and (2) absence of proper regulation of selection of such a preventive measure as bailment, in particular, there is no single mechanism of reception, keeping, return of the assets or property, given on bail, and the procedure of its transfer in favour of the state in case of violation of the conditions of bailment. For example, in accordance with the provisions of articles 148 and 150 of the CPC, preventive measures are applied, if there are “sufficient grounds to consider, that a suspect, an accused person, a defendant will try to avoid an investigation and a trial or fulfilment of the processual decisions, to hinder the establishment of truth in a case or continue his criminal activity”. When selecting a certain preventive measure, “the severity of a crime, in commitment of which a person is suspected, accused, his age, state of health, marital and financial status, type of activity, place of residence and other circumstances, which characterize him” are taken into account.

An additional condition for selection of a preventive measure in the form of taking into custody is a suspicion or accusation of a person in commitment of a crime, for which the law provides punishment in the form of imprisonment for a term of over three years. However, in exceptional cases this preventive measure can be applied in the cases

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<sup>20</sup> In more details these problems were studied in a research, conducted in the years 2007-2008 by the Institute of Applied Humanitarian Researches – see Buromensky M. V., Serdyuk O. V., Tocheny V.I. Evaluation of social-economic expenses, when a preventive measure in the form of taking into custody is applied. – Kyiv: Yustynian, 2008. – 76 p.

about crimes, for which the law provides punishment in the form of imprisonment for a term of not more than three years. At the same time the CPC does not name, what cases can be considered exceptional, which creates certain conditions for abuse on the part of investigators, public prosecutors and judges. Besides this, in practice the above mentioned circumstances, as a rule, are not established by investigators or some of them are established, and public prosecutors and judges do not pay considerable attention to this fact. It is also provided by the CPC, that in the case, when there are no sufficient reasons for application of a preventive measure, “from a suspect, an accused or a defendant a written obligation about appearance on the call of a person, who conducts the inquiry, an investigator, a public prosecutor or a court, and also that he will report about the change of the place of his stay”. But investigators give preference to application of namely preventive measures. Thus, the imperfection of the law, which does not clearly form individual provisions about the grounds for selection of preventive measures, on the one hand and the absence of proper control over observance of the laws on the other hand create certain conditions for appearance and development of corruption practices, when selecting a preventive measure.

**Conduction of searches, seizures, surveys.** In the evaluations of the experts there is a certain contradiction, concerning the existence of corruption practices, when conducting the above named investigative actions. A part of the experts consider these questions completely regulated by the legislation, which disables the existence of corruption practices. Other (they, obviously, make majority) – do not agree with this, paying attention to the following – “there is a possibility to hide the grounds for conduction of such actions”, the “legislation does not give clear distinction of certain processual actions: *It is unknown what differs a survey from a search; the legislation contains conditions for abuse of processual rights, especially at the stage prior to institution of a criminal case*”. That is, on the one hand, the legislation quite clearly regulates the order and the grounds for conduction of such investigative actions, and on the other hand – in practical activity there are possibilities for certain corruption abuses. If all the requirements of the law are followed, than indeed, in theory it is difficult to commit any abuses, because during the conduction of these investigation actions participation of two independent public representatives is necessary – attesting witnesses, who watch the order of conduction of an investigation action and by their signatures approve in a protocol the correctness of description of the process, the order and the results of an investigation action. However, by the testimonies of the experts, cases happen in practice, when under the guise of a survey a search is actually conducted, when an investigation action is carried out without participation of the witnesses, or they are in a certain dependence on an investigator, and in connection with that they sign a protocol without paying attention to its content. Besides this, the experts point at situations, when investigators, following corruption motives, record the results of conduction of investigation actions improperly, or intentionally falsify protocols of conduction of investigation actions in such a way, in order to attain the goal of certain corruption agreements about closing of a criminal case or changing of the criminal-juridical qualification of a crime from a grave to a less grave one.

***Imposition of arrest on correspondence, retrieval of information from the communication channels.*** The experts point at imperfection of the legislation about the operative search activity (OSA), which creates possibilities for corruption abuses. In particular, it is possible to receive a decision on conduction of the given actions without sufficient grounds or falsification of materials of a criminal or an operative search case for artificial creation of formal grounds for this purpose. On the other hand, those situations are considered the most wide-spread, when such actions are conducted without any resolutions, but the obtained information is used for special purposes or sold to the certain business circles.

***Appointment (conduction) of judicial expertises.*** Experts associate the appearance of corruption risks with unclearness of the terms definition (which allows to delay both appointment of judicial expertises and their conduction), absence of clear guarantees of independence of the experts, the possibility of falsification of experts' conclusions. One of the reasons of such situations the experts name the wide definition of a judicial expert in the terms of the CPC of Ukraine. According to Article 75 of the CPC *any person can be summoned as an expert*, who has the necessary knowledge for giving a conclusion about the examined questions. The question about acknowledgement of a person as the one, who has a certain qualification, belongs to the authority of an investigator and a court. In this sense, a corruption risk arises both in the moment of designation of a person in the quality of an expert and in the moment of giving to this person of conclusions, which can either satisfy or dissatisfy a person, interested in the results of an investigation.

During the in-depth interviews, in particular, the experts pointed at a certain spreading of falsification of the conclusions during conduction of such types of judicial expertises as auto-technical (determination of a possibility for a driver to prevent a traffic accident), forensic medical examination (determination of the level of severity of a physical injury), forensic psychiatric (determination of sanity of a person). The conclusion of the named and some other expertises is a key proof, on the basis of which is decided the question about bringing or not bringing of a person to criminal responsibility or closing of a criminal case. The conditions, which favour such violations, are the absence of proper control over the activity of judicial experts and the absence of a possibility of appointment of alternative expertises by another part in a case. This makes exposure of drawbacks of an expertise or deliberately false expert conclusions practically impossible.

***Criminal-juridical qualification of an act.*** The criminal substantive law has certain shortcomings too. The vagueness of certain provisions of the Criminal code, the general formulations of the component elements of a crime enable abuses during the criminal-juridical qualification of an act and qualification of an act by individual characterizing signs, which influence taking of a decision about selection of a preventive measure, the possibility of application of an act of amnesty, determine the severity of punishment, and so on. Such estimative concepts in the criminal law as "with use of psychological violence", with "a threat of application of violence" and so on are established mainly according to the sufferers' testimonies and can be formed in a protocol of interrogation of a sufferer for the purpose of qualification of an act on the bases of both a less grave crime, and a more grave crime. The necessity to "slant" the events of a crime in favour of

the categories of the criminal law give certain room for manipulation with the criminal-juridical qualification of an act, which substantially influences the subsequent fate of a suspect, an accused person or a defendant.

One more condition, which favours the existence of corruption practices, is presence of a possibility to bring to responsibility for the same act by the Criminal code and the Code of administrative offences. Hooliganism (a crime) and petty hooliganism (an administrative offence), a theft (a crime) and a petty theft (an administrative offence) and so on, can exemplify that. Under certain circumstances, investigators can use these drawbacks of the legislation for the purpose of reception of corruption payments for the refusal to institute a criminal case and for the transfer of the verification materials for bringing of a person to administrative responsibility.

**Organization of work of law-enforcement bodies** has the biggest importance. 70.2 % of the examined experts admit, that the corruption is generated by the “work of these bodies for indices”. This means, that one of the essential factors, which also influence the work of investigators and create grounds for commitment of corruption crimes or violations, is the organization of statistics and reporting, the system of evaluation of the results of activity of an investigator. Such a reporting system is based on so-called indices, which are measured as the quantity of the investigated criminal cases for a certain period. As a rule, statistics by the results of work of an internal affairs body is formed “from above” and must be followed strictly. In case of non-performance of the “plan” for a certain period measures of disciplinary character can be applied to the investigators and other officers (inquiry officers, operative officers), which causes, in particular, a decrease of the monthly financial allowance. Besides, the necessity to achieve the indices or improve them also has big importance and influences the corruption behavior of the investigators or other persons, authorized to perform a pre-judicial investigation. In such a case there may be falsifications of the materials of verification of the information about a crime with the aim to achieve the statistics index with regard to institution of the criminal case, or a letter of accusation may be based on doubtful grounds, which is also an index for statistical reporting. An investigator takes a decision (on agreement with the management) to initiate a criminal case or arraign charges against a person, in the result of which respective cards of statistical reporting are filled, after which a criminal case may be closed either at the stage of pre-judicial investigation or in a court. In such situations an investigator can ensure “achievement of the plan” and obtain a corruption payment for resolution of the issue of closing of a criminal case in spite of the fact, that he had all lawful grounds for closing of the case. During the last years this sphere is being reformed, however, according to respondents’ testimonials during in-depth interviews, the reforms have *“fragmentary character, some things change for the better, but other things remain unchanged. Especially at the initial level.”*

Among the conditions, which favour appearance and existence of corruption practices in criminal proceedings, which have organizational character, it is worth mentioning the excessive militarization of the inquiry and pre-judicial investigation bodies, existence of subordination and dependence of operative officers on the head of a body, which is practically an inquiry body, and dependence of an investigator on the head of a body – service subordination, dependence in issues of promotion to the next special

grade, financial allowance amount, regular vacations, etc. So, the role of a head in law-enforcement bodies is important, and the result of review of the materials, verification of claims about crimes and in some cases taking certain processual decisions are in a high degree dependant on the head's direct orders.

**The level of the salaries of officers of law-enforcement bodies** has a significant importance. More than a half of the examined experts (64.5 %) acknowledge this index to be the key one in the appearance of corruption motivation of officers of law-enforcement bodies. This fact met its confirmation during the in-depth interviews too. Numerous examples were cited, describing arrangement of corruption agreements by officers with the aim to: *“buy medicines for the sick child”, “pay the apartment rent for the family”*, etc. The insufficiency of financing of the pre-judicial investigation bodies also leads to the necessity to apply corruption practices in order to provide possibilities for performance of duties, connected with a criminal case investigation: procurement of paper, computer and copying equipment, equipment repairs, etc. At the same time, ambiguousness of the matter was noted. Some experts turned their attention to the fact, that *“time is lost, which means, that a simple salary increase will not improve the situation. A part of the officers (especially on “corruption” positions) are so used to it, that they cannot refuse corruption practices”*.

In the law-enforcement bodies **the efficiency of internal and external (first of all from the side of the public prosecutor's office) control is too low**. 53.6 % of experts indicate inefficiency of the internal control in the law-enforcement bodies, 41.4 % of respondents have drawn attention to the absence (or formal character) of the internal control over following the demands of the professional ethics. 50.9 % of the pollees find the public prosecutor's office control inefficient. Moreover, relations between investigators and prosecutors have corruption elements as well. The main ground for corruption relations is the necessity to ensure the respective statistical indices of investigation work, which are approved by the prosecutor. It means, that the prosecutor signs Form 4, which is filed for an arraigned charge and is the main index of the work of the investigation departments. In connection with this, there are cases, when shortly before the reporting period investigators, and most often the heads of investigation departments, enter corruption relations with prosecutors in order to provide signing of the necessary quantity of statistical cards, which are necessary for “the plan performance”.

It is worth underlining separately the problem of absence of a respective control of the work of prosecutors. Practically, the work of the prosecutors is controlled by the prosecutors of a higher rank, which allows to hide separate facts of the corruption practices by the officers of the public prosecutor's office for the sake of the corporate interest of the public prosecutor's office and conservation of the positive image of the public prosecutor's office, though the polls of the citizens and experts, the results of which are mentioned above, indicate a certain distrust to the public prosecutors' offices from the side of the population and the corruptness of its officers. The analysis of the materials, placed at the official Internet page of the General Public Prosecutor's Office also in an indirect way confirms insufficient activity of the public prosecutors' offices in revelation of corruptive officials in their own ranks. In total we have managed to find not more than 10 cases, when prosecutors were brought to responsibility for corruption crimes for the

last 5 years. These figures do not correlate to the level of trust from the side of population and the percentage of experts who acknowledge the existence of corruption in the public prosecutors' offices: 56.7 % of experts consider, that the corruption practices at the stage of pre-judicial investigation are most spread in the public prosecutors' offices; 37.9 % and 42.9 % of the population consider the public prosecutor's office to be the most corruptive state body according to the data, provided by Gorshenin institute and a nationwide examination, which has been conducted with the support of corporation "Challenges of the millennium", the trust of the population relative to the fight against corruption makes 15 % according to the results of the researches, conducted by the Institute of Applied Humanitarian Researches in 2003. On the other hand, certain positive steps have been taken and groundwork has been done. In particular, in the beginning of the year 2005 in the General Public Prosecutor's Office there was created an administration of internal security and defence of the officers of the public prosecutors' office, the work of which ensured a possibility not only to prevent indecent actions of the officers of the public prosecutor's office, but allowed to reveal operatively malfeasance cases.

*In particular, it has been established, that the prosecutor of Oleksandriysk district in Kirovograd region regiondemanded from a person, accused of a grave service crime 5 thousand US dollars for assistance in determination of a punishment, which would not be connected with imprisonment. In total for a period of 9 months of the year 2005 the administration revealed eight facts of crimes, committed by the officers of public prosecutors' offices.*<sup>21</sup>

However, unfortunately, there were no more mentionings of activity of this administration of the General Public Prosecutor's office of Ukraine.

A specific matter is the **spreading of informal contacts** among different branches and subjects of the criminal sphere. More than a half of the polled experts (55.1 %) acknowledge, that non-service relations between separate categories of the officers of the law-enforcement bodies and the judges favour corruption. However, attitude to this factor is ambiguous. In the in-depth interviews with the officers of the law-enforcement bodies attention was brought to the fact, that "such relations can be useful in the process of investigation, as they are operative and not burdened with formalities". At the same time, in mass (quantity) polls less than a third of the experts agree with this statement (30.7 %). 71.6 % of the experts acknowledge, that, for example, "between investigation (the head of an investigation division) and the prosecutor there are informal relations of corruptive character". In the in-depth interviews additional information was obtained about the character of the corruptive connections of the investigators and the prosecutors: "solution of the issue of preventive measures, which are not connected with detention", "ungrounded requalification of crimes to less grave ones", "diminution of the quantity of episodes in a case", "diminution of the quantity of accused persons", "destruction

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<sup>21</sup> The General Public Prosecutor of Ukraine fights against criminals in shoulder-straps 22.09.2005 [http://www.gpu.gov.ua/ua/news.html?\\_m=publications&\\_t=rec&\\_c=view&id=77137](http://www.gpu.gov.ua/ua/news.html?_m=publications&_t=rec&_c=view&id=77137)

*of proofs”, “adoption of resolutions about absence of property, which can be arrested”, “nepotism and division of the “spheres of influence” in a certain case” etc.*

In more details corruption practices, which are based on the above described grounds of their appearance and development, are described below.

### **Types of Corruption Practices**

At the stage of pre-judicial investigation the following main corruption practices have become spread (in this context these are processual actions with corruption grounds):

1. Solution of the issue of non-bringing to criminal responsibility or closing of a criminal case;
2. Solution of the issue of choosing of a preventive measure, alternative to detention;
3. Solution of the issue of mitigation (improvement) of the state of a suspected or accused person during pre-judicial investigation;
4. Solution of the issue of provision of a verdict of acquittal by a court or recommitment of a criminal case;
5. Solution of the issue of exertion of pressure on certain persons with the aim to pursue personal interests or business interests of a third party.

**Corruption practice.** Solution of the issue of non-bringing to criminal responsibility or closing of a criminal case.

The sense of this corruption practice lies in the fact that the person, authorized to conduct a pre-judicial investigation, prosecutor’s supervision and judicial control over the pre-judicial investigation, intentionally creates conditions for taking a decision or takes an ungrounded decision to close a criminal case or not to bring to criminal responsibility. In order to close a criminal case there are several grounds, stated in the respective articles of the Criminal-processual code. In particular, these are existence of circumstances, which exclude conduction of a criminal case (article 6 of the CPC), existence of grounds for release from criminal responsibility (articles 7-11-1 of the CPC) and unproved participation of an accused person in the commitment of a crime (article 213 of the CPC). This corruption practice may also be associated with cases, which make investigation of a criminal case impossible due to the judge’s repeal of decree about initiation of a criminal case. Depending on the grounds, which are formally applied in solution of this issue for corruption payments, forms of corruption acts, characteristic for this corruption practice, may be indicated.

Subjects of this corruption practice are an investigator, a prosecutor and a judge. An investigator has the right to take a decision to close a criminal case in certain cases himself, however under the prosecutor’s approval. In certain cases an investigator under the prosecutor’s approval takes a decision about the possibility to close a criminal case, however the decision itself is taken by the judge. As a rule, at such a corruption practice, it is difficult for an investigator to act by himself, except for the cases of creation of formal conditions, which indicate grounds for closing of closing of a criminal case. The prosecutor has most possibilities for such a corruption practice, in certain cases he can take such decisions independently. A judge is a key person in cases, when a complaint is filed against the resolution of initiation of a criminal case. In such cases a judge unilaterally takes a decision about cancellation or approval of the resolution of

initiation of a criminal case and the terms of processing of the complaint, which also has a significant importance for the investigation.

***Cancellation by a judge of the resolution of initiation of a criminal case for a corruption payment in cases, when the initial material contained sufficient grounds for initiation of a criminal case***, allows to resolve an issue of non-bringing of a person to criminal responsibility or to create obstacles for the pre-judicial investigation.

Analysis of the investigation and judicial practice, as well as polling and interviewing of experts indicate the existence of corruption practices, connected with the possibility to appeal to the court a resolution to initiate a criminal case at the stage of pre-judicial investigation. According to the provisions of a part of article 234 and article 236 of the CPC of Ukraine, as well as the Order of the Constitution Court of Ukraine of January 30, 2003, N 3-пн/2003<sup>22</sup>, at the stage of pre-judicial investigation the court can accept complaints against resolutions of an investigator and a prosecutor concerning the terms, grounds and the order (sequence) of initiation of a criminal case against a certain person. This decision, taken by the Constitution Court of Ukraine, was caused by the necessity to provide the citizens of Ukraine with a possibility to apply the constitutional guarantee of judicial defence of rights and freedoms, including the right to appeal in a court the decisions, activity or inactivity of the bodies of state power, bodies of local self-government, civil servants and officers. However, in practice, such a possibility has created additional conditions for appearance and existence of corruption practices during the judicial control of the activity of the pre-judicial investigation bodies. In particular, judges for corruption payments can groundlessly cancel resolutions of investigators and prosecutors to initiate a criminal case. The vagueness of the statements of the CPC, which regulate the issue of initiation of a criminal case, and absence of due control over the judges' activity. Appealing the resolutions of an investigator or a prosecutor to initiate a criminal case practically blocks the investigation of a criminal case and makes collection of proofs impossible. According to paragraph 4 of part 1 of article 206 of the CPC for the time of examination of a complaint against a resolution to initiate a criminal case investigation activity may be stopped by a court. As a result, even if the complaint was not satisfied or was filed to the Supreme Court, which cancelled the decision of the court of the first instance, investigation division loses its time and, respectively, the proofs.

In this way the possibility to appeal the resolutions of an investigator or a prosecutor to initiate a criminal case from one hand has given the citizens a possibility to defend their rights in court more efficiently, from the other hand, it has turned into an effective means of counteraction to investigation, and it has created a possibility for corruption abuses from the side of judges. This is confirmed by the results of empiric studies. During the polls the experts were offered to determine their point of view on the thesis, that "the right for judicial appeal of resolutions to initiate criminal cases has created additional

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<sup>22</sup> Decision in a case on the constitutional presentation of the Supreme Court of Ukraine in respect of correspondence (constitutionality) of the provisions of part three of article 120, part six of article 234, part three of article 236 of the Criminal-Procedural Code of Ukraine (a case about examination by a court of certain resolutions of an investigator and a prosecutor).

grounds for corruption agreements”. 52.8 % of experts agree with that “completely”, only 18.9 % – do not agree.

***Deciding about non-bringing to criminal responsibility through closing of a criminal case due to vindicating or non-vindicating circumstances, on condition of reception of a corruption payment.*** The Criminal-Processual Law contains about 16 different grounds for closing of closing of a criminal case and non-bringing of a person to criminal responsibility. The highest corruption risks are connected with application of the following grounds for closing of closing of a criminal case and non-bringing to criminal responsibility: (a) due to absence of an act of a crime (paragraph 1, part 1, article 6 of the CPC); (2) due to absence of elements of a crime in an act (paragraph 2, part 1, article 7 of the CPC); (3) absence of proof of participation of a suspected person in a criminal act (paragraph 2, article 213 of the CPC); (4) due to confession of guilt ( paragraph .1 part.1 article. 7-1 of the CPC); (5) due to reconciliation of an accused person, a defendant with the sufferer (paragraph 2, part 1, article 7-1 of the CPC); (6) due to compulsory measures of correctional administration being applied to a juvenile (paragraph 3, part 1, article 7-1 of the CPC); and (7) due to admission of a person to bail to the staff of an enterprise, an institute, an organization (paragraph 4, part 1, article 7-1 of the CPC). In all the above named cases there are possibilities for artificial creation of conditions for using of any ground for closing of closing of a criminal case. Creation of respective conditions by an investigator or a prosecutor in order to take a decision about non-bringing to criminal responsibility or closing of a criminal case can be effected through: intentional poor quality organization of investigation or violation of terms of the Criminal Processual Law during execution or recording of certain investigation activities, non-performance or untimely performance of certain investigation activities, intentional destruction or damage of material proofs in a case. Experts play an important role in creation of conditions for closing of a criminal case or non-bringing to criminal responsibility, as in many cases the key proof, on which such a processual decision is based, is the conclusion of a respective judicial expertise. An expert may provide a deliberately untruthful conclusion or a conclusion of a non-categorical character, which leads to ambiguous interpretation of the results of and expertise.

Such situations are mostly spread in investigation of tax crimes and other economical crimes, car accidents, drug traffic cases and other, further investigation of which is impossible provided certain documents are absent or destroyed.

*For example, in Dnepropetrovsk, an assistant of the head of the investigation department of the tax militia of the Region State Tax Administration of the region was taken into custody for obtaining a bribe in the amount of fifty thousand UAH for taking a decision to close a criminal case against the manager of one of the public utility companies, which was initiated due to nonpayment of taxes by the enterprise.<sup>23</sup>*

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<sup>23</sup> A high-position public officer was arrested in Dnipropetrovsk for reception of a bribe // News of the 11 news channel of Dnipropetrovsk of the 16-th of July 2007 <http://www.11tv.dp.ua/news/dp/2007/07/16/13614.html>.

*Or, the Public Prosecutor's office of Donetsk region initiated a criminal case against the senior investigator of the department of investigation of car accidents of the City Administration of the MIA of Ukraine in the region, who had extorted and obtained a bribe in the amount of 10 thousand US dollars from an attorney for non-bringing to criminal responsibility of his defendants – a car driver of an enterprise for causing a car accident and a mechanic for putting a defected car into operation.<sup>24</sup>*

A decision on closing of a criminal case can be taken without special creation of artificial grounds for that. As practically all the above mentioned grounds for taking this processual decision are based on the analysis and evaluation of the materials of a case by an investigator or a prosecutor, which mostly have a subjective character, there are numerous opportunities for abuses. Especially, such cases are spread during the investigation of criminal cases, committed by juveniles. From one hand, the criminal-processual law provides possibilities to mitigate the state of juveniles during pre-judicial investigation and creates more grounds for avoidance of a criminal responsibility and serving of a sentence by juveniles, from the other hand, such processual privileges of juveniles provide additional possibilities for corruption abuses.

Analysis of the investigation and judicial practice testifies to spreading of such practices. According to the data, provided by the General Public Prosecutor's Office of Ukraine in 2008 the public prosecutor's offices cancelled over 7 thousand resolutions of illegal closing of cases. It is impossible to affirm, that all the resolutions are cancelled for corruption payments, but, taking into account the data about spreading of corruption practices in taking of such processual decisions, we can conclude, that a certain percentage of those orders had corruption character. Numerous cases are known of bringing to responsibility of investigators for bribes, which were obtained for closing of criminal cases or non-bringing a person to criminal responsibility.

*For example, the senior investigator of one of the territorial departments of militia of Shevchenkivsky district administration of the City Administration of the MIA of Ukraine in Kyiv was taken into custody for extortion and obtaining of a bribe in the amount of 2000 US dollars for closing of a criminal case and return of a civil passport.*

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<sup>24</sup> A criminal case has been instituted in Donetsk in respect of an investigator // Information of the press-service of the General Public Prosecutor's office of Ukraine of 01.04.2008 [http://www.gpu.gov.ua/ua/news.html?m=publications&\\_t=rec&\\_c=view&id=13986](http://www.gpu.gov.ua/ua/news.html?m=publications&_t=rec&_c=view&id=13986).

*In Zaporizhzhya Region for extortion and obtaining of a bribe 2 investigators of the district department of militia were taken into custody. They obtained from a local citizen 700 US dollars as payment for closing of a criminal case, which had been initiated against him for illegal drug distribution.*

*In Vinnytsa Region the senior investigator of one of regional militia divisions of Vinnitsa city Administration of the Ministry of Internal Affairs was taken into custody for obtaining a bribe in the amount of 3 thousand US Dollars for closing a criminal case on that stage.*

The prosecutors also take part in corruption practices, connected with closing of a criminal case.

*For example, The General Public Prosecutors' Office of Ukraine has initiated a criminal case against the prosecutor of one of the regions of Rovno Region for the law violation as per part 3 of article 368 of the Criminal Law of Ukraine, in particular, for obtaining several thousand US Dollars as a bribe for closing of a criminal case.*

One of the forms of non-bringing to criminal responsibility is **non-bringing to criminal responsibility of persons, who have a status of witnesses at the initial stage of investigation**. Such situations are characteristic for crimes, which are committed by a group of persons, as a rule, in the sphere of economy, but are not limited by it. Practically, the object of corruption exchange in such situations is to keep the status of a witness for a person through a superficial examination of the circumstances of a case, effecting of pressure on the suspected and accused persons, who are interested themselves in a smaller quantity of case participants, non-recording of certain episodes of activity and non-description of certain facts, which were informed by other witnesses, suspected and accused persons.

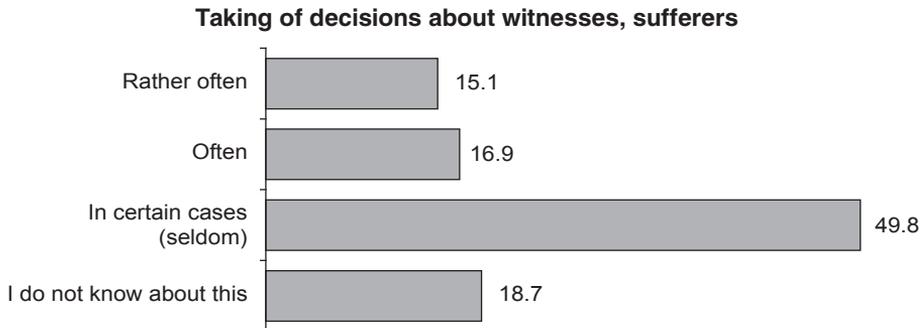
*For example, in Cherkasy a local citizen was taken into custody, who tried to give a bribe in the amount of 300 US dollars to an investigator for taking the decision to change the processual state of his son from a suspected person to a witness.*

In relation to witnesses and sufferers, investigators and prosecutors may take other processual decisions, which affect their interests. According to the results of the in-depth interviews with the experts it was established, that they were aware of certain facts of obtaining corruption payments from the witnesses and sufferers for taking certain processual and organizational decisions in cases, connected with reimbursement,

non-recording and non-disclosure of certain facts, which were established during the investigation, etc. Such cases are rather rare, however, sometimes they take place in activity pre-judicial investigation bodies. As per the results of polling of the experts: half of them agree (49.8 %), that such cases are rare; 18.7 % – are not aware of such cases at all, however, almost one third of the experts consider, that corruption practices, connected with taking decisions concerning witnesses and sufferers are spread: “rather often” – 15.1 %, “often” – 16.9 % (**Diagram 40**).

*Diagram 40.*

**Spreading of corruption actions, when certain processual actions are executed at the pre-trial investigation stage: experts' evaluations**



**Corruption practice.** Solution of an issue of choosing preventive measures alternative to taking into custody.

The essence of such corruption practice is in the following: for a certain corruption payment an investigator, a prosecutor or a judge makes a decision about application of a preventive measure, which is not connected with keeping of a suspect, an accused person or a defendant in custody. Despite the fact, that in Ukraine the biggest value is considered to be a person, his/her rights and freedoms, application of preventive measures such as taking into custody is still quite spread compared to other preventive measures.<sup>25</sup> Nowadays choosing of such a preventive measure is more a standard than an exception, like it must be according to the provisions of the European Convention on Protection of Human Rights and Freedoms and the practice of the European Court of Human Rights, which are a part of the national legislation. Because of such practice, which dates back to the Soviet Union, investigators and prosecutors are cautious about choosing preventive measures, alternative to taking into custody, when investigating crimes punishable by three and more years of imprisonment. Besides that, the beneficiaries of corruption

<sup>25</sup> Buromensky M. V., Serdyuk O. V., Tocheny V. I. Evaluation of social-economic expenses, when a preventive measure in the form of taking into custody is applied. – Kyiv: Yustynian, 2008. – p. 10

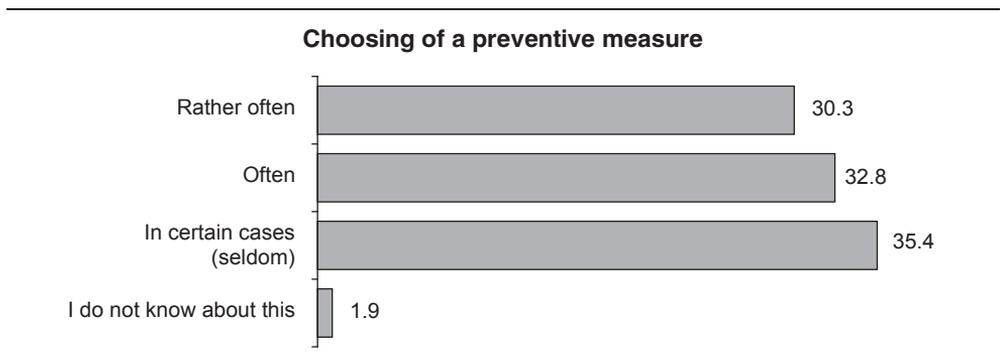
practices – suspects and accused persons – are most of all interested in evasion of imprisonment, before a judge tries their case. Such situation provides substantial conditions for acceptance of corruption payments.

According to the data, received during the polls of the experts, corruption practices while choosing preventative measure are quite wide spread: “quite often” – 30.3%, often – 32.8% (see **Diagram 41**). Only making decisions regarding institution of criminal case is considered to be more corrupted: “quite often” – 45.3% of interviewed experts and “often” – 20.7% (see **Diagram 42**).

Subjects of such corruption practice are an investigator, a prosecutor and a judge. First of all, solution of the issue regarding choosing of a preventive measure is influenced by an investigator. He initiates choosing of a certain preventive measure by sending an appropriate petition to a judge upon consent of a prosecutor. A prosecutor agrees or disagrees with the position of the investigator, taking into account the materials of a case and his interests, when corruption practices are involved. The prosecutor has the

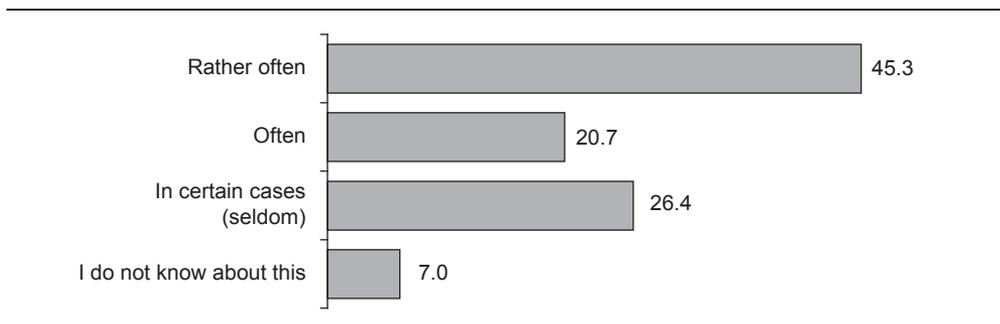
*Diagram 41.*

**Spreading of corruption, when specific processual actions are executed at the pre-trial investigation stage: experts' evaluations**



*Diagram 42.*

**Spreading of corruption when decisions about institution of a criminal case are taken: experts' evaluations**



right to cancel the investigator's resolution about choosing of a preventive measure and pass his own resolution about choosing of another preventive measure. A judge passes a resolution about choosing of a preventive measure such as taking into custody or refuses to satisfy the investigator's petition. Refusal of the investigator's petition and passing of a resolution about choosing of a preventive measure in the form of taking into custody, may have a corruption basis too.

Except choosing of a preventative measure, solution of the issue, which is desirable for the beneficiary, i.e. application of a prevention measure to him, which is not connected with keeping in custody, is also possible by the way of substitution of a prevention measure in the form of taking into custody with another one. Solution of the issue of **substitution of a prevention measure in the form of taking into custody to another one**, which is not connected with keeping in custody, is conducted by the way of satisfaction by a judge of a petition of an investigator or an attorney on condition of reception of a corruption payment or sending by an investigator of such a petition for a corruption payment. Doctors can be used to create conditions for taking of such decisions. These doctors are given corruption payments for their medical reports on suspects' and accused persons' state of health and connection between the state of health and staying in custody. The analysis of the investigative practice shows existence and certain spreading of such corruption practice.

*For example, in Odessa a criminal case was instituted against a citizen of Georgia, who offered a five thousand US dollars bribe to an investigator for a change of a preventive measure to a written undertaking not to leave Odessa for her brother, who was suspected in committing a crime.<sup>26</sup>*

There are examples, when officers of an inquiry body, who actually don't have influence on choosing or substitution of a prevention measure, demanded bribes, taking advantage of the vulnerable state of a suspect or an accused person, or their relatives, for solving such issues.

*In Lviv a former criminal retrieval operative officer of the line department at the Lviv station was sentenced to a five year imprisonment without a right to occupy any position in law-enforcement bodies during two years. He demanded from a person, suspected in illegal circulation of drugs, a bribe in the sum of one thousand US dollars for change of a preventive measure from taking into custody to a written undertaking not to leave Lviv.<sup>27</sup>*

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<sup>26</sup> An investigator from Odessa refused from a bribe of five thousand dollars // News of the internet publication Uainter.net of 25-10-2008 [http://news.uainter.net/index.php?t=details&nw\\_language=ukrainian&linkid=1197774&newdate=20081025](http://news.uainter.net/index.php?t=details&nw_language=ukrainian&linkid=1197774&newdate=20081025).

<sup>27</sup> An investigator has been arrested for reception of a bribe // Internet-publication "Utro.ua", news of 01 of april, the year 2008 [http://utro.ua/ru/proisshestviya/sledovatelya\\_zaderzhali\\_za\\_poluchenie\\_vzyatki\\_4a07da45e2696](http://utro.ua/ru/proisshestviya/sledovatelya_zaderzhali_za_poluchenie_vzyatki_4a07da45e2696)

**Corruption practice.** Solution of an issue about mitigation (improvement) of the state of a suspect or an accused person during pre-trial investigation.

The essence of such corruption practice is in the following: an investigator or a prosecutor accepts a corruption payment and takes such procedural decisions, which create conditions for improvement of the state of a suspect or an accused person during pre-trial investigation. First of all, improvement of the state of a suspect or an accused person may be in the criminal-judicial qualification of his actions according to a less serious article of the Criminal Code or a corresponding part of an article of the Criminal code, fixation of not all the episodes of his criminal activity, reduction of the number of accused persons in the case, which influences the gravity of a crime, and in creation of a possibility to communicate with relatives, saving of the belongings of an accused or a suspect, return of the things or documents, seized during the investigation. Such practice is used, when beneficiaries of corruption practices have failed to solve the issue concerning non-bringing to criminal responsibility or closing of a case.

**Change of charges from more to less serious crimes.** First of all and in the majority of cases, the improvement of the conditions of a suspect or an accused person is connected with a criminal-judicial qualification of an action, for commitment of which they are brought to criminal responsibility. Change of a criminal-judicial qualification of an action from a heavier to a less heavy practically consists in cessation of an investigation according to a heavier article of the Criminal code of Ukraine and in initiation of a criminal case according to a less heavy article of the Criminal code or a less heavy part of a certain article. A decision regarding pressed charges is based on the materials of a criminal case, i.e. proofs received during the investigation. The process itself of such decision making is quite subjective and is based on professional assessment of established facts and their interpretation according to the Criminal law. At the same time issues of criminal-judicial qualification can be quite arguable, and an investigator and a prosecutor can make such decisions in criminal cases on the basis of corruption agreements, disguising them successfully as lawful and justified grounds. Conditions, which favour appearance and development of this corruption practice, were given above in the characteristics of of the drawbacks of the criminal substantive law.

The subjects of this corruption practice are an investigator, who is directly occupied with the issues of criminal-judicial qualification of an act, a public prosecutor, who has the same functions and who, besides that, can give orders in writing to an investigator about changing of a criminal-judicial qualification. A judge is occupied with the issues of criminal-judicial qualification even at the stage of judicial examination of a criminal case. An attorney can play a certain role in these issues by filing requests to an investigator and appealing against his decisions about the criminal-judicial qualification of an act. In this regard, sometimes a curious situation takes place, when an attorney disagrees to re-qualify an act during the prejudicial investigation by an investigator, and he wishes it to be done at the court, and thus it will look as a result of effective work of the attorney and not of provision of objectivity of the investigation by the investigator. Again, this gives an attorney a possibility to draw certain both financial and professional

dividends. Already at the judicial sitting such situation creates favourable conditions for reception of corruption remunerations by a judge for the pronouncement of less heavy sentence, than a defendant could expect. Formally, on the part of a judge all the factual data look legal and just, which finds its reflection in the materials of a case. Thus, a situation is created, when the defendants having no certain knowledge in the field of law-enforcement are grateful for those actions, which in any case an investigator, a public prosecutor, a judge, and even an attorney is obliged to execute according to the law. On his part, an investigator in the controversial moments of criminal-juridical qualification is forced to qualify the acts by a more grave crime or a heavier part of an article of the CC to “play safe” and not to receive a criminal case for additional investigation, which is considered a very negative indication in the work of an investigator and in certain situations can entail undesirable consequences of disciplinary and even financial nature. It is connected with the fact, that at a judicial sitting a court has the right to change a criminal-juridical qualification of an act from a heavier one to a less heavy, but it cannot change it from a less heavy one to a heavier one. In such situations a case is sent for additional investigation. The criminal-juridical qualification of an act also influences presence or absence of grounds for selection of a preventive measure in the form of taking into custody, a possibility of application of an act of amnesty in relation to a suspect or an accused person. Sometimes, an investigator himself is interested in application of amnesty towards the persons under investigation: this diminishes his workload, spares superfluous attention to an investigator and the quality of his work on the part of a public prosecutor and a judge.

Existence of such corruption practice confirms the practices of prevention and exposures of corruption crimes in the actions of officers of the law-enforcement bodies.

*For example, in Volyn Region has been registered the fact of reception of a bribe in the sum of 150 US dollars and 100 hryvnas by an investigator of one of the territorial departments “for mitigation of charge to a person, who is under investigation of a criminal case”<sup>28</sup>.*

For the purpose of concealment of actual reasons for changing of a criminal-jurudical qualification, investigators and public prosecutors can artificially create situations, which give them formal rights to take this decision in a case. Artificial creation of grounds for taking decisions, which mitigate (improve) the status of a suspect or an accused person consists in intentional creation of formal grounds for taking procedural decisions. Such grounds can be created by intentional elimination or spoilage of material proofs in a case, refusal to attach material proofs to a case, influence on witnesses and sufferers, low-quality conduction of individual investigative actions, in particular surveys, searches,

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<sup>28</sup> A militia officer has been seduced by a bribe // Volyn – an independent public–political newspaper. – Electronic publication № 449. - 2 of February, the year 2006. - <http://www.volyn.com.ua/?rub=8&article=0&arch=449>

especially – interrogations of witnesses and sufferers, non-appointment of judicial expertises or putting of improper questions for decision by an expert and so on.

Issues about material proofs can be decided both by a legal way, that is by taking a procedural decision about the fate of material proofs, as a rule, return of a material proof or non-registration of the fact of its discovery and withdrawal of the corresponding investigation action in a protocol, and by direct and gross violation of the requirements of the criminal-processual law. However, in any case an investigator operates on the basis of a corruption agreement with the beneficiaries. As a rule, return of material proofs and other abuses take place in the course of investigation of crimes against property, concerning embezzlement at facilities of economy, and crimes in the field of economic activity and relates to financial-accounting documents.

*For example, an investigator of the Main Administration of MIA in Odessa region has been detained in Odessa for reception of a bribe in the amount of 50 thousand dollars for returning of documents to businessman – proofs, which had been withdrawn from them during conduction of a search at their enterprise within the bounds of investigation of a case about an economic crime. The case was conducted by another investigator and the detained person had access only to the materials of the criminal case.<sup>29</sup>*

*In Donetsk region an officer of the investigation department of the State Tax Administration has been detained after reception of a bribe in the amount of 5 thousand dollars for returning of the documents, withdrawn at a mining enterprise during nvestigation of a criminal case, which was under his conduct.<sup>30</sup>*

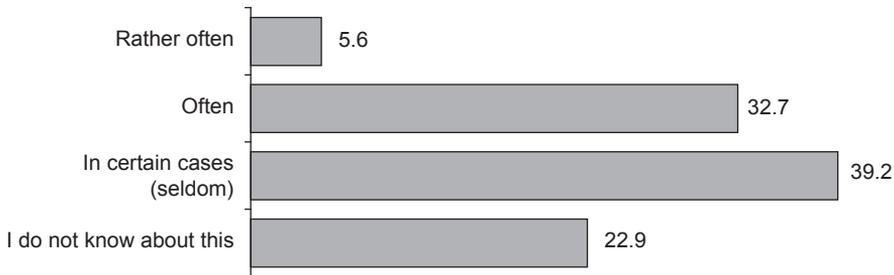
Carrying out of the polls of the experts and the in-depth interviews also indicates presence and certain spreading of corruption practices, related to taking decisions by investigators and public prosecutors about material proofs. More than one third of the experts acknowledge such practices widely spread, 32.7 % of the experts acknowledge such spreading frequent, and 5.6 % of them acknowledge it very frequent. However, more than half of the experts point at the fact, that such practices are rare or generally unknown, – 39.2 % of the experts answered “rarely”, and 22.9 % of the experts in general do not know about existence of such practices (see **Diagram 43**).

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<sup>29</sup> Militia officers in Odessa were caught at reception of a bribe: an investigator took 50 thousand dollars and disappeared // the Internet – news publication NEWSru.ua, news of 28 November, the year 2008. <http://palm.newsru.ua/crime/28nov2008/vzjatku.html>

<sup>30</sup> An employee of the local tax administration was arrested in Donetsk region for a bribe // Internet newspaper “News of Donbass dn.ua, news of 08.02.2007 [http://novosti.dn.ua/import.php?url=http://ostro.org/shownews\\_ks.php?id=34812&lang=ru](http://novosti.dn.ua/import.php?url=http://ostro.org/shownews_ks.php?id=34812&lang=ru)

Diagram 43.

**Taking of decisions about material proofs**

A kind of artificial creation of grounds for taking a decision in a case is **registration of not all the episodes of criminal activity or registration of criminal activity not in the full volume**, which takes place, when an investigator or a public prosecutor, abusing their authority and violating the principle of completeness and objectivity of pre-trial investigation, does not register individual facts, which became known during the investigation of a crime, in the processual documents. In such situations, for a certain corruption payment an investigator or a public prosecutor does not introduce into the judicial documents the facts, which are qualifying signs for changing of a criminal-juridical qualification to a more grave crime or which are circumstances, which burden the punishment (Article 67 of the CC).

Presence of corruption practices, directed at mitigation (improvement) of the suspect's or an accused person's status, is also confirmed by the investigation-judicial practice of exposure and investigation of corruption crimes, committed by officers of the law-enforcement bodies.

*For example, in Sumy Region a criminal case has been instituted in relation to the chief of a department of the militia line office at the Konotop station by the signs of reception of a bribe in the amount of 1500 US dollars to solve the issue about mitigation of a female suspect's status, who was brought to criminal responsibility by the investigation department of the line office for illegal acquisition, storage and sale of drugs.<sup>31</sup>*

**Solution of property issues and issues about material proofs** consists in taking procedural decisions by an investigator or a public prosecutor, which favour provision of

<sup>31</sup> A major of militia was arrested for a bribe // Information of the press—service of the General Prosecutor's Office of Ukraine of 14.10.2004. - [http://www.gpu.gov.ua/ua/news.html?\\_m=publications&\\_t=rec&\\_c=view&id=68653](http://www.gpu.gov.ua/ua/news.html?_m=publications&_t=rec&_c=view&id=68653).

saving of a suspect's or an accused person's property. Such actions improve the suspect's (accused person's) status, because they ensure saving of his possession. In accordance with the provisions of the CPC, an investigator, when conducting investigation of a criminal case, is obliged to take measures for provision of a civil claim in a criminal case and confiscation of property, and also to establish the location and seizure of property and assets, which were received in a criminal way, and to provide their seizure. For this purpose, an investigator makes a list of property, which is subject to arrest, and imposes an arrest on it, takes a decision about blocking operations with bank accounts (e.g., imposition of arrest on deposits) by means of reception of a proper resolution of a court. However, for corruption payments in the form of separate payments or part of property or assets, received in a criminal way, investigators do not take such measures or do it formally. In practice, solution of an issue about property or assets, received illegally, and property and assets, belonging to a suspect (an accused person) has the following forms: conscious decision about non-inclusion of property into the list, which is subject to arrest; taking no decision about imposition of arrest on property or deposits; registering in the protocol of an investigation action of an incomplete sum of the assets, found during a search or a survey, or non-inclusion into the protocol of the fact of revelation of the assets or valuable things, which are appropriated by an investigator, as a rule, under agreement with a suspect or an accused person; cancellation of a decision about imposition of arrest on property and deposits. Extortion of a corruption payment for a refusal to impose arrest on property or cancellation of a proper decision can take place also in relation to persons, who are not suspects (accused) in a case. It is done exceptionally for the purpose of reception of cash assets by applying on 'he's official status.

*For example, in Lviv region an investigator of militia has been detained, who received 950 US dollars as a bribe from a local habitant for returning of his car, which was arrested within the bounds of a criminal case, conducted by this investigator. The proprietor of the car even was not involved in the indicated criminal case.<sup>32</sup>*

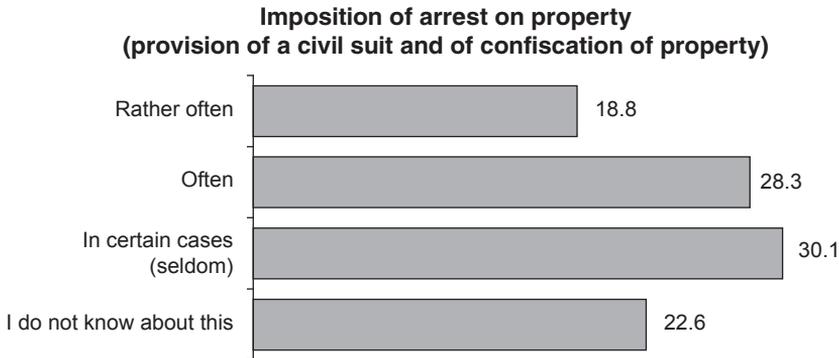
The presence of such corruption practices is also testified by the polls of experts, who have ambiguous attitude toward the spreading of cases of solution of issues, related to imposition of arrest on property for the purpose to provide a civil claim and to confiscate property. The opinions of the experts practically split in half, – 47.1 % of the pollees on the whole consider such practices wide-spread (“often enough” – 18.8 %, “often” – 28.3 %), 30.1 % of the experts consider such situations rare, and 22.6 % of the experts are not aware of such cases (see **Diagram 44**).

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<sup>32</sup> An investigator of militia was caught at reception of a bribe of 950 dollars // Internet publication PROUA, news of 10.10.2008 <http://ua.proua.com/news/2008/10/10/112838.html>.

Diagram 44.

**Spreading of corruption actions, when separate procedural actions are executed at the pre-trial investigation stage: experts' evaluations**



**Solution of the issue about the possibility of communication with close people and reception of help from them.** In the cases, when a preventive measure in the form of taking into custody is applied to a suspect (an accused person), a possibility to see each other, to receive parcels is critical for him and his close people, for provision of proper terms of detention and the psychological status of a suspect (an accused person). In connection with this, in individual cases the decisions of an investigator about admittance of relatives as a defender, granting permission for an appointment, parcels and so on become objects of corruption exchange. In accordance with Article 44 of the CPC the close relatives of a defendant, his guardians or intercessors can be admitted to participate in a case as defenders and thus be able without obstacles to meet with the defendant without limitations in time. However, the CPC limits the moment, from which such a decision can be taken – production of the materials of the prejudicial investigation to an accused person for acquaintance, that is actually after completion of the prejudicial investigation and presentation of an accusation. That is why investigators, violating the indicated norms for certain corruption payments, take a decision about bringing in relatives as defenders practically from the beginning of investigation. In its turn, as practice shows, a court, as a rule, does not pay attention to the indicated violation of the criminal-processual law, using as basis of such attitude the fact, that these actions are an insignificant violation of the criminal process, which have not caused substantial harm to the rights of a defendant”.

The described corruption practice has not been studied in details and has not been included to the questionnaire, however, during the in-depth interviews individual experts pointed at such abuses on the part of investigators. A research, which was conducted by the Institute of Applied Humanitarian Researches in the year 2008, directed at the estimation of social-economic charges at application of a preventive measure in the form of taking into custody, is an indirect indicator of existence of such situations. Based on the data

of this research, “relatives and close people of a prisoner quite often have the status of a defendant’s representative, which enables them to have additional meetings<sup>33</sup>”. Besides this, one third of the expenses for keeping of persons in a pre-trial detention facility are the expenses of the close people and relatives only on parcels, which emphasizes the significance of contacts with the relatives and close people during the stay in the places of preliminary confinement.<sup>34</sup>

To the actions, which belong to the given corruption practice, it is also possible to ascribe the reception of corruption payments by an investigator for not applying measures of search of a suspect or an accused person, who is formally on the wanted list. In such situations, the location of a suspect (an accused person) is unknown to an investigator, however, he does not take measures for his detention, because he receives certain corruption payments.

**Corruption practice.** Solution of the issue about provision of an acquittal sentence by a court or return of a criminal case for additional investigation.

Actually, this corruption practice accumulates in itself the actions, described above, when giving characteristics to other corruption practices, because all of them, regardless of the fact, that the majority of them is directed at solution of intermediate goals, are directed at achievement of the most desirable result, – an acquittal sentence in a case, closing of a criminal case or reception of the least severe punishment possible. At the same time, actions of an investigator and a public prosecutor at this practice have some peculiarities, that is why it is examined separately.

The essence of this corruption practice consists in creation of conditions during the prejudicial investigation of a criminal case for pronouncement of an acquittal sentence in a court or sending a criminal case for additional investigation during the judicial examination of a case. Creation of conditions for provision of an acquittal sentence in a case or return of a criminal case for additional investigation, followed by closing of a criminal case, by means of: (a) intentional delay of investigation; (b) intentional low-quality organization of investigation on the whole; (c) conduction or registration of individual actions of investigation with violation of the requirements of the criminal-processual law for acknowledgement by a court of individual proofs impermissible in the future; (d) presentation of non-categorical conclusions by an expert, which allows to level the results of an expertise or interpret them ambiguously; (e) presentation of intentionally wrong conclusions by an expert.

Intentional delay of investigation and intentional low-quality investigation on the whole are the categories, which are very difficult to prove exactly in the part, that these actions were committed intentionally. In particular, it concerns the intentional delay of an investigation, untimely taking of a decision for a case, which results in the loss of important proofs and provides a possibility to the criminals to destroy proofs and

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<sup>33</sup> Buromensky M. V., Serdyuk O. V., Tocheny V. I. Evaluation of social-economic expenses at application of a preventive measure in the form of taking into custody. – Kyiv: Yustynian, 2008. – p. 30.

<sup>34</sup> The same edition, – p. 36

disappear, makes impossible the use of measures, directed at provision of property confiscation and a civil juridical lawsuit in a criminal case. First of all, such actions concern the personal skills of an investigator, which are not connected with the criminal-processual law, supervision over his activity and so on. In such situations an investigator can put aside conduction of interrogations, surveys, seizures, searches and so on for an indefinite term, and thus creating conditions for suspects or accused persons to eliminate proofs or influence witnesses and sufferers.

Another way to creation of conditions for provision of necessary judicial perspective of a case with pronouncement of an acquittal sentence or return of the case for additional investigation is a conscious violation of the requirements of the criminal-processual legislation calculating, that during a judicial examination the proofs, obtained or registered with violation of the criminal-processual legislation, will not be acknowledged possible. The following can be named among the examples: absence of indication in an investigation action protocol of the fact of video filming or audio recording applied, use of “false” witnesses, who were not present during the conduction of the investigation action and so on. A possible scenario of behaviour is also intentional elimination, change or full loss of material proofs in a case, which were mentioned above. Spoilage or elimination of documents – material proofs, makes impossible their expert research, elimination or diminishing of the amount or weight of drugs, elimination of magnetic, digital and other data carriers, with valuable evidential information deprives of proofs, which are actually always are the foundation for accusation in a court. Such actions are disguised as accidents, carelessness, breaking of the rules of handling material proofs (for example, placement of a diskette or a tape within the effective area of magnetic radiation, action of high temperature, moisture) and so on. Also during conduction of investigation actions the order of registration of money, jewelries and other valuable things, withdrawn during conduction of searches, seizures, surveys of places of event, can be infringed. For example, registration of not all the amount of the found and actually withdrawn money assets can be carried out, when the hidden assets are appropriated by investigators. Sometimes it is done under agreement with those people, who were hiding these things. Thus, it takes the form of a bribe. In another situation, a properly registered protocol can be not attached to the materials of a criminal case by investigators at all. Such practices are disguised as insufficient level of knowledge and skill, high workload of an investigator and so on, which allows to avoid a serious punishment and is limited, if exposed, by disciplinary penalties.

Certain corruption practices during the prejudicial investigation are connected with the activity of judicial experts, who, for corruption payments, can resort to direct infringements of the criminal law – passing of a deliberately wrong conclusion of an expertise, and also they can receive non-categorical conclusions as a result of an intentional low-quality expert research. In many cases, non-categorical conclusions of an expertise disable proving in a criminal case. Thus, the guilt of a defendant in commitment of a crime can be not proved, or the guilt in commitment of a less grave crime can be proved. In this sense, the large part is played by the commodity expertise, establishing

the value of property, which has become an object of criminal encroachment. The harm, caused by a crime, is established depending on the value, and on it depends the presence of such a qualifying sign as considerable material harm. A forensic medical expertise also influences the criminal-juridical qualification and proving during investigation of infliction of bodily harms, establishment of the reasons of death and the time of death, establishment of cause-and-effect relation between the actions of a suspect (an accused person) and the criminal consequences. Expertise of drugs also plays a considerable part in proving of a person's guilt in commitment of crimes, related to illegal drug traffic, where the fact of bringing to responsibility depends on the weight and the amount of drugs. Judicial-ballistic expertise and expertise of cold arms also play the decisive part for criminal-juridical qualification and bringing of a person to criminal responsibility in the part of the issues of recognition of objects to be cold arms and fire arms. Forensic psychiatric expertise is also used to avoid bringing to criminal responsibility on the basis of immunity of a person from jurisdiction or establishment of diagnoses, which can influence the strictness and type of punishment.

*The fact of existence of abuses at formation of conclusions of a forensic psychiatric expertise was declared in Kharkiv, where in the spring of the year 2008 a scandal flamed up around the Kharkiov inter-regional centre of forensic psychiatric expertises. The scandal arose from a statement of five doctors of the centre, that the head of this centre forced them to sign expert conclusions, which did not meet the real situation.*<sup>35</sup>

*As the judicial experts testified, every tenth examination, which was conducted in the centre from the spring of 2007 to the spring of 2008, was conducted with infringements.*<sup>36</sup>

However, in such situations the question is about conscious infringement by judicial experts of the current legislation for corruption remuneration, when the legislation does not contain factors, which create conditions for commitment of abuses on the part of experts, who bear criminal responsibility for drawing of a deliberately wrong conclusion. The reason, that such cases take place, is absence of actual possibility for a suffered or an accused party in a criminal process to appoint alternative expertises in relation to the same object, which complicates external control over the experts' activity. The position of dependence of the experts, who work in the departmental expert institutions, for example, in the Ministry of Internal Affairs, on the heads of a structural department (a district, city department, the regional administration), who sometimes receive instructions from the

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<sup>35</sup> Larysa Salimonovych // Young Ukraine. - <http://www.umoloda.kiev.ua/number/1118/324/39953/>

<sup>36</sup> Rharxiv psychiatric hospital is in the centre of a scandal // Newscast "Details of TV" of march the 10-th, the year 2008. - <http://podrobnosti.ua/podrobnosti/2008/03/10/503447.html>

heads about falsification of the results of expertises for “needs of the service”. Such cases are unknown to us, however, taking into account general tendencies, which exist in the departments and offices of the internal affairs bodies, such cases should not be excluded.

During the conducted research, the issues of spreading of participation of judicial experts in corruption practices have been studied. Taking into account, that according to the Law of Ukraine “On Judicial Examination” those experts work in Ukraine, who are on the staff of public expert institutions – institutes of judicial expertises of the Ministry of Justice, expert centres, departments and offices in the structure of the Ministry of Internal Affairs, and the expert institutions of the Security Service, the Ministry of Defence and the Ministry of Health and private judicial experts – entrepreneurs, who are engaged in expert practice independent from public institutions. Half of the interviewed experts (50.1%) pointed at existence of the practice of bribing of forensic experts. Herewith the respondents consider private forensic experts to be more disposed to corruption practicess. The poles assessed the spreading of corruption agreements among different types of forensic experts in the following way: forensic experts of state forensic examination institutions – 38.4%, private forensic experts – 48.1 %, could not answer – 32.7%.

In terms of spreading of corruption practices during conduction of investigation actions and use of gaps in the law for commitment of such actions, by the results of expert polls it is possible to draw a conclusion, that such practices are not considered widely spread. Only 13.4 % of experts suppose, that such practices are encountered during the conduct of searches, seizures and surveys quite often, and 13 % say, that such practices are encountered often, while 46.5 % of experts say, that such situations are possible in particular cases, and 26.9 % of experts are unaware of such facts at all. A little different situation took place concerning the opinion of experts about spreading of corruption practices during the conduct of judicial expertises. 13 % of the polled experts consider such practices quite frequent, and 18.9 % of experts consider them frequent. However, 32.1 % of experts suppose, that such practices occur rarely, and more than one third, 35.9 %, of experts are unaware of the existence of such corruption practices (see **Diagram 45**).

*Diagram 45.*

**Spreading of corruption actions, when certain processual actions are executed at the pre-trial investigation stage: experts' evaluations**

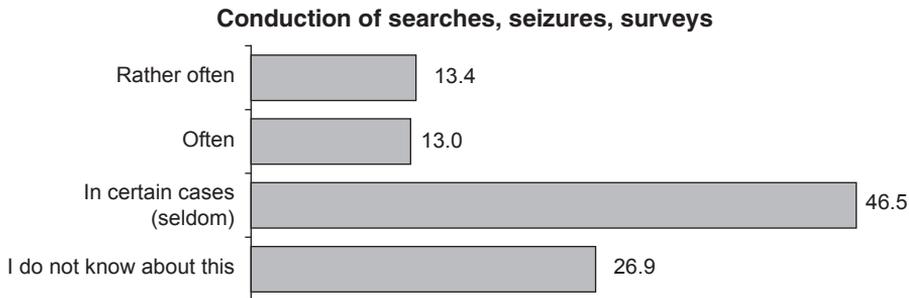
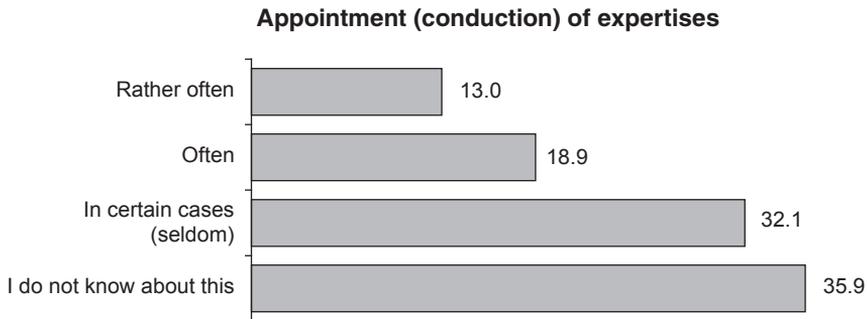


Diagram 45 (continuation).



**Corruption practice.** Solution of the issue of putting pressure upon certain persons for the purpose of solution of one's own interests or businesses interests of third persons.

During the consideration of corruption practices, inherent to the stage of verification of information about a crime and institution of a criminal case, the issues of "ordered criminal proceedings" were considered, when a criminal case is instituted exceptionally for the purpose of putting pressure upon a certain person. During the prejudicial investigation are also encountered cases of commitment of illegal actions for corruption payments for the purpose of putting pressure upon certain persons. Such practices can be a continuation of actions, committed at institution of a criminal case, and can be committed during the investigation of a criminal case on legal grounds. A decision about institution of a criminal case, as a rule, is accompanied by a decision about selection of a preventive measure in the cases, where identity of the criminal is established, or those, where a criminal case can be instituted exceptionally against a certain person. Selection of such a preventive measure creates a big number of possibilities for putting both psychological and physical pressure upon a person. In such situations, for the purpose of putting psychological pressure upon a person with all methods an attorney is not allowed to meet a defendant. Usually it is done with reference to absence of an investigator's "permission". Without the indicated "document" an attorney will not be admitted to the temporary holding facility. Attempts of an attorney to receive the "permission", as a rule, are unsuccessful, because an investigator avoids meeting him. Also, taking into account the fact, that detention takes place, as a rule, on the eve of the week-ends – a detained person is absolutely defenceless for the first three days. Of course, an attorney tries to use the possibilities, given by the law: filing of requests to the head of an investigation body, a public prosecutor and so on.

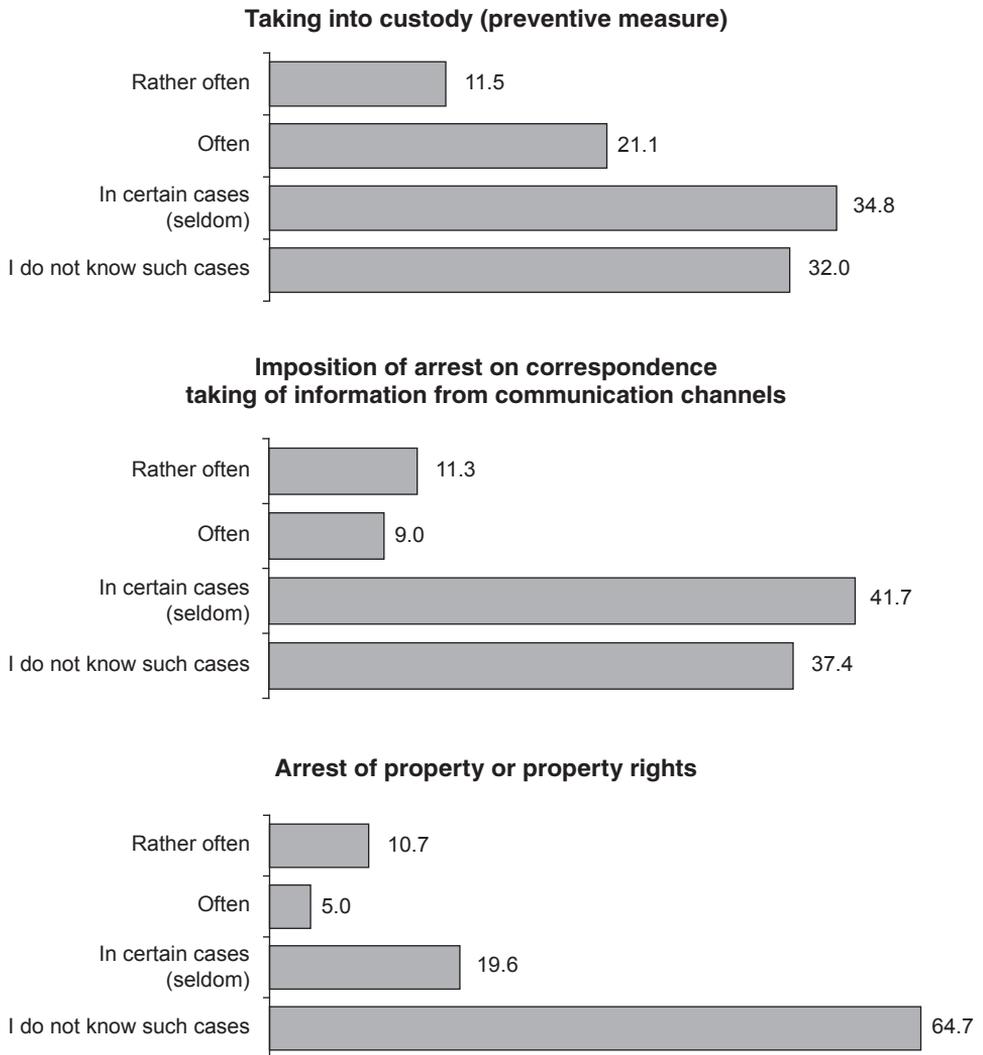
In fact, according to Item 1 of Article 44 of the CPC of Ukraine the authority of a defender for participation in a case is confirmed by a warrant of an appropriate association of attorneys. There is no need in any "permission" in writing or in other form. Moreover,

investigators, in accordance with Article 47 of the CPC, are obliged to provide for a detained person or a person, kept in custody, help in establishment of communication with a defender. However, this norm is absolutely ignored. Until an attorney finds a possibility to meet his client, all the time law-enforcement officers “work” with a detained person. They can have different goals: from intimidation to direct compulsion to give financial assistance for building and development and so on. In the future, if it becomes known, that indeed the detained person has, committed a crime, verification, as a rule, is not conducted by a public prosecutor’s office or conducted superficially.

As a rule, taking into custody is offered to a suspect or a defendant person as the only possible preventive measure, and he can be delivered from it only if he meets certain conditions – either for corruption payment, or if he provides certain testimonies. For example, taking the guilt for unsolved non-grave crimes, for example, for theft. Thus, “having solved” crimes an investigator can count on encouragement, promotion, increase of money supply and so on.

Intentional illegal actions in behalf of third persons, which are committed by investigators during the pre-trial investigation for corruption payments, are not limited by the selection of a preventive measure in the form of taking into custody. Investigators for lucrative reasons can also commit an arrest of property or rights of properties and impose an arrest on correspondence and retrieve information from communication channels. Such actions are accomplished for the purpose of putting pressure upon a person, appropriation of the person’s property and illegal reception of information about a person, his activity, doing of business and so on.

Interviews with experts confirm existence of such practices and their certain spreading. Most often, according to the opinion of the experts, instances of application of taking into custody exclusively on the grounds of corruption payment take place. According to the opinion of 11.5% of pollees such situation could happen “rather often” and according to 21.4% – often). 34.8 % of the experts acknowledged, that such situations are rare, but 32 % of experts are unaware of such situations in general. Cases of imposition of arrest on correspondence and taking of information from communication channels take place less often. 11.3 % of the experts consider such practices quite frequent and 9 % of experts consider them frequent. In opinion of 41.7 % of experts such practices are used rarely and 37.4 % of the polled experts are unaware of such practices. In opinion of the polled experts the least wide-spread practices are those relating to the arrest of property or rights of property. Only 10.7 % of the experts consider them quite frequent, 5 % – frequent and 19.6 % – rare. 64.7 % of experts are unaware of such practices in general (see **Diagram 46**).

*Diagram 46.***Spreading of situations, when some procedural measures are taken exclusively with the aim of reception of a corruption payment: experts' evaluations**

Existence of such practices is indirectly confirmed by the results of activity of the Internal Security administration of the Ministry of Internal Affairs of Ukraine. For 9 months of the year 2008 based on the materials of internal security 455 criminal cases were instituted. In particular, based on the facts of infringement of constitutional rights of citizens during execution by militia officers of their official duties 123 criminal cases were instituted. Among them are illegal apprehension of citizens and infliction of bodily harms to them, illegal conduction of search and appropriation of the property of citizens, illegal bringing to criminal and administrative responsibility and illegal detention.<sup>37</sup>

Not only abuse of processual rights, given to the officers of bodies of inquiry and pre-trial investigation, can become the subject of corruption exchange, but also breaking of the rules of keeping official secrets by granting to the criminals of consultations about counteraction to investigation and prevention of detention of criminals.

*Two officers of the Security Service of Ukraine have been detained in Kirovograd region. They rendered advisory services on security and secretness of actions for reception of a bribe to a group of bribers, who were extorting 190 thousand US dollars and 120 thousand hryvnas from a private entrepreneur for solution of the question of recognition of him as the winner of an auction on selling of a non-residential three-storeyed building. In particular, they gave them advices and instructions about how to avoid responsibility for giving a bribe and about the methods, used by the law-enforcement officers to counteract this type of crime. Also, by using special equipment they had to provide verification of the received assets for their authenticity and absence of special chemical marks for exposure in bribery. For that they were supposed to receive their share of money from the bribe.*<sup>38</sup>

We consider, it is necessary, when examining corruption practices at the stage of pre-trial investigation to pay attention to the cases, when using the quite wide-spread idea about corruptibility of the bodies of pre-trial investigation and insufficient legal awareness of citizens, investigators or operative officers resort to actions, which remind corruption practices, however, by the acting CC they are qualified as a swindle. These are the situations, when the officers of bodies of inquiry and pre-trial investigation promise

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<sup>37</sup> The MIA will go on getting rid principally of officers, who are capable of stepping over the border of the law // Information of the Department of public relations and the international activity of the MIA of Ukraine of 09.10.2008 <http://www.mvs.gov.ua/mvs/control/mmvs/control/main/uk/publish/article/149767>

<sup>38</sup> Participation of two officers of the Security Service of Ukraine in bribery was revealed in Kirovograd region// Information of the Department of public relations and the international activity of the MIA of Ukraine of 23.04.2009 <http://www.mvs.gov.ua/mvs/control/main/uk/css/common/img/common/uk/publish/article/202936>;

for a certain remuneration to solve an issue of taking certain decisions about non-bringing to criminal responsibility, closing of a criminal case, selection of a preventive measure alternative to taking into custody, and so on. However, they actually have no authority to commit such actions and take decisions, because a criminal case is not under their conduction. The examples of such situations have been given above, and now we can give a few more examples, known in the investigation-judicial practice.

*The Public Prosecutor's Office of Poltava region has instituted a criminal case against the deputy chief of the criminal search sector of one of the regional departments of the Main Administration of MIA of Ukraine in Poltava region, who for the purpose of appropriation of another person's property by means of deception, by abusing his official status, extorted and received a bribe in the amount of 4 thousand US dollars from the father of an accused person for assistance in taking a positive decision in the court in order to receive a conditional sentence instead of real imprisonment for the committed crimes, based on the signs of crimes, specified in Part 1 Article 190, Part 2 Article 364, Part 4 Article 27, Part 1 Article 15, Part 1 Article 369 of the CC of Ukraine.<sup>39</sup>*

*In Khmelnytsk an investigator of the line department at the Khmelnytsky station of the South-West railway has been sentenced for 5 years of imprisonment for a swindle and abuse of official status. He used unawareness of a person under investigation in legal questions to intimidate him repeatedly by the perspective of conviction for imprisonment and finally offered his assistance in solution of that issue "with the public prosecutor's help". For that purpose allegedly a bribe had to be passed to the latter.*

At the stage of pre-trial investigation of crimes it is possible to mark out a considerable number of various corruption practices, however, more exact assessment of their spreading requires independent researches. The characteristic feature of the overwhelming majority of corruption practices at this stage of criminal proceedings is not so much usage of collisions or gaps in the legislation, as direct ignoring and infringement of the requirements of law.

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<sup>39</sup> The press-service of the General Public Prosecutor's Office of Ukraine 07.05.2008. A criminal case has been instituted against the head of one of district departments of the MA of the MIA of Ukraine in Poltava region// Information of the press centre of the General Public Prosecutor's Office of Ukraine. - [http://www.gpu.gov.ua/ua/news.html?\\_m=publications&\\_t=rec&\\_c=view&id=14666](http://www.gpu.gov.ua/ua/news.html?_m=publications&_t=rec&_c=view&id=14666)

### **3.2.5 Corruption Risks at the Stage of Trial Examination of a Criminal Case**

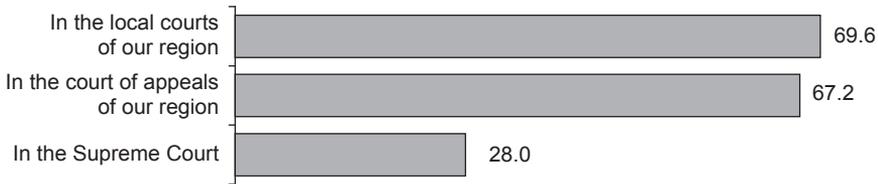
The stage of trial examination of a criminal case starts from the moment, when a criminal case is received by a judge, and ends, when the verdict enters into force. The only subject of corruption practices at this stage is a judge, who is empowered to make decisions about cancellation or change of a preventative measure, change of the criminal-judicial qualification of an act from a more serious to a less serious, application of a softer kind and character of punishment or the minimal term of imprisonment. A judge can also release from criminal responsibility or acquit a defendant from serving a punishment on certain condition.

The trial is divided into two stages: preliminary consideration and hearing in court room. During preliminary consideration judge considers the following issues: (1) if the case falls into the jurisdiction of the court, for examination by which it has come; (2) if there are any grounds for cancellation or postponement of the case; (3) if indictment act compliant with CPC requirements; (4) if there are any grounds for cancellation, change or application of particular preventative measure; (5) if there were such violations of the CPC during pre-trial investigation, which would prevent from the hearing. During the hearing all the proofs are examined, necessary decisions are taken and the verdict is announced. Thus the majority of issues, which could become a subject for corruption exchange, could be solved already at the stage of preliminary hearing of the case. During the hearing and while pronouncing a verdict, a judge can abuse his/her discretionary powers towards evaluation of proof and circumstances of the case, determination of a social danger of a person etc. In other words, a judge can disrespect proofs or not take into account particular circumstances, and as a result take decisions for the benefit of the beneficiaries of corruption practices.

In comparison to other stages of criminal proceedings, which have been considered earlier, the trial stage is considered by the experts to be less corrupted, 32.7 % of the experts consider, that corruption practices are widely spread at this particular stage (see **Diagram 28**).

In general criminal proceedings at the trial stage passes three instances: by a court of the first instance, a court of appeals and a cassation court, which is the Supreme Court of Ukraine. During the interviews the experts were asked their opinion regarding occurrence of corruption practices in each instance.

**Diagram 47** illustrates general evaluations by the experts of the level of spreading of corruption practices in courts of each instance.

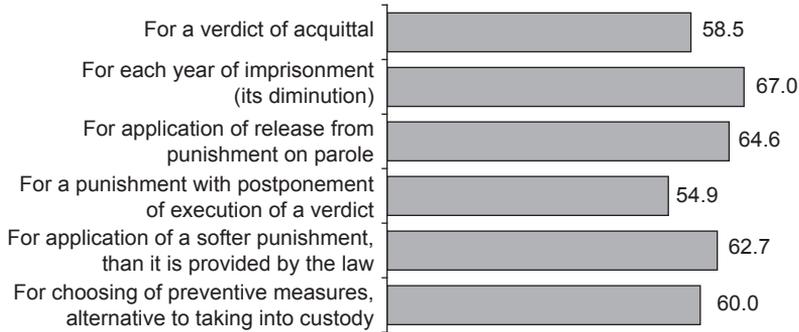
*Diagram 47.***Spreading of corruption practices in criminal proceedings: experts' evaluations***(% of those, who consider, that such practices are widely spread)*

As this Diagram shows, local courts i.e. first instance courts and court of appeal are considered to be the most corrupted. Almost equal number of experts consider first instance courts and courts of appeals to be equally corrupted, respectively 69.6 % and 67.2 %. A considerably smaller number of experts – 28 % – consider, that corruption practices are widely spread in the Supreme Court of Ukraine.

Though the given above data show quite a high level of occurrence of corruption practices, it is not quite an evident indicator of corruptness of criminal proceedings. More than one third of the experts (37.7%) agreed with the statement, that “the kind, and form criminal punishment as well as length of the imprisonment in the majority of cases are determined by an agreement, reached between a judge, a defence attorney and a prosecutor before the hearings, based on corruption agreements”. At the same time only 13.2% of the respondents agreed with statement, that “it is not possible to receive fair and impartial verdict without corruption payment”. This contradictory evaluation was a subject for discussion at focus groups with judges and defence attorneys. The received explanations can’t be admitted as exhaustive, because participants of the focus groups made an accent exclusively on “the guarantees of fairness and impartiality, existing in the criminal process itself, which relate to the possibility to appeal decisions, and presence of real procedural rights of the parties of an examination.”

Existence of the “tariffs” for some procedural decisions or measures evidence the customary character of corruption practices in criminal proceedings. Experts’ evaluations of these issues are shown in **Diagram 48**.

The Diagram shows, that almost in each of the suggested decisions, which could be taken by a judge, based on corruption agreements with beneficiaries of corruption practices, there are corruption tariffs according to more than a half of the interviewed experts. The most wide spread court decisions, which have corruption tariffs are decisions regarding the term of imprisonment with payment for each reduced year in a prison (67%), imposition of punishment on parole or probation (64.6 %) and application of a softer punishment, than it is provided by the law (62.7 %). The smallest number of

*Diagram 48.***Experts' evaluations of existence of "corruption tariffs" in courts for certain kinds of decisions or actions***(% of those, who agree with the thesis about existence of appropriate "corruption tariffs")*

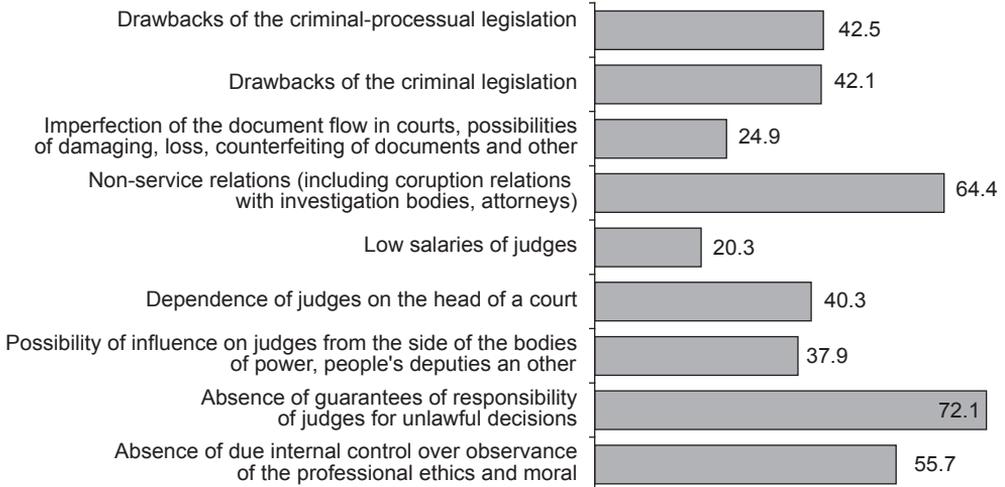
the polled experts – 54.5 % – indicate existence of corruption tariffs for imposition of a punishment with suspended execution of sentence.

During in-depth interviews concrete data with numbers regarding existing “corruption tariffs” were received:

- For a sentence of acquittal: “from 3 to 10 thousand US dollars”, “it depends on the charges and circumstances of the case but in average – from 1 to 30 thousand US dollars”, “not less than 3 thousand US dollars”, “the last known to me fact – 15 thousand hryvnas”;
- For each reduced year of imprisonment: “1 thousand US dollars for each reduced year”, “2500 US dollars for a year”, “3000 hryvnas for a year”, etc.;
- For imposition of a punishment on parole or probation – the majority of respondents named an average customized “tariff” – “5 thousand US dollars” though at the same time it was noted that the amount could vary in either way;
- For choosing of preventative measures alternative to pre-trial detention – in this case the estimations vary considerably, because respondents used quite a broad specter of the “tariffs” – from 10 thousand US dollars to tens of thousands of US dollars. Everything depends on the circumstances of a case and the capabilities of interested persons.

During the research factors, favoring generation and development of corruption practices at the stage of trial in a criminal cases, were considered. Different by essence factors influence differently formation of corruption practices at the trial stage of criminal proceedings. Experts' evaluations of such influence are presented in **Diagram 49**.

Diagram 49.

**Significance of certain circumstances for formation of corruption agreements: experts' evaluations of criminal proceedings***(% of those, who evaluate such circumstances as significant)*

Analysis of the received results leads to the following conclusions. First of all, the experts do not consider the drawbacks of the criminal-procedural and the criminal law to be key factors, though 42.5% of the respondents have drawn attention to some provisions of the criminal procedural law, which generate corruption, and 42.1% of respondents consider some deficiencies of the criminal law to be the factors, which generate corruption at this stage of criminal proceedings. At the same time, when carrying out the in-depth interviews, it was indicated, that the conditions, favouring the corruption practices at the stage of judicial examination of a case, are the provisions of the criminal substantive law, which give wide discretionary possibilities for a judge to select the kind and the nature of a punishment for commitment of a crime, and absence of proper control over a judge's activity, who acts under the conditions of the imperfect law, the drawbacks of which were described during the consideration of the previous stages of criminal proceedings. Moreover, in accordance with the provisions of the CPC, a judge takes a decision based on his own internal persuasion, which is a sufficiently subjective process. Certain corruption risks are also born by the right of a court in the necessary cases at its own initiative to demand and study the proofs at the judicial meeting. Such right of a court creates conditions in case of presence of a corruption agreement with one of the parties to conduct a judicial investigation in its favour or not to conduct it. Such a situation also breaks the principle of competitiveness of a process. The development of corruption practices at the stage of trial examination of a criminal case is also favoured by the right of a court to send a criminal case for additional investigation, which, besides

this, also breaks the principle of equality of the parties and competitiveness of a process, because the accusing party in this case has the “second chance” for proving the guilt of a person.

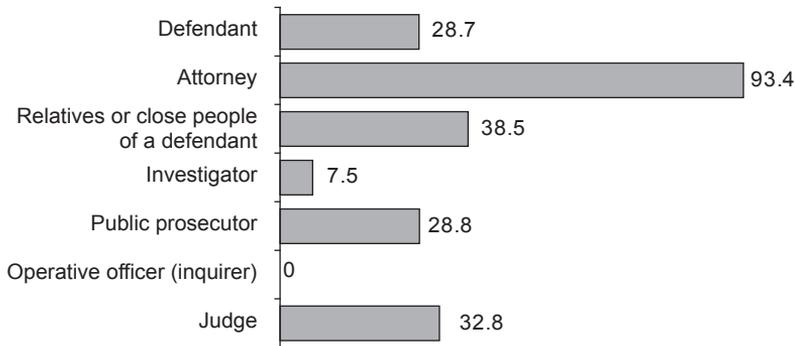
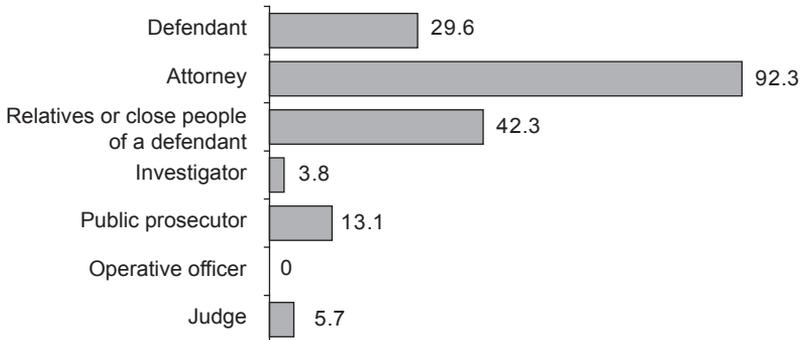
Second, the majority of the experts (72.1%) ties corruption motivation with “impunity” of judges for corruption abuses. During in-depth interviews such assessments were clarified by the following statements: “there is an excessive and quite often unjustified corporate solidarity of judges, even when appointing punishments in completed and well grounded cases of bribery, judges when show “softness and sympathy”, “procedures of bringing to responsibility are complicated”. Assessments regarding “impunity” correspond with the statement, that “absence of proper internal control over abundance of professional ethics and moral rules”. 55.7% of the respondents have drawn attention to this. In the in-depth interviews the interviewees highlighted “the formalism and declarative character of the rules of judicial ethics”, “absence of effective and real mechanisms of control and responsibility”.

Facts of obvious infringement of the requirements of the law by individual judges during examination of criminal cases are connected with the named factors. In particular, from the organizational and procedural point of view, the acts of corruption from the side of a judge are committed by way of formal attitude to the issues, which must be decided, in particular at the stage of preliminary consideration of a case. The judges, because of permanent demands of the courts of appeals and the Supreme Court to keep to the schedule of examination of a case, quite superficially approach the study of a case, and that is why the solution of issues, raised by the law, does not actually take place. As the practice demonstrates, judges suppose, that study of the issue of observance of the requirements of the criminal-processual law is possible directly at a court sitting. Thus, a judge can ignore possible infringements of criminal and criminal-processual law, which took place during the pre-trial investigation of a case. On the other hand, under condition of participation of a judge in the corruption agreements, a judge can solve the required issue already at this stage.

When considering a case in a court, a judge can ignore the requirements of the criminal-processual law concerning the subject and the sources of reception of proofs, give an improper evaluation to the actions of a defendant and so on. Such infringements of the requirements of the law on the part of a judge can be explained not only by the corruptness of the latter, but also by superfluous workload of judges, by an insufficient qualification level of a judge and so on.

Third, the next in significance factor according to the experts’ assessment is informal contacts of judges, defence attorneys, law enforcement officers, and this was acknowledged by 64.4% of the respondents. In this relations the most latent mechanisms of judges’ dependence are formed, which become a basis for further corruption relations.

These results were clarified in the evaluations of participation of some persons in direct negotiations regarding corruption agreements and performance by these persons of the functions of a middleman in transferring corruption payments (see **Diagram 50 and Diagram 51**).

*Diagram 50.***Persons, who conduct the main negotiations for achievement of a corruption agreement during examination of a criminal case in a court: experts' evaluations***Diagram 51.***Subjects of criminal proceedings, who immediately transfer a corruption remuneration to judges: experts' evaluations**

These data in comparison to the data, received regarding the pre-trial stage draw attention to the raised role of defence attorneys, and this is the key point of corruption agreements. 93.0% of the respondents acknowledge, that defence attorneys conduct negotiations on a corruption agreement, and 92.5% acknowledge, that defence attorneys channel corruption payments to judges. Besides that, at the stage of negotiations the role of prosecutors and judges (colleagues of a person, who examines the case) is quite significant. Earlier we have drawn attention to the fact, that experts noted quite a high significance of informal alliance “a prosecutor – a judge” for formation of corruption relations (48.1% acknowledged, that such alliance is used “quite often” and 13.4% – “often”). In general, in the result of analysis of the data, received about informal relations between different participants of criminal proceedings, alliance “a prosecutor – a judge”

is the most corruptogenic type of informal relations between officials in criminal proceedings.

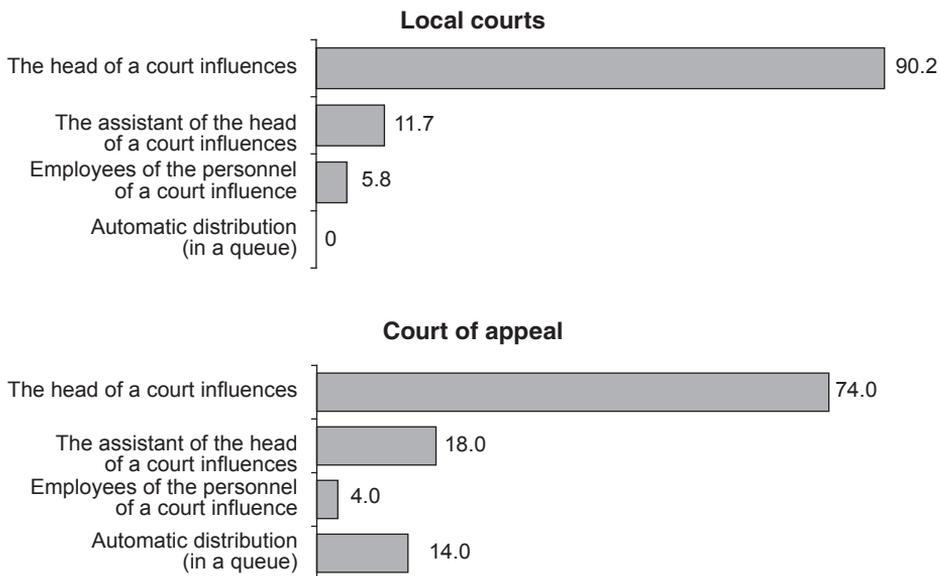
Quite an important finding is the fact, that almost half of the respondents (49.2 %) have drawn attention to the existence of steady arrangement between judges of the first instance and of the courts of appeals regarding upholding rulings of the first instance courts, which were issued based on the corruption agreements.

The research also discovered facts of participation of witnesses and victims in corruption relations, who are bribed with the aim of changing their testimony or testify in a necessary way (“paid witnesses”), refusal from a claim etc. But in comparison to the pre-trial investigation stage it happens more rarely.

Fourth, about 40.0% of the respondents have drawn attention to existence of non-procedural dependence of judges inside and outside the judicial system upon corresponding heads of courts and politicians, deputies etc. It is conditioned by the particularities of functioning, financing and organization of the courts activities, the leading role of the head of court in assignment of cases and thus of the workload of each judge, by the necessity to secure activities of the court by own means etc. Thus, according to the experts’ opinion assignment of cases is the courts are the most sensitive to corruption procedure within administration of court proceedings. **Diagram 52** provides assessment of existence of influence at the case assignment procedure in the courts of first instance and appellate courts.

*Diagram 52.*

**Peculiarities of distribution of cases (criminal proceedings):  
experts’ evaluations of the conditions in the courts of their region**



As the diagram shows, the main part in the distribution of cases among the judges is acted by the head of a court and his deputy, on the average more than 90 % of experts agreed with such situation. This allows them, on the one hand, to influence the judges in terms of organization, for example, to give the most difficult or unpleasant cases for distribution among the judges, who do not respond certain requests of the head of court or for other reasons do not satisfy the head of court. On the other hand, this allows to distribute criminal cases in the way, to be able to influence the solution of a case, that is, to those judges, who pay heed to the “advices” of the head or constantly take part in the corruption schemes, share the corruption profits and so on. According to the experts’ opinion, the current practice makes it possible to secure assignment of a particular case to the “necessary judge”: 86.2% of respondents acknowledge this possibility in local courts and 81.0 % – in the courts of appeal.

Insignificant percentage of the poles (5.8 % – for the local courts and 4 % for the court of appeals) point at the fact, that the distribution of cases can be influenced by the employees of a court. Such cases are possible, when the employees of a court execute certain technical work, related to the distribution of cases, or they know the system, according to which the cases are distributed by the head of a court or his deputy. The respondents draw attention to the fact, that court personnel also participates in other corruption relations. 46.9% of the interviewees agreed with this. During in-depth interviews it was estimated, that court personnel receives corruption payments for different actions, but mostly for assistance in “getting access to particular judges”, provision of a possibility of familiarization with particular documents in a case, delay or speeding up of the “movement of certain documents” etc.

Fifth, only 20.0% of the polled experts tie corruption abuses by judges to the low salaries. During in-depth interviews it was also repeatedly mentioned, that it is not possible to explain judicial corruption dominantly by motivations, based on dissatisfaction with the level of salary.

Sixth, an additional factor of corruption practices in courts was discovered during the in-depth interviews – the low level of professional education of judges. It is worth to note, that the low level of professional preparation is characteristic not only to judges but also other representatives of the juridical profession. In particular, last time more and more is talked about the substantial worsening of the level of professional preparation of investigators and public prosecutors, who studied both in specialized and civil educational establishments.

### **Types of Corruption Practices at the Stage of Trial Examination of a Criminal Case**

The main objects of corruption practices at the stage of trial examination of a criminal case are: (a) reception of a judgment of acquittal of a court; (b) reception of a punishment, not connected with imprisonment and/or confiscation of property; (c) reception of a punishment with the postponement of a sentence; (d) reception of a punishment, not

connected with imprisonment; (e) reception of the maximum possible minimal punishment or term of imprisonment. In individual cases the object of corruption exchange can also be taking of a decision by a judge about a change or cancellation of a preventive measure in the form of taking into custody in case of reception of a corruption payment.

Based on this, it is possible to mark out the following general corruption practices, classification of which is based on the nature of a decision, which a judge takes:

1. Solution of the issue about release from criminal responsibility.
2. Solution of the issue about release from serving the punishment.
3. Solution of the issue about application of the highest possible minimal punishment.
4. Solution of the issue about change or cancellation of a preventive measure.

The essence of all the named corruption practices consists in the fact, that a judge using his own discretionary authorities, sometimes with infringements of the requirements of the criminal-processual law, takes a decision considering the interests of a defendant for a certain corruption payment. The type of decision, in this case it is an object of corruption exchange, depends on the circumstances of a case, type and character of proofs in a case, activity of the sufferers or their representatives in a case, public resonance of a case, quality of pre-trial investigation, financial possibilities of a beneficiary, presence of corruption alliance with the judges of a court of appeals and some other factors. The given data about the rates for corruption services, although they are ramified, testify the importance of one or another decision, which is determined by the “cost of an issue”. Fluctuations in the sizes of the sums probably depend on the complexity of a case and other factors, which have just been shown.

By the methods of actions on the part of a judge, all the named corruption practices do not have substantial differences – that is taking a certain decision. The rest of characteristics, such as public unsafety of such actions, severity of infringement of the requirements of the criminal-processual law and so on, will be individual for each particular case. That is why corruption practices of this stage of criminal proceedings will be described generally.

**Corruption practice.** Solution of an issue about release from criminal responsibility during the trial examination of a criminal case takes the form of a judgement of acquittal or taking a decision about closing of the criminal case under circumstances, considered above, concerning corruption practices, which take place during pre-trial investigation.

*For example, the Public Prosecutor’s Office of the Autonomous Republic of Crimea instituted a criminal case in relation to a female judge of the District Administrative Court of Kyiv region. Earlier, when working as a judge of the Railway district court of Simferopol without holding judicial sittings, she forged a decision in favour of a defendant.*

*In particular, the judge, having allegedly considered a criminal case at an open judicial sitting, ruled to release him from criminal responsibility and close this criminal case in connection with changing of the circumstances of proceedings.<sup>40</sup>*

Although, in the given case the fact of reception of a bribe by a judge was not established, but the corruption motive of her actions is obvious. She will endure punishment for taking a deliberately wrongful decision and official counterfeit.

**Corruption practice.** Solution of an issue about release from serving of a punishment can take forms of release from punishment on probation or release from punishment on parole, or release from punishment with application of compulsory measures of educational nature for a juvenile person. In such situations a judge can ignore certain circumstances, which characterize a person and the circumstances in a case, which burden the guilt of a defendant. To ensure solution of this issue, a judge can preliminary change the criminal-juridical qualification of an act from more heavy to less heavy.

*For example, a criminal case was instituted by the General Public Prosecutor's Office of Ukraine in relation to the deputy head of one of the district courts of Odessa region for extortion and reception of a bribe from a defendant in the amount of 4 thousand US dollars for pronouncing a sentence, unconnected with real deprivation of freedom and the right to occupy certain positions<sup>41</sup>.*

*In septembre of the year 2007 a judge of a district court of Rivne region was detained "red-handed" by officers of the Security Service of Ukraine during reception of a bribe. The judge was extorting a bribe from a defendant in the form of A-95 brand petrol in a criminal case, which was in his proceeding, for his release from serving the punishment with a probation term.<sup>42</sup>*

<sup>40</sup> A judge was exposed in taking a deliberately wrongful decision // Report of the Department of Government Service of fight against economic criminality of Ministry of Internal Affairs of Ukraine of 17.01.2009 <http://www.mvs.gov.ua/mvs/control/main/uk/publish/article/css/main/uk/publish/article/172114> A criminal case has been instituted in relation to a female judge, who illegally freed from criminal responsibility a person accused in a bribery // Report of the Press-Service of the General Public Prosecutor's Office of Ukraine of 11.12.2008 [http://www.gpu.gov.ua/ua/news.html?\\_m=publications&\\_t=rec&\\_c=view&id=21247](http://www.gpu.gov.ua/ua/news.html?_m=publications&_t=rec&_c=view&id=21247).

<sup>41</sup> A criminal case in relation to the head of one of the district courts of the Odessa Region was instituted by the General Public Prosecutor's Office of Ukraine // Report of the Press-Service of the General Public Prosecutor's Office of Ukraine dated 16.09.2008 [http://www.gpu.gov.ua/ua/news.html?\\_m=publications&\\_t=rec&\\_c=view&id=18525](http://www.gpu.gov.ua/ua/news.html?_m=publications&_t=rec&_c=view&id=18525).

<sup>42</sup> The SSU counteracts corruption in authoritative administrative, law enforcement and supervisory bodies // Report of the Press-Centre of the SS of Ukraine dated September 27, 2007 [http://www.sbu.gov.ua/sbu/control/uk/publish/article?art\\_id=68989&cat\\_id=68254&mustWords=%D1%85%D0%B0%D0%B1%D0%B0%D1%80+%D1%81%D1%83%D0%B4&searchPublishing=1](http://www.sbu.gov.ua/sbu/control/uk/publish/article?art_id=68989&cat_id=68254&mustWords=%D1%85%D0%B0%D0%B1%D0%B0%D1%80+%D1%81%D1%83%D0%B4&searchPublishing=1).

**Corruption practice.** Solution of an issue about application of the maximum possible minimal punishment consists in solution of an issue about application of punishment, not connected with deprivation or limitation of freedom; application of the minimal term of imprisonment or a term, which is less than the lower limit, provided by a sanction of an appropriate article of the Criminal Code. The list of the judge's actions in this situation will be the same, as in the previous practice.

*For example, in October 2008 in Mariupol town a judge of Ordzhonikidze district court was detained for extortion and reception of a bribe in the amount of 2 thousand US dollars from the wife of a defendant in a criminal case for pronouncement in his relation of a sentence, not connected with limitation of freedom.<sup>43</sup>*

*The main investigation administration of the General Public Prosecutor's office of Ukraine has accomplished pre-trial investigation and directed to a court a criminal case on accusation of the head of one of the local courts of Donetsk region for reception of a bribe – 8 thousand US dollars for meting out a less heavy punishment to a defendant, than it is provided by the proper sanction of an article of the Criminal code of Ukraine, and also in relation to an attorney for complicity in giving a bribe to the same head of the court in the mentioned case.<sup>44</sup>*

**Corruption practice.** Solution of an issue about a change or cancellation of a preventive measure consists in the judge's actions, directed at ungrounded taking of a decision about a change of a preventive measure in the form of taking into custody to another preventive measure, which is not connected with detention in custody. As a rule, similar judge's decisions are taken at the stage of pre-trial investigation. However, the law gives a possibility to a judge to do it independently. A judge can resort to such corruption practice at the stage of trial examination of a case in situations, when a defendant has failed to "come to agreement" about it with an investigator and/or a public prosecutor earlier. In fact, in order to take an appropriate decision at the stage of pre-trial investigation, a judge has to receive a proper presentation from an investigator or a public prosecutor. The results of activity of the General Public Prosecutor's Office of Ukraine testify about existence of such practice.

*For example, the Central Administration on investigation of particularly important cases of the General Public Prosecutor's Office of Ukraine has*

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<sup>43</sup> A judge of one of the district courts of Mariupol was exposed for the reception of a bribe // Report of the press-service of the General Public Prosecutor's Office of Ukraine dated 08.10.2008 [http://www.gpu.gov.ua/ua/news.html?\\_m=publications&\\_t=rec&\\_c=view&id=19268](http://www.gpu.gov.ua/ua/news.html?_m=publications&_t=rec&_c=view&id=19268)

<sup>44</sup> A criminal case in relation to a judge-briber and an attorney was directed to a court // Report of the press-service of the General Public Prosecutor's Office of Ukraine dated 29.05.2007 [http://www.gpu.gov.ua/ua/news.html?\\_m=publications&\\_t=rec&\\_c=view&id=90021](http://www.gpu.gov.ua/ua/news.html?_m=publications&_t=rec&_c=view&id=90021)

*accomplished proceedings of a criminal case: by an accusation of the head of one of the local courts of Dnipropetrovsk region in extortion and reception in July, 2008 of a bribe in the amount of 50 thousand US dollars for a change in favour of a defendant of a preventive measure from detention in custody in a detention facility to a recognizance not to leave.*<sup>45</sup>

The results of activity of the public prosecutors' offices in the first half of the year 2008 testify the existence and certain spreading of corruption practices at the stage of trial examination of criminal cases too. For the indicated period the public prosecutors achieved cancellation by their appeals of the decisions of courts about 89 persons, groundlessly acquitted or whose cases were closed on the basis of vindicating grounds; 478 persons – because of the leniency of the appointed punishment; 984 – because of groundless return of cases by the courts for additional investigation. Certainly, not in all of the indicated cases the judges pronounced such sentences on the basis of corruption reasons, however, taking into account certain spreading of corruption practices at this stage of the criminal process, it is possible to say, that these figures testify taking by the judges of decisions about groundlessly lenient punishments.<sup>46</sup>

By the data of the Security Service of Ukraine, 29 criminal cases were instituted in relation to judges in the year 2006, based on materials of the SS of Ukraine, in the year 2007 – 43 cases, in 2008 – 52 cases. But, during the first quarter of the year 2009 – 24 criminal cases were instituted. The overwhelming majority of these criminal cases were instituted based on the signs of bribery by the judges at taking of deliberately wrongful decisions both in criminal and civil and other cases. The Security Service of Ukraine highlights as a particular problem the corporateness of the judicial system, which conditions taking of biased decisions by courts at examination of criminal cases about accusation of judges in commitment of official crimes and of the materials of administrative cases, related to their corruption actions. As a result of this, during the years of independence of Ukraine criminal punishment for the committed crimes was pronounced only to 12 judges, and beginning from the year 2006 to this time only one sentence of a court about the fact of bribery of a judge came into effect.<sup>47</sup>

Such facts can serve as additional factors, which favour certain spreading of corruption practices at the stage of examination of a criminal case in a court.

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<sup>45</sup> A criminal case in relation to the head of one of the local courts of Dnipropetrovsk region was directed to the Supreme Court // Report of the press-service of the General public prosecutor's office of Ukraine 03.12.2008 [http://www.gpu.gov.ua/ua/news.html?\\_m=publications&\\_t=rec&\\_c=view&id=21025](http://www.gpu.gov.ua/ua/news.html?_m=publications&_t=rec&_c=view&id=21025)

<sup>46</sup> Accusation on behalf of the state in courts as an integral and completing component of criminal prosecution // Report of the press-service of the General public prosecutor's office of Ukraine dated 29.07.2008 [http://www.gpu.gov.ua/ua/news.html?\\_m=publications&\\_c=view&\\_t=rec&id=17105](http://www.gpu.gov.ua/ua/news.html?_m=publications&_c=view&_t=rec&id=17105)

<sup>47</sup> Criminal activity of the deputy head of a court has been terminated in Cherkasy region // Report of the press-centre of the SS of Ukraine dated April 14, 2009 [http://www.sbu.gov.ua/sbu/control/uk/publish/printable\\_article?art\\_id=85887](http://www.sbu.gov.ua/sbu/control/uk/publish/printable_article?art_id=85887)

### 3.2.6 Conclusions and Recommendations

By the results of the given research it is possible to draw conclusion, that criminal proceedings are considered one of the most corrupted among experts in the field of jurisprudence.

Criminal judicial proceedings are divided into **three stages**. Spreading of practices of corruption at each stage is considered different by experts: verification of information about a crime – 62.5 %; prejudicial investigation – 38.4 %; judicial examination – 32.7 %. By the object of criminal proceedings, the most wide-spread were named investigations, relating to taxation and economic crimes, crimes in the field of official activity, crimes related to illegal narcotics trafficking and traffic accidents, and also some crimes against property and individuals.

Corruption practices, which became wide-spread in criminal proceedings of Ukraine, have two forms from the point of view of the Criminal code of Ukraine – commitment of public service crimes, such as acceptance of bribes, abuse of power and official position, official counterfeiting and so on, and also commitment of crimes against justice, such as deliberately illegal detentions, attachment, arrest or detention in custody, bringing of deliberately innocent person to criminal responsibility, pronouncement of a deliberately unjust sentence, decision, approval or provisions and some other acts by a judge (judges), based on corruption motives. Commitment of fraudulent actions by investigators, public prosecutors, officers of a body of inquiry in the form of promises to accomplish corruption actions in behalf of the persons, who ask them to commit such actions, should be examined separately. Intention of these persons in such cases is directed not at violation of official relations, but at reception of material benefit. It is necessary to pay attention to another fact, that such fraudulent actions are possible due to the strong persuasion of ordinary citizens in the corruptness of the lawenforcement bodies and the possibility of solution of issues, relating to avoidance of criminal responsibility or its mitigation by means of corruption relations.

**The objects of corruption exchange** in criminal proceedings are the decisions of a body of inquiry, a prejudicial investigation body, a public prosecutor and a judge in behalf of a suspect, the accused person and the defendant, and on special occasions the witness, about not bringing to criminal responsibility, closing the criminal case, avoidance of using a preventive measure in the form of taking into custody, imposition of arrest onto property and deposits, achievement of the most lenient by its kind and the shortest by its term criminal punishment or avoidance of punishment in the form of real deprivation of freedom. In behalf of witnesses decisions can be made about not bringing them to criminal responsibility, and in relation to victims – about provision of return of property and compensation for damages, acceleration of investigation, avoidance of unnecessary contacts with an investigator and other.

Corruption practices became most wide-spread, when the following judicial decisions are taken at the stage of verification of information about a crime and at the stage of prejudicial investigation: institution of a criminal case and choosing of a preventive

measure. Based on the data, obtained during the questioning of experts, taking of a decision about starting of a criminal case is considered the most corrupted: 45.3% of the polled experts acknowledge it as “rather frequent”, 20.7% consider it “frequent”. Choosing an appropriate preventive measure is the next processual decision in terms of prevalence of corruption practices: 30.3% of experts indicated, that such practices occur “rather often” and 32.8% of experts indicated, that such practices occur “often”. Decisions, which are taken during the judicial examination of a case, have received almost even spreading. This conclusion can be drawn based on information, obtained about existence of rates for taking of one or another decision. The most wide-spread types of decisions of judges, for which certain corruption “rates” exist, experts named decisions about the term of imprisonment with payment for each year of diminishing of such term (67%), application of release from punishment on parole (64.6 %) and application of a more lenient punishment, than it is provided by law (62.7%). The least amount of experts, 54.5% of the polled experts, point at existence of “rates” in relation to imposition of punishment with suspension of execution of a sentence. Specific data about the existing “corruption rates” have been obtained in the in-depth interviews:

- *for a judgment of acquittal* – the following answers have been received – “*from 3 to 10 thousand US dollars*”, “*it depends on the article and the case circumstances, but on the average – from 1 to 30 thousand US dollars*”, “*not less than 3 thousand dollars*” “*the last fact known to me – 15 thousand hryvnias*;
- *for each year of diminution of a term of imprisonment* – in the given case most of the pollees name the following condition – “*1 thousand US dollars for each year of diminution of the term*”, in individual cases there were references to other conditions – “*2500 US dollars for a year*”, “*3000 hryvnias – for a year*”, and so on;
- *for application of release from punishment on parole* – most of the poles point at the most stable “tariff” – “*5 thousand US dollars*”, although it is noted in this regard, that the sum can be both lower and substantially higher;
- *for choosing preventive measures alternative to taking into custody* – in this case the most substantial differences are noted, because the experts apply a rather wide range – from 10 thousand hryvnias to tens of thousands of US dollars. Everything depends both on the circumstances of a case and the possibilities of the interested persons.

Among **the subjects of criminal proceedings**, most often in the corruption relations take part judges (78.4 %), public prosecutors (71 %), investigators (52.3 %), operative officers (49.5 %). The most wide-spread informal alliances, resulting in appearance and existence of corruption practices in criminal proceedings are informal relations between judges and public prosecutors. Such alliances are used in opinion of 61.5 % of the experts (“very often” – 48.1 %, “often” – 13.4 %). Also rather widespread are informal relations between investigators (probably, in most cases the heads of investigation departments) and public prosecutors. Such an alliance is considered wide-spread by 48 % of the poles

(“very often” – 23 %, “often” – 25 %). Most corrupted according to the received data are considered the public prosecutors. Most of the experts (70.6 %) agree with the statement, that “a public prosecutor compared to other processual subjects (an investigator, an inquiry officer and others) has more favourable conditions for corruption abuses”. Attention was paid to the “internal corruption” in the procedures of criminal proceedings and the corresponding bodies. A considerable part of experts (49.0 %) agree with the statement, that “the public prosecutors receive corruption remunerations for signing the statistical reporting forms (in particular, form №4, the statistical ticket for a crime, for commitment of which a charge is brought against a person)”, which are the basic indicator of the activity of investigation departments. Attorneys take a special part in corruption practices in criminal proceedings. As a rule, they act as mediators, and on some occasions – initiators of corruption relations at all the stages of criminal proceedings: 75.4 % of the experts say about activity of attorneys, when achieving corruption agreements during verification of the information about a crime; 92.3 % of the experts indicate the active role of an attorney, when holding negotiations about corruption relations at the stage of prejudicial investigation, 78.8 % indicate his active role at the transfer of a corruption remuneration and 67.9 % – as initiator of corruption relations at the stage of prejudicial investigation; and attorneys play the most active part in negotiations about corruption relations (93.4 %) and a transfer of a corruption remuneration (92.3 %) at the stage of judicial review of a criminal case. At the stage of judicial review of a criminal case officers of the personnel of a court can play a certain part too. 46.9 % of the pollees have agreed with this. In the in-depth interviews it has been determined, that officers of the personnel of a court receive corruption remunerations for different actions, however, most often *for assistance in “access to specific judges”, for reception of possibilities of getting acquainted with some documents in a case, for procrastination or speeding up of “motion of certain documents” and so on.*

**The beneficiaries** of such practices are persons, relative to whom a decision is taken to institute a criminal case, suspects, defendants, their relatives or close people. Involvement of witnesses and sufferers in corruption relations was revealed in the research too. At all the stages of criminal proceedings the highest activity in offering of corruption payments is shown by the relatives and close people of a suspect, a defendant or an accused person, a little less often – the subjects of criminal responsibility themselves. From the experience of 41.5 % of the pollees at the stage of verification of information about a crime the initiators of corruption agreements are the persons, in relation of whom a verification is conducted, and by the data of 56.1 % of the pollees -relatives of such persons. At the stage of prejudicial investigation 67.7 % of the experts name the activity of relatives and close people and totally 48 % – the activity of suspects and defendants. At the stage of judicial review of a case the activity of relatives and close people at holding negotiations is noted by 38.5 % of the experts, of a defendant – 28.7 %, at the transfer of corruption payments the activity of relatives – by 42.3 %, of defendants – by 29.6 %. More than a quarter of the polled experts (26.9 %) acknowledge existence of bribery of public prosecutors and investigators by witnesses for the purpose of “exclusion from a case”. Approximately one third of the experts (31.0 %) acknowledge existence of facts

of bribery of investigators and public prosecutors by victims. Most of the polled experts (67.3 %) agree with existence of practice of bribery of witnesses and sufferers by the participants of a process (the suspects and the defendants).

Separately judicial experts has been examined in the capacity of the subjects of corruption practices. Half of the polled experts (50.1 %) pointed at existence of the practice of *bribery of judicial experts*. Experts acknowledge judicial experts – private entrepreneurs as more inclined to corruption agreements. The distribution of evaluations relating to the issue of greater spreading of corruption agreements among the different categories of judicial experts was as follows: judicial experts – officers of the state expert institutions – 38.4 %, judicial experts – private entrepreneurs – 48.1 %, could not give an answer – 32.7 %. Corruption practices received considerable spreading during conduction of such types of judicial expertises as auto-technical (determination of the possibility for a driver to prevent a traffic accident), forensic medical examination (determination of the severity level of a physical injury), forensic psychiatric (determination of sanity of a person).

Among the **bodies of criminal proceedings**, in which corruption relations are the most widely spread, the following situation has formed at certain stages of criminal proceedings. At the stage of verification of information about a crime tax militia (69.2 %) and militia (64.5 %) stand out, the public prosecutor's office (51.5 %) and the SSU (32.7%) are considered less corrupted. A little different picture takes place at the stage of prejudicial investigation, but the general tendency remains unchanged: tax militia (61.3 %), militia (58 %), the public prosecutor's office (55.7 %), the SSU (28.3 %). At the judicial stage the difference between the local courts, the courts of appeals and the Supreme Court of Ukraine has been studied. Almost equal number of experts consider identically corrupted the local courts and the courts of appeals – 69.6 % and 67.2 % respectively. Substantially less number of experts (28 %) consider, that corruption practices are widely spread in the activity of the Supreme Court of Ukraine.

During the interview the experts paid attention to existence of a specific phenomenon – “**ordered criminal proceedings**”, that is situations, when certain judicial actions were executed exceptionally for the purpose of receiving corruption remunerations (part of the cases – personally from the “victims” of such actions, in other cases from third persons, who “order” such actions for the purpose of pressure on the competitors, and so on). Almost one third of the experts point at the fact, that a criminal case is instituted on the basis of corruption motivation: 7.7 % of the polled experts think, that it occurs “rather often”, 26.9 % – “often”. For the same purpose is used a preventive measure in the form of taking into custody (“rather often” in the opinion of 11.5 % of the pollees, “often” – 21,1 %). Somewhat less often such motivation becomes apparent in situations, when decisions are taken about the arrest of property or property rights (“rather often” and “often” together – 15.7 %).

Among the **factors, which favour appearance and development of corruption practices** in criminal proceedings, were named the following:

**1. The drawbacks of the criminal substantive and processual legislation.** At all stages of criminal proceedings compared to other circumstances they are not the main corruptogenic factor. However, almost half of the polled experts (49.3 %) acknowledge

existence of such shortcomings of the processual law and a little more than one third of the experts (34.8 %) say about presence of drawbacks of the criminal substantive law, which favour corruption at the stage of prejudicial investigation. As for the stage of judicial trial of a case, 42.5 % of the poles pay attention to the fact, that certain provisions of the criminal-processual law are corruptogenic, and 42.1 % of the polled experts attribute the drawbacks of the criminal legislation to the significant factors, which favour appearance of corruption practices.

Among the existing problems, first of all the investigators have noted the obsolescence of the Criminal-processual Code of Ukraine, which by its spirit and ideology does not meet the modern social relations. The approaches and the soviet ideology of the code do not take into account the dissolution of morals in the society, the neglect of morality principles, the juridical nihilism, which develops, first of all, among the jurists, whatever juridicalspecialization they have. Those provisions of the CPC, which were introduced into it for the purpose of provision of the rights of a person, often become the instrument of abuses and cause the reverse effect – gross violation of the rights of a persons.

The following drawbacks of the criminal-processual and the criminal substantive law favour appearance of corruption practices in criminal proceedings: absence of clear definition and criteria for evaluation of the grounds for institution of a criminal case; lack of proper regulation of the activity of an inquiry body at the stage of verification of information about a crime; absence of a clear list of cases and criteria of definition of circumstances relative to the selection of a preventive measure in the form of taking into custody; presence for an investigator of a wide range of discretionary powers as for taking decisions within the scope of investigation of a criminal case, conduction of investigation actions and criminal-legal qualification of a crime; limitation of the rights of a defender at the stage of prejudicial investigation; impossibility to institute alternative judicial expertises by the party of defence in a criminal process; absence of proper control over the processual activity of a public prosecutor; presence in the criminal-processual law of evaluating notions, which substantially influence taking of processual decisions (“sufficient data”, “inner persuasion” and so on); the general description in the criminal code of the formal components of a crime and spreading in it of evaluating notions such as “psychological violence”, “threat of application of violence”, “severe consequences”, “especially severe consequences” and so on; the possibility of bringing of a person to both criminal and administrative responsibility for similar actions (lesser theft and theft, lesser hooliganism and hooliganism and so on); the wide choice of measures, which can be applied to suspects, accused persons and defendants, which provide grounds for closing a criminal case; absence of a single authoritative source of interpretation of the laws, which would be obligatory for all officers, who apply the criminal and the criminal-processual legislation. The realization of judicial control over the prejudicial investigation should be emphasized separately, in particular many problems have arisen in connection with taking by the Constitutional Court of Ukraine of the decision about the possibility of appeal against resolutions about institution of a criminal case, which has created additional possibilities for abuse on the part of the judges and has transformed this mean

of defence of the rights and freedoms of a citizen into a powerful and effective mechanism of counteraction to investigation of crimes. Judges are also subject to corruption risks in connection with taking by them of the decision about selection of a preventive measure in the form of taking into custody. At the stage of judicial examination it is necessary to add to the drawbacks of legislation the fact that a judge has wide discretionary powers concerning determination of the degree of guilt and selection of punishment, and also the absence of proper competitiveness.

**2. Organization of work of the law-enforcement bodies has the greatest significance.** First of all to such factors should be attributed the orientation of the activity of the bodies of inquiry and prejudicial investigation at achievement of statistical indices, which influences negatively the quality of prejudicial investigation, requires correction of investigation of criminal cases in accordance with the statistical plan; improper financing of the prejudicial investigation bodies; absence of proper conditions for storage of material proofs and withdrawn property; dependence of investigators and experts-criminalists on the chief of an internal affairs body in the official and financial respects; dependence on the public prosecutor not only in the processual, but in organizational issues too – the necessity of approval of the statistical reporting cards, absence of effective control on the part of the public prosecutor’s office, presence of branching in the directions of work of the bodies of fight against organized crime and the bodies of fight against economic crimes and absence of proper cooperation and information exchange.

**The efficiency of the internal and external (first of all, from the public prosecutor’s office) control is acknowledged to be too low.** 53.6 % of the experts point at ineffectiveness of the internal control in the law-enforcement bodies, at the same time 41.4 % of the polled paid attention to the absence (or formal character) of the internal control over the observance of the requirements of professional ethics. 50.9 % of the polled consider the control of the public prosecutor’s office ineffective.

At the stage of judicial examination of a criminal case to the organizational moments, which favour appearance and development of corruption practices, is ascribed the division of cases between judges in courts, where the key role is played by the heads of the courts and their deputies, with which more than 90 % of the polled have agreed. The existing practice enables getting of a case to the “necessary judge”: in the local courts such a possibility is noted by 86.2 % of the polled, in the courts of appeals – by 81.0 %.

**3. The level of wages of the law-enforcement officers and the judges.** More than a half of the polled experts (64.5 %) acknowledge this factor as the key one in the origination of corruption motivations of the officers of law-enforcement bodies. A different situation has composed in relation to the judges. Only 20.0 % of the polled experts associate corruption abuses of the judges with the low level of their wages.

**4. Spreading of informal contacts** between the different branches and subjects of criminal proceedings is a specific factor. More than a half of the polled experts (55.1 %) acknowledge, that out-of-office (unofficial) relations of certain categories of the officers of the law-enforcement bodies and the judges favour corruption. However, attitude to this factor is contradictory. In the in-depth interviews with officers of the law enforcement

bodies attention was drawn to the fact, that “such relations can be helpful in the process of investigation, as they are operative and non-burdened with formalities”. At the same time, in the mass (quantitative) polls less than one third of the experts (30.7 %) have agreed with this statement. At the same time – 71.6 % of the experts acknowledge, that, for example, “there are informal cooperations of corruption character between the investigation (the chief of an investigation department) and the public prosecutor”.

In relation to the stage of judicial examination of a case, the second in order of importance in accordance with the estimations of the experts is the spreading of informal contacts between judges, attorneys, officers of the law enforcement bodies, which is acknowledged by 64.4 % of the poles. In this plane are formed the most latent mechanisms of dependence of judges, on which, actually, corruption relations are based.

**5.** One of the reasons of existence and spreading of corruption practices during criminal proceedings is the **high latency of such actions** and, accordingly, **complication of their exposure**. It is explained by the specific character of activity on provision of the criminal legal proceedings. In this case, both parties – subjects of corruption offences and the beneficiaries – are interested in the result, and both parties are not interested in divulgence of such information, because the negative consequence for both parties is the same – severe criminal punishment.

**6. The educational and cultural level of the officers of the law enforcement bodies, public prosecutor’s offices and the judges has great importance.** Lately, more and more attention has been paid to the decline of the level of scholarship, worsening of moral and ethical characteristics of the officers of the noted state bodies, destruction of the system of professional values, absence of educational moment and insufficient attention to the issues of professional ethics of a jurist: an investigator, a public prosecutor, a judge, an attorney and so on. Actually, today the real and effective mechanism of selection and training of personnel is absent. Proper control of professional and moral qualities is not carried out, there is no juridical base for reception of complete characteristics and recommendations from the work collectives or other subjects and of juridical education of proper quality. This results in appearance of psychological orientation atreception of maximal benefit from the occupied position, abuse of power and the official position, necessity in easy money making, sometimes by means of deception and abuse of trust of ordinary citizens and so on.

Most of the experts (72.1 %) associate the sources of corruption motivation with the “impunity” of judges for corruption abuses. With estimations about the “impunity” correspond statements about “absence of proper internal control over observance of the professional ethics”. 55.7 % of the poles have drawn attention to this. Approximately 40.0 % of the polled experts draw attention to the existence of non-processual dependence of judges both inside the judicial system (on the heads of courts) and outside it (on the politicians, deputies and so on).

As a result of the research were selected most wide-spread **corruption practices**, inherent to each stage of the investigations, with selection of inherent to them forms of processual actions.

At the stage of **verification of information about a crime** it is possible to select the following corruption practices:

- (1) Solution of the issue about avoidance of bringing a certain person to criminal responsibility, which has the following forms:
  - creation of conditions for taking the decision about the refusal of institution of a criminal case;
  - falsification or destruction of the materials of the pre-investigation verification;
  - taking a decision about refusal to institute a criminal case by means of abuse of the official powers.
- (2) Solution of the issue about illegal institution of a criminal case in relation to a certain person for the purpose of putting a certain pressure on that person or on a certain business, which has the following forms:
  - institution of a criminal case or creation of a picture of institution of a case by authorized persons for the purpose of reception of the corruption payment;
  - institution of a criminal case for a corruption payment “by the order” of a third party, which is not a participant of the criminal process.

At the stage of **prejudicial investigation** the following corruption practices have been selected:

1. Solution of the issue of not bringing to criminal responsibility or closing of a criminal case, which takes the following forms:
  - Abolition by a judge of a resolution about institution of a criminal case for a corruption payment in the cases, when the primary material contained sufficient grounds for institution of a criminal case;
  - Solution of the issue of not bringing to criminal responsibility by closing a criminal case under vindicating or non-vindicating circumstances on condition of reception of a corruption payment.
2. Solution of the issue about selection of a preventive measure, alternative to taking into custody, or replacement of this preventive measure with another.
3. Solution of the issue about mitigation (improvement) of the state of a suspect or a defendant during the prejudicial investigation, which takes such forms:
  - change of the criminal-legal qualification of an act from a more severe to a less severe crime;
  - solution of issues of of property character and issues about material proofs;
  - solution of the issue about the possibility of communication with close people and reception of help from them.
4. Solution of the issue about provision of a judgement of acquittal or return of a criminal case for additional investigation:
  - intentional delay of investigation;
  - intentional low-quality organization of investigation on the whole;

- conduction or registration of particular investigation actions with violation of the requirements of the criminal-processual law for the purpose of acknowledgement of particular proofs inadmissible in the future by a court;
  - giving by an expert of conclusions of non-categorical character, which allows to level the results of examination or interpret them ambiguously;
  - giving by an expert of a beforehand untruthful conclusion.
5. Solution of the issue about exertion of pressure onto certain persons for the purpose of resolution of own interests or business interests third persons.

At the stage of **judicial review** of a criminal case the following corruption practices have been selected:

- I. Solution of the issue about release from criminal responsibility;
- II. Solution of the issue about release from enduring the punishment;
- III. Solution of the issue about application of the lowest possible minimal punishment;
- IV. Solution of the issue about change or abolition of a preventive measure.

## CHAPTER 3. CORRUPTION RISKS IN CIVIL LEGAL PROCEEDINGS

Examination of cases in the order of civil legal proceedings is regulated by the Civil Processual Code of Ukraine (farther – the CPC), adopted on the 18-th of march the year 2004, which entered into force on the 1-st of septembre the year 2005.

According to article 15 of the CPC of Ukraine courts examine in the order of civil legal proceedings cases about protection of violated, unacknowledged or disputed cases, freedoms or interests, which appear from civil, dwelling, land, family and labour relations, and also from other juridical relations, besides the cases, when examination of such cases is conducted by the rules of other legal proceedings.

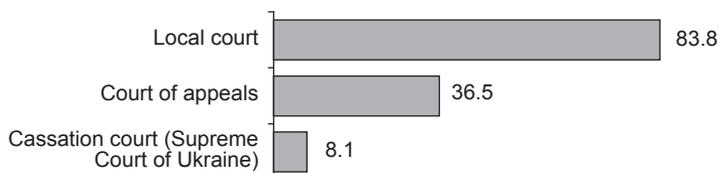
In the order of civil legal proceedings is examined the majority of cases, connected with protection of corresponding rights of physical persons in civil, dwelling, land, family and labour juridical relations. And although in the order of these legal proceedings are not solved, for example, corporate disputes (regardless of the subject composition of the persons), disputes about return of taxes, liberation from tax collections, appellation of decisions of fiscal bodies and other, however sometimes the real cost of the property, relative to which a dispute arises, and the social resonance in cases of civil jurisdiction can be not smaller. For example, in cases about establishment of the fact of handing into property of a land lot of square 959 hectares<sup>48</sup>.

Participation in these disputes of physical persons, in particular, in the capacity of plaintiffs or defendants determines certain peculiarities of examination of cases, reception and study of proofs, clarification of the circumstances of a case, determination of the limits of examination of a case in the appellation and cassation instances and other. We should also stress, that the cases in the order of civil legal proceedings on the first instance are examined by local courts, which at the same time solve criminal cases, cases about administrative law violations and a certain category of cases of administrative jurisdiction too, which, unconditionally, influences the loads onto judges, and therefore onto the terms of examination and solution of cases.

**Spreading of corruption practices.** In **Diagram 53** are presented general evaluations by experts of the possibilities of formation of corruption practices in civil legal proceedings (courts of different levels).

*Diagram 53.*

**Possibilities of application of corruption schemes in civil court proceedings: experts' evaluations of the conditions in courts of different levels**  
(% of those, who point at the favourableness of such conditions)



<sup>48</sup> Marynenko O. Arbitration courts as potential danger to the national security // Dzerkalo tyzhnya. – 2008.11.22. – № 44. [Electronic resource]. – Regime of access: <http://www.dt.ua/1000/1050/64749/>

The data, presented above, show existence of essential differences between courts of different levels. The majority of the questioned people (83.8 %) consider, that the most corruptogenic are the conditions in the local courts. In general, it is the highest index among the courts of different types. Focus-groups show, that the main social groups have stable stereotypes of evaluation of civil legal proceedings (especially at the level of the first instance) as “litigation”, “a very long, but not always just process”, “very vulnerable as for corruption”.

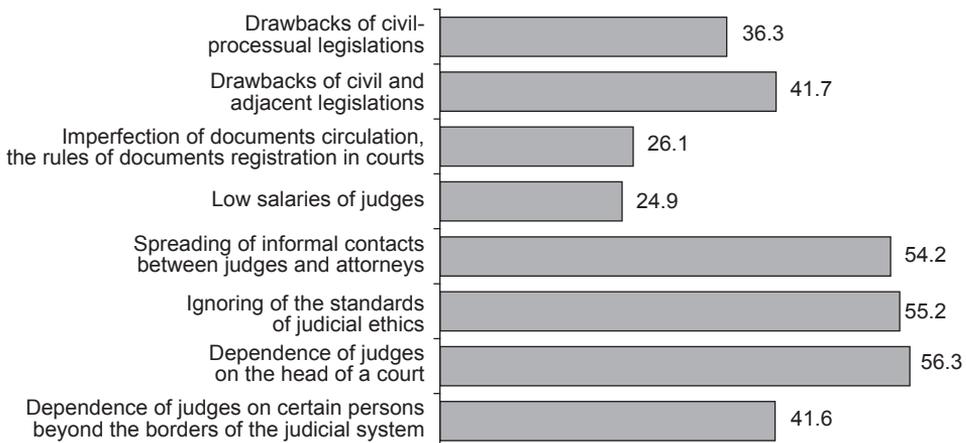
In questionings of experts were noted categories of cases, where corruption risks are met most often. Divergencies of evaluations in this case were rather notable, especially considering the diversity of civil cases. The majority of experts note such categories of cases (citations from focus-groups and in-depth interviews): “*all the disputes about property*”, “*acknowledgement of the right of property*”, “*division of property*” (these categories of cases are mentioned most often), “*disputes about inheritance*”, “*dwelling disputes*”, “*labour disputes*”, “*land disputes*”, “*acknowledgement of contracts concluded (not concluded)*”, “*compensation of damage*”. Some respondents pointed at the fact, that “*corruption risks do not depend on the subject, but are determined by the cost of a suit and the importance of a positive decision*”.

### 3.3.1 General Provisions about Corruption Practices in Civil Legal Proceedings

**Factors of corruption practices.** An important task of the research was revelation of the influence of different by nature factors on formation of corruption practices in civil legal proceedings. Experts’ evaluations of such influence are presented in **Diagram 54**.

Diagram 54.

**Experts’ evaluations of the level of corruptogenity of certain conditions in the civil judicial proceedings** (% of those, who consider, that the following circumstances influence the possibility of appearance of corruption practices)



Analysis of the received results allows to make the following conclusions:

- Only about one third of experts (36.3 %) associate the existence of corruption risks with the drawbacks of the processual legislation, although farther the in-depth interviews revealed some risks, which are conditioned by the legislation about corresponding procedures itself.
- The importance of the drawbacks of the substantive law (civil and adjacent to it) is somewhat higher. 41.7 % of the questioned people associate formation of corruption risks with such drawbacks. In the in-depth interviews experts pointed at existence of two most essential problems of the material law: a) gaps in the legislation, absence of strict reclamation of certain procedures; b) collisions in the legislation. Influence of this factor is strengthened by the fact, that, as the results of the in-depth interviews testify, a part of the judges has a rather low level of professional preparation.
- More than half of the questioned experts (55.2 %) acknowledge dependence of corruption practices on the “deformations or ignoring of the ethical standards of the profession of a judge”. Attention was drawn in the in-depth interviews at the fact, that “*absence of moral limits*” influences the possibility of formation of stable corruption (“informal”) alliances between judges and attorneys (54.2 % of the questioned people indicate such alliances). These alliances are used by judges for simplification of their activity too. Attorney Z.: “*Usually the judges, with whom a corruption agreement is reached, receive from the attorneys the projects of judgements too, which satisfies them very much*”. Pensioner B.: “*When I lost a case on a suit to a store, which has inflicted damage to me, I was given a judgement, which was typed on a printer with a font, which differed from the other documents in the case. I compared this text to the answer of the defendant to my suit and I can state, that the judgement was typed on the same printer, as the answer of the defendant.*”
- Experts do not attribute the level of salaries to the essential factors of corruption motivation, since only 24.7 % of the questioned people associate the corruption abuses by judges with the low level of their salaries. In the in-depth interviews attention was also constantly accentuated on the impossibility to explain judicial corruption mainly on the basis of the motives, which are based on the dissatisfaction of judges with the level of their salaries.
- Experts acknowledge some forms of non-processual dependence of judges to be an important factor. Dependence of judges on the head of a court has a special importance (56.3 % of the questioned people indicate this). The external dependence has an essentially smaller importance (on the politicians, deputies and others. 41.6 % indicate this).

**Corruption risks at selection of candidates to judges, their appointment to a position first and termlessly. A juration of a judge.** The non-transparency and subjectivity of the procedure of selection of candidates to professional judges should be considered the first and one of the main corruptogenic factors, including in the civil legal proceedings.

As they indicate on this occasion, the judicial reform, as earlier, is reduced to solution of three issues – provision of courts with personnel, instrumental provision of the activity of a court, material-technical provision. Not a single of these issues has been solved yet. “Let us return to the soviet system of staging in a court and to the responsibility of those, who have pledged for a candidate to judges. I am for us to select and answer. In courts must be established corporativity”<sup>49</sup>.

It is considered, that the selection of candidates to judges and election (appointment) of judges within the five-year term or termlessly, determined by articles 8 and 9 of the Law “About the Status of Judges” and the Law of Ukraine. About the order of election to a position and removal from the position of a professional judge by the Supreme Council of Ukraine” of the 18 of march the year 2004, has significant corruptogenic factors as for understanding of revelation and verification of the sufficient qualification, professionalism of the candidates, their moral-business qualities.

The existing system of selection of candidates creates broad possibilities for abuses, when solving this issue. The persons, who have an intention to become judges, can be involved into corruption schemes yet before the beginning of their careers of judges.<sup>50</sup> The evaluative report about Ukraine, composed by GRECO (Strasbourg, the 19-23 of march the year 2007) contains principally similar provisions.

It follows from the speech of the head of the Supreme Qualification Commission of Judges of Ukraine I. L. Samsin at the parliamentary hearings “About the state of Jurisprudence in Ukraine” on the 18 of march the year 2009, that the Supreme qualification commission of judges of Ukraine supports the procedure of selection to the position of a judge, which is based on the competitive foundation. The anonimity of passing of a written examination will give a possibility to avoid subjectivity in evaluation of the results. Fulfillment of test and situational tasks is an optimal variant for verification of knowledges<sup>51</sup>.

According to the Provision about conduction of testing of candidates to the position of a judge, approved by the deicion of the Supreme Qualification Commission of Judges of Ukraine of the 4 of april the year 2008, the indicated testing is an integral part of the competitive selection of candidates to the vacant positions of judges, and it determines the methods of formation of test tasks, evaluation of answers to test tasks.

Corruption risks at selection of candidates to the position of a judge and at solution of the issue about election of a judge termlessly can be removed with introduction into this process, in particular of principles of transparency (public information about vacant positions, requirements to candidates, the time of conduction of qualification examinations); competitiveness (All the candidates to the position of a professional judge

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<sup>49</sup> Kryvenko V. V. Speech at the hearings of the Supreme Council “About the state of justice in Ukraine” in the Supreme council of Ukraine, the 18 of March the year 2009. // Visnyk of the Supreme court of Ukraine. 2009 № 4 (104). – p. 8.

<sup>50</sup> [http://gska2.rada.gov.ua/pls/zweb\\_n/webproc4\\_1?id=&pf3511=34771](http://gska2.rada.gov.ua/pls/zweb_n/webproc4_1?id=&pf3511=34771)

<sup>51</sup> Samsin I. L. Speech at the hearings of the Supreme Council “About the State of Justice in Ukraine” in the Supreme council of Ukraine, the 18 of March the year 2009. // Visnyk of the Supreme court of Ukraine. 2009 № 4 (104). – p. 8.

must have equal possibilities for occupation of a vacant positions. Access to the profession of a judge must be separated from access to a specific position of a judge); objectivity of the procedure of evaluation of the knowledges in a professional specialty and the moral qualities of the candidates (in particular, with introduction of independent testing with use of computer systems); systematicity of professional preparation of candidates to the vacancies of judges and the continuity of raising of qualification of professional judges; strict determination of the conditions (possibility) of a repeat conduction of a qualificative test of a candidate to the position of a judge in the Supreme Council of Justice. A specially created unified body – the Qualification commission of judges of Ukraine – must become responsible for observance of these principles of formation of the corps of judges.

For persons, concerning which an issue of election of them termlessly is solved, this procedure must be maximally public, including official spreading of information about the results of work of that judge for the previous five years with information about the quantity of examined cases, cancelled or changed judgements, the categories of cases and availability and quantity complaints, which have been filed about this judge.

Propositions about election of judges first or termlessly by the population are considered completely purposeless, since at this it is not only impossible to verify the professional and moral qualities of the candidates, but additional corruption risks of election to the position of a judge of a person at the cost of interested business-structures are created.

**Potential corruptogenity in the understanding of the absence of authority to realize justice in civil disputes exists relative to the persons, who have not pronounced a juration of a judge, too.** According to the data of one of the sessions of the Supreme Council of Justice, when the issue about filing of a petition about dismissal of a judge for violation of a juration was examined, it was clarified, that for all the 30 years of work as judge that judge has not pronounced a juration of a judge. The justification was found in the fact, that in the legislation in force the procedure of pronouncement of a juration of a judge at a repeat appointment is not envisaged, and, as it was indicated above, the majority of judges have not pronounced it<sup>52</sup>.

*According to article 10 of the Law of Ukraine “About the Status of Judges” of the 15 of december the year 1992 a Judge, First Appointed for a Position give a following swear: “I swear solemnly to execute the duties of judge honestly and conscientiously the duties of a judgei, to realize justice, submitting myself only to the law, to be objective and just”.*

*A juration is taken at a session of that body, which has elected a judge.*

*According to article 10 of the Law of the USSR “About the Status of Judges in the USSR” of the 04 of august the year 1989 (it was brought into action from the 01 of december the year 1989 and was in force on the territory of the Ukrainian SSR) people’s judges of district (town) people’s courts, judges*

<sup>52</sup> Bondarenko M. The final in the case of judge Borodin. // Juridical practice. № 15 (381) of 11.04.2005. [Electronic resource]. – Regime of access: <http://www.vru.gov.ua/index.php?u,prsu,11042005a>

*of regional courts were elected by the respective higher Councils of People's Deputies for the term of 10 years. Article 11 of this Law envisaged, that the judges, elected for the first time, swear a jurament. The text of a jurament of a judge, and the order of swearing of it for the judges of the courts of the union republics is determined by the Supreme Councils of the union republics.*

*In the Ukrainian SSR the text of a jurament of judges and the order of swearing of it was provided for that time by the Decree of the Presidium of the Supreme council of the Ukrainian SSR "About a Jurament of Judges and people's representatives of the courts of the Ukrainian SSR" of the 15 of decembre the year 1989 (it lost its force on the 02 of february the year 1994). It was noted, that a judge of a corresponding court swore a jurament in the presence of the judges of a regional court and a member of the Presidium of the Supreme Council or a people's deputy of the Ukrainian SSR. The jurament was sworn in solemn circumstances in individual order by way of pronouncement of the text of a jurament by each of the judges.*

*Till the indicated normative acts entered into force, the current legislation did not envisage swearing of a jurament by judges. Neither the Law of the USSR "About the Status of Judges in the USSR", nor the Law of Ukraine "About the Status of Judges" envisaged the necessity and the order of swearing of a jurament by judges, who already were elected judges and realized judicial proceedings at the time of adoption of these laws.*

*From the date of entering into force of the Constitutional agreement the right to appoint judges was first given to the President of Ukraine. However the order of swearing of a jurament of judges was determined officially only with the decree of the president of Ukraine "About the Order of Swearing of a Jurament by a Judge, First Appointed for a Position" №493/99 of the 11 of may the year 1999. That is even with the article 10 of the Law "About the status of judges" about the duty to swear a jurament of a judge, elected for the first time, in the time period from the 08 of june the year 1995 till the 11 of may the year 1999 there was no determined order of swearing of a jurament by judges, appointed for the position of a judge by the president of Ukraine for the first time, in Ukraine.*

A paradoxal situation has composed itself, when legal proceedings in civil cases is realized by a part of judges, who have not sworn a jurament of a judge, and therefore, among other things, such a ground as violation of a jurament of a judge (paragraph 5 part 5 article 126 of the Constitution of Ukraine) and disciplinary proceedings were instituted in connection with breaking of the jurament of a judge (part 4 of article 97 of the Law "About the Judiciary").

The indicated issue must be examined as for application of paragraph 1 of article 6 of the Convention about protection of human rights and the fundamental freedoms, because realization of legal proceedings with participation of such a judge can be considered examination of a case by a court, "not established by the law".

**Therefore, from the point of view of corruption risks non-authorization of the composition of a court because of non-swearing by a judge of the juration of a judge and putting under doubt of his authority to realize justice creates the corruption practice of limitation or impossibility to bring a person to juridical responsibility in case of rendering of an unjust decision.**

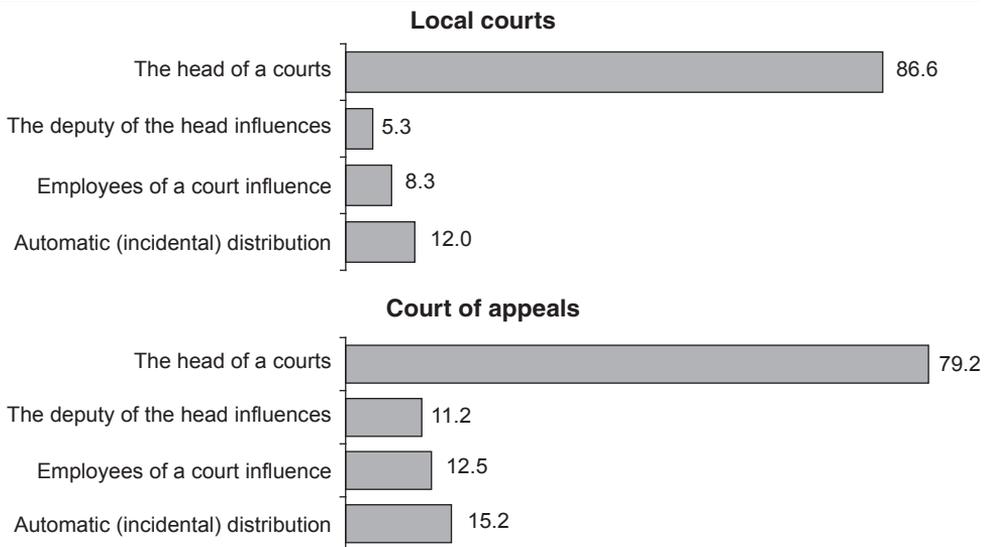
The indicated circumstance must be considered an unconditional ground for cancellation of a judicial decision about according to paragraph 1 of part 1 of article 311 and paragraph 1 of part 1 of article 338 of the CPC of Ukraine.

Besides, the fact of non-authority of a specific judge to examine civil cases can be used in a way, not envisaged by the law, at illegal pressure onto him both from the side of the administrative persons of courts and at pressure by persons, to whom political power is given.

**The role of courts in the process of selection of judges, appointment of them onto the positions of judges, handing of cases for examination.** In this context the thought of experts at clarification of, how *distribution of cases* happens, that is whether some external influences take place at this stage. The results of the questionings of experts are presented in **Diagram 55**.

*Diagram 55.*

**Peculiarities of distribution of cases: experts' evaluations of the conditions in the courts of their region**



In general experts agree, that distribution of civil cases happens mainly “in the manual mode”, when the head of a court and his deputies have the key roles. Such distribution is justified in the conditions of small local courts (the number of judges does not exceed 7-8). In other cases, by the evaluations of experts, it can have corruption ground. The possibility of the employees of the personnel of a court to influence distribution of cases, in particular in the appellate courts; 12.5 % of the experts have drawn attention to this.

These data show an insignificant specific weight of the principle of automatic distribution of cases both in a local and in an appellate courts. But even application of automatic (incidental, and other) distribution of cases is not a guarantee of independence, since the possibility of a case getting to the “necessary judge” remains. 89.3 % of the respondents noted in the questionings, that a case may get to the “necessary judge” in a local court, and 87.4 % – in an appellate court.

The thesis, that the judges, who occupy administrative positions in courts, should be deprived of authorities, connected with distribution of cases between judges, handing of cases to another court, giving to judges of premiums and other material incentives, since at this they can influence the result of solution of cases. For raising of the guarantees of impartiality and objectivity of justice, making impossible of pressure from the side of the heads of courts and their deputies the latter must be deprived of authorities, which allow them to intrude into examination and solution by judges of specific judicial cases, in particular the authorities to: distribute cases between judges; form panels of judges for examination of cases; to take measures for material incentives of judges, provision with dwelling and other.

The law of Ukraine must determine:

- the order of automatic distribution of cases in courts and an exhaustive list of cases, when this order is not applied;
- the order of formation on an incidental foundation of the composition of the panels of judges on examination of this or another case;
- broadening of the authorities of the heads and corresponding employees of courts in the part of the organizational-technical and material-economic provision of the activity of a court.

The procedure of the career growth of a judge is considered not enough regulated and potentially corruptive. In particular, it is not understood, how preference is given at recommendation of a judge for taking positions in the courts of higher instances.

Corruptive risks increase significantly in case of occupation of the positions of judges and employees of courts by relatives and close people in the same court. Therefore the law must:

- envisage a competitive procedure of taking by judges of positions in higher courts by means of independent evaluation of their professional knowledges, parameters of work facts of bringing to disciplinary responsibility;
- exclude the possibility of staying in the same court on the positions of judges and employees of courts of relatives and close people;
- outline the borders of methodical help and its meaning at execution of respective functions by the judges of the appellation and cassation instances.

**An absolutely corruptive practice is occupation of the positions of a judge and the head of a court of a higher instance of this jurisdiction of persons, who are relatives or close people, and examination by the local courts of cases with participation of a person, who is the head of the appellate court of this appellation circuit.**

In fact the existing career and, partially, material dependence of judges of a respective appellative circuit on the heads of the appellate courts of the same circuit is significant.

In particular, presentation of information to the body, which has appointed or elected a judge, about proposal of the candidature for election as judge, presentation of a proposal to a respective qualification commission about taking of a disciplinary penalty before the term (part 2 article 15, part 3 article 36 of the Law “About the Status of Judges”); giving of a characteristic of a judge at discussion of the issue about election of a candidate to the position of a judge termlessly at a plenary sitting of the Supreme Council of Ukraine (part 5 of article 12 of the Law “About the Order of Election to the Position and Removal from the Position of a Professional Judge by the Supreme council of Ukraine”); issuance of a respective order on the basis of an act about appointment onto the position of a judge or election as judge termlessly, realization of measures for provision of formation of the composition of people’s assessors, appointment of the judges of an appellate court to the composition of a respective court chambre, issuance of an order on the basis of an act about election (appointment) as judge or cessation of the authorities of a judge of an appellate court; formation of the composition of people’s assessors, appointment of judges of an appellate court to the composition of a respective court chambre, issuance of a respective order on the basis of an act about election (appointment) as judge or cessation of the authorities of a judge of an appellate court; formation of court chambres and presentation for approval by the presidium of a court of their compositions, organization of work of the presidium of an appellate court, presentation for its examination of issues and presiding at the sittings of the presidium, presentation for approval of the composition of court chambres, writing of a characteristic of a judge, who is subject to a qualification attestation, with reflection of the business and moral qualities of the judge, evaluation of his professional activity, and, accordingly, writing of a characteristic of the head of the local court for the purposes of qualification attestation (paragraphs 3, 5 of part 1 of article 24, part 7 of article 25, paragraphs 3, 4 of part 1 of article 28, paragraph 2 of part 2 of article 30, parts 3, 4 of article 90 of the Law “About the judiciary”) depends on the head of the court, in which a judge works, or on the head of a higher court.

Non-incidentally reception of the competence to appoint (elect) judges onto the positions of the heads of courts (their deputies) can be considered of key importance in realization of court proceedings and possible influence onto judges and the process of rendering decisions.

In the decision of the Constitutional Court of Ukraine of the 16 of may the year 2007 in case №1-6/2007 about dismissal of a judge from his active position a juridical position was expressed, according to which were considered the foundations of independence of court bodies, worked-out by the international community, expressed, in particular, in the recommendations of the Committee of the Ministers of the European council of the 13 of octobre the year 1994 № (94) 12 “Independence, Effectiveness and the Role of Judges”, where it is indicated, that a body, which is authorized to take decisions about the careers of judges, must be independent of the government and administrative bodies; in the European charter about the Law “About the Status of Judges” of the 10 of july the year 1998, in which it is provided, that decisions about service raising of a judge are presented by a body, independent

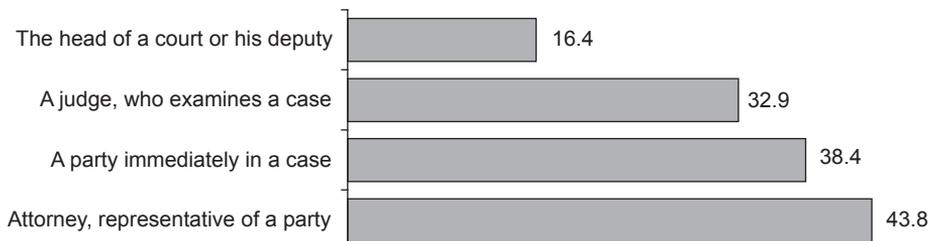
of the executive and legislative powers; in “The Main Principles of Independence of Judicial Bodies”, approved by the resolutions of the GA of the UNO № 40/32 of the 29 of november the year 1985 and № 40/146 of the 13 of december the year 1985, in which it is indicated, that removal from a position or dismissal of judge must be an object of an independent verification. The conclusion of experts of the European Council of the 19 of december the year 2002 about the Law of Ukraine “About the Judiciary of Ukraine” concerning, that the president cannot play in the selection of judges to administrative positions such an active role, and the provision of the Concept of improvement of the judiciary for establishment of just trial in Ukraine according to the European standards, approved by the decree of the President of Ukraine of the 10 of may the year 2006 № 361, in which it is envisaged to introduce an order, under which the administrative positions in courts will be occupied by judges, appointed by the bodies of judicial self-government.

*The decision of the Council of Judges of Ukraine of the 31 of may the year 2007 about the possibility of appointment of judges to the administrative positions in the general jurisdiction courts and dismissal from these positions has actualized reception of membership in the Council of judges of Ukraine by the current administrative persons of the courts, first of all of the appellation level. At the IX regular Congress of Judges of Ukraine at election of the members of the Council of judges of Ukraine an application of the meeting of judges of the Supreme Court of Ukraine about bringing of changes into the Provision about the Council of Judges of Ukraine and the necessity to fix the rules about formation of this body, as a rule, of judges, who do not occupy administrative positions, was examined but not supported.*

**Corruption relations in courts: the conditions, the character of corruption abuses, the processual subjects, intermediaries and beneficiaries. The role of representatives of the parties in raising of corruption risks.** Formation of corruption agreements in the civil proceedings happens according to schemes, which have much in common with the other kinds of judicial proceedings. However, there are some differences here too. **Diagram 56** shows, who of the participants of the process is an immediate **initiator of corruption agreements**.

*Diagram 56.*

**Initiators of corruption agreements:  
experts' evaluations of civil judicial proceedings**



Most often initiators of corruption agreements are attorneys, which is explained by stable informal contacts with judges. Together with this is noted a rather high level of activity of the judges themselves too (32.9 % of the questioned people name them initiators of corruption agreements, for comparison, 38.4 % – a party in a case). It reveals itself also in the fact, that, in the cases, when a party immediately (or its representative) is the initiator of a corruption agreement, it enters negotiations with a judge (90.3 % of the questioned people consider so), much more seldom with the head of a court (9.7 %).

It is rather important, that almost a half of the experts (44.2 %) draw attention to the existence of stable agreements between the judges of the local and appellate courts about leaving in force of judicial agreements, which were rendered on the basis of corruption agreements. Only 12.0 % of the questioned people negate the existence of such agreements.

A third of the questioned experts (33.4 %) acknowledge spreading of the practice of bribing of court experts, which is a somewhat lower index, than in some other kinds of proceedings. At this experts acknowledge experts, who are private entrepreneurs, as more inclined to corruption agreements (distribution of evaluations concerning the issue of bigger spreading of corruption agreements among different categories of the experts was following: experts, who work in expert establishments – 15.4 %, experts, private entrepreneurs – 29.2 %, other – have not determined their positions).

Experts draw attention to the inclusion of the employees of courts into corruption relations too (18.7 % of the questioned people agree with this). It was established in the in-depth interviews, that employees of courts receive corruption remunerations for actions of different content, however, most often, *for assistance in registration of applications or solicitations “with a reverse date”, for reception of the possibilities of acquaintance with some documents in a case, for delaying or speeding up of the “movement of certain documents”, for assistance in “access to some judges”, in some cases – for handing of a case to a specific judge and other.*

The results of the questionings allow to receive an idea about the **objects of corruption agreements**, that is about, what the interested persons strive at. (see **Diagram 57**).

Diagram 57.

**The object of corruption agreements in the courts of the first instance: experts' evaluations** (% of those, who consider, that corruption abuses by judges concern namely this stage of the process of these processual actions)

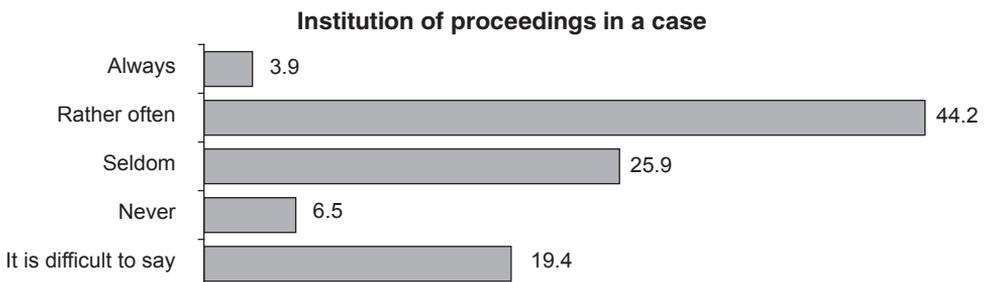


Diagram 57 (continuation).

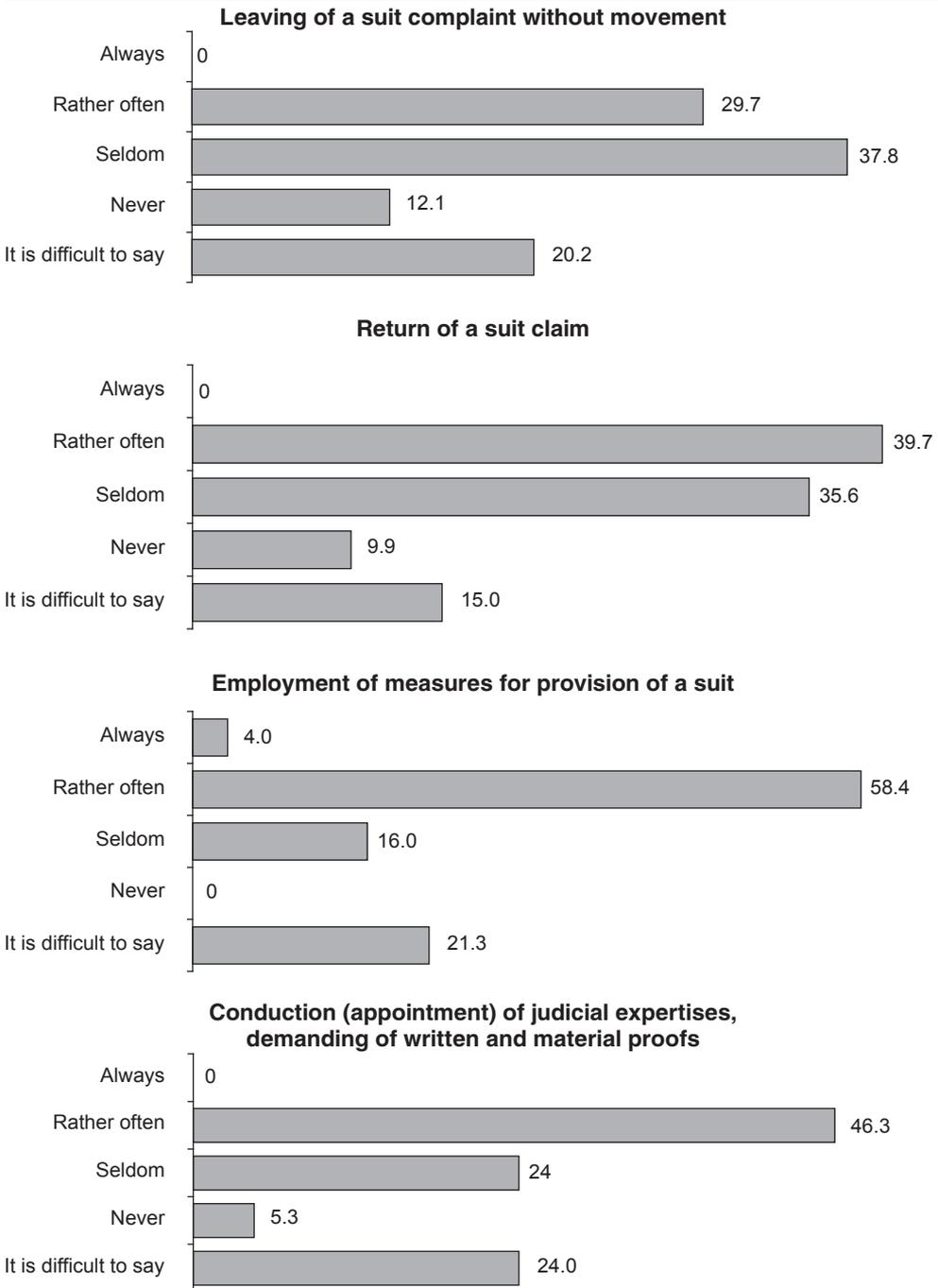
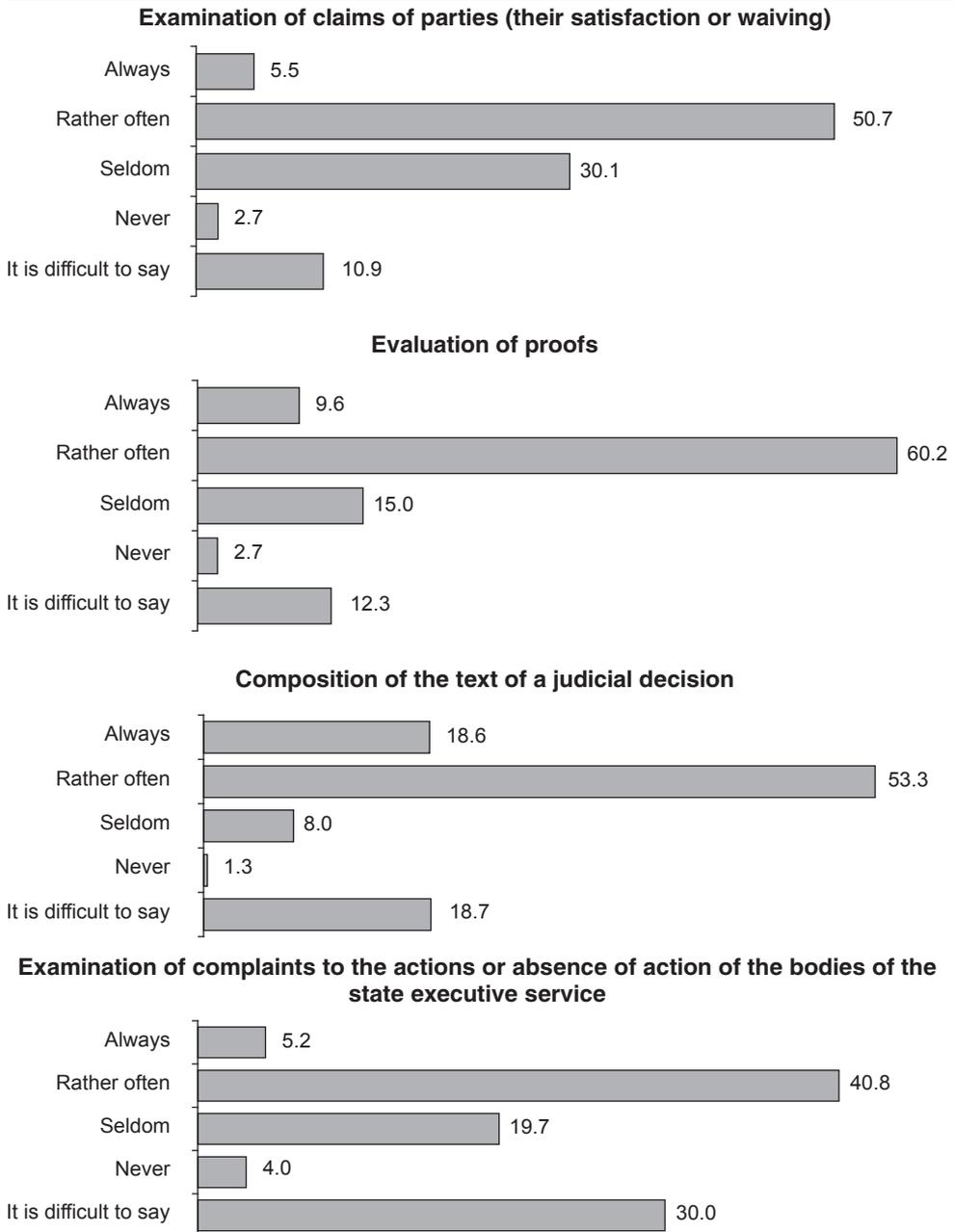


Diagram 57 (continuation).



These data show, that corruption risks are rather uniformly spread relative to the main processual stages and the actions of a judge. Although, most often they concern measures for **provision of a suit, evaluation of proofs and composition of the text of a judicial decision**, actions, which concern “movement of a case”, especially often – return of suit applications or rejection, or satisfaction of suits of the parties.

Experts have drawn attention to the *connection of corruption practices with some drawbacks of the legislation in force* (farther in the text are given citations from the in-depth interviews and the reports about focus groups):

- **Situations, which concern “movement of a case” (institution of proceedings, leaving of a suit without movement and other)**. Experts do not attribute such situations to the most corruptogenic. Attention is drawn to the existence of numerous conditions, which allow to delay examination artificially. Also in such cases attention is drawn to the use by judges of the formal requirements to writing of processual documents (phenomenon of “excessive formalism”) as ground for waiving of suits. In the in-depth interviews respondents indicate situations, when “*judges exert psychological pressure onto the participants (most often – “simple people”) in order to convince them of the impossibility to achieve desired goals.*” (law-protector M.).

*Cases of leaving of a suit application without movement on artificial grounds, in particular, by means of reference to non-giving by a plaintiff of proofs, which he grounds his suit demands with, and also non-indication of grounds for liberation from proving. As it was clarified, the period, which has been given by a court for correction of the “drawbacks” of the suit application, was about 70 days from the date of filing of the suit. Obviously, the court had no intention to examine the filed suit with the hope, that the plaintiff will lose interest to the examination of the case.*

*A resolution about leaving of a suit application without movement according to the CPC of Ukraine is not subject to appellation and the side had to wait for the end of that period and rendering of a resolution about return of a suit application. The resolution, appealed against in the appellation order, was cancelled with reference to the fact, that establishment of belonging, admissibility, trustworthiness and sufficiency of proofs at the stage of acceptance of a suit does not take place. As a result, hearing of the case was appointed in the local court only 7 months after filing of the suit.*

- **Measures for provision of a suit.** This element of proceedings is examined not with a single meaning, but most often – as one of the most contradictory elements of the civil process. Experts acknowledge, that in the legislation these issues are regulated not strictly enough, which causes the possibility of corruption abuses. The fact, that judges have a high level of discretion in such situations, becomes an important corruptogenic factor, since the possibilities of appealing against such decisions become essentially complex. The non-optimality of processual periods is acknowledged as a separate problem.

*Cases of rendering by a court of invented and ungrounded resolutions about provision of a suit, with which in fact was stopped any activity of the respondents or other persons, not engaged in the case. In one of the cases about acknowledgement as invalid of an agreement of rent of a land lot a local court provided a suit and forbade the defendant to do any actions, connected with working-out of project documentation on building of a structure on the given land lot. The indicated resolution was cancelled because of disparity and non-coincidence with the object of the suit.*

• **Examination of solicitations of parties.** In this case in the in-depth interviews was noted presence of *excessive formalism*, which is rather often masking presence of corruption agreements. Besides, attention is drawn to the existence of non-strictness of the legislation in the part of the requirements relative to motivation of decisions about waiving or satisfaction of the majority of such solicitations and the possibility of delaying of examination of such solicitations.

Such a refusal to satisfy a solicitation about demanding of proofs was indicated in the in-depth interviews as “*presented before the time*” (*Law-protector M.*).

• **Evaluation of proofs.** Experts draw attention to the situations of non-execution by certain persons of the judicial resolutions about demanding of proofs. Absence of an effective responsibility for such actions makes this circumstance corruptogenic. Attention is drawn to the existence “*of unobjectible prejudicial meaning of certain kinds of proofs, as already established in court sittings.*” Giving of such a status to the decisions of arbitration courts in the understanding of the introduced changes to part two of article 35 of the EPC (Economic-processual code) of Ukraine, by which facts, established by a decision of an arbitration court, were excluded of the circle of predudicial facts, but not the introduction of analogical changes (by means of direct indication) to article 61 of the CPC of Ukraine. Besides, “*in the process goes evaluation of the proofs by a court according to personal convictions, however such convictions do not always coincide with the law*”.

Fulfillment of corruption agreements demands execution of certain actions, which have “tactic” character as for achievement of the goal of such agreements, since in most cases the speech is about not only the content of a judicial decision, but about other characteristics of the proceedings too, which are important in the context of limitation of the possibilities of certain participants both immediately in the process and at appellation of respective decisions. **Diagram 58** shows, **which actions namely judges accomplish within the limits of corruption agreements.**

These data show, that different means are used (for example, manipulations with documents – hiding of certain documents, groundless complication of access to the materials of a case and other). However, *namely artificial delaying of judicial examination* is one of the most often used tricks in the situations of realization of corruption agreements, which makes implementation in the ukrainian judicial proceedings of the criteria of the Council of Europe about “examination of a case during a reasonable period” extremely actual.

Diagram 58.

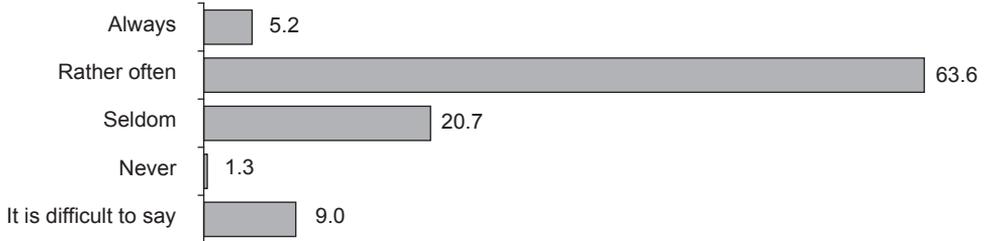
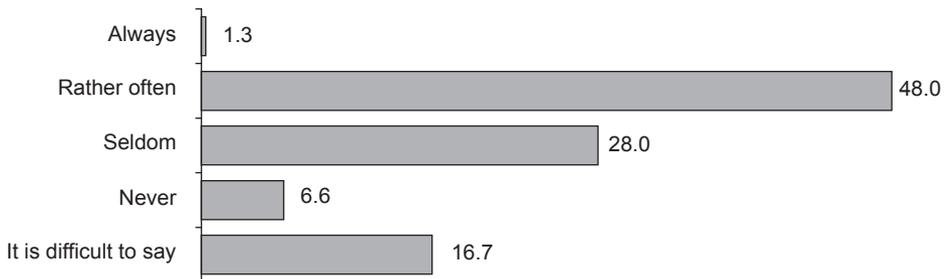
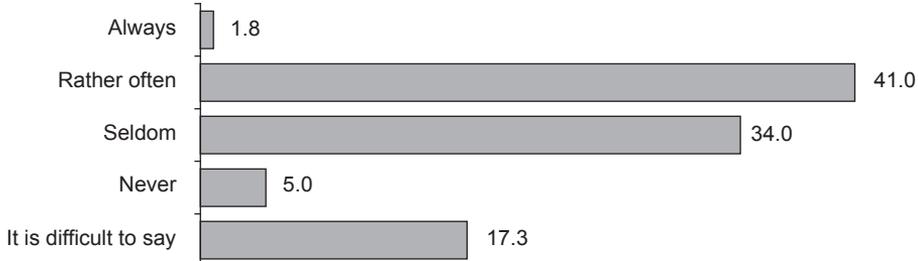
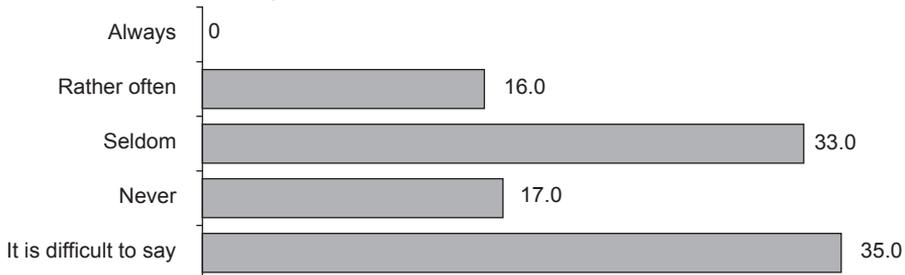
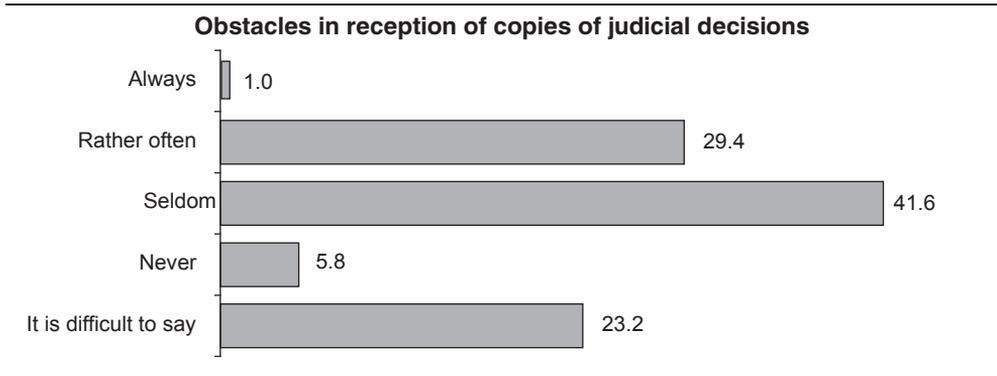
**Use if certain actions for fulfillment of corruption agreements:  
experts' evaluations***(% of those, who consider, that such actions are used in the civil judicial proceedings)***Groundless, artificial delaying of a judicial examination****Nonsending to a party of information about appointment of a hearing of a case****Limitation of possibilities of acquaintance with a case****Nonregistration of documents by the chancellery**

Diagram 58 (continuation).



### **Corruption risks of independent material provision of courts and judges.**

Clarification of the thought, that the level of salaries of the judges is not attributed by the experts to the essential factors of corruption motivation. In the in-depth interviews attention was constantly accentuated on the impossibility to explain judicial corruption mainly with the motives, which are based on dissatisfaction of judges by the level of salaries (See higher **Diagram 54**).

The issue of due material provision of the courts and judges is also important and can become motivational, when corruption practices appear and spread.

*In the decision of the European Court on Human Rights of the 9 of novembre the year 2006 in case “Biluha against Ukraine” the female claimant stated, that the court was not impartial, because the Company, to which the suit was presented, has manufactured and installed the bars on the windows of the new building of the court, given a computer and repaired the heating system of the court. The claimant also referred to the interest of the head of the local court, stating, that the court has received some property due to “unofficial” relations between the management of the Company and the head of the court. The Court noted, that the Government did not argue the statement of the claimant relative to, whether the head of the local court, who unilaterally examined the case of the claimant in a court of the first instance and whose decisions were left without changes by the courts of the higher instances, asked and received without payment property from the Company-defendant. To the thought of the Court, under such circumstances the fear of the claimant relative to the interest of the head can be considered objectively justified, regardless of the fact, that the court has satisfied one of the complaints of the claimant.*

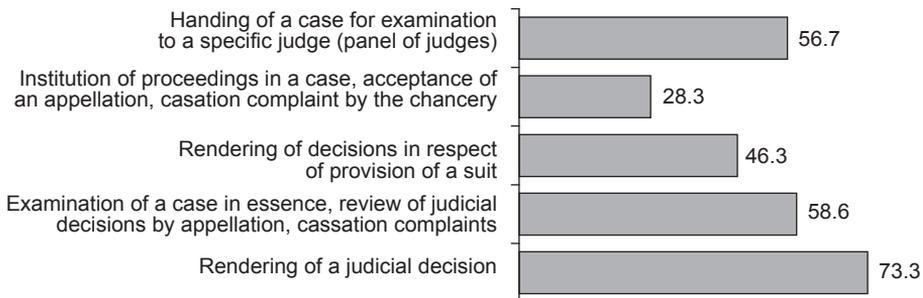
Judges are dependent on the administrative bodies in the issues of financial, information and other provision of the process of justice, and therefore necessity to remove such dependence for the goals of minimalization of corruption practices.

### 3.3.2 Corruption Risks at Certain Stages of Examination of Civil Cases

**Corruption risks at handing of a case to a judge, when it comes to a court.** Corruption practices have **different frequency** depending on the stage of judicial examination (**Diagram 59**).

*Diagram 59.*

**Spreading of corruption practices (corruption agreements) at the main stages of examination of civil cases: experts' evaluations**  
(% of those, who consider, that such practices are "widely spread")



These data testify, that for civil judicial proceedings the decisive meaning has the final stage, that is the factual content of a rendered judicial decision. However, here (like in other kinds of proceedings too) other stages can be "attractive" too. In particular, experts note the special meaning of the initial stage of judicial proceedings (distribution of cases), when such conditions are created on the basis of corruption agreements, under which a case gets to the "necessary judge". And namely this is decisive for the whole process.

With articles 118, 297 and 327 of the CPC of Ukraine the order of handing of cases (cassational complaints) to the judge-reporter in the order of a queue. However, we should say with conviction, that in courts such order of correspondence to the requirements of the law is not kept. First, it was not introduced simultaneously with entering into force of the CPC of Ukraine, and second, in those courts, where such order exists factually today, not unique cases are known of solution of the issue about handing of cases by means of the resolution of the head of a court (his deputy), which is placed onto respective documents or separate sheets, which are destroyed later.

*Cases became known from communication with experts, when information about the main mass of the cases are really brought into an electronic system, and some of them – only after distribution by the head of a court with following bringing into the electronic data base.*

It is obvious, that the electronic system of distribution of cases does not exclude such illegal sequence of actions. At this technical possibility of bringing into the data base of information "with a reverse date". Proving of this fact is extremely complex, but

possible. This way, conditions remain for certain cases that the head of a court will hand a case to the “necessary” judge with a beforehand prognosed result of examination of a case. Solution of this problem is seen in obligatory adding to the materials of a case of the printed algorithm of the case (cassational complaint) distribution program, with indication of the date and time of realization of the logical operation.

The position of the experts coincides fully with the provisions of the corruption prevention concept and relative to the necessity of determination in the Law “About the status of judges” of the general duty of a judge to claim self-dismissal, if a conflict of interests arises at a judicial examination of a case. The unified notion of the *conflict of interests in the sphere of justice* must be determined in the legislation as situation, in which direct or indirect personal interest of a judge influences or can influence the impartial, objective fulfillment by him of judicial functions or there is a danger of appearance of contradiction between the personal interest of a judge and the legal interests of physical, juridical persons or the state – parts of the judicial process.

The category of *personal interest of a judge*, as it is proposed in the the corruption prevention concept, can be determined in the legislation as a possibility of reception by a judge at fulfillment of professional duties of profits in the form of material remuneration or another unlawful advantage immediately for him, the members of his family, other physical or juridical persons, to whom a judge is connected with juridical obligations.

Violation of the rules of judiciability of cases is used by dishonest judges, employed in so-called raider operations for unlawful seizure of other people’s property (first of all real estate, land lots, land shares). At application of corruption schemes such cases are examined not by the place of the property, but by the place of a plaintiff or a defendant, which conditions the possibility of reception of several judicial decisions on the same object of a dispute. As a result solution of such a category of proceeding disputes lasts for years and generates juridical chaos.

*Experts brought an example of violation of the rules of judiciability of cases between courts of different jurisdictions, when the head of a district court handed for examination by a judge of several scores of single-type cases by suits of the tax inspection about cessation of activity by juridical persons on the grounds of not giving by them during a year of financial reporting documents. Taking to attention, that no objections occur in the cases of this category, and the tax inspection had to report about the done work, the cases were examined (by the head of the court himself) without consideration of their non-judiciability to the district court.*

For the goals of overcoming of corruption practices relative to the artificial judiciability of cases should be:

- strictly determined the rules of territorial judiciability of the disputes of a respective category;
- unified the rules of judiciability and strictly delimited the competence of judicial jurisdictions in the civil, economic and administrative judicial proceedings;

- minimized exclusions of the general rules of judiciability;
- determine examination of a case with violation of the rules of territorial judiciability as unconditional ground for cancellation of a judicial decision.

**Experts' evaluations of certain aspects of connection of the state of legislation and formation of corruption risks.** In general, both in the questionings and in the in-depth interviews the thesis, that *“corruption practices are not a problem of the legislation, it is a problem of a law-applier, the system of administration of the judicial activity, internal and external relations, the professional ethics of judges and other”*. However experts analyzed separate problems, which attract attention in the last years both in the legislation in force and in law-project propositions. Among them the following:

- Almost a quarter of the questioned experts (24.2 %) acknowledge existence of corruption risk in the provisions of the processual legislation about examination of a case in the appellation and cassation order, which is in force, exclusively within the limits of the arguments of the lodged complaints.

Corruption practices are seen in, that, from one side, the appellate court verifies the legality and groundedness of a decision of a court of the first instance within the limits of the arguments of an appellation complaint, and from the other the appellate court is not limited with the arguments of the appellation complaint, if during the examination of a case wrong application of the norms of the substantive law or violation of the norms of the processual law is established, which are an obligatory ground for cancellation of the decision (part 1 of article 303 of the CPC of Ukraine).

As far as the court of the cassation instance is concerned, according to part 4 of article 328 of the CPC of Ukraine wrong application of the norms of the substantive law or violation of the norms of the processual law is a ground for institution of cassation proceedings regardless of the groundedness of a cassation complaint. According to parts 1, 3 of article 335 of the CPC of Ukraine during examination of a case in the cassation order a court verifies within the limits of a cassation complaint the correctness of application by the court of the first or appellation instances of the norms of the substantive or processual legislation. A court is not limited by the arguments of a cassation complaint, if during the examination of the case wrong application of the norms of the substantive law or violation of the norms of the processual law is detected, which is an obligatory ground for cancellation of a decision.

This way, reference by judicial decisions of the appellation and cassation instances to, that the arguments of an appellation (cassation) complaint do not give grounds for cancellation or change of a judicial decision (or institution of cassation proceedings) can be viewed as illegal. Realization of judicial proceedings is the obligation of a court, and therefore rendering of a lawful, grounded and just judicial decision is a part of the obligation of a court.

- The position of experts concerning the provision about the possibility of adding or change of an appellation or cassation complaint only during the term for appellation is expressed less strictly. Only 16.2 % of the questioned people relate this provision to corruptogenic, 32.2 % – acknowledge such a statement erroneous, other could not determine their opinions.

The indicated position of the issue actualizes revelation of corruption practices at application of the prescriptions of the legislation about the possibility of change or supplement of the lodged complaints *only* in the limits of the terms for appealation (part 1 of article 300, part 1 of article 330 of the CPC of Ukraine), because acceptance and consideration of the arguments in respect of the violations, which a court of the appealation or the cassation instance is obliged to consider regardless of the content of the lodged complaint, is directly connected with realization by courts of the laid duty to approve a lawful, grounded and just judicial decision and to realize justice in the case.

- Experts name an important problem introduction of the order, according to which a court may limit itself with composition of only the introductory and resolutive parts of the decision in a case. 34.2 % of the experts point at the existence in this case of corruption risks. During the in-depth interviews this problem received non-single meaning evaluations. Agreeing with the existence of corruption risks in this order, respondents (attorneys, jurists, judges and also ordinary citizens) stressed its necessity as a means of simplification of the procedure, especially in “*ordinary or standard, single-type cases*”.

- The attitude of experts to the introduction of the order of appealation of resolutions, which do not interfere with examination of a case, only in the appealation order is more single-meaning. Almost one third of the experts (29.3 %) is convinced, that this will create additional corruption risks at the level of appellate courts. Only 10.9 % of the questioned people disagree with this.

*The experts have brought an example, when a court of the first instance applied measures for provision of a suit in the form of confiscation of an arrested automobile from a person, who was determined by a state executor, and handing of it to the owner for keeping. In the materials of the case there were proofs, that this automobile, given earlier to a bank as pledge of reception of a credit in the sum of 40 thousand dollars, was purchased by the following owner through a commodity exchange for 100 hryvnias! When the appellate court gave an evaluation to the selected kind of provision of the suit and motivation of the rendered resolution indicated, that a violation of the exclusive competence of the state executor to appoint the person-keeper of the arrested property.*

*During the two years, when the case was in the local court, it was not heard a single time in essence. It is obvious, that the case will be stopped in some time in case of absence of the need of the owner of the automobile to use it, and the case **will never get to the higher judicial instances.***

*The indicated resolution of the appellate court is not subject to cassational appealation, therefore the principle “paper will endure everything” can be applied without any limitations in the content of the rendered judicial decisions.*

- Experts evaluate the non-obligatoriness of summon of parties to a judicial sitting of the cassation court. Such a position is characteristic for 42.7 %, 11.4 % disagree with this.

We should agree, that a court of the cassation instance solves issues of the law, and not issues of facts, and it may not establish or (and) consider circumstances, which have not been established in the decision or rejected by it, to solve issues about trustworthiness or non-trustworthiness of this or another proof, about prevalence of some proofs over the others. Together with this, the fullness of establishment of the circumstances of a case can be put under doubt simultaneously with the results of the preliminary judicial examination. This will demand both personal explanations relative to the facts and an opinion about due juridical qualification of juridical relations. According to part 4 of article 6 of the Law “About the Judiciary” no one can be deprived of the right to participate in the examination of his case in the order, determined by the processual law in a court of any level.

*In the decision of the European Court on Human Rights of the 19 of decembre the year 1997 in case “Brula Homes de la Tore against Spain” the Court indicated, that article 6 of the Convention does not oblige countries, participants of the Convention, to create appellation and cassation courts. However there, where such courts exist, the guarantees, set forth in article 6, must be observed, for example, in the sence, that this would guarantee to the sides of a dispute an effective right of access to courts for the goals of clarification of their “civil rights and obligations”.*

Besides, examination of a case without summon of the persons, who participate in a case, can be viewed as violation of the publicity of examination of a case and the absence of the guarantees of public control.

*Introduction in the CPC of Ukraine of norms about in absentia solution at presence of an abuse by a judge makes a potential threat of corruption practices.*

*In the Corruption prevention concept it is indicated about spreading of cases of rendering by courts of in absentia decisions about deprivation of the right of ownership for the property of these or other persons under circumstances, when they even did not suspect about existence of a suit and its examination in a court. It is indicated, that judges abuse namely the juridical fact “due information”, when rendering ordered judicial decisions in the in absentia proceedings procedure, provided by the legislation. Sometimes a message about summon to a judicial sitting is sent already after conduction of a judicial process. It is indicated, that non-observance of the requirements of the legislation in respect of due information of a party of a process should be viewed as ground for disciplinary responsibility of a judge.*

*It is known about rendering by a court of in absentia decisions simultaneously in approximately 20 single-type cases about expulsion of the inhabitants of a dormitory from their dwelling rooms. It was clarified, that the dormitory passed to the ownership of the enterprise in the process of privatization. When a law, which provided the right of the inhabitants for privitization of their rooms, the rooms gained a special meaning for the owners of the enterprise.*

*The information about summon to judicial sittings of the defendants was placed by the plaintiff only in the local mass information medium, after which the court approved in absentia decisions about acknowledgement of the inhabitants such, who lost the right for the rooms.*

*It is important, that copies of in absentia decisions were not sent to the defendants, however on the contrary to paragraph 16.6 of the Instruction on document registration in the local general court without information about the fact of reception by the defendants of copies of in absentia decisions the judge testified with his signature, that the decisions gained lawful force. All the defendants were taken off registration by the internal affairs bodies, they lost the right for privatization of the rooms under such conditions.*

*A part of the defendants later lodged to the court a claim about review of the in absentia decisions, after which these in absentia decisions were cancelled and by a claim of a plaintiff the suit claims were left without examination.*

In the civil judicial proceedings is also noted existence of a specific phenomenon – “**ordered proceedings**”, that is situations, when certain processual actions (or proceedings completely) were executed exclusively for the goal of reception of corruption remunerations for solution of a case not as a whole, but only for achievement of certain goals: reception of access to certain documents, limitation of the authorities of certain persons or bodies, imposition of arrest onto the property or property rights and other. By the evaluations, received from in-depth interviews, most often in such situations the speech is about imposition of arrest onto the property or property rights, moving of the heads of juridical persons off their positions for the goals of obtention of the stamps or establishing documents, reception of forced access to the territory of enterprises and clarification of information with limited access (bank secrets, information from various registers and other).

More than half of the experts (58.1 %) indicate, that they know cases of “ordered” proceedings, 66.7 % of the questioned people acknowledge existence of corruption grounds of such actions. It is rather important, how proceedings go farther in such cases after achievement of the desired goal: a case is stopped on grounds, formally provided by the law – 35.1 %, the suit was left without examination – 11.0 %, a plaintiff refused from a suit – 10.8 %, a case ended with a peace agreement – 7.8 %, a case was examined in essence with rendering of a decision – 52.0 %. These situations were illustrated not once in the in-depth interviews of representatives of some social groups.

**Corruption risks at evaluation of proofs, juridical qualification, motivation of a decision, rendering of a decision in a case.** The indicated corruption practices can be established and proved exclusively in the established processual order of review of judicial decisions by courts of higher instances, and also in case of acknowledgement of a judicial decision by an international judicial establishment, the jurisdiction of which is acknowledged by Ukraine, such, which violates the international obligations of Ukraine.

Such practices are fully connected with the processual activity of a judge in the sphere of justice, and therefore, first, any judicial decision, which has not been cancelled and has entered into force, is obligatory for execution on all the territory of Ukraine (part 5 of article

124 of the Constitution of Ukraine), and second, the independence and untouchability of judges are guaranteed by the Constitution and the laws of Ukraine, influence onto the judges in any way is forbidden (parts 1, 2 of article 126 of the Constitution of Ukraine).

The principle, according to which judges at realization of justice obey only the law and they do not report to anyone, is objective and necessary, proceeding from the fact, that independence of justice is the main precondition of their objectivity and impartiality. According to the resolution of the plenum of the Supreme court of Ukraine of the 13 of June the year 2007 № 8 “About independence of the Judicial Power”, freedom of impartial solution of judicial cases according to their inner conviction, which is grounded on the requirements of the law, is provided for judges. A corresponding court has the exclusive right of verification of lawfulness and groundedness of judicial decisions according to the processual legislation. Appellation in any way of judicial decisions, activity of courts and judges concerning examination and solution of a case beyond the order, provided by the processual law in a case is not allowed. Taking for examination by any persons or bodies, except for a corresponding appellation or casation court, of claims, in which judicial decisions are appealed, their examination, demanding from courts of information about judicial cases in connection with such claims, sending of claims to courts, requirements to judges about establishment of control over the examination of a case by a court or a judge is violation of the independence of trial.

*As it is indicated in the concept of prevention of corruption, not in a single of the processual laws there are strictly determined criteria, by which a judge must evaluate proofs, give preference to some of them. The procedures of judicial proving ground on the principle, according to which a judge must be guided in his activity apriori with the principle of justice, but the realities of the ukrainian justice point at numerous cases of neglection of this foundation, which leads to rendering of unlawful judicial decisions.*

Under such conditions the corruption practices of the personality character, immediately connected with the process of law-application, can be the most probable. Their removal can be guaranteed exclusively by the procedure of review of the decisions of the courts of higher instances. Namely by this reason high-quality selection of judicial personnel and moral foundations of realization of justice can be the only effective preventive measures for corrupt judges.

### **3.3.3 Some Guarantees of Removal of Corruption Practices in the Civil Judicial Proceedings**

**Public control over realization of justice, publicity of the activity and openness of the judicial power as guarantee of removal of corruption practices.**

Openness of courts and maximal publicity of justice and judicial decisions can be one of the guarantees of removal of corruption practices in the civil judicial proceedings.

At this “the two-sided dialogue” cannot be grounded on the explanations, that judges have extremely high loads and work at the limit of human forces. Correction

of the situation in respect of decrease of the quantity of suit claims or complaints to the respective courts should be searched not in the artificial ways of non-acceptance of them or non-motivation of judicial decisions. One of the reasons of increase of the load in courts, and the geometrically growing quantity of claims to the European Court on Human Rights against the state of Ukraine should be searched in the significant fall of trust of people to judges, courts and other state institutes.

The authority of courts cannot be grounded exclusively on the formal signs of realization of judicial activity. This authority is based on social trust to the juridical and civil, and therefore just, position of judges, which follows from judicial decisions and actions of the administrative persons of judges. Any ugly, humiliating or immoral deeds and decisions will never favour raising of trust of the population to judges. In this list should be included all the abuses, which happen in courts and with judges' help, including covering of the processes of redivision of property, reception of land lots, "roofing" of power and business.

Among those, who keep silence, there are conscious professionals. The fate of the Ukrainian justice depends on their principle position. The society waits for their weighty word. Therefore, one of the general tasks of the judicial power must be establishment of an open and honest dialogue between the courts and the public.

*By the words of the Minister of Justice of Ukraine M. Onishchuk, courts are actively used in the political fight in the country, often taking both the authorities of the Supreme Council and the executive branches of the power. Now take place abuses of examination by courts of cases, a party in which are the higher service persons of the state, the higher bodies of the state power, when courts solve issues of stopping of the action or cancellation of their acts, taking onto themselves the functions of the Constitutional Court of Ukraine. The crisis in the court system requires immediate and common actions of representatives of all the branches of power with active engagement of the civil society<sup>53</sup>.*

*By the words of the retired head of the Supreme Court of Ukraine V. T. Malyarenko, the moral, conscience and juridical awareness degrade. A highly experienced, independent and untouchable, but a dishonest and immoral person, and he will distort anything at any procedure. We must think, how not to let dishonest people become judges. And if they have penetrated there, how to get rid of them as soon as possible<sup>54</sup>.*

*As it is indicated in the decision of the European Court on Human Rights of the 17 of January the year 2008 in case "Ryakib Biryukov against Russia", the public character of judicial examination protects the parties of the judicial process against conduction of justice in the mode of secrecy and without civil control, which is also one of the means of*

<sup>53</sup> <http://www.minjust.gov.ua/0/19237>

<sup>54</sup> Malyarenko V. T. Speech at the hearings in the Supreme Council of Ukraine "About the State of Justice in Ukraine", the 18 of march the year 2009 // Visnyk of the Supreme Court of Ukraine. 2009 № 4 (104). – C. 7.

*support of trust to the lower and higher courts. When conduction of justice is realized openly, publicity favours achievement of the goal of paragraph 1 of article 6, and namely: just judicial examination is the guarantee of one of the fundamental principles of any democratic society by the content of the Convention. The court repeated, that “in a democratic society by the content of the Convention, the right to just conduction of justice has such a significant place, that the limiting interpretations of paragraph 1 of article 6 will not satisfy the goal and intent of this norm”.*

*In particular, in this case, the Court acknowledged, that announcement at an open judicial sitting of only the introductory and resolute parts of a decision testifies about non-subordination of the state to the requirements of publicity of judicial decisions, since guaranteeing of the control of justice by the public has not been achieved, because the motives, which had to make possible understanding, why the requirements of a plaintiff have been waived, have not been accessible to the public.*

*Full transparency of the judicial procedures is the most important factor of raising of the consciousness of judges during realization of court proceedings.*

One of the steps on this way is acceptance of the Law of Ukraine “About Access to Judicial Decisions”, which has become substantial progress on the way of provision of the openness of justice for the public. But this law turned out only a step to the put goal, because, as testify sociological questionings, only approximately a fifth part of the citizens knows about existence of the single register of judicial decisions<sup>55</sup>.

It is considered, that for real openness of the judicial power it is necessary to provide in the law:

- the principle of general access of all the necessary information about all the courts of general jurisdiction;
- the order of reception on the web-sites of courts, and on the web-site of the State Court Administration of Ukraine of exhaustive and precise information about all the courts of general jurisdiction, about movement of his case in a court through the internet;
- the possibility to provide access of the parties of the process not only to final decisions in a case, which have entered into legal force, but to intermediate rulings, resolutions, orders and other judicial decisions, which have meaning for protection by the parties of the process of their rights, freedoms and interests;
- telephone lines of trust, through which citizens would have a possibility to inform about facts of extortion of bribes and commitment of other law-violations by judges, employees of courts at execution of their service duties;
- the possibility of direct videotranslation of a certain category of cases through the internet (at presence of sufficient financing of the judicial power and technical possibilities, and agreement of the participants of a sitting);

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<sup>55</sup> [http://gska2.rada.gov.ua/pls/zweb\\_n/webproc4\\_1?id=&pf3511=34771](http://gska2.rada.gov.ua/pls/zweb_n/webproc4_1?id=&pf3511=34771)

- such order of organization of the activity of courts, under which judges and participants of a judicial process would have a possibility to meet exclusively in a hall of judicial sittings, and forbiddance of reception by judges of the parties of a process or their representatives before the beginning or during a judicial sitting.

We should add, that a judicial decision may enter into force only after its obligatory inclusion into the Unified register of judicial decisions of Ukraine, exactly as for realization of any compulsive actions for its execution.

Openness of the judicial system and judicial proceedings is impossible without participation in the informing about its activity of mass information media with the possibility of access without obstacles of representatives of the media to the premises of courts, in which open court sittings are conducted, and to other premises, where is or can be information about the activity of a court.

*The European Court on Human Rights expressed a principle juridical position in the decision of the 26 of February the year 2009 in the case "Kudeshkina against Russia". In connection with giving of publicity by O. Kudeshkina to certain negative processes, which, to her opinion, have place in the community of judges, she was dismissed off the position of a judge. The plaintiff in the case indicated, that although the power announced, that cessation of her authorities is necessary in the goals of support of the authority and impartiality of the judicial system, it is not the real goal of application of the disputed measure. She asserted, that the power is full of determinateness to show to all the members of the judicial power, that the information about illegal functioning of the judicial system must not be disclosed to broad public.*

*At evaluation of the circumstances of the case the Court proceeded, in particular, from, that application to the plaintiff of the most severe punishment of those, which can be applied in disciplinary cases, could, of course, interfere with other judges making in the future claims with critics of the state establishments or policy under fear of loss of a position of a judge. It became a ground for the Court to make a conclusion about non-provision of the correct balance between the necessity of protection of the authority of the judicial power and protection of the reputation or rights of other persons from one side and the necessity to protect the right of a plaintiff for the freedom of expression of a thought from the other side.*

For the goal of prevention of corruption in the judicial corp the order of declaration of profits by judges and the members of their families should be introduced, for which it should be provided in the legislation:

- presentation by judges of annual declarations about their incomes and the incomes of the members of their families, and also information about the material situation and the obligations of material character;
- the possibility for the competent bodies to conduct monitoring of the realized real expenses by judges and the members of their families in comparison to the declarations about incomes;

- disciplinary responsibility of judges for non-lodging or untimely lodging of declarations about incomes, and for indication in those declarations of untrustworthy data.

**Corruption risks at bringing of judges to disciplinary responsibility. The problem of judicial untouchability.**

People consider, that four main conditions exist, which can favour development of corruption in judicial systems:

- absence of a system of appointment of judges according to their professional qualities, which can lead to appointment of corrupt judges;
- low salaries and bad conditions of work, and also absence of conditions for raising of the qualifications of judges lead to bigger vulnerability of the employees of courts to bribery;
- imperfect procedures of dismissal of corrupt judges may lead to the politization of the processes of moving of judges to another work or their liberation;
- non-transparency of judicial procedures may make the monitoring of the activity of the judicial system from the side of mass information media and the civil society.

*According to the information by I. L. Samsin, in the year 2007, like in the year 2008, were initiated 300 adductions about bringing of judges to disciplinary responsibility. Together with this, a complex procedure of dismissal from their positions of judges, who have violated the juration of a judge<sup>56</sup>. In essence this statement is supported by Yu. S. Medvedenko, indicating, that the effectiveness of any responsibility is in operativity and inevitability, but not in the centralization and pompousness<sup>57</sup>.*

Experts consider, that in fact the ineffective order of bringing of judges to disciplinary responsibility must be changed with the idea of creation of of a special body, which would realize disciplinary proceedings relative to the judges – of the Service of Judicial Inspectors – the unified central body on execution of verifications of complaints of citizens and juridical persons about the actions of the judges of local and appellate courts at realization of proceedings, subordinate to and controlled by the congress of judges of Ukraine. Considering the peculiarities of the activity of the indicated service, jurists with flawless reputation, necessary knowledge and experience of practical activity at the positions of a judge, an attorney or a prosecutor must be elected to it.

In the legislation as ground of disciplinary responsibility of a judge should be provided detection of one of such facts, among them: reception of an application, a complaint, a suit or a solicitation by a judge in non-work or non-reception time without registration in the chancery of a court; information not of all the participants of a judicial process, who participate in a judicial examination, about the date and place of a judicial examination, and also non-engagement in a case in the capacity of third persons of those subjects,

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<sup>56</sup> Samsin I. L. Speech at the hearings in the Supreme Council "About the State of Justice in Ukraine" in the Supreme council of Ukraine, the 18 of march the year 2009 // Visnyk of the Supreme court of Ukraine. 2009 № 4 (104). – C. 8.

<sup>57</sup> Medvedenko Yu. S. Speech at the hearings of the Supreme council of Ukraine "About the State of Justice in Ukraine", the 18 of march the year 2009 // Visnyk of the Supreme court of Ukraine. 2009 № 4 (104). – C. 10.

whose rights or interests this decision will touch obviously; groundless refusal to a participant of a process in acquaintance with the materials of a case or realization of full fixation of a court sitting; falsification of a protocol of a court sitting; intentional non-bringing into a protocol of a court sitting of certain testimonies from persons, who have participated in the sitting, if such testimonies had an important meaning for objective solution of the dispute; destruction of the materials of sound recording; acceptance of a resolution about provision of a suit, if application of respective measures is not necessary, limits the rights and freedoms of a person or if at this beforehand takes place solution of issues, connected with examination of a case in essence; acceptance for examination and examination of a case with violation of the rules of judiciability, established by the processual legislation; violation of the rules of internal distribution of cases in a court according to the specialization of courts; solution in a judicial decision of issues, which have already been solved in another judicial decision, which has entered into legal force.

The reality testifies about existence of “crying” cases of corruption practices by judges and the factual complication of bringing of them to juridical responsibility.

*According to the information by the head of the Supreme Court of Ukraine V. V. Onopenko, he brought to the Supreme Council of Justice a solicitation with propositions about dismissal off their positions of judges, who violate roughly laws during solution of land disputes, for violation of a juration. In particular, in respect of all the judges of Makarivsky district court of Kyiv region, in which were detected the most violations of the law during examination of the indicated cases<sup>58</sup>. It is obvious, that the crying of “Makarivsky court proceedings” can be compared by its consequences to “Basmanny jurisprudence”, and only the traditionally Ukrainian property, and not the political colouring of the disputes does not allow to name them completely similar.*

The issues of judges’ untouchability and raising of the juridical, first of all, criminal responsibility, are actual and such, which demand their legislative solution.

### **3.3.4 Recommendations**

According to the results of the conducted research the following changes to the legislation in force should be proposed.

1. To bring changes to the Law of Ukraine “About the Status of Judges”, with which to provide the principles of selection of candidates to the positions of professional judges, among which transparency; competitiveness; equality of possibilities for occupation of a vacant position; delimitation of access to the judicial profession from access to a specific position of a judge; objectivity of the procedure of evaluation of the professional knowledge and the moral qualities of candidates; the systematicity of the professional preparation of candidates to the positions of judges; continuity of raising of

<sup>58</sup> Marynenko O. Arbitral courts as potential danger to the national security // Dzerkalo tyzhnya № 44 (723) 22 - the 28 of november the year 2008. - [Electronic resource]. – Regime of access: <http://www.zn.ua/1000/1050/64749/>

the qualification of professional judges; strict determination of the conditions a repeat conduction of a qualification test of a candidate to the position of a judge.

2. To introduce changes to the Law of Ukraine “About the Judiciary” with provision of obligatory placement on generally accessible official internet-portals of annual information about the quantity and categories of the examined cases by separate courts, and also by every specific judge of those courts with indication of the quantity of cancelled, changed decisions and resolutions; grounds for cancellation, change of decisions and resolutions, presence of violated disciplinary proceedings and accepted decisions about bringing to disciplinary responsibility.

3. To bring changes to the Law of Ukraine “About the Judiciary” with introduction of the notion of a conflict of interests in the sphere of justice as situation, in which direct or indirect personal interest of a judge influences or can influence the impartial, objective execution by him of judicial functions or at existence of a threat of appearance of a contradiction between the personal interest of a judge and the legal interests of physical, juridical persons or a state – parties of a judicial process.

To provide in the capacity of one of the cases of a conflict of interests in the sphere of justice occupation of the positions of a judge or the head of a court of a higher instance of this jurisdiction of persons, who are relatives or close people, and also inadmissibility of examination by local courts of cases with participation of a person, who is the head of an appellate court of the same appellation circuit.

4. To realize the order, introduced in the CPC of Ukraine, of handing of cases for their examination in the first instance, and also of review of judicial decisions in the appellation and cassation orders of queues to the judge-reporter with adding to the materials of a case of proofs of observance of the indicated requirement.

4. In the capacity of a principle of civil proceedings it is necessary to provide in the general provisions of the EPC of Ukraine the right of a person for a legal, grounded and just judicial decision.

5. To provide in the CPC of Ukraine the impossibility of entering into legal force by in absentia decisions and forbiddance for its forceful execution without reception by a court of proofs of reception by a defendant of its copy.

6. To bring changes to the Law of Ukraine “About the Judiciary”, according to which to introduce an official unified in all the courts generally accessible system (with probable forbiddance of disclosure of information, which give the possibility to identify a physical person) about the movement of a case in a court through the internet network.

7. To bring changes to the CPC of Ukraine, according to which a judicial decision may enter into force and can be forcefully executed and also used in the activity of the bodies of state power and local self-government only after obligatory inclusion of a judicial decision to the Single Register of Judicial Decisions of Ukraine.

## CHAPTER 4. CORRUPTION RISKS IN ECONOMIC JUDICIAL PROCEEDINGS

Consideration of cases in the order of the economic judicial proceedings is significantly related to the solution of disputes about the objects of property of extraordinarily high cost, including the real estate, corporate rights, minerals, rights to objects of intellectual property of high profitability, money flows, which often determines decisive influence on the proper industries of national, and also world economy, receipt or loss of control packet of votes in economic partnerships, access to management or acquisition in the ownership of state and communal property, takeover and ousting the subjects of entrepreneurial activity from markets and so on.

The indicated facts determine special personal interest in the results of examination of the economic cases of the parties of dispute and receipt of the desired result by using the judicial decisions. Practical activity testifies, that by means of the courts and the judicial decisions actually the processes of redistribution of property quite often take place by the methods, which would be impossible by means of another method. Among others, this is also favoured by absence of effective procedure of appellation of the judicial decisions by the specially authorized public persons, actual impossibility of appeal of a court decision by persons, who are not the participants of dispute, in the cases concerning public interest (for example, by the residents of territorial society in the issues of condemnation of land within the limits of settlement, communal property and so on), and also complicated and often inactive procedure of bringing the judges to legal responsibility.

Practice testifies, that considerable influence on the judicial proceedings also has political and other authoritative protection, which is guaranteed in exchange for taking unjust decisions on the part of representatives of influential corporations of business and individuals. Combination of business and politics in one person simultaneously with the dependence of judges on the administrative persons of courts and weakness of public institutions of control over the realization of judicial proceedings becomes a strong foundation for illegal redistribution of property. Under such conditions the public purpose of judicial proceedings is entirely lost, legal institutes are levelled, realization of judicial proceedings can turn into a farce. Thus, morality, conscience, legitimacy and sense of justice degrade.

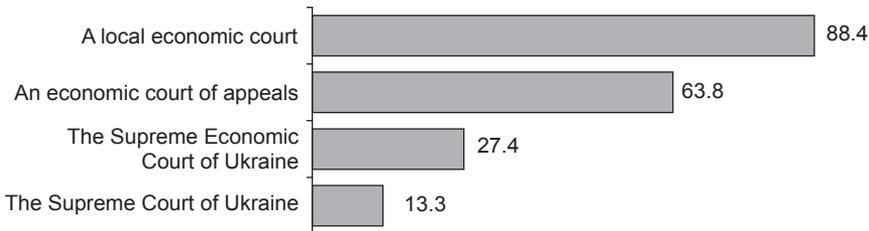
The appearance and stability of corruption practices in the economic judicial proceedings is closely associated with the status of development of society, sense of justice and legal culture of judges, jurisprudents, population, state of public control over the realization of judicial proceedings, and also presence of political or other pressure upon courts and judges, the degree of mass media development, logistical support of courts and judges.

The data, obtained from the conducted research of the spreading of corruption practices, provided the following results. General experts' evaluations of possibilities for corruption practices to be formed in the economic judicial proceedings are given in **Diagram 60** (courts of different levels).

Diagram 60.

**Possibilities of application of corruption schemes  
in economic courts: experts' evaluations**

(% of those, who point at favourableness of such conditions)



These estimations were complemented by the results of the in-depth interviews with businessman (leaders, proprietors, staff lawyers). On the whole for businessman is characteristic existence of quite stable stereotypes about “*impossibility to receive a just decision in economic courts, if no corruption agreements exist*”.

The existence of regional differences in the evaluations of spreading of corruption practices was unexpected: they are named more wide-spread by respondents in the centre and in the west.

In the questionings of experts the categories of cases were determined, where corruption risks occur most often. There were almost no disagreements of the evaluations.

*Almost all experts agree on the fact, that corruption practices more frequently take place: in corporate disputes, in the cases about bankruptcy, in property cases (where the subject is real estate, land, tangible assets and so on), disputes about privatization of communal property. In some areas the respondents pointed at spreading of practices in the cases about issuance of orders of economic courts to implement the decisions of arbitration courts. Individual experts emphasized the absence of any differences, because corruption practices are characteristic of all cases, considered by economic courts.*

In the in-depth interviews it was indicated, that specifically these categories of cases are **most frequently discussed in mass information media** in the context of standard topics about judicial corruption.

Corruption risks in the economic judicial proceedings, which is also characteristic of other types of judicial proceedings, can be divided into three groups for convenience:

1. Risks of legislative regulation;
2. Organizational risks;
3. Risks of personality nature.

These corruption practices are interconnected, however for each of these groups there is a typical specific character, reasons of appearance, ways of elimination or minimization and so on.

1. Risks of legislative regulation are related to the existence of juridical norms, which favour accomplishment and concealment of corruption practices due to the imperfection of normative regulation or increased probability of granting illegal advantages, refusal of access to a law-court, groundless prohibition to accomplish certain actions and so on.

2. Organizational risks in the judicial proceedings consist in accomplishment of actions or inactivity, which are not directly connected with administration of justice, however they influence the knowledge of the participants of a process or public about examination of cases, limit the right to receive judicial decisions or information about them, the right to get acquainted with the materials of a case, in untimely submission of cases to the courts of higher instances, in lack of publicity of trials and judicial decisions, including, by means of publication or placement in the publicly available Internet and so on.

3. Risks of personality nature are connected with implementation of the given authorities during the conduction of judicial proceedings by judges, and also administrative and other persons in the judicial activity and the related legal relationships.

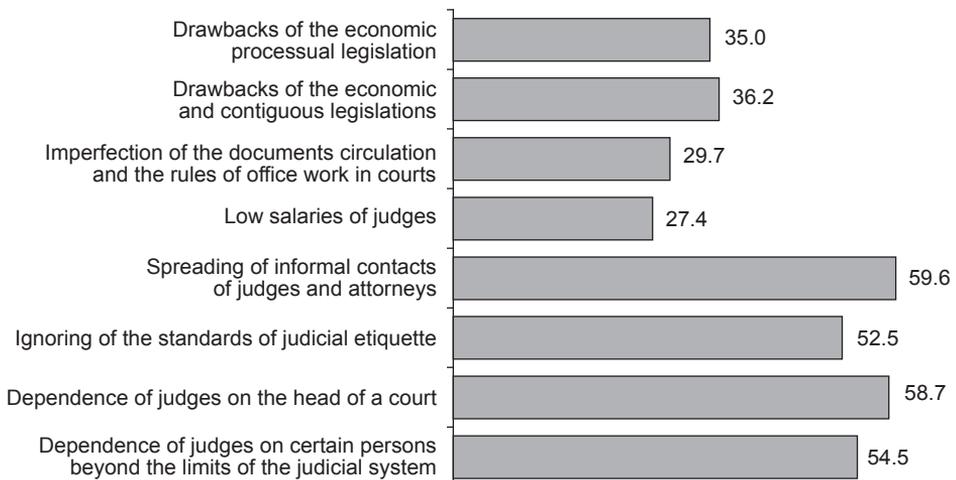
### 3.4.1 Description of Individual Corruption Practices of General Character in the Economic Judicial Proceedings

**Factors of corruption practices of general character.** The important task of the research was to reveal the influence of factors different by their nature onto the formation of corruption practices in the economic judicial proceedings. The experts' evaluations of such influence are shown in **Diagram 61**.

*Diagram 61.*

#### **Experts' evaluations of the level of corruptogenity of individual conditions in the economic judicial proceedings**

*(% of those, who consider, that the following circumstances influence the possibility of appearance of corruption practices)*



The analysis of the obtained results allows to draw the following conclusions:

- Only a comparatively insignificant part of experts (35.0%) associates the existence of corruption risks *with the drawbacks of the judicial legislation*, although the in-depth interviews further were able to reveal individual risks exactly, conditioned namely by the legislation about the proper procedures. The influence of this factor is increased by the fact, that, as the results of in-depth interviews testify, a part of judges has a rather low level of professional training. Attorney Sh.: *“I was shocked, when during the proceedings a judge of an economic court could not take a decision about the correlation of provisions of the general and the special law, which should be known even to a student of a juridical institute”*.

Shocking with its ignorance is also the shown example of taking of a decision by an economic court with such formulation of the resolute part: *“To obligate the Technical Inventory Bureau to acknowledge the right of ownership of a nonresidential premise”*; afterwards the same judge in an additional decision: *“To obligate the TIB to acknowledge the right of ownership of the nonresidential premise on the basis of the technical passport”*; still afterwards, in an approval about explanation of the same decision the same judge: *“The court meant to acknowledge the right of ownership of the nonresidential premise”*.

- Formation of corruption risks is associated with the *drawbacks of the economic and the contiguous legislation* only by a little more, than one third of the questioned experts (36.2 %). In the in-depth interviews experts pointed at the existence of two most substantial problems of the substantive law: a) gaps in legislation, absence of clear regulation of individual procedures, b) collisions in legislation.

- More than a half of the questioned experts (52.5 %) acknowledge the existence of dependence of corruption practices on *“deformations or ignoring of the standards of ethics”* of the profession of a judge. In the in-depth interviews the problem of conflict of interests was especially emphasized, which becomes more urgent for the economic judicial proceedings. A situation, when a father is the head of a court, and his son is an attorney, who is conducting a case in the same court, in most incidents is taken as a *“normal phenomenon”*.

- Only 27.4 % of the questioned experts associate corruption abuses by judges with the *low level of their salaries*. In the in-depth interviews attention was also constantly emphasized on the impossibility to explain judicial corruption mainly on the basis of the motives of dissatisfaction with the level of salary.

- Almost 60.0 % of the experts explain the existence of corruption practices by the existence of *stable corruption (“informal”) alliances* between judges and attorneys (the lawyers-representatives of individual subjects of economic activity). Largely, such alliances actually mean involvement of judges in certain *“juridical technologies of attorneys and juridical firms”*. The most latent mechanisms of dependence of judges are formed in this plane, which have stable corruption motivation of judges as a basis, and on which the specific types of corruption relations are actually formed.

- Experts acknowledge some forms of *nonprocessual dependence of judges* as an important factor both inside the judicial system (on the heads of courts, which is indicated by 58.7 % of the questioned people), and beyond it (on the politicians, deputies, and so on, which is indicated by 54.5 % of the questioned people). In this case an especially high index of *“external” dependence*, which takes different forms, draws attention. For example,

according to the evaluations of the questioned experts, “*individual financial industrial groups have “their own” judges, both at the regional level and in the higher courts*”.

**Experts’ evaluations of individual aspects of connection between the status of legislation and formation of corruption risks.** On the whole, both in questioning and in the in-depth interviews, a thesis was dominant, that “*corruption practices are not a problem of the legislation, but a problem of a law-enforcer, the system of administration of the judicial activity, internal and external relations, professional ethics of judges, and so on*”. However, experts analyzed individual problems, which draw attention in the last years both in the acting legislation and in the draft law proposals. Among them are the following.

- Experts acknowledge, that corruption risks are influenced by the *method of solution of the issue of recusation of a judge (judges)* in case, it is claimed by a party, or in case of self-recusation. The positions of experts about, who should decide this issue, were distributed as follows: the head of a respective court or his deputy – 55.1 %; the head of a higher court (or his deputy) – 24.1 %, the judge himself or a panel of judges, which he belongs to – 18.9 %, another judge or another panel of judges of this court – 5.2 %.

- The problem of *change of judges or the composition of a panel* is similar. Such practice is known to more than a half of the questioned people (51.2 %). The foundation of such changes was: an illness of a judge – 42.8 %, staying on leave – 28.7 %; a considerable workload – 10.7 %; satisfied recusation – 53.5 %; business trip – 10.7 %; an unmotivated change – 24.9 %. By experts’ evaluation, a part of such situations has “corruption implication”.

- Experts name the necessity of implementation of the order, according to which the participants of proceeding would have the right to raise an *objection on the actions of the chief judge* with their acceptance or rejection by awarding a decision. The necessity of existence of this order is supported by 62.0 %, and it is not supported by 17.3 % of the experts.

- The attitude to implementation of norms on *leaving of a suit claim by an economic court without motion* is contradictory. Only 18.9 % of the questioned people acknowledge, that it will diminish the corruption risks, 47.6 % of the questioned people disagree with this, and almost one third of them could not take a decision.

- More single-meaning is the attitude of experts to implementation of the order of *appellation of decisions, which do not hinder examination of cases*, only in the appellate order. More than a half of the experts (58.6 %) are certain, that this will create additional corruption risks at the level of the courts of appeals.

- The proposal to limit the authorities of the Supreme Court with reviewing of decisions only under exceptional circumstances is ambiguously taken by experts. Almost 40 % of the questioned people point out, that it will create additional corruption risks at the level of the cassation economic court, 29.3 % of the questioned people disagree with this evaluation.

**Corruption risks at administration of justice by judges, whose authorities can be questioned, and also at selection of candidates to judges, their appointment (election) to a position first and for an unlimited term.** For the current date the administration of justice in economic relations is regulated by the Economic Processual Code of Ukraine (further the

EPC of Ukraine), accepted on the 06 of November the year 1991 as the Arbitration code of procedure of Ukraine and carried into effect from the 1 of march the year 1992.

Before carrying into effect by the Arbitration processual code of Ukraine, solution of economic disputes was conducted by the State arbitration of the Ukrainian SSR and the state arbitrations of the regions and Kyiv. In fact, in this period the bodies of state arbitration were considered as bodies of management with individual administrative functions, which considered the properties disputes, mainly, between the state juridical persons. They were at the executive-administrative bodies of power and were subordinate to the Council of Ministers of Ukraine. The stated bodies of state arbitration acquired the status of courts after bringing of changes into the Constitution of Ukraine of the year 1978 and passing of the Law of the USSR “About the Arbitration Courts” of the 4 of June the year 1991. This Law provided, in particular, such principle of organization and activity of arbitration court as arbitrage (active participation of parties in solution of a dispute and taking of decisions together with an arbiter), and also obligatory pre-trial settlement of disputes. Competitivity of parties as a principle of these judicial proceedings was introduced only in the year 1997.

***The above stated reformation of the system of bodies, which decide economic disputes, and their becoming a body of justice, substantially influenced both the procedure of solution of disputes and the order of appointment (election) of persons, who consider cases and solve disputes, their independence or submission, accountability, disciplinary responsibility, presence of authorities to administer justice and so on.***

Certain issues of implementation of justice in economic cases also arose in connection with passing of the laws of Ukraine “About Qualification Commissions, Qualification Attestment and Disciplinary Responsibility of Judges of the Courts of Ukraine”, of the 02 of February the year 1994 and “About the Status of Judges” of the 15 of december the year 1992.

In the Law “About the Status of Judges” it was noted, in particular, that the features of the status of judges of arbitration courts and the special requirements, necessary for occupation of the position of a judge of an arbitration court, are determined by the Constitution of Ukraine, the Law of Ukraine “About the Arbitration Court” and other laws of Ukraine. The order of appointment of arbiters (judges) of arbitration courts to the position, the terms of their appointments, individual requirements, necessary for appointment to a position were different and so on. The law “About the Arbitration Court” and the Arbitration Processual Code of Ukraine also after passing the Law “About the Status of Judges” used the notion “arbiter” and did not refer to the notion “judge”. All the legislative changes to the Law “About the Arbitration Court” of before the 20 of february the year 1997 inclusive, after the law “About Status of the Judges” had taken effect, did not change its reference to realization of justice in economic relations by an arbitration court and reference to the arbiter as a person, who carries out justice in economic cases.

In accordance to the changes to the Law of Ukraine “About the Arbitration Court”, of with the 20 of february the year 1997, it was pointed out, that the judge of an arbitration court is a public officer, to whom are given authorities to administer justice in economic relations, the terms of appointment (election) of judges of arbitration courts were not determined.

The above mentioned fact has principle character, in particular, in understanding of the simultaneous use for a certain period by different legislations of the notions “an arbiter of an arbitration court”, “a judge of an arbitration court”, “a judge”, “the head, the deputy of the head of an arbitration court”, the terms and the order of appointment of persons to a position of a judge, and also to administrative positions of arbitration courts.

As long as justice is administered by professional judges in accordance with article 127 of the Constitution of Ukraine, this calls in question the competence to administer justice by persons, who have not been appointed (elected) to a position of a professional judge. It is impossible to apply fully the terms of appointments, determined by the legislation for the arbiters of arbitration courts in relation to persons, who have been appointed as judges of arbitration courts or as administrative persons of these courts.

*For example, the issues of unplenipotentiarity of judges of economic courts sometimes arise as a basis for recusation of a judge or as a basis for abolition of a decision. In particular, in one of the cases an argument was stated, as basis for abolition of a decision, about unplenipotentiarity of a judge of an economic court, appointed by the President of Ukraine in accordance with the Constitutional agreement of the 08 of June the year 1995. The authority of a judge was called in question with reference to the fact, that the provision of the Law “About the arbitration court” about the unlimited term of election of arbiters of Arbitration Courts can not apply to persons, who were first appointed to a position of a judge according to the procedure of selection, provided by the Law “About the status of judges”, that is for a maximum five-year term of the first election. And though the decision of the court was abolished by the highest court, the foundations for its abolition did not concern the above mentioned argument, which remained without proper motivation. The courts of higher instances with reference to the changes to the Law “About the Arbitration Court” and “About the Status of Judges” of by the 21 of June the year 2001, specified only, that in them word “arbitration” in all cases was replaced with word “economic” in the proper cases.*

In a similar aspect a question can be put also in the meaning of the type of a position, to which a person was elected (appointed) in the transitional period of formation of the legislation, which determined organization of the courts and the order of election (appointment) of persons, who solved economic disputes. Appointment of a person to an administrative position of the proper arbitration court, different from the position of a judge, or a position of an arbiter, calls into question the presence of such person’s authorities to administer justice according to article 127 of the Constitution of Ukraine.

**Potential corruptogenic nature in the meaning of lack of authority to administer justice in economic disputes exists also in relation to persons, who did not swear a jurament of a judge.** In accordance with article 10 of the Law “About the Status of Judges” a judge, elected for the first time, in solemn situation takes a jurament.

Taking into account the substantial change of the legislation, which regulated the election (appointment) of arbiters and judges of arbitration (economic) courts, normative regulation of presence of duty and the procedure of taking of a jurament of a judge resulted in a certain legislative gap. Neither the Law of the USSR “About the Status of Judges in the USSR”, which was valid for a certain time in Ukraine, nor the Law of Ukraine “About the Status of Judges” provided necessity and order of swearing of an oath by judges, who for the time of passing of these laws were already selected (appointed) to be judges (arbiters) and carried out judicial proceedings in economic cases. Before the noted regulatory acts became effective, the legislation, which was active at that time, had not provided swearing of an oath by judges (by state arbiters, arbiters).

*Quite a paradoxical situation has formed, when the judicial proceedings in economic cases are carried out by a part of judges, who have not sworn an oath of a judge, and consequently, among others, suspension of authorities can not be applied to them as an infringement of an oath of a judge (paragraph 5, part 5, article 126 of the Constitution of Ukraine) can not be applied and disciplinary procedure can not be instituted in connection with infringement of an oath of a judge (part 4, article 97 of the Law “About Organization of the Courts”).*

From the objective point of view the absence of a sworn jurament deprives such persons of authorities to carry out proper activity in the field of justice and puts in different juridical positions the persons, who administer justice, because some of them are obliged by jurament, others are not.

The indicated issue should be considered for the purpose of application of paragraph 1 of article 6 of the Convention on the Protection of Human Rights and Fundamental Freedoms, because realization of judicial proceedings with participation of such a judge can be thought of as examination of a case by a court, not “established by the law”. The European Court on Human Rights in decisional cases notes, that the word combination “created on the basis of the law” belongs not only to the juridical foundation of existence of a court, but also to the composition of a court in each case (decision of the 4 of may the year 2000 on complaint № 31657/96 “Buskarini against San Marino”, and also paragraph 37 of the decision of the 4 of march the year 2003 on complaint № 63486/00 “Posohov against the Russian Federation”). Thus, the Court pronounces, that the duty of confirmation of juridical grounds for participation of the persons, who administer justice at examination of cases, is laid upon the state (the decision of the 4 of march the year 2003 to complaint № 63486/00 “Posohov against the Russian Federation”, paragraph 41).

**From the point of view of corruption risks, the unplenipotentiarity of the composition of a court, resulting from the fact, that a judge has not sworn a jurament of a judge, and his authority to administer justice called in question, creates the corruptogenic situation of limitation or impossibility to bring a person to juridical responsibility in case of awarding of an unjust decision.**

**The indicated fact could be considered an absolute foundation for abolition of a court decision, however neither paragraph 1 of part three of article 104 of the EPC, nor paragraph 1 of part two of article 111<sup>10</sup> of the EPC refer to it, providing**

**examination of a case by a court of illegal composition of the panel of judges as ground for abolition of a judicial decision.**

**In addition, the fact of unplenipotentiarity of a concrete judge to consider economic cases can be used in a way, not provided by the law, if illegal influence is applied to him both on the part of the administrative persons of courts, and when pressure is exerted by persons, to whom political power is given.**

The last fact is equally important. Thus, by the data of the website “Segodnya.ua”, according to the questioning of attorneys, the main problem for today, actually, consists not in the judicial system, but in the fact, that corruption in the system is beneficial to persons, who have authorities of power. It is noted, that every politician or a businessman has his own “pocket judges”, who render decisions in his favour. This situation so far is more advantageous for our elite, than creation of clear, equal for all and transparent rules of game<sup>59</sup>.

**Selection of candidates to a position of a judge and election (appointment) of judges within the five-year term or for an unlimited term.** Specified in articles 8 and 9 of the Law “About the Status of Judges” and by the Law of Ukraine “About the Order of Election to a Position and Discharge from a Position of a Professional Judge by the Supreme council of Ukraine” of the 18 of march the year 2004, the selection of candidates for a position of a judge and election (appointment) of judges within the five-year term or for an unlimited term has considerable corruptogenic factors in the meaning of exposure and verification of sufficient qualification, professional competence of candidates, their moral and professional features.

This has principle significance, as long as the administration of justice by a professional judge is based considerably on independence in taking decisions by him, using as guideline the law and the principle of the supremacy of law. A judge’s activity to a great extent requires demonstration of his own juridical consciousness, a sharpened feeling of equity, seeking of truth and essence, understanding of “the high law”. Not every candidate to a position of a judge and not everybody, selected or appointed to a position of a judge, is capable of making a conscious choice, undertaking responsibility for other persons’ fates and rendering of a legal and grounded court decision. Revelation of such qualities is not a simple task.

***Formation of a judge corps, capable to administer justice skillfully, conscientiously and impartially on the professional basis, is a key issue in overcoming judicial corruption.***

As practice testifies, not all the persons, appointed or elected to positions of judges, are endowed with necessary merits. Not each of these persons is able to resist the negative influence of circumstances and persons, professional deformation and corruptive influence.

According to the evaluation report about Ukraine, prepared by GRECO (Strasbourg, March 19-23, 2007), the existing procedure of election and appointment of judges was acknowledged not transparent enough, and that is why there is a situation, which creates favourable conditions for abuses or at least suspicions of existence of such abuses. It was noted, that the information about vacancies is necessary to announce in public, and the selection of candidates should be based on principles of competitiveness. Moreover, newly elected judges should pass a trial period, however it was noted, that a five-year

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<sup>59</sup> <http://www.segodnya.ua/news/13048671.html>

trial period was too long, and this system can be used for putting illegal pressure upon separate judges (paragraph 90).

**Insufficient transparency of selection of candidates and also of election and appointment of judges creates one of the main reasons of appearance of corruption in the subsequent judicial activity of persons, appointed to positions of judges.**

*Society is considered to have not a single notion, where judges are taken from<sup>60</sup>. The questioned experts have testified the cases of appointment to positions of judges of persons, convicted earlier for commitment of crimes, dismissed from the law enforcement bodies on discrediting grounds, in particular, for reception of bribes. However, such circumstances were not noted in the order for dismissal. The subsequent professional activity of such persons, as a rule, has abruptly growing promotion. The similar formal latency of negative moral and professional features of a person as a professional judge can remain “unnoticed” by persons, who influence to one extent or another the appointment and promotion of persons as candidates to a position of a judge.*

As it is indicated in the theses of the speech of the Minister of Justice at the parliamentary hearings “About the Status of Justice in Ukraine” (Kyiv, the 18 of march the year 2009), it is necessary to approach carefully and weightedly the formulation of the virtually new system of access to the profession of a judge. Only the best candidates should be selected to the rows of the judges corps, the procedure of selection should be based on the principles of transparency, clear unbiased criteria. Improvement of selection of the personnel of a court is important – introduction of specialized training in a common national establishment, introduction of anonymous testing, differentiation of the issue of access to the profession of a judge from access to a concrete position of a judge<sup>61</sup>.

Lately proposals are put forward to elect persons to positions of judges by people, as it was the case during a certain period of time in the soviet system of judicial proceedings. Such a way can not be considered a solution of the present problems of judicial corruption and it is vicious. It is associated both with impossibility of objective verification of the professional qualities of candidates, and with impossibility of determination of criteria, by which judges will be elected by people. It is also considered, that high possibilities for corruption are created at the same time, because, in particular, elections are expensive, and the funds for these purposes are given by persons, to whom the judges after election to a position will work back the invested funds, defending their interests<sup>62</sup>.

Obviously, it will be correct to introduce anonymous test selection of candidates for a judge position. Such method of selection of candidates for appointment to a position of

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<sup>60</sup> Yu. Vasilenko: “Dirty linen of the domestic themis”. [Electronic resource]. – Mode of access: <http://maidan.org.ua/static/mai/992861479.html>

<sup>61</sup> <http://www.minjust.gov.ua/0/19237>

<sup>62</sup> Bogdan Futey: “Here, with us, your chief judge is replaced with a clerk and a drum” // Segodnya. - 2007.11.16. [Electronic resource]. – Mode of access: <http://www.segodnya.ua/interview/661229.html>

a judge minimizes the commercial and exceptionally subjective approach, which quite often takes place in these issues.

*As the Ministry of Justice of Ukraine reported, as a result of implementation of the first pilot project of anonymous test selection of candidates for positions of judges in Donetsk region, only 2 applicants of 26 passed the competition. It was thus noted, that it is the only method in order to decrease the risks of selection of unprepared or casual people, and also to disable the corruption component of this process, already at the stage of formation of the judges corps. Beginning from the next year, the Higher Qualification Commission of Judges of Ukraine intends to implement anonymous testing for a judge position in the all-Ukraine scale. A respective decision was approved by Convention of Judges of Ukraine and is supported by the Ministry of Justice<sup>63</sup>.*

**The corruption risks in judicial procedures consist of insufficient qualification, insufficient experience and quite often an extremely low level of the knowledge of applicants on positions of judges, both of the people, appointed for the first time, and those, who are elected for an unlimited term.** When considering impartially the issue of granting recommendations for appointment to the position of a judge and finding out of the proper knowledge and proper level of professional training, this can be found out both during a qualification test, and at appealation of a negative for a candidate decision of the qualification commission of the respective appellate district<sup>64</sup>.

One of the ways to solve the problem of formation of a skilled judge corps is a specialized professional preparation of candidates to the positions of judges and systematic raising of the qualifications of acting judges. It is also obligatory to introduce for candidates and for persons, who are considered to be elected judges for unlimited terms, anonymous testing for the purpose of finding out and verification of the level of professional training, their psychological, personality and professional features.

By the order of the President of Ukraine “About Preparation of Professional Judges” of the 14 of April the year 1999 in Yaroslav Mudry National Law Academy of Ukraine a faculty has been created for preparation of professional judges; by the decree of the President of Ukraine “About the Institute of Preparation of Professional Judges” of the 27 of december the year 2001 at Odessa National Law Academy the Institute of Preparation of Professional Judges has been formed; by the decree of the President of Ukraine “About formation of the Ukrainian Academy of Judges” of the 9 of september the year 2000 the Ukrainian Academy of Judges has been formed at the Ministry of Justice of Ukraine, which was afterwards liqui of and in accordance with paragraph 129 of the Law of Ukraine “About Organization of the Courts of Ukraine” by the decree of the President of Ukraine “About the Academy of Judges of Ukraine” of the 11 of october the year 2002

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<sup>63</sup> <http://www.minjust.gov.ua/0/18645>

<sup>64</sup> Raiderring and the priority right to become a judge. Such problems the VKKS (BKCC – The Supreme Qualification Commission of Judges) encountered when considering the complaints and giving recommendations. Prepared by Marina Zakabluk. [Electronic resource]. – Mode of access: <http://www.zib.com.ua/article/1167390611310/?print>

№ 918/2002 the Academy of Judges of Ukraine has been formed at the State Judicial Administration of Ukraine.

**The role of the heads of courts in the process of selection of judges, their appointment to positions of judges and administrative positions, transfer of cases to judges for examination, implementation of other authorities by the administrative persons of courts.**

*By the data of the conducted questioning one of the important sources of corruption in the procedures of the economic judicial proceedings is the role of the heads of courts (their deputies), first of all, the heads of economic courts of appeals. The indicated fact can create foundation for existence of well-established corruption practice “divide et impera” and appearance of dependence of realization of the judicial proceedings on personalities. In opinion of some specialists, without solution of two issues – justice and transparency of selection of personnel and limitation of the authorities of the heads of courts and their deputies – all other problems are even not necessary to touch<sup>65</sup>.*

Personnel issues are very important for the judicial system. The state of organization of justice in courts, the quickness and quality of examination of juridical cases depends to a great extent on the heads of courts and their deputies. At the same time, the issue of limitation of the administrative authorities of the head of a court, which are unusual for this position, requires solution, in particular, concerning the distribution of cases between judges, awarding of judges, solution of issues about selection and careers of judges, distribution of apartments for judges, which is a lever for nonprocessual influence on a judge. The functions of the head of a court should be limited by the representative authorities and the control over the organization of activity of a court. The head of a court should represent a court as body of public power<sup>66</sup>. In this context it is important to find out the opinion of experts about the order of distribution of cases, that is whether some external influences take place at this stage. The results of questioning of experts are shown in **Diagram 62**.

These data show a relatively high specific weight, in opinion of experts, of the principle of random distribution of cases both in a local court and in a court of appeals. At the same time, even random distribution of cases is not a guarantee of independence, because still there is a possibility of a case getting to the “necessary judge”. In questionings 81.1 % of respondents noted, that a case can get to the “necessary judge” in a local court, and 77.2 % of questioned people – in an economic court of appeals. More than a half (53.4 %) of experts of those, who point at the existence of automatic distribution of cases in economic courts, acknowledges the possibility of a case getting to the “necessary judge”.

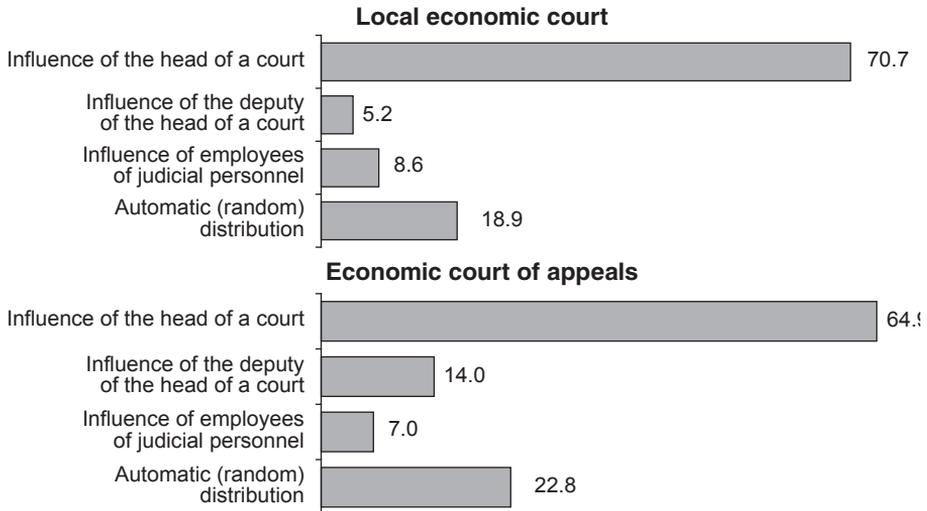
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<sup>65</sup> Tetyana Montyan. The ukrainian justice: there is no bottom in the abyss. [Electronic resource]. – Mode of access: [http://www.ord-ua.com/categ\\_1/article\\_53788.html](http://www.ord-ua.com/categ_1/article_53788.html)

<sup>66</sup> Theses of the speech of the Minister of Justice of Ukraine M. Onishchuk at the parliamentary hearings “About the state of justice in Ukraine” of March 18, 2009 [Electronic resource]. – Mode of access: <http://www.minjust.gov.ua/0/19237>

Diagram 62.

**Characteristics of distribution of cases: experts' evaluations of the conditions in the regional economic courts**



The EPC of Ukraine formally does not provide the transfer of cases to a judge for examination in a queue or in another way, founded on incidenciality, which would entirely exclude the partial and biased examination of case.

*By the report of practicing lawyers, transfer of a case to the necessary judge can cost a different price depending on the instance of examination of a case, the location of a court, the importance of a case, the required result, the amounts of money, mentioned in a claim. However, solution of cases in a court can be by “packages”, when simultaneously with transferring of a case to the necessary judge, who is elected by the same administrative person, reception of a positive examination of case is provided by influencing a judge in a nonjudicial way.*

***The order of transfer of a case to a specific judge for examination can be beneficial to administrative persons of economic courts for different reasons. Such order should be immediately changed, and, taking into account the consequences of its infringement, unconditional abolition of a judicial decision by a court of a higher instance.***

Exclusion of influence on judges at the stage of transfer of a case for examination and minimization of administrative authorities of the heads of courts (their deputies) can be attained by means of automated (computer) distribution of cases in accordance with the number of cases in the proceedings by a judge and his specialization, by establishment of a calendar order of reception of cases, or, as it is done in the USA, by drawing lots, performed by judges themselves. Obviously the last method is organizationally complicated in the time, however it can be applied for a certain limited amount of cases of the most resonance category, for example, in corporate disputes.

*In particular, by a draft law, prepared by the Supreme Court of Ukraine “About bringing of changes to some legislative acts of Ukraine (about the automated distribution of cases between judges)”, it was suggested to carry out the automated distribution of cases between judges during registration in a court of criminal cases, suit claim, claims, solicitations, complaints and also other documents, which can be an object of a judicial examination. When determining the personal composition of a court for examination of a specific case by means of an automated system, the order in a queue, the workload, the specialization of every judge, and also requirements of the processual law, will be taken into account<sup>67</sup>.*

According to article 24, articles 28, 29 and articles 41, 42 of the Law “About Organization of the Courts” the administrative persons of courts are provided with authorities to carry out organizational guidance of the activity of a court or a respective judicial chamber, to which actually are also attributed the issues about transfer of a case to a specific judge – a speaker.

***Abolition of the acting order of transfer of economic cases to the judge-speaker by the administrative persons of courts will considerably limit the influence on judges on the part of such persons, and also the influence on judges by persons, interested in the results of examination of a case.***

It should also be emphasized, that although the EPC of Ukraine does not provide a special order of transfer of cases to judges-speakers, such order is an infringement of the principle of independence of courts and independence of judges, guaranteed in article 126 of the Constitution of Ukraine and it can be acknowledged an infringement of the international obligations of Ukraine in the meaning of paragraph 1 of article 6 of the Convention on Protection of Human Rights and Fundamental Freedoms. Thus, it is possible to put a question both about unplenipotentiarity of the composition of a court to consider such a case both by “a court, created not on the basis of the law” (decision of the European Court of the 4 of may the year 2000 on complaint № 31657/96 “Buskarini against San Marino” and of the 4 of march the year 2003 on complaint № 63486/00 “Posohov against the Russian Federation”) and also in the meaning of probable dependence and bias of a court.

*It is reckoned, that very big influence remained with the heads of courts: they are engaged in distribution of cases, raising of the degree of judges, granting them apartments, distribution of vacations. “In every region there are public officers, governors or heads of regional councils, who are directly subordinate to either the president, or the prime-minister, or somebody else – they influence the heads of courts...”<sup>68</sup>.*

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<sup>67</sup> The Supreme Court of Ukraine proposes an automated distribution of cases between the judges. [Electronic resource]. – Mode of access: <http://www.scourt.gov.ua/clients/vs.nsf/0/05C9F6DB152CC8A7C22574190059E37A?OpenDocument&CollapseView&RestrictToCategory=05C9F6DB152CC8A7C22574190059E37A>

<sup>68</sup> Yu.Vasilenko: “90% of the judges should be driven away”. Interviewed by Lesya Padalka. [Electronic resource]. – Mode of access: <http://maidanua.org/static/mai/1179769551.html>

*In one of the cases, which was considered by a court of appeals, a judge-speaker in the case, being in the courtroom before the beginning of examination of the case received telephone instructions from a respective administrative person (the administrative person was on leave) and reported, that they were going to kick out this complaint now, and then they simply will not accept it. Afterwards, personal greetings were passed from judges of the panel, who were sitting alongside. As was reported, the “kicking out” failed, and the case was heard until the resistance of one of the judges, who occupied the principle juridical position, was overcome, and until the rebellious judge was replaced with another loyal one. The circumstances of the case exposed its nonjudiciability to economic courts. It is interesting, that for avoidance of the personal responsibility of a judge-speaker at its examination by a court of the first instance a panel of judges was appointed.*

*By the reported information, only in the court of the first instance the case was solved on the pay-off principles directly with the person, on whom depended taking of a decision.*

**Competence of the head of a court or his deputy to take a decision about recusation of a judge is corruptogenic according to article 20 of the EPC of Ukraine.** An administrator should not interfere with the process of administration of justice. The solution of the issue of recusation of a judge or judges of the panel of judges should take place within the scope of judicial activity of a court by means of pronouncement of a decision by the composition of the court, which considers a case. Groundedness of the declared recusation, establishment in the appellate or cassation order of the circumstances, which caused a doubt in impartiality of a judge (judges), should be an unconditional foundation for abolition of a judicial decision.

In one of the cases, by a representative of the interested party, with whom a judge-speaker did not want to have an agreement, assurance was received from the head of the court, that in case of a claim of recusation of a judge, such claim will be satisfied. Having received the assurance, the representative of the party gave out a notarized power of attorney in behalf of the name of a judge-speaker about possession and using of his car. This document was given as proof of existence of personal confidential relations. The claim about recusation was satisfied, the case was transferred to the necessary judge, then the power of attorney was abolished.

**The influence of the heads of courts, first of all the heads of courts of appeals, consists in the actual possibility to solve the issues of both nomination of candidates and selection of judges to the courts of the appellate district, and in the actual possibility to influence the choice of their deputies through commitment of illegal actions and agreements.** At this a regularly working network of personal communications, personal dependence and personal devotion is created. Occupation of the position of the head of a court of appeals for a person with well-established bureaucratic conceptions about the above indicated, forms absolute corruptogenic practice.

*When considering a complaint against the decision of one of the qualification commissions of judges, it was found out, that the head of the court of appeals was present at its meeting and emphasized the fact, that the candidate's documents in general were not put on the list of the personnel reserve, and it is unknown, how they appeared at the qualification commission without the personnel reserve. At the same time, it became known, that the candidate's documents were put on the list of the personnel reserve preliminary with the signed positive character reference. There are vacancies in the economic court, but in the personal talk with the head of the court of appeals it was said, that quite another person has the priority right to occupy the position of the judge<sup>69</sup>.*

From the reported information it became known about quite frequent cases of existence of conflicts between the heads of courts and their deputies or judges. This ends, in particular, with creation for the latter of conditions of intolerance and impossibility to stay in office in case of their refusal to execute instructions of the heads of courts. Such persons are actually driven out from these courts or from the positions of judges. The above noted is demonstrated to all other persons as an evident example of public punishment. In such cases, to the positions of rebellious deputies of the heads of courts, the heads of judicial chambers, the heads of panels of judges and judges often inexperienced, not highly intellectual or personally dependent persons are nominated and protected, which afterwards determines their special devotion and guarantee of reception, if required, of a judicial decision, necessary for the interested persons of a court. Such investments pay off.

It is no coincidence, that the issue of appointment (election) of persons to administrative positions in the courts of all levels was and remains one of the key issues in understanding of the activity of particular courts and the judicial system on the whole. The noted position directly or indirectly allows to attain the possibility of actual influence on the processes of redistribution of the means of production, land, real estate, financial flows.

In accordance with the decision of the Constitutional court of Ukraine of May 16, 2007 in case № 1-6/2007 on the basis of the constitutional proposal of the Higher Council of justice on official interpretation of the provision of part five of article 20 of the Law of Ukraine "About Organization of the Courts of Ukraine" (a case about dismissal of a judge from an administrative position) a juridical position was pronounced, according to which the principles of independence of judicial bodies, worked out by the international community, were taken into account, stated, in particular, in the recommendations of the Committee of Ministers of the Council of Europe of October 13, 1994 № (94)12 "Independence, Effectiveness and Role of Judges", where it is specified, that a body, authorized to take a decision about the careers of judges, should be independent of the government and administrative bodies; in the European charter about the Law "About the Status of Judges" of the 10 of July the year 1998, which stipulates, that decisions about the promotion of a

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<sup>69</sup> Raiderring and the priority right to become a judge. Such problems the VKKS encountered when considering the complaints and giving recommendations. Prepared by Marina Zakabluk. [Electronic resource]. – Mode of access: <http://www.zib.com.ua/article/1167390611310/?print>

judge are moved by a body, independent of the executive and legislative powers; in “The Basic Principles of Independence of Judicial Bodies”, approved by resolutions № 40/32 of November 29, 1985 and № 40/146 of December 13, 1985 of the General Assembly of the UNO, noting, that removal from a position or dismissal of a judge should be subject to an independent verification. Also was taken into account the conclusion of experts of the Council of Europe of December 19, 2002 about the Law of Ukraine “About Organization of the Judiciary of Ukraine” in relation to the fact, that the President can not play such an active part in selection of judges for administrative positions, and the provision of the Conception of improvement of judging in order to affirm fair and just trial in Ukraine according to the European standards, approved by the Decree of the President of Ukraine of May 10, 2006 № 361, which provides for implementation of an order, by which the administrative positions in courts will be occupied by judges, appointed by the bodies of judicial self-government.

At the same time it was noted, that the issues about appointment to the positions of the head, the deputy of the head of a Court and his dismissal from this position (except for administrative positions in the Supreme court of Ukraine) should be well-regulated in the legislative order, and the provision of part five, article 20 of the Law of Ukraine “About Organization of the Courts of Ukraine”, according to which the head of a court, the deputy of the head of a court are appointed to a position and dismissed from a position by the President of Ukraine acknowledged as not meeting the requirements of the Constitution of Ukraine (unconstitutional).

The decision of the Council of Judges of Ukraine of May 31, 2007, accepted under conditions of lack of proper legislative regulation by the results of examination of the issue about appointment of judges to administrative positions in the courts of general jurisdiction and dismissal from these positions, requires legislative legalization. According to this decision appointment of judges to the positions of heads, the deputies of the heads of courts of general jurisdiction for a five year term and dismissal from these positions is effected by the Council of Judges of Ukraine upon the proposal of the Head of the Supreme Court of Ukraine, to the positions of the heads of the supreme specialized courts – upon the proposal of the Head of the Supreme Court of Ukraine on the basis of a recommendation of the proper council of judges, and to other positions of the heads and the deputies of the heads of specialized courts – upon the common proposal of the Head of the Supreme Court of Ukraine and the head of a respective higher specialized court on the basis of a recommendation of a respective council of judges.

At the same time such order of appointment of administrative persons of courts requires exclusion of acting administrative persons of courts from the Council of Judges of Ukraine, who, actually, will vote for themselves and influence the process of selection of administrative persons of their own appellate district.

**Corruptogenic are the cases of actual refusal of the heads of economic courts of different instances or their deputies to exercise authority of judge as a person, who administers justice, and implementation of exceptionally administrative functions.** The acting legislation provides for the guarantees of independence of judges. However, a high level of financial and public security is guaranteed to a person not for implementation of administrators’ functions, but in connection with the duties to administer justice in economic cases, laid upon this person.

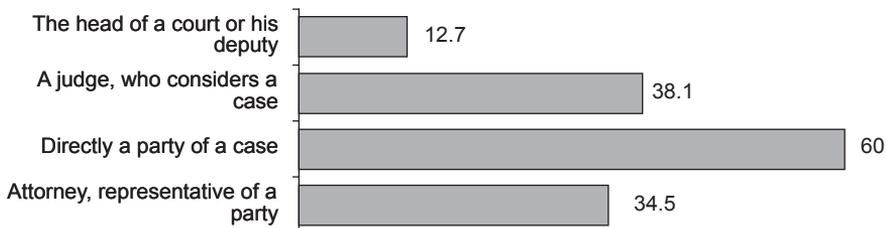
*For all the time of existence of Lviv Administrative Court of appeals its former head has considered not a single case personally. He only counted: who to take from and how much, whom to pay to, counted, who would give more. Facts of bribery have been registered by almost all judges of this court. These people became so used to taking themselves and giving to somebody, that they can not work differently. As an officer of a law enforcement body notes, while we work on this matter, judges make the rates of bribes twice and even thrice higher. If earlier they took 5-10 thousands of dollars for one or another decision, today they extort 15-20 thousands, and there is information about extortion of a bribe in the amount of 160 thousand dollars. They only have become more cautious. The bribes are received through tested people – children of judges and heads of courts. In the future justice is replaced with informal problem solving<sup>70</sup>.*

It is reckoned, that the State Judicial Administration of Ukraine should reveal to public regularly, how many cases and of what categories namely have been considered since the appointment for the positions of the heads of courts of appeals and local economic courts, and also their first deputies and deputies. The taxpayers have the right for similar information also concerning a head and his first deputies, deputies of a head of the higher specialized courts of Ukraine.

**Corruption relations in courts: conditions, nature of corruption abuses, judicial subjects, mediators and beneficiaries. The role of representatives of the parties in the increase of corruption risks in the economic judicial proceedings.** Formation of corruption agreements in economic courts takes place according to schemes, which have much in common with other types of judicial proceedings. However, certain differences are here too. **Diagram 63** shows, who of the participants of a process, in the opinion of the experts, is the direct **initiator of corruption agreements**.

*Diagram 63.*

**Initiators of corruption agreements:  
experts' evaluations of the economic judicial proceedings**



<sup>70</sup> O.Uzarashvili. The wife of judge Zvarych was his "accountant". Interview with the chief of the department on investigation of especially important cases of the first investigation administration of the General Public Prosecutor's Office of Ukraine V.Zherbitskiy // Vysoky zamok. 07.03.2009 № 39 (3933). [Electronic resource]. – Mode of access: <http://www.wz.lviv.ua/pages.php?ac=arch&atid=72121>

In these data, compared to other kinds of proceedings, the specific weight of attorneys is considerably lower. However, it is explained by the fact, that the participants of a judicial trial are legal entities, who are represented by professional lawyers or their chiefs, who in most situations can independently negotiate without engaging mediators. Experts testify, that in the situations, when a party is the direct initiator of a corruption agreement, it negotiates with a judge (83.3 % of the questioned experts think so) or the head of a court (14.8 %).

It is rather important, that almost one third of the experts (32.3 %) pay attention to the existence of stable agreements between the judges of the local courts and the courts of appeals about leaving in effect of the judicial decisions, which were taken on the basis of corruption agreements. Only 10.3 % of experts deny the existence of such agreements.

One third of the questioned experts (31.4 %) acknowledge the spreading of practice of bribery of judicial experts, which is a bit lower value, than in some types of proceedings. When explaining this fact, experts paid attention to the specific nature of economic proceedings and the “*document nature of most evidences*”. At the same time, experts acknowledge, that the experts-private entrepreneurs (the distribution of evaluations about the issue of wider spreading of corruption agreements among different categories of experts were as follows: the experts – officers of expert establishments – 28.2 %, the experts – private entrepreneurs – 39.1 %, others – not determined) are more inclined to corruption agreements. Among the types of expertises, where the corruption agreements occur most often, the following were named in the in-depth interviews: “*commodity expertise*”, “*property expertise*”, “*accounting expertise*”, “*construction-engineering expertise*”.

Experts pay attention to the involvement in the corruption relations of the officers of the personnels of courts too (23.5 % of the questioned experts agree with this).

It was determined in the in-depth interviews, that the officers of the personnels of a court receive corruption remunerations for different actions, however, most frequently for assistance in “access to individual judges”, in some situations – for transfer of a case to a specific judge, for assistance in registration of claims or solicitations “with a back date”, for reception of possibilities to become acquainted with some documents of a case, for delaying or acceleration of the “motion of certain documents”, and so on. In the questionings of entrepreneurs situations were revealed, when officers of the personnels of courts were the key element in corruption agreements, that is, they “solved all the issues, related to the reception of a necessary decision”.

*In the theses of the speech of the Minister of Justice M. Onishchuk at the parliamentary hearings “About the Status of Justice of Ukraine”, Kyiv, the 18 of march the year 2009, it was noted, that our compatriots continue to consider the judicial system of Ukraine ineffective, unfair, and moreover – corrupted. The system of judicial proceedings enjoys the least confidence among all the public bodies – only 10 % of citizens trust the courts. More than 70 % of the respondents deny a possibility to achieve truth in the courts legally. Most of the questioned people are certain, that a judicial decision can be purchased for money. The results of the questioning indicate the fact,*

*that people have an idea – “the higher the indexes of material wealth, the bigger the confidence in winning of a case in a court”<sup>71</sup>.*

A corrupted judge is considered to have a so-called “circle of influence”. It consists of the tested by years lawyers/attorneys, through whom the transfer of assets for a “correct” decision is directly carried out. Usually, a “circle of influence” includes from one to three attorneys. An agreement about rendering of juridical services is concluded between an attorney and a “customer”, a mediator should know well both parties, estimate in reality the degree of danger and options for retreat<sup>72</sup>. It is reckoned, that there can be a few capable of such actions judges-corruptioners and mediators at every Ukrainian court<sup>73</sup>.

One of the methods of mediation of reception and transfer of a bribe became known from information, obtained in the circle of practicing lawyers. With the help of the state supervisory body the interested economic entity has provoked conducting of a verification and drawing up of a corresponding act with indication of infringements, the formal documentation of which was presented as a condition to receive a bribe. Afterwards, the tested enterprise was blocked by a security body, and access to it was denied until the solution of the issue about payment of a penalty, including payment of the bribe directly to the persons, who conducted the verification. Taking into account the obstinacy of the penalized subject, the interested economic entity initiated a legal claim without sending to the defendant of a copy of the suit claim and approximately 150 documents enclosed. On the day of presentation of the claim a judge of the economic court imposed an arrest on the money assets of the defendant on its bank accounts. A copy of the decision about imposition of arrest by the court was not sent until the moment of actual imposition of arrest. According to the reported information, there is a well-established procedure of reception of a bribe by the judge – from the party-applicant for imposition of arrest on money assets and from the other party – for taking of a decision about removal of arrest. The money, received for abolition of arrest, is distributed pursuant to the participation of all interested subjects.

*After submission of an appeal simultaneously with the copy of a decision about provision of a claim, the defendant was sent a commercial proposal by one of the juridical firms about a possibility to solve necessary issues and an intention to initiate negotiations according to the achieved arrangement.*

A lot of cases of “judicial solving of problems” are known from practice. Usually, it is discovered during the conduction of hearings of a case and at the reception of texts of documents.

*From the reported information a case became known, when one of the representatives of a party, emotionally discussing the results of a judicial meeting, was assuring another party about futility of its actions, because*

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<sup>71</sup> <http://www.minjust.gov.ua/0/19237>

<sup>72</sup> A. Ilchenko, E. Solomko. How much is to buy a judge. Anatomy of judicial corruption: how much, to whom, for what. [Electronic resource]. – Mode of access: <http://www.segodnya.ua/news/13048671.html>

<sup>73</sup> Yu. Vasilenko: “Kidalovo vulgaris” [Electronic resource]. – Mode of access: <http://infoporn.org.ua/yuriy-vasilenko-%C2%ABkidalovo-vulgaris%C2%BB>

*this case cost him not too much – only four thousand dollars. The above indicated is representative in understanding of the formed consciousness of the population in the issues of bribery and corruption in courts.*

According to the statistical data of the MIA of Ukraine, 2.9 thousand facts of bribery were disclosed in 2008. The total sum of the received bribes reached 117.1 million UAH (in 2007 – 34.5 million UAH). The average amount of a bribe makes 72 thousand UAH (in 2007 – 26.6 thousand UAH). As a result of destruction of the corruption schemes 1.6 thousand bribers were brought to criminal responsibility, the overwhelming majority of whom are the public officers and 19 judges<sup>74</sup>.

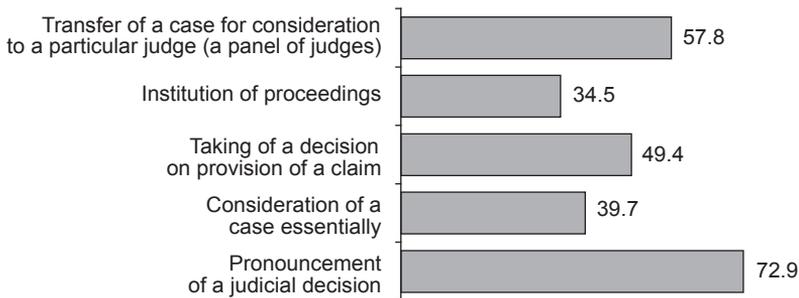
### 3.4.2 Corruption Risks at Individual Stages of Examination of Economic Cases

According to the obtained data of the experts' research the corruption practices have **different frequencies** depending on the stage of a judicial trial. For more details see **Diagram 64**.

*Diagram 64.*

#### **Spreading of corruption practices (corruption agreements) at the basic stages of consideration of economic cases**

*(% of those, who consider such practices "widely spread")*



Experts note, that for the economic judicial proceedings the completing stage has a decisive value, that is, the actual content of a judicial decision. However, here (as well as in other types of proceedings) can also be "attractive" other stages. In particular, experts note the initial stage of judicial proceedings, when on the basis of corruption agreements such conditions are created, under which a case arrives to a "necessary judge".

The results of the questionings allow to get an idea of the **subjects of corruption agreements**, that is, what the interested persons aim at (see **Diagram 65**).

These data show, that the corruption risks are "distributed" quite evenly in relation to the basic processual stages and actions of a judge. Although, more often they concern the

<sup>74</sup> [mvs.gov.ua/mvs/control/main/uk/publish/article/178737.jsessionid=29B5A6920FCF16857C662E2CE6D95466](http://mvs.gov.ua/mvs/control/main/uk/publish/article/178737.jsessionid=29B5A6920FCF16857C662E2CE6D95466)

*Diagram 65.***Subject of corruption agreements in the economic courts: experts' evaluations**

(% of those, who consider, that corruption abuses of judges concern exactly this stage of a process or these processual actions)

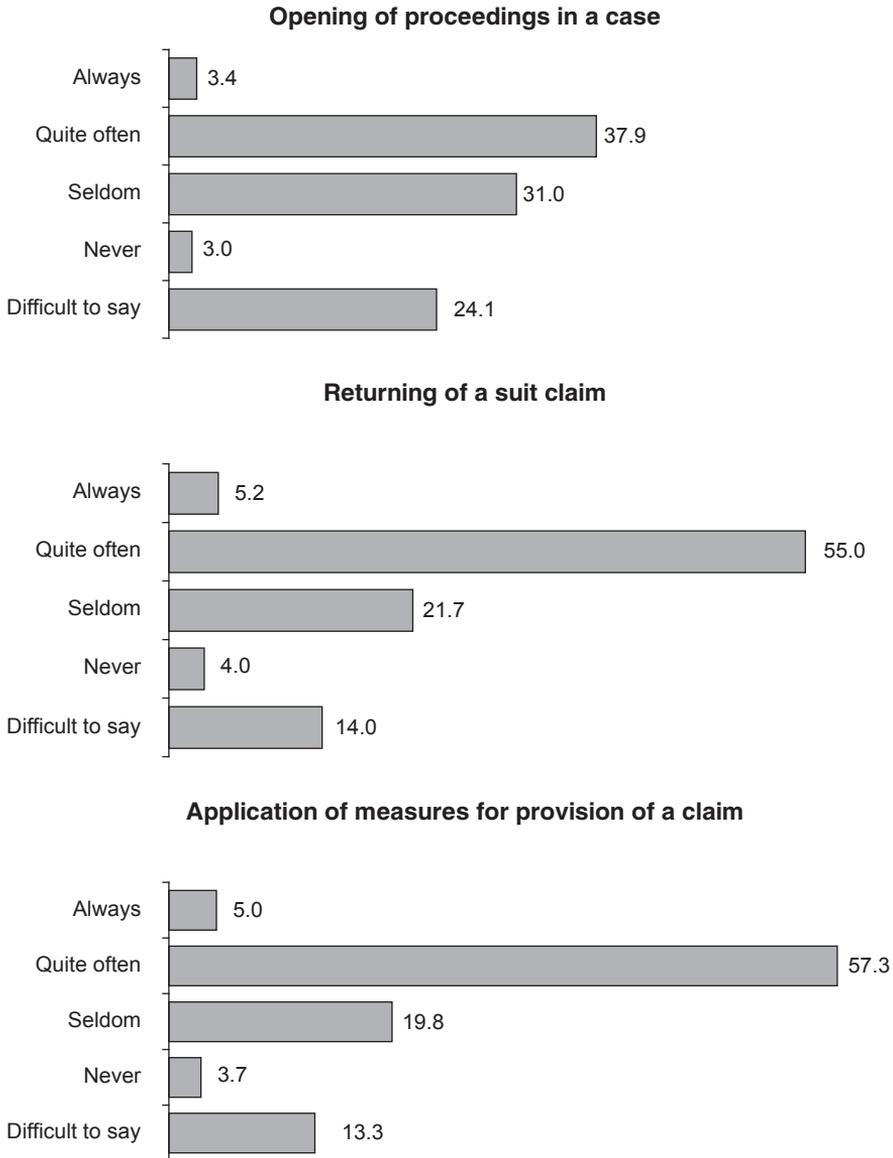
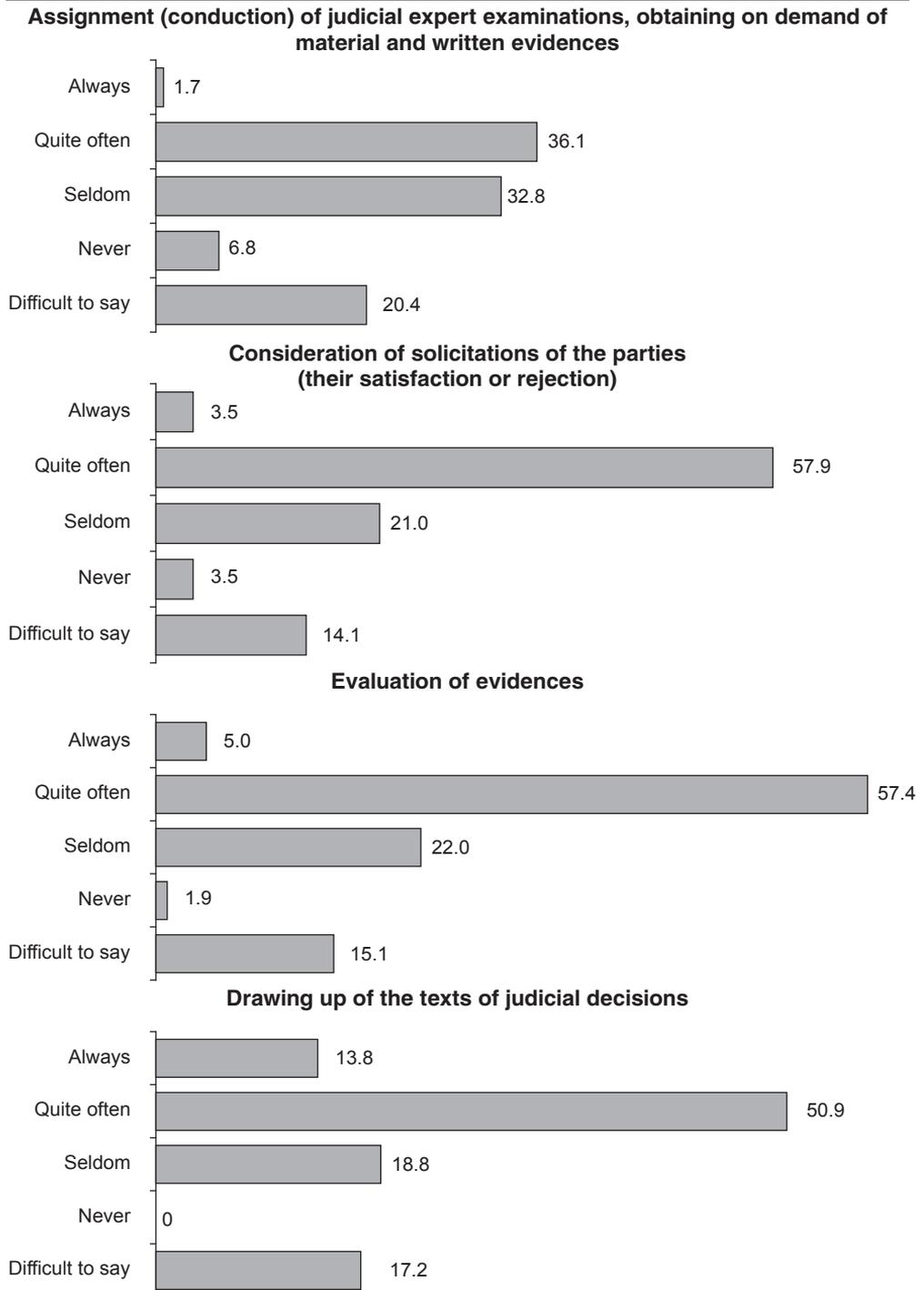


Diagram 65 (continuation).



measures of provision of a claim, evaluation of evidences and drawing up of the text of a judicial decision, quite important are the actions, which concern the “motion of a case”, especially often – returning of suit claims or rejection or satisfaction of solicitations of the parties.

**The corruption risks at returning of a suit claim, infringed proceedings in a case, execution of preparatory actions to conduct hearings in essence.** The authority, specified in article 63 of the EPC of Ukraine, of the economic court to return a suit claim and the documents enclosed to it without examination, as a rule, provides for non-observance of formal requirements, demanded from a plaintiff at submission of a suit claim, and represents potential corruption practice.

Quite often with reference to individual paragraphs of article 63 of the EPC of Ukraine the courts return the suit claim and the documents enclosed to them without examination, in essence abusing their authorities, not wishing, in reality, to administer justice in the cases. Obviously, the indicated practice is characteristic of examination of the economic disputes and was directed at effectiveness of examination of the cases among the subjects, who are able to receive a competent legal assistance.

At the same time, the desired effectiveness quite often actually turns into judicial procrastination, and also well-known judicial abuses. After the return of a suit claim, the probability, that a party will repeatedly go with it to a court is considerably higher, than the probability of appeal of a decision of court in the appellate or cassation order. However, in the first situation the same case, probably, will be passed on to another judge.

*Typically frequent cases of the individual returning of the suit claims by the economic courts on the basis of non-submission of the proofs of payment of the state tax in the established order and amount, non-submission of proofs of sending to the defendant of a copy of a suit claim and documents enclosed to it, non-submission of reasonable calculation of the claimed or disputed amount of money, submission, as an attachment, of the copies of documents not testified with a signature and a seal, and so on. Thus, as a rule, such a motivation of the decisions taken by the economic courts neither corresponded with the materials, or the actual circumstances of a case, nor the requirements of judicial legislation.*

*The economic courts, in particular, return the suit claims on the basis of sending of a suit claim to a defendant without postal description of an attachment, not accepting the postal receipt or the register of the posted mails as a proof, nor verifying the actual circumstances.*

*The courts return the suit claims also on the basis of absence of inscription on the original of payment order about putting assets into the state budget, although, for example, arrangement of the same payment through the cash office of a bank by making out a receipt is not required for that. The similar result of individual return of a suit claim by a court takes place in the situation of certification of the indicated inscription on a payment document not by the head of a bank and the chief accountant, but by other persons, however, authorized for this or by those acting as such persons.*

In the decision of the European Court on Human Rights in the case “Sovtransavto-holding against Ukraine” of 25.07.2002 (decision in essence, paragraph 81) the European Court noted, that by the decision of April 2, 2002, the Higher Economic Court rejected the cassation appeal of an applicant, not actually considering it, because the latter was not accompanied by a document, which would confirm payment of the tax for examination of the appeal. The court returned to an applicant a sum of money, paid by him as a tax, and noted, that after fulfilment of the corresponding formality an applicant can submit an appeal again. By the next decision of April 26, 2002, the Higher economic court rejected an appeal of an applicant in connection with him skipping a one month term, provided for its submission. Thus, the European Court discovered, that the cassation appeal of an applicant was not actually considered because of failure to observe formalities, provided by the legislation, which could give grounds for a conclusion, that an applicant did not exhaust internal means of juridical defence. However, the Court reminded that, in accordance with his precedent practice about the rule of exhausting the internal means of juridical defence, this rule should be used with certain flexibility and without extreme formalism; it is not applied automatically and does not have absolute character; when verifying its implementation, attention should be paid to the circumstances of a case.

The situation is interesting also because of the fact, that at one time returning of cassation appeals to the judicial decisions about the issues of formal infringement of the Rules of rendering of mail services (sending of copies of cassation appeals through the recommended postal service, instead of the insured letter with the description of an attachment) was implemented by the economic court of cassation, which actually created artificial cutback of the cases, which were considered by the court in essence. The noted practice of returning the suit claims remained the same so far, despite the clear legal positions, expressed on this occasion by the Judicial chamber in the economic cases of the Supreme Court of Ukraine.

A case is known, when the economic court of the first instance returned a suit claim due to infringement of requirements of one of the paragraphs of article 63 of the EPC of Ukraine, and after abolition of this decision by the court of appeals the same judge returned the same suit claim repeatedly, however, due to other reasons, and a party again applied to the court of appeals. As a result, a case was opened with the hearings in the economic court approximately in 8 months after its first submission.

It is also necessary to notice, that the groundless returning of the suit claims can be carried out by a judge both with an intention of artificial decrease of his own workload and due to unwillingness to consider a case upon an agreement with the interested persons as a result of corruption practice.

***Practice testifies, that the norm of article 63 of the EPC of Ukraine concerning the returning of a suit claim bears a potentially corruptogenic result owing to the abuses of judges at the examination of the noted issue. It will be expedient in such a case, instead of the possibility of returning of a suit claim, to leave it without motion with granting a party of a sufficient term for correction of possible drawbacks of the submitted suit claim.***

The issue of infringement of proceedings in a case is closely associated with determination of the proper jurisdiction of a case and competence of the economic court

to consider it by the rules of economic judicial proceedings taking into account the matter of a dispute and its subject composition.

Determination of appropriate jurisdiction of a case can bear corruption risks in the meaning of profitability of transfer of a case by the interested party to a certain judge in the economic court favourable for this party, and in connection with the problem of the, so called, “raidership” in the corporative disputes or illegal capture of real estate.

In this context the right solution would be to introduce changes to the legislation, namely introduction of paragraph 7 of part three of article 104 of the EPC of Ukraine as unconditional basis for abolishment of a decision, if it was taken by an economic court with infringement of the rules of exceptional jurisdiction. Along with that, there is still a problem of determination of juridical consequences of such abolishment, because with such basis for abolishment, a case should be sent for a new examination to a local court, although article 103 of the EPC of Ukraine makes no provision for this authority to a court of the appellate instance.

In the decision of the European Court on Human Rights about the case “Sokurenko and Strygun against Ukraine” of July 20, 2006 (statements № 29458/04 and № 29465/04), and also in the decision about the case “Veritas against Ukraine” of November 13, 2008 (statement № 39157/02), the Court came to a conclusion, that implementation of a processual action by the economic court of a corresponding instance after abolishment of a judicial decision contrary to the provided authorities must be regarded as examination of a case by a court, “not established by the law”, which breaks paragraph 1 of article 6 of the Convention on Defence of Human Rights and Fundamental Freedoms.

In the economic judicial proceedings is also registered the existence of a specific phenomenon – “**ordered proceedings**”. These are situations, when certain processual actions were executed exceptionally for the purpose of reception of corruption remunerations in order to get access to certain documents, limitation of authorities of certain persons or bodies, imposition of arrest onto property or the rights of property, and so on. Most often, in such situations the speech is about imposition of arrest onto property or the rights of property. *In the in-depth interviews, the entrepreneurs pointed at the fact, that, sometimes, such proceedings allow to get access to confidential information of competitors, for example, about the founders, main contractors, amounts of sales of goods and services and so on.*

More than a half of experts (53.8 %) note, that they know cases of “ordered” proceedings, almost three fourths of them (70.5 %) acknowledge the existence of corruption basis for such actions. It is interesting, how the proceedings are conducted in such cases after achievement of the desired purpose: a case is stopped on a basis, formally provided by the law – 19.4 %, a claim remained without examination – 22.7 %, a plaintiff renounced a claim – 5.5%, a case was considered in essence with taking of a decision – 49.2 %. These situations were repeatedly illustrated in the in-depth interviews of the representatives of some social groups.

Corruption manifestations during realization of preparatory actions for conduction of hearings of a case in essence can actually show up in obtaining of documents on demand of the courts and obligation to accomplish actions, which are not caused by a real necessity of examination of a case, and are realized, as a rule, in artificially stated suits. Such abuses

often take place, when a party needs to get copies of documents, which have the mode of restricted access: they contain a bank secret, information about ownership of real estate, transport vehicles, the status of shareholders or possession of securities, about which exhaustive records are present exceptionally in the corresponding registers and so on.

A case is known, when during the preparation of a case for examination, an economic court called on documents of more than a hundred titles, which concerned the lists of the owners of registered securities. Upon the reception of information of limited access and having made copies of the given documents, a plaintiff lost any interest to the matter of the dispute, and his claim was left without examination.

It is supposed, that the above indicated abuse of the available authorities can be overcome only by realization of severe judicial control by the higher judicial instances, if the taken judicial decisions are subject to appeal, and also by an appropriate reaction of the bodies of judicial self-government and public control over the courts with maximum publicity of all the processes. It is also impossible not to take into account the fact, that similar actions and decisions could not be taken, if a particular judge had the sufficient level of sense of justice and professionalism, and also in case of inevitability of his personal juridical responsibility and responsibility of the state for taking of unjust judicial decisions, which is actually absent in Ukraine.

**Corruption risks at application of measures of provision of a claim.** The noted risks are absolutely corruptive at application of such a juridical means by a judge-corruptor.

A big number of cases are known from practice, when measures on provision of a claim were applied groundlessly. This totally paralysed the activity of legal entities, individual enterprises, bodies and so on. Obviously, pronouncement of such groundless decisions was accompanied by the facts of bribery, other manifestations of corruption, and also, by illegal influence on a court for the purpose of taking of an intentionally unjust decision.

*A case is known, when a judge of one of the courts with a decision of December 27, that is on the eve of the new-year holidays, forbade more than 100 supermarkets and other stores on the territory of Ukraine to carry out realization, introduction into the economic turnover (export, wholesale and retail selling) of certain food products, which caused direct damages in the amount of hundreds of thousands of hryvnias. However, in two days by the suit of the defendant the court independently abolished the ruled decision as groundless.*

In another case an economic court in a case about the collection of the debt money secured a claim by forbidding the defendant in any way to avoid fulfilment of commitments according to a delivery contract, in particular, not to give appropriate monthly orders for delivery of goods to the plaintiff and to renounce its acceptance, remove from realization the alcohol products, received from the plaintiff by the delivery contract. When abolishing this decision, a court of the higher instance noted, that the groundless limitation of the authorities of the company, ensured by the legislation and the constituent documents about realization of economic activity was an infringement of the principles of economic activity in Ukraine.

It is supposed, that the above indicated abuse of the available authorities of a court or established illegality of the corresponding decision can be overcome only with realization of severe judicial control by the higher judicial instances and also with an appropriate reaction of the bodies of judicial self-government and public control over the courts with maximal publicity of all the processes.

Experts also paid attention to the *connection of corruption practices with some drawbacks of the current legislation* (below are given the quotations from the in-depth interviews and from the reports about the focus-groups):

- **Situations, concerning the “motion of a case” (infringement of proceedings, leaving of a case without motion and so on).** In such situations, attention is paid to application of formal requirements by the judges to the appearance of judicial documents (phenomenon of “excessive formalism”). Lawyer M.: “*Judges quite often return claims and solicitations, referring to quite insignificant formal inconformities of the submitted documents with the requirements of the processual law. Especially – in situations, where the entrepreneurs do not have competent juridical assistance*”.

- **Measures on provision of a suit.** It is one of the most contradictory elements of the economic process. Experts acknowledge, that these issues are not regulated clearly enough in the legislation, which causes a possibility of corruption abuses. Especially emphasized is the “absence of clear criteria of proportion of measures of provision of a suit and the subject of a suit”, especially in the disputes about corporate rights. That is why the presence in such disputes of a high level of discretion for judges becomes an important corruptogenic factor, because the possibilities of their appeal are substantially complicated.

- **Consideration of solicitations of the parties.** In this case, the presence of *excessive formalism*, which is quite often a disguise of the presence of corruption agreements, was noted in the in-depth interviews. In addition, attention is paid to the existence of unclarity of the legislation as for the requirements to the motivation of the decisions about rejection or satisfaction of most such solicitations, and also possibilities of postponement of examination of such solicitations.

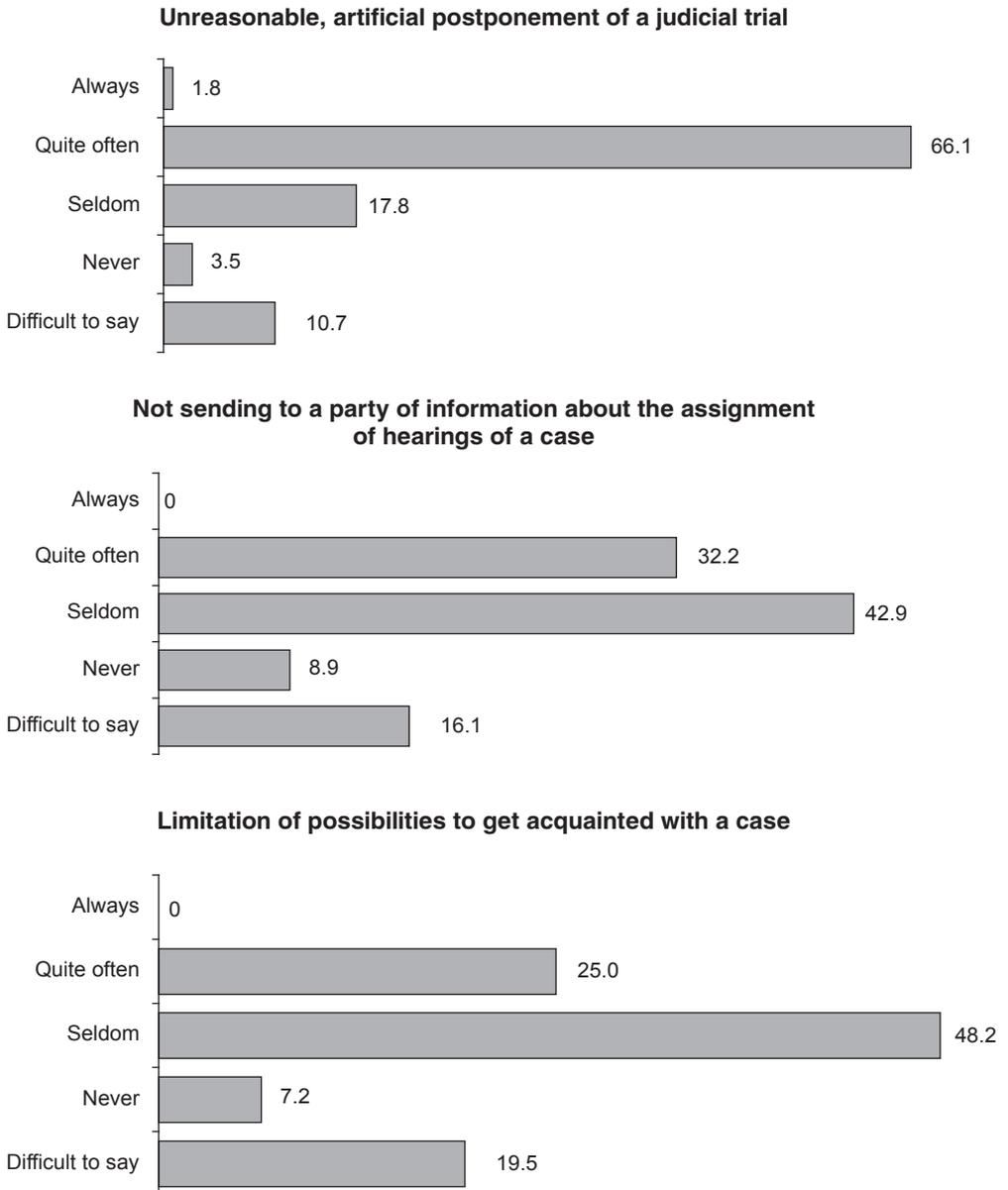
- **Evaluation of evidences.** In this case, experts pay attention to the existence of “*irrefutable prejudicial meaning of some types of evidences, as already established at the judicial sittings*”. Especially problematic is the situation, when the decisions of the courts of arbitration are also provided with this status.

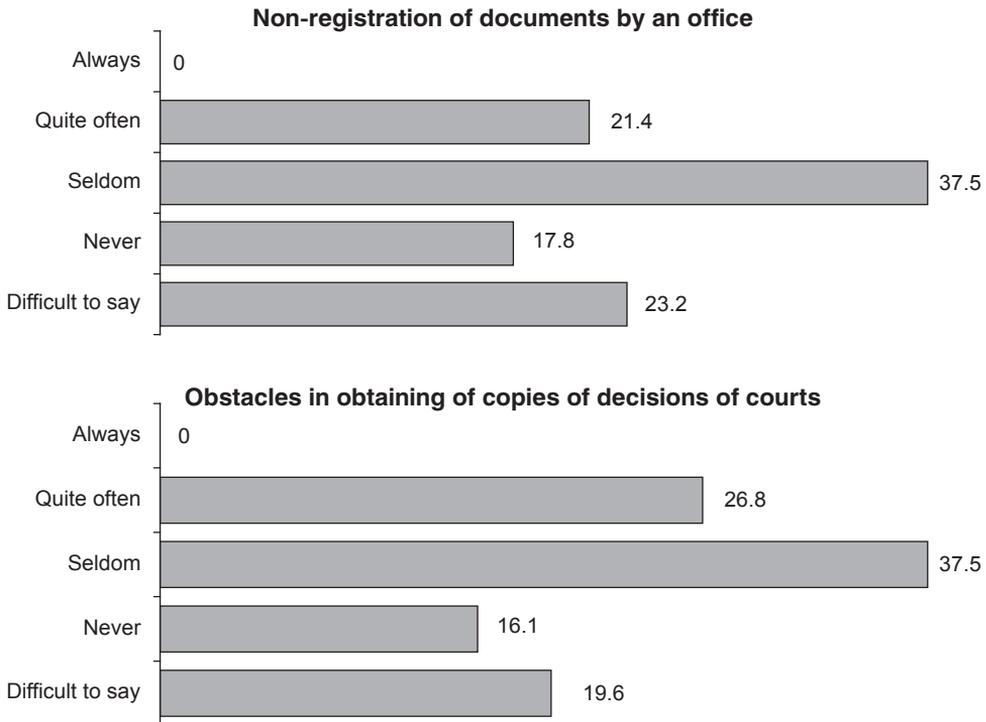
- **Assignment (conduction) of expert examinations.** Experts associate appearance of corruption risks with unclarity of determination of terms (which allows to postpone both the assignment of expert examinations and their conductions), absence of clear guarantees of independence of experts, a possibility of falsification of the experts’ conclusions.

Realization of corruption agreements requires execution of certain actions, which have “tactical” character concerning achievement of the purpose of such agreements, because in most cases the question is not only about the contents of a judicial decision, but also about other characteristics of proceedings, which are important in the context of limitation of the possibilities of certain participants both directly in a process and at appealing of the corresponding decisions. **Diagram 66** shows, which actions exactly judges do within the frameworks of corruption agreements.

Diagram 66.

**Application of individual actions for execution of corruption agreements: experts' evaluation** (% of those, who consider, that such actions take place in the economic judicial proceedings)



*Diagram 66 (continuation).*

These data show, that artificial postponement of a judicial trial is one of the most often used methods in the situations of implementation of corruption agreements. In addition, certain manipulations with documents also have a substantial value (concealment of individual documents, groundless complication of access to the materials of a case and so on).

**Corruption risks at conduction of a trial, ruling of a decision in a case, estimation of evidences, motivation of a judicial decision.** The corruption risks of the indicated category are connected to a significant extent with the processual activity of a judge in the field of justice, which can be verified exceptionally in the processual way by means of the appellate and cassation re-examination of judicial decisions.

In this aspect it should be taken into account, that in accordance with the decision of the plenum of the Supreme Court of Ukraine of 13.06.2007 № 8 “About independence of the Judicial Power”, keeping in mind, that independence of the judges is the main pre-condition of their objectivity and impartiality, a judge, when administering justice, is subordinate only to the law and is accountable to nobody. Freedom of impartial solution of cases is provided for judges in accordance with their internal persuasion, which is grounded on the requirements of the law. The exceptional right of verification of legality and reasonableness of the judicial decisions has a corresponding court pursuant to the processual legislation. Appeals of judicial decisions, the activity of courts and judges concerning examination

and solution of a case beyond the order, provided by the processual law in a case, is not allowed. Reception for examination by any persons or bodies, except for the corresponding court of appeals or cassation court, of applications, containing appeals against the judicial decisions, their examination, demanding from the courts of information about the judicial cases in connection with such applications, direction of applications to courts, requirements to judges about establishment of control over the examination of a case by a court or a judge, are abuses of independence and self-sufficiency of a court.

*Therefore, when an economic court administers justice, corruption risks can be revealed and proven exceptionally by a method, provided by the processual law, after abolishment of a judicial decision by a corresponding court of a higher instance.*

It is possible to consider, that under such conditions most probable at these stages can be risks of personality nature, directly related to the law-enforcement process.

**Corruption practices of infringement or limitation of the publicity of a trial process.**

In accordance with part 7 of article 811 of the EPC of Ukraine, registration of a trial process with the help of sound-recording hardware in a court of the first instance or a court of the appellation instance during the examination of a case in essence is carried out only on request of, at least, one participant of a trial process or by the initiative of a court.

Neither the EPC provides a possibility of examination by a court of objections of the participants of a trial to the actions of the head and solution of the issue about their acceptance or rejection by pronouncement of a ruling.

It is reckoned, that the absence of a regulation, by which the registration of a trial with the help of sound-recording hardware is obligatory during the examination of a case in essence and does not stipulate pronouncement of a decision by a court about objections to the actions of the head, bears the corruption risk of twisting of the actual circumstances of a case. Afterwards, these circumstances in a twisted form can be registered in a judicial decision, and also deprive a party of the evidential basis in case of applying to the authorized bodies or persons with complaints about the actions of the head or the judges, which can take place during a judicial sitting.

Incidents are known, that lately judges through the secretaries of the judicial sittings under different occasions “implore” the representatives of the parties to sign a prearranged application about refusal to register a judicial sitting. Afterwards, during the hearing of a case it turns out, that there were different reasons for that, which interested persons would like to conceal as much as possible, as a rule, connected with the facts, reported during the judicial sitting, later on twisted in judicial decisions.

*Therefore, the absence in the EPC of Ukraine of a regulation, which would obligate the courts to register the course of a judicial sitting by means of a sound-recording hardware, bears potential corruptogenity.*

Imposition by judges of prohibitions in realization of the right of a party to obtain photocopies of the materials of a case, which contradicts article 22 of the EPC of Ukraine, should also be considered a corruption practice. Exceptionally diverse are also the motives of such actions, beginning from indignation, that a party will have the same collection of the materials of a case, as a judge has, and also, referring to the fact, that these materials of a case can be placed in the Internet. The scope of materials, given by the courts for photocopying,

is also selective: with prohibition to copy protocols of the judicial sittings, descriptions of the materials of a case, and also decisions about the motion of a case and so on.

Blocking by the courts of the electronic devices of informational access to the data concerning the appointed cases, the participants of processes and so on, on acquisition of which and for the software development the budgetary funds have been spent, belongs to corruption practice. In these situations are also revealed multi-choice methods of blocking of operation of electronic devices, for example, a device can be switched on, however, with locked buttons, which do not respond to a signal or are switched off. Thus, reception of information about assignment of a case according to the programmed search system is impossible.

*From the reported information cases became known, when a judge-speaker forbade the persons, who were not participants of a trial, to be present during a public judicial sitting, with reference to disagreement of the parties with this, and also, the necessity to receive permission of the head of the court.*

**Absence of appropriate motivation of judicial decisions as a corruption risk.** This requirement is provided in article 84 of the EPC of Ukraine and it results from paragraph 1 of article 6 of the Convention on Protection of Human Rights and Fundamental Freedoms.

*In the decision of the European Court on Human Rights in the case “Pronina against Ukraine” of July 18, 2006 (statement № 63566/00, paragraph 25), the Court acknowledged a violation of the right of a person for access to a court on the basis of absence of corresponding motivation of the judicial decisions, having noted, that the applicant applied to the national courts with a request to solve her dispute with a reference to article 46 of the Constitution as a direct action norm. However, the national courts have not made a single attempt to analyse the applicant’s complaint from this point of view, regardless of her clear reference to this article in applications to every judicial instance. In opinion of the Court, the national courts, ignoring the issue on the whole, although it was special, important, actually failed to fulfil their duties according to § 1 of article 6 of the Convention. Attention should be paid, that paragraph 84 of the EPC of Ukraine does not contain references to such requirements to a judicial decision as legality and foundation, which are stipulated in other processual codes.*

Thus, when grounding the infringement of these requirements, the persons, who make complaints, and also the courts, motivate their arguments by referring only to the resolution of the Plenum of the Supreme Court of Ukraine № 11 of 29.11.1976 “About a Judicial Decision”, according to which a decision is deemed legal then, when a court, having executed all the requirements of the civil processual legislation and having comprehensively verified the circumstances, solved a case in accordance with the norms of the substantive law, which are subject to application to these juridical relationships, and at their absence – on the basis of the law, which regulates similar relations, or on the basis of the general principles and substance of the legislation of Ukraine.

Such a decision is acknowledged grounded, where the circumstances, relating to the given case, are represented in full, the conclusions of a court about the established circumstances and the juridical consequences are comprehensive, meet the reality and are confirmed by the authentic evidences, explored in the judicial sitting.

*Herein, alterations appear to be necessary in article 84 of the EPC of Ukraine, providing for such requirements in the article, which are demanded to a judicial decision as legality and foundation.*

**Corruption practices of returning of an appeal or cassation complaint by the courts of the corresponding instances on formal bases.** Articles 97 and 111<sup>3</sup> of the EPC provide for the possibility of a court of the corresponding instance to return the filed complaint on the bases of not meeting, as a rule, of certain formal requirements, which are presented to such documents or the order of their presentation. In practice, this means actual impossibility of a subsequent appeal of the judicial decisions due to missing of the term of appeal, which may be not renewed in such a case. The EPC, in particular, points out the following reasons for returning of the filed complaints: signing by a person, whose official position is not indicated, absence of enclosed evidences about sending of a copy of a complaint to the parties of a case, or about payment of a state tax in accordance with the established procedure and amounts and so on. The above indicated is considered corruptive due to the enhanced risk of abuse on the side of the judges and actual limitation of a person in fulfilment of her right to appeal against the judicial decisions in the appellate and cassation order.

*An incident is known, when the department of paperwork of an economic court separated from a filed complaint the evidences about the fact, that the complaint had been sent to other parties of a case, for the goal of the following expected return of the filed complaint without review of the decision in a higher instance.*

### 3.4.3 Recommendations

By the results of the conducted research, it is necessary to offer the following changes to the acting legislation.

1. Introduce changes to paragraph one of part three of article 104 and paragraph one of part two of article 111<sup>10</sup> of the EPC, with the note, that the foundation for abolition of a decision of a local court (or a resolution of a court of appeals) is examination of a case by an unplenipotentiary judge or in an illegal composition of a court.

2. Institute the order of transfer of the cases for their examination at the first instance, and also, review of the judicial decisions in the appellate and cassation order of a queue to the judge-speaker with the materials of a case, supplemented with the evidences of adherence to the noted requirement.

3. Abolish the provided by article 20 of the EPC of Ukraine competence of the head of an economic court or the deputy of the head of an economic court to solve the issues

about recusal of a judge or judges of a panel of judges. Include in the noted article a provision, that the issue about recusal is solved by a court, which considers a case by pronouncement of a motivated decision. At the same time, as foundation for abolition of the judicial decision by the courts of the appellate and cassation instances, it is necessary to provide for such a foundation, as establishment by the courts of these instances of groundedness of the declared recusal of a judge of a court of the previous instance on the basis of circumstances, which questioned his impartiality.

4. Introduce changes to the Law of Ukraine “About Organization of the Courts” providing obligatory placement on the publicly available official Internet-portals of annual information about the amount and categories of the considered cases by individual courts, and also by every individual judge of these courts with indication of the amount of abolished or changed decisions, rulings, resolutions; grounds for abolition, change of decisions and rulings, presence of instituted disciplinary proceedings and taken decisions on bringing to disciplinary responsibility.

5. Change article 63 of the EPC of Ukraine, which provides for returning of a suit claim without examination, providing for possibilities for an economic court to return a suit claim and the documents, enclosed to it, only after leaving the suit claim without motion, and if the drawbacks, found in the submitted suit claim, have not been removed by the person within a reasonable term, defined by the court.

6. Change article 97 article 111<sup>3</sup> of the EPC of Ukraine, which provide for non-reception of the appellate/cassation complaints and their returning by a court of an appellate/cassation instance, providing for the authority of a court of an appellate/cassation instance to return the appellate/cassation complaint only after leaving of the appellate/cassation complaint without motion, and if the found drawbacks of their submission have not been removed by the person within the reasonable term, defined by a court of the corresponding instance.

7. Provide in article 103 of the EPC of Ukraine for the authority of a court of the appellate instance to send a case for a new examination, if a judicial decision is abolished on the ground of institution by an economic court of a case of subject or territorial jurisdiction.

8. Provide in the EPC of Ukraine for a regulation, according to which the participants of the proceedings would have the right to raise objections against the actions of the head judge to be accepted or overruled by awarding of a judgement by a composition of a court, which is added to the materials of a case.

9. Provide for the obligatory registration of a trial with the help of a sound-recording hardware in a court of the first and appellate instances.

10. Provide in article 22 of the EPC of Ukraine for the right of the parties to make copies of the materials of a case by means of photographic equipment and other means of copying of documents.

11. Provide in article 82 of the EPC of Ukraine for requirements of legality and foundation of a judicial decision, and also the duty of an economic court to pronounce a legal, grounded and equitable decision.

## CHAPTER 5. CORRUPTION RISKS IN ADMINISTRATIVE JUDICIARY

### 3.5.1 General Characteristics of Administrative Judiciary

During the preparation of this unit we tried to avoid the fact, that the result of the work done should be a traditional analysis of a legislative act together with outlining of the provisions of Code of Administrative Judiciary of Ukraine (further referred to as CAJU) which need to be changed. That is why the research of CAJU regulations is done systematically with a vivid demonstration of experts' opinions as to the existing practice of its application by courts, as well as the demonstration of conduct of the judges and other persons involved.

The authors paid attention to the following facts while doing the research:

- at certain conditions, a part of drawbacks of any law can become a real pre-condition of abuse of legal provisions. At this point, CAJU is not an exception from this rule;
- the courts' practice can differ from the law drafter's purpose, and when it is influenced by a real existing *time* interval necessary for the case consideration and reconsideration in the appeal and cessation procedures, sometimes it almost *completely* satisfies abusive and unlawful needs;
- a unified practice of application of certain legal regulations is absent.

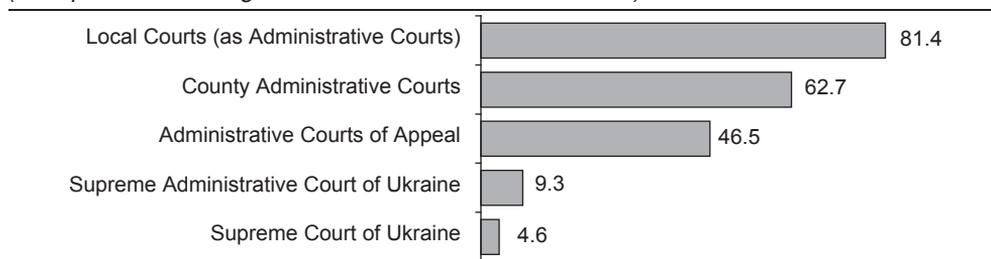
Therefore, no matter how high-quality is the law from the point of view of professionals – it is only the practice that can demonstrate the level of its perfection, though this practice can nullify the good intentions of the drafter. For example, if we take a look at the mechanism of reaction of national bodies of CE Member States to the decisions of the European Court of Human Rights establishing infringements from the part of the state, the correction of practical methods and means of practical law application is considered to be a *no less* effective means of protection of human rights than introducing changes to the legislation. And for this specific reason this research contains the examples of legal positions of administrative courts of different instances.

**Prevalence of corruption practices.** Diagram 67 shows general estimations by the experts of prevalence of corruption practices in administrative judiciary.

*Diagram 67.*

#### **Possibilities of usage of corruption schemes: expert estimations of conditions in courts of different levels**

*(% of persons claiming that these conditions are favorable)*



Comparing these estimations with the results of surveys for “lay citizens” it is worth mentioning their differences: the experts provide higher estimations of the level of prevalence of corruption in administrative courts in comparison with lay people. The explanation of these differences was received in the process of in-depth interviews and focus groups. They can be summarized in the following way:

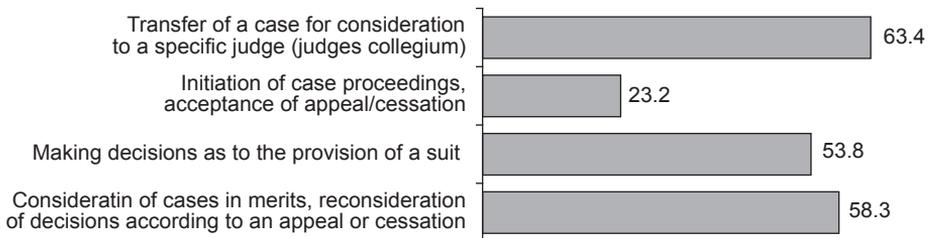
*“Administrative courts consider essentially different by the level of “bribery contents” cases, most of which concern lay people and are not connected with any forms of corruption. ” (lawyer K.), “Lay population participates in disputes rarely involving a possibility or necessity of bribing of judges” (lawyer M.).*

Expert surveys determined the categories of administrative cases, where corruption displays were the most prevalent. Differences in these estimations were almost absent. Almost all the experts agree to the fact that corruption practices can be seen most often in particular, *in disputes with the participation of the taxation service (especially those involving the return of VAT), disputes with the participation of the customs administration, disputes with the bodies of local self-government and local bodies of executive power on land issues.* In-depth interviews determined that these specific categories of cases are discussed most often in mass media in the context of standard judicial corruption topic.

Corruption practices have **different frequency** depending on the stage of judicial consideration (**Diagram 68**).

*Diagram 68.*

**Prevalence of corruption practices (corruption agreements) on basic stages of consideration of administrative cases: expert estimations**  
(% of persons claiming that these practices are prevalent )



These data demonstrate that in the experts’ opinion, one of the *most desired* results of the “interested” persons is transfer of a case to the specific judge in order to resolve the issue (initiation of case proceedings, further activities for the suit provision, consideration of the dispute on merits etc.). In other words, even before applying to court with a claim or appeal for provision of proofs or measures on provision of claim, which can be made prior to submitting a claim in certain categories of disputes, the interested person already knows who the judge resolving his dispute will be. According to the experts, this result can be achieved in certain courts (as an example, economic courts are mentioned for some reason). It is evident that the most effective counter-mechanism should be random distribution or distribution in order of priority of cases among the judges.

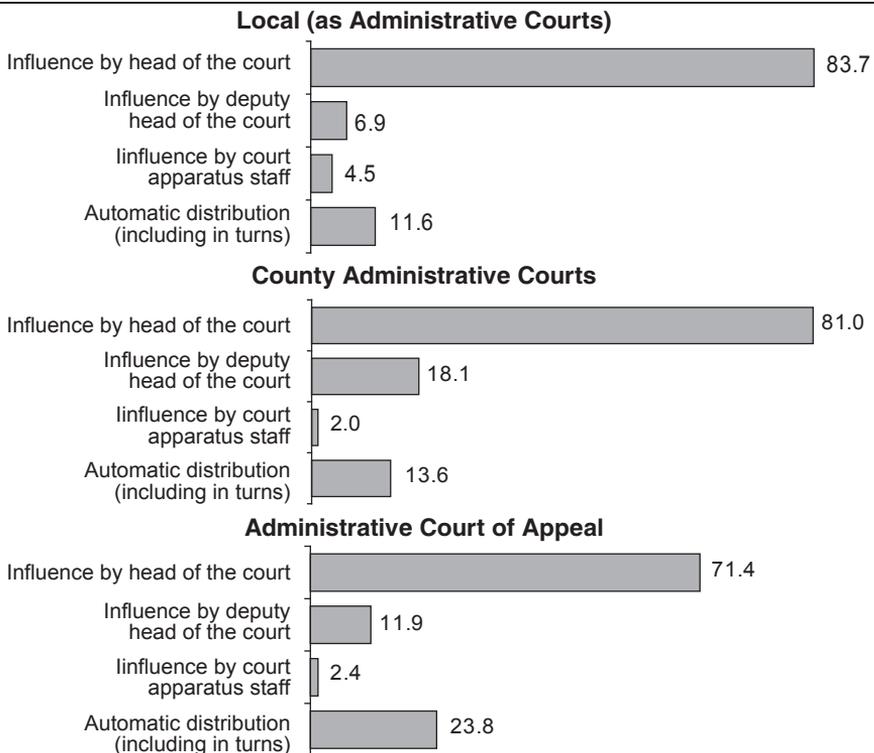
However, this mechanism is not a cure for the problem. Once again, let us find out the experts' opinion. At this point, the specified aspect also has several variations. In particular, specific courts are mentioned, among which there are both county administrative and local general courts, where the question of the cases distribution is strictly and in one person controlled by the head of the court. Theoretically it is possible to influence this process, but it is not always rational from the point of view of "cost effectiveness", i.e. the "amount of gratitude" for the transfer of the case to a certain judge can be significantly larger than the economical effect of approval of a corresponding decision. In these circumstances, according to the "practical experts", it is better to wait for the "official" transfer of the case to one of the judges in order to establish direct contact with him/her. The latter example draws one to the conclusion that the availability of a procedural mechanism by itself, unfortunately, is not a guarantee of the desired result.

In this context it is important to find out how the distribution of cases is realized, i.e. if there is any external influence on this stage. The results of the expert's survey are shown in the **Diagram 69** below:

Simultaneously, it is worth studying the regulations of CAJU relating to the *distribution* of cases among separate judges. Correspondingly, the *first* reference to the

*Diagram 69.*

**Peculiarities of cases distribution: Expert estimations of the conditions in the courts of their region**



judges' actions as to the claim is mentioned in part 1 Art. 107 of CAJU, which reads that the judge, after *receiving* the claim, must verify if the corresponding legal requirements are met. According to the provision of part 2 Art. 107 of CAJU, after this, the judge initiates the administrative case proceedings on the basis of the submitted application, if there are no grounds to return the application or refuse in the initiation of the case proceedings. However, the aspect of making decision as to the direction of a claim to a certain judge remains *beyond* legal regulation.

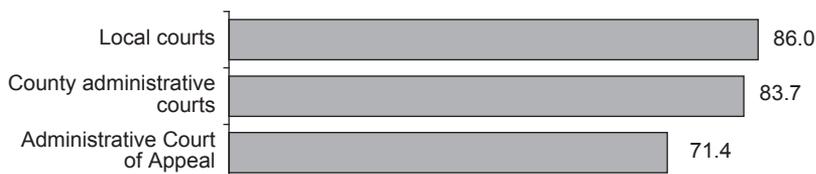
Quite *different* are the legal mechanisms provided in accordance with corresponding procedures in the courts of *supreme* instance. In particular, according to the provisions of part 1 Art.189 of CAJU, an administrative case is registered on the day of its arrival to the administrative court of the appeal instance, and no later than on the next day it must be directed to the reporting judge in the *order of priority*. Analogically, the regulation of part 1 Art. 214 of CAJU provides that a cessation complaint shall be registered on the day of its arrival to the cessation court, and no later than on the next day it must be directed to the reporting judge in the *order of priority*. The complex analysis of the regulations above and other regulations of the Code gives one grounds to consider that the drafter *intentionally* refuses from a regulatory indication that a claim must be directed to a judge of a local administrative court in order of priority as well. This conclusion can be confirmed by the regulation of part 1 Art 250 of CAJU that an application on reconsideration of a judicial decision in accordance with the newly discovered circumstances, which arrived to court, must be directed to a judge in the *order of priority*. It is evident that an “administrative court” indicated in part 1 Art. 250 of CAJU can also be a first instance court.

Only 11.6% of the questioned experts agree to the fact that this peculiarity of the procedure in local general courts is not related to corruption risks. Besides this, the experts agree that even the application of an automatic (random etc.) distribution of cases is not a guarantee of independence since there is still a possibility that the case will be received by the “necessary judge” (see **Diagram 70**).

This is confirmed by the situation in administrative courts of appeal. Almost one half (47.3%) of experts confirming the existence of automatic distribution of cases in administrative courts of appeal admit the possibility that the case will be received by the “necessary judge”.

*Diagram 70.*

**Expert estimations of the possibility that a case can be given to the “necessary judge”**  
 (% of persons who agree that a case can be given  
 to the “necessary judge” in the courts of their district)

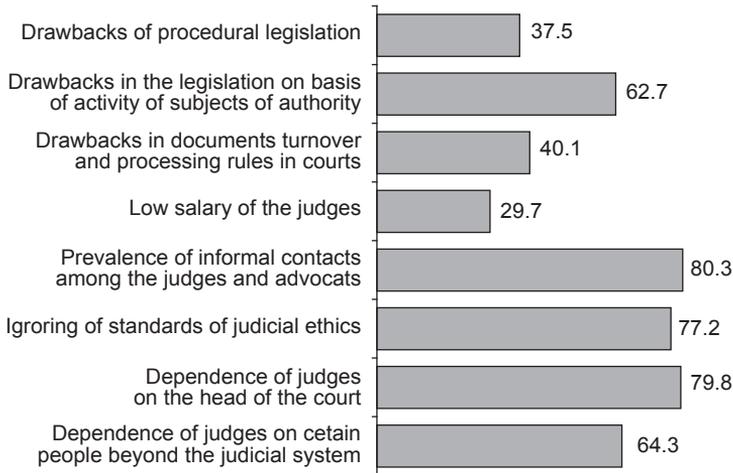


**Causes of corruption practices.** An important goal of the research was to determine the influence of different by their nature causes to the formation of corruption practices in administrative judiciary. Expert estimations of this influence are provided in **Diagram 71**.

*Diagram 71.*

**Expert estimations of level of ability of certain conditions of administrative judiciary to cause corruption**

*(% of persons who believe that the following circumstances influence the possibility of corruption practices)*



The analysis of the results received allow for the following **conclusions**:

- only a relatively small part of the experts (37.5%) connects the existence of corruption risks with the **drawbacks of procedural** legislation, though the in-depth interviews could later reveal certain risks caused by the legislation on corresponding procedures;
- Besides this, more than one half of the questioned experts (62.7%) admit the prevalence and importance of corruption risks caused by the **drawbacks** of the legislation on the **status of subjects of power authorities** and corresponding **administrative procedures**.
- Only 29.7% of the questioned experts connect the abuse by judges with the **low level** of their **salary**. In the in-depth interviews it was also emphasized that it is impossible to explain judicial corruption mainly by the motives of dissatisfaction with the level of salary. However at this point certain respondents paid attention to the psychological factor – in certain cases dealt with by the judges of administrative courts the “cost efficiency” is so big that “*for a person with vague moral principles, it is hard to resist*”. Correspondingly, this is confirmed by the fact that 77.2% of the questioned experts connect the causes of corruption motivation of the judges with “*ignoring of judicial ethic standards*”. In the

in-depth interviews this estimation was somewhat specified by the reference to the absence of effective and real mechanism of control over compliance with these standards and lack of punishment for non-compliance (*especially in the situations of conflict of interests*). Thus we need to confess that the increase of salaries in itself up to the level of the countries of Western Europe, for example, will not automatically lead to the necessary effect, because the amount of “unofficial” income (in other words, illegal income) can be even more than the level of income of the judges in the other countries.

- The vast majority of experts (80.3%) explain the existence of corruption practices by **sustainable corruption** (“informal”) **alliances** between the judges and advocates, which actually means that the judges are included into certain “legal technologies of advocates and law firms” (for example, legalization of certain types of property, return of VAT, “customs cleanup” etc.). In this area, the most latent mechanisms of judges’ dependence are created, which from the specific types of corruption relations. Some examples were mentioned during the in-depth interviews: (advocate P.) – “*I had a case in my practice recently, when it turned out that a powerful conversional center “prepared” two judges in the course of five years, who first worked in the economic court, and then were transferred to the administrative court. It was them who “managed” all the cases on VAT return and the disputes with the taxation administration*”.
- The majority of the questioned experts also mention the existence of **non-procedural dependence of the judges** both inside the judicial system (on the heads of courts, as indicated by 79.8% of the questioned experts) and beyond it (on politicians, MP’s etc. as indicated by 64.3%) among the causes of corruption practices.
- In-depth interviews also revealed another substantial cause of corruption practices in courts – low level of the judges’ professional education, which to a certain extent can be explained by the peculiarities of formation of the judicial corpus of administrative courts (prior corruption experience or lack of real practical experience, low level of education etc.).

However, in the classification of corresponding corruption risks, it is first of all important to separate **real** risks from **imaginary** ones.

**Imaginary risks.** In particular, one of such **imaginary** risks is valid legal mechanisms of appeal to court against legal acts of Verkhovna Rada and President of Ukraine. Discussion in the society of competence of administrative courts as general jurisdiction courts to resolve corresponding disputes took place, for example, in connection with the generally known events of appeal against the President’s Decree about the ahead of term termination of Verkhovna Rada authorities and scheduling of Parliamentary elections. It was also mentioned that the consideration of this category of disputes belongs to the exclusive competence of Constitutional Court of Ukraine.

Such positions are not grounded, i.e. the conclusion as to the existence of the problem of separation of constitutional and administrative jurisdiction is far-fetched. In resolving this question, it is considered appropriate to take into account the legal position of the

Constitutional Court of Ukraine formulated in the Decision as of 27 March 2002 according to the results of consideration of the Case on acts on election/appointment of judges to their positions and on their dismissal. This decision reads that according to the legal subject's application to constitutional submission, the acts of Verkhovna Rada of Ukraine and President of Ukraine on election/appointment of judges to their positions and on their dismissal must be considered by the Constitutional Court of Ukraine for their correspondence with the Constitution (*Constitutionalism*) according to their *legal contents* and *compliance* to the *procedure* of their consideration, approval or entry into effect established by the Main Law of Ukraine. It is also important to take into account the position of the Constitutional Court of Ukraine represented in the Decision as of 07 May 2002 in the Case on departmental subordination of acts on appointment or dismissal of public officials. This document reads that Parliamentary Decrees, Orders or Decrees of President of Ukraine are subordinate legal acts, i.e. those adopted on the basis and in the application of the Constitution and laws, and must correspond to them. Thus, these acts *can* be checked for their compliance not only with the Constitution, but also with the laws of Ukraine. At this point, the checkup of the *legality* of the mentioned above acts is a function of courts of *general* jurisdiction.

Even if we do not take into account the fact that the above-mentioned positions of the Constitutional Court of Ukraine directly concern only the legal acts of President and Verkhovna Rada of Ukraine, we are certain that the formulated legal position can be equally taken into consideration when considering disputes regarding appeals against legal acts of the head of state and the Parliament. Once again, legal bases of the procedure of appeal against the decisions of Verkhovna Rada of Ukraine and President of Ukraine on the basis of *illegality*, and also consideration of the corresponding disputes by the courts of administrative jurisdiction are provided by the Constitution of Ukraine, which was more than once confirmed by the Constitutional Court as well. At this point, the administrative court can only verify the correctness of the basis indicated by the applicant, and, correspondingly, refuse in the initiation of the case proceedings according to the provision of paragraph 1 part 1 Article 109 of CAJU when the appealed decision should be checked for correspondence to the Constitution of Ukraine. Simultaneously, let us agree with the position of specific experts saying that the notion of *legality* should be understood broader than simply as correspondence to the *law*, but also as correspondence to the *international agreements*, consent to obligatoriness of which was given by Verkhovna Rada of Ukraine. Another problem, which is sometimes considered in the system of imaginary risks, is justification of application of measures of provision of administrative appeal in the cases on appeal against the acts of the supreme institutions of power. This aspect will be given separate attention in the part devoted to the real risks.

**Real corruption risks concerned with the drawbacks of the legislation.** Analyzing real risks of the procedural law we need to specify that that prior to the adoption of CAJU, a law *should have been adopted*, which would determine the bases, principles and rules of activity of subjects of power authorities, whose decisions, actions or inactivity are appealed against according to the rules of CAJU. In other words, a doubtless positive moment is that part 3 of Art 2 of CAJU establishes a number of criteria, for the correspondence to which the court checks the appealed decision, action or inactivity,

and with which administrative bodies and their public officials – the subjects of power authorities – must correspondingly comply. However, the analysis of court practice demonstrates that a direct fixation of requirements for the functioning of the indicated subjects in a separate law would be much more efficient and less corripitogenous.

At this point, it would be appropriate to legislatively fix the above-mentioned requirements similar to criteria mentioned in part 3 Art. 2 of CAJU in complex with the compulsory description of the *contents* of some of them. A drafter should take into account the fact that these criteria should be equally applied for the estimation of the activity of a very *broad* circle of potential *defendants* in the cases: *starting from* a head of a village council, a head of a passenger train, member of a district election commission, fish protection inspector, and *up to* Verkhovna Rada of Ukraine, President of Ukraine, Cabinet of Ministers of Ukraine, central bodies of the state executive power. At the other hand, proper understanding and perception of the essence of certain requirements, such as: justification, impartially, sobriety, proportionality, reasonable term – is possible *only* by way of taking into account of legal positions formulated in the decisions of the European Court of Human Rights, and also a number of recommendations of the Committee of Ministers to the Council of Europe Members States in the area of administrative judiciary and administrative law. Thus, together with the problem of *tactical* nature – adoption of the corresponding law (evidently, the long expected Code on Administrative Procedure), there is a problem of *strategic* nature – a quality enhancement of legal culture, first of all, of subjects of power – corresponding bodies and their public officials.

At the moment, the Supreme Court of Ukraine established the availability of corresponding grounds in a number of administrative cases: *ununiform* application by cessation court (courts) of the same legal regulation, and, in particular, terminated the decision of the Supreme Administrative Court of Ukraine on the basis of its non-compliance with the latest requirements as for the checkup of the appealed decision, action or inactivity for the correspondence to the criteria of part 3 Art. 2 of CAJU. For example, the Supreme Court of Ukraine considered the case according to the claim of “G.K.” LTD. against the Eastern Regional Customs Service on unlawfulness of taxation notifications, according to the proceedings in the exclusive circumstances. The decision of the Supreme Court of Ukraine indicated that the cessation court, while reconsidering the decisions of the courts of the first and appellate instances, *did not check* if the courts of the lower instances complied with the requirements of part 3 Art. 2 of CAJU, which infringes Art. 227 of CAJU.

The research determined the experts’ attitude to certain problems in the procedural legislation. They are as follows.

### **3.5.2 Jurisdiction (Subject and Territory)**

Almost a half of the experts (47.8%) mention the existence of contradictions and gaps in CAJU regulations on territory jurisdiction allowing to artificially “organize” the transfer of a case to a different court or return of a claim after the proceedings were initiated. Such situations are quite prevalent when a decision of state power bodies or

local self-government are appealed against. In the aspect of jurisdiction problems it is also worth mentioning certain peculiarities of law, which are actually displayed in the experts' positions.

For example, the provision of Art. 19 of CAJU establishes the rules of territory jurisdiction of consideration and resolving of cases. In its turn, according to the requirement of para. 3 part 1 Art 22 of CAJU, incompliance with these rules leads to **transfer** of a case for consideration to another administrative court, if the specified circumstances were discovered after the initiation of the case and **before the beginning** of a court consideration. Thus, the revelation of the infringement of requirements of territory jurisdiction after the beginning of a case consideration, **de-jure is not a ground** any more to transfer the case for consideration to a different court. Moreover, the results of interpretation of the corresponding regulations and legal positions formulated by the Supreme Court of Ukraine to a certain degree allow for a **rather free** interpretation of the requirements as to the territory jurisdiction. As a consequence, we get a quite probable **abuse** of the corresponding regulations of the procedural law.

In particular, in the case initiated by the appeal of S. against the President of Ukraine on renovation in public service of the judge of Constitutional Court of Ukraine, the Supreme Administrative Court of Ukraine, during the consideration of the cessation appeal of S., indicated that according to part 2 Art. 6 of CAJU, nobody can be deprived of the right to consideration of his case in the administrative court, to the jurisdiction of which it relates according to this Code. Simultaneously, Art. 6 of the Convention on Protection of Human Rights and Fundamental Freedoms provides that each person has the right to just and public consideration of his case in the course of a reasonable term by an independent and impartial court established by law. According to the Supreme Administrative Court, this regulation indicates a court established by law for the resolving of a specific dispute, according to its **jurisdiction** for resolving the case and taking into account the subject of the dispute, instance and territory jurisdiction. The term "unauthorized composition of court" cannot be perceived **only** as availability of the judges' authority for the fulfillment of their professional duties. The authority of the court composition should be perceived as **competence** in the meaning of availability of authority for the consideration of cases in court according to the subject of the dispute, for the resolving of cases by a court of a certain instance and by a court authorized to the consideration of cases in the limits of the territorial jurisdiction determined by the Code, which provides the right to consideration of a case by an independent and impartial court determined by law. Judiciary exercised with the infringement of these rules, when the court's impartiality is in doubt, **cannot be considered judiciary**, and decisions adopted with such infringements cannot remain in effect due to their unlawfulness. At this point, the Supreme Administrative Court of Ukraine agreed to the position of the court of appeal that the incompliance by Shevchenkivskiy district court of Kyiv with the rules of territorial jurisdiction and legal consequences of this infringement of the procedural law regulations cannot be considered formal and such that did lead and could not lead to the incorrect resolving of the case. For this reason, the decision of the first instance court should be nullified and the case should be directed to a new judicial consideration due to the unconditional grounds provided by para. 1

part 1 Art. 204 of CAJU as a decision adopted by an unauthorized court composition. Simultaneously, the Supreme Court of Ukraine did not agree with the conclusions of the courts of appeal and cessation instances. Resolution of the Supreme Court of Ukraine emphasized that the requirements concerning the court composition are determined in chapter 2 unit II of CAJU. In particular, Articles 23 and 24 determine the **quantitative** court composition for the consideration of cases of certain categories. It is also provided that the court composition, during the consideration and resolving of an administrative case in the court of the same instance, should be unchanged (Art. 26 of CAJU) and there should be no grounds excluding the possibility of the judge's participation in the case consideration (Articles 27 and 28 of CAJU). In order to establish the availability of due **authority** with the court composition for the consideration and resolving of an administrative case, it is important to determine correctly its **subject** and **instance** jurisdiction. According to the Supreme Court of Ukraine, judiciary exercised with the infringement of these rules cannot be considered judiciary because resolving of a case by a non-authorized court composition is a doubtless ground for the reconsideration of a judicial decision.

Simultaneously, one **cannot** consider **unauthorized** a court composition, which considered a case initiated **without compliance** with the rules of **territorial** jurisdiction, i.e. procedure established by the procedural law on distribution of cases between the courts of the same level depending on the territory encompassed by their jurisdiction. Supreme Court of Ukraine decided that the rules of territorial jurisdiction **do not provide for** any procedural **advantages** to a court of any level in comparison with another court of the same level, and also for an exclusive right of a court to the consideration of cases of a certain category, and this leads to the fact that a court, having discovered that a case proceedings were initiated without compliance with the rules of territorial jurisdiction, according to art. 22 of CAJU, can transfer the administrative case to consideration to another administrative court only before the beginning of the judicial consideration. According to the Supreme Court of Ukraine, courts of **the same** level have **the same** competence and **equal** possibilities as for the consideration of any case within their subject jurisdiction. Thus, only the **incompliance** with the rules of territorial jurisdiction **does not** and **cannot** influence the determination of the fact if the court composition was authorized in the meaning of para. 1 part 1 Art. 204 of CAJU. Rewording this legal approach, it will be possible to put it this way: *formal presence of infringement of a legal provision will not have negative consequences.*

During the research of some positions of CAJU, there appeared such a question: does legislator apply such formulation of the corresponding regulation **intentionally** and what is the **aim** of the application of such a regulative construction. As a vivid example of a similar situation, once again we can provide the rules of territorial jurisdiction established in part 1 Art. 19 of CAJ of Ukraine. According to the general provisions of part 1 Art. 19 of CAJ of Ukraine, cases should be resolved by an administrative court according to the place of residence **of the respondent**. At the same time, disputes concerning the appeal against legal acts of individual action (further – LAIA), and also actions or inactivity of subjects of power which concern the **interests** of a concrete person, are resolved by administrative courts on the place of residence (stay) of **the claimant**, which is specified by the provision of part 2 Art. 19 of CAJU. Let us analyze this regulation systematically

with the position of Art. 104 of CAJU concerning the fact that a person, who considers that his *rights, freedoms or interests* in the field of public legal relations were infringed, has the right to appeal to administrative court. By the way, the formulation of Art. 104 of CAJU accurately corresponds to the definition of the goals of administrative judiciary according to part 1 Art. 2 of CAJU, namely: protection of rights, freedoms and interests of physical persons, and also the rights and interests of legal bodies in the field of public legal relations. Thus, there is a question: why *only* the interests of the claimant from the “triad” of possible objects of protection (rights, freedoms and interests) are mentioned in the establishment of territorial jurisdiction according to the provision of part 2 Art. 19 of CAJU. Is it another display of imperfection of the law, or conscious application of the limited circle of objects of protection.

On the one hand, the Decision of the Constitutional Court of Ukraine of December 1<sup>st</sup>, 2004 in Case on the interest protected by law, contains a position according to which the concept of “interest protected by law” means a legal phenomenon which, in particular, *falls outside the limits* of contents of subjective *law* and is an *independent* object of judicial protection and other means of legal protection. If one takes into account this position of the Constitutional Court he will have the reasons to believe that the regulation established in part 2 Art. 19 of CAJU concerning the definition of territorial jurisdiction according to the place of residence of the claimant cannot be applied in case of appeal against a certain action or inactivity which, according to the claimant, infringes his rights or freedoms, and *not* the interests. On the other hand, some authors avoid discussion of the operating formulation of part 2 Art. 19 of CAJU in the publications, and also specify, in particular, that this regulation is applied in *all* cases concerning infringement of rights, freedoms and interests of the claimant. Let us also mention that the above-mentioned problem of proper understanding of the content of the regulation of the procedural law has an actual *applied* value besides the fact that practical implementation of one of the interpretations suggests *the choice* of the corresponding court. Thus, under certain circumstances and taking into account *the inadequate* territorial jurisdiction in the procedure of application of positions of para. 3 part 1 Art. 22 and para. 6 part 3 Art. 108 of CAJU it is possible to artificially “organize”, correspondingly, the transfer of an administrative case after the initiation of proceedings to another court for consideration or return of the claim to the claimant. Once again, the corresponding procedural decision can be formally proved by the corresponding understanding of the content of regulation of part 2 Art. 19 of CAJU.

Let us also address some aspects of the problem of subject jurisdiction. In particular, para. 2 part 1 Art. 18 of CAJU provides that *all* administrative cases concerning decisions, actions or inactivity of subjects of power in cases on bringing to administrative liability are within the jurisdiction of local general courts as administrative courts. According to the procedure of application of this regulation, it is possible to appeal against a decision of any *executive body* (official) concerning the imposing of a fine. At the same time, the procedure of case consideration on administrative abuse concerning a significant amount of such delicts is preceded by drawing of minutes about the administrative abuse which, in its turn, is an *action* of the corresponding authorized person. Thus, there is a question of the *possibility* to appeal, according to the procedure of application of

para. 2 part 1 Art. 18 of CAJU, against the legitimacy *of drawing up of minutes* as a *separate* action of the subject of powers in the case on bringing to administrative liability *without binding* to the corresponding decision concerning the application of fine. In our opinion, the check of legitimacy of drawing up of minutes should occur *only* during the court consideration of the case on claim against the final decision on application of administrative sanctions. Also we suppose that having provided the possibility to appeal against the corresponding *actions* in para. 2 part 1 Art. 18 of CAJU, the legislator aimed to create a legal mechanism of court checkup of legitimacy of the following actions: dispatch of the infringer, administrative detention, personal search and the search of things, withdrawal of things and documents, temporary withdrawal of driver license, temporary detention of vehicles, temporary withdrawal of coupon on passing the state technical maintenance or a license card on a vehicle provided by articles 259 261, 264, 265, 265<sup>1</sup>, 265<sup>2</sup>, 265<sup>3</sup> of Code of Ukraine on Administrative Offences (further referred to us CUAO). If the *opposite* position is observed and, actually, the possibility of appeal against the drawing up of minutes on administrative offence and consideration of such a case within “independent” proceedings separately from checkup of the decision on application of fine is recognized, this will create broad grounds for abuse. Let us specify that under certain circumstances and under the condition of court’s taking measures of the claim provision by means of prohibition of certain actions in general, it is possible to brake the legal investigation process on administrative delict for a long time. At the same time, taking into account *the maximum possible terms* of consideration of cases of this category provided by article 38 of CUAO, the person, who is really guilty in the abuse, can avoid the liability. It is also necessary to mention that the practice of administrative courts already contains the examples of consideration of cases on appeal against the actions of drawing up of minutes on administrative abuses on merits.

### **3.5.3 Separation of Administrative Jurisdiction from other Jurisdictions, Including Separation of Public and Private-Law Disputes**

According to the definition of Art. 14 part 1 Art. 3 CAJU an *administrative contract* is an agreement which contains the rights and duties of the parties resulted by administrative functions of the subject of power which is one of the contract parties. Absence of a standard *list* of such contracts or accurate *criteria* which would be fixed in the legislation is one of the most essential gaps of current legislation. This results in difficulties in judicial practice of *identification* of contracts as “administrative”. Though, probably, the term “difficulty” is too soft for the estimation of situation due to numerous examples of courts’ exercise *of different* legal positions in cases, first of all, concerning appeal against the decisions of subjects of powers on managing sites of land and other property, carrying out of privatization, tenders etc. In other words, the problem of separation of administrative cases as *public legal* disputes from *private legal disputes*, which should be considered and resolved according to the rules of civil or economic legal proceedings, really exists and is actual enough.

The existence of the problem *of separation* of public legal and private legal disputes was also indicated by the respondents during the focus groups and in-depth interviews. In general, during the experts survey, only 20,4% of respondents recognized that there exist accurate bases for such separation in the legislation.

According to the experts, the decision of the Supreme Court of Ukraine of December 5th, 2006 by results of the decision according to the procedure of the exclusive consideration of case according to the claim Open Company “B.M.P.” the Cherkask garrison to the Cherkask regional council, became a certain “watershed” in the formation of the corresponding practice of administrative courts. In this decision, the Supreme Court of Ukraine has formulated a position according to which the dispute between these parties concerning the decision of the local government on granting of land sites for usage is not a public dispute, the consideration of which should be carried out according to the rules of CAJU. Before the adoption of the above-mentioned decision, the practice, in particular, of the Supreme Administrative court of Ukraine was that all the disputes on appeal, for example, against the decisions of public authorities and local self-government concerning the management of property were resolved as administrative legal proceedings. However, it is necessary to recognize that even after the adoption of the above-mentioned decision of the Supreme Court of Ukraine, there are numerous examples of observance of different positions by administrative courts in the activity of courts concerning the possibility or impossibility of resolving of disputes of such category according to the procedure of application of CAJU regulations. In the conditions of *lack* of accurate *criteria* of separation of corresponding judicial competence and also in the conditions of process of formation of practice of the supreme courts, which has been lasting till nowadays, all these circumstances together create *favorable* conditions for possible *abuses*.

Taking a look at the problem of accurate separation of the *limits* of competence of the administrative court, it is impossible to ignore an actuality of provision of para. 4 part 2 Art. 17 of CAJU according to which the competence of administrative courts *does not extend* to public disputes concerning relations, which according to the law, are classified by the statute (provision) of association of citizens as its internal activity or exclusive competence. Let us mention that Law of Ukraine of January 12th, 2007 “On Modification of Some Laws of Ukraine concerning the Status of Members of Verkhovna Rada of Autonomous Republic of Crimea and Local Councils” classifies decision-making as to the dismissal and ahead of time termination of powers of deputies of the local council (except for rural and village council) as the authority of the higher supervising body of a political party (electoral block of political parties), i.e. – *association of citizens*. At the same time, since adoption, for example, of Law of Ukraine “On Status of Members of Local Councils” – July 11th, 2002 – the regulation of part 3 Art. 5 of this Law has been operating, according to which disputes concerning the ahead of time termination of authority of a member of a local council are resolved by *court*. In practice, this circumstance has caused exercise of *opposite* legal positions by administrative courts concerning their own competence.

In particular, the Kyiv Administrative Court of appeal agreed with the position of local administrative court as to the refusal in initiation of proceedings in administrative

case according to the claim of a citizen against the Council of Block of political parties “BYuT”, the decision on withdrawal and ahead of time termination of deputy powers of the claimant. Kyiv administrative court of appeal emphasized that the first instance court reached the correct conclusion that disputable relations that can be classified as its *internal* and *exclusive* competence had formed in this political association of citizens in this situation, while the intervention of state bodies into the activity of associations of citizens is not permitted, except for cases provided by law. In another case, Kyiv administrative court of appeal specified that because the decision on cessation and ahead of time termination of powers of the deputy of a local council exclusively relates to the competence of the association of citizens, such a dispute *should not* be considered as administrative legal proceedings. A similar legal position is present in the decisions of Lviv, Dnipropetrovsk and Odesa administrative courts of appeal. Taking into account the above-mentioned, it is possible to come to the conclusion that in these cases, courts have established the absence of their own competence to resolve the disputes of this category and thus, recognized the impossibility of application of the provision of part 3 Art. 5 of Law of Ukraine “On Status of Members of Local Councils” as such, which contradicts to para. 4 part 2 Art. 17 of CAJU. At this point., courts obviously based their judgment on the fact that the regulation of the law which was adopted *later* should be applied. At the same time, the practice of decisions of the Kharkiv administrative court of appeal contains examples of consideration of cases *on merits* according to claims against parties and blocks as for cessation and the ahead of time termination of powers of their members. This position is also observed by the Supreme Administrative Court of Ukraine which is reviewing the decision on similar cases in cassation and recognizes that the disputes on this subject are within the jurisdiction of administrative courts.

### 3.5.4 Measures of Claim Provision

Sometimes unlawful use of the law *nullifies* the purpose and intentions of the drafter. It is possible to illustrate a similar sad situation with an example of the legal mechanism of *measures of provision* of administrative claim. The position of part 1 Art. 117 of CAJU defines the bases of applying of such measures by court, namely: existence of obvious danger of infringement of rights, freedoms and interests of the claimant before the resolution of the case; a situation when the protection of these rights, freedoms and interests becomes impossible without applying such measures, or it will be necessary to put a lot efforts and expenses for their restoration; and also if there are obvious attributes of illegality of the decision, action or inactivity of the subject of imperious powers. At the same time, there are multiple cases of groundless application of positions of the Art. 117 of CAJU by administrative courts, which combined with the duration of consideration of appeals against the decisions of local administrative courts mean *the actual* resolving of a dispute on merits and “*satisfaction*” of claims for long period of time. Such vicious practice became the reason of the fact that several decisions of Plenum of the Supreme Administrative Court of Ukraine emphasize the necessity of a grounded and thorough usage of corresponding regulations of the procedural law. In particular,

Art. 15 of Decision of Plenum as of April 2nd, 2007 No.2 “On Practice of Application of Positions of the Code of Administrative Procedure of Ukraine by Administrative Courts during Consideration of Disputes on Legal Relations Concerned with Elections or Referendum” (further referred to as Decision № 2/07) emphasizes that at the time of the consideration of electoral and referendum disputes, courts should keep in mind that for the purposes of claim provision, courts **cannot** terminate the effect of decisions or forbid electoral and referendum commissions to act, as the result of which the electoral or referendum process will be **stopped**, except for the interdiction to publish the results of elections in case of their appeal. Art. 17 of Decision of the Plenum of the Supreme Administrative Court of Ukraine of March 6th, 2008, № 2 “On Practice of Application of Separate Positions of Code of Administrative Procedure of Ukraine by Administrative Courts During Consideration of Administrative Cases” (further referred to as Decision № 2/08) also emphasizes that according to parts 3 and 4 Art. 117 of CAJU, the provision of claim in administrative cases can be **only** done in two forms: 1) termination of effect of a decision of a subject of powers or its separate positions which are appealed; and 2) prohibition to make certain actions. The presented **list** of the bases for the provision of claim is **exhaustive**. Besides, Decision № 2/08 emphasizes that court should provide **motives** in its decision about the provision of claim, which led it to the conclusion about the existence of obvious danger of damage to the rights, freedoms and interests of the claimant before making a decision in an administrative case, or the protection of these rights, freedoms and interests will become impossible without the usage of such actions, or their restoration will require great efforts and expenses, and also specify the attributes which serve as evidence of illegality of the decision, actions or inactivity of the subject of powers. This Decision pays specific attention to the aspects of cases which concern adjudging of decisions on dismissal from a position illegal, where the claim demands are the **cancellation** of legal acts of individual action and renewal on the position. For this reason, the provision of such a claim by terminating the effect of a legal act of individual action on dismissal from a position, the court **actually** continues office relations between the claimant and employer (subject of imperious powers) which leads to the corresponding consequences: performance of official duties, payment of wages etc. Thus, *the court actually adopts a decision without considering the case on merits*, and this does not correspond to the purpose of application of the legal institution of provision of the claim. At this point, Decision № 2/08 summarizes that courts should keep in mind that by the provision of the specified administrative claim in such a way, courts fall outside the limits of bases of the provision of claim provided by part 1 Art. 117 of CAJU, which is **unacceptable**.

The surveys frequently contained the acknowledgement of existence of certain “technologies” with the corruption meaning based on the usage of institute of provision of claim. Almost half of the questioned experts (47,6%) admit that there are prevalent situations when the provision of claim (imposing of interdictions, arrest of property etc.) is the real purpose of the proceedings, i.e. the party tries to receive the corresponding decision at any cost which is actually already the resolution of dispute or satisfaction of certain needs for a long time. Everything becomes even more complicated in the conditions

of discrepancy of provisions on territorial jurisdiction. Explaining this situation, experts pay attention to two circumstances which do not give a possibility to counteract such “technologies” effectively. First, artificial obstacles (untimely notification, concealment or even destruction of documents etc.) are created in court. 52.6 % of the questioned experts emphasize this. Secondly, the procedure of appeal against the decisions on provision of claim is admitted as inefficient (excessive from the point of view of the appeal term – 42.1%, complicated from the point of view of procedure – 25.8 %). *The possibility of the judge who adopted such a decision to change or cancel the provision of claim is estimated by experts as rather often* (34.8 % of the questioned experts). Besides, such correcting decisions had an essential corruption context: by estimations of the questioned experts, the real bases of such decisions were as follows: “objective change of circumstances” – 30.3%, “external pressure upon the judge” – 31.0%, “achievement of the corruption arrangement with the judge” – 46.5%.

### **3.5.5 Principle of Official Ascertainment of Circumstances in a Case**

Taking into account the *goals* of administrative judiciary – the *protection* of rights, freedoms and interests of physical persons, rights and interests of legal bodies from, generally speaking, damage from the part of *imperious* subjects established in part 1 Art. 2 of CAJU, principles *of competitiveness* and *dispositiveness* of the administrative process are applied systematically with the principle *of official* ascertainment of all circumstances in case as it is provided by provisions of articles 7 and 11 of CAJU. Thus, in a dispute with the authority, *a person* (we recognize that legal bodies are in most cases created by physical persons for the satisfaction of various rights, interests, needs etc.) should be provided with a little broader *volume* of practical *possibilities*. In our opinion, providing of a more effective achievement of the goal of administrative judiciary is envisaged in the *imperative* provisions of parts 4 and 5 of Art. 11 of CAJU reading that the court *takes* measures provided by law necessary for ascertainment of all circumstances in a case, including those concerning the revelation and reclamation of proofs under own initiative, and that the court *must* suggest the persons who take part in the case to provide proofs, or to summon proofs under own initiative which, in the opinion of the court, do not suffice. However, first, in practice these regulations sometimes remain without attention. At the same time, courts apply the regulations of part 1 and 5 of Art. 71 of CAJU quite enthusiastically reading that each party *must* prove the circumstances on which its requirements and objections are based, except for the cases established by the Art. 72 of CAJU, and the court *can* collect proofs under its own initiative. The specified regulations of Art. 72 are in certain *disagreement* with the requirements of Art. 11 CAJU, and this creates grounds for abuse.

The attempt to nullify the discrepancy between the provisions of articles 11 and 71 of CAJU was made in the decision of the Supreme Court of Ukraine in case initiated by the claim of Open Company “F.S.V.” against the Taxation Administration of Pechersky area of Kyiv. The decision of the Supreme Court of Ukraine emphasizes that the sense of parts 4 and 5 Art. 11 of CAJU is that the court *must* define the nature of disputable legal relations and the contents of legal requirements, material law regulating them, and also *the facts*

that should be established and constitute the basis of requirements and objections; to find out what the *proofs* confirming of the specified facts are, and *to take* measures to their timely *submission*. Also it is emphasized that the court adopts the decision on completion of ascertainment of circumstances of the case and their verification by proofs *only* after all the measures necessary for the comprehensive and full ascertainment of circumstances of case are taken, all requirements and objections of persons participating in the case are verified, and *all* possibilities *of collecting* and evaluation of evidence are exhausted. According to board of judges of the Supreme Court of Ukraine, the list of proofs to which the cessation court refers in the appealed decision is obligatory but *not exhaustive*. At the same time, taking into account the essence of objections against the claim, the court *must* summon the proofs, which confirm their arguments.

By the estimations of the experts, the principle of official ascertainment of circumstances in the case is exercised incompletely (“it is exercised completely” – 4,6%, “it is more often exercised than it is not” – 23,2%, “is not exercised more often”- 39,5%, “is not exercised at all”-16,0%). Explaining this situation, experts pay attention to following circumstances: “low qualification of judges” – 37,5%, “judges’ conservatism of sense of justice” – 34,8%, “pressure from authorities” – 34,0%, “imperfection of the legislation and absence of interpretation” – 40,6%, “lack of professional education of lawyers” – 18,5%, “lack of legal knowledge of the participants of the process” – 40,4 %.

### 3.5.6 Peculiarities of Participation of the Subject of Powers in the Dispute

Taking into account the structure of general “model” of administrative judicial process, namely: the dispute between *the person* and *the power*, it is also important to investigate the aspect of participation of the public prosecutor in this process. In particular, according to provision of part 1 Art. 60 of CAJU, the public prosecutor can appeal to administrative court in *cases* determined by law. In its turn, the provisions of Art. 35 the Law of Ukraine “On Prosecutor’s Office” establish corresponding powers of the public prosecutor and provide, in particular, that the public prosecutor can enter the case on any stage of the process if it is required by protection of constitutional rights of citizens and interests of the state and society, and is obliged to take measures provided by law in due time in order to eliminate violations of law no matter who may cause them. Thus, the public prosecutor has equal rights with other participants of the court session. At the same time, according to Art. 36<sup>1</sup> of Law of Ukraine “On Prosecutor’s Office”, *appeal* of the public prosecutor to court *with claims* or statements for the protection of rights and freedoms of another person, an uncertain circle of persons, rights of legal bodies, when interests of the state are violated, or about adjudging legal acts, actions or decisions of bodies and officials as unlawful are the forms *of representation* by the Prosecutor’s Office of interests of citizens or the state in court.

At this point, a systematic analysis of these provisions of CAJU and Law of Ukraine “On Prosecutor’s Office” leads one to the conclusion that the public prosecutor can appeal with claims in the interests of the state and in the name of a state body *only* in case when the corresponding state body *also* has the authority to appeal to administrative

court. Here, it is necessary to keep in mind the requirement of Art. 104 of CAJU that the subject of powers has the right to appeal to administrative court in *cases* determined by law. There are many examples of discretionary interpretation of this provision by courts “to the advantage” of *the authorities*. In particular, administrative courts of three instances considered a case on merits according to the claim of a public prosecutor in the interests of the state in the name of the Treasury management against an enterprise. Nevertheless, the right of Treasury of Ukraine to appeal to court is determined exclusively by a subordinate legislation act – the Position on Treasury of Ukraine. *No* authority of Treasury of Ukraine to file a claim to court *is provided* by the Budgetary Code of Ukraine, or any other law. So, if an authority body is not authorized by law to file a claim to court, the Prosecutor’s Office is also *unauthorized* to appeal to court in the name of this body. However, the practice contains examples of an absolutely different approach. Thus, in a dispute between a person and the power, the latter has much more practical possibilities.

### **3.5.7 Proceedings in Cases Concerning the Appeal Against Legal Acts**

Keeping in mind a large amount of special attributes of the possible object of the administrative dispute – *a regulatory legal act* of the subject of authority, the legislator has provided a number of special provisions of procedural law, the majority of which are contained in Art. 171 of CAJU. At the same time, it is necessary to mention certain risks, which can be a consequence of non-observance or abuse of law requirements. For example, part 3 Art. 19 of CAJU establishes the rule of *exclusive* territorial jurisdiction and defines that cases including those concerning the appeal against legal acts of the President of Ukraine, the Cabinet of Ministers of Ukraine, the ministry or other central executive body, National Bank of Ukraine or another subject of authority, whose authority encompasses *all the territory* of Ukraine, are resolved by the district administrative court whose territorial jurisdiction covers the city of Kyiv. Applying the “from the opposite” logic, let us set the following questions: that will happen if *a different* court, *in violation* of the provision of part 3 Art. 19 CAJU, considers a case on merits concerning the appeal, for example, against a ministry’s legal act? Taking into account the position of the Supreme Court of Ukraine specified above, the answer is unequivocal: this in itself will be a basis for cancellation of the final decision of the first instance court. A similar position is also presented in part 6 of Decision № 2/08 emphasizing that in case of non-observance of rules of territorial jurisdiction, the administrative case should be transferred to the appropriate court, but only provided that this was found out after the initiation of proceedings in the case and prior to the beginning of the case judicial consideration (para. 3 part 1 Art. 22 of CAJU). Nevertheless, if non-observance of the territorial jurisdiction was found out already during case judicial consideration, the court should finish the legal investigation and adopt a judgment for the dispute on merits. During the reconsideration of the case decision in a court of *higher* instance, non-observance of rules of territorial jurisdiction in itself *cannot* result in *cancellation* of a judgment. It is also necessary to specify that in practice there are already very resonant examples of initiation of proceedings in cases concerning the appeal against legal acts of ministries by the courts, other than County Administrative Court of Kyiv.

According to the provision of part 3 Art. 171 of CAJU, in case of initiation of proceedings in an administrative case concerning appeal against a legal act, the court **obliges** the respondent to publish an **announcement** about this in the edition, in which this act was or should have been officially announced. In its turn, the provision of part 6 Art. 171 of CAJU provides that if the announcement is published in due time, **it is considered** that all the interested persons are properly informed about the case judicial consideration. At the same time, complaints against the court decisions in this case done by such persons, if they did not participate in the case, remain without consideration. What will be the legal consequences of the respondent's non-fulfillment of the obligation to publish the announcement, or court's non-fulfillment for any reasons of the requirement of part 3 Art. 171 of CAJU, i.e. court's **non-imposing** of this obligation to the respondent?

We admit that taking into account the specifics of legal acts establishing obligatory rules of conduct extend their action to an uncertain circle of persons and have long-term application – the case decision will also concern, undoubtedly, the rights, freedoms, interests and/or duties **of an uncertain** circle of persons. The appropriate and timely publication of the announcement creates **a presumption** of the fact that all interested persons are potentially informed. Accordingly, the absence of the announcement about the appeal in itself is already an infringement of rights, freedoms and interests. On the one hand, according to the provision of part 6 Art. 171 CAJU, the absence of the announcement grants the **right** to appeal against the decision of the first instance court in the appeal and cassation instances to an **uncertain** circle of persons. At the same time, this circumstance in itself **is not the ground** for **nullification** of the decision of a local administrative court by the court of appeal instance. It is only the cessation court, according to the procedure set forth in part 2 Art. 227 of CAJU, that is authorized to nullify the decision of courts of the first and appeal instances and direct the case for a new trial on the basis of infringement of the procedural law regulation, which cannot be eliminated by the court of cassation instance. Taking into consideration the existing realities of duration of administrative cases consideration, it is possible to characterize the situation as paradoxical, if not absurd. Besides, the situation is very similar to the situation of infringement of territorial jurisdiction, namely: the **presence** of the infringement – the **absence of negative** consequences – **the appealed** legal act is **in effect** and, accordingly, it **operates** (if its effect is not terminated according to the procedure of measures of provision).

### 3.5.8 Electoral Disputes

Among all the regulations of CAJU establishing the peculiarities of consideration and resolving **of electoral** disputes, according to the author, one should mention rather short **deadlines** for **the appeal** against the decisions of local administrative courts in this category of cases. In particular, according to the regulation set forth in part 5 Art. 177 of CAJU, such decisions can be appealed according to the appellative procedure within **two days** from the date of their announcement, and as for judgments adopted before the voting day – no later than 12 AM on the voting day. The aspect of observance of this regulation is also specified in Art. 19 of Decision No. 2/07 reading that the regulations of Art. 188 of CAJU on the terms of directing of appeals together with case to a court of appeal **do**

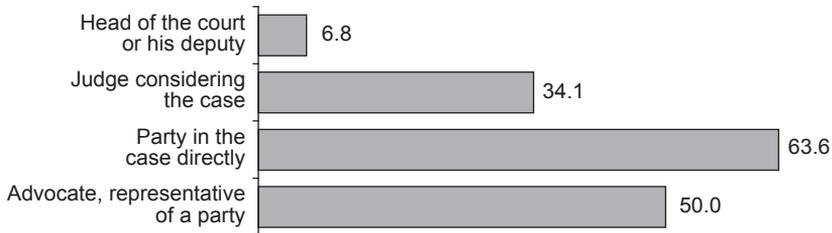
*not apply* to disputes concerned with electoral or referendum process. A first instance court, on receipt of the appeal, should *immediately* direct it to the corresponding court of appeal together with the case. Besides, according to the requirements of part 2 Art. 186 of CAJU, the appeal should be submitted to the local court which considered the case, and a copy should be sent to the court of appeal. Therefore, Decision № 2/07 emphasizes that when resolving the question of compliance or non-compliance with the two-days deadline established for the submission of the reclaiming appeal, courts of appeal should be guided by the *first* date of the receipt of appeal to any of these court.

Thus, problematic situations arose in autumn 2007 during the campaign of extraordinary Parliamentary elections. In particular, the decision K. administrative court of appeal of September 29th left without consideration the appeal of M. against the decision of D. regional court of September 27th in the case on inclusion of M. to the electoral register. The decision of court of appeal emphasizes that the appeal was submitted by the appellant on September 27th at 18:57, and the case together with the complaint of the claimant was received by the court of appeal on September 29<sup>th</sup> at 11:00. Abstracting from the fabula of the specific case, we must admit that even if the weather was extremely unfavorable, *it could have not taken K. 36 hours* to get to the administrative court of appeal. Let us also mention that in the latter case a citizen was deprived of his active right to vote. However, the problem of *someone's* inactivity can have more grave consequences due to the loss of possibility to complain against the decision of a local administrative court, such as cancellation of a candidate's registration on local elections, forging of the voting results etc.

Talking about the gaps of procedural legislation in a part of the regulations related to the consideration of electoral disputes it is worth mentioning another fact. According to the general requirements provided by part 3 Art. 106 and part 7 Art 187 of CAJU correspondingly, a document confirming the payment of the judicial tax should be attached to the claim and to the appeal. During the electoral period it is often necessary to apply to court on weekend, when it is *impossible to pay* the judicial tax. Here, only part 9 Art. 172 of CAJU establishes the obligation of the court to accept the claim against a decision, action or inactivity of an electoral or referendum *commission* or a *member* of the corresponding commission *regardless* of the payment of this tax. As for all the other categories of disputes according to Articles 174 and 175 of CAJU, such a possibility is not provided. At the same time, the practice of consideration of disputes by the County Administrative Court of Kyiv during the extraordinary elections of members of Kyiv city council and head of Kyiv in spring 2008 contains the examples when the claims against the actions of candidates were accepted for consideration without the payment of the judicial tax on the basis that physical impossibility to pay the tax *cannot limit* a person's access to court.

**Corruption relations in courts: conditions, nature of corruption abuses, procedural subjects, mediators, and beneficiaries.** Corruption agreements in administrative courts are formed according to the schemes similar to the other types of judicial proceedings. However, there is a difference here. **Diagram 72** demonstrates which participants of the process are the direct **initiators of corruption agreements**.

Diagram 72.

**Initiators of corruption agreements in administrative courts: expert estimations**

These data, in comparison with the other types of proceedings, contain a smaller influence of advocates. However this is explained by the fact that the participants of the judicial consideration are often legal persons represented by professional lawyers. Correspondingly, the “corruption potential” of such participants, who have the possibility to arrange negotiations without any mediators, increases.

It is also quite important that almost a half of the experts (48.8%) pay attention to the existence of sustainable arrangements between the judges of local (both general and county administrative) and administrative courts of appeal about leaving their judgments in effect if they were made on the basis of corruption agreements.

In comparison with the other types of judicial proceedings, the experts are more constrained in their estimation of the possibility of *bribing the experts* in the administrative process, and only 23.0% admitted the prevalence of this practice. Explaining this fact, the experts mentioned the “*documentary nature of the majority of evidence*”. At this point, the experts recognize the experts who are members of expert institutions as more tending to corruption agreements (the distribution of estimation of prevalence of corruption agreements among different categories of experts was as follows: experts who are members of expert institutions – 27.0 %, experts who are private entrepreneurs – 24.3 %, could not answer – 59.4 %).

The experts mention the inclusion of the court apparatus staff members into the corruption relation (21.4% of the questioned experts agree to this). In-depth interviews established that the apparatus members receive corruption awards for different types of actions, but most often it is “*for favoring the access to specific judges*”, *for providing the possibility to get familiarized with certain case documents, for delay or speed-up of the “proceeding of certain documents” etc.*

The results of the surveys create an idea of the **objects of corruption agreements**, i.e. about the aims of the interested persons (see **Diagram 73**).

These data demonstrate that corruption risks are often “distributed” uniformly in relation to the main procedural stages and the judge’s actions. Although most often they concern the estimation of proofs and drawing up of the text of judgment, actions concerning the “proceeding of the case” are quite important. During the interviews

Diagram 73.

**Objects of corruption agreements in first instance courts: expert estimations**

(% of those who consider that corruption abuses of judges concern this specific stage of the process or these procedural actions)

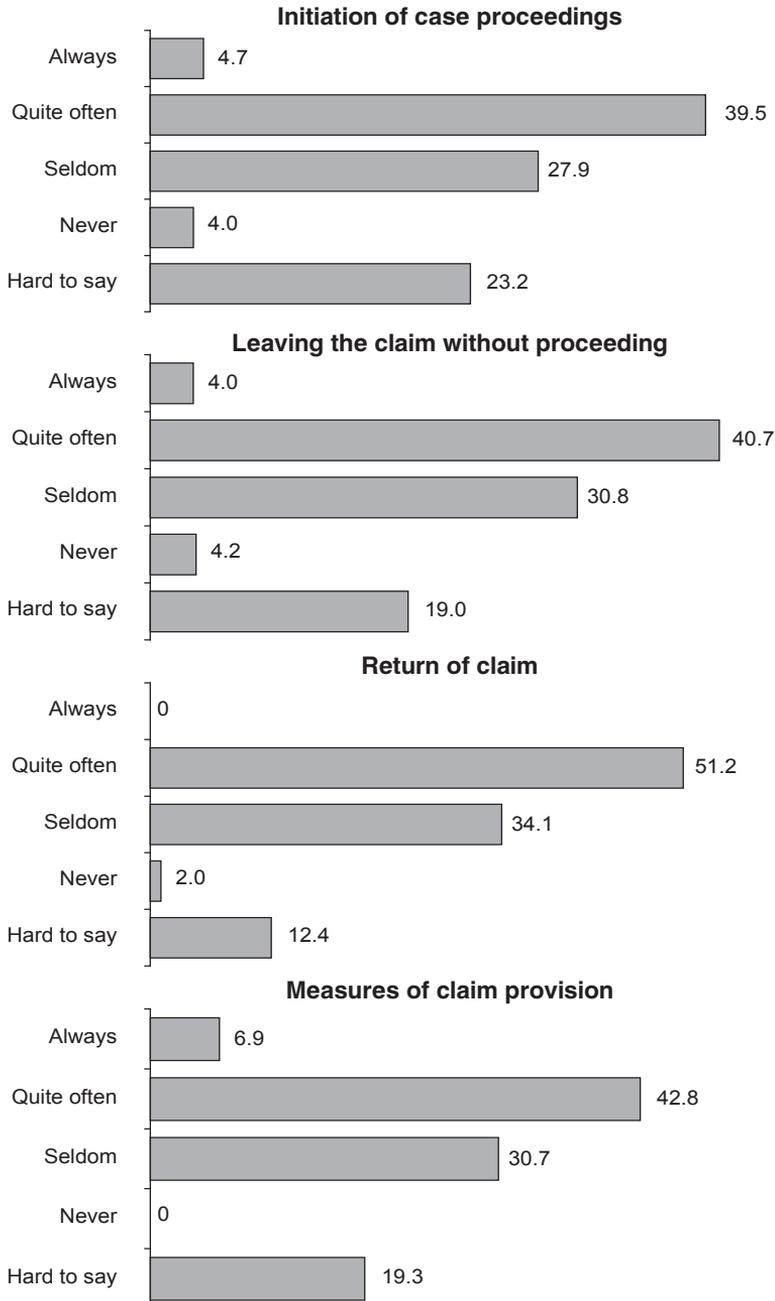
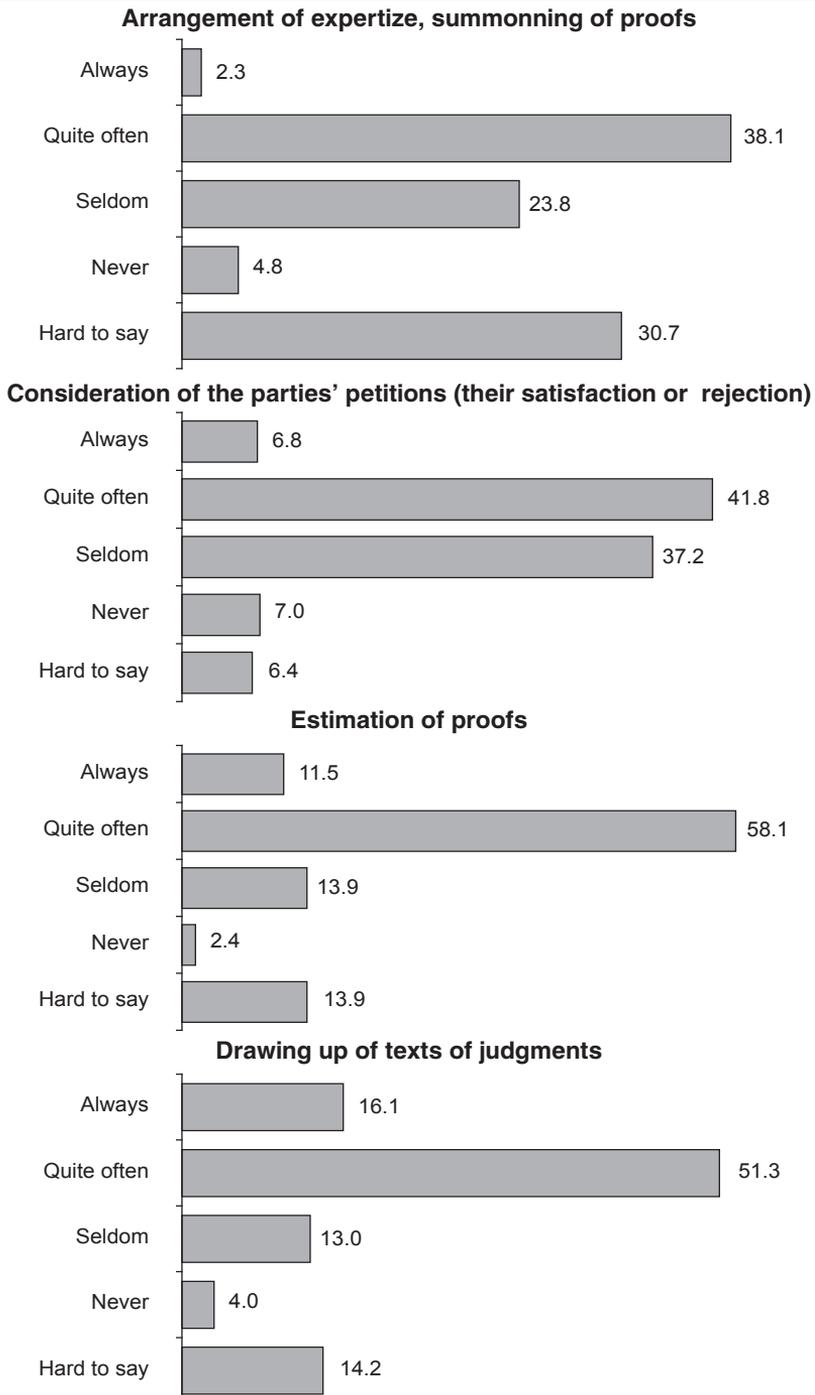


Diagram 73 (continuation).



the experts paid attention to the existence of a specific phenomenon – the “**ordered proceedings**”, i.e. the situations when certain procedural actions were made with the purpose to get corruption awards for getting access to certain documents, limitation of authority of certain persons or bodies, arrest of property or property rights etc. Almost a half of the experts (49.4%) admit that they know of some examples of such proceedings, and almost  $\frac{3}{4}$  of them (72.8%) admit the corruption basis of these actions. It is rather interesting to see how the proceedings in such cases are carried on after the purpose was reached: the case is terminated according to the formal reasons provided by law – 19.2%, the claim remains without consideration – 46.1%, the claimant refuses from his claim – 7.7%, the case is considered on merits and a judgment was made – 38.3%. These situations were demonstrated many times during the in-depth interviews for the representatives of certain social groups.

The experts paid attention to the connection between the corruption practices and certain drawbacks of the current legislation (below are the quotations taken from the in-depth interviews and reports on focus-groups):

- **Situations concerning the “proceeding of the case” (initiation of the proceedings, leaving the claim without proceeding etc.).** In such situations attention is paid to the usage of formal requirements for the drawing up of procedural documents by the judges (the “extra-formalism” phenomenon). Pensioner B.: *“I am not a lawyer, but I prepared all the documents by myself complying with principles of CAJU. However the judge returned my claim saying that some defendant’s details which I have no way to find out are missing, and these details are required by the general provisions of the procedural law”*.

- Below is another example. Before the establishment of the county administrative court, a claim on (1) adjudging of the activity of the subject of authority unlawful; (2) obligation to make actions; (3) compensation of moral damages, should have been submitted to the Economic Court of K. region. Let us mention that according to the provision of part 2 Art 21 of CAJU, claims for **compensation** of moral **damages** caused by unlawful decisions, actions or inactivity of a subject of authority or other infringement of rights, freedoms and interests of subjects of public legal relations, should be **considered** by the administrative court if they are claimed in one proceeding with the demand to resolve the public legal dispute. Otherwise, claims on compensation of damages should be resolved by the courts according to the civil or economic legal proceedings. Thus, the right to demand the compensation of damages cause by the unlawful appealed action is **directly** provided by the Code. Art. 16 of Direction No. 2/08 indicates that if the judge did not initiate the proceedings on the administrative case, and the claim contains the demand that needs to be considered according to the procedure of other legislation, the court closes the case proceedings in **this** part, and according to part 2 Art. 157 of CAJU, it should provide the applicant with the explanation: to the jurisdiction of which court the case consideration with this demand is related. Thus, in any case the requirements of (1) and (2) are such, the consideration of which is related to the jurisdiction of the administrative court. However, the judgment of Economic Court of K. region refused to

initiate proceedings on the basis of para. 1 part 1 Art. 109 of CAJU, “*due to the reason that this claim should not be considered according to the procedure of administrative judiciary*” (the entire claim, but not the part of the claim related to the compensation of moral damage!).

- **Measures of the claim provision.** The experts admit that these questions are not regulated strictly enough in the legislation, which creates the possibility of corruption abuses: “requires the improvement of Art. 118 of CAJU and related articles”. The necessity to put all possible measures of the claim provision and principles of their application (adequacy, proportionality) as strictly as possible is particularly emphasized, because the “*claim of citizen K. (costing 1 thousand hryvnas), if the judges are interested in it from the point of view of corruption, is able to paralyze the decision-making procedure for millions and dozens of millions hryvnas*” (entrepreneur O.)

- **Consideration of the parties’ petitions.** In this case, the in-depth interviews demonstrated the presence of *extra-formalism*, which is very often a mask for the corruption agreements. Besides, one should pay attention to the lack of strictness of the legislation in terms of requirements to the motivation of decisions on declining or satisfaction of the majority of such petitions, and also the possibility of dragging the consideration of such petition in time.

- **Evaluation of proofs.** The estimations are not univocal in this case. On the one hand, the impossibility to put all the criteria and methods of evaluation of proofs in the procedural law is admitted. On the other hand, “*the absence of the court’s obligation to evaluate all the proofs provided by the parties*” is recognized as a drawback (legal advisor of the trade company M.)

- **Scheduling (carrying out) of expertise.** The experts explain the corruption risks by the vague definition of terms (allowing to drag both the scheduling of expertise and their carrying out), absence of strict guarantees of the experts’ independence, possibility of falsification of the expertise results.

- **Drawing up of the text of court decision.** The results in terms of the possibility to facilitate the text of the court decisions were contradictory. The judges believe that *the requirement of the “complete text of the court decision in simple cases” is not justified* (judge E.). The members of the judicial consideration do not agree to this statement paying attention to the massive incompliance with the requirements of Art. 163 of CAJU by the judges.

Realization of corruption agreements requires certain actions of “tactical” nature in terms of the achievement of the purpose of such agreements, because the majority of cases concern not the contents of the court decision, but the other features of the proceedings, which are important in the context of the limitation of possibilities of certain participants both directly during the process and during the appeal against the corresponding decisions. **Diagram 74** demonstrates **what specific actions the judges make in the framework of the corruption agreements.**

The prevalence of these actions was also mentioned during the focus groups and in-depth interviews. The respondents mentioned that “*in some cases the judge, formally fulfilling the requirements of the procedural legislation, actually creates advantage for*

Diagram 74.

**Usage of certain actions for the realization of corruption agreements:  
expert estimations**

(% of those who think that these actions are made)

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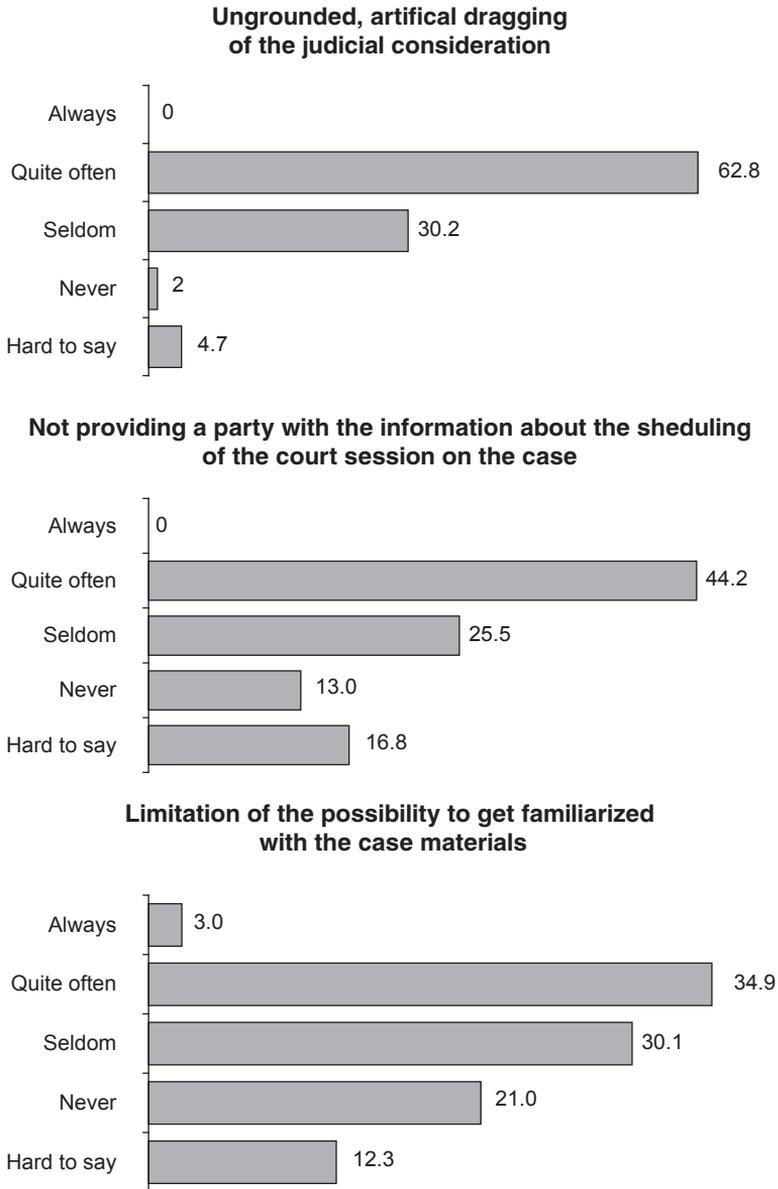
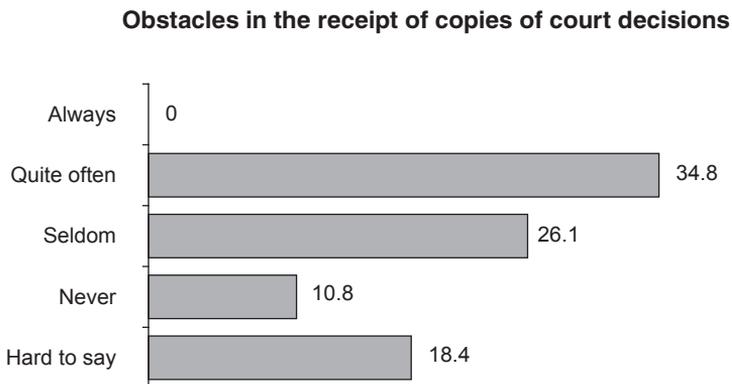
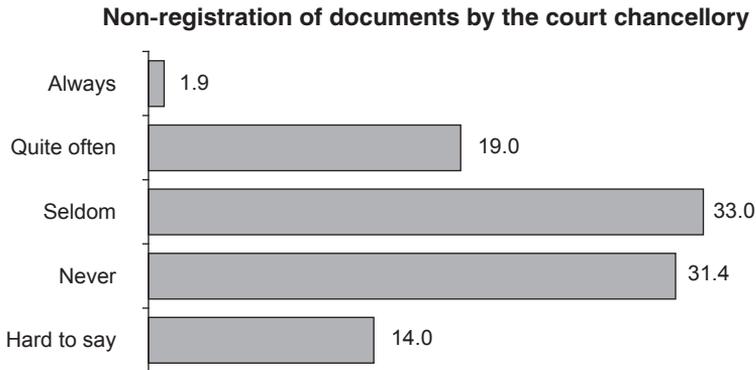


Diagram 74 (continuation).



*one of the parties, and sometimes this is enough...”, “quite often a case was resolved by simply concealing certain documents” etc.*

In the end, let us specify that the attempt to fight against the problem of corruption in the judicial system by only reforming the “judicial” legislation is rather one-sided. This conclusion appears in the result of the conversations with experienced lawyers, who use the legal mechanisms of application to court and resolving of cases by court in the interests of their clients in order to achieve unlawful intentions. This can be, for example, initiation of a dispute within the procedure of economic judiciary, the object of which is a big amount of money. Besides, what is quite real, it is the state money. Besides, what is also quite real, at the condition that all the persons participating in the case, without any exception, including the defendant, third persons, prosecutor, are all interested in the adoption of a certain decision for the benefit of the applicant so that each of them would receive his part of the “general interest”. In this way, a deliberately unlawful and illegal decision contradictory to the interests of the state and society is adopted “in the name of Ukraine”. It is clear that the “project budget” in this case initially includes the case being

considered in all the instances, so that nobody could doubt the proper use of power, first of all, by the state bodies and their officials as the result of not fulfillment, in particular, of timely appeal of the court decision to a higher instance court. Similar examples, as the experts and practitioners say, can be also found in the practice of administrative courts. In particular, during one of the “non-public by the form of conduct” “round tables” for the judges and representatives of the State Taxation Administration devoted to the problem of compensation of VAT, a judge of the Supreme Court mentioned that sometimes the representatives of the Taxation Administration actually act in the unlawful interest of certain enterprises in the corresponding disputes, because they keep to the positions initially unfavorable for the state.

### **3.5.9 Conclusions and Recommendations**

The main corruption risks in the administrative process are as follows:

- 1) Drawbacks of the legislation on the status of subjects of authority and corresponding administration procedures;
- 2) Sustainable “informal” alliances between the judges and advocates which actually means the inclusion of the judges into certain “legal technologies of advocates and legal firms”;
- 3) Non-procedural dependence of judges both inside the judicial system (on the head of courts or their deputies), and beyond it (on the politicians, members of Parliament etc.);
- 4) Low level of professional education of judges.

Corruptiogenous provisions of the Code of Administrative Judiciary of Ukraine are as follows: provisions on territorial jurisdiction; separation of public legal and public legal disputes; procedures of application of measures of the claim provision; improper application of the principle of official finding out of circumstances in the case; extra-formalism in drawing up of documents and in certain procedures; vague regulation of the proofs estimation; absence of proper independence of forensic experts and lack of guarantees of prevention of deliberately false expertise.

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