

# THE STRUGGLE FOR GOOD GOVERNANCE IN UKRAINE, GEORGIA AND MOLDOVA



EDITED BY  
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# **The Struggle for Good Governance in Eastern Europe**



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# PREFACE

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This volume forms part of a wider project on the European Union's Association Agreements (AAs) and Deep and Comprehensive Free Trade Areas (DCFTAs) with Georgia, Moldova and Ukraine. These agreements serve as the cornerstone of the EU's ambitious strategy to help anchor these three states into what they themselves call their "European choice". They are comprehensive in scope and content, with an equal weight attached to both political and economic aspects. This broad landscape of issues has been analysed systematically in three Handbooks, now appearing in their second editions.<sup>1</sup>

The present volume picks up on the key political aspects in greater depth, and does so with a comparative approach taking all three cases together. The task has been to go through the critical determinants of, and obstacles hindering 'good governance', including constitutional aspects and hazards for the process such as the oligarchs, pervasive corruption and the unique geo-political situation in which the three states find themselves in between the EU and Russia.

As with the three 'Handbooks', this present volume was produced by research teams from four independent think tanks, CEPS in Brussels, Reformatics in Tbilisi, Expert-Grup in Chisinau and the Institute for Economic Research and Policy Consulting in Kyiv.

While much of the content of the Handbook is undoubtedly rather dry, we hope that the reader will appreciate the lighter touch in the artwork of Constantin Sunnerberg, which graces the introductory page of each chapter.

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<sup>1</sup> Emerson, M. and V. Movchan (eds), *Deepening EU-Ukrainian Relations - What, why and how?*, Brussels and London: CEPS and RLI, 2<sup>nd</sup> edition, 2018.

Emerson, M. and T. Kovziridze (eds), *Deepening EU-Georgian Relations - What, why and how?*, Brussels and London: CEPS and RLI, 2<sup>nd</sup> edition, 2018.

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All conclusions drawn are of course attributable only to the authors.

Michael Emerson, Denis Cenușă, Tamara Kovziridze  
& Veronika Movchan

# THE ESSENCE OF THE STRUGGLE

MICHAEL EMERSON

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This book is about the political struggle underway in three countries in Europe's eastern neighbourhood – Georgia, Moldova and Ukraine – that have made what they call their “European choice”. The struggle is about their political and economic transformation, from being post-Soviet states into being part of “normal Europe”. The struggle is most fundamental in political terms, to become European-style democracies. Facing this challenge is all the more ambitious at a time when much of the rest of the world sees or talks about what

has been called a “democratic recession”, even if its reality is itself contested.<sup>1</sup>

All three countries would like to have the incentive of getting onto the ladder leading to full membership of the European Union (EU). The officially designated ‘membership perspective’ language and status is not agreed by the member states of the EU, but neither is it excluded at some future date. The EU’s constituent treaty says that any European democracy is entitled to apply for membership.

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<sup>1</sup> See S. Levitsky and L. Way, “The Myth of Democratic Recession”, *Journal of Democracy*, Vol. 26, No. 1, January 2015.



But for the time being, the EU is unwilling to create premature expectations when the states in question are a substantial way off meeting the political and economic conditions for full membership, and the EU itself is in a state of considerable turmoil. The EU is struggling with uncertainty over how to reinforce its own protection against significant levels of immigration from its Arab and African neighbours, how to strengthen the governance of the eurozone, how to respond to the rise of illiberal democracies in parts of Central Europe and how to manage Brexit. There is also a long queue of Balkan states whose pre-accession processes are moving very slowly.

Despite this ambiguity from the EU side, the struggle to achieve good governance in Georgia, Moldova and Ukraine is being fought out on the political stage day by day, year by year. For a vivid perspective, the comparison may be made with Russia and other states of the Eurasian Economic Union (EAEU), where there is hardly any real struggle at all, with the possible exception of Armenia. Authoritarianism prevails, and opposition movements are either suppressed or allowed a weak existence that amounts to a parody of democracy.

Four core chapters in this book address the political state of these three struggling semi-democracies, with detailed accounts of fundamental factors impeding or buttressing democratic practice, notably the judiciary, the oligarchs and anti-corruption policies.

“Democracy and its Deficits” is the short title of the first chapter by Ghia Nodia *et al.* Both words are crucial. For sure, the political systems of the three states are relatively democratic, compared to those in the EAEU; but their systems also have serious shortcomings in relation to any broad normative definition of ‘European-style’ democracy. The formal constitutional arrangements in all three countries have allowed for competitive political processes. The basic institutions of political democracy are established, and elections are openly, and indeed fiercely, competitive.

However, not all government changes have been achieved by ordinary elections. The distinction is made between government changes by the ballot box, versus at the barricades. The ‘colour revolutions’ of Georgia in 2003 and Ukraine in 2004 and 2014 saw the people at the barricades, protesting in anger at the failure of

regular politics to deliver what the electorate reasonably expected by way of clean or at least cleaner governance.

The distinction is also made between two competing elites that still exist in all three countries: between the former Communist *nomenklatura* and new elites promoting mixes of pro-democracy and nationalist agendas. Crucially, all three countries were unable to begin their post-Communist periods with comprehensive democratic and free market reforms. The *nomenklatura* learned to speak 'democracy', but have proved structurally resistant to thorough reform processes. The political systems have had to face the "painful choices between efficiency and pluralism that are typical of countries with weak democratic traditions". Nodia notes that Georgia has been the only one of the three where the executive (under President Saakashvili in 2003-13) accumulated a concentration of power that departed from the democratic, yet at the same time delivered the most successful public policy reforms (and notably so in curbing corruption, to which we return further below).

An indispensable pillar of sound democratic systems is independence of the judiciary, to assure both the rule of law in its operational detail and well as a key component of the requisite checks and balances between the three branches of government – legislature, executive and judiciary. There are reform efforts, but also ongoing problems in all three countries, as discussed in the chapter by Steven Blockmans, 'Integrity on Trial: Judicial reform in Georgia, Ukraine and Moldova'.

Reform in Georgia's justice sector has been implemented in several phases for over a decade. The objectives have become more and more sophisticated. Technically, Georgia has done more than any other country in the region. Yet local and international watchdogs have pointed to instances of selective justice and attempts whereby making legal/institutional progress has been overshadowed by a lack of political will (or too much will, but in the wrong direction). With many good practices in place, the ultimate test is the guarantee for the judiciary against undue political interference, over which the workings of the power structure in Georgia pose issues of concern.

Moldova's direction of travel has been in reverse in recent years and its Justice Sector Reform Strategy for the period 2011 to

2016 has fallen flat: changes were made mostly at the procedural and technical levels, but they have not been matched by improvements in the independence and integrity of judges. Moldova is facing unprecedented attacks on judicial independence and an increasing phenomenon of selective justice.

In Ukraine, in spite of the Euromaidan revolution of 2013, there is still a post-Soviet legacy of weak rule of law and high levels of fraud. The judiciary, in particular, has traditionally been perceived as one of the most corrupt institutions in the country. In June 2016, the authorities kick-started a process of multi-annual reform of the justice sector, with amendments to the Constitution and the adoption of new legislation. Despite these attempts at reform, law enforcement remains biased, with groups of top officials and wealthy businessmen seemingly enjoying low levels of accountability and high levels of illicit privileges. The changes to the justice sector are planned to be introduced gradually over the course of the next few years, so until 2020 the jury is still out.

One of the major impediments to sound democratic governance in all three countries has been the role of oligarchs, or of very rich individuals able to heavily influence if not capture the political process. Wojciech Kononczuk et al. view the oligarch phenomenon as a key obstacle to reform. This chapter documents in some detail the economic holdings of the several oligarchs in Ukraine, the single oligarch-leader of Moldova, Vlad Plahotniuc, and the single very rich individual in Georgia, Bidzina Ivanshvili, who controls the ruling party. Neither Plahotniuc nor Ivanshvili currently holds elected office. The President of Ukraine is a rich individual, but not to the point of being classified as a five-star oligarch. Mr Ivanishvili was briefly prime minister of Georgia, but has subsequently preferred to operate without the constraints of public office.

The disadvantages of oligarchy are several: limiting political pluralism, monopolising the economy, blocking reforms, capturing state institutions, sustaining corruption, and so on. Lest these disadvantages sound rather general, one can cite two recent instances where the oligarchs have been instrumental in bringing the economy close to the point of financial bankruptcy. In Moldova, the political leadership has failed to bring to justice those responsible for a huge banking fraud in 2016. In Ukraine, the

leading private sector bank owned by a pre-eminent oligarch also saw a huge banking fraud in 2017. In both cases, the public budget had to contribute macroeconomically significant sums to rescue/privatisation operations.

How can these countries respond to the ominous challenges posed by oligarchy? There is no single magic bullet, but rather a set of conditions that reach into all the fundamental requisites for good governance: a maturing of democratic systems, rules for the funding of political parties, effective anti-corruption policies, serious competition policies and independence of the judiciary and media. Also relevant is the reform agenda of the Association Agreements with the EU, with their many measures in the broad field of economic regulation (need for independent regulators for energy and major service sectors, etc.).

Pervasive across the governance of almost all the post-Communist states of Europe is the problem of corruption, both 'petty corruption' involving for example technical inspection services, through to 'grand corruption' at the level of the political leadership and oligarchs. Anti-corruption policy has in recent years become a well-structured subject, thanks to the work of several international organisations and NGOs. This provides a robust basis for comparisons. Among the three countries, Georgia stands out for having quite dramatically transformed itself into a de-corrupted state, whereas neither Moldova nor Ukraine have been able to do so yet. Why? The chapter by Michael Emerson *et al.* documents anti-corruption agendas, first at the strategic level of political leadership and the role of the judiciary (as highlighted above); second at the level of detailed legislation on such matters as the criminalisation of corruption, sanctions and immunities, asset declarations and the protection of whistle-blowers, etc.

Broadly speaking, all three countries have advanced a lot in parallel on the legislative agenda. Where they differ however, is on the decisive question of the political will to apply the legislative agenda with sincerity and determination. As mentioned above, Georgia distinguished itself with a dramatic programme combining economic regulatory liberalisation and de-corruption during the Saakashvili presidency. Unfortunately for the purpose of our narrative, this was achieved with ruthless effect, unhindered by democratic niceties. On the other hand, it is remarkable that this

episode seem to have left its mark, with no significant relapse into corrupt practice under succeeding administrations. Georgian society seems to have locked itself into a de-corrupted culture. At the same time, Moldova and Ukraine, while making considerable progress on the legislative agenda, have not had political leaderships willing and able to offer consistent, strong support for implementation.

An intriguing question raised in the chapter by Serena Romano is whether these problems of corruption might be eased if more women held high positions in these countries. Some scholars have argued that women are more trustworthy and public-spirited than men, and thus more likely to reject opportunities for corruption. By contrast men are seen as more individualistic. Some evidence for this view is found in a correlation between high numbers of women in parliaments and lower levels of corruption. A more refined thesis, supported by some research, is that when the level of female representation is increased from a very low level, the incidence of corruption declines, but where the level gets closer to parity this gain is reversed. Moldova, as a country with both a high level of representation in official positions and high corruption is cited as illustrating this point. The author acknowledges that these conclusions are contested by other scholars, and that further research is needed. What seems to be more generally accepted, is that where women are far away from gender balance in an assembly their influence will be marginal, whereas a figure of around 40% or more passes the threshold for effective representation of gender-related issues.

While Georgia, Moldova and Ukraine marked their 'European choice' by signing their Association Agreements with the EU, some of their neighbours – notably Belarus and Armenia – made the contrary choice of joining the Russian-led Eurasian Economic Union. This raises the question how far these developments mean a definitive division of the East European space into two clubs of radically different political and societal cultures. This issue is explored by Andrey Makarychev, and the wording in the title of his chapter "Incomplete Hegemonies, Hybrid Neighbours..." is already pointing towards a more nuanced view. Split identities in these states, looking both east and west, remain and even deepen.

The respective neighbourhood strategies of the EU and Russia are set out in some detail. ‘Europeanisation’ is the keyword in the EU’s strategy, stressing values and rules, while renouncing the use of coercive instruments. But one of the hard lessons for the EU has been the observation that while leaders in some states with Association Agreements have tended to become adept in the use of the discourse of European democracy, they have not made significant reductions in the corruption of their regimes. Russia’s toolkit for its ‘near abroad’ is based on both ideas and military force. The ideas are those of Eurasian integration and the ‘Russian world’, which embraces ethnic, religious and linguistic aspects that are missing in the European approach. Russia’s willingness to use military force has been amply illustrated in Georgia and Ukraine; the author sees this “overtly militarised imperial *Realpolitik*” to have brought few dividends, and indeed negative alienation as a result. This is the background to the author’s exploration of several scenarios that could lead to a still hypothetical pan-European space, in which the actual tensions between the two regional hegemonies – the EU and Russia – might be eased. These deserve open-minded consideration and debate, since the status quo is so unsatisfactory, although there is no easy option.

Contrasting with these ideas of ‘hybrid’ status and identity, the chapter by Michael Emerson and Gergana Noutcheva looks comparatively at the quality of governance of all states of the European neighbourhood that seek full membership of the EU, i.e. the remaining Balkan non-member states and the three East European states with Association Agreements with the EU. The EU itself discriminates between the two groups, with the Balkan states granted ‘membership perspectives’, whereas this is denied to Georgia, Moldova and Ukraine. The chapter therefore reviews the performance of both groups of countries in terms of their political and economic governance. Multiple sources, both official and non-governmental, converge on a basic message, namely that the two groups are comparable. Both groups see a considerable range in performance, between front-runners and laggards, but this enriches rather than undermines the message. The front-runners in both groups (Serbia, Montenegro and Georgia) are comparable, although Georgia scores a little better than the Balkan front-runners. As for the laggards, Moldova and Ukraine are closer to, if somewhat ahead

of Albania and Bosnia. These findings show that the EU's discrimination between the membership perspectives of the two groups is without objective foundation. Yet the prospect of the EU's further enlargement is itself remote. Overall, the conclusion is that the EU's set of enlargement and neighbourhood policies needs a re-think, for which three options are offered.

Finally, a chapter by Kataryna Wolczuk reviews the three Handbooks on the Association Agreements with Georgia, Moldova and Ukraine.<sup>2</sup> This offers an overview of the key features of the three Association Agreements, which contain an unprecedented export of the EU's regulatory legislation to non-member states, in addition to radical market-opening provisions. The assumption is that EU regulatory standards equate with what is modern, efficient and of widespread validity in the territories of the neighbouring states. While this may sound hyperbolic to those accustomed to the EU's own fierce internal debates, the very fact that the pursuit of good governance in the three countries is such a struggle draws attention to a specific point of real importance. The domestic politics of the three countries risk continued instability, especially in Moldova and Ukraine, given the structural problems discussed above (imperfect democracies, oligarchs, corruption, etc.). In this situation, the adoption of extensive approximation on tested EU legislation translates into a stable structure for the processes of reform, and sets these processes in part at least on automatic pilot for a number of years ahead. Without this, the prospects for political and economic reform would be much weaker, as is visible in the countries of the Eurasian Economic Union.

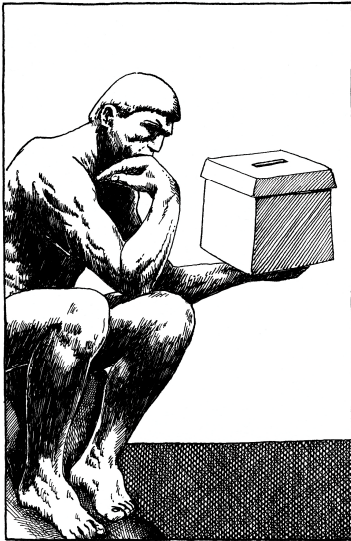
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<sup>2</sup> See references in Chapter 8.

# 1. TOWARDS BECOMING EUROPEAN-STYLE DEMOCRACIES

GHIA NODIA WITH DENIS CENUȘĂ  
& MIKHAIL MINAKOV

---



## Introduction

Georgia, Moldova and Ukraine are three participating states of the European Partnership that have chosen to conclude Association Agreements with the European Union, often at the expense of relations with their most powerful neighbour, Russia. They are also rather similar in their levels of democratic development. Within a post-Soviet space, they stand out for their relatively high level of democratic freedoms and political pluralism; none of them, however, can be considered a consolidated

democracy, and most analysts describe them as uncertain or hybrid political regimes that combine features of autocracy and democracy.

This chapter offers a comparative analysis of the three countries' political systems and aims to interpret both the roots of their relative success, and the nature of the deficits that prevent them from consolidating their democratic institutions. Among these deficits are problems stemming from ethnic, regional and cultural conflicts; strong and weak features in their general constitutional systems; the links between democratic development and government capacity to produce public goods; state capture (including control over the most influential media organisations) by



powerful oligarchs and endemic corruption; underdevelopment of political parties and party systems; insufficient trust towards institutions of electoral democracy and a resulting propensity to use extra-constitutional means of political struggle. Civil society organisations have also failed to penetrate the wider public and the anti-liberal discourse of traditionally dominant churches and anti-Western media and civil society groups is often supported by Russia.

Despite these structural challenges, the commitment to European values and norms demonstrated by societies in these three countries gives hope that they can eventually consolidate their democratic institutions. It is argued that closer ties to the EU are important in explaining their relatively high level of democratic development. For this reason, the consistent and enhanced commitment of the European Union to this region is crucial to their continued success in this area.

Georgia, Moldova and Ukraine do not constitute a single geographical region, but since 2014 they have acquired a certain commonality of fate. In that year, all three countries signed Association Agreements (AA) with the European Union that came into effect in July 2016 for Georgia and Moldova and in September 2017 for Ukraine. This choice proved far more difficult, if not momentous, than what most Europeans and many citizens of these countries had initially imagined. Ukraine paid the heaviest price for the choice it made: it endured a violent government overthrow, effective loss of territory, and continuing Russia-inflicted warfare in the Donbas region. For Moldova and Georgia, however, the choice of this still modest form of European integration spells bigger problems for its relations with Russia and active resistance to its Europeanising policies from within. The choice for Europe makes these three countries stand out from their partners in the European Eastern Partnership of the EU, as well as from the post-Soviet realm in general. It is also notable that the choice was made when the tide of Euroscepticism within the EU, and Russia's openly aggressive attempts to undermine it from without, exposed Europe's vulnerability. It is therefore perhaps justified to denote Georgia, Moldova and Ukraine as an 'AA region' in Europe's East: we use this term in the rest of the paper.

As seen by societies within the AA region, the AA should not be the final destination for relations with the EU. These countries insist on their European vocation and believe that it should ultimately be recognised by offering them a path to membership. There is no consensus on this issue within the EU, although the voices in favour of a European calling for Georgia, Moldova and Ukraine increase in volume.<sup>1</sup>

However, it is also understood that both association with the EU and the hope of eventual membership is closely linked to acquiring European values, norms, institutions and practices. The values of liberal democracy are of paramount importance. How do the three AA countries score on this account? It depends on which standard we choose. If we compare them to other post-Soviet countries (excluding the Baltic states), they are by far the most democratic ones. But this does not make them consolidated democracies, and they are still far from meeting the demands that the EU would expect of its future members. Their political institutions are weak, unstable, susceptible to being captured by oligarchs<sup>2</sup> or autocratic leaders, and have low trust among their populations. Yet they also have lively political competition, periodically go through changes of power (sometimes by constitutional, sometimes by revolutionary means), have relatively vibrant independent media and civil society, and people who largely support democratic values. Nevertheless, the political systems are at risk from within and are open to external influences. But two assumptions can be made with confidence: they have genuine chances of success, and successful cooperation with the European Union may be the key factor in this success.

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<sup>1</sup> European Parliament, Recommendation of 15 November 2017 to the Council, the Commission and the EEAS on the Eastern Partnership, in the run-up to the November 2017 Summit (<http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P8-TA-2017-0440+0+DOC+XML+V0//EN&language=EN>).

<sup>2</sup>, Wojciech Konończuk, Denis Cenusă and Kornely Kakachia, "Oligarchs in Ukraine, Moldova and Georgia as key obstacles to reforms", June 2017 (<http://3dcftas.eu/publications/other/oligarchs-ukraine-moldova-and-georgia-key-obstacles-reforms>).

This paper summarises the trajectories of three countries in their development of European-style democratic institutions, and outlines the challenges ahead. It does not aspire to offer a comprehensive account of achievements and problems, but focuses on several key dimensions that have mattered most in their political development so far and exposes the most painful aspects of that process of development. Some important areas, such as the rule of law and justice systems, are not discussed here.<sup>3</sup> It aims to paint a broad picture and serve as a starting point for discussion.

**Where do the three countries stand?**

Despite huge differences between the domestic political scenes and development trajectories of the three AA countries, they also have features in common. This is confirmed by most widely used comparative international assessments of the levels of democracy in different countries. In its “Freedom in the World” reports, Freedom House typically ascribes to these countries scores between 3 and 4 (with 1 standing for the most “free” or democratic country, and 7 for the most “unfree” or autocratic.) This means that they are considered as only “partly free”, but that they are also rather close to being “free” – a score of 2.5 would allow for that.<sup>4</sup> In fact, their scores improved marginally over the last three years – the period when association with Europe was high on their political agendas (this is not to suggest that such relative progress will be sustainable in years to come).

*Table 1.1 Freedom in the World scores, 1996-2016*

	<b>Georgia</b>	<b>Moldova</b>	<b>Ukraine</b>
1996-2016 mean	3.52	3.26	3.26
2014-2016 mean	3	3	3

<sup>3</sup> CEPS is producing a comparative study on this subject.

<sup>4</sup> The only exception is Ukraine between 2004-09, when it was given a score of 2.5 (or a “free” country) for five consecutive years – but this did not prove sustainable.

The *Democracy Index* of the Economist Intelligence Unit, which uses a somewhat different methodology and terminology, attributes the same countries slightly above or below 6 points<sup>5</sup> – this happens to be a dividing line between “hybrid regimes” and “flawed democracies”. However, it assessed the differences between countries to be somewhat larger: since 2007 when Democracy Index started to collect its data, it has assessed Moldova as a “flawed democracy” (even more flawed than most others); Georgia – as a “hybrid regime” (although in the last four years it is thought to be one of the most democratic of the “hybrid regimes”); while Ukraine has descended from the “flawed democracy” category (2007-10) to that of “hybrid regime” (2011-16).

Similar numerical scores do not necessarily imply similarities in the *typology* of problems or achievements between the three countries, as the following analysis attempts to demonstrate. We start by reviewing the general development path of these unstable democracies and typical problems that stem from their starting conditions and environments.

## How democracy evolved: Parallel trajectories

In all three countries, democracy emerged as an alternative to the discredited Soviet Communist rule. The early post-Soviet period was notable for its enthusiasm for democracy as a declared aim of reforms. However, the success of the democratic project was hampered by many structural or societal deficits: a habit of overdependence on the state; weak capacity of citizens’ voluntary association in the public space (something that we know as civil society); a lack of understanding of how democratic institutions actually work (which contrasts with the high legitimacy of the general normative idea of democracy); and deep cleavages among multi-ethnic populations towards the projects of new nation states. These problems were exacerbated by the economic breakdown caused by the implosion of the Soviet-style ‘command economy’ and the disruption of economic ties with the rest of the former Soviet Union. These problems have hindered the democratic transition and challenged the development of democracy over the last 25 years.

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<sup>5</sup> In this case, higher ratings mean more democratic and lower ratings less democratic.

On the political level, there were two main competing elites. An alternative political elite emerged out of parties and movements that challenged the existing regime on a combination of pro-democracy and strong nationalist agendas. They confronted the existing Communist *nomenklatura* that was keen to preserve its power and accompanying privileges. Both these elites had fundamental shortcomings. The post-Communist elites shed their erstwhile ideological commitments and professed allegiance to new slogans of democracy and nation state, but were structurally predisposed to resisting necessary democratic and free-market reforms. They were also well-placed to translate their pre-existing administrative power into control over the most important economic resources, thus laying the ground for the plutocratic (or oligarchic) character of the new regimes. The weaknesses of the newly emerging elites lay in their lack of political experience, insufficient organisation and over-emphasis of the nationalist agenda, which could have alienated ethnic minorities. The electorate saw the *nomenklatura* as a force for stability and moderation, while the new elites saw it as standing for change and reform. The turbulence of the early post-Communist years inclined them to give preference to the values of stability.

The outcomes of the struggle between these elites were different in different countries. In Georgia, the alternative elite was initially the most successful by ousting the Communist party from power in the October-November 1990 elections. That looked like a clean break with the past, and no successor organisation to the Communist party was ever created in Georgia. However, the nationalist Round Table coalition led by the charismatic Zviad Gamsakhurdia proved divisive and incompetent and in January 1992, it was ousted following a popular insurgence or coup. The incoming government led by Eduard Shevardnadze, a reformed Communist, included a mixture of former *nomenklatura*, democratic reformers and armed strongmen. Developments in Moldova and Ukraine were not so dramatic, but the new elites were never successful in defeating and delegitimising former *nomenklatura*, although they were partly successful in imposing elements of their agenda on it. The outcome was that, unlike more successful democracies in Central and Eastern Europe, the three countries did not start their transitions with a period of more or less

comprehensive democratic and free market reforms led by new non-Communist elites.

Ethno-territorial divisions were another birthmark of the three nascent democracies that continue to dog them to this day. They stemmed both from the 'objective' reasons (some ethnic minorities were not prepared to embrace new nation states); mistakes made by nationalist elites; and Moscow's willingness to manipulate the internal difficulties of the emergent states. Again, Georgian developments were the most momentous, with two protracted wars for secession in Abkhazia and South Ossetia,<sup>6</sup> which ended in defeat for the central government and the creation of two unrecognised states. Moldova faced a similar problem and a similar outcome in Transnistria in 1992, although the scale of violence was far lower. In both countries, the Russian military was an important actor that played a prominent role in defining the outcomes of the conflicts. Ukraine was the most successful in preventing ethno-territorial problems, but as it turned out it only postponed the problem until Russia decided to use the existing cleavages for its hybrid war in 2014 in eastern Ukraine and Crimea.

For these reasons, the first half of the 1990s was a period of uncertainty, economic crisis, and – in the case of Georgia – total breakdown of statehood. The situation only stabilised in the mid-1990s by creating mixed regimes. The above-mentioned Freedom House ratings confirm that this mixed character of political systems has remained largely unchanged since then. It was also at this time that all three countries adopted new constitutions. Each constitution reflected the political balance and attitudes of the day, and were subject to periodic overhauls as the power balances changed.

While stability was welcome after a period of turbulence, in practice it was largely bought at the expense of high levels of corruption, state capture by oligarchic groups, government inefficiency in terms of its capacity to provide public goods and slow economic development. All countries faced a contradiction between formally declared principles of constitutional democracy, transparency and meritocracy, which were also more or less reflected in the constitutions and legislation (that could be drafted

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<sup>6</sup> The war in South Ossetia continued from January 1991 to June 1992, while that in Abkhazia lasted from August 1992 to September 1993.

in cooperation with consultants from established Western democracies), and the reality of neo-patrimonial, informal, clan-based governance. This undermined the legitimacy of the entrenched elites (often rooted in the former *nomenklatura* but 'enriched' by new economic and political entrepreneurs), so the demands for dramatic change ripened. This expressed itself in the 'colour revolutions' in Georgia and Ukraine in 2003 and 2004, respectively. In Moldova, the resistance to the rule of the Communists led by a chaotic coalition of pro-European political forces did not take these dramatic forms, but in 2009 they also succeeded in coming to power after the April youth riots and subsequent political turmoil in the same year.

These power changes, however, have led to different outcomes in different countries. In Georgia, reforms carried out by President Mikheil Saakashvili and his United National Movement (UNM) were largely successful in uprooting corruption, visibly improving the quality of public services and improving the investment climate. However, the fact that these reforms were carried out in a top-down fashion, at the expense of concentrating power in the presidency, and were accompanied by some human rights abuses, eventually triggered strong protests based on a heady mix of democratic and nativist discourse. In Ukraine, the 'Orange' government was more pluralistic but did not bring about any serious achievements, either in political or economic development, which led to very deep public disappointment. In Moldova, the coalition of centre- to right-leaning parties was successful in overthrowing the Communists from power, but became mired in corruption and poor governance scandals and hence lost credibility.

Another new trend in the 2000s could be termed the 'geopolitisation' of the political discourse on democracy.<sup>7</sup> On the one hand, a more muscular Russia emerged under Putin, clearly alarmed by the colour revolutions, interpreting them as Western conspiracies to squeeze Russia out from its position of influence in its 'near abroad'. On the other hand, the inclusion of the regional countries in the European Neighbourhood Policy (2003 for Moldova and Ukraine, 2004 for Georgia), and, especially the Eastern

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<sup>7</sup> See Ghia Nodia, "The Revenge of Geopolitics", *Journal of Democracy*, Vol. 25, No. 4, October 2014, pp. 139-150.

Partnership (EaP) initiative turned the EU into a more influential actor in the region, and came to be considered as the key partner and ally of pro-reform political groups within these countries. Hence, the division between pro-democratic reforms and pro-status quo agendas began to be perceived as a clash between pro-Europe and pro-Russia forces.

This perception was shared by the Russian government, and by the different societal actors within the future AA region. The strongest expression of this was the 2013-14 Euromaidan revolution in Ukraine, triggered by the outrage at President Yanukovych's last-minute refusal to initial the Association Agreement with the EU. Ukraine was both pressured and seduced by Putin, but the agenda of Euromaidan developed into a general protest against the regime and corrupt oligarchic rule. The EU thus became a symbol of clean, effective and participatory democracy for which the Ukrainian people yearned. This was less the case in Moldova, where the EU was accused of supporting corrupt elites following revelations of bank fraud in November 2014, which had an adverse effect on public attitudes to the EU.

While there is a genuine popular demand in all three countries for such democracy, there is also a deep frustration with political elites, including those who claim to be harbingers of reform and fighters of corruption. In all three countries, political parties are among the least trusted institutions. While there have been several changes of power – through revolutionary or constitutional means (giving widespread hope of a genuine democratic breakthrough as well as good governance), they usually ended in frustration on the part of the citizenry. On the other hand, these countries maintained relatively dynamic and competitive political landscapes, an open space for political debate and healthy levels of social activism.

## **Ethnic, regional and cultural conflicts and divisions**

Agreement about borders, as well as a shared sense of belonging among citizens of a given state, may be the single most important precondition for a successful democratic political system. Before people embark on the difficult task of jointly constructing institutions of democratic state, they should consider themselves as a political community or nation, which does not necessarily coincide with an ethnic nation. This is why an attempt at democratic



transition may be critically dangerous for the unity of nascent democratic states, especially when this period coincides with the break-up of multinational states or empires.

In general, most democratic countries have regional and/or ethnic divisions. With proper management of diversity, these divisions do not necessarily pose a risk to the unity of the country. Whether some divisions lead to conflicts that threaten unity and civic peace depends on many factors, including the depth of pre-existing cultural cleavages, strategic decisions made by political elites and/or external influences.

Georgia, Moldova and Ukraine have considerable ethnic and regional divisions and unresolved territorial conflicts. It was in the period of the Soviet break-up that most such conflicts in the post-Soviet space emerged. Georgia had two such conflicts (Abkhazia and South Ossetia). They resulted from pre-existing ethno-cultural differences; differing collective historical and identity memories; certain minorities were apprehensive of the nationalist rhetoric of emergent elites in the new countries; and the outside influence of Russia. Moldova has a conflict in the Transnistrian region with no ethnic roots, but based rather on historical and geopolitical distinctions, mixed with a renaissance of nationalist movements following the collapse of the USSR. Overall, Russia was not interested in the consolidation of new nation states on the territories of post-Soviet countries that it considered its natural zone of influence, and sought local allies to disrupt such processes: ethnic minorities could be a natural choice.

In all three cases, the outcome was similar: the separatist forces won, establishing *de facto* control over areas they claimed; supposedly temporary ceasefire agreements created quasi-permanent dividing lines, and *de facto* states of an uncertain international status developed into quasi-polities with all the formal attributes of statehood on the seceded territories. All three of them have been in existence for more than 20 years now. At least in the perception of the so-called 'parent-states,' Russia's support was crucial to that outcome, and in maintaining the shaky status quo. Residents of *de facto* states became accustomed to living that way and developed into separate societies, although Transnistria, unlike the two other cases, has fairly strong economic ties with its parent

state via humanitarian payments (pensions, social allowances, etc.) and the gas-connected benefits to the breakaway region's industry.

While the international community tried to resolve these conflicts and achieve more permanent and mutually agreed solutions, it was Russia that was in effect the main power-broker. For a long time, the Russian government was interested either in solutions that would substantively compromise the sovereignty of the affected states (that the latter rejected), or in prolonging the status quo that would buy it influence in the area. In the wake of the 2008 Russian-Georgian conflict, the situation changed with regards to Georgia, with Russia recognising the independence of Abkhazia and South Ossetia. Only a handful of states followed Moscow's example, which meant that both territories turned into Russian protectorates with little effective sovereignty. After these changes, Georgia considered both Abkhazia and South Ossetia to be "territories occupied by Russia". In the case of Moldova, Russia tried to maintain its influence by proposing the federalisation of the country envisaged by its 2003 'Kozak Plan', the plan that the Moldovan government initially considered but eventually rejected. The latter sparked the first confrontation with the Kremlin, consisting of reviewed prices for gas supplies and embargoes on Moldovan wines.

Not all ethnic or regional divisions ended in such conflicts, however. All three countries had other ethnic and religious minorities; in some cases, their existence did not cause tensions, in others, tensions were resolved. For instance, Moldova managed to contain the problem that emerged in relations between the nascent Moldovan state and its Gagauzian minority, instituting a Gagauzian administrative autonomy. Likewise, Georgia had a regional problem with the Adjara Autonomous Region, which claimed greater powers than the Georgian constitution provided for. But there has never been an agenda of secession, or threats of violence. After the local autocratic leader, Aslan Abashidze was ousted by the protest movement, the territorial problem appears to have disappeared. While there were some fears that part of the Georgian regions of Samtskhe-Javakheti and Kvemo Kartli where respectively ethnic Armenians and Azeris are concentrated on the border with their ethnic homelands, there was never any open conflict in these regions either.

Ukraine also is a multi-ethnic and multi-confessional country, but all its identity-based divisions are overshadowed by the cleavage between its south-eastern part that tends to be culturally closer to Russia, and the western part where Ukrainian ethnic identity, and a desire for national sovereignty, is much stronger. Yet while this cleavage was strongly pronounced in voting patterns, with the east tending to vote for candidates considered as 'pro-Russian' and the west supporting pro-independence and pro-European forces, Ukraine had long managed to avoid political confrontation along cultural identity lines. In 1991, instituting an autonomous region in Crimea (the most Russia-oriented among Ukraine's regions) appeared to have averted the danger of a territorial conflict of the kind seen in Georgia and Moldova. However, in 2014, Russia used the pretext of the change of Ukrainian government when President Yanukovych fled the country to annex Crimea and foment separatist revolt in the south-eastern regions. This revolt ended with the creation of two non-recognised 'statelets' in the Donbass region. After eight months of bloody war in 2014-15, the frontline stabilised and slowly turned into a quasi-border with the Russian-backed separatist region. As a result, Ukraine's situation came to resemble that of Georgia and Moldova, with Crimea being annexed by Russia and Donbass becoming an area of 'semi-frozen conflict'.

Such conflicts impede democratic consolidation in several ways: they disrupt the general functioning of the state; strengthen the political players inclined towards radical and exclusive nationalist agendas; are conducive to the creation of citizens' militias whose presence can disrupt the balance of power and hamper orderly democratic procedures; and, of course, lead to massive violations of fundamental human rights and freedoms. However, especially for Ukraine and Georgia, these conflicts, which are primarily perceived as conflicts with Russia, weakened the latter's capacity to influence national political actors and generally strengthened both countries' resolve to pursue the European integration agenda. Following the eruption of fighting in the Donbass region, the population that is generally Russian-speaking took a strong pro-Ukrainian position. In this sense, the fighting contributed to the consolidation of Ukrainian civic identity on territories other than those under separatist control.

As a result of these conflicts, all three countries have part of their territories outside their effective jurisdictions. While none of them contemplate reconciling themselves to the loss of these territories, the countries recognise that they have little chance of restoring their territorial integrity soon, and there is consensus that they have to focus on the agenda of domestic reforms and development without abandoning the reintegration efforts. This does not mean, though, that there are no remaining identity and culture-related cleavages and challenges in the parts of the countries where the control of the state is not challenged. In Moldova, the issue of Moldovan vs Romanian identity continues to be divisive. Once the European aspirations of Moldova became clearer in 2009, and especially after the signing of the Association Agreement, the movement for reunification with Romania moved closer to or even merged with pro-EU sentiments. Since Moldova started to be run by so-called pro-EU governments, and the dialogue with the EU intensified, the geopolitical division between pro-EU and pro-Russian political forces dramatically increased. In Ukraine, issues related to the formal status and practical use of the Russian vs Ukrainian language continues to be controversial. In Georgia, most in the Armenian and Azeri ethnic minorities do not have a command of the Georgian language and are weakly integrated into Georgian society, which hampers their participation in political, social and economic life. The status of religious, especially Muslim minorities is also an area of concern. In all countries, support for European integration tends to be weaker among many in the minority populations,<sup>8</sup> so the governments and societies need to convince them that the path of European integration will actually improve the protection of minority rights.

## General constitutional systems

Georgia, Moldova and Ukraine adopted their first post-Communist constitutions in the mid-1990s: Moldova in 1994, Georgia in 1995

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<sup>8</sup> For instance, in Georgia in June 2017, in minority settlements only 23% supported the state goal of European integration and 49% that of Eurasian option. Laura Thornton, David Sichinava, "Public attitudes in Georgia Results of a June 2017 survey carried out for the National Democratic Institute by CRRG Georgia", ([https://www.ndi.org/sites/default/files/NDI%20poll\\_june%202017\\_ISSUES\\_ENG\\_VF.pdf](https://www.ndi.org/sites/default/files/NDI%20poll_june%202017_ISSUES_ENG_VF.pdf)).

and Ukraine in 1996. This was preceded by a lengthy process of debate between different political forces. The forces of stability usually promoted strong presidential rule, greater centralism and majoritarian electoral systems, while reformist forces typically (but not always consistently) called for stronger parliaments, greater decentralisation and proportionate voting systems. Moreover, the first constitutions had to take into account the actual and potential ethno-territorial conflicts that threatened the three nascent states.

The outcomes were based on some sort of compromise between different political forces, and were different in different countries. Ukraine adopted a semi-presidential system with the president having firm control of the executive branch, including the cabinet, the prime minister, and a network of the president's regional (oblast) representatives called governors, including the Autonomous Republic of Crimea. However, the parliament (Rada) retained a high level of independence, and shared with the president an impact on the judiciary system. There was a mixed system of political representation, including both majoritarian and proportionate components. The constitution also reaffirmed the autonomy of the region of Crimea (which it did not have in Soviet times).

In Georgia, the conflict between pro-government and opposition forces led to a compromise solution, which was a strict, American-style division between president and parliament. This allowed parliament to be a relatively independent centre of power. Due to the difficulty in reaching consensus on the territorial arrangement of the country, this topic was not included in the constitution at all, on the pretext that it would be added after the conflicts in Abkhazia and South Ossetia had been resolved (the Upper Chamber of Parliament also had to be created after that). In practice, however, a rather centralised system of governance was established. A new regional level of governance (not yet mentioned in the constitution) was created, based on the office of the president's personal representatives in the regions. Municipal (*rayon*) level administrators (*gamgebelis*) were also appointed by the president.

Moldova was the only country of the three (as well as in the post-Soviet area in general) that avoided the path of strong presidentialism. The parliamentary system has shaped the politics

of the country since its independence in August 1991, and several later attempts to introduce a stronger presidency failed (even though it has been always a popular idea, as confirmed by the results of the referendum of 1999 that had no juridical effects).<sup>9</sup> According to a constitutional provision enacted in 2000, the president had to be elected by three-fifths of the parliament (rather than by direct popular vote, as before), but this created problems after 2009 when a monopoly of the Communist party ended and diverse ruling coalitions had trouble garnering enough votes to fill the president's seat. Under these circumstances, Moldova faced numerous political crises and frequent snap elections (in 2001, 2009, and 2010). In 2016, in a controversial act, the Constitutional Court restored the constitutional provisions effective prior to the modification of 2000, thus re-introducing the direct election of the president.<sup>10</sup> The system is not yet stabilised, however, and there are continuous calls to extend the competences of the president.

Although Moldova's constitution has been relatively stable since its adoption, in Ukraine and Georgia the changing balance of power led to several overhauls. In the case of Ukraine, the competencies of the president, and the balance of power between the president and prime minister/parliament changed several times. Despite this, however, the president was always considered to be the most important political figure in the country. In Georgia, changes of the constitutional system of power turned out to be more thorough. The 2004 package of amendments changed the system into a formally semi-presidential but in effect more presidentialist one – something that the government of the day justified by the necessity to carry out rapid reforms. Another large overhaul took place in 2010 (most of the changes came into effect in 2013), when

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<sup>9</sup> According to the referendum of May 1999, out of 1.4 million citizens (58.33% of the total population) 55.3% opted for presidential form of government and conferred to the president the right to form and rule the government. However, the plebiscite had no juridical effects because it included less than 61% of the electorate (<http://www.e-democracy.md/monitoring/politics/comments/constitutional-crisis-responsibilities-consequences/>).

<sup>10</sup> Denis Cenușă, "Back to direct presidential elections in Moldova: From one political crisis to another?", 21 March 2016 (<http://3dcftas.eu/publications/other/back-direct-presidential-elections-moldova-one-political-crisis-another>).

the powers of parliament were considerably increased at the expense of the presidency, which tended to become a largely ceremonial position. A movement towards parliamentary system was completed through amendments in 2017 that removed direct elections of the president. The electoral system also became a purely proportional one. The implementation of both changes, however, was postponed until after the next presidential and parliamentary elections (due in 2018 and 2020).

No less important is how the constitutional *process* developed. Georgia has had a propensity for parliamentary supermajorities: this allowed the parties in power to change the constitution at will. The 1995 constitution was the result of a genuine compromise between the government and opposition parties; but the overhauls of 2004, 2010 and 2017 reflected the political will of a single party (UNM in the first two cases, the Georgian Dream in the latter case). It was the outside powers (represented by the Venice Commission, for instance) that played some balancing role. In the Moldovan and Ukrainian parliaments, strong majorities are almost never created, which provides for more debate and an inclusive constitutional process, even if the same factor often undermines the efficiency of governance.

Whatever the strong or weak features of the formal constitutions in the three countries, all of them face a challenge of extra-constitutional governance. The weakness of democratic traditions and institutions make them vulnerable to powerful extraconstitutional informal influences. The entrenched business oligarchies are the most obvious example. The term, however, is more strictly applicable to the political scene in Moldova and Ukraine, where there is a group of ultra-rich players who sometimes become political players directly, or try to influence the political process by aligning themselves to different political and social players, and own the most influential media. This could lead to some kind of oligarchic pluralism based on infighting between different financial-political groups, especially in Ukraine. This checked the autocratic tendencies of any single political actor, but also makes it extremely difficult to achieve clean, transparent and efficient government.

Until recently, Georgia has not experienced 'oligarchy' in the strict sense, because there has never been a group of powerful

businesses able to manipulate political players. Here, the problem was rather one of the extreme personalisation of politics, with charismatic individual leaders (Zviad Gamsakhurdia, Eduard Shevardnadze, Mikheil Saakashvili) often seen as standing above party systems and constitutional rules. This may have changed with the advent of Bidzina Ivanishvili, who came to power in 2012 largely thanks to his enormous, by Georgian standards, financial resources (he is widely believed to wield powerful informal influence over his ruling Georgian Dream party since his resignation from the position of prime minister in 2013). This makes Georgia's situation somewhat closer to that of Moldova, where Vladimir Plahotniuc, a rich businessman, also calls the shots in the ruling Democratic Party and the country without occupying the position of prime minister or any other elective mandate.

To sum up, the formal constitutions of all three countries are generally conducive to a competitive political process that provides for the creation of accountable government. They also include all the major safeguards for the protection of political liberties and human rights. This does not mean that there is no place for the improvement of the formal constitutional systems (for instance, strengthening local and regional governance may be such an area), but such shortcomings do not prevent these countries from consolidating their democratic political systems. In practice, however, these systems are susceptible to the negative influence of extra-constitutional factors, such as charismatic individuals and their personality-driven parties, and powerful business players known as oligarchs.

The political systems also face a painful choice between efficiency and pluralism that is typical for countries with weak democratic traditions. The period between 2004 and 2013 in Georgia might have been the only one in all three countries when the formal constitutional set-up clearly provided for an excessive concentration of power in the executive. However, it was in this period (especially during the first half) that Georgia carried out the most successful public policy reforms, when the level of corruption went down significantly, while the capacity of the government to produce public goods (as well as the quality of those public goods) increased substantially. The same system also created a genuine threat of the autocratic consolidation of power. On the other hand,



a constitutional environment providing for greater pluralism may also weaken the government's capacity to carry out necessary public policy reforms, thereby enabling powerful plutocratic actors to manipulate the system.

All three countries have yet to find a proper balance between strong and efficacious state on the one hand, and strong democratic institutions capable of imposing genuine accountability on their rulers on the other. They also need to accept that only an inclusive, consensus-based constitutional process will lead to the adoption of legitimate, effective, formal constitutional rules rather than have extra-constitutional powers guide the behaviour of political actors.

## Government performance and legitimacy

Apart from observing democratic norms such as respect for human rights, accountability, and transparency, etc., democratic regimes also need to gain 'performance legitimacy' to demonstrate that they are capable of effectively serving their peoples. When making their political choices, most citizens are not motivated by ideological considerations but by the ability of the government to produce public goods that make their lives better. In post-Soviet countries, democracy has suffered from the widespread perception that democratic pluralism brings chaos, inefficiency and corruption, whereas the autocratic Soviet government delivers more orderly and affluent lives. Communist *nomenklatura* exploited this nostalgia for former times and presented themselves as more competent leaders who could ensure stability after a period of turmoil. Putin's regime in Russia is the most obvious example of such a trend, as it largely based its legitimacy on the contrast with the more democratic but unruly and poor 1990s. It is therefore crucial for democracies to prove that they can perform better than autocracies.

Government performance has been a problem for all the three countries discussed here, although the degree of the problem and the dynamics of development varied. In the 1990s, it was Georgia that suffered the most dramatic implosion of state, caused by both prolonged ethno-territorial conflicts and the crisis of legitimacy engendered by the violent change of the first democratically elected government. At this time Georgia was a textbook example of a failed state, with armed militias competing for control that the government had lost. While basic order was restored by the mid-

1990s, the state was still notoriously weak and corrupt, incapable of collecting taxes, paying salaries to public servants, taking care of public infrastructure, etc. In 2003, it shared 124-128<sup>th</sup> places among 133 nations in the Corruption Perception Index of Transparency International.<sup>11</sup> The trust towards almost all government bodies was below 20%.<sup>12</sup> This overall failure of the government created a background that led to the 'Rose Revolution' of November 2003.

Georgia is also the country that has achieved the most salient success in efforts to reform the government after the Rose Revolution. By 2012, it reached 51<sup>st</sup> place among 174 nations.<sup>13</sup> It also made considerable progress in the areas of fiscal policy, the provision of public services to citizens and the development of public infrastructure, etc.<sup>14</sup> While the breakthrough was achieved during the UNM's period in power, the reforms proved generally sustainable, also when power changed: for instance, by 2016, Georgia's position in the Corruption Perception Index further improved with the country occupying 44<sup>th</sup> place among 176 nations,<sup>15</sup> above a number of European Union countries including Italy, Greece, the Czech Republic, Slovakia, Hungary and Croatia.

This does not translate into great confidence on the part of citizens, however. Between April 2015 and June 2016, the number of Georgians who believed that the country was going in the right direction oscillated between 20-30%, reaching 33% by April 2017 (31% thought that Georgia was going in the wrong direction, and another 31% thought that it was not changing at all). When it came to the performance of institutions, between 30-55% rated the

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<sup>11</sup> Transparency International, *Corruption Perception Index 2002* ([https://www.transparency.org/research/cpi/cpi\\_2002/0/](https://www.transparency.org/research/cpi/cpi_2002/0/)).

<sup>12</sup> International Republican Institute, *Georgia National Voter Study May 2003*; Theodor Hanf and Ghia Nodia, *Lurching to Democracy. From agnostic tolerance to pious Jacobinism: Societal change and people's reactions*, Baden-Baden: Nomos Verlagsgesellschaft, 2000, p. 105.

<sup>13</sup> Transparency International, *Corruption Perception Index 2016* ([https://www.transparency.org/news/feature/corruption\\_perceptions\\_index\\_2016](https://www.transparency.org/news/feature/corruption_perceptions_index_2016)).

<sup>14</sup> World Bank, *Fighting Corruption in Public Services: Chronicling Georgia's Reforms*, Washington, D.C., 2012.

<sup>15</sup> Transparency International, *Corruption Perception Index 2016* ([https://www.transparency.org/news/feature/corruption\\_perceptions\\_index\\_2016](https://www.transparency.org/news/feature/corruption_perceptions_index_2016)).

performance of public service halls, the army, and the police as good or very good, while the positive approval ratings of the Prosecutor’s Office, the courts, and parliament were between 10-13%. This does not mean that people are completely dissatisfied: between 40-50% rated their performance as “average”.<sup>16</sup>

*Table 1.2 Performance of state institutions and the dominant church (“good or very good”)*

	Georgia <sup>17</sup>	Moldova <sup>18</sup>	Ukraine <sup>19</sup>
Army	49	46	57
Police	37	46	41
Courts	13	24	9
Parliament	10	17	14
Church	58	68	62
Country is going in the right direction	31	38	35

Ukraine is often used as a counter-example. It never fell as low in terms of weakness of the state as Georgia did in the 1990s, but following two Maidan revolutions its democratic breakthroughs never translated into any sizeable success in overcoming corruption or increasing the effectiveness of public services. After the 2004 Orange Revolution, the incoming government failed to carry out effective reforms and was soon discredited, losing power to the very candidate (Victor

<sup>16</sup> Public attitudes in Georgia Results of an April 2017 survey carried out for NDI by CRRC Georgia ([https://www.ndi.org/sites/default/files/NDI\\_April\\_2017\\_political%20Presentation\\_ENG\\_version%20final.pdf](https://www.ndi.org/sites/default/files/NDI_April_2017_political%20Presentation_ENG_version%20final.pdf)).

<sup>17</sup> Laura Thornton and Koba Turmanidze, “Public attitudes in Georgia: Results of a April 2017 survey carried out for NDI by CRRC Georgia” ([https://www.ndi.org/sites/default/files/NDI\\_April\\_2017\\_political%20Presentation\\_ENG\\_version%20final.pdf](https://www.ndi.org/sites/default/files/NDI_April_2017_political%20Presentation_ENG_version%20final.pdf)).

<sup>18</sup> Institute for Public Policy, “Barometer of Public Opinion”, April 2017 ([www.ipp.md](http://www.ipp.md)).

<sup>19</sup> “Stavlennia hromadyan Ukrainy do suspilnykh instytutiv, elektoralni orientatsii”, Razumkov Center, 11 October 2017, (<http://razumkov.org.ua/uploads/socio/Press1017.pdf>).

Yanukovych) whom Victor Yushchenko, the favourite of the 2004 movement, had defeated. The government elected in the wake of 2014 'Revolution of dignity' did carry out certain reforms, and achieved some results. In 2015-16 two new institutions were created to prosecute (National Anticorruption Bureau, NABU) and prevent corruption (National Agency for Prevention of Corruption, NAPC), with a number of high-profile investigations into people close to the president and the former prime minister.<sup>20</sup> This brought modest results: in 2016 the Corruption Perception Index scored 29 points, as shown in Table 1.3, which is the highest score for the entire period of measurement, but it still stands for endemic corruption and leaves the country in the 131<sup>th</sup> place among 176 nations – hardly a satisfying position.<sup>21</sup>

*Table 1.3 Levels of corruption*

	<b>Georgia</b>	<b>Moldova</b>	<b>Ukraine</b>
2002	24	21	24
2009	41	33	22
2016	67	30	29

*Notes:* Today, a score of 100 stands for the least corrupt, and a score of 1, for the most corrupt countries. Until 2012, however, Transparency International used a system whereby the least corrupt country would get 10 rather than 100 points. Thus, for instance, in 2006 Georgia's score was expressed as 4.1 rather than 41, but for better visibility we upgraded the older scores to the new format both in Table 1.3 and later in the text.

*Source:* Corruption Perceptions Index, Transparency International (<https://www.transparency.org/research/cpi/>).

This situation is further reflected in the very low trust towards government institutions. In a December 2016 poll, among the most trusted (over 50%) institutions are the church, volunteers and the army; while the least trustworthy (at under 10%) are the

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<sup>20</sup> <http://www.reuters.com/article/us-ukraine-corruption-arrests/ukraine-makes-two-high-profile-detentions-in-corruption-case-idUSKBN17N1AS?il=0>

<sup>21</sup> Ibid.

government, parliament and courts.<sup>22</sup> Over 70% of Ukrainians believe that Ukraine is developing in the *wrong direction*, which reflects a rather high level of public dissatisfaction that may be dangerous for the legitimacy of the political system.<sup>23</sup>

Government inefficiency and corruption are also considered to be a huge problem in Moldova affecting public procurement, the management of the companies with state participation, public assets, but also the integrity of decision-making in areas such as the financial sector, energy, and the environment etc. Generally, Moldova is considered to be a highly corrupt country in the Corruption Perception Index of Transparency International, although it has its ups and downs: in 2012-14 it had the best scores ever of 35-36, but they fell to 33 and 30 (123<sup>rd</sup> place among 176 nations) in 2015 and 2016. This was somewhat better than in the 2000s, in the period of the Communist party rule, when typical scores oscillated between 24-28%.<sup>24</sup> The people of Moldova are deeply dissatisfied with how things are going: according to the Institute of Public Policy research, in April 2017, only 31% of those polled believed that the country was heading in the right direction, and 64% thought it was going in the wrong direction.<sup>25</sup>

Especially for Ukraine and Moldova, increasing government effectiveness, its responsiveness to citizens' needs, and substantively reducing the rate of corruption is an extremely high priority task. This, however, can only be achieved through confronting the key political problem of state institution 'capture' by powerful oligarchic groups or super-rich individuals in all three countries.

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<sup>22</sup> Kiev International Institute of Sociology, "Trust to Social Institutions" ([https://www.transparency.org/news/feature/corruption\\_perceptions\\_index\\_2016](https://www.transparency.org/news/feature/corruption_perceptions_index_2016) <http://kiis.com.ua/?lang=eng&cat=reports&id=678&page=1>).

<sup>23</sup> IRI Poll: Social and Political Moods of Ukrainians, 8 June 2017 ([http://ratinggroup.ua/en/research/ukraine/poll\\_iri\\_dinamika\\_obschestvenno-politicheskikh\\_vzglyadov\\_v\\_ukraine.html](http://ratinggroup.ua/en/research/ukraine/poll_iri_dinamika_obschestvenno-politicheskikh_vzglyadov_v_ukraine.html)).

<sup>24</sup> Ibid.

<sup>25</sup> Source: Institute for Public Policy, [www.ipp.md](http://www.ipp.md).

## Political parties and party systems

The considerable level of political pluralism and competitive political environment are among the most important positive features of the political systems in the three countries. This is what makes them stand out from other, more autocratic regimes in the post-Soviet realm. In these countries, elections often (if not always) constitute an area for meaningful and unpredictable competition for power rather than a mere democratic façade, and elections may be a way for the opposition to come to power (although they are still not the only way).

On the other hand, in all three countries the level of development of political parties and party systems may be one of the main (if not the main) underlying structural weaknesses of democratic institutions. Parties are weakly institutionalised and often personalised, while party systems are fragmented and unstable, and the level of popular trust towards political elites is low. Typically, the party scene may change radically from one election to the other, with once seemingly strong parties often leaving the political scene altogether and being completely marginalised.

There is a tendency to develop, on the one hand, parties of power that are hardly distinguishable from the state administration, and are used more as an instrument of power. However, this merger with the state administration may be their point of vulnerability as they are also dependent on maintaining their position in power for their very existence or organisational stability, and may have a difficult time when they lose levers of administrative control. On the other hand, the opposition may consist of a multitude of small unstable groups lacking consistent and clear policy platforms and stable constituencies, rather than competing for the protest vote and trying to take advantage of the weaknesses of incumbent authorities. People are thus cynical about political parties, considering them as machines that vie for power rather than truly representing their interests. One of the most notable expressions of this mistrust towards the political class was the insistence of Euromaidan activists during the 2014 protests on distancing themselves from all political parties and their leaders, because they were presumed to be corrupt organisations by definition. This contrasts with the 2004 'Orange Revolution', when Victor

Yushchenko and his Our Ukraine party still attracted the broad enthusiasm of protesters. But this party did not survive for long, and disappeared as a political force by 2010.

Arguably, the decline of political parties, including the crisis of their public credibility, is also a problem faced by many established democracies of the West. Here, the negative trend expresses itself in the strengthening of new populist parties with extreme right or left agendas, narrowing the political space for moderate established parties. In the countries discussed, however, there have never been any 'established parties' to begin with, and the behaviour and public rhetoric of most important parties could always be described as 'populist' – at least, when they were in opposition.

In Georgia, the trend to create dominant parties of power, always inspired by their leaders' personalities. The first of such parties, the Citizen's Union of Georgia, was built around the personality of Eduard Shevardnadze after he had already established himself as the country's leader. The same is true of Georgia's Revival Union, built around Aslan Abashidze, the Adjara regional leader. Mikheil Saakashvili's United National Movement (UNM) and Bidzina Ivanishvili's Georgian Dream (GD), on the other hand, originated as broad opposition movements. However, as parties of power, all of them acted in a similar manner, being a tool of political dominance over all branches of state governance, and often constitutional majorities in parliament. Following the 2016 elections, GD outperformed all its predecessors, gaining more than three-quarters of parliamentary seats. All of them, except for UNM, disappeared as soon as they lost power and their leaders left the political scene.

In Ukraine and Moldova, attempts to create stable parties of power were less successful. President-led parties, namely Leonid Kuchma's *For United Ukraine!* (as well as his *People's Democratic Party* and *Social-Democratic Party of Ukraine (united)*), Victor Yushchenko's *Our Ukraine*, Victor Yanukovich's *Party of the Regions*, and Petro Poroshenko's *Bloc* obtained pluralities in parliament (the largest share of votes, but never majorities), so they had to create parliamentary coalitions. In Moldova, only the Communist party had stable parliamentary majorities between 2001 and 2009.

The public personalities of major leaders might have been associated with their political records or charismatic personalities (such as Victor Yushchenko in Ukraine, Eduard Shevardnadze and Mikheil Saakashvili in Georgia), but there is also a growing trend of building new parties around the economic power of rich individuals or oligarchs. In Moldova, Vladimir Plahotniuc, who is often described as possibly the richest individual in the country, came to lead the Democratic Party (PDM) that since the beginning of 2016 has been in control of the Moldovan government. He is believed to effectively coordinate government activities without occupying any official or elected position. Control over the government took place during 2015-16, when Plahotniuc's party absorbed defected MPs from rival partner and opposition parties. This allowed the Democratic Party, outside an electoral exercise, to increase the number of MPs from 19 to 41 in two years. In Ukraine, President Petro Poroshenko is also described as one of the oligarchs, albeit not the wealthiest one. Other oligarchs are actively involved in supporting or opposing the regime and different political figures. It is widely believed in Ukraine that building strong political forces without at least some support from oligarchic groups is very difficult. In Georgia, the Georgian Dream party was created by Bidzina Ivanishvili, who is by far the wealthiest person in the country; although he is not formally in charge of it, he is widely believed to be its main unifying force capable of defining its direction if he so wishes.

This oligarchisation of the political process may be considered to be both an *expression* of political party weakness, and a factor that contributes to the further erosion of public trust towards this key institution of democracy. It shows that society has insufficient mobilisation, cohesion and social and economic capital to support independent political organisations, and the void may be filled by wealthy individuals that replace social groups as powers that either stay at the helm or are behind political parties. But if political parties become the instruments of rich individuals or groups, this gives citizens good reason not to trust them.

Being personalistic, oligarchic and clientelist, the parties usually lack a clear ideological or programmatic vision. The Communist parties in Ukraine and Moldova may be partial exceptions. In these countries (but not in Georgia), Communist



parties and old *nomenklatura* networks were successful at maintaining relatively strong successor organisations. They did not have the agenda of fully restoring Communist-like economic order and accepted the democratic rules of political competition, but their symbolic affiliation with a supposedly more orderly and affluent Communist past gave them a somewhat distinct ideological profile, while linkage to the networks of the former *nomenklatura* helped preserve relative organisational stability. In Ukraine, the Communist party was a strong organised parliamentary force until 2014, and in the 1990s it had the strongest factions in Verkhovna Rada (Parliament) – although other parties in cooperation with independent MPs created parliamentary majorities that excluded Communists. The Socialist party, a more centralist offspring of the CPU, was also influential in the 1990s and up to 2006. However, they never came close to obtaining power. In Moldova, the Communist party was actually in power between 2001 and 2009 but the influence of Communist parties in both countries tended to decline over time, while in Ukraine it was outlawed for allegedly supporting Russian aggression in the east.

Most other parties do not have coherent ideological profiles. They tend to combine campaigning on issues of social justice during elections with centre-right policies when in office. In lieu of the clear programmatic distinctions that tend to characterise parties in the West, differences between parties tend to be identity-based and geopolitical. On the one hand are supporters of the European (or generally pro-Western) policies who usually tend to be stronger supporters of national independence, who are in conflict with those who are sceptical of the idea of European integration and tilt towards stronger cooperation with Russia. This is more obvious in Ukraine and Moldova. In Ukraine, traditionally, the east and the south vote differently from the west and the north, with the latter part being sovereigntist and pro-European. Public opinion polls also confirm this divide: there was never majority support for NATO membership, and quite divided attitudes towards EU integration. However, Russia's annexation of Crimea and the effective control of part of Donbass by Russian-backed separatist forces – the provinces that happened to be most supportive of pro-Russian trends, as well as popular outrage about Russia's

aggressive policies, has tilted the political balance towards Europe.<sup>26</sup>

Despite its image, the Communist party in Moldova was balancing between policies of accommodation with Russia and coming closer to Europe, while the Socialist party (now represented in power by President Igor Dodon) takes an openly Eurosceptic and pro-Moscow line. The pro-European flank is represented by a group of parties that coalesce to create cabinets, as they have done since 2009. In recent years, the Democratic Party (PDM) has become the strongest of them. At present, the pro-Moscow line in Moldova is the strongest among the three countries, which is probably caused by inefficiency and numerous corruption scandals typical of coalition cabinets that are controlled by parties supportive of EU integration. Uneasy cohabitation, and even allegedly occasional coordination, between pro-Russian President Dodon and the pro-European cabinet epitomises the shaky geopolitical balance.<sup>27</sup>

In Georgia, the constituency of pro-Russian forces is the smallest of the three. Since the second half of the 1990s, support for pro-Western policies, potentially also for EU and NATO policies, have become the point of national consensus that no party of any consequence challenged. For the UNM government, support for pro-Western policies became their signature issue. Public opinion polls have showed stable and solid majorities in favour of European and Euro-Atlantic Integration. After the August 2008 war, the informal taboo about open support for pro-Russian positions was broken, probably due to disappointment with insufficient Western support during and after the 2008 war, a backlash against the 'westernising' reforms of Mikheil Saakashvili's government, and Russia's new policies of active support for pro-Russian political and civil society groups. So far, however, this has not led to radical changes in Georgia's political landscape. One openly pro-Russian party, the Patriot's Alliance, barely cleared the 5% barrier to enter the Georgian parliament following the 2016 elections. However, polls also show that the number of supporters for Eurasian over

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<sup>26</sup> See <http://kiis.com.ua/?lang=eng&cat=reports&id=713&page=1&y=2017>.

<sup>27</sup> Expert-Grup, "State of the Country Report 2017" (<http://expert-grup.org/en/biblioteca/item/1482-raport-de-stare-a-tarii-2017>).

European integration grew to about 25%, and is especially high among Armenian and Azeri ethnic minorities.<sup>28</sup>

The political party scene is also influenced by electoral legislation, namely the balance between majoritarian (single-mandate constituency seats). In Ukraine, this balance has never become the point of contention between different political parties, save for the 1994 elections (when elections were based on single-mandate constituencies) and the 2006-07 elections (based on the PR principle), the 50/50 principle has been working, with half of the 450 seats elected through proportionate representation, and the other half in single-mandate constituencies). This system is still in place, despite some pressure to change to a purely proportionate system with open candidate lists. The parties of power tended to have some advantages in single-constituency districts and gave preference to strengthening that component of the electoral system.

In Moldova, the proportional electoral system had been in place since early the 1990s, but in 2017 it changed to a mixed system whereby 50 of 101 MPs are elected, as before, through party lists, and 51 from single-mandate constituencies. This change, adopted despite protests from the opposition and civil society, and ignoring recommendations from the Council of Europe and the EU, was supported by the Democratic Party and the Socialists, the two parties that control, respectively, the cabinet and the presidency. This confirms the trend that incumbent parties hope to benefit more than opposition parties from the majoritarian or first-past-the-post elections in single-mandate constituencies.

In the case of Georgia, the mixed system had been used in all elections, except for 1992. In 1995-2004, the number of seats apportioned by the proportional system exceeded that of single-mandate constituencies, but after the number of seats was reduced to 150, the system was about 50/50. The majoritarian component strongly favoured the parties in power and was considered the main reason for the creation of parliamentary supermajorities. As a result, the opposition and pro-democracy groups advocated the

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<sup>28</sup> Laura Thornton-NDI Georgia, Koba Turmanidze-CRRC Georgia, "Public attitudes in Georgia. Results of a November 2016 survey carried out for NDI by CRRC Georgia" ([https://www.ndi.org/sites/default/files/NDI\\_November%202016%20poll\\_Issues\\_GEO\\_vf.pdf](https://www.ndi.org/sites/default/files/NDI_November%202016%20poll_Issues_GEO_vf.pdf)).

introduction of a fully proportionate system, while incumbent parties supported the status quo. In 2016, the ruling GD obtained 48% of the vote according to party lists, but having carried nearly all single-mandate constituencies, won 117 out of 150 parliamentary seats. During the next overhaul of the constitutions in 2017, the GD majority agreed to switch to a purely PR system, but this change will only come into force after the next parliamentary elections expected in 2020.

The chief cause for concern is that changes within the political landscape show little sign of improvement. Parties continue to rely on personalities and most important ones increasingly rely on the political interests of plutocrats. In Moldova, the geopolitical division between pro-Russian and pro-European outweighs all other public policy considerations, and the former tends to be currently on the rise. Georgia is still prone to creating dominant parties with parliamentary supermajorities. The public is even more disillusioned with its political class. Substantive progress towards the consolidation of democracy in all three countries is hardly possible without the development of strong political parties that convince citizens of their ability and willingness to represent their interests, and distinct political agendas that allow for an improvement standard of living.

## **Revolutionary and rule-based forms of political competition**

Lack of trust in the political class and the resulting scepticism about the validity of procedural democracy that may be ‘captured’ by oligarchic interests results in the general weakness of representative democracy institutions on the one hand, and a greater readiness to revert to forms of direct democracy, such as mass rallies and acts of civil resistance that might oust the government. The relatively high legitimacy of such methods of political struggle is partly justified by popular mistrust about the integrity of procedures of electoral democracy and political parties, as well as the practices of incumbent governments that often question the very legitimacy of opposition groups and use selective justice procedures to prevent their most dangerous opponents from taking part in the political process. This gives credence to claims that a mobilised public may serve as a more authentic representative of the will of the people

than the latter's duly elected representatives. In practice, this expresses itself in unconstitutional changes of power, or in attempts at such changes.

This problem is much more pronounced in Georgia and Ukraine than in Moldova. In both former countries, power changed twice through unconstitutional means. In Georgia, the first democratically elected president, Zviad Gamsakhurdia, was ousted in a bloody popular rebellion or coup in January 1992. This was succeeded by a deep crisis of legitimacy, a break-down of statehood, and civil war, from which the country took years to recover. The second such episode occurred in November 2003, when broad popular protests caused by blatantly rigged parliamentary elections forced President Shevardnadze to resign: this came to be known as the 'Rose Revolution'. This time, the protest took the form of peaceful civil resistance, while after the president's resignation the processes swiftly resumed the constitutional mould, and the incoming UNM government carried out reforms that led to the strengthening of political institutions and much more efficient government.

While the peaceful character of the Rose Revolution conditioned its generally positive image in the collective memory, it failed to consolidate a system whereby only constitutional methods of fighting for power were considered acceptable. In 2007 and 2009 the Georgian opposition – alleging that the autocratic nature of Mikheil Saakashvili's rule made it impossible to change government through elections – tried to replicate the Rose Revolution methods by mobilising a broad peaceful protest movement, but without success. While in October 2012 the GD coalition came to power peacefully through elections, before that there were widespread expectations among both government and opposition supporters of a large post-election turmoil (with one side hypothetically refusing to accept their actual outcome). Despite the fully constitutional transfer of power, however, the winning GD government opened criminal cases against almost all leaders of the former government, including President Saakashvili) that many observers considered to be a political vendetta based on selective

justice.<sup>29</sup> Currently, it is a popular opinion among supporters of the UNM, the strongest opposition party, that GD will not allow a peaceful transition of power, so sooner or later the mobilisation of street protests to that end may become necessary. This view is not widely shared, but neither is there consensus that only constitutional means of contesting power will be acceptable from now on.

In Ukraine, the 2004 'Orange Revolution' followed a scenario close to the then recent Georgian case: in allegedly rigged presidential elections Victor Yanukovych was declared winner in the run-off with Victor Yushchenko, which then led to protracted public protests that forced the government to declare the election results null and void and set a re-vote, won by Yushchenko. This was another example of successful peaceful resistance movement in support of democracy, and it did indeed bring about greater democratic pluralism and created hopes of democratic consolidation. However, as hopes generated by the Orange Revolution were frustrated due to lack of successful government reforms, by 2009 the support for pro-democracy forces dropped.<sup>30</sup> In 2010, Yushchenko lost elections and conceded power to Victor Yanukovych, and later his Party of the Regions also gained plurality in Parliament. The precedent of constitutional change of power was perceived by some scholars as an indicator of the consolidation of democracy, but such assessments proved premature. Yanukovych took a harder line, imprisoning his main political opponents, including Yulia Tymoshenko, his main rival in the 2010 elections. The second Maidan revolution of 2013-14 was much more dramatic: it was prompted by Yanukovych's decision to drop the plan of association with the EU in favour of joining the Russia-led Eurasian Union, led to armed clashes between the police and the protesters and ended up with President Yanukovych fleeing the country. This change of power also gave Russia a pretext to annex Crimea and instigate a separatist rebellion in the south-eastern Ukraine.

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<sup>29</sup> Denis Corboy, William Courtney and Kenneth Yalowitz, "Justice or Vengeance?", *International Herald Tribune*, 26 November 2012; Parliamentary Assembly of the Council of Europe (PACE), *The functioning of democratic institutions in Georgia*, Resolution 2015 (2014).

<sup>30</sup> <http://kiis.com.ua/?lang=eng&cat=reports&id=299&page=1&y=2009>.

It remains to be seen whether the second Maidan revolution will after all lead to the consolidation of rules-based electoral democracy. However, there is no guarantee that political competition will remain within the limits of the law. This was indicated, for instance, by a September 2017 episode, when Mikheil Saakashvili, this time a Ukrainian opposition politician, forced his way, together with his supporters, through the Ukrainian border. He chose to do this because several weeks before President Poroshenko deprived him of his Ukrainian citizenship, allegedly on political rather than legal grounds. Several of the most popular Ukrainian opposition politicians supported Saakashvili's action and actually stood by his side, which showed that the episode may set the tone for the following political processes. The process continued by erecting a tent town in Kyiv, but at the time of writing the protesters only call for accelerating reforms rather than the resignation of the government.

The cases of Victor Yanukovych winning presidential elections in Ukraine in 2010, and of the GD defeating the UNM in Georgia in 2012 show that peaceful constitutional transitions of power from government to the opposition are possible in these countries. In both cases, these precedents were broadly welcomed as signs of imminent democratic consolidation. But the general tendency towards concentration of administrative resources by the incumbent government, the weakness of opposition parties and the weak rule of law hampers the creation of a level playing field for the government and opposition players, and undermines the trust of the citizens that governments may be voted out of power by routine procedures.

Moldova has never experienced an unconstitutional change of power. The change of power usually takes place through elections that according to ODIHR reports are considered generally free and fair, but in reality are influenced by the use of administrative, media and poorly accountable resources. The only case when Moldova was close to turmoil that could endanger the constitutional process was in 2009, when the youth riots in April reacted to the outcomes of elections of April 2009, when the

Communist party gained 60 seats in the legislative.<sup>31</sup> The riots ended with violent persecution of the protesters by police and state security forces. This provoked public reaction that undermined the legitimacy of the Communist party and prompted political support for the so-called pro-European parties. This complicated the appointment of the country's president in the parliament that failed to obtain 61 votes and triggered early elections in July 2009, which became a departure point for all the pro-EU governing coalitions that have run the country since then.

In all three countries, the vast majority of people cherish stability and loathe any repetition of revolutionary turmoil. Currently, there are no indicators that any of the three countries may be moving towards another unconstitutional change of power. However, these societies have still not reached a stage described by Alfred Stepan and Juan Linz as rule-based electoral democracy being 'the only game in town'.<sup>32</sup> The perception is still widespread that the incumbent government may manipulate the system in a way that does not allow the opposition a chance to meaningfully challenge their position in power. This provides legitimacy for agendas and tactics that imply a possibility of an extra-constitutional use of 'people power'. This weakens citizens' trust towards democratic political institutions, and continues a challenge to long term political stability of the country.

## **Media, civil society, media, popular movements, social forces, religious groups**

Georgia, Moldova and Ukraine largely owe their image as mostly democratic countries to their vibrant and pluralistic civil society scene, which includes independent media and different popular movements. Generally, civil society actors are free to express their

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<sup>31</sup> Resolution of the European Parliament of 300 April 2009 regarding the situation in Moldova (<http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+MOTION+B6-2009-0264+0+DOC+XML+V0//EN&language=en>).

<sup>32</sup> J.J. Linz and A. Stepan (1996), *Problems of Democratic Transition and Consolidation: Southern Europe, Latin America and post-communist Europe*, Baltimore, MD: Johns Hopkins University Press.



opinion, including harsh criticism of the governments in all three countries. Legislation does not on the whole create unnecessary hurdles for the functioning of such groups.<sup>33</sup> Moreover, at some point they may influence the process of political agenda-setting, or specific political decisions.

Civil society organisations frequently serve as a pool for political and civil service appointments, especially when pro-European pro-reform parties come to power. This sometimes allows them to pursue their agenda on a new level. For instance, the success of reforms after the Rose Revolution is often ascribed to the fact that most political teams pushing for reforms came from civil society organisations and brought with them fresh attitudes and bold visions. In Ukraine, NGO coalitions are active and creative in trying to push the reform agenda: “Reanimation Package of Reforms” is the latest such initiative.<sup>34</sup> In Georgia, an NGO the *Es shen gekheba* (“This affects you”) coalition was active in the last period of UNM rule and sometime afterwards, pushing for specific demands in the area of human rights with occasional success in influencing government policies. In December 2016, in Moldova, the joint actions of civil society prevented the adoption of the draft law allowing tax and capital amnesty, which would have legalised illegally obtained wealth while encouraging further illicit practices.<sup>35</sup> Signing Association Agreements with the EU boosted civic activism in each of the three countries, where civil society platforms and domestic advisory groups largely focus on advocating and monitoring reforms linked to the Europeanisation process. This contrasts sharply with most other post-Soviet countries where increasingly restrictive and repressive laws are

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<sup>33</sup> However, there is a growing pressure on anticorruption NGOs in Ukraine that now must report on their income in the e-assets declaration system together with highest officials and politicians. In the case of Moldova, there were some attempts to limit the activity of the NGOs that receive funds from abroad, which were dropped as a result of civil society’s opposition, supported by the donor community.

<sup>34</sup> See information on the coalition at <http://rpr.org.ua/en/>.

<sup>35</sup> Legal Resources Centre from Moldova, December 2016 (<http://www.crjm.org/en/amnistia-fiscala-si-de-capital-republica-moldova/>).

instituted that treat NGOs and independent media as subversive forces that may also be unwelcome agents of foreign influence.

The role of civil society during the 2004 'Orange Revolution' and the 2013-14 'Revolution of Dignity' were high points that showed the power of civil society in Ukraine. The same is true of the role of Georgia's civil society during the 2003 'Rose Revolution'. Civil society played an important role by setting the agenda for the protest movements, mobilising citizens' participation, keeping the movement within the limits of peaceful civil resistance, and demonstrating a high level of organisation and resilience during the lengthy stand-off between the government and the public. In the case of the 2013-14 Ukrainian movement, especially when political parties were deliberately sidelined, the spontaneous self-organisation of civil society played a decisive role in the success of the movement.

Yet several structural weaknesses challenge civil society in these countries. Civil society organisations mostly depend on external players and communicate less effectively with local constituencies, making them insufficiently embedded in the wider society.<sup>36</sup> Many citizens perceive civil society organisations as elite groups with links to foreign donors, which makes it easier for governments to ignore their demand for reform. Moreover, the image of civil society as a force promoting foreign, namely European agendas is used by conservative, often Church-related and pro-Russian groups, to discredit them and resist their liberal calls for anti-discrimination legislation, for example.

While the media is generally free and pluralistic in all three countries, its ownership structure is problematic. In Ukraine, most influential media outlets belong to the big oligarchs that hold media pluralism hostage to their competing political interests. In Georgia, where there is no pluralism of oligarchs, most popular media organisations fall under government influence, which curbs public access to different sources of information and opinion. One of the most important points of criticism against Mikheil Saakashvili's rule in Georgia was that since 2008, the three top TV companies were

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<sup>36</sup> K. Smaglyi, "A Wake Up Call for Ukraine's Civil Society", Kennan Cable No. 25 (<https://www.wilsoncenter.org/publication/kennan-cable-no25-wake-call-for-ukraines-civil-society>).

subservient to the government view. Currently, the situation is better since Rustavi-2, one of the two most popular TV companies, informally affiliated to the strongest opposition party, and is strongly critical of government policies. The authorities appear resolved to take control of the company through a proxy businessman who claims it was unlawfully deprived of ownership in the past. The legal process has signs of political bias, and only intervention by the European Court of Human Rights has suspended the process of company takeover.<sup>37</sup>

Though less pronounced, the trend of leading political parties trying to take control of main media outlets is also true of Moldova. The most powerful Democratic Party has built a powerful media empire directly covering, or via proxies, four TV channels (Prime, Publika TV, Canal 2 and 3) with national coverage, including radio stations, online and to a lesser extent the printed press. Other parties have their own media organisations but not nationwide TV companies, which wield the greatest influence over public opinion. For the survival of independent media, the advertising market plays a decisive role, but approximately 50-60% of this market is controlled by the most powerful oligarch of the country, the Democratic Party leader Vladimir Plahotniuc. Even the recent amendments to the Audio-visual Code that limit the ownership of licences to two are avoided by transferring the control of media institutions to various proxies.

In sum, while all three countries enjoy a relatively high level of media pluralism, with citizens for the most part having access to various opinions, media freedom is without solid grounds and is vulnerable to political intervention. The internet is fairly free in all three countries and is increasingly influential for young and educated people. Television remains the most powerful media, however, and control of the most popular national TV networks offer considerable advantage to specific political players. Without equal access to this most influential media, there is no level playing field for different political actors.

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<sup>37</sup> Luis Navarro, "Georgia's Back and Forth Freedom Marches: The Case of Rustavi-2", Foreign Policy Research Institute (FPRI), 7 March 2017 (<http://www.fpri.org/article/2017/03/georgias-back-forth-freedom-marches-case-rustavi-2/>).

Religious organisations may also play a role, but the situation in all three countries is different. In Ukraine, there is a split between two major Orthodox denominations: one is led by Kiev Patriarchy, is independent from Moscow and strived to be represented an autocephalic Orthodox Church, the other is subordinate to Moscow Patriarchy (most Orthodox Ukrainians belong to this Church). The split is highly politicised: the Kiev Patriarchy is supported Victor Yushchenko and generally pro-Western political forces, earning political support in return, while Victor Yanukovych and his Party of the Regions had a similar relationship with Moscow Patriarchy-oriented groups. After Euromaidan, new ruling groups planned to adopt legislation aimed at limiting the activities of churches whose leadership was based in an “aggressor state”, which implies Russia – a step that may be a blow to a Moscow-subordinated Orthodox Church in Ukraine.<sup>38</sup>

There is similar division in Moldova, where there is the Metropolis of Moldova (Moldovan Orthodox Church), which is affiliated to the Russian Orthodox Church, and another Orthodox religious organisation subordinated to the Romanian Orthodox Church. The former is much more powerful and politically active, however. The Metropolis of Moldova tacitly supported the pro-Eurasian (in effect, pro-Russian), anti-European Igor Dodon’s candidacy for president,<sup>39</sup> and promised to revoke the anti-discrimination law adopted in May 2012. On the other hand, Dodon’s Socialist party presents itself as a champion of traditional family values, claiming that European integration threatens these values and calling on Moldovans to embrace Eurasian civilisation.<sup>40</sup> In addition, the same Church opposed anti-discrimination legislation as it allegedly ‘promoted’ homosexuality, citing it as an

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<sup>38</sup> Paul Goble, “Ukrainian Legislation about Religion Will Finalize Divorce between Kyiv and Moscow”, *Euromaidan Press*, 19 May 2017 (<http://euromaidanpress.com/2017/05/19/ukrainian-legislation-about-religion-will-finalize-divorce-between-kyiv-and-moscow-euromaidan-press/>).

<sup>39</sup> Denis Cenușă, “Geopolitical Games Expected Ahead of Moldova’s 2018 Elections”, 10 October 2017 (<https://www.fpri.org/article/2017/10/geopolitical-games-expected-ahead-moldovas-2018-elections/>).

<sup>40</sup> Denis Cenușă, “European values versus traditional values and geopolitical subtext in Moldova”, IPN, 29 May 2017 (<http://www.ipn.md/en/integrare-europeana/84125#>).

indication of Europe promoting 'immorality' in its neighbourhood. The latest gesture of Igor Dodon is the signature of the CIS Declaration of 11 October 2017 promoting traditional family values.

In Georgia, the Georgian Orthodox Church (GOC) is the single dominant religious organisation. It is strongly linked to Georgia's national identity and its privileged status is legally established through a 2002 Constitutional Agreement between GOC and Georgian state. GOC's official position is that it supports Georgia's European integration. However, many members of the clergy, including those close to the top of the hierarchy, view European integration policies as a threat to public morality and indigenous Georgian culture. For instance, the Church actively opposed anti-discrimination legislation because it included clauses prohibiting discrimination based on sexual orientation and gender identity. Moreover, a number of NGOs are affiliated to the Church or claim to be defending traditional religious values. Such organisations (that may fall under the category of 'uncivil society') often use violence to attack representatives of minority religious denominations or groups that promote liberal values, especially the rights of LGBT community.

## **External policies and influences**

All three countries have long experienced two types of external influences – from Europe and from Russia. This implies not just general geopolitical competition, but also impacts on the trajectory of development of domestic political institutions. Very few players can compete with these two. The US is also an important actor, but its general policies towards this region, including efforts at democracy promotion, are indistinguishable from those of the EU, and local actors often conflate them into a general vision of 'the West'. However, the EU's EaP and AA institutional frameworks make it the chief democracy-promoter in these countries.

While these two vectors were also perceived as competing and pushing the countries in opposite directions in the 1990s, this competition gradually became more confrontational in the 2000s. The first impetus to this trend was given by the colour revolutions in Georgia and Ukraine of 2003 and 2004. While the West generally welcomed them as legitimate expressions of people power in protest at electoral fraud and to support the domestic forces of

reform, Russia's leadership perceived the same events as Western conspiracy to install anti-Russian regimes in its immediate neighbourhood, thereby creating a model and precedent for similar 'regime change' in their own countries. Thus, for Russia's political elite, the advance of democracy in its neighbourhood acquired geopolitical significance, with democracy promotion by Western actors being perceived as hostile anti-Russian acts.

The Russian-Georgian war of 2008 and Russia's hostile acts towards Ukraine in 2014-17 following the 'Revolution of Dignity' was the next step in which Russia punished Georgia for its attempts to join NATO and Ukraine for its choice to associate itself with Europe. Trade sanctions applied to Georgia, Moldova and Ukraine in response to the signature and ratification of the AA/DCFTA by these countries were also a form of punishment, albeit a milder one.

*Table 1.4 Support for different foreign policy options (%)*

	<b>Georgia<sup>41</sup></b>	<b>Moldova<sup>42</sup></b>	<b>Ukraine<sup>43</sup></b>
EU integration	62	39.4	53
Eurasian Integration	23	39.9	18

The effect of Russia's actions was that efforts aimed at democratic development in the three countries of the EaP that chose the path of European integration became "geopoliticised". While Europe is the chief democracy promoting actor in the eastern European AA region, Russian political elites consider the same countries as geopolitical battlefields, where the possible success of democratic reforms is only understood as an attempt to undermine Russia's interests in the region. Russia therefore acts as a spoiler

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<sup>41</sup> Laura Thornton and David Sichinava, "Public attitudes in Georgia, Results of a June 2017 survey carried out for NDI by CRRC Georgia" ([https://www.ndi.org/sites/default/files/NDI%20poll\\_june%202017\\_ISSUES\\_ENG\\_VF.pdf](https://www.ndi.org/sites/default/files/NDI%20poll_june%202017_ISSUES_ENG_VF.pdf)).

<sup>42</sup> Institute for Public Policy, *Barometer of Public Opinion*, April 2017 ([www.ipp.md](http://www.ipp.md)).

<sup>43</sup> *Public Opinion Survey of Residents of Ukraine (April 21 – May 5, 2017)*, conducted by International Republican Institute, Rating Group Ukraine and the Center for Insights in Survey Research, accessed online (checked on 4 November 2017) ([http://www.iri.org/sites/default/files/2017-may-survey-of-residents-of-ukraine\\_en.pdf](http://www.iri.org/sites/default/files/2017-may-survey-of-residents-of-ukraine_en.pdf)).

rather than as a country providing an alternative model of development: it aims to discredit the very idea of Europe-inspired democratic reforms and the political forces associated with this policy direction.

Hence it is Russia's priority to counter European efforts by strengthening the pro-Russian actors in the three countries. On the political level, it is most successful in Moldova where president Dodon and his Socialist party openly prefer Eurasian to European integration. However, the success of this party can be explained not so much by Russia's efforts as by the collapse of public support for the notionally pro-European parties that were discredited by corruption, bank fraud and the overall poor performance of the governing coalitions controlled by these parties. In Ukraine, Russia's aggressive behaviour since 2014 undermined its influence on the Ukrainian political scene, but the government's poor performance can also be used by Russia for political purposes. In Georgia, the openly pro-Russian political forces are relatively weak, but the relative increase in support for the option of Eurasian (rather than European) integration still implies that Russia can have levers within Georgia as well.

Apart from political parties, Russia uses alliances with civil society, media and religious groups to promote its agenda. In all three countries, Orthodox Churches (in Moldova and Ukraine, those directly affiliated with Moscow Patriarchy) are considered open or tacit allies of Russia. Russia also tries to support pro-Russian media-organisations, websites, and civil society groups.

It is also notable that ethnic minority-populated areas often tend to be less supportive of the European integration path than overall population. For instance, during an unconstitutional referendum held in February 2014, approximately 98% of Gagauzian voters in Moldova supported integration with the Russian-led Customs Union.<sup>44</sup> Armenian and Azeri-populated areas in Georgia are also less supportive of the EU and NATO

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<sup>44</sup> Radio Free Europe (<https://www.rferl.org/a/moldova-gagauz-referendum-counting/25251251.html>).

integration projects, although the difference here is less marked.<sup>45</sup> This is an additional reason for Russia to focus its 'soft power' policies on ethnic minorities in the pro-Western neighbours (although 2014 Russian intervention in the regions of Ukraine that were least supportive of the country's pro-Western policies went beyond 'soft power' methods).

Nevertheless, the principal success factor in all of these propaganda and disinformation efforts is the failure of democratic and good governance reforms in Association Agreement countries. While Russia has some geopolitical levers such as influencing conflicts in the east of Ukraine or 'frozen conflicts' in Georgia and Moldova, it is the success or failure of reforms that determines the influence of these competing world views.

## Concluding remarks

The state of democratic development in Georgia, Moldova and Ukraine allows for both pessimistic and optimistic conclusions. The three countries face significant, and differing structural problems in their democratic development, but there are major similarities.

Nation-building processes in each country have been challenged by minorities disagreeing about their place and status within emerging nation states and/or the external manipulation of these disagreements, which led to violent conflicts, and the reality of 'frozen' or (in Ukraine) 'semi-frozen' conflicts and secessionist movements. None of the countries managed to create a reasonable distance between economic and political elites, such that being close to power almost becomes a necessary condition of gaining wealth, and the super-rich often succeed in converting their economic resources into political power, thus becoming 'oligarchs'.

Corruption and state capture have become endemic in political regimes, although since 2004 Georgia has had more success than others in tackling that challenge. Trust in state institutions is rather low: only a fraction of people believe that they are doing good

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<sup>45</sup> In an April 2017 poll, 54 percent of respondents in minority areas supported Georgia's policy to join the EU, against 80 percent nation-wide. See Laura Thornton and Koba Turmanidze, *Public attitudes in Georgia Results of April 2017 survey carried out for NDI by CRRC Georgia*.



job at providing public goods, and only a minority in each country agree that their countries go in the right direction.

The institutions of electoral democracy are not fully trusted either: while there have been precedents of power change through elections in each of the three countries, such changes have not become routine, and in some cases peaceful or not so peaceful revolutions were needed to oust unpopular governments. Still, there is no consensus among the major political players (in Georgia and Ukraine) that elections are the only legitimate means to gain political power. Such scepticism about electoral democracy is caused by the absence of fair political competition, due to the incumbent authorities' propensity to monopolise political control, harass and delegitimise the opposition, apply selective justice, take control of the most influential media outlets, and other undemocratic practices.

The public is generally supportive of democratic institutions and occasionally displays an enormous capacity to mobilise for democratic causes – but has so far failed to develop a robust network of intermediate institutions, such as stable political parties or broad public associations that could articulate, represent and advocate for interests of different segments of society. As a result, the ongoing political competition is mainly between charismatic (or super-rich) personalities and broad identity-based geopolitical orientations rather than between political visions and platforms. There is no public consensus on values of diversity, pluralism and tolerance of minority cultures or lifestyles, with influential social groups such as Orthodox Churches promoting openly illiberal agendas.

There are also genuine grounds for optimism, however. Despite autocratic trends, all three countries have proved resilient in preserving relatively high levels of political and media pluralism, and more or less competitive political environments. There has been significant progress in specific areas of political reforms. Constitutions (if not necessarily constitutional processes) generally satisfy modern democratic principles, even if parties in power tend to tailor them to their political interests.

Despite active propaganda and disinformation from illiberal and anti-Western groups and organisations, liberal democracy continues to be the only normative reference for most political

actors. Civil society, while insufficiently rooted in the broader public, has been active, vibrant, relatively well-organised and successful in setting agendas for reform, occasionally influencing political decisions. As a result, while the political regimes in all three countries have never reached the point of democratic consolidation, they are considered by most observers to be freer than any other successor-states of the Soviet Union (with the exception of the Baltic states), and closer to being democracies than autocracies.

The European dimension has been an extremely important factor for the continuous democratisation of all three countries. Despite competition between European and Eurasian identities, each of them ultimately considers itself to be a European country. The choice to pursue the path of association with Europe, which the countries made despite obvious political risks (especially momentous in the case of Ukraine) is the best proof of their genuine commitment to the European path of development. This gives the EU considerable leverage in these countries, which has been used to urge them to carry out democratic reforms, or – at the very least – to limit autocratic trends.

In the future too, the EU can play a very important, if not decisive role in helping these countries consolidate their democratic systems. However, with Association Agreements having been concluded, visa-free regimes granted, and the EU reluctant to extend a membership perspective to these countries, there is a shortage of incentives that the EU can use to back up its democracy-promotion efforts. In order to keep up momentum for the process of reforms, it is vital that the EU develop a clearer forward-looking strategy towards the emerging AA-DCFTA region in its eastern neighbourhood, including convincing incentives for the further Europeanisation of these countries.

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## 2. OLIGARCHS AS KEY OBSTACLES TO REFORM

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& KORNELY KAKACHIA

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### Introduction

The chapter reviews the role of oligarchs in Georgia, Moldova and Ukraine. Oligarchy is a term being used to denote a system of governance in which a small number of very wealthy individuals are able informally to control or strongly influence state policy. The portfolios of economic assets of the main oligarchs of the three countries is described in some detail. The nature of their influence on policymaking is further analysed, in particular the disadvantages for the governance

of these countries.

While these impacts differ in their detail by country, in general terms they tend towards limiting political pluralism, capturing state institutions, corruption, monopolisation, and more broadly the blocking of reform processes. Oligarchs are symptoms rather than causes of weak political institutions. Correspondingly, the remedies need a wide reach, including institutional capacity-building, effective anti-corruption bodies, suitable public funding for political parties, effective competition policy and an independent judiciary and media, supported by many features of the Association Agreements and DCFTAs with the EU. Modern

economies will always need major business leaders and enterprises. The challenge is how to transform the oligarchs into normal business leaders.

The oligarchic system has been known since ancient times, and is still a phenomenon in some of the post-Soviet states.<sup>1</sup> Although the situations in Ukraine, Moldova and Georgia are different, there are also significant similarities. The most obvious is that all three have signed Association Agreements with the EU and declared European integration to be a key priority of their domestic and foreign policies.

It appears that the negative legacy of post-Soviet oligarchs has not been fully acknowledged by the West, and has therefore been insufficiently studied. Part of the reason for this may be difficulties in fact-finding and describing and proving oligarchic influence, which is often a chain of opaque political, economic or financial operations. Oligarchy is an informal institution and in some respects it is more important in Ukraine, Moldova and Georgia than the formal institutions and norms based on their constitutions. Anyone studying oligarchy is therefore forced to rely on presumptions rather than hard facts. Behind-the-scenes oligarchic systems are extraordinarily important to understanding the policy-shaping mechanisms at work in Ukraine, Moldova and Georgia, and are a real obstacle to structural reform.

## Who are the oligarchs?

The oligarchs' origins are different in each of the three countries. In **Ukraine** oligarchs first emerged as important players in the mid-1990s and quickly became a dominant feature of domestic political and economic life. Ukraine's transformation and privatisation process resulted in the emergence of several business groups that accumulated economic power by controlling key economic sectors. In order to defend their assets they started investing in politics, thus becoming key political players. The most powerful oligarchs of the last two decades are Rinat Akhmetov, Ihor Kolomoyskyi and

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<sup>1</sup> The term 'oligarchy' was coined in the mid-1990s in Russia, and popularised by Russian sociologist Olga Kryshchanovskaya.



Dmytro Firtash.<sup>2</sup> In addition, over a dozen smaller groups can be defined as oligarchic.

The oligarchs in Ukraine have mostly been reluctant to hold public positions, but instead either establish their own means of political action or support existing parties in exchange for lobbying for their interests. They have never monopolised state power, but thanks to their resources they have become the indispensable partners of the political class. One distinctive characteristic is the oligarch's political flexibility. They lack consistent political sympathies and support any political party they deem useful for the protection of their business empires.<sup>3</sup>

The last two decades have shown that the periodical changes of political regime in Ukraine have had little effect on the country's enduring oligarchic system. Despite reshuffles among Ukrainian oligarchic groups and some loss of influence, a core of oligarchs remains stable.<sup>4</sup> Likewise, in the three years since the Revolution of Dignity, the oligarchic system has been weakened but remains an important element in political and economic life. Some of the formerly most powerful oligarchs were eliminated as a factor in Ukrainian politics (the so-called Family or oligarchic group centred around the former President Victor Yanukovych's and led by his son Oleksandr and by Serhiy Kurchenko), or lost part of their influence (Dmytro Firtash's group), but others are still influential (such as the Kolomoyskyi group and so-called agrarian oligarchs representing the fast-growing agriculture sector). A special case is Petro Poroshenko, who – before being elected president – had been considered a second-rank oligarch with substantial political experience (formerly he served as minister of foreign affairs and economy). Obviously, his position and influence has increased significantly but his main business asset, the Roshen confectionery company, was passed to a trust fund managed by the Rothschild

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<sup>2</sup> See further below on requests for Firtash's extradition, which may now limit his influence.

<sup>3</sup> Jaba Devderiani, *Between Europe and Russia, oligarchs rule*, Carnegie Europe, 1 December, 2016.

<sup>4</sup> Heiko Pleines, "Oligarchs and politics in Ukraine", *Demokratizatsiya: The Journal of Post-Soviet Democratisation*, 24 (1), winter 2016, p. 125.

Group.<sup>5</sup> Overall, the oligarchic system still shapes Ukraine's politics and economy.

In **Moldova** the first steps towards an oligarchic system were taken during the rule of the Communist Party (2001-09), but the process of the country's oligarchisation accelerated during the first period in power of the Alliance of European Integration coalition (2009-13). Its main shareholders were the Prime Minister Vlad Filat, leader of the Liberal Democratic Party of Moldova (PLDM), and Vlad Plahotniuc, the informal leader and sponsor of the Democratic Party of Moldova (PDM). Both politicians became allies and key players in Moldovan politics, but there was also a constant 'under the carpet' struggle between them for political influence and business assets. This period of difficult co-habitation has also been called 'oligarchic pluralism', as before entering politics Plahotniuc and Filat were seen as successful businessmen, and both are among the richest citizens of Moldova.<sup>6</sup>

In 2014 the relationship between the two politicians suffered a definitive rupture, and as a result in October 2015 Filat was arrested and sentenced to nine years in prison. This led to the monopolisation of power by one oligarch, Vlad Plahotniuc, who due to his control of the state's main institutions has concentrated unprecedented political and economic instruments in his hands. The overwhelming scale of Plahotniuc's influence and his currently unchallenged position make it possible to say that Moldova is now displaying the symptoms of a 'captured state'.<sup>7</sup>

The situation in **Georgia** is very different from that in Ukraine and Moldova because previously there had not been a group of wealthy people who divided spheres of control. Georgia's slow economic development, relatively small market and unstable political situation did not allow the 'luxury' of an oligarchy. During Eduard Shevardnadze's presidency (1995-2003) attempts were made by members of his family to take control of some business

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<sup>5</sup> Rothschild says Ukraine president's trust up to international standards, Reuters, 7 April 2016.

<sup>6</sup> Kamil Całus, Moldova: from oligarchic pluralism to Plahotniuc's hegemony, *Centre for Eastern Studies*, 11 April 2016.

<sup>7</sup> Denis Cenușă, "Captured state" and "useful oligarchs" in proximity of EU: Moldova, Georgia and Ukraine, IPN, 17 October 2016.

assets, but ultimately this failed. Instead, a specific type of oligarchs emerged who made their fortunes in Russia in the 1990s and belonged to the Russian oligarchy during its most powerful period (from the mid-1990s to 2003, when the so-called Yukos affair started and the previous oligarchs lost their former power).

In the late 2000s these Russian oligarchs of Georgian descent returned to their homeland and decided to translate their wealth into political power. The three most important figures were Badri Patarkatsishvili, who attempted a state takeover in 2007 but failed (and died in 2008), Kakha Bendukidze, who after his return to Georgia in 2004 became the Rose Revolution's ideological dynamo and served as State Minister for Reform Coordination (but died in 2014 in London),<sup>8</sup> and Bidzina Ivanishvili, who established the Georgian Dream coalition that won the parliamentary elections in 2012.<sup>9</sup> Ivanishvili became prime minister (2012-13) but then resigned and gave up the position to a member of his party. Since then, however, he has been widely perceived to be the most influential political actor in Georgia, essentially controlling Georgian politics even if formally he does not hold any public or party functions. In October 2016 the Georgian Dream won a constitutional majority in the parliamentary elections, which has further increased Ivanishvili's influence over the country.

## Oligarchic portfolios

### *Ukraine*

The oligarchs have been able to maintain their status as important players in Ukraine's politics thanks to a number of factors. The most important is their dominance over strategic branches of the economy. Oligarchic capital in Ukraine is much stronger than in

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<sup>8</sup> Stephen Jones, Kakha Bendukidze and Georgia's failed experiment, *Opendemocracy.net*, 2 January 2015.

<sup>9</sup> Bidzina Ivanishvili used to be one of the most secretive oligarchs in Russia. In the mid-1990s he was one of the so-called *Semibankirshchina*, an informal group of seven Russian oligarchs established to re-elect President Boris Yeltsin. Regis Gente, Bidzina Ivanishvili, a man who plays according to Russian rules?, *Caucasus Survey* 1, 2013.

other countries in the region. According to Deloitte's CEE Top 500 report, which ranks the largest companies in Central Europe and Ukraine, 64% of Ukrainian enterprises are controlled by local private capital (compared to 29.4% in Poland, 23.2% in the Czech Republic and 4.6% in Romania).<sup>10</sup> The share of foreign capital in the ownership structure of Ukrainian companies consists of just 12%, and is the weakest among the CEE countries (compared to 54.4% in Poland, 63.8% in the Czech Republic and 84% in Romania). The *Economist's* crony-capitalism index estimates that the Ukrainian oligarchs' wealth equals 7.8% of the country GDP.<sup>11</sup>

Traditionally there have been a dozen or so oligarchic groups in Ukraine, whose assets extended into all key sectors of the economy, especially energy, raw materials and heavy metals. They have never consolidated into one integrated group; on the contrary, they have often had contradictory interests and compete with each other for new assets and political influence. Several of these oligarchs have had the strongest positions:

- Rinat Akhmetov is the richest oligarch in Ukraine, who owns among many other assets the largest electric energy and coal company (DTEK, with a 25% share in the total production of electricity and a 70% share in the production of electricity from fossil fuels), the largest metallurgy corporation (Metinvest), crucial companies in the agricultural (HarvEast), gas production (Neftegasdobycha) and telecommunications (Ukrtelecom) sectors, as well as one of the most popular TV channels (Ukraina TV), etc.
- The Privat Group of Ihor Kolomoysky and his business partner Hennadiy Bogoliubov is among Ukraine's most powerful oligarchic groups since the 1990s, which controls assets in the energy sector (42% stake in Ukrnafta, the main player in the oil market), the chemical, metallurgic and transport sectors, the media (1+1 TV channel), agriculture (Privat Agro-Holding), and the biggest Ukrainian bank (Privatbank, until December 2016, when it was nationalised as a failing bank of systemic importance).

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<sup>10</sup> Deloitte Central Europe Top 500.

<sup>11</sup> Comparing crony capitalism around the world, *The Economist*, 5 May 2016.

- The group of Dmytro Firtash, whose interests are mainly in the chemical and gas sectors (DF Group) and the media (the Inter TV channel, among others). Although since 2014 he has been under house arrest in Vienna waiting for possible extradition to the US on bribery charges, he remains an important factor in Ukrainian politics.<sup>12</sup> Traditionally Firtash has had close ties with Russia and his business expansion was supported by Gazprombank's loans.

There are also other oligarchs whose interests are focused on particular branches of the economy, such as Viktor Pinchuk (metallurgy and media), Yuri Kosiuk, Andriy Verevskiy and Oleg Bakhmatiuk (the agriculture sector), Kostyantyn Zhevago (the iron ore mining industry) and Petro Poroshenko (confectionery and automobile industry). According to some assessments, the wealth of the 50 richest Ukrainians in 2010 was equivalent to 46% of Ukraine's GDP (compared to 16% in Russia and 4% in the US) but due to the economic crisis this level dropped to around 18% of the GDP in 2016.<sup>13</sup> The general map of the oligarchs' assets has remained relatively stable over the last ten years or so.

Many of the oligarchic groups have additional powerful instruments, which make their position vis-à-vis the authorities even more powerful. In particular, they control most of the media market as the major TV channels owned by four oligarchs

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<sup>12</sup> In February 2017 the Austrian court granted the US's extradition request, but the final decision will be taken by the Austrian minister of justice. Additionally, a separate warrant for Firtash has been issued by Spain on money-laundering charges. His political interests in Ukraine are represented by Serhiy Lyovochkin and Opposition Bloc party.

<sup>13</sup> Iryna Zhak, Pasquale Tridico, A plea for change, *The Ukrainian Week*, 8 October 2014. According to the most recent Forbes ranking of the richest people in the world, six Ukrainians have wealth estimated at more than \$1 billion: Akhmetov (US\$4.6bn), Kolomoysky and his business partner Hennadiy Boholubov (respectively \$1.4bn and \$1.1bn), Kosiuk (US\$1bn), Kostyantyn Zhevago (\$1.2 bn) and Pinchuk (\$1.1bn). Poroshenko's assets are estimated at \$850 million.

(Kolomoysky, Firtash, Akhmetov and Pinchuk) control around 80% of the Ukrainian television market.<sup>14</sup>

## *Moldova*

In the last few years Moldova's economy has become monopolised by the country's two most powerful oligarchs, who combine political and business activities. Although it is not easy to assess their business assets, which they often hold through proxies and offshore companies, information from 2010 indicates that Vlad Plahotniuc's personal wealth amounted then to over \$2 billion and Vlad Filat's to approximately \$1.2 billion (altogether around half of Moldova's GDP).<sup>15</sup> They increased their political and economic power by replacing the Communist Party's monopoly during the political turmoil in April 2009.

Apart from the Plahotniuc/Filat tandem,<sup>16</sup> other smaller oligarchs attempted to gain and/or increase political influence during 2009-14, but they failed. Ilan Shor, who gained a significant share of his fortune through transactions on the banking market, has faced investigations and trials related to banking fraud, in addition to evidence that his companies were involved in the massive 'stolen billion' banking fraud revealed in late 2014.<sup>17</sup> There are indications that Shor, under pressure from Plahotniuc, agreed to make serious corruption-related accusations against Filat in 2015. Consequently, the General Prosecutor's Office exempted him from the imputations of banking fraud.<sup>18</sup>

Another oligarch, Veaceslav Platon made big gains from illegal operations in the banking sector since the 1990s. He has been accused of the illegal takeover of banks, money laundering involving Russia, and many other criminal offences. Platon

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<sup>14</sup> This calculation is based on figures from the Television Industry Committee (2016).

<sup>15</sup> Presa rusa: Premierul Vlad Filat, locul trei in topul celor mai bogati oameni din R. Moldova, 10 July 2010.

<sup>16</sup> Denis Cenusă, "Captured state" and "useful oligarchs" in proximity of EU: Moldova, Georgia and Ukraine, 17 October 2016.

<sup>17</sup> See <https://www.rise.md/articol/codrii-shorheiului/>

<sup>18</sup> See <http://newsmaker.md/rus/novosti/shor-iskupil-svoyu-vinu-tem-cto-napisal-etot-donos-intervyu-nm-s-genprokurorom-ed-29986>.

repeatedly avoided arrest by moving his business to Ukraine, where he worked with Victor Yanukovich's proxies, and before that entered Moldovan politics (2009-10). In August 2016 Platon was detained and extradited from Ukraine and sentenced to 18 years imprisonment in April 2017 with regard to the 'stolen billion' affair.

Renato Usatii came to prominence after building his fortune in Russia, where he also established close relations with Russian oligarchs in the railroad sector, including various Russian criminal entities and the intelligence services. Both Shor and Usatii planned to enter high-level politics by creating new or building up already existing political parties, and won local elections in 2015 in Orhei and Bălți, respectively. According to recent polls,<sup>19</sup> Usatii still maintains significant political popularity, although he runs his party from Moscow as he is afraid of arrest on the basis of a controversial warrant issued by the Moldovan law enforcement bodies.

Abundant information about Plahotniuc and other oligarchs' operations became available since the dispute between him and Vlad Filat. According to reports from investigative journalists, civil society and the opposition, Plahotniuc promotes the majority of his interests via proxies in the real estate, media and scrap metal industries, among others. By March 2017, a company associated with Plahotniuc controlled a big share of the media market: four TV channels out of the five with nationwide coverage and three radio stations.<sup>20</sup> These outlets reportedly cover 60-70% of the market.<sup>21</sup> Control of the media is important not only because they present a favourable public image of Plahotniuc but also because they ensure income from advertising, which is channelled to another Plahotniuc-related company. Due to this media advantage, Plahotniuc and his Democratic Party can reach a large audience and influence the daily political agenda. Even after the Audio-visual Code was adjusted in March 2017 to impose limits of up to two licences per owner for TV and radio stations, with respective

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<sup>19</sup> Barometrul de Opinie Publică, October 2016.

<sup>20</sup> See <https://anticoruptie.md/ro/stiri/oficial-vlad-plahotniuc-proprietar-apatru-televiziuni-si-trei-posturi-de-radio>.

<sup>21</sup> Press Freedom of Republic of Moldova 2015, *Independent Journalism Center* 2015.

sanctions, Plahotniuc continued to control the media market. His company (General Media Group) transferred the broadcasting rights for two of its channels to a new company (Telestar Media), which belongs to one of Plahotniuc's advisors.

Plahotniuc has been involved in the energy sector and allegedly in the recent crisis of the banking sector, but rather through intermediary persons and companies. The offshore intermediary company Energokapital, which sold electricity produced in Transnistria's Cuciurgan power plant between December 2014 and March 2017, seems to be linked to him.<sup>22</sup> The banking sector started to run out of resources at previous stages (2010-13) through various transactions involving offshore companies. However, the hardest hit came between January-December 2014, when three banks – two of which, Banca de Economii and Banca Sociala, were government-backed and of systemic importance – became involved in illegal lending operations. According to investigations led by the Kroll Company, these schemes had a direct connection with companies associated with Shor<sup>23</sup> and Russian banks, but without clear links to Plahotniuc. However, Platon has claimed that Plahotniuc, via his proxies and thanks to his control over the National Bank of Moldova, contributed to the mass fraud.<sup>24</sup> Apart from Platon, another high profile figure is prosecuted for charges concerning the 'stolen billion' affair - Chiril Lucinschi, son of the former President Petru Lucinschi and former Member of Parliament from the Liberal Democrat Party, run by former Prime Minister Vlad Filat.

## Georgia

Bidzina Ivanishvili's dominant position in Georgian politics is based on his personal wealth, which is estimated at around \$4.5

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<sup>22</sup> Michael Bird, Andrei Cotrut, Moldovan energy intermediary company linked to "billion-dollar bank theft" scandal, 14 March 2016.

<sup>23</sup> Kroll Report, 2015.

<sup>24</sup> Veaceslav Platon: „Dețin documente despre implicarea lui Plahotniuc în furtul miliardului”. Ce spune despre Gofman și Iaralov, [« I have documents regarding the theft of one billion » What does this say about Gofman and Iaralov.] *Ziarul National*, 25 July 2016.



billion (a third of Georgia's entire GDP).<sup>25</sup> He made his money in Russia and moved back home in 2003 after selling his business shares there. His bank Rossiyskiy Kredit was sold for \$352 million to a group of investors comprising major Russian bankers. His drugstore chain Doktor Stoletov was sold for \$60 million to the Imperia-Pharma company, which according to the Russian press is controlled by the Chairman of the Federation Council Valentina Matvienko's son, Sergey. He also found purchasers for his agriculture company Stoilenskiy Niva. Due to offshore companies and a lack of transparency, it is hard to ascertain the extent of Bidzina Ivanishvili's current assets. According to the Panama Papers,<sup>26</sup> Ivanishvili has not indicated all companies in his asset declarations. The declaration also revealed that a significant part of Ivanishvili's assets were registered under the names of family members.

Apart from his assets in Georgia,<sup>27</sup> Ivanishvili owns a substantial portfolio of shares and bonds in blue-chip Western companies.<sup>28</sup> His art collection is estimated to be \$1 billion, accounting for around 25% of his capital.<sup>29</sup> These two categories of assets would have nothing to do with his oligarchic powers in Georgia.

According to the Officials' Asset Declarations database,<sup>30</sup> at least 38 officials have worked for companies associated with Bidzina Ivanishvili in the past, many of whom currently hold political office. While nobody could claim that these people have been illegally appointed or elected to their positions, this trend raises concerns

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<sup>25</sup> See <http://www.forbes.com/profile/bidzina-ivanishvili/> .

<sup>26</sup> Luisa Kroll, *Billionaires, Former Billionaires Outed For Offshore Wealth By The Panama Papers*, 3 April 2016.

<sup>27</sup> Ivanishvili owns vast land across Georgia, including in Borjomi, a resort town in south-central Georgia and wealthy Tbilisi suburb. The report revealed he also owned a property in Moscow.

<sup>28</sup> Tamar Khurtsia, *What do Georgian Government members own?*, Agenda.ge, 8 January 2014.

<sup>29</sup> Bidzina Ivanishvili's Net Worth Dropped by \$400 Million: Forbes Releases Billionaires List, *Caucasus Business Week*, 2 March 2016.

<sup>30</sup> See <https://declaration.gov.ge/> .

about whether the principle of merit-based selection of public officials has been justly applied.<sup>31</sup> Ivanishvili's name is also associated with GDS TV, which is 100% owned by his son Bera Ivanishvili.

Now that Saakashvili is out of the political picture, Ivanashvili represents himself as a kind of messiah figure to which Georgian society seems particularly disposed.<sup>32</sup> While outside democratic control and beyond any institutional checks and balances, Ivanashvili is believed to be the overarching controller of the Georgian government, even though he has not held any official post since he stepped down as prime minister at the end of 2013. The Ivanishvili factor alone makes many Georgians question the government's transparency and complain about the persistent, informal system of political governance. A major risk is the continuing dependence of the nation and its ruling party on the financial resources and personality of a single person.

### *To summarise*

As described above, and presented in Table 2.1, the nature of oligarchic influence is different in Ukraine, Moldova and Georgia. In Ukraine there has tended to be a balance between the various oligarchic factions and state power, although the former have always had enough resources to pressure decision-makers. The Moldovan case represents a classic case of 'state capture', where the de facto merger between economic and political power has had far-reaching consequences for the quality of democracy. The Georgian case is the least obvious, and it would be an exaggeration to claim that it is a 'captured state' but its current leadership could lead the country in this direction.

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<sup>31</sup> Ivanishvili's companies – the forge for government officials, TI Georgia, 22 April 2015.

<sup>32</sup> All three of Georgia's previous post-independence leaders, Zviaad Gamsakhurdia, Eduard Shevardnadze and Mikheil Saakashvili fitted this mould.

*Table 2.1 Anatomy of the oligarchic groups in Ukraine, Moldova and Georgia*

	<b>Ukraine</b>	<b>Moldova</b>	<b>Georgia</b>
<b>Type of oligarchic influence</b>	Balance between different groups of oligarchs	Severe form of oligarchic presence – ‘state capture’	Informal governance with an oligarch in key political positions
<b>Number of oligarchic groups</b>	Numerous oligarchs – ‘oligarchic pluralism’	Dominant position of one oligarch, with no challenger or competitor	Dominant position of one oligarch, with no challenger or competitor
<b>Key areas of economic activity</b>	Energy, metallurgy, agriculture, media	Media, real estate	Real estate, media
<b>Means of operations</b>	Direct and indirect influence (via the parliament and informal ties with the government)	Indirect via offshore companies and proxies, and direct via political parties and state institutions	Via political institutions and political parties

## The disadvantages of oligarchy

The oligarchic system has numerous negative consequences for political, economic and social activities in Ukraine, Moldova and Georgia. The oligarchs emerged in specific conditions in each country, and are usually the products of the weakness of the state, the ineffectiveness of the state’s public institutions, endemic corruption and political party systems that are either inefficient or completely absent in the normal sense. Yet the oligarchs are a symptom of the crisis condition of the state, rather than a direct cause of it.<sup>33</sup>

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<sup>33</sup> Heiko Pleines, “Oligarchs. More a symptom than a cause of Ukraine’s crisis”, *VoxUkraine*, 19 January 2017.

Oligarchs are not usually interested in changing the *status quo* and support the existing regimes, albeit on condition that they pose no threat to their business interests. Oligarchic systems fossilise the weaknesses of a state, and in many cases make them even weaker. Successful modernisation would mean a change to conditions that had previously been favourable for them.

Below we review the various types of impacts that oligarchs have had in Ukraine, Moldova and Georgia. Some of them are relevant to all three countries, albeit with varying degrees of intensity, but others are specific to just one or two. Generally, it is difficult to track accurately the activities of the oligarchy and the damage it does because by nature they operate in the shadows and behind the scenes. But there are also obvious oligarch-backed activities that provide enough evidence to assess the nature and goals of their influence.

### *Limiting political pluralism*

In a poorly managed state with a corrupt and ineffective bureaucracy, oligarchs are the best-organised group and know how to use their competitive advantages. Thanks to the resources at their disposal (financial power, dominance of the media, etc.) they can afford to spend huge sums of money on political bribes and to hire lobbyists to work at home and abroad. Since the beginning of the 1990s, ensuring as big a representation in parliament as possible has become one of the oligarchs' key goals. This mechanism has been clearly visible in Ukraine since the 1990s. To protect their business interests they need to win support from major political parties; in exchange for funding political campaigns and granting access to the media they control, political parties agree to lobby for the oligarchs' interests or reserve some of the seats on their electoral lists to individuals put forward by the oligarchs.

The experience of the Ukrainian parliamentary system has shown that no serious political force is able to successfully operate without financial backing from the oligarchs. This does not mean that the politicians become mere puppets of the oligarchs, but their role in shaping important political decisions has often been decisive. According to press reports, Dmytro Firtash was one of the brokers of a deal between Petro Poroshenko and Vitali Klitschko in March 2014. Klitschko, whose UDAR party was probably financed by

Firtash, withdrew from the presidential race and left room for Poroshenko. Moreover, the post-Maidan parliamentary elections of 26 October 2014 confirmed that the major Ukrainian oligarchic groups have retained significant influence in parliament thanks to their control over a few dozen deputies at least (however, in the previous terms of parliament the oligarchs' impact was greater). It is difficult to assess the influence the oligarchs' hold over the political parties, but almost all the main parties (including the Petro Poroshenko Bloc and the People's Front) are influenced by the most powerful oligarchic groups.<sup>34</sup>

In the case of Moldova, two crucial political parties (i.e. Democrats and Liberal-Democrats) have been almost completely taken over in recent years by their oligarchic 'owners', namely Vlad Plahotniuc and Vlad Filat respectively. Georgia faces a similar situation, where Bidzina Ivanishvili backed the Georgian Dream party, which won the parliamentary elections in October 2016.<sup>35</sup> The broad scope of the oligarchs' influence is a serious obstacle to creating normal political party systems, because the oligarch-dependent parties receive informal benefits at the expense of other political forces. It creates unequal conditions, undermines political pluralism and expands political corruption. It also has triggered opposition outside the conventional political system.<sup>36</sup> As a result, shadow actors, whose power and influence are not constrained by law and who occupy no elected positions, participate informally in the decision-making process.<sup>37</sup> In this way, the oligarchs have become a permanent feature of politics (in Ukraine), or hold the real power (in Moldova and Georgia).

In Georgia, a new wave of 'oligarchisation' of politics emerged before the 2012 election period and most notably in the aftermath of the 2012 elections. However, unlike in Ukraine or

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<sup>34</sup> More details: Wojciech Konończuk, *Oligarchs after the Maidan: the old system in a 'new' Ukraine*, *Centre for Eastern Studies*, 16 February 2015.

<sup>35</sup> Maciej Falkowski, *The Georgian Dream takes total control*, *Centre for Eastern Studies*, 9 November 2016.

<sup>36</sup> Denis Cenușă, *Moldova between protests and "state capture"*, CIDOB, March 2016, [https://www.cidob.org/publicaciones/serie\\_de\\_publicacion/opinion/europa/moldova\\_between\\_protests\\_and\\_state\\_capture](https://www.cidob.org/publicaciones/serie_de_publicacion/opinion/europa/moldova_between_protests_and_state_capture).

<sup>37</sup> Some Ukrainian oligarchs were members of the parliament in the past, namely Akhmetov, Poroshenko and Pinchuk.

Moldova, in Georgia the oligarchic influence is not closely linked to corrupt structures or inefficient institutions. Bidzina Ivanishvili appeared at a time when Georgia's institutions were the strongest and most efficient in the post-Soviet space. In terms of fighting corruption, Georgia had emerged as a model in the post-Soviet space and broader region.

Yet key figures among Georgia's political elite in power are financially dependent on the oligarch. Bidzina Ivanishvili has two main types of influence: political, as no key decisions are made without him or his instruction, and financial, where he funds some of the prominent politicians to maintain influence over them. Ivanishvili's openly declared objective has been to destroy the political opposition and in particular the United National Movement, the main alternative political party. Important political opponents and politicians have been jailed, or sued based on criminal charges, including former President Mikhail Saakashvili, former mayor of Tbilisi Gigi Ugulava, former Minister of Interior Vano Maribishvili, etc. This situation puts Georgia in a vulnerable position vis-à-vis both its commitment to democracy and its foreign policy orientation, and increases regime and institutional uncertainty for the future. Informal oligarchic governance is also associated with a gradual emergence of pro-Russian sentiment in Georgia and increased Russian influence over Georgian NGOs and the political party landscape. For the first time since independence, an openly Eurosceptic nationalist party – widely believed to be harbouring pro-Russian sentiments – entered the Georgian Parliament after the 2016 elections, allegedly backed by Bidzina Ivanishvili.

### *Capturing state institutions*

The restriction of political pluralism leads to the 'capture' of specific state institutions, which in this way become mere façades. Rather than serving the public interest, such institutions serve the private interests of politicians, or the oligarchs themselves if they succeed in capturing state power. The first model is seen in Ukraine, where state institutions are fragile and dependent on the ruling coalition, which does not have the will to reform and convert the institutions into independent bodies, which is always a prerequisite for a

successful transformation.<sup>38</sup> An example of this is the Prosecutor General's Office, which is subordinated to the Ukrainian president and perceived to be a powerful weapon against potential political rivals. In 2016, Yuriy Lutsenko, a close ally of Petro Poroshenko and former head of the president's party in parliament, was appointed as prosecutor general. His activities have so far been beneficial for the president due to his use of legal instruments to start investigations against the president's political foes.<sup>39</sup>

Moldova is probably the most 'advanced' model of state capture in Europe. Many of its key institutions (in particular in the law enforcement area such as the Prosecutor General Office, Anti-Corruption Centre) are seen as being under the full control of Vlad Plahotniuc.<sup>40</sup> Control over the Anti-Corruption Centre became a matter of permanent dispute between Vladimir Plahotniuc and ex-Prime-Minister Vlad Filat, who was ultimately arrested by this institution after being stripped of his immunity in parliament. As the oligarchic Filat-Plahotniuc tandem was dismantled, the Democratic Party government controlled by Plahotniuc significantly increased its power in the country.<sup>41</sup> In his last speech before parliament in October 2015 (anticipating his imminent arrest), Filat named the law enforcement state institutions (the General Prosecutor's Office and the Anti-Corruption Centre) as having fallen under the control of Plahotniuc. The Council of Audits also seems to be under a certain level of influence from political stakeholders, including Plahotniuc. Other institutions related to the

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<sup>38</sup> Many such arguments are given in Daron Acemoglu, James Robinson, *Why Nations Fail: The Origins of Power, Prosperity, and Poverty*, Crown Business 2012.

<sup>39</sup> Генеральна прокуратура Юрського періоду [The General Prosecutor's Office of the jurassic period], Radio Svoboda, 14 April 2017; Sergej Leshchenko, Corruption Inc., *Die Zeit*, 5 May 2017.

<sup>40</sup> Joint Statement EPP-ALDE: Moldova – the uninominal system is a desperate attempt to keep the Democratic Party in power, <http://www.epp.eu/press-releases/joint-statement-epp-alde-moldova-the-uninominal-system-is-a-desperate-attempt-to-keep-the-democratic-party-in-power/>

<sup>41</sup> After Filat's downfall in late 2015, the governing coalition reshaped and included the Democrats, their junior ally the Liberal Party, and fugitive MPs from other parliamentary parties (the Liberal Democratic Party, the Communist Party), totalling around 57 MPs. This allowed the Democrats to extend their control over 12 of the 16 ministries (four being conceded to the Liberal Party), Expert-Grup, State of the Country Report 2016.

media or energy regulation are also of questionable independence from the Democratic Party and its dwarf political allies. The economic position of Plahotniuc and his proxies is assured by their control over those crucial public institutions. Neither the General Prosecutor's Office nor the Anti-Corruption Centre has reacted to the involvement of the oligarch's proxies in banking frauds, shady energy schemes or embezzlement cases involving state-owned companies. The same institutions have engaged in only rather selective fighting of corruption (notably against Filat and his proxies, Platon etc.) rather than targeting all cases systematically.

The 'capture' element is also seen in the parliament. By May 2017, the Democratic Party had drawn more than 40 MPs via different forms of 'sticks and carrots' into the Democratic Party's faction in the Parliament. As a result, the Democrats more than doubled their number of seats in the legislative body from their initial 19 MPs after the elections in November 2014. Increasing the number of MPs is meant to ease the law-making process for the Democrats. In addition, the Democrats seek to change the electoral system without having the full support of the opposition and civil society and being openly criticised by the major pan-European political parties. Recent polls show that the Democrats risk falling below the threshold of 6% necessary to remain in parliament. They seek to justify the need to switch from the current proportional system to a mixed system that would see half the seats elected by uninominal voting, which would include representatives from the diaspora and the Transnistrian region. They argue that this would give more voter control over MPs. On this they might reach a consensus with the Socialists, with whom President Igor Dodon is associated.

As regards Georgia, Transparency International recently published an analysis showing that its system of democratic checks and balances remains weak. The report found that parliamentary oversight of the judiciary is too weak to serve as an effective check on the power of the executive branch, whose power remains largely secured by the ruling party's constitutional majority in Parliament.<sup>42</sup>

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<sup>42</sup> Andrew McDevitt, [The State Of Corruption: Armenia, Azerbaijan, Georgia, Moldova And Ukraine](#), Transparency International 2015.



## Corruption

Ukraine and Moldova are among the most corrupt countries in the world, currently ranked 134th and 123rd respectively on the Transparency International Corruption Perception Index 2016.<sup>43</sup> Meanwhile, Georgia (44th place) is an example of the great progress that can be made in reducing corruption, which was one of the biggest achievements of Mikheil Saakashvili's presidency (2004-12).

The system of governance in both Ukraine and Moldova has been transformed into rent-seeking mechanisms.<sup>44</sup> Systemic corruption is an important factor in keeping the oligarchs powerful. They did not invent political corruption, but they actively participate in various corrupt schemes with the political class. Oligarchs' businesses can thrive thanks to shadowy corruption-based deals with the ruling elite, as well as public tenders or privatisations whose outcomes may be fixed in advance. The authorities participate in illegal schemes and share their profits with the oligarchs, with consequences for the state budget.

In the case of Ukraine, this longstanding model of specific synergy between the authorities and the oligarchs was preserved after the Revolution of Dignity due to the decision taken by the post-Maidan elite to enter into an informal alliance with the main oligarchic groups. But this is on a smaller scale than during the Viktor Yanukovich presidency. Furthermore, new anti-corruption bodies were created: the National Anti-Corruption Bureau (NABU), the National Agency for the Prevention of Corruption and the Anti-Corruption Prosecutor's Office, which is a good start in fighting systemic corruption. Their work shows that only the NABU can be perceived as a truly independent institution; the other two fall under the influence of the presidential office, which also attempts to limit NABU operation.<sup>45</sup> Despite some achievements in the anti-corruption campaign (including investigations into a few high-level officials) moderate progress has been achieved.

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<sup>43</sup> [Transparency International Corruption Index 2016](#).

<sup>44</sup> Heiko Pleines, [Oligarchs. More a symptom than a cause of Ukraine's crisis](#), *VoxUkraine*, 19 January 2017.

<sup>45</sup> Sergej Leshchenko, Corruption Inc., *Die Zeit*, 5 May 2017.

There is not enough space in this chapter to present all the 'old-new' shadow deals since 2014, but some salient examples can be cited.

In March 2016, the National Commission for Energy, Housing and Utilities Services Regulation (NKREKU) introduced a new formula for calculating the price of the electricity generated by power plants. The new system is based on the price of coal in the port of Rotterdam plus the cost of its delivery to Ukraine. The so-called 'Rotterdam-plus' formula was one of the reasons why Ukrainian customers started to pay energy bills that are three and a half times higher than in 2015. The main beneficiary of the new price formula is DTEK, owned by Rinat Akhmetov; this company is not only Ukraine's largest coal producer but also produces 70% of Ukraine's energy from thermal power plants. The Rotterdam price formula has been widely criticised by Ukrainian experts as lacking economic logic and being politically motivated.<sup>46</sup> Thanks to the new formula, the energy companies, mainly DTEK and Centrenego (state-owned, but media reported it to be under influence of Igor Kononenko, a Poroshenko Bloc deputy and the president's trusted man), have received additional revenues of up to US\$400 million a year.<sup>47</sup> According to the government's initial statements, the new energy formula was intended to allow Ukrainian power plants to switch to coal sourced other than from the separatist-controlled part of the Donbas region. However, the Ukrainian government has not implemented any directive to create the legal framework to force power plants to spend additional revenues on their technological modernisation. On the contrary, the 'Rotterdam-plus' formula can be seen as a government-designed helping hand for the heavily indebted DTEK (the company's debts are estimated at US\$2.3bn).

Some shady energy sector schemes are visible in Moldova, in particular, supplies of electricity to Moldova from the Transnistrian region's Cuciurgan power plant via traders with an offshore

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<sup>46</sup> Andriy Gerus, [What's Wrong With the 'Rotterdam Formula'?](#), *Ukrainska Pravda*, 22 June 2016.

<sup>47</sup> Владислав Шве́ц, [Баланс недели: чрезвычайные меры в электроэнергетике, рост ВВП и прокурорская проверка тарифов](#) [[The outcome of the week: extraordinary measures in the energy sector, the rise of GDP and the prosecutor's review of tariffs](#)], *Unian*, 18 February 2017.

presence, namely through Energokapital<sup>48</sup> between December 2014 and March 2017, which conducted transactions offshore via VictoriaBank, associated with Plahotniuc's proxies until autumn 2016.

Since 2003, Georgia has made significant progress in fighting corruption. Following transfers of power in 2012 and 2013, the then Prime Minister Bidzina Ivanishvili and his successor Prime Minister Irakli Garibashvili both pledged to strengthen Georgia's anti-corruption stance. Georgia is widely recognised as having had considerable success in tackling petty corruption and public-sector bribery. This means that the reforms implemented in Georgia since 2004 have indeed had a substantial impact on corruption. Transparency International's Corruption Perception Index concluded that perceived corruption in Georgia is lower than in several EU member states, including Slovakia, Italy, Greece, Romania and Bulgaria, and much lower than in neighbouring Armenia, Russia and Azerbaijan.

### *Monopolising the economy*

Oligarchs gain control over some of key sectors of the economy, hindering normal market competition. In Ukraine, for instance, oligarch-controlled companies have considerable market power in the electric energy sector, coal mining (in the dominant position of DTEK), the media, gas distribution (mainly controlled by Firtash), and the oil refinery sector (Ukratnafta controlled by Kolomoysky). In addition to the oligarchs' assets, they also manage some of the most valuable state-owned monopolies (especially in the sectors of energy, ports, transport, and alcoholic drinks) thanks to their informal deals with the authorities. Ukraine's Anti-Monopoly Committee has not hindered this – on the contrary.

One of the many negative effects of this monopolisation of economic activities is the poor investment climate. The 2017 Index of Economic Freedom ranks Ukraine 166th (out of 180 countries),

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<sup>48</sup> Denis Cenușă, Otilia Nuțu, [The Bridge over the Prut, version 2.0: the electricity interconnection between Romania and Moldova](#), Expert Grup, 19 January 2017.

Moldova 110th, contrasting with Georgia's 13th place.<sup>49</sup> Foreign investors are discouraged from entering Ukraine and Moldova because of informal preferences for oligarchic capital, the weak rule of law, and the fear of corporate raiding.<sup>50</sup> As a result, the level of FDI in these two countries is among the lowest per capita in Europe.

In Moldova there is a little evidence of direct interference by Vlad Plahotniuc in the decision-making process that would favour the specific sectors allegedly controlled by him and/or his 'inner circle'. Some cases can be traced, however. In early 2016, the parliamentary majority of the Democratic deputies passed a draft law to modify the country's existing broadcasting code. The law aimed to reduce the monopoly in the media sector by introducing legal limitations to the number of broadcasting licences, from five to two per media owner. Nevertheless, the already existing licences are to be maintained until they expire.<sup>51</sup> In 2016, the Democratic Party proposed modifications to the code, criticised by local NGOs and by international organisations.<sup>52</sup> The critics regarded the amendments as favourable to the big outlets, similar to those controlled by Plahotniuc's proxies, which have nationwide coverage and control more than 50% of the advertising media market. Facing harsh criticism from the media NGOs, the draft law was then overtaken by a new broadcasting code that received support in the first reading in 2016, having been welcomed by local NGOs.

Another case is the government's decision in December 2016 to create a monopoly for pharmaceutical procurement in the public sector, which raised concerns among local observers.<sup>53</sup> The authorities justified their decision by highlighting the need to

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<sup>49</sup> See <http://www.heritage.org/index/ranking>

<sup>50</sup> Matthew Rojansky, [Corporate Raiding in Ukraine: Causes, Methods and Consequences](#), *Demokratizatsiya: The Journal of Post-Soviet Democratization* vol. 22, 3/2014.

<sup>51</sup> [Statement of the civil society, March 2016](#)

<sup>52</sup> See <https://freedomhouse.org/article/moldova-restrictions-foreign-broadcasters-undermine-press>

<sup>53</sup> [Governmental Decision no. 1336](#) of December 2016 regarding the establishment of the state-controlled joint stock company MoldFarm.

eliminate frequent contractual irregularities in the procurement of pharmaceuticals for the public sector. A similar initiative is being proposed for the gambling sector, where new regulations will replace the current, poorly governed state of affairs, but only by introducing another state monopoly.<sup>54</sup> The state's poor performance in managing public properties intensifies concerns about the creation of new state monopolies, which would be controlled by Plahotniuc's proxies. Overall, the Democratic Party has not engaged extensively in the de-monopolisation of sectors where Plahotniuc's interests mostly stand (scrap metal, the advertising industry).

In Georgia, Ivanishvili's influence is stronger in the political field (namely on the government and parliamentary majority) than on the economy. He did not make money in Georgia, although he owns certain assets and increasingly gains control of the media. Unlike some other oligarchs, Ivanishvili does not focus so much on investment projects in his home country. The main exception is a much-vaunted private equity fund he launched less than a month before key presidential elections. The \$6bn Georgian Co-Investment Fund has attracted heavyweight investors, including the UAE's Abu Dhabi Group, Turkey's Calik Holdings and China's Milestone Intl. Holding – plus a commitment of \$1bn of his own money from Ivanishvili himself. The fund's size and governance structures cause concern in an environment where business and politics have often been intertwined. The Fund aims to finance projects in energy, tourism, manufacturing, agriculture, infrastructure and other areas.

Recent developments in the media landscape in Georgia may endanger media pluralism. These include the merger of three major television channels (Imedi TV, GDS, and Maestro TV<sup>55</sup>), and controversial events surrounding the Georgian Public broadcaster. In addition, the courts have transferred ownership of the Rustavi2 TV channel, the highly popular network that is consistently critical

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<sup>54</sup> See <http://eco.md/index.php/home/rss/item/4975-plahotniuc-multiplic%C4%83-metalferosul>.

<sup>55</sup> Imedi TV is owned by the family of deceased businessman Badri Patarkatsishvili, GDS is owned by Bera Ivanishvili – the son of Bidzina Ivanishvili – and Maestro TV has several shareholders. Controlling shares in Maestro TV and GDS will be transferred to Imedi TV, and Patarkatsishvili's family will own the new media conglomerate.

of the government, to someone who is close to the ruling party. Critics view this as politically motivated and initiated by the government,<sup>56</sup> and timed to precede local elections.<sup>57</sup>

### *Blocking reforms*

The oligarchs remain one of the key obstacles to reform. Any programme for the systemic modernisation of the state and for establishing a rule-of-law based system poses a threat to their interests. Hence, they have tried to use the instruments at their disposal to influence the reform process, to ensure that it does not strike at their business interests (in Ukraine) or, thanks to their control over the state's institutions, to block changes less favourable to their interests (Moldova and Georgia).

Reforms in Ukraine since 2014 have already weakened the interests of certain some Ukrainian oligarchs, however, especially in the gas and banking sectors. Another step in the right direction was the decision to fund political parties from the state budget, but it is still too early to say whether this will help to curb the oligarchs' influence; they are skilful in obstructing or delaying reforms and in some spheres influence decision-making processes. In cooperation with some of the ruling elite, the oligarchs have been accused of blocking the modernisation and privatisation of many major state-owned enterprises, particularly in the energy sector (Ukrnafta and Centrenego, controlled by Kolomoysky and Kononenko respectively),<sup>58</sup> the chemical sector (the Odessa Port Plant,

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<sup>56</sup> K. Kakachia, B. Lebanidze, J. Larsen, M. Grigalashvili, [The First 100 Days of The Georgian Dream Government: A Reality Check](#), Georgian Institute of Politics 2017.

<sup>57</sup> Cory Welt, [The Curious Case of Rustavi-2: Protecting Media Freedom and the Rule of Law in Georgia](#). PONARS Eurasia Policy Memo, November, 2015.

<sup>58</sup> [Как Коломойский выводит миллиарды из «Укрнафты» \[How Kolomojski is syphoning billions out of 'Ukrnafta'\]](#), *Capital.ua*, 14 June 2016.

controlled by Kononenko),<sup>59</sup> and the Ukrainian Railways (which is under the influence of Akhmentov and Leonid Yurushev).<sup>60</sup>

One of the most important achievements of the Ukrainian reform process has been the creation of the independent National Anti-Corruption Bureau (as discussed in more detail in chapter 4). But its initial period of operation shows that its work is being obstructed by part of the ruling elite, including the Prosecutor General's Office, as it poses a danger to the interests of corrupt politicians and oligarchs. Another example concerns the case of a new energy regulator, established in September 2016 after longstanding pressure from the IMF and the European Commission. Although the regulator is a desirable part of energy sector reform, the authorities (the president, the parliament and the ministry of energy) have informally reserved themselves the right to select the members of the new institution's board, which will give them significant leverage over the regulator's work.<sup>61</sup> In order to make the work of the energy regulator genuinely independent its board members should be elected by an independent commission, in which representatives of authorities should have less than half of the seats and in an election process in which energy market participants are genuinely involved.

In Moldova, Plahotniuc's objective clashes with the logic of reforms that would reduce political and systemic corruption in the public, private and overall judiciary. The most recent and illustrative cases of blocking the reforms refer to the appointment of the new General Prosecutor, and the 'Integrity' legislative package that empowers the National Commission of Integrity to enforce asset declarations of public officials. The rapid and controversial appointment of Eduard Harunjen as new general prosecutor in late 2016 raised serious questions about the commitment of the

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<sup>59</sup> [Приватизацию ОПЗ сворачивают, завод возглавит экс-помощник Кононенко](#) [OPZ – End of privatisation, the plant will be led by ex-assistant Kononenko], *Epravda.com.ua*, 13 December 2016.

<sup>60</sup> The Ukrainian Railways (Ukrzaliznytsia) accounts for around 3% of the country's GDP. Иван Верстюк, [Тяжелый рок Войцеха Балчуна \(Hard rock of Wojcech Balchun\)](#), *nv.ua*, 3 February 2017. [http://www.liga.net/projects/corruption\\_transport/](http://www.liga.net/projects/corruption_transport/)

<sup>61</sup> Tadeusz Iwański, [Ukraine: new regulator of the Energy sector](#), Centre for Eastern Studies, 28 September 2016.

authorities to continue the Prosecutor Office's reform, initiated in 2015. The Democratic Party blocked the 'Integrity' package law in 2015, and new legislation has only progressed subsequently under the pressure of the EU and Western partners. The new law should increase the powers and the efficacy of the body in charge, with verification and investigation of the asset declarations public officials. However, the body requires an administration formed from people selected in a transparent way and with no political affiliation.

Ivanishvili's Georgian Dream government came to power after an active and successful phase of reforms, which lasted eight-nine years and transformed Georgia from a failing state with weak institutions to a fast-growing liberal economy which has increasingly emerged as a regional hub. But since 2012 the pace of reforms has slowed. However, Georgia is making headway in implementing a number of reforms to strengthen democracy, uphold the rule of law and bolster the economy, according to a report released on 29 November 2016 by the European External Action Service and the European Commission. Its findings show that Georgia has implemented a number of measures required under the EU-Georgia Association Agreement, which came into force on 1 July 2016. The report also notes that Georgia successfully met all benchmarks under the Visa Liberalisation Action Plan, as evidenced by the European Commission's proposal to the Council and the European Parliament that subsequently led to the lifting of visa obligations for Georgian citizens in March 2016.<sup>62</sup>

## **How to respond to the challenges posed by oligarchs?**

The fragmentary reforms in Ukraine, Moldova and their slow pace in Georgia since 2012 have not curbed oligarchic influence to any significant degree. The majority of reforms implemented have been under pressure from Western institutions (the EU, the US, and the IMF), often against the will of the oligarch-backed governments. Moreover, these reforms are not irreversible and are still far from laying the foundations for genuine systemic change. It is crucial to

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<sup>62</sup> [EU report: Georgia making headway in the implementation of its Association Agenda](#), Brussels, 29 November 2016.



fully implement some reforms already accepted by the parliament. Measures urgently needed to cleanse the political, economic and justice systems of interference by the oligarchs can be summarised as follows:

### *Institutional capacity building*

Each of the countries discussed has weak and dependent state institutions, which leads to a lack of checks and balances mechanisms. It is essential to free the law enforcement institutions of political influence by ensuring the transparent appointment of senior officials, initially under the possible supervision of the EU and other international donors. Law enforcement institutions should be subject to the oversight of parliament as the more representative political body. The goal should be to reach a situation whereby the state institutions are strong enough to withstand pressure from oligarchic groups. Another element should be fair salaries for state institutions' staff.

### *Effective anti-corruption bodies*

Independent anti-corruption institutions should play a key role in minimising the role of informal political and economic actors. Combating corruption directly benefits the reform process. In Ukraine's case it is crucial to protect the National Anti-Corruption Bureau from political interference so that it can continue its operations. Moldova's Anti-Corruption Centre must function without political control. Building the principles of transparency and accountability into the governance system is the best way of reducing corruption risks: public officials are likely to refrain from using power for personal gain if they know that citizens can easily access information about their activities (transparency) and that whatever crimes they commit will result in punishment (accountability). It is impossible to have transparency and accountability mechanisms (such as an independent judiciary or free media) in an undemocratic system.

### *Funding for political parties*

The essential steps here are to cleanse the political parties of vested interests and oligarchic groups by implementing new legislation on

financing political parties from the state budget (in Moldova<sup>63</sup> and Georgia), in parallel with a close permanent audit of their finances, and sanctions for offences. In Ukraine, the new legislation for financing political parties that has been implemented has yet to prove its effectiveness. This should include capacity-building and more specialised (financial) competences for the Central Electoral Committee. Only normal political parties with transparent budgets, audited regularly by a truly independent state institution, can be immune from oligarchic pressure.

### *Competition policy*

It is necessary to beef up the institutions that promote competition and develop more robust legislation and mechanisms for dismantling *de jure* or *de facto* monopolies which involve state enterprises or private entities controlled by vested interests. The DCFTA provisions are extremely helpful, but only their consistent implementation can genuinely change the current state of affairs and reduce the oligarchs' influence. Another important contribution should be the creation of independent regulators for various branches of the economy, especially for the energy market. Without an effective competition and deregulation policy, better conditions for the development of small and medium-sized enterprises will not be created. The development of SMEs played an important role in transforming the economies of Central Europe.

### *Independent judiciary*

Cleaning up corrupt justice systems should be one of the priorities of the reform process as it will affect many other dimensions, create a positive business climate and enhance the public's trust in the state. Part of the broader approach towards reforming the justice system should be a fundamental reform of rules in the Prosecutor General's Office, to liberate the judiciary from control of the Prosecutor's Office or the government.

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<sup>63</sup> The Electoral Committee demanded that eligible political parties create bank accounts to receive the funds from the budget monthly, which overall amounts to approx. 40 million MDL (approx. 19 million EUR). [Report on the implementation of the Priority Reform Action Plan](#), Expert-Grup, ADEPT, CRJM, September 2016.

### *Independent media*

To balance the near-monopolistic influence of the oligarch-owned media (especially TV channels), public media should be strengthened. This would require reform of the state's funding policy, as well as the introduction of television licences (regular fee paid by citizens). Additional laws limiting the concentration of media outlets in the hands of one company or individuals are also needed. This will improve the quality of the information and will increase public awareness about the vital policy issues faced by the countries. Additionally, the audio-visual bodies require both capacity building and more competences to sanction disinformation and fake news.

### *Association Agreements and DCFTA implementation*

All three countries have started to implement Association Agreements (including DCFTAs), which include many provisions to reinforce, directly or indirectly, the policy priorities summarised above to curb the undue influence of oligarchs, and more broadly to accelerate the modernisation of their economy and political institutions by reforming the state's regulations in many spheres.<sup>64</sup> The foremost mechanism is through the liberalisation of external trade, which puts an end to the process of oligarchic interests securing protection for specific sectors, especially when backed up by reforms of internal competition, public procurement, and diverse regulatory functions.

## **Conclusions**

Curbing the power of the oligarchies in Ukraine, Moldova and Georgia depends on the effectiveness of the abovementioned reforms. Only their successful implementation, which in some spheres has already begun, will offer these countries the opportunity to fundamentally revise the relationship between political power and the oligarchs. Transforming the oligarchs into normal economic players – key business leaders – can only be

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<sup>64</sup> Michael Emerson, Veronika Movchan (eds) (2016), [Deepening EU-Ukrainian Relations: What, why and how?](#), CEPS; with companion publications on Georgia and Moldova.

achieved through transformation of the economic and political system in the three countries examined here.

‘De-oligarchisation’ depends on the de-politicisation of specific state institutions, the effective fighting against corruption, and the de-monopolisation of the media and key economic sectors. This will determine the success of the modernisation and building-up of democratic institutions in these countries.

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### 3. INTEGRITY AND JUDICIAL REFORM ON TRIAL

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#### Introduction

The EU Association Agreements with Georgia, Moldova and Ukraine, signed in 2014, are premised on a mutual commitment to liberal democratic values. They recognise that the rule of law lies at the heart of political association and economic integration; respect for the rule of law is declared an “essential element”, the violation of which may lead to a suspension of the agreements. The jointly agreed Association Agendas flesh out this essential element but remain rather vague, nonetheless. Priority matters

for action in the justice sector include the impartiality of the judiciary, prosecution and law enforcement bodies, and their freedom from political interference and corruption. All three countries are expected to ensure the review of the appointment procedures of judges, strengthen the independence of the judiciary,

establish zero tolerance of corruption for the legal profession, and reform legislation regarding prosecutors, judges and lawyers.<sup>1</sup>

On paper the commitments of Georgia, Moldova and Ukraine look more or less the same, yet the starting points for implementation are very different. This is the result of different historical trajectories and current-day political trends in the transition of the three associated states.

Georgia applied shock therapy to its constitutional, administrative and economic systems after the Rose Revolution in 2003. Reform in the justice sector was slower to take off and has been implemented in three increasingly sophisticated waves that have brought significant improvement in recent years. Judicial independence has been stymied by executive and legislative interests, however. A lack of transparency and professionalism surrounding proceedings also remains a problem. But even if Georgia has slipped a little in global rankings of late, it remains far ahead of its 3DCFTA fellows.

Ukraine is having a second stab at the radical reform of its governance structures but, unlike Georgia 15 years ago, is finding it much harder to wipe the slate clean. Although due process guarantees exist, in practice individuals with financial resources and political influence can escape prosecution for wrongdoing. The Ukrainian government has made little progress in meeting domestic and international demands to investigate and prosecute crimes committed during the final months of the Yanukovych administration in late 2013 and early 2014, which included shooting protesters. Despite the legislative boom overall and the introduction of far-reaching vetting processes, which have led to a quasi-automatic clean-up of parts of the judiciary, the authorities' failure to prosecute extensive high-level corruption has undermined the popularity of the government and altered the reform dynamic.

Moldova also struggles with endemic corruption among its public officials and within the judiciary. Oligarchic groups continue to hold sway over all state institutions and stand in the way of the country's fight against corruption. Reforms have mostly addressed

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<sup>1</sup> For a detailed analysis of the commitments entered into by each of the three countries, see the second editions of the handbooks produced by Emerson et al. in the context of the 3DCFTAs project and taken up in the list of references.



the procedural and technical levels but have not been matched by improvements in the independence and integrity of judges. The latter was dealt several blows in 2016, as a result of the political fallout over a massive banking scandal that had rocked Moldova in 2014. Numerous other controversies, such as the appointment of a judge to the Supreme Court, despite failing to meet requirements for financial disclosures, have completely eroded citizens' trust in the courts.

In spite of the differences between the three DCFTA countries, their judicial systems also have common features and challenges: progress (albeit varied) in modernising the legal framework for the organisation of the judiciaries; resistance in the implementation of innovations with regard to the functioning of the judiciary; political interference and corruption in appointment procedures of judges and the work of the courts; difficulties in creating an independent prosecutorial service – the bane of any corrupt political regime – and/or effective law enforcement bodies.

In its 2015 review of the European Neighbourhood Policy, the EU put 'resilience' front and centre. The services' adoption of this buzzword reflects a shift in the debate about the nature of EU engagement with neighbouring countries. It de-emphasises the goal of transformation that formed the bedrock of the 'old' ENP and replaces it with support for the ability to withstand systemic shocks and threats at both the state and societal level, mainly in the (hard) security sphere, but also in providing access to justice and building effective, accountable and inclusive institutions. By taking a context-specific approach to improving relations with neighbouring countries on a differentiated basis, the EU is keen to identify and build upon existing positive sources of resilience, as well as to track and respond to vulnerabilities with the right mix of instruments and budgets at its disposal.<sup>2</sup>

In the case of Georgia, this raises the question of how resilient the Saakashvili-era reforms are. Can they withstand the corrosion of corruptive practices by narrow-minded political and economic

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<sup>2</sup> Joint Communication from the European Commission and the High Representative to the European Parliament and Council, "A Strategic Approach to Resilience in the EU's external Action", JOIN(2017) 21 final, 7 June 2017, Annex 10, particularly guiding consideration no. 4.

operators? In Ukraine, however, the challenge is how to prolong and channel the positive reform dynamic to firmly anchor institutional and procedural change in the justice sector. In Moldova, the issue is rather to insulate the few pockets of successful reform while supporting drivers of change in their fight against illiberal forces.

This paper aims, firstly, to identify innovations in the three associated states' justice sectors. It will do so by analysing changes to both the 'hardware' of the justice system, i.e. the constitutional and institutional frameworks (section 2), as well as the 'software', i.e. selection, appointment, promotion and disciplinary procedures and other means to fight corruption in the justice sector (section 3).<sup>3</sup> While recognising that the results of judicial reform will not always be visible right away and that, as a consequence of the specificities of each country's context, there may not be one preferred model of justice sector reform, it is nevertheless useful to identify landmark innovations in an area in which lasting change is so notoriously difficult to secure.

By way of *obiter dictum*, this report will compile noteworthy judicial practice in Georgia, Moldova and Ukraine with the implementation of the Association Agreements (section 4). The AA/DCFTAs are destined to have a profound effect on the legal and judicial systems for several reasons. They have already triggered and are likely to trigger further constitutional amendments aimed at ensuring that these Eastern Partnership countries effectively share the EU's liberal democratic values and implement the AAs. To achieve this, the provisions of the AAs and the decisions of the common institutions set up under the agreements must be effectively applied (i.e. in conformity with the relevant EU *acquis*) by the three countries' judiciaries, raising the issue of direct effect within the Georgian and Ukrainian legal systems. Setting precedents for implementation is key, as the landmark judgments of the Moldovan Constitutional and Supreme Courts show. Not only does a review of the existing court practice with the AA/DCFTAs serve to gauge the awareness levels of national judges about the need to enforce their country's contractual obligations

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<sup>3</sup> On the fight against corruption writ large, see the contribution by Emerson, Hriptievski, Kalitenko, Kovziridze and Prohnitchi to this volume.

entered into with the European Union. It also offers insights into the level of openness of domestic courts to use international/European law in setting aside conflicting national rules and bad practices. The focus will be on the deep and comprehensive free trade arrangements (DCFTAs) of the Association Agreements, thus linking up to the second edition of the Handbooks published under the umbrella of the '3DCFTA' research project.<sup>4</sup>

## **Constitutional and institutional reform**

### ***Constitutional and institutional reform in Georgia***

Technically speaking, the adoption in 1997 of the 'Organic Law on Common Courts' was the first step in Georgia's judicial reform process,<sup>5</sup> but the initiative failed due to lack of political will, despite strong backing from international partners. It was not until after the Rose Revolution in 2003 that the newly elected government put everything at stake to transform the country into a modern state. All sectors of the economy were targeted in a major anti-corruption drive.

One of the first changes concerned Georgia's criminal law, with the introduction in 2004 of a US-inspired plea bargain mechanism as an alternative and consensual means of criminal case resolution pending more comprehensive changes to the justice system.<sup>6</sup> The government at the time believed that this out-of-court

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<sup>4</sup> See <http://www.3dcftas.eu>.

<sup>5</sup> The period from 1997 to 1999 saw i) an Organic Law on Common Courts of Georgia; ii) an Organic Law on Supreme Court of Georgia; iii) a new system for appointment of judges; iv) judges appointed during the Soviet period left the system; v) the appointment of judges who passed the exams and went through the selection process.

<sup>6</sup> An out-of-court settlement of cases whereby the defendant agrees to a guilty plea in exchange for a lesser charge or for a more lenient sentence and/or for dismissal of certain related charges. As in other countries, there were two basic forms of plea bargains in Georgia: the guilty plea (agreement on plea) and the 'no contest' plea (agreement on sentence without guilty plea). Under the system, the defendant has the right to appeal the judgment rendered consequent to the plea bargain. The court must then satisfy itself that the plea

dispute settlement mechanism was a helpful tool for law enforcement agencies in the early stages of the state-building exercise. Georgia delivered such impressive results that the mechanism even became the object of criticism because of 'trigger-happy' prosecutors.<sup>7</sup>

One of the main reforms started in 2005 was the reorganisation of the judicial architecture to create a functionally balanced system ensuring the principle of sequential order. The reform modernised the trial courts, clarified their jurisdiction, and introduced the specialisation of judges. The structure of trial courts was set up in a new way, with 24 enlarged district (city) courts (with approx. 130 judges in each) reviewing cases in first instance. Under their authority, new magistrate courts (41 judges each) ensure the timely and simplified review and adjudication of less significant cases.

Two Appellate Courts were introduced, thereby changing the model of regional courts within the unified system of common courts. These courts adjudicate cases only by way of an appeals procedure and no longer in first instance. Appeals against decisions of trial courts (among them those of magistrate judges) from the west of Georgia are heard by the Kutaisi Court of Appeal, whereas the judgments of courts from the east Georgia are addressed by the Tbilisi Court of Appeal.

The Supreme Court of Georgia turned into a purely cassation instance court. The criminal cases panel of the Supreme Court, which used to review cases of particular gravity as a first instance court, was abolished. The Supreme Court considers the admissibility of cases in accordance with new criteria on the significance of claims for the development of the law and their contribution to the establishment of a common judicial practice.

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bargain was concluded with the free will of the defendant, that the defendant fully acknowledged the essence of the plea agreement and its consequences.

<sup>7</sup> By 2010, around 80% of the cases were decided through the plea bargain mechanism, for which Georgia was often criticised by NGOs and European institutions alike. see 'Plea bargaining in Georgia', 23 February 2010, Transparency International Georgia, report available at <http://transparency.ge/en/post/report/plea-bargaining-georgia>.

Substantial amendments to the constitution were enacted on 27 December 2006 whereby the appointment and dismissal of judges were removed from the competence of the president of Georgia and transferred to the High Council of Justice (HCJ).

Until then, the HCJ had been an advisory body for the president, consisting of 12 members: four appointed by the president, four appointed by the parliament, one by the Supreme Court of Georgia; plus the presidents of the High Court of Abkhazia and High Court of Adjara, and the minister for justice as *ex officio* members. This system was changed by the law of 19 June 2007. The High Council of Justice was transformed into the highest authority for the administration of justice. For the first time, the HCJ mostly comprised judges (8 out of 15 members, elected by the Conference of Judges, a self-governing body of judges); the minister for justice and prosecutor general were removed as members. As part of the “new democratic reforms package within the Second Wave” announced in 2009, one member of the High Council of Justice was elected from the ranks of opposition MPs. Until the reforms undertaken by the new government of Georgia in 2013 (see below), the High Council of Justice was chaired by the chairman of the Supreme Court of Georgia and had full and exclusive authority to appoint, dismiss and take disciplinary measures against the judges.

In July 2007, the Criminal Code of Georgia was amended to de-criminalise the adoption of unlawful judgments or other decisions by a judge, and the Georgian parliament adopted the Law on Rules of Communication with Judges of Common Courts to ensure adherence to the principles of independence and impartiality.<sup>8</sup>

In 2008, the position of the Prosecutor General was abolished and merged with the Ministry of Justice, drawing on both the French and US models. The government at the time claimed that it linked criminal justice policy with the politically responsible person but that the Prosecutor General kept operative independence because the minister had no power over criminal cases. The office of chief prosecutor became a quasi-autonomous branch of the

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<sup>8</sup> On 26 February 2010 further amendments increased the fine for the violation of the rules of communication by public servant twofold; for state political officials the fine was increased threefold.

ministry of justice, with the chief prosecutor appointed by the president of Georgia upon the nomination of the minister for justice and dismissed solely by the president. Changes to the 'Law on Prosecutor, CPC and Law on Structural Authority and Activity of Government' were adopted in 2015, according to which the office of prosecutor remained in the system of the ministry of justice, while a prosecutorial board was introduced, through which the minister executed general oversight. The rules on appointing the general prosecutor were also modified and delegated to the board, government and parliament.<sup>9</sup> Recently adopted changes to the constitution<sup>10</sup> stipulate that the prosecutor's office is independent in its activity. Yet, the general prosecutor is selected by parliament by majority vote (of full composition), contrary to the Venice Commission's recommendation for QMV, upon nomination of the prosecutorial board.<sup>11</sup>

The first decade of judicial reform saw other positive changes too, such as higher salaries and improved infrastructure. NGOs and the international community nevertheless criticised Georgia for the slow pace and indecisiveness of reform in this critical sector, especially in comparison to the progress made in other sectors.

A new 'First Wave' of justice reform was launched on May 1st, 2013 by the incoming government. Amendments were made to the 'Law on Common Courts', the 'Law on Disciplinary Responsibility and Disciplinary Prosecution of Judges' and the 'Law on the High School of Justice'. These changes were eagerly awaited by civil society organisations and very much derived from their recommendations. The rules for the selection of members of the High Council of Justice were also sharpened: politically neutral persons would hitherto be selected for a non-renewable mandate by way of an open competition, not by MPs selected by their peers. In addition, the right to nominate candidates was granted to higher education institutions, NGOs and the Georgian Bar Association.

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<sup>9</sup> See [http://www.venice.coe.int/webforms/documents/default.aspx?pdf=file=CDL-AD\(2015\)039-e](http://www.venice.coe.int/webforms/documents/default.aspx?pdf=file=CDL-AD(2015)039-e)

<sup>10</sup> See <http://www.parliament.ge/ge/ajax/downloadFile/75697/1324-rs>

<sup>11</sup> See [http://www.venice.coe.int/webforms/documents/default.aspx?pdf=file=CDL-AD\(2017\)023-e](http://www.venice.coe.int/webforms/documents/default.aspx?pdf=file=CDL-AD(2017)023-e)

The role of the Conference of Judges was enhanced. Prior to the amendments, the Chairperson of the Supreme Court had the exclusive right to nominate candidates to be judges in the High Council of Justice to the Conference of Judges. With the amendments, each member of the Conference of Judges gained the right to nominate these candidates.<sup>12</sup> All of these improvements strengthened the position of the HCJ and enhanced its freedom from political interference.

Prosecutors were thenceforth separated from the ministry of justice;<sup>13</sup> the plea-bargaining system was abolished; trials were opened to the public and media scrutiny (conditions apply); an obligation was created to keep audio/video records of courts hearings and disclose them to involved parties upon request; access to trial by jury was expanded;<sup>14</sup> and the rights of defendants and their legal counsel were increased, including the right to retrial.

The Venice Commission, the Council of Europe Parliamentary Assembly, EU special envoy Thomas Hammarberg and the European Commission supported the amendments and continue to monitor their implementation.

A 'Second Wave' of reform was launched on August 1st, 2014 but has generally been perceived as regressive.<sup>15</sup> Although it introduced the appointment of judges for life (before reaching the age of 65 determined by law), it also set a mandatory three-year probation period – thus putting a strain on the independence of least 100 judges.

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<sup>12</sup> Similarly, the Chairperson of the Supreme Court would no longer serve as the Chairperson of the Independent Board of the High School of Justice. The latter chairperson was thenceforth elected by the Conference of Judges, while the remaining members of the Independent Board were elected by the HCJ instead of the Chairperson of the Supreme Court.

<sup>13</sup> In November 2008, the position of prosecutor general was abolished and the prosecutorial office was merged with the ministry of justice.

<sup>14</sup> First introduced in the 1917-21 years of independence.

<sup>15</sup> Statement of the Coalition about Appointment of Judges for a Probationary Period, the Coalition for an Independent and Transparent Judiciary, available at: <http://bit.ly/2btwUYy>.

The 'Third Wave' of reforms was passed on 8th February 2017 when parliament voted down 26 objections and amendments proposed by President Margvelashvili and supported by the Venice Commission and civil society organisations.<sup>16</sup> In particular, the legislative package did not envisage the election of court presidents by judges and contained regressive changes regarding the composition of the HCJ.<sup>17</sup> One positive element of the new legislation is the introduction of an electronic case-assignment system. Unfortunately, the launch of this system has been postponed several times.

The greatest weakness of the Third Wave of legislative reform lies precisely in the opaque way in which it was introduced and in its delayed implementation. The latter has 'allowed' the HCJ – in a controversial process decried by NGOs for its lack of transparency – to appoint 64 judges, five of whom (former judges of the Supreme Court and Constitutional Court) for life, without a probation period. Tensions grew, as the NGO community refused to present a report in protest at the developments in the judicial system. In June 2017 the Parliament of Georgia heard proposed amendments to the legislation regulating judicial probation, with a view to complying with the Constitutional Court decision of 15 February 2017 in the case of Omar Jorbenadze vs. Parliament of Georgia. The law should determine the circle of judges to be exempted from the probation period and set the procedure for their life-time appointment. Despite high public interest in the matter, amendments were prepared without engaging civil society. NGOs believe that the draft law still leaves ample room for arbitrariness since it does not establish in a clear and unequivocal manner the HCJ's obligation to

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<sup>16</sup> Joint Opinion N°773/2014 of the Venice Commission and the Directorate of Human Rights (DHR) of the Directorate General of Human Rights and Rule of Law (DGI) of the Council of Europe on the Draft Law on Amendments to the Organic Law on General Courts, Strasbourg, available at: <http://bit.ly/2bKgoJQ>.

<sup>17</sup> See Coalition for Independent and Transparent Judiciary, [https://www.scribd.com/document/348378290/The-Judicial-System-Past-Reforms-and-Future-Perspectives#fullscreen&from\\_embed](https://www.scribd.com/document/348378290/The-Judicial-System-Past-Reforms-and-Future-Perspectives#fullscreen&from_embed)



substantiate its decisions of appointing acting and former justices of the Supreme and Constitutional Courts for life.<sup>18</sup>

In general, the court system is more gender balanced than the administration of other branches of power in Georgia. Currently, the Supreme Court is chaired by a woman; one of her two deputies is also female, in addition to three female judges out of 10 in total. In the Constitutional Court four out of nine judges are women. According to 2012 data, 42% of judges of the Supreme Court were female; 33% in the Constitutional Court; 54% in Appeal Court and 47% in District Courts.<sup>19</sup>

## Constitutional and institutional reform in Ukraine

It took the violence of the Euromaidan to shift Ukraine's real judicial reform into gear. Upon the proposal of the new President of Ukraine and the Constitutional Commission set up under his authority, the Verkhovna Rada has adopted a triptych of primary legislation aimed at improving the constitutional foundations and practical implementation of the rule of law.

In June 2016, the Rada adopted the first two parts of the package. The 'Law on Amendments to the Constitution'<sup>20</sup> provides for:

- Restructuring the judicial architecture by: a) granting the Constitutional Court of Ukraine an independent status; b) introducing a complaint procedure under which a natural or legal person is given the right to appeal to the Constitutional Court on the constitutionality of the law which is applied in final instance in his/her case;<sup>21</sup>

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<sup>18</sup> See <http://www.transparency.ge/en/post/coalition-addresses-hearing-legislative-amendments-lifetime-appointment-judges>

<sup>19</sup> Research by Natia Gorgadze - Gender Equality (2012), on file with the authors.

<sup>20</sup> Law number 3524 "On Amendments to the Constitution of Ukraine" of 2 June 2016 had been approved by the Venice Commission on 26 October 2015. It entered into force on 30 September 2016.

<sup>21</sup> Uncertainty still surrounds the retroactive effect of Constitutional Court decision in this respect.

- The composition of the High Council of Justice – the body responsible for the appointment, career development and responsibility of judges – in a manner in which the majority of its members will be judges elected by judges;
- De-politicisation of the judiciary through: a) the abolition of the five-year probation period for the appointment of judges and the implementation of a procedure according to which judges hold positions indefinitely; b) eliminating parliament from the process of appointment and dismissal of judges, a power which is formally exercised by the President of Ukraine, based on a binding submission by the HCJ; c) granting the HCJ (rather than the president and the parliament) the competence to dismiss judges, and transfer them from one court to another;
- Limitation of judicial immunity from absolute to functional: a) without the consent of the HCJ a judge cannot be arrested or held in custody or detention until the sentence has been delivered by a court (except after the commission of a grave crime or a felony); b) a judge cannot be held liable for a court decision that s/he has made, except when this constitutes a crime or a disciplinary offence;
- Financial independence of the courts and the activity of judges: in the state budget, the expenses for the maintenance of the courts are determined separately, taking into account the proposals of the HCJ, and the amount of the remuneration of the judge is established by law;
- Raising professional requirements of judges by: a) increasing the age limit from 25 to 30 years; and b) raising the required professional experience in the sphere of law from 3 to 5 years;
- Cancellation of unusual supervisory powers of the public prosecutor over the observance of: a) human/citizen rights and freedoms; b) laws on these issues by executive authorities, local governments and their officials and officers; c) laws in the execution of judgments in criminal cases, as well as the application of other measures of coercion related to the restraint of personal liberty of citizens.

In parallel to the above-mentioned constitutional amendments the Verkhovna Rada adopted a new version of the 'Law on the Judicial System and Status of Judges'.<sup>22</sup> This law drew sharp criticism from the expert community because of the violation of the regulatory procedure for its adoption: the draft had only been submitted to Parliament on 30 May 2016, i.e. three days prior to its adoption. Important provisions of the law concern:

- Enhancing the integrity criteria for judges by: a) introducing an obligation for all (candidate) judges to file a Declaration of Kinship and a Declaration of Integrity; b) establishing a new ground for dismissing a judge for violation of the duty to confirm the legality of the origin of property; c) establishing a Public Council for Integrity (PCI) at the High Qualifications Commission of Judges of Ukraine (HQCJ) with the aim of facilitating the latter in establishing criteria of professional ethics and integrity to test the suitability of (candidate) judges;
- Enhancing the independence of judges by: a) significantly increasing the salaries: €1,630/month for local courts (a rise of €570); €2,700 for appeal courts (a rise of €1,600); €4,000 for the Supreme Court (a rise of €2,765); b) introducing the possibility of entitlements for work that involves access to state secrets, seniority, holding an administrative position and/or an additional degree.

The law also restructured the four-level Ukrainian judicial system, which thenceforth consists of a Constitutional Court and a three-tiered system of courts of general jurisdiction:<sup>23</sup>

- Courts of the first instance, consisting of circuit courts (criminal and civil jurisdiction), administrative circuit courts, and commercial circuit courts;
- Courts of appeals, consisting of appellate courts (criminal and civil jurisdiction), administrative appellate courts, and commercial appellate courts;

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<sup>22</sup> Law number 4734 of 2 June 2016.

<sup>23</sup> Higher specialised courts were taken out from in-between appellate courts (ruling upon judgments by local, first instance, courts) and the Supreme Court of Ukraine.

- A new Supreme Court, consisting of five internal bodies: the Great Chambers of Supreme Court, the Administrative Court of Cassation (divided in chambers for tax issues, social rights, and political rights), the Commercial Court of Cassation (with separate chambers for bankruptcy, intellectual property and antitrust, and corporate disputes), the Criminal Court of Cassation, and the Civil Court of Cassation.

Although the law does not explicitly refer to when the court system should be reorganised, the general activity of the authorities involved in judicial reform indicates that this will only be possible now that the composition of the new Supreme Court of Justice has been finalised. Completed in November 2017, the selection of judges to the Supreme Court only partly contributed to the judicial system's clean-up, with the PCI questioning the integrity, independence and professional records of about a quarter of newly appointed judges. Despite widespread criticism about the failure of the High Qualification Commission of Judges to select Supreme Court candidates fairly and through transparent processes, President Poroshenko formally appointed 113 judges, including a number of incumbent or retired judges who were considered to be flawed candidates.

Another eye-catching change to the judicial architecture of Ukraine is the creation of two (first-instance) specialised courts: a 'High Court on Intellectual Property' and a 'High Anti-Corruption Court' (HAC). The necessity of their establishment, however, was a matter of intense debate. With regard to the former, critics said that the number of disputes related to intellectual property in Ukrainian courts is not that big. While litigants may benefit from narrowly specialised IP judges, the question is, indeed, whether significant budget allocations are needed for the creation of this court. As for the HAC, the scope of its horizontal jurisdiction was subject to a protracted on/off debate with the president of Ukraine, as well as amendments to Ukrainian procedural laws. In April 2018, the second and final reading of the draft legislation for the creation of the HAC was pushed back to allow for consultations with the Venice Commission. After much international pressure, the Rada finally approved the 'Law on Establishment of the Anti-Corruption Court in Ukraine' on 7 June 2018. The HAC will consider only the top-corruption cases which fall within the investigative jurisdiction

of the National Anti-Corruption Bureau of Ukraine (NABU) and the Specialized Anti-Corruption Prosecutor's Office (see section 3.2). A committee of international experts will play an important role in the selection of judges serving the HAC. Now that the law has been passed, implementation can start.

The third and final part of the 2016 legislative triptych concerned the adoption of the 'Law on the High Council of Justice'.<sup>24</sup> This law fleshed out some of the elements of the constitutional changes introduced in June of that year and attributed a number of powers to the High Council of Justice, including: a) submitting to the President of Ukraine the appointment of a judge; b) ensuring the implementation of disciplinary proceedings against judges; c) taking decisions to dismiss judges; d) granting consent to the arrest or detention of a judge; e) deciding on transfers or secondment of judges from one court to another; f) deciding on the temporary removal of a judge from the administration of justice; g) agreeing on the number of judges in courts; and h) participation in determining the expenditures of the state budget for the maintenance of courts, bodies and institutions of the justice system.

On the side of the prosecution, the 'Law on the Prosecutor's Office' of October 2014 had already put an end to its general supervisory role. Since the adoption of the 2016 amendments to the constitution, the main functions of the Office are the maintenance of a public prosecution in court; the organisation and procedural guidance to the pre-trial investigation, supervision of the secret and other investigation activities and searches of law enforcement bodies;<sup>25</sup> and the representation of the interests of the state in court in exceptional cases and in the manner prescribed by the law.

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<sup>24</sup> Law number 1798-VIII of 21 December 2016.

<sup>25</sup> The transitional provisions of the Law stipulate that the Prosecutor's Office will continue to i) carry out pre-trial investigation prior to the commencement of the activities of the State Investigation Bureau, but not later than five years after the entry into force of the Criminal Procedure Code, i.e. 11 August 2018; and ii) supervise the observance of the law in the execution of court decisions in criminal cases, in the application of other measures of compulsory nature, related to the restrictions of the personal freedom of citizens, before the entry

A significant achievement of the law of 2014 was the introduction of the prosecutorial service's self-governing bodies (the 'All-Ukrainian Conference of Prosecutors' and the 'Council of Prosecutors of Ukraine') and the 'Qualification Commission of Prosecutors', whose main task is the selection, career development and accountability of prosecutors.<sup>26</sup>

While these innovations look good on paper, reforming the prosecution has in practice been extremely slow and unable to meet the general needs of society. Political influence has remained: the Rada may express no confidence in the Attorney General, which results in his resignation. 'Soviet' elements have also survived recent reforms, such as the military prosecutor's office and the function of representing the interests of individuals and the state in court. There is a high degree of system preservation: according to the results of the competitions conducted for the positions in local prosecutor's offices, 76% of the seats were occupied by incumbents. This is due to: a) delay of entry into a force of the law; b) the period of the competition: July-August; c) the fact that competitions were conducted only for the positions of the heads of local public prosecutors; d) the significant reduction of wages by the government during the second stage of the competition for these posts (by about €100; salaries now average at €300 per month).

Effective enforcement of judgments has been a longstanding concern for investors in Ukraine. The enforcement system currently faces substantial challenges since the percentage of actually enforced judgments is extremely low. Moreover, the officials responsible for the job are rather (financially) unmotivated and the cooperation between authorities in this area is problematic and complicated. The main novelty of the 'Law on Enforcement of Judgments' provides that, apart from the State Enforcement Service of Ukraine, the decisions of the courts and other authorities may now be enforced by 'private enforcers' listed in the Unified Registry. Such individuals have to meet certain age, educational and other requirements as well as pass a test to be allowed to enforce

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into a force the law on the establishment of a dual system of regular penitentiary inspections.

<sup>26</sup> Of the 11 members of the Commission 5 are prosecutors, while the other 6 are appointed by the legal community and the Ombudsman.

decisions. Another essential requirement is that such individuals are obliged to insure their professional liability. Private enforcers are not allowed to enforce judgments whose monetary value exceeds their insurance premium. Within these parameters, there is good ground to believe that one of the most persistent problems in Ukrainian litigation might be solved.

Technical support of the judiciary falls within the purview of the State Judicial Administration (SJA).<sup>27</sup> According to a recent report by the SJA, the judicial system (about 600 courts) was in 2016 equipped with 25,016 computers linked up to the court registration system. All courts have technical equipment for conducting court sessions in video communication mode, which is gaining popularity among the people. The Unified State Register of Judicial Decisions has been functioning since 2006, which currently includes more than 65 million copies of court decisions. Until recently, a 2013 pilot project on the exchange of electronic documents between the parties of the trial and the court operated in parallel to the sending of such documents in paper form, in accordance with the requirements of the law. Moreover, in accordance with the provisions of the 'Law on the Judiciary and the status of judges', an 'Institute of Electronic Justice' is envisaged, which will greatly improve the access to and administration of justice, reduce its cost and the risk of fraud.<sup>28</sup> It will take time to consistently and fully implement the truly progressive legislation underpinning the creation of a much-anticipated 'electronic court'.<sup>29</sup> But work has begun. In accordance

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<sup>27</sup> Until end of 2016, the EU-funded project "Support to Justice Sector Reforms in Ukraine" aimed to support sector-wide reforms (<http://www.justicereformukraine.eu>). The project was divided into six key legal components central to policy and institutional reforms: justice sector reform strategy; support to execution of court decisions; prosecution reform; access to justice and the right to defence; independence of the judiciary; prevention and fight against corruption.

<sup>28</sup> From 2015 onwards, measures have been taken to establish and connect information-payment terminals in courts to provide the payment of court fees.

<sup>29</sup> No less popular among the population is the institution of sms-message for the participants in the trial about the date and the time of the case. Unfortunately, the information is only about the previous years, but one can observe a positive trend in their use. Thus, in the first quarter of 2016, about

with Order No. 367 of 23 March 2017, the State Judicial Administration of Ukraine has approved the procedure for the exchange of electronic documents in civil, administrative and economic cases between seven pilot courts.<sup>30</sup> The first results of the operation of the E-Court subsystem give rise to hope in its future success.<sup>31</sup>

## Constitutional and institutional reform in Moldova

Since its independence from the Soviet Union in 1991, Moldova has been held back by a string of constitutional crises. The constitution of July 1994 introduced the institutional framework of Moldova's current political system, with a unicameral parliament, a directly elected president, and substantial autonomy to the regions of Transnistria and Gagauzia. In 2000, a constitutional amendment endowed parliament with the power to elect the president. In light of parliament's failure to fulfil this duty, a referendum in 2010 tried to reintroduce direct presidential elections to the country, but failed

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380,000 such text messages were sent by the local and appellate courts, up by 13% compared to the same period in 2015.

<sup>30</sup> It is assumed that electronic documents can be filed to the court only after a registration in the subsystem 'E-Court' posted on the website of 'Judiciary Ukraine' at: [e.court.gov.ua](http://e.court.gov.ua). Registration in the subsystem 'E-Court' includes: creating an account with the postal system 'mail.gov.ua'; Registration of personal electronic cabinet's tied to his electronic signature. Once registered, participants of the trial may sue electronically all procedural documents to the court, stipulated by the procedural law of Ukraine, but only when submitting to the court the relevant legal documents at the next hearing in writing form.

<sup>31</sup> Preliminary results indicate that interaction between courts, lawyers, free legal aid centres, banking institutions, the prosecutor's office and one institute conducting forensic research (in Odessa) has been established and that there is a reduction in the average length of the trial in court (20-30 days), while the average time for processing one document (registration, automatic distribution, transfer to a judge) is five minutes. In addition, with the help of the 'E-Court' subsystem, it is possible to create and send an executive document (issued for enforcement in accordance with a court decision) electronically. Consequently, unlike the current order, according to which the average length of receipt of documents to the executive service is 5-7 days, the receipt of such a document using the subsystem 'E-Court' occurs instantaneously. The cost of sending documents is 0 UAH (today 10 UAH).



as the turnout requirements were not met. An indirect electoral system was maintained.

Unlike Georgia and Ukraine, widespread popular dissatisfaction with the government, the economy and lack of reforms has each time been channelled and temporarily defused through a vast number of elections marred by irregularities. Even the 2009 'Twitter Revolution' did not manage to change the broken system. Each time a new clan of inept and corrupt politicians took over.

Moldova inherited a legacy of weak justice sector institutions that continue to undermine public trust in law enforcement and the court system, even as it aspires to meet European standards. The judicial system consists of the Supreme Court of Justice, the Court of Appeal, and the courts of first instance. The structure and jurisdiction of the courts are established by an organic law. Judges of the first and appeal courts are appointed by the president, judges of the Supreme Court of Justice by the parliament, all at the proposal of the Superior Council of Magistracy. Judges are appointed at first for a five-year term and subsequently until the age of retirement. The Constitutional Court is deemed to be independent of any other public authority. Its six judges guard the implementation of the notion of the separation of state powers. Once appointed, judges of the Constitutional Court cannot be removed. Judges of the Constitutional Court are appointed by the legislature, the government and the Superior Council of Magistracy, each of those bodies selecting two candidates.

The 2011-16 Justice Sector Reform Strategy (JSRS) focused on several reforms pertaining to the Constitutional Court: its composition, the criteria and procedures for selecting its judges, their term of office, and the group of subjects enjoying legal standing before it. No significant legislative reform was carried out until mid-2016, when the ministry of justice initiated consultations on a draft law amending the composition and competencies of the constitutional court. The draft law, adopted by the government and positively reviewed by the constitutional court, was taken up by parliament on 22 December 2016 but suffered delays thereafter. The draft law provides for an increase in the number of judges from six to seven, with a seventh to be appointed by the president. It also provides for the extension of the mandate of judges from six to nine

years, non-renewable. The adoption of the law by parliament would also codify the constitutional court's own decision to widen *locus standi* to all courts.<sup>32</sup>

The judicial activism of the constitutional court has earned many plaudits for its independent stance in a hotly contested political environment.<sup>33</sup> Yet, some of its decisions have raised serious questions among independent observers about the constitutional court's impartiality and place in the *trias politica*. In March 2016, the court declared the changes introduced to the electoral law in 2000 as unconstitutional. It thus established direct presidential elections through the back door. Without holding a public hearing, without hearing the parties and against recommendations by the OSCE and the Venice Commission, the court in September 2016 dismissed a claim against the prohibition on foreign financing of political parties, thus favouring the ruling party in making use of the administrative apparatus. The elections of autumn 2016 nevertheless resulted in the victory of a populist and openly pro-Russian candidate. This sparked tensions with the pro-EU oriented government and parliamentary majority. In October 2017 the constitutional court ruled in favour of the "temporary suspension" of the president, when he refused to fulfil his constitutional obligations, in particular the promulgation of laws. The same ruling entitled the prime minister and the speaker of the parliament to temporarily exercise presidential prerogative on specific issues. The parliamentary majority seized the opportunity to reshuffle the government and to enact anti-propaganda legislation. The constitutional court's rulings have thus indirectly

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<sup>32</sup> This provision was already in force due to the decision of the constitutional court of 9 February 2016, which concluded that the role of the supreme court in addressing constitutionality exceptions raised by courts is a formal one and that hence any court can directly address the constitutional court. By this decision the constitutional court *de facto* allowed citizens to directly address it on constitutionality issues in ongoing trials. More details are provided below.

<sup>33</sup> For example, the Court's decision of 16 April 2015 declaring several provisions of the Law on Professional Integrity Testing partially unconstitutional. On 23 February 2016, the Court ruled that the total period of 12 months for arrest includes both the criminal investigation phase and the court examination phase, putting an end to various problematic practices. On 9 February 2016 the Court extended the *locus standi*, thus providing a direct avenue for constitutional review to any litigant in a court case.

reshaped the political environment, in many respects disadvantaging the opposition. The court has not yet taken any decision that would run directly counter to the interests of the Democratic Party of Moldova (DPM).

The reorganisation of the judiciary was among the priorities of the JSRS 2011-16. Maintaining a multitude of courts with a small number of judges was deemed too expensive, a hurdle to both judges' professional growth and the random assignment of cases, which are important anti-corruption tools. The reform was carried out in several steps. The economic courts were abolished first. In 2014, the Court of Appeal in Bender was eliminated. But it took until April 2016 for parliament to adopt law no. 76 providing for the merger of 44 first instance courts into 15, over a 10-year period (1 January 2017 – 31 December 2027). The specialised – commercial and military – courts were abolished first, on 1 April 2017. This is one of the biggest reforms in judiciary since Moldova's independence. The reform has great potential for improving the quality and efficiency of justice, but the success depends largely on good will and thorough implementation. The ten-year period of implementation carries the risks of delays and unplanned changes along the way.

Since 2007, the National Institute of Justice (NIJ) has been in charge of initial and continuous training for judges, prosecutors and certain court staff. The focus is on candidate judges and prosecutors, as well as continuous on-the-job training of judges. The NIJ has long suffered from allegations of corruption at entry and graduation exams, as well as the poor quality of training. In need of reform, amendments to its legal framework were passed in 2012. Although considered insufficient, there has been resistance until 2016 in the adoption of additional amendments intended to improve the *modus operandi* of the NIJ.<sup>34</sup> The NIJ has now developed a new type of entry examination and included a representative of the US Embassy in the admissions commission. This is thought to be an improvement. At the time of writing, the NIJ was updating its teaching curricula. A worrying recent development is the decision

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<sup>34</sup> The NIJ has benefited from direct technical and financial assistance of several important development partners such as USAID, UNDP and the Council of Europe.

of the SCM requiring that any legal training of judges be coordinated with the NIJ. This means a rather closed system of access for judges to informal education. It remains to be seen how exactly the decision will be implemented.

Reform of the prosecution has also been long anticipated. As recently as 2011, Moldova still had one of the most unreformed prosecutorial services in the region, with a strong Soviet legacy: dangerously wide competencies going well beyond criminal justice, largely at the service of the minister for justice. Although reform of the prosecution was a key condition for budget support, failure by the parliament to act led the EU to withhold €1.8 million of the envisaged €60 million. The draft law was ultimately adopted on 25 February 2016 and has been in force since 1 August 2016. It narrows the powers of prosecution and of the prosecutor general, increases the powers of the Superior Council of Prosecutors and reduces political involvement in the appointment of the prosecutor general. It also strengthens the specialised (anti-corruption and organised crime) offices, reduces the hierarchical subordination of prosecutors and provides for merging of several prosecution offices. While the law and by-laws (also amended in 2016) look good on paper, political will has been in short supply to adequately implement the reform measures. The reform of the Anti-Corruption Prosecution Office, for instance, has lagged behind.<sup>35</sup>

Another example is the recycling of incumbents in key positions. A noteworthy case is that of the Prosecutor General Mr. Harunjen, who was selected by the Superior Council of Prosecutors in a public contest and within 24 hours approved by the previous president (i.e. days before Dodon took office as president), despite publicised materials about his excessive personal wealth and allegations that he gave the order to close a criminal investigation

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<sup>35</sup> For details see the chapters on anticorruption and prosecution reform in the Monitoring report on the implementation of the Priority Reform Action Roadmap (March-August 2016), prepared by the Association for Participatory Democracy (ADEPT), “Expert-Grup” Independent Think-Tank and Legal Resources Centre from Moldova (LRCM), available at [http://crjm.org/wp-content/uploads/2016/09/2016-09-Rep-Roadmap\\_fin-en-1.pdf](http://crjm.org/wp-content/uploads/2016/09/2016-09-Rep-Roadmap_fin-en-1.pdf).

involving the death of a person in the civil unrest of 2009.<sup>36</sup> It should be noted that Harunjen worked in the Anti-Corruption Prosecution Office between August 2013 and July 2015 (including the period of bank fraud) before being successively promoted to the position of first-deputy of the Prosecutor General, Interim Prosecutor General and then Prosecutor General. The 2010 secret annexes of the then ruling tripartite coalition mentioned explicitly that the leaders of the Prosecutor General's Office and the National Anti-Corruption Centre were appointees of the DPM.<sup>37</sup> The slew of high-level corruption cases initiated since then, some examined behind closed doors, smacks of selective prosecution of persons affiliated with the other two coalition parties, namely the Liberal-Democratic Party of Moldova (LDPM) and Liberal Party (LP). Likewise, it is noteworthy that the Supreme Court has in the past few years not take any important decisions contrary to the interests of the Democratic Party (DPM).

## Fighting corruption in the justice sector

### *Fighting corruption in the justice sector in Georgia*

The eradication of corruption in the justice sector has been a top priority for successive governments since the 2003 Rose Revolution. Measures have included the manifold increase in salaries and the modernisation of infrastructure.

Before the start of judicial reforms in 2005, court premises were in a deplorable condition, as were all other public institutions. Today, court premises have been rebuilt and/or refurbished. Courtrooms are equipped with proper furniture and computers, that allows the production of verbatim reports and minutes of hearings electronically and the viewing of physical evidence using electronic displays. Key support has been provided throughout the

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<sup>36</sup> See <https://www.zdg.md/stiri/stiri-justitie/foto-casa-si-cv-ul-procurorului-general-interimar-eduard-harunjen>.

<sup>37</sup> See Agreement for the creation of the European Integration Alliance 2 (EIA 2), 30 December 2010, <http://www.e-democracy.md/files/parties/acord-constituire-aie-2010.pdf>. For details, see <http://unimedia.info/stiri/doc-acordul-aie2--mina-care-a-desfiintat-alianta-cum-s-au-partajat-functiile-57321.html>.

years by a host of international donor organisations.<sup>38</sup> The World Bank financially supported the process initially, but today the renovations are financed from the state budget, with around 75% of financing spent on salaries.

As shown in Table 3.1, the first dramatic rise in salaries occurred during the initial stage of reforms in 2005-06 and has been growing since. The most recent rise concerns the head of the Supreme Court (from GEL 5650 to GEL 7000); appeals court judges (from GEL 2500 to GEL 5000); district court judges (from GEL 2500 to GEL 4600).<sup>39</sup> These salaries are high when compared to average figures in the public sector but they are not sufficient to deter corruption.

*Table 3.1 Budget increase for courts /GEL Mio. (2003-15)*

2003	2005	2007	2009	2011	2013	2015
11,153	16,838	36,113	44,358	38,978	45,202	59,315

*Source:* Supreme Court of Georgia.

Other areas of concern include the selection and appointment process of judges, merit-based promotion, and other. To establish more effective criteria for the recruitment of judges, the Georgian parliament on 28 December 2005 adopted a Law on the High School of Justice. The function of the School is the professional training of candidate and incumbent judges and court clerks. Later waves of reforms provided for a higher level of independence of the School. The year 2015 marked a watershed in terms of developing quality trainings and standardised methodologies.<sup>40</sup> In June of that year, the Independent Council of the High School of Justice approved an upgraded training programme for the 12th group of candidate

<sup>38</sup> World Bank, USAID, UNDP, Council of Europe, NORLAG, GIZ, IRZ, EU, OSCE, ABA.

<sup>39</sup> Law on Amendments in the Law on Remuneration of Judges, 26 December 2013. 1000 GEL = 380 EUR.

<sup>40</sup> See <http://www.hsoj.ge/uploads/Uploads/ActivitiesReport2015Year-edited.pdf>

judges.<sup>41</sup> Another interesting step forward was the introduction of a quality evaluation framework – ‘Kirkpatrick's 4-Level Evaluation Model’. The School also provides vocational trainings.<sup>42</sup>

The specialisation of judges is one of the positive achievements of the Georgia's reform. In practice, however, the number of judges appointed to chambers/boards not matching their specialisation is still quite high, especially in Tbilisi City Court. While the High Council of Justice claims that its selection criteria for judges (i.e. education, professional experience, personal traits, moral and ethical features) are in line with international norms<sup>43</sup> and have been codified in the Organic Law of 2017, watchdogs argue that they are vague<sup>44</sup> and that the recruitment process generally lacks transparency, thus leaving opportunities for corruption and nepotism.<sup>45</sup> The quick dismissal of the president of the Tbilisi City Court Mamuka Akhvlediani, who reported an alleged leak of a judge's examination, raises serious concerns about

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<sup>41</sup> The High School of Justice has prepared the draft amendments concerning the extension of judicial training period. In particular, the initial 10-month period stipulated by law is to be extended to 24 months and a 6-month training period for persons of certain categories is to be extended to 14 months.

<sup>42</sup> In 2015, conducting 85 professional trainings, wherein a total of 1,298 participants took part (gender balance: 38% – male 62% – female).

<sup>43</sup> See <http://hcoj.gov.ge/en/reforms/judicial-reform>

<sup>44</sup> The nature of the work that judges perform differs across different levels of the judiciary and requires different skills and qualifications. This is not taken into account in the evaluation of candidates. Requirements for judges of first instance courts and higher courts are identical. An individual without any experience as a judge can still be appointed to the appellate court.

<sup>45</sup> In the period from 2011 to 2015, the HCJ actively used the legal mechanisms for re-appointing (i.e. transferring/promoting) judges to other courts, without, however, any substantiation of the decisions, let alone any form of competition. Unsurprisingly, this raised serious suspicions about a deliberate, strategic distribution of judges in different courts, by-passing pending recruitment procedures and affecting judicial independence and impartiality. Watchdog NGOs have observed a declining trend, partly due to legislative amendments. Controversy flared up after the rushed appointment of judges prior to the enactment of new amendments to the law. See <http://www.transparency.ge/en/post/general-announcement/statement-regarding-possible-lifetime-appointment-judges-murusidze-and-sul>.

the objectivity and impartiality in the selection and appointment of judges.<sup>46</sup>

The distribution of cases represents another risk of corruption. Concerns have been voiced recently about the allegedly political motivation behind the distribution of some high profile cases, such as against former ruling party members and the Rustavi 2 TV Channel.<sup>47</sup> On paper, the rule of random electronic case distribution introduced with the third wave of reforms is an important improvement. Yet, contrary to recommendations by the Venice Commission, the law leaves open a range of critical issues, including exceptional cases, regulation for which falls under the High Council of Justice.

Despite many concerns about the independence of the judiciary and prosecutorial dominance in the period from 2005 to 2012 and the emergence of a new set of challenges in the period from 2013 to 2017 (incl. alleged selective justice), corruption-related allegations have not resurfaced for over a decade. It is therefore especially worrisome to note the recent news of possible corruption cases in courts, as voiced by the International Chamber of Commerce, foreign diplomats, businesses and local NGOs.<sup>48</sup> A general increase in corruption perception has also been noted by Transparency International, which reported in 2016:

Approximately 40 percent of the citizens believe that abuse of authority in civil servants for private profit is widespread. As a result, the percentage showing the issue increased by 15 units when compared to the

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<sup>46</sup> See <https://idfi.ge/en/the-high-council-of-justice-dismissed-mamuka-akhvlediani-in-violation-of-the-law> and the chronology of events from the first statement of Mamuka Akhvlediani to his dismissal - <http://bit.ly/2b7iK05>.

<sup>47</sup> See, e.g., the judges assigned to three criminal cases brought against one of the most important former officials were simultaneously relocated to the Tbilisi City Court just before the hearing. See <https://goo.gl/l19xSR>; and Transparency International Georgia, 'The second trial monitoring report of high-profile criminal cases', 2014 <http://www.gdi.ge/uploads/other/0/241.pdf>.

<sup>48</sup> See <https://www.finchannel.com/~finchannel/business/65323-icc-georgia-urges-government-to-reform-bias-unreliable-and-corrupt-court-system>.



outcome of 2015 and by 28 units when compared to 2013.<sup>49</sup>

This is a sad trend for a country which had achieved so much in terms of countering corruption.

The introduction in 2017 of an asset declaration system for officials, which covers the judiciary as well, was a welcome development. Pursuant to the commitments entered into under the Association Agreement with the EU, an Independent Committee has been created to conduct spot checks of the declarations. This audit tool is critical, since law enforcement has so far failed to respond to questions raised by the media regarding assets held by certain officials and judges.

### *Fighting corruption in the justice sector in Ukraine*

According to various international and domestic opinion polls conducted over the last five years, the level of trust in Ukrainian courts is one of the lowest in the world (below 10%).<sup>50</sup> With the adoption of the 'Law on the Judiciary and the Status of Judges' in June 2016, a series of unprecedented anti-corruption measures has been introduced in the justice sector.<sup>51</sup> They concern every sphere of professional activity of (candidate) judges and include: checking the declarations of assets and kinship; transparent and competitive selection procedures; periodic qualification assessment; the establishment of a Public Council for Integrity in the HQCJ (see section 2.2); and the widening the list of grounds for prosecution.<sup>52</sup>

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<sup>49</sup> See <http://www.transparency.ge/en/blog/results-public-opinion-poll-indicates-deterioration-field-corruption>.

<sup>50</sup> See, e.g., 2016 polls by the Democratic Initiatives Foundation at <http://dif.org.ua/>.

<sup>51</sup> In this context, it is also worth pointing to the creation in September 2015 of a Specialised Anti-Corruption Prosecution Office, whose authority includes the supervision of observance of the law during the conduct of (pre-trial) investigative activities by the National Anti-Corruption Bureau of Ukraine (NABU). The head of this prosecutor's office is appointed as the result of an open competition.

<sup>52</sup> Wages have also been raised. It is also worth observing that the law allows certified lawyers and academics who have no judicial experience to compete for positions in the Supreme Court and appellate courts. The aim of this

Among the new measures, the vetting process of candidate and incumbent judges has been hailed as key to the effort to clean the judicial system from the inside out. It consists of an asset declaration (all income, assets, including corporate rights and securities, financial obligations and expenses) of the person authorised to perform functions of the state, as well as his/her family members; a declaration of integrity; and a declaration of kinship: family ties, positions related to public service.

Vetting the livelihood of a (candidate) judge is carried out by the National Agency for the Prevention of Corruption (NAPC). The full review comprises the determination of the authenticity of the declared information; the accuracy of the assessment of the declared assets; the verification of the existence of a conflict of interest and signs of illicit enrichment. Full verification of the declaration is carried out for each judge at least once every five years, as well as at the request of the HCJ or the HQCJ. The information obtained is included in a dossier and can also be used to assess the adherence to the rules of professional ethics.

Criteria for professional ethics and integrity have been established by the PCI. This body consists of twenty members, including representatives of human rights organisations, lawyers, and journalists of good repute. Among the main functions of the PCI are collecting, verifying and analysing information about a candidate judge; assessing criteria of professional ethics and integrity and advising the HQCJ. In the selection process, candidate judges should pass a special check by the HQCJ in accordance with the submitted documents, a qualifying exam, an interview and special training. Based on the results of the qualification assessment, the HQCJ adopts a motivated decision to confirm or not confirm the ability of a (candidate) judge to administer justice in a relevant court. In the case of non-confirmation, a sitting judge shall be suspended for up to six months, with simultaneous referral to the National School of Judges (see below) for the completion of the refresher course, followed by a re-qualification assessment. In case of repeated refusal for a judge to administer justice in a relevant court, he or she must be dismissed from the position.

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relaxation of selection criteria was to allow for a speedy update and clean up the judiciary.

Finally, the number of grounds for disciplinary action against (candidate) judges has been increased to 19. These include: the failure or late submission of declarations, as well as the submission of knowingly false information; the admission by a judge of unfair behaviour, including the incurrence by a judge or members of his family of expenses exceeding the income of such a judge and the income of his family members; failure to inform or untimely communication with the HCJ about an actual or potential conflict of interests of the judge; failure to inform the HCJ of a case of interference with activities in the administration of justice.

Full-scale application of the above-mentioned measures has not yet taken place, which contributes to the continuation of unfair practices in selection procedures, illegal enrichment and the adoption of customised decisions. At the same time, it should be noted that the mass voluntary retirement of judges (about 1,600 in 2016) was largely driven by the adoption of the 'Law on ensuring the right to a fair trial' of 2 February 2015, which introduced the qualification evaluation of judges. This, in itself, constituted a major clean-up operation.

Despite the generally positive nature of the above-mentioned reforms, their success is not guaranteed. This is primarily due to the dearth of qualified human resources. For the first time since independence, Ukraine is facing a situation in which only 4,824 of nearly 8,000 judge positions (and less than half at cadre level) have been filled, with dozens of local courts relying on one or two judges, while 12 courts have been forced to close. As a result, citizens do not have proper access to justice.<sup>53</sup>

The body responsible for training highly qualified personnel for the justice system is the National School of Judges of Ukraine (NSJU), a state institution with special status in the justice system. The NSJU is formed under the High Qualification Council of Judges and carries out its activities in accordance with the Law and the Charter approved by the HQCJ. The tasks of the NSJU include special training for candidate judges; training of judges, including those who are elected to administrative positions in courts; periodic

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<sup>53</sup> This situation is compounded by a lack in security of court buildings after the special unit 'Griffin' was abolished during the 2015 reform of the state's law enforcement bodies.

training of judges in order to improve their qualifications; conducting training courses determined by a qualification or disciplinary authority to improve the qualifications of judges temporarily suspended from the administration of justice; and training of court staff and improving their qualifications.<sup>54</sup>

A major pending change to Ukrainian litigation concerns the representation of parties in court. Currently, Ukrainian lawyers willing to represent the interests of clients in court do not need to pass (the equivalent of) the bar exam. Even a law diploma is not required. The only limitation in this respect applies to practising criminal law where lawyers need to have a legal education, two years of working experience with an attorney, and to pass the exam for an attorney's licence. Ukraine's legal community is divided on the question whether the introduction of a 'monopoly' for attorneys at law is a positive development. On the one hand, it is argued that the exclusive right of attorneys to represent clients in court is not a privilege but about increasing their responsibility, which should be subsequently envisaged in procedural law. On the other hand, the introduction of the monopoly is viewed as a limitation of the right of access to court, as there is a risk that attorneys' fees may rise disproportionately.

### *Fighting corruption in the justice sector in Moldova*

Moldova is a typical example of over-regulation with no discernible practical impact. As noted earlier, several important legislative amendments have been implemented either partially or contrary to the stated goals (see section 2.3).

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<sup>54</sup> According to the latest report of the NSJU in 2016, 155 specialised training sessions were held for local court judges. They included topics such as: judicial ethics; anti-corruption legislation; time management in the judiciary; application of the ECHR in the administration of justice. Overall, in 2016 NSJU conducted 257 training activities for judges of local and appellate courts; 3,461 judges were trained to maintain qualification (average annual number of judges passing this training is about 4,000 people). The financing of these measures was carried out both at the expense of the state budget and donor organisations. In 2016 an additional 6,000 court staff were trained in NSJU and enhanced their skills. On the whole, in 2016, 414 judges, 207 lawyers and practitioners were involved in teaching activities.

A case in point concerns the selection and promotion of judges. In 2012, the Moldovan Parliament passed a package of legislative amendments that introduced, *inter alia*, the Judges' Selection and Career Board; criteria for the selection, transfer and promotion of judges;<sup>55</sup> a mandatory three-yearly performance evaluation; and a limited discretion of the Superior Council of Magistracy (SCM) on the career of judges. These novelties should have led to the selection and promotion of the most competent and correct candidates. Yet the practice of 2013-17 shows a different picture. For instance, in the period 2013-16 several cases were noted when judges with outstanding integrity issues were appointed or promoted by the SCM, including after the president's unsubstantiated refusal to appoint other candidates.<sup>56</sup> Credible mass-media have disclosed integrity problems regarding several candidates. Civil society organisations have requested adequate procedures from the SCM, however, no reasoning was ever provided by the SCM for appointing or promoting judges with integrity issues.<sup>57</sup> Instead of using questionable tools such as polygraph tests, a proper implementation of the rules on asset declaration would have a much bigger impact.

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<sup>55</sup> There are two types of candidate judges: graduates of the National Institute of Justice and legal specialists with work experience. They have to go through the same procedure: graduation of the National Institute of Justice or exam before the Graduation Committee (for candidates with work experience); review by the Judges' Selection and Career Board; proposal by the SCM; and appointment by the President/Parliament (the latter for Supreme Court). Promotion of judges includes the following stages: performance review by Judges' Performance Evaluation Board; review by Judges' Selection and Career Board; proposal by the SCM; and promotion by the President/Parliament.

<sup>56</sup> The president of the country appoints judges of the first and second instance courts (the Parliament for the Supreme Court) at the proposal of the SCM. The president can refuse only once the appointment of a candidate judge, by reasoned decree. The SCM may propose the same candidate by a vote of two thirds of its members and the president is obliged to promote the respective candidate.

<sup>57</sup> See, e.g., <http://crjm.org/ong-uri-solicita-presedintele-rm-verifice-informatii-candidati-judecatori-si-admita-pe-cei-cu-reputatie-ireprosabila/>.

Another example of a failed reform is the 2014 ‘Law on disciplinary responsibility of judges’,<sup>58</sup> which introduced a raft of improvements such as the appointment procedure for members of the Disciplinary Board, an extended list of disciplinary offences and a longer period (from 1 to 2 years) to hold judges accountable. At the same time, however, the law provided for a cumbersome mechanism that allows too much discretion to the Judicial Inspection to declare inadmissible disciplinary complaints, and a long mechanism of five bodies able to examine complaints and quash the decision of the previous body. Although the new law has increased the categories of persons that can submit disciplinary complaints about judges,<sup>59</sup> the number of disciplinary sanctions in 2015 and 2016 decreased when compared to 2011-14.<sup>60</sup>

In the case of disciplinary sanctions for certain offences, a judge may lose the right to a so-called ‘exit allowance’. Arguably, this system undermines judicial independence. The same applies to judges benefiting from below market prices for apartments in blocks built at the request of the Judges’ Association or under the authority of the SCM, on plots of land transferred by the Chisinau municipality at preferential conditions. Judges have been found to own several apartments, including some registered under the

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<sup>58</sup> Law no. 178 on disciplinary responsibility of judges, of 27 July 2014, in force since 1 January 2015.

<sup>59</sup> Prior to the 2014 law, only members of the Superior Council of Magistracy (SCM) could initiate a disciplinary procedure. Since January 2015, any person can submit a complaint to the Judicial Inspection, including members of the Superior Council of Magistracy, which can proceed with the case or dismiss the complaint.

<sup>60</sup> Judicial Inspection dismissed as manifestly ill-founded 72% of all disciplinary complaints in 2015 and 81% in 2016. The rate of dismissals by the admissibility panels is even higher: 97% in 2015. For more details and analysis, see P. Grecu, N. Hriptievsci, *Analysis of the legislation and practice concerning disciplinary liability of judges 2015-2016*, Legal Resources Centre from Moldova, 2016, <http://crjm.org/wp-content/uploads/2016/11/2016-11-Analiza-Disc-CRJM-final-ENG.pdf> and, by the same authors, *Assessment of needs to improve the legal framework on disciplinary liability of judges*, Legal Resources Centre from Moldova, 2016, <http://crjm.org/wp-content/uploads/2016/02/CRJM-Politici-8-Disciplinar-ENG.pdf>.

names of relatives and others sold at market prices.<sup>61</sup> Rather than providing perks that compromise the independence and integrity of judges, existing benefits should be significantly reduced and regular salaries further increased.

Corruption in the Moldovan judiciary sparked peak public indignation in September 2016, when 16 judges were criminally charged for money-laundering activities in a \$20 billion ‘Russian Laundromat’ scheme.<sup>62</sup> Although the SCM had been aware since 2012 of the involvement of judges in these cases,<sup>63</sup> it took no action until the autumn of 2016. In the meantime, several of the incriminated judges were positively evaluated,<sup>64</sup> promoted to administrative positions in district courts or to Courts of Appeal.<sup>65</sup> The majority of judges that issued court orders for the transfer of funds came from the Chişinău Rîșcani District Court, where the current president of the SCM served before 2013. The Moldovan think tank IDIS Viitorul has concluded that judges

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<sup>61</sup> See <https://anticoruptie.md/ro/investigatii/justitie/chilipiruri-imobiliare-pentru-judecatori-pe-terenurile-statului>.

<sup>62</sup> See, e.g., <https://www.theguardian.com/world/2017/mar/20/british-banks-handled-vast-sums-of-laundered-russian-money> and Transparency International-Moldova, ADEPT, LRCM and IDIS-Viitorul, *State Capture: The case of the Republic of Moldova* (available at [http://www.transparency.md/wp-content/uploads/2017/06/TI\\_Moldova\\_State\\_Capture.pdf](http://www.transparency.md/wp-content/uploads/2017/06/TI_Moldova_State_Capture.pdf)).

<sup>63</sup> The SCM knew about the ‘Russian Laundromat’ back in 2012 when the Security and Intelligence Service (SIS) was notified of the actions of Judge Iurie HÎRBU at Teleneşti Court. At the time, the SCM took note of the information provided by the Judicial Inspection that the judge certified the debt of USD 30 million on the basis of unauthenticated copies of documents. The SCM also noted the intention of a member of the SCM to initiate disciplinary proceedings against that judge and forwarded the materials to the General Prosecutor’s Office. See SCM decision no. 812/38 of 8 December 2012 in Romanian, <http://csm.md/files/Hotaririle/2012/38/812-38.pdf>. In 2014, the SCJ analysed court practice on this issue and found several instances of misconduct by judges. The findings were brought to the attention of prosecutors, NAC and SCM. In May 2014, SCM took note of this information but did not order any further investigation or disciplinary proceedings. See SCM decision no. 470/16 of 27 May 2014 in Romanian, <http://csm.md/files/Hotaririle/2014/16/470-16.pdf>.

<sup>64</sup> See Performance Evaluation Board, decision no. 18/2 of 13 February 2015, <http://csm.md/files/Hotaririle%20CEvaluare/2015/02/18-2.pdf>.

<sup>65</sup> See SCM, decision no. 769/30 of 20 October 2015, <http://csm.md/files/Hotaririle/2015/30/769-30.pdf>; and decision no. 8/2 of 26 January 2016, available at <http://csm.md/files/Hotaririle/2016/02/8-2.pdf>.

were aware of the illicit nature of the transactions and adopted decisions in favour of criminal networks because they were assured of high political support.<sup>66</sup> The cases against the judges have been pending since August 2017.

Several other negative trends have eroded public trust in the (independence of the) judiciary.<sup>67</sup> One is the phenomenon of closed hearings in high-profile cases such as that of Moldova's ex-Prime Minister Filat, sentenced to nine years in prison for, inter alia, passive corruption. The first instance and appeals courts heard the case in closed proceedings.<sup>68</sup> On 22 February 2017, the Supreme Court rejected Filat's appeal in a written procedure. Only the decision of the Supreme Court was published in full. Two other notorious cases concerned the 'billion-dollar theft' from the Moldovan banking sector.<sup>69</sup> Examining such cases behind closed doors fuels the perception of abuse among the public.

Other threats to the (perception of) independence of the Moldovan judiciary concern the initiation of criminal proceedings against judges for the merits of their decisions; an increase in the

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<sup>66</sup> IDIS Viitorul, *Operațiunea Laundromat: Analiza actorilor și a acțiunilor întreprinse* (Laundromat Operation: Analysis of the actors and actions taken), Chișinău, 2017, pages 15-16, [http://www.viitorul.org/files/library/Puterea%20hibrida\\_site.pdf](http://www.viitorul.org/files/library/Puterea%20hibrida_site.pdf).

<sup>67</sup> According to polls 74.5% of the population did not trust the judiciary in November 2011. In October 2016, this figure has dropped to 89.6%. Institute for Public Policies, *Public Opinion Barometer*, October 2016: <http://www.bop.ipp.md/result?type=bar>.

<sup>68</sup> On 21 June 2016, just six days before the sentence in Mr. Filat's case was issued by the first instance court, the SCM adopted a new 'Regulation on publishing court decisions', according to which decisions of cases examined behind closed doors are not to be published on its website. The previous regulation from 2008 did not provide such a limitation and all court decisions were published.

<sup>69</sup> Reference is made here to the cases of Veaceslav Platon, a businessman sentenced to 18 years in prison, and Ilan Shor, the mayor of Orhei and former President of the Board of Economy Bank of Moldova. This episode concerned the disappearance of around 1 billion USD from Moldovan banking sector, representing nearly a third of the National Bank's reserves, or the equivalent of 15% of Moldovan GDP. For a detailed explanation, see <http://www.transparency.md/2016/12/20/radiography-of-a-bank-fraud-in-moldova-from-money-laundering-to-billion-fraud-and-state-debt/>.



interference of the executive and legislative branches with judiciary; and dismissals of judges based on information from intelligence services, provisions declared unconstitutional on 5 December 2017. The most telling example that combines these systemic trends is the pending case of ex-judge Domnica Manole.<sup>70</sup> On 14 April 2016, Judge Manole of the Chisinau Court of Appeals annulled the decision of the Central Electoral Commission (CEC), by which the latter had rejected the initiation of a constitutional referendum. The Supreme Court annulled her decision, ruling in favour of CEC. Based on this ruling, the Interim General Prosecutor on 26 May 2016 submitted a request to the SCM to approve the initiation of criminal investigation of Judge Manole for her interpretation of the law in a context when the constitution contains contradictory provisions and there is no judicial precedent on this issue. Five days later the SCM approved the request in a closed meeting, ignoring the judge's request to examine it in a public hearing. In a parallel development, the Anti-Corruption Prosecution Office reopened an investigation against Judge Manole in a case of alleged failure to declare properties. This case was quashed in February 2015 after the National Anti-corruption Centre (NAC) found that the judge had committed no such breach. The reopening of the case smacked of an orchestrated (ab)use of prosecutorial powers to harass the judge. On 5 July 2017, i.e. before she could submit her publicly announced candidature for SCM membership, the SCM decided to dismiss Judge Manole on the basis of a non-legally binding opinion of the Information and Security Services which was examined behind closed doors, although Manole had asked for a public hearing. Manole appealed the dismissal by the SCM before the Supreme Court. Although the case was still pending, the president on 21 July 2017 signed the decree dismissing the judge. Given the personalities involved in this case one would be forgiven for wondering whether this kind of prosecution serves the judicial hierarchy in setting an example for other judges that would dare to go against the grain.<sup>71</sup>

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<sup>70</sup> In another case in which a judge was dismissed based on secret intelligence, a complaint was lodged before the European Court of Human Rights for alleged breach of due process guarantees required by Article 6 ECHR.

<sup>71</sup> At the General Assembly of Judges of March 2016, Judge Manole had criticised several proposals of the judiciary's leadership, launched in 2015. She

## Judicial implementation of the DCFTA

Having discussed the judicial reform efforts undertaken in Georgia, Moldova and Ukraine as a result of these countries' shared desire to associate themselves more closely with the EU, the analysis now turns to court practice with the implementation of the AA/DCFTAs. Not only does such an exercise serve to gauge the awareness levels of national judges about the need to enforce their country's contractual obligations entered into with the European Union, it also offers insights into the level of openness of domestic courts to use international and EU law in setting conflicting national rules and bad practices aside.

In the case of Georgia, according to the 'Law on Normative Acts' and the 'Law on International Treaties of Georgia', international agreements such as the Association Agreement with the EU are an integral part of the country's legislation. Their hierarchical position is below that of the Constitution and above (organic) laws of Georgia. Georgian courts may therefore refer to AA/DCFTA provisions. This was also the case for rights and obligations derived from the Partnership and Cooperation Agreement (PCA), but Georgian case law reveals no traces of the PCA.<sup>72</sup> At the time of writing, only one explicit reference had been made to the AA/DCFTA. In its Decision of 31 July 2015, the Constitutional Court concluded that there is a right for employees to receive damages in the event of unlawful termination of an employment contract. The Court based its reasoning, *inter alia*, on Articles 228 and 229 of the AA but was careful to add that these

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had appealed the SCM decision of 26 January 2016 for lack of reasoning for the promotion of judges to the Supreme Court and publicly criticised the SCM for selective approaches on promotions. She was the judge rapporteur in two disciplinary cases that sanctioned several judges of the Supreme Court of Justice.

<sup>72</sup> See G. Gabrichidze, 'Legislative Approximation and Application of EU Law in Georgia', in: P. Van Elsuwege and R. Petrov (eds.), *Legislative Approximation and Application of EU Law in the Eastern Neighbourhood of the European Union: Towards a Common Regulatory Space?* London: Routledge, 2014, 188.

provisions codify standards established by the International Labour Organisation.<sup>73</sup>

The near absence of direct references to the AA/DCFTA in Georgian jurisprudence might be explained by the fact that the agreement – in contrast to the ECHR – contains hardly any provisions which could qualify for direct applicability. Yet a review of the Unified State register of Judgments reveals that domestic courts have used EU (legal) acts in order to reinforce their own legal positions.<sup>74</sup> A more likely explanation is therefore that it is simply too soon after the entry into force of the AA/DCFTA for Georgian litigators and judges to have woken up to the idea that the agreement could provide them with an autonomous source of legal backup, especially after the lukewarm reception by the Constitutional Court of Articles 228 and 229. But as the Georgian Parliament proceeds with the approximation of large parts of national law to the EU *acquis*, the likelihood grows of domestic courts choosing to interpret the former in conformity with the latter.

The reason for this sense of optimism is gleaned from court practice in Ukraine. Even if the Constitutional Court has not yet expressed itself on the direct applicability of the AA/DCFTA in the legal order of Ukraine, it could well be asked to rule on the binding nature of decisions adopted by the EU-Ukraine Association Council or on the obligation of the EU-Ukraine joint arbitration panel to abide by rulings of the ECJ on the interpretation of the relevant EU *acquis*. In the past, the High Commercial Court of Ukraine has recognised the precedence of the PCA over conflicting provisions of national law.<sup>75</sup> The reform wave which is currently sweeping across the justice sector has awakened the activism of judges to seek inspiration in Ukraine's international treaty obligations and rulings

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<sup>73</sup> Decision of the Constitutional Court of Georgia, N 2/3/630, 31 July 2015.

<sup>74</sup> See G. Gabrichidze, 'The Constitutional Order of Georgia and its Adaptability to the EU- Georgia Association Agreement', in R. Petrov and P. Van Elsuwege (eds.), *Post-Soviet Constitutions and Challenges of Regional Integration. Adapting to European and Eurasian Integration Projects*, London: Routledge, 2018, 105-117.

<sup>75</sup> See judgments of the High Commercial Court of Ukraine on 2 February 2005, No. 12/267; of 22 February 2005 ('Odek' LTD v Rypne Custom Office) No. 18/303; and of 25 March 2005 (Closed Stock Company 'Chumak' v Kherson Custom Office), No. 7/299.

by the European Court of Human Rights.<sup>76</sup> Administrative courts have already used EU *acquis* and ECJ case law, not as a source of law in and of itself, but as a “persuasive source of reference” for the “harmonious interpretation of national legislation of Ukraine with established standards of the EU”.<sup>77</sup> According to the High Administrative Court this practice is justified by the need for effective implementation of the EU-Ukraine Association Agreement.<sup>78</sup> In his research, Roman Petrov has uncovered dozens of judgments rendered since 2014, where general, specialised and high courts have referred to the AA/DCFTA and EU *acquis* (fundamental principles, secondary legislation and ECJ case law) in order to reinforce their legal argumentation in cases concerning customs duties,<sup>79</sup> the supply and trade of natural gas,<sup>80</sup> the definition of origin of goods (honey),<sup>81</sup> and even the legality of legislative drafts by the President of Ukraine.<sup>82</sup> Some judges have even gone so far as to consider the entry into force of the AA/DCFTA as an obligation to apply EU common values in Ukraine.<sup>83</sup> The latter may find

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<sup>76</sup> See R. Petrov, ‘The Constitutional order of Ukraine and its Adaptability to the Process of European Integration’, in R. Petrov and P. Van Elswege (eds.), *Post-Soviet Constitutions and Challenges of Regional Integration. Adapting to European and Eurasian Integration Projects*, London: Routledge, 2018, 91-104.

<sup>77</sup> See R. Petrov, ‘Regulatory Convergence and Application of EU Law in Ukraine’, in P. Van Elswege and R. Petrov (eds.), *Legal Approximation of EU Law in the Eastern Neighbourhood of the EU: Towards a Common Regulatory Space?*, London: Routledge Press, 2014, 137-158.

<sup>78</sup> Information Letter of the High Administrative Court of Ukraine, No. 1601/11/10/14-14, 18 November 2014.

<sup>79</sup> See e.g. Judgment of the Appellate Court of the region of Lviv on 06 April 2016, No. 33/783/241/16.

<sup>80</sup> See e.g. Judgment of the District Administrative Court of the city of Kiev on 13 April 2016, No. 826/594/16.

<sup>81</sup> See e.g. Judgment of the District Court of the city of Tsyrypynsk on 29 April 2016, No. 664/906/16-c.

<sup>82</sup> See e.g. Judgment of the High Administrative Court of Ukraine on 26 April 2016, No. 800/251/16.

<sup>83</sup> Petrov, *loc. cit.*, who refers to the judgment of the Inter-district Court of Kolomyia of 7 July 2016, No. 346/3499/16-c, which contains a rather emotional passage: “The Court notes that after the signing of the Association Agreement with the European Union by the President of our country, and after the

expression in future (general or Constitutional) court practice in cases where new domestic legislation rubs up against such “essential elements” of the AA as the freedom of expression.<sup>84</sup>

Moldova has produced an uneven court practice with the application and enforcement of its AA. State bodies and lower courts have based some of their decisions on provisions of the AA/DCFTA, albeit often in a partial way not in conformity with best practice. Fortunately, wrong interpretations have been corrected at last instance when proceedings ran their full course. The Constitutional Court addressed the correlation between national constitutional principles and the Law on the ratification of the EU-Moldova Association Agreement for the first time in October 2014.<sup>85</sup> The Court argued that the right of the state to assume international commitments is an inherent element of state sovereignty, which can be manifested externally by establishing collaborative relationships with other countries and international entities on the basis of international agreements. Strikingly, the Constitutional Court also concluded that, when doing so, the attribution of competences to designated international institutions does not imply the simultaneous transfer of national sovereignty per se, but merely the exercise thereof. As such, the Moldovan Constitutional Court has adopted the legal canons that define the relationship between the supranational EU and its member states

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ratification by the supreme legislative body (the Verkhovna Rada Ukraine), Ukraine, as a state aspiring the full membership in the EU, must respect private property rights of every person as a basic tenet and a cornerstone of European values and inviolable foundation of the EU, which must be complied by all Member States and by associated countries.”

<sup>84</sup> See, e.g., Executive Order (Ukaz) of the President of Ukraine No. 133/2017 of 15 May 2017 banning Russian social networks; and the commentary by P. Van Elsuwege, ‘Ukraine’s Ban on Russian Social Media: On The Edge Between National Security and Freedom of Expression’, *VerfBlog*, 2017/6/02, <http://verfassungsblog.de/ukraines-ban-on-russian-social-media-on-the-edge-between-national-security-and-freedom-of-expression>. In a similar vein, see the ‘Law Amending the Administrative Code regarding the ban on production and propaganda of the St. George (Guards’) Ribbon’ of 16 May 2017.

<sup>85</sup> Judgment of the Moldovan Constitutional Court on 9 October 2014 (<http://www.constcourt.md/ccdocview.php?tip=hotariri&docid=511&l=ro>). The said law was adopted on 2 July 2014.

and set the scene for lower courts to use the AA/DCFTA as a source of inspiration and directly applicable law. Two landmark cases stand out in this respect, both related to the protection of the geographical indication an international trade mark 'Prosecco'.

The first case, *Bulgari Winery SRL v. State Agency for Intellectual Property (AGEPI)*, concerns an action for annulment of AGEPI's refusal of 27 March 2015 to allow the claimant's use of the name 'Pronto Prosecco' for marking its sparkling wine while accepting the use of the international trade mark Prosecco DOC and PDO on the territory of Moldova for champagne-like sparkling wines. The first instance court of Riscani, district of Chisinau, rejected AGEPI's arguments, including breaches of provisions of the EU-Moldova Association Agreement that allow exceptions only to marks / names that had been in use by local companies long before the agreement entered into force, as well as a violation of the already protected trade mark DOP Champagne (country of origin: France). On 23 February 2017, the Chisinau Court of Appeal upheld the ruling by the first instance court without, however, going into the merits of the case. In fact, both court rulings lacked adequate reasoning and appeared to be verging on the arbitrary. The Appeals Court limited itself to stating that AGEPI had acted like the defender of the private company owning the rights over the combined mark Prosecco DOC/PDO, contrary to its statutory competencies. It also referred to its sister court in Comrat, which had ruled that Bulgari Winery had the right to use the name Prosecco.

The parallel case, *Tomai-Vinex SA and Bulgari Winery SRL v. State Inspection for Alcohol Production and the Ministry of Agriculture*, concerned the decision of the State Inspection of 25 January 2016 prohibiting the production and placement on the market of the two companies' sparkling wine products with the trademarks 'Prosecco'.<sup>86</sup> When challenged, the Head of the State inspection amended the decision, thereby prohibiting only the placing on the market, not its production. The Ministry of Agriculture, however, upheld the decision of 25 January 2016 and also prohibited Tomai-Vinex SA from using the trade mark 'Prosecco Pronto' (for exports to Russia) and Bulgari Winery SRL from using the mark 'Prosecco Cassara' (for exports to the US). On 24 June 2016, the first instance

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<sup>86</sup> AGEPI joined the state authorities in the proceedings.

court of Comrat ruled in favour of the two companies. On 20 October 2016, the Court of Appeal of Comrat upheld that judgment by ruling that the state authorities had overstepped their competences, because these were limited to the territory of Moldova, whereas both companies had stopped their production and exports to Russia and the US prior to the decision of January 2016. The Court stated that according to Article 302 of the AA, the Republic of Moldova benefited from a transitional period of five years (starting 1 April 2013) to put in place all (customs border) measures necessary to stop any unlawful use of protected geographical indications. Hence, it seems that the first instance and appellate courts concluded that the state authorities were barred from taking any measures to impede the production activity of economic operators, including the use of the geographical indication 'Prosecco' by the two companies, until the end of the five-year transition period. On 20 September 2017, the Supreme Court of Justice quashed this reading of the AA and upheld the orders of the State Inspection and the Ministry of Agriculture.<sup>87</sup>

The Supreme Court ruled that Articles 297-301 and Annexes XXX-C/D of the Association Agreement<sup>88</sup> obliged the Government of Moldova to protect the geographic indications according to the level provided by the AA and by way of adequate administrative and judicial procedures (including on customs). The Court also held that the Moldovan authorities had to ensure the respect of the protections at the request of EU.<sup>89</sup> The Supreme Court found that the lower courts had wrongly interpreted the regime of exceptions

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<sup>87</sup> See Decision no. 3ra-426/17, Supreme Court of Justice, 20 September 2017, available in Romanian at [http://jurisprudenta.csj.md/search\\_col\\_civil.php?id=38959](http://jurisprudenta.csj.md/search_col_civil.php?id=38959). The ruling of the Court is only reviewed insofar as it relates to the AA.

<sup>88</sup> Ratified by Law no. 112 of 2 July 2014.

<sup>89</sup> The European Commission brought a complaint of an Italian company that had the right to use the protected geographic indication 'Prosecco' to the attention of the first meeting of the subcommittee for protection of geographic indications that took place on 15 December 2015. The issues had been raised again at the EU-Moldova dialogue of 31 March 2017 and a subsequent meeting between Prime Minister Pavel Filip and EU Commissioner for Trade Cecilia Malmström. See an article published on 24 April 2017, available in Romanian at <http://agora.md/stiri/31348/spumantul-prosecco-poate-declansa-un-scandal-diplomatic-intre-r--moldova-si-ue>.

whereby a limited number of traditional wines produced prior to the entry into force of the AA could indeed – until the end of the transition period – continue to be marked under such names as *Champagne*, *Cognac*, *Cahors* for exports to CIS countries, but not products under new names that belong to companies from the EU, such as Prosecco.

Building on the Constitutional Court's ruling of October 2014, this judgment of the Supreme Court of Justice represents a positive example that Moldova's highest judicial bodies are on the right track in faithfully implementing the letter and the spirit of the EU-Moldova Association Agreement. At the same time, the two Prosecco cases reveal the urgent need to shield the judiciary from inappropriate (corporate) interferences and to properly train lawyers and lower court judges on the complexities of the Association Agreement.

## Conclusions

Going by the provisions of the Association Agreements and the texts of the ensuing Association Agendas, the commitments of Georgia, Moldova and Ukraine to reform their judicial systems look more or less the same, yet the starting points for implementation are very different. This is the result of different historical trajectories and current-day political tendencies in the transition of the three associated states.

Reform in Georgia's justice sector has been implemented in several phases. Building on a major overhaul during the second half of the 2000s, the current government, which took office in 2012, initiated three waves of reforms. The objectives have become more and more sophisticated. Technically, Georgia has done more than any other country in the region. This is reflected in, for instance, the World Justice Project's "Rule of Law Index 2017-8", where Georgia ranked 1st in Eastern Europe and Central Asia, and 38th globally out of 113 countries – down from 29th out of 102 in 2015 but still ahead of EU member states Greece, Bulgaria and Hungary. Yet, with significant progress made in a relatively short period of time and many achievements to be proud of to this day, the judicial reform has still not addressed principal issues such as the ambiguity of disciplinary liability of judges, the lack of norms regulating the High Council of Justice, and the flawed procedures for the election



of court presidents and candidates for the European Court of Human Rights. While previous governments had succeeded in substantially reducing corruption and in establishing institutional effectiveness, the lack of political independence of the judicial system, including the Prosecutor's Office, remains to be addressed. Local and international watchdogs have pointed to instances of selective justice and attempts whereby making legal/institutional progress has been overshadowed by a lack of political will (or too much will, but misplaced). With many good practices in place, the ultimate test is that of the 'resilience' (i.e. quality, ethics and principles) of the judiciary against undue political interference. In this context, it is dispiriting to note that oligarchic power has reasserted itself in influencing political choices.<sup>90</sup>

In spite of the Euromaidan revolution of 2013, Ukraine is still suffering from its post-Soviet legacy of a weak rule of law and high levels of fraud. The judiciary, in particular, has traditionally been perceived as one of the most corrupt institutions in the country. In June 2016 the authorities kick-started a process of multiannual reform of the justice sector, with amendments to the Constitution and the adoption of new legislation aimed at reorganising the judicial architecture of the country (by creating a new Supreme Court and reducing the judicial tiers from four to three), strengthening judicial independence (e.g. by subjecting sitting judges to examinations and mandatory electronic asset declarations), and abolishing the state's monopoly on the enforcement of court decisions (i.e. through the introduction of private bailiffs). Details of many of these reforms will need to be regulated in implementing acts but, overall, they represent a major overhaul of Ukraine's judicial system and a revolutionary attempt to eradicate widespread corruption in the judiciary (cf. the vetting process).

Despite these attempts at subjecting the justice sector to Georgia-style shock therapy, law enforcement remains biased, with groups of top officials and wealthy businessmen seemingly enjoying low levels of accountability and high levels of illicit privileges, while others cannot have their rights protected. The situation has improved a little under the previous and current

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<sup>90</sup> See also the chapter by Konończuk, Cenuşa and Kakachia in this book.

governments but Ukraine still performs below average according to indicators of the World Justice Project's "Rule of Law Index 2017-8", where the country ranks 77th. The selection of judges to the new Supreme Court (completed in November 2017) only partly contributed to the judicial system's clean-up as the Public Council of Integrity questioned the integrity, independence and professional records of about a quarter of newly appointed judges. Efforts to modernise the General Prosecutor's Office are still ongoing and the authorities have dithered over the creation of a much-anticipated High Anti-Corruption Court. The adoption of the necessary legislation to establish the HAC was pushed back well into 2018. Now that it has been passed, attention turns to implementation.

The changes to the justice sector are planned for gradual introduction over the next few years, so until 2020 the jury is still out, as it were. The emerging practice of administrative and commercial courts with the implementation of the EU-Ukraine Association Agreement gives reason for hope. Unfortunately though, the general impression is that the judicial reform dynamic has hit the buffers, due to a ruling elite that is unwilling to undermine its own wealth and power in the name of progress towards an independent judiciary. The justice sector reform in Ukraine is rather like the procession of Echternach: three steps forward, two steps back.<sup>91</sup>

Moldova's direction of travel has been backwards in recent years and its Justice Sector Reform Strategy (JSRS, 2011-2016) has fallen flat: changes were made mostly at the procedural and technical levels but have not been matched by improvements in the independence and integrity of judges. Moldova is facing unprecedented attacks on judicial independence and increasing instances of selective justice. These are attested mostly via the selection and promotion of judges with questionable integrity; ungrounded prosecution of outspoken judges; questionable dismissals; reduced transparency and corporatism at the level of the Superior Council of Magistracy (SCM); increased use of closed hearings in high profile cases and reduced transparency of courts in

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<sup>91</sup> Echternach is a locality in Luxembourg which has an ancient tradition of dances conforming to this model.

general. The alleged involvement of 16 judges in a \$20 billion money laundering scheme from Russia to various European states between 2010 and 2014 is but the tip of the iceberg of a highly dysfunctional judicial system. Implementation of the 2016 Law on Prosecution has been slow. As a result of high levels of corruption and selective justice, citizens' trust in the judiciary remains below 10%, one of the lowest figures globally. The World Justice Project's "Rule of Law Index 2017-8" ranks Moldova 78th out of 113 countries. Citing insufficient progress in reforming the justice sector, the EU in 2017 took the unprecedented step of annulling the remaining half (i.e. €28 million) of budget support for justice sector reform. Recognising the need for urgent measures, the government's current minister of justice has embarked on implementing a 'small-scale justice reform' for 2018. It remains to be seen whether this will be enough to thoroughly reform the judiciary. Given the fragile state of its judiciary, it is remarkable that Moldova has witnessed the first cases of application of AA/DCFTA provisions, with laudable precedent-setting judgments rendered by both the Constitutional Court and the Supreme Court of Justice.

In spite of the differences between the three DCFTA countries, our research has helped to bring some common features into sharper focus. Firstly, each of the countries faces daunting geostrategic and economic challenges which go beyond the focus of this report. Under the banner of EU-inspired modernisation, socio-economic change is fast-tracked, but some justice reforms are being delayed or derailed. The latter has heightened tensions between rights groups and those defending vested interests. Secondly, populist promises of 'draining the swamp', i.e. eviscerating corruption, have turned out to be half-true (Georgia and Ukraine), if not completely false (Moldova). This is vividly illustrated in the justice sector, where the appointment procedures of judges and the distribution of cases, to name just two examples, are tainted by political interference.

This ultimately poses challenges for the European Union in the ways it can confront illiberalism and remove obstacles to an independent and impartial judiciary in the three associated states. All three countries have come under intensified scrutiny from the EU. Their performance in the early stages of implementation of the Association Agreements has been evaluated in reports published by

the European Commission.<sup>92</sup> Yet, pre- and post-accession experiences with countries from central (e.g. Hungary and Poland) and southeast Europe (e.g. Bulgaria, Croatia and Romania) show that judicial transformation processes are not just long and arduous, but – in the absence of proper enforcement tools in the hands of the guardians of the EU treaties – also subject to potential reversal. This downward trend of the rule of law within the EU creates a negative feedback loop to corrupt elites outside of the Union and undermines the position of the European Commission in enforcing commitments made in the context of the European Neighbourhood Policy. There is precious little leverage beyond withholding financial support ('less for less'), an act that may in itself contribute to further delays in or escapes from the implementation of judicial reforms. Rethinking the EU's approach to creating and maintaining resilience in the rule of law and justice sector is a topic that should exercise minds across the internal/external policy divide of the EU.

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<sup>92</sup> See Joint Staff Working Documents, Association Implementation Report on Georgia, Brussels, 9 November 2017, SWD(2017) 371 final; Association Implementation Report on Ukraine, Brussels, 14 November 2017 SWD(2017) 376 final; Association Implementation Report on Moldova, 3 April 2018 SWD(2018) 94 final.

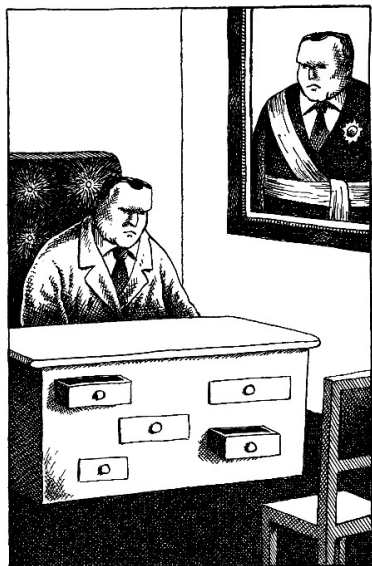
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## 4. ANTI-CORRUPTION POLICIES

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### Introduction

Thanks to the work of several international organisations and NGOs in recent years, anti-corruption policy has become increasingly well-structured as a subject, providing a robust basis for inter-country comparisons. In the cases of the three countries Georgia, Moldova and Ukraine, Georgia stands out as having taken early and radical steps to largely eradicate corruption, from a starting point of being deeply corrupted similar to the situation persisting in Moldova and Ukraine: though the latter two countries

have in recent years engaged in much of the legislative agenda for curbing or preventing corruption, vested interests have continued to block the full potential impact of these measures.

In Moldova, some key measures to assure the independence of key anti-corruption institutions have not yet been taken, and a single oligarch group exercises power amounting to 'state capture'. In Ukraine considerable progressive steps have been taken, but the overall picture is still marred by a lack of clear and consistent political resolve regarding implementation. While legislative action does not automatically deliver results, legal infrastructure

supported by a real political will at the highest level is key to achieving the desired outcome.

What is corruption? A primary distinction is made between 'petty corruption' where individuals or small businesses have to pay small bribes for securing public services or for passing examination by inspectors in relation to various regulations; versus 'grand corruption' where top-level officials or politicians are involved in large financial transactions or significant policy decisions, including the role of oligarchs in what is known as 'state capture' (see Chapter 2). Other categories of corruption can include extortion, nepotism, exploiting conflicting interests, and the making of improper political contributions.

A comparative analysis of anti-corruption policies in Georgia, Moldova and Ukraine is of particular interest, since they have much in common due to their Soviet past, and all now follow essentially the same course for economic and political reform, set out in their Association Agreements with the European Union. Yet their experiences so far with anti-corruption policy are very different. While several sources show Moldova and Ukraine as still perceived to be the most corrupt of 40 European countries, Georgia is perceived to be one of the least corrupt of all post-communist Europe, and even ranks ahead of the EU average.<sup>1</sup>

Whereas the question of perceptions is very general and subjective, the results are broadly confirmed in sources that pose more precise and varied questions, such as in Table 4.1, based on the World Bank's enterprise survey. For example, the percentage of firms experiencing at least one bribe request is a minimal 2% in both Georgia and the OECD's high-income countries, while the corresponding figures for Moldova and Ukraine are 31% and 50%, respectively.<sup>2</sup> A broadly similar picture emerges from several other questions posed in this World Bank enterprise survey.

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<sup>1</sup> Transparency International, 2016.

<sup>2</sup> The most recent World Bank Enterprise Survey was conducted in Georgia, Moldova and Ukraine in 2013 (<http://www.enterprisesurveys.org/>).



Table 4.1 World Bank's Enterprise Survey

	<b>Bribery incidence (% of firms experiencing at least one bribe request)</b>	<b>Bribery depth (% of public transactions where bribe requested)</b>	<b>% of firms expected to give gifts in meetings with tax officials</b>	<b>% of firms expected to give gifts to secure government contracts</b>	<b>% of firms expected to give gifts to get a construction contract</b>	<b>% of firms expected to give gifts to public officials to get things done</b>	<b>% of firms identifying corruption as a major constraint</b>
OECD	2	1	1	11	2	8	11
Eastern & Central Europe	17	14	13	26	25	20	22
Georgia	2	1	0	1	12	2	3
Moldova	31	22	14	11	49	16	38
Ukraine	50	45	50	99	73	73	38

Source: OECD (2016), based on WB Enterprise Surveys conducted in Georgia, Moldova and Ukraine in 2013.

The Association Agreements and DCFTAs cite the fight against corruption as a general objective in the context of promoting the rule of law (Articles 3 and 22 in the Ukraine agreement, for example), but do not address the issue in any specific or operational terms. However, certain sectoral chapters are operationally relevant to the fight against corruption, notably those concerning public procurement and corporate governance.

Work on anti-corruption policies over the last few decades by international organisations and NGOs has developed a well-defined set of analytical templates. These identify key institutional arrangements and categories of normative legal measures that are the backbone of anti-corruption policy. See in particular the work of the World Bank, the OECD anti-corruption network for Eastern Europe and Central Asia, the Council of Europe's GRECO programme, the UN Office on Drugs and Crime, and Transparency International. In what follows we make extensive use of the OECD's recent 2013-2015 report (OECD, 2016c), and the UN Guide for Anti-Corruption Policies (UNODC, 2003).

Endemic corruption is the costliest of all factors contributing to a negative investment climate, and hence impeding economic growth. In the cases of Moldova and Ukraine, it is also undermining many of the measures being taken under the Association Agreements and DCFTAs to modernise their economies.

## Strategic and overarching aspects

### *Political will*

In what follows we compare how the three countries have progressed along the lines of the detailed templates of institutional arrangements and normative laws (Tables 2, 3 and 4). But first there is the crucial overarching question of whether there is the political will to really fight corruption, going beyond political declarations of intent and basic legislation.

The fundamental feature of **Georgia's** fight against corruption was the strong determination of the elite at the highest level to eradicate corruption, including the president in leading the Rose Revolution, starting in 2004. The objective was to defeat widespread corruption in the shortest possible time. The Rose

Revolution had been preceded by an anti-corruption movement, and public support for radical anti-corruption measures was strong. In practice the method of the government was quite ruthless, with entire institutions or their functions completely abolished rather than reformed gradually. The logic behind this was that a step-by-step approach would not yield tangible results in the short term. Another distinguishing feature of the Georgian story was that economic liberalisation and deregulation went hand-in-hand with anti-corruption reforms, and there was strong and genuine political support for both. Regulations, rules and requirements prone to generate corruption and burdensome for businesses were simply abolished with the same ruthless approach.

Some sceptics felt that this ‘big bang’ fight against corruption would only prove a short-term success, could only work under the leadership that crafted the strategy, and would collapse with a subsequent change of government. This hypothesis proved wrong: years after the change of government, the reforms have been broadly sustained, and Georgia’s corruption rankings have improved further.

In **Moldova**, the strong initial commitments to fight against corruption undertaken by the pro-European governments in 2009-10 have subsequently been eroded following agreement by the governing parties to divide the leadership positions in the judicial, anti-corruption and law enforcement institutions between their respective nominees. Achievements in strengthening the anti-corruption legal and institutional framework were mainly thanks to external pressure in the form of aid and conditionality. But there is still limited political will to systematically fight corruption, while reforms of the prosecutorial and integrity systems remain long overdue. Although significant work was done to build a legal and institutional anti-corruption framework, their implementation remains weak and enforcement inconsistent. In recent years, the unprecedented scale of the politicisation of state institutions revealed after the 2014 banking scandal and the increasing concentration of power in the hands of a single oligarchic group puts Moldova into an extreme ‘state capture’ category.

Corruption was one of the catalysts for **Ukraine’s** Revolution of Dignity (or Euromaidan), which in February 2014 led to the fall of the government and the flight of the president. The new regime

saw a rapid improvement in political will to tackle corruption, with the adoption of a series of important strategic documents, including the opening up of many public registries, offering access free of charge or for a small fee. But since then, anti-corruption 'policy' has become rather chaotic, especially when it comes to initiatives of members of parliament. None of the programmes of parliamentary parties regarding anti-corruption measures correspond to the recommendations made by international institutions. Proposed measures are often more populist than substantive in nature. Despite the positive role of civil society organisations in anti-corruption efforts, the government seems increasingly to view civil society as a dangerous opponent rather than a partner. Grand corruption is not effectively addressed by prosecutions of high-level officials, so exemplary convictions are inevitably non-existent. There have also been some worrying signs of curtailing new anticorruption bodies, and some of them show disturbing vulnerability to political influence. Overall, there is a huge doubt about any genuine political will to tackle corruption, not only with words, but also in practice.<sup>1</sup>

To summarise, in Georgia, the political will for radical and rapid anti-corruption reform has been broadly sustained since 2004. In Moldova, the initially strong political will in 2009-10 has ceded to a system of 'state capture' by a single group of oligarchs. In Ukraine, legislative regulation is slowly approaching international standards, but implementation is being held back by various factors, which may be summarised as a lack of political will.

### *Anti-corruption strategies and action plans*

The drawing up of such strategies and action plans has become general practice in the post-communist states, and is indeed one of the central elements of the reform process. But much depends on their quality. Such strategies and action plans need to define and prioritise the actions of various agencies, allocate domestic and foreign aid budgets, set timelines, and organise monitoring and the engagement of stakeholders. Anti-corruption strategies need to be comprehensive, non-partisan, transparent, and evidence-based.

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<sup>1</sup> Andrei Marusov, 'Anti-Corruption Policy of Ukraine, first successes and growing resistance', Renaissance Foundation, December 2016.

*Table 4.2 Anti-corruption strategies and institutions*

	<b>Georgia</b>	<b>Moldova</b>	<b>Ukraine</b>
Anti-corruption strategies and action plans	Anti-Corruption Strategy and Action Plans since 2005, latest for 2015-16 adopted in 2015.	Anti-corruption Strategy and Action Plans since 2004, latest for 2017-2020 adopted in 2017.	Anti-corruption strategy for 2014-17, first such legal text, adopted in 2014, updated for 2015-17. Draft Anti-corruption strategy 2018-20 before the Parliament.
Anti-corruption institutions	Anti-Corruption Council.	Since 2012, National Anti-Corruption Centre, Anticorruption Prosecution Office, National Integrity Authority (undergoing a reform since 2016).	Established in 2015, operational since 2016: - National Anti-Corruption Bureau; - National Agency for Prevention of Corruption; - Specialised Anti-Corruption Prosecutor's Office (established in 2018, to be operational in 2019) <sup>1</sup> - High Anti-Corruption Court
Integrity of public service	Competitive merit-based recruitment for civil service; a Code of Ethics under preparation.	Mandatory competitive recruitment (incomplete); Civil Servant's Code of Conduct; sectoral codes of ethics; integrity certificates (since 2018).	Competitive recruitment and promotion in civil service; several codes of ethics.
Integrity of judiciary	High Council of Justice independently appoints judges since 2006, with life tenure since 2013.	Supreme Council of Magistracy; Independence criticised for membership of Minister of Justice, and Prosecutor General.	Independence of High Council of Justice since 2016 with life tenure for judges from 2016.

<sup>1</sup> Law # 1402-VIII dated 02.06.2016 "On the Judiciary and the Status of Judges", Law #2447-VIII dated 07.06.2018 "On High Anti-Corruption Court".

**Georgia's** first National Anti-Corruption Strategy was adopted in 2005, followed later that year by a National Anti-Corruption Action Plan. There have been successive revisions of these key documents, the latest addressing the years 2015-16, which was adopted by the Anti-Corruption Council in February 2015 after extensive public consultations and approved by the government Decree on 20 April 2015. This document aims "to develop a unified anti-corruption policy for preventing and combatting corruption; to boost public trust by increasing transparency and accountability of public entities; to enhance civil society and establish transparent and accountable governance." It lists a comprehensive set of priorities for both the prevention and criminalisation of corruption. The Strategy has served as a guiding document throughout, but has definitely not been the primary tool for fighting corruption in practice.

**Moldova** has had a succession of anti-corruption strategy and action plan documents from 2004. The latest strategy addressing the period 2017-2020 and a subsequent action plan were adopted in March 2017, after extensive public consultations and entered into force in June 2017.<sup>1</sup> The strategy provides a new holistic approach in tackling and preventing corruption, based on the Transparency International methodology in assessing the national integrity system.<sup>2</sup> The strategic measures are structured according to eight 'integrity pillars',<sup>3</sup> and are mainly oriented towards removing barriers to effective implementation of the existing anti-corruption legislation. Each pillar has a separate action plan with specific progress indicators. However, this commendable document sits uneasily alongside non-compliant political practice.

**Ukraine** adopted an Anti-Corruption Strategy for 2014-2017 in 2014.<sup>4</sup> This was the first time that such a document had been

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<sup>1</sup> Parliament Decision No. 56 as of 30.03.2017, (<http://lex.justice.md/index.php?action=view&view=doc&lang=1&id=370789>).

<sup>2</sup> TI Moldova, "National Integrity Assessment Moldova 2014", ([https://www.transparency.org/whatwedo/nisarticle/moldova\\_2014](https://www.transparency.org/whatwedo/nisarticle/moldova_2014)).

<sup>3</sup> These pillars are: the parliament; government, public sector and local public administration; justice and anticorruption authorities; Central Election Commission and political parties; Court of Accounts; Ombudsman; private sector; civil society and media.

<sup>4</sup> Law no.1699-VII as of 14.10.2014, zakon.rada.gov.ua/laws/show/1699-18

adopted as a legal text and it was followed by the drafting of an implementation programme, detailing institutional innovations including establishment of a National Agency for Preventing Corruption (NACP – see further below). As of March 2017, out of 44 planned anti-corruption measures, only 9 have been completed in full. The more recent Anti-Corruption Strategy for 2015-2017 is also behind schedule. In April 2018, the Cabinet of Ministers approved a draft Anti-Corruption Strategy for 2018-20 prepared by the NACP, which is pending in the *Verkhovna Rada*.

All three countries have been adopting Anti-Corruption Strategy documents and action plans, but even in Georgia they are not viewed as being the main drivers of the fight against corruption. In Moldova and Ukraine the documents themselves are in line with international standards, but implementation lags behind.

## **Institutional issues**

Invariably there are three key institutions, the prosecutor's office, the judiciary, and a specific anti-corruption agency and/or inter-agency coordination system. As regards the specific anti-corruption mechanism no single model has prevailed, notably regarding how far such entities should be independent, stand-alone bodies, or coordinating mechanisms integrated within other government structures. There is the further issue of specialised anti-corruption units within the prosecutor's office and judiciary. A widespread trend has been the development of inter-agency policy coordination or consultative councils with the functions of anti-corruption policy development, coordination and monitoring of implementation.

**Georgia's** Anti-Corruption Council (ACC) has been operating since 2008 as an interagency coordination body that is accountable to the government. The composition of the Council includes public agencies, NGOs, businesses and international partner/donor organisations. The Minister of Justice of Georgia chairs the Council. It operates through an Expert Level Working Group, which mirrors the composition of the Council and has a broader representation of the non-governmental sector. While the ACC is judged by the OECD to have shown a high quality of strategic policy development and monitoring of its implementation, its role should not be exaggerated. Key decisions which resulted in eradication of corruption in various sectors were taken not in the

ACC, but by the government and/or single ministers in their areas of competence. It is notable that Georgia achieved bigger and faster results with a simpler and lighter set of anti-corruption institutions than in the cases of Moldova and Ukraine.

The anti-corruption agency in **Moldova**, the National Anticorruption Centre (NAC), has gone through several waves of reform since its establishment in 2002. The latest, in 2012, revised its mandate, authorising the NAC to conduct preventive, operational, investigative and integrity testing activities, to develop and implement integrity plans, and to carry out anti-corruption screening of draft legal acts, monitoring of anti-corruption policies, research and studies. The agency is supposed to be independent from the government, but this is frequently called into question by civil society and the political opposition on account of the political interference in the appointment of the NAC leadership<sup>5</sup> and the selective approach of NAC in investigating corruption cases.<sup>6</sup> The independence and accountability of the NAC has been also subject to political disputes within the latest ruling coalitions, and resulted in moving the supervision of NAC from the parliament to the government in 2013, and back to the parliament in 2015.

In 2016, two reforms redesigned the anticorruption institutional framework in Moldova. First, a specialised office to target high-level corruption – the Anticorruption Prosecution Office (APO) – was upgraded with enhanced independence. However petty corruption was not excluded from its competences and this generates a heavy workload, which risks prejudicing its original purpose.<sup>7</sup> Second, was intended to reform the National Integrity Commission (NIC), in charge of controlling asset and interest

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<sup>5</sup> The ruling coalition agreement signed in 2010 contained a secret annex, dividing offices between the constituent political parties, including the law-enforcement and anti-corruption institutions (NAC and Prosecutor General's Office). The secret annex was leaked to the press in 2013 and is available at: <http://unimedia.info/stiri/doc-acordul-aie2--mina-care-a-desfiintatalianta-cum-s-au-partajat-functiile-57321>.

<sup>6</sup> TI-Moldova, ADEPT, CRJM and IDIS Viitorul report "State Capture: the Case of the Republic of Moldova", Chisinau 2017, ([http://www.transparency.md/wp-content/uploads/2017/06/TI\\_Moldova\\_State\\_Capture.pdf](http://www.transparency.md/wp-content/uploads/2017/06/TI_Moldova_State_Capture.pdf)).

<sup>7</sup> Idem.



declarations. Set up in 2012, this agency has proved very ineffective. The 2016 reform aims to strengthen its institutional independence and expand its competences, but there are long delays in making this operational, despite official commitments.

The four entities of **Ukraine's** institutional set-up for combatting corruption need to operate as inter-locking parts of a single system:

- National Agency for Prevention of Corruption (NACP),
- National Anti-Corruption Bureau (NABU),
- specialised Anti-Corruption Prosecutor's Office (SAPO), and
- Anti-Corruption Court, in the course of being established.

The NACP is an executive agency to advance the formation and implementation of the state anti-corruption policy. It offers significant guarantees for the independence of its members and has wide-ranging competence for anti-corruption policy, verification of asset declarations, monitoring of public servants' lifestyle, control over observation of anti-corruption restrictions (plurality of offices, conflict of interests, gifts, etc.), cooperation with and protection of whistle-blowers, etc. An additional function of supervising political party and election financing was added in October 2015. With some delay, the NACP became operational in August 2016 after overcoming some obstacles, including conflicts with the government and delays with the election of the agency's members, etc. Questions have been raised regarding the proactivity and efficiency of the NACP and the lack of well-established channels to make it accountable and fully transparent.

The NABU, established in 2015, is a specialised investigative agency for high-level corruption cases. The Bureau became operational in 2016. As of May 31, 2018, the NABU has conducted 611 investigations, submitted 140 cases to the courts, and obtained 21 convictions.<sup>8</sup> NABU has itself performed well and had investigated and prosecuted a number of high-ranking officials but the process has been stuck at court level. NABU also does not have authority to independently intercept (wiretap) information from communication channels, it has to submit a request to the State Security Service of Ukraine to install wiretapping, which

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<sup>8</sup> <https://nabu.gov.ua/>.

undermines NABU's independence and risks information leakages in high-profile anti-corruption investigations.<sup>9</sup> There are persistent attempts to pressure NABU, in particular through failure to provide the adequate detective capacity, the threat of removal of the NABU Director from office through a mechanism controlled by certain political forces, and a number of draft laws to limit NABU's investigative capacity. At the same time, independent experts commissioned by the US Embassy and the EU Anti-Corruption Initiative in Ukraine found no signs of external interference in NABU's work during the first years of its operations.<sup>10</sup>

The SAPO was established in 2015 as an independent unit of the Prosecutor General's Office, and subordinated exclusively to the Deputy Prosecutor General – Head of the Specialized Anti-Corruption Prosecutor's Office. It is entrusted with the supervision of the observance of laws during detective and investigative activities, pre-trial investigations conducted by the NABU, prosecution duties in relevant proceedings, and representation of citizens or the State's interests in court in cases connected with corruption. However, in practice the accountability of SAPO is poor and prosecutors are often inadequately trained. Moreover, relations between the NABU and the Prosecutors Office remain tense.

A High Anti-Corruption Court (HACC) was finally established in 2018 by a specialised law<sup>11</sup> largely aligned with the international recommendations, in particular the Venice Commission.<sup>12</sup> In particular, the issue of the competitive selection of judges was settled and a possibility for the Public Council of International Experts to prevent the selection of judges in case of integrity concerns was assured. However, further amendments to the law are needed to address the issue of jurisdiction over appeals

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<sup>9</sup> The initiative to give the NABU an autonomous right to wiretap was a condition of Ukraine-IMF Memorandum signed in September, 2016 and was openly supported by the EU. Despite this, the relevant draft law was not adopted by the Parliament.

<sup>10</sup>[https://nabu.gov.ua/sites/default/files/page\\_uploads/25.04/nabu\\_assessment\\_report\\_en.pdf](https://nabu.gov.ua/sites/default/files/page_uploads/25.04/nabu_assessment_report_en.pdf)

<sup>11</sup> <http://zakon5.rada.gov.ua/laws/show/2447-19/page>

<sup>12</sup>[http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=C DL-AD\(2017\)020-e](http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=C DL-AD(2017)020-e)

against first-instance courts decisions made before the HACC establishment. The current law foresees a general jurisdiction, while the NABU,<sup>13</sup> civil society representatives as well as the EU<sup>14</sup> recommend the HACC jurisdiction over appeals.

All three countries have dedicated anti-corruption institutions. Georgia has the simplest system with its Anti-Corruption Council. Moldova and Ukraine have much more complex, multi-institutional setups, with some successes but also failings, and without good overall results so far.

### *Integrity of public service*

In **Georgia**, the major effort in public service that contributed to the successful fight against corruption was the reform that started in 2004 with two major objectives. First, it was aimed at downsizing and optimising a public sector, including public institutions, ministries and agencies, which at that time had an excessive and unnecessarily high number of employees. Second, the target was to increase salaries of public servants in order to prevent corruption and bribes and attract qualified personnel to work for the government. This reform was implemented across all ministries and agencies, and resulted in a huge (15-fold) increase in the salaries of civil servants. This reform was one of the most effective anti-corruption measures. Georgia has also introduced rules for civil service recruitment. Vacancies, including high level positions, must be published on the online recruitment portal [www.hr.gov.ge](http://www.hr.gov.ge) and filled through competition. However, these new legal provisions have not been fully implemented in practice. After the 2012 elections and widespread dismissals, many civil servants working in ministries were appointed as acting officials, and had to undergo open competition at a later stage in order to stay in their positions. In April 2017, the Georgian government issued a decree on the

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<sup>13</sup><https://nabu.gov.ua/en/novyiny/sentences-nabu-cases-made-courts-general-jurisdiction-should-be-appealed-appeals-chamber-high>

<sup>14</sup><http://www.consilium.europa.eu/media/36086/joint-statement-eu-ua-summit-2018.pdf>

definition of the General Rules of Ethics and Behaviour in Public Institutions<sup>15</sup> in order to regulate the conduct of civil servants.

In **Moldova**, the Civil Service Law<sup>16</sup> competition procedures are not mandatory for a number of high-level official positions, while in other cases are applied only after other recruitment procedures have been exhausted. This provision has been largely used by the ruling coalitions since 2009 to make numerous political appointments in senior positions. The new law on integrity that came into effect in July 2017 has introduced mandatory competition for all public positions, except elective and political positions. A controversial amendment to the Civil Service Law, in force since February 2016,<sup>17</sup> has relaxed the incompatibility regime for public servants by allowing work in the private sector outside the programme hours. Starting June 2018, an integrity certificate, issued by the National Integrity Authority, was introduced as a compulsory condition to hold a public position, as a measure to increase the integrity of public service<sup>18</sup>. In 2015, salary increases for civil servants began to be implemented. The pressure to comply with EU conditions for visa liberalisation and the association process has contributed to the process of building up the integrity legal framework, but has not translated so far into significant improvements in public administration, which has remained highly politicised and prone to corruption.

The new Law on Civil Service of **Ukraine**, enacted in May 2016, aims at the creation of a professional and politically neutral senior civil service, with measures to improve remuneration, upgrade discipline, etc. Entry into the civil service and also promotion must be through a competitive selection process based exclusively on merit. Many senior appointments in the Ukrainian administration are now effectively conducted on the basis of open

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<sup>15</sup> <https://matsne.gov.ge/ka/document/view/3645402>

<sup>16</sup> Law No. 158 on Public Office and the Status of Civil Servants, of 4 July 2008 with later amendments (<http://lex.justice.md/md/330050/>).

<sup>17</sup> Law no. 297 as of 22.12.2016 amending art.25 of the Civil Service Law, (<http://lex.justice.md/md/368700/>).

<sup>18</sup> Integrity certificates are issued by the National Integrity Authority based on their records and final rulings of the courts on persons forbidden to hold a public office due to violation of legislation on declaration of assets and interests. (Law no. 74 of 26.04.2018).

and transparent competitions. One such example is the selection and appointment of the first Head of the National Anti-Corruption Bureau. However, despite this significant breakthrough in civil service reform, there is a need for effective implementation of these adopted regulations. There are several codes of conduct for civil servants. Monitoring and control over implementation of the rules of ethical conduct are entrusted to the NACP.

### *Integrity of the judiciary*

This is a core issue for anti-corruption policy, but one that extends into the far broader issue of the rule of law, and is discussed in greater detail in Chapter 3. The main issues concern:

*Constitutional guarantees of independence.* All three countries express guarantees of the independence of their judiciaries in their constitutions, but the devil is in the detail.

*The role of judicial councils.* Such councils, generally consisting mainly of judges elected by their peers, have a key role in the independence of appointment of judges. **Georgia** reformed its High Council of Justice in this sense in 2006, whereas previously the Council only had the role of advising the president. In **Ukraine** the pre-Euromaidan system did not assure independence of the High Council of Justice, but constitutional amendments regarding the High Council of Justice were passed in June 2016. The special law was adopted in December 2016 and enacted in January 2017. In **Moldova**, the composition of the Superior Council of Magistracy (SCM) is criticised for the *ex officio* membership of the Prosecutor General, the Minister of Justice, who is an active politician, and the President of the Supreme Court of Justice, who has a strong influence on the judiciary due to his double role as president of the highest court and as member of the Council. Draft laws amending the Constitution regarding the judiciary have failed to be passed in 2016-2017 through lack of political will.

*The secure term of judges.* The main issue here is whether judges have secure tenure, with life tenure favoured by the Venice Commission, versus systems that see probationary periods or limited fixed terms. **Georgia** adopted life tenure in 2013, but retained exceptions for probationary periods and fixed terms for the Supreme Court. **Ukraine** moved to life tenure in June 2016, but not before a period of great turbulence involving the dismissal of

thousands of judges in the wake of the Euromaidan. **Moldova** retains a system of five-year probation for judges before they obtain secure tenure until retirement age. This is a severe impediment to judicial independence.

*Appointment procedures.* All three countries have established objective criteria and competitive procedures for the nomination of judges. However, in **Moldova**, the SCM has a record of ignoring the Career Board in many instances, without providing reasons for its decisions. Selection and promotion of judges in Moldova is selective and has been criticised both by civil society and international development partners. In **Ukraine**, the selection of the Supreme Court judges in 2017 was also marred with scandals as the concerns of the Public Integrity Council regarding the candidates' integrity were ignored in many instances.

*Financial autonomy.* In **Ukraine**, there is a problem of inadequacy of financial resources for the judiciary, even if the situation improved with the judiciary reform in June 2016. In **Moldova**, the financial autonomy of the judicial system has considerably improved. In **Georgia**, the budget for the judicial system has been increasing continuously in recent years.

*Ethics rules.* Codes of professional ethics have been generally established, but their enforcement is often weak.

*The right to public hearings* is a generally accepted principle. However, in **Moldova**, closed court hearings tend to be used in politically significant cases, such as that of former Prime Minister Filat, charged with corruption, and that of the businessmen Platon and Shor, charged with involvement in the major bank fraud revealed in late 2014. In addition, in September 2016, a regulation imposed severe restrictions on access to the courts. This was criticised by several media and civil society organisations<sup>19</sup> and subsequently suspended, with no new regulation adopted as of 28 September 2017.

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<sup>19</sup> See, for example, a declaration (<http://www.api.md/news/view/ro-declaratie-ong-urile-de-media-si-redactiile-protesteaza-impotriva-restrictiilor-abuzive-de-acces-la-sedintele-de-judecata-1343>).

### *Role of civil society*

The work of non-government organisations (NGOs) is crucial in enhancing public awareness and feeding public concerns into the work of public authorities.

In **Georgia**, NGOs were involved in drafting the 2015-2016 Anti-Corruption Action Plan and are involved in its implementation and monitoring, in particular by contributing to elaboration of the new monitoring methodology. NGOs are active in the thematic working groups of the Anti-Corruption Council, which are co-chaired by civil society and include NGOs as members.

In **Moldova**, NGOs have also played an important role in developing the National Anticorruption Strategy for 2011-2016, its evaluation and the drafting of the new National Integrity and Anticorruption Strategy for 2017-2020. Civil society representatives are included in the monitoring groups of the 2017-2020 strategy. However, recently there have been several signs of a worsening environment for NGOs, with actions aimed at discrediting civil society organisations. Among these, in July 2017, the Minister of Justice included three articles in a draft law on NGOs and published the draft for public consultations. In general, the draft law was a progressive and necessary one, developed through an inclusive process by a group of civil society representatives and the Ministry of Justice. However, three articles were added to prohibit foreign funding for NGOs involved in activities aimed at influencing legislation or very broadly defined “political activities”. More than 65 NGOs criticised this attempt to limit foreign funding of NGOs and called upon the Ministry of Justice to withdraw these provisions.<sup>20</sup> On 12 September 2017, the leader of the Democratic Party Vladimir Plahotniuc announced at a press conference that the political bureau of the party had requested the Minister of Justice halt any work on the draft law on NGOs. On the same day, the Minister of Justice issued an order cancelling further work on this draft law. Such interventions from Vladimir Plahotniuc, who has no

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<sup>20</sup> Declaration in English (<http://crjm.org/wp-content/uploads/2017/07/2017-07-11-Declaration-MJ-initiative-contrary-to-law.pdf>).

elected position in the current government, highlight the deficiencies existing in the democratic decision-making process.

In **Ukraine**, civil society has played a crucial role in developing anti-corruption legislation and policies following the Euromaidan, providing the roadmap for reforms and making statements of alarm when called for. The 2014-2017 Anti-Corruption Strategy and subsequent legislation were written with a significant contribution from civil society. In terms of conducting anti-corruption expert evaluations, civil society institutions have also turned out to be the strongest. Investigative journalists and media have actively continued to reveal corruption. But cooperation between the state and civil society became fragile, as the sincerity of the government's intentions was thrown into doubt. There has also been a move by the parliament to subject the representatives of anticorruption NGOs to e-declaration requirements. This is a discriminatory requirement solely targeting anti-corruption activists. There are attempts to discredit civil society, initiations of criminal prosecution, requests to shut down some of the most active organisations, and even violence against them. There is an impression of targeted, systemic action by the government to harass anti-corruption activists.

Overall, civil society NGOs have been highly active in advancing anti-corruption policies in all three countries, but there have been some recent steps, especially in Ukraine and Moldova, that seek to weaken their effectiveness.

## Specific legal mechanisms

There is a plethora of specific legal provisions employed in anti-corruption policies. The last decade has seen significant progress in the definition of international standards, and their application in many countries, including Georgia, Moldova and Ukraine. The broad picture is one in which Georgia was a leader with its relatively early adoption of such measures after the Rose Revolution of 2003, while Ukraine lagged behind until the substantial progress made since the Euromaidan, whereas Moldova is still trailing at the back. The main measures are those listed in Table 4.3, and commented on below. It has to be emphasised that legislative action can only be a beginning, and implementation at best takes years to follow through, and in the worst case may be persistently frustrated.



Table 4.3 Legal provisions related to anti-corruption policies

	<b>Georgia</b>	<b>Moldova</b>	<b>Ukraine</b>
Criminalisation of corruption	'Active' and 'passive' bribery is a criminal offence since 2006.	'Active' and 'passive' bribery criminalised in the Criminal Code of 2003.	'Active' and 'passive' bribery defined and criminalised in 2014 law.
Corporate liability for corruption	Law already in 2006 introduces criminal liability of companies.	A broader definition effective since 6 May 2016.	Law introduced in 2009, but abolished 2011, and then re-introduced in 2013
Illicit enrichment	No specific law; covered in money laundering law.	Criminal offence since February 2014; Constitution presumes legality of assets held by persons.	Criminal offense; Law (inadequate) in 2011, revised in 2014-15.
Sanctions	Minimum fine €48,000; minimum sentence for bribery 6 months	<i>Passive bribery</i> : imprisonment from 3 to 7 years with a minimum fine of €9,700. <i>Active bribery</i> : imprisonment up to 6 years with a minimum fines of €5,000 - €14,500.	Maximum imprisonment: 12 years. Fines can be applied in case of 'low-damage' offense (min: €55, max: €850).
Asset declarations	Senior officials must make on-line electronic declarations, which are publicly open.	All public officials and some non-public officials should disclose wealth and interests. Starting in 2018, electronic submission became mandatory, except for a few categories of public offices.	All public officials covered since 2016 and senior officials since 2015; their declarations are electronic and open (system launched in 2016).

Confiscation of assets	Civil Procedure Code of Georgia since 2007 provides for this after criminal conviction.	Criminal Code provides for 'extended' confiscation since August 2016.	Provisions introduced in Criminal Code in 2016.
Statute of limitations	15 years.	Minimum for public sector: 15 years; For private sector: 2 years.	5-15 years.
Immunities	MPs enjoy immunity.	MPs enjoy extensive immunity.	2016 law limits immunities of judges; MPs enjoy immunity.
Whistle blowers	Extensive protection, enhanced in 2015.	Insufficient legislative regulation and no public authority assigned for whistle blowers protection.	2014 law regulates and partly protects.

### *Criminalisation of corruption*

Since 2006, the Criminal Code of **Georgia** provides for criminal responsibility for promising, offering or giving of money or other material benefits to an official ('active' bribery), in order for such person to perform or not to perform any action. Direct or indirect demanding of a bribe by an official ('passive' bribery), is also criminalised. A physical handover of the bribe is not required.

Under the criminal code in **Moldova**, passive and active bribery in public and private sectors, as well as trading in influence, are criminalised. Sanctions for corruption were increased through amendments to the Criminal Code at the end of 2013. A physical handover of the bribe is not required. The law includes a list of aggravating circumstances, which imply heavier sanctions.

In **Ukraine**, the 2014 anti-corruption legislation significantly improved provisions for the criminalisation of corruption. Missing components of bribery offences and trading in influence were included and sanctions strengthened. Some inconsistency remains in the definition of corruption crimes in relation to international standards.

### *Corporate liability for corruption*

**Georgia** had already introduced criminal liability of legal persons for money laundering, private sector bribery and active bribery in the public sector in 2006. However, very few cases of corporate liability have been observed.

**Moldova's** Criminal Code provides for corporate liability for corruption with specific sanctions for legal entities in several articles<sup>1</sup> (see 3.4 below) and by having extended the criminal liability of legal entities since May 2016.

**Ukraine** introduced legislation in 2009, only for this to be abolished in January 2011. Fresh legislation, particularly related to legalisation of property, or to promising, offering, and providing an illicit benefit was introduced in May 2013 and entered into force in 2014 with a limited list of sanctions.

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<sup>1</sup> See art. 21 para. (5) of the Criminal Code.

## *Illicit enrichment*

This is generally defined as wealth out of line with what could plausibly have been made from official public salaries.

While the **Georgian** Criminal Code does not contain a separate offence of illicit enrichment, its elements can be found in the money laundering legislation, where money laundering is defined as “the [attempted] legalisation of illicit income”.

In **Moldova**, illicit enrichment was introduced in the Criminal Code at the end of 2013,<sup>2</sup> defined as: “Holding by a person with responsible duties or by a public person, personally or through third parties, of goods when their value substantially exceeds the acquired means and it was established based on evidence that these could not have been obtained legally”.

However the Constitution of Moldova includes an explicit presumption of the legality of assets in possession of the person. The responsibility to prove the unlawful nature of the goods lies solely with the state bodies. The very small number of cases makes it difficult to draw any significant conclusions.<sup>3</sup> The strongly embedded constitutional provisions and high requirements of the burden of proof on investigation authorities might be an impediment for bringing such cases.

**Ukraine** introduced illicit enrichment into law as an offence in 2011, but its definition was out of line with UN recommendations. In 2014-2015, the wording was revised and brought into line.

In sum, provisions for tackling illicit enrichment have been introduced in all three countries, but there is little evidence of effectiveness, and particular doubts in the case of Moldova.

## *Sanctions*

In **Georgia**, the lower limit for financial sanctions against corrupt practice is a large fixed sum of money (€44,000). There is no maximum. The minimum sentence for basic passive bribery is 6 years of imprisonment. This has been considered disproportionate,

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<sup>2</sup> Art. 330/2 of the Criminal Code, introduced by Law no. 326 of 23 December 2013, in force since 25 February 2014.

<sup>3</sup> National Anticorruption Centre, activity reports for 2015 and 2016, available at [www.cna.md](http://www.cna.md).

not leaving room for an appropriate sanction for small value bribes. The risk is that cases may not be brought to court because the minimal sentence is inappropriate. However, these provisions reflect the urge to fight ruthlessly against corruption.

In **Moldova**, passive bribery in the public sector is subject to imprisonment from 3 to 7 years with a minimum fine of €9,700<sup>4</sup> and deprivation of the right to hold certain public jobs or to exercise certain activities for a period of 5 to 10 years. For small bribery (not more than €250)<sup>5</sup> there are lower sanctions. Active bribery in the public sector is subject to imprisonment for up to 6 years with a minimum fine of €5,000,<sup>6</sup> while for a legal entity the minimum fine is €14,600<sup>7</sup> with deprivation of the right to exercise a certain activity. Taking bribes in the private sector is subject to lower sanctions, around half as substantial as those applying in the public sector. According to a study on corruption cases, archived in the courts for the period of 1 January 2010 to 30 June 2012, judges have made excessive use of certain provisions of the Criminal Code that significantly reduce criminal punishment.<sup>8</sup> In four out of five corruption cases on which verdicts of conviction were pronounced, judges applied a plea bargain agreement and reduced the maximum punishment by one third. In a third of cases the courts decided to apply milder punishments in connection with certain exceptional circumstances, and to suspend imprisonment.

In **Ukraine**, fines are applied for 'low-damage' cases, while for more severe offenses the key sanction is imprisonment, possibly complimented by deprivation of the right to hold certain public jobs or to exercise certain activities for up to three years and confiscation of assets. For example, illicit enrichment and abuse of power are

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<sup>4</sup> The Criminal Code Provision: 4,000 conventional units.

<sup>5</sup> 100 conventional units

<sup>6</sup> 2,000 conventional units.

<sup>7</sup> 6,000 conventional units

<sup>8</sup> The study was developed by the National Anti-Corruption Centre with the support of the Supreme Court of Justice and together with the experts of MIAPAC Project and EUHLPAM Mission, available in Romanian and English (<http://www.cna.md/libview.php?l=ro&idc=117&id=205&t=/Studii-si-analize/Studii-despre-coruptie/Studiu-privind-dosarele-de-coruptie>).

sanctioned by imprisonment. Passive bribery in the public sector can be subject to sanctions starting from a fine (€566 - €850) and up to 12 years' imprisonment plus additional sanctions, depending on the severity of the offense. Sentencing for active bribery varies from a fine (€283 - €425) to 10 years' imprisonment. A plea bargain agreement can reduce the punishment. A study of 335 corruption-related sentences in 2016 shows<sup>9</sup> that 44 (13%) resulted in sentences of imprisonment (though the majority of these sentences are still under appeal), 194 (54%) in fines, including 109 cases of plea bargain agreements, while discharge from punishment (conditional imprisonment) occurred in 22% of cases. Only 40 (11%) saw acquittal. The situation did not change much in 2017.<sup>10</sup>

### *Confiscation of assets*

In 2007, **Georgia** was the first to introduce provisions for the confiscation of illegal property and unexplained wealth of public officials in its Civil Procedure Code. Such confiscation is possible after criminal conviction. Some confiscation cases were publicly broadcast, especially in the case of high-level officials in the aftermath of the Rose Revolution, aiming to set an example.

In **Moldova**, legislation permitting 'extended confiscation' entered into force in February 2014. Similar to the interpretation of the norms regarding illicit enrichment, the Constitutional Court reiterated its interpretation of the Constitution as providing for the principle of absolute presumption of the lawful acquisition of the goods, assigning the burden of proof solely to state bodies. In practice, confiscation of assets has never been properly carried out in Moldova. However, in July 2017, the Agency for Recovery of Criminal Assets was established within the National Anticorruption Centre. Although the agency has started seizing criminal assets, their recovery is still impossible as the appropriate regulatory

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<sup>9</sup> The study concerned Article 368 of the Criminal Code of Ukraine only (<http://nashigroshi.org/2017/02/23/habari-2016-koho-posadyly-i-za-scho/>).

<sup>10</sup> Burakovsky I. et al (2018) Ukraine's Fight against Corruption: The Economic Front. Economic Assessment of Anticorruption Measures Implemented in 2014-2018. [www.ier.kiev.ua](http://www.ier.kiev.ua)

framework was approved only in June 2018.<sup>11</sup> The agency is also understaffed and not fully equipped.

In **Ukraine** provision for such confiscation was introduced as an amendment to the Criminal Code of Ukraine in February 2016. This was followed in November 2016 by establishment of the Asset Recovery Management Agency (ARMA). The agency was staffed in 2017. In the first half of 2018, the ARMA transferred over \$130 million of revenues from the seized assets management to the central budget. Of particular importance for Ukraine is activation of possibilities for international ‘mutual legal assistance’, notably for recovery of the assets of former President Yanukovich. This is an unprecedented scale of investigative activity involving foreign evidence being undertaken on corruption matters by Ukrainian law enforcement, particularly by NABU and SAPO. In 2017, the Prosecutor General reported the confiscation of about \$1.5 billion deposited on accounts of the former President Yanukovich and his affiliates,<sup>12</sup> but much more is expected.

### *Statute of limitations*

The statute of limitations for active bribery and other corrupt acts is a long 15 years in **Georgia**. For **Moldova**, with new legislation in effect since 2014, the limit is also 15 years for bribery in the public sector, but 5 years for bribes in the private sector. Similarly, in **Ukraine** there is a 5-15 year statute of limitations.

### *Immunities*

In **Georgia**, parliamentarians enjoy immunity. According to Article 52 of the Georgian Constitution, “arrest or detention of an MP, search of his/her place of residence, vehicle, workplace, or any personal search shall be permissible only by consent of parliament, except when the MP is caught at the scene of crime, in which case parliament shall be notified immediately. Unless parliament gives

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<sup>11</sup> The Regulation on the evaluation, administration and use of seized criminal assets was approved at the Government sitting of June 20, 2018.

<sup>12</sup> See <https://www.pravda.com.ua/news/2017/04/28/7142538/>.

its consent, the arrested or detained MP shall be released immediately".<sup>13</sup>

In **Moldova**, parliamentarians enjoy full immunity against any judicial prosecution, except in cases of flagrant offence. There have been several attempts to amend the legislation to exclude or at least reduce this immunity, but none was carried out. However, the immunity of an MP and former Prime Minister (Vlad Filat) was lifted by parliament in October 2015. He was arrested for passive corruption, considered as being clearly connected to the major bank fraud at the end of 2014.<sup>14</sup> This was the first time an MP's immunity had been lifted since 2006, out of six requests by the Prosecutor General.<sup>15</sup> Judges also have special rules on immunity. A judge cannot be detained, arrested or searched, except in case of a flagrant offence, without the prior approval of the Supreme Council of Magistrates. Criminal investigation against a judge may only be initiated by the Prosecutor General or his/her First Deputy, or, in the latter's absence, by another prosecutor appointed by the Prosecutor General, with the prior consent of the Superior Council of Magistracy. In cases of flagrant offence and, since 2013, also in cases of money laundering, passive corruption, trading in influence and illicit enrichment, consent from the Superior Council of Magistracy is not necessary. A judge cannot be detained, arrested or searched, except in case of a flagrant offence, without the prior approval of the SCM. Judges have also extensive administrative immunity.<sup>16</sup>

In **Ukraine**, the parliament has been criticised for the misuse of immunity provisions by MPs, including for acts of corruption. MPs cannot be held criminally liable, detained or arrested without the consent of parliament itself. From 2016-2017, the Prosecution

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<sup>13</sup> The Constitution of Georgia (<https://matsne.gov.ge/en/document/view/30346>).

<sup>14</sup> The "Billion fraud" or "billion theft" case involved the disappearance of around 1 billion USD from the Moldovan banking sector, including nearly a third of the National Bank Reserves, or the equivalent of 15% of Moldovan GDP, within the space of several years. The information was publicly released at the end of 2014. For a detailed explanation, see <http://www.transparency.md/2016/12/20/radiography-of-a-bank-fraud-in-moldova-from-money-laundering-to-billion-fraud-and-state-debt/>.

<sup>15</sup> GRECO op. cit.

<sup>16</sup> Art. 19 of the Law no. 544 on the status of judges of 20 July 1995.



Office asked for the immunity of several MPs to be lifted, but was only partly successful as not all decisions were passed. It therefore appears necessary to narrow the content and scope of their immunity, by for example authorising the conduct of covert investigations into actions of an MP without having to first obtain parliamentary consent.

The removal of MPs' immunity has been promised during several parliamentary elections, but never realised. Over 2015-2017, several draft laws regarding this issue were submitted to the Parliament, but were not passed. In October 2017, the President submitted to the Parliament a new draft law,<sup>17</sup> which was submitted immediately to the Constitutional Court. The Court concluded in June 2018 that the proposed draft law does not contradict the Constitution of Ukraine. However, as changes need to be made in the Constitution, it is unlikely that the current parliamentary coalition will find votes for this initiative.

In June 2016, a law with amendments to the constitution was passed that limited the immunities of judges to a certain extent, for example by allowing arrests in cases of flagrant offence. Influence by politicians on judicial activity and pressure by prosecutors on judges not to acquit the accused has been frequently observed.

### *Asset declarations*

In **Georgia**, only senior officials (about 5,600 in number) are obliged to submit asset declarations. In 2010 an Online Asset Declaration System was launched to replace the paper declaration system. Officials are required to submit the information regarding both themselves and their immediate family members for real estate, cars, jewellery, bank accounts, cash, shares, and other assets worth over €5,000. The submitted declarations are public and are available on the web-site <https://declaration.gov.ge>. However, many important officials at the local level are presently exempted.

In **Moldova**, the system of asset declarations is currently undergoing an institutional reform, following the adoption of a legislative package in mid-2016 and amended in 2018 under

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<sup>17</sup> See: [http://w1.c1.rada.gov.ua/pls/zweb2/webproc4\\_1?pf3511=62727](http://w1.c1.rada.gov.ua/pls/zweb2/webproc4_1?pf3511=62727)

considerable external pressure.<sup>18</sup> The new legislation has extended the list of subjects obliged to submit asset declarations to 70,000 persons, as well as the scope of declarations to include cash worth over 15 average monthly wages (approx. €4,000),<sup>19</sup> gifts of comparable amounts received from family members and relatives, jewellery, artworks, and different types of collections worth more than 20 average monthly wages (over €5,000). Until 2018 the declarations were submitted on paper and made public after they have been processed and scanned on a single website platform [www.declaratii.ani.md](http://www.declaratii.ani.md). Since January 2018, the electronic submission of declarations has become mandatory, except for public servants, whose identity is securitised. From July 2018, the ANI has begun issuing integrity certificates for persons seeking to hold a public position and has resumed the verification of assets. However, it continues to remain poorly equipped and severely understaffed.

The system of asset declarations in **Ukraine** has undergone major changes. Legislation in 2011 established the obligation for a vast number of public officials (1 million) to declare their assets, income, expenses and financial liabilities, with declarations to be submitted at their place of work in paper form. New legislation in 2014 made the National Agency for Corruption Prevention (NACP) responsible for the asset declaration system, and requires all declarations to be submitted in an electronic form via the NACP's web-site, where they are automatically published. The new law extended the scope of disclosure to include cash, assets such as jewellery, antiques and works of art worth over €5,250, and intangible assets (e.g. intellectual property rights). Officials of the State Security Service, an institution perceived by citizens as corruption-prone, are exempt from the public disclosure requirements. Persons with high status and responsibility and at a high risk of corruption are subject to a mandatory full examination.

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<sup>18</sup> The adoption of the legislative package on integrity was among the conditions set by the EU for resumption of its financial aid to Moldova after it was frozen in 2015.

<sup>19</sup> The value is calculated based on the nationwide monthly average wage, which in according to the July 2017 Governmental Decision is about 5,600 Moldovan Lei (MDL) in 2017.

The list of positions with high corruption risk was approved by the NACP in 2016.

In 2017, the NACP received 1.24 million e-declarations,<sup>20</sup> while verified only about 100 e-declarations.<sup>21</sup> The low verification speed is largely explained by an absence of an automatic verification of e-declarations. The commitment to introduce the automatic verification was among unaccomplished conditions for the disbursement of the last tranche of the EU macro-financial assistance III (MFA III). The strengthening of the verification system for asset declaration is also explicitly mentioned among conditions for the disbursement of the MFA IV approved by the European Parliament and the Council in July 2018.<sup>22</sup>

### *Protection of whistle-blowers, mechanisms for reporting corruption*

**Georgia** is a frontrunner of countries regarding the protection of whistle-blowers. Whistle-blowing may be anonymous, and there are extensive guarantees to protect whistle-blowers and close relatives. The whistle-blower's identity is confidential, unless they choose to the contrary. In addition, the whistle-blower may not be subjected to prosecution, or be otherwise held responsible for the circumstances related to the facts of the whistle-blowing. 2015 amendments to the law allow whistle-blowers to inform civil society or the mass media promptly.

In **Moldova**, there is no law protecting whistle-blowers and no public authority assigned for their protection. A framework regulation on whistle-blowers covering only the public sector was adopted by the government in 2013. All public institutions were to adapt their internal regulations on this basis, but not all had done this by 2018. In May 2018, the law on protection of whistle-blowers, included in the new 2017-2020 National Strategy of Integrity and Anticorruption (SNIA), passed the first reading in parliament.

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<sup>20</sup> See <https://nazk.gov.ua/statystychni-dani/>.

<sup>21</sup> See [https://dt.ua/POLITICS/za-rik-nazk-perevirilo-91-deklaraciyu-iz-1-5-mln-solomatina-260283\\_.html/](https://dt.ua/POLITICS/za-rik-nazk-perevirilo-91-deklaraciyu-iz-1-5-mln-solomatina-260283_.html/).

<sup>22</sup> See <https://eurlex.europa.eu/legalcontent/EN/TXT/PDF/?uri=CELEX:32018D0947&from=EN>.

In **Ukraine**, a 2014 law established a definition of a whistle-blower and procedures for protecting them from personal harm and from harmful measures by a supervisor or employer. The law also provides that information about the whistle-blower may be disclosed only with his or her consent and that anonymous reports can be accepted. The NAPC has approved methodological guidelines for the organisation of work with reports of corruption by whistle-blowers, but has not yet started to develop the practice of whistle-blower protection measures. There is at present no information about cases of NACP support for whistle-blowers. Further guarantees and incentives for whistle-blowers are stipulated in the special draft law currently being promoted by civic activists and reform-minded MPs and public officials.

### **Broader policy issues**

This section covers a number of important preventive measures targeting corruption, which are summarised in Table 4.4. These are mainly concerned with governing the transparency of funding or ownership of important institutions (political parties) or corporate entities, including the media, and public procurement. A final far-reaching question concerns the complexity or simplification of the regulatory system, which effectively concerns every sector of the economy.

*Table 4.4 Broader corruption-related issues*

	<b>Georgia</b>	<b>Moldova</b>	<b>Ukraine</b>
Financing of political parties	State funding, with limitations on private funding.	State subventions since 2015, high thresholds for private funding.	Limitations on private funding, state funding since 2015.
Media ownership transparency	2016, legislation for media ownership transparency being prepared.	2015-16 amendments to the Broadcasting Code improved the transparency of media ownership.	2015 law establishes transparency of media ownership.
Corporate governance	Georgia commits in 2016 to establishing transparency of beneficial ownership.	2017, legislation on mandatory disclosure of beneficial ownership being prepared.	Since 2015 mandatory disclosure of beneficial ownership.
Public procurement	Independent state procurement agency; entirely electronic; system wins awards.	2016 law in compliance with EU directives pending implementation.	2015-16, new law and electronic tendering, wins award.
Regulatory complexity	Saakashvili regime radically de-regulated; regulations now relatively simple.	Technical inspectorates reluctant to reform.	Significant deregulation in 2014-18.

### *Financing of political parties*

In **Georgia**, the parliament passed amendments to the 2011 law on financing political parties in 2013. Parties with 4% of votes in parliamentary polls or 3% in local polls will obtain state financing. Companies gained permission to grant political parties a maximum of 120,000 GEL (about €40,000). Individuals may donate no more than 60,000 GEL (about €15,000) to parties.

In **Moldova**, a new law on party and campaign funding was adopted in 2015 in order to address some previous recommendations by international organisations.<sup>1</sup> All political parties that participated in the last parliamentary and local elections are eligible for public subsidies, allocated according to votes received in elections. Contrary to international recommendations, the parliament has increased the caps on private donations several times.<sup>2</sup> The 2017 amendments to the Electoral Code<sup>3</sup> reduced these amounts to some extent and only for election campaigns,<sup>4</sup> while the excessive donations ceiling for political parties remains. The ban for donations from out-of-country sources of income (e.g. the Moldova diaspora) also remains in place.<sup>5</sup> The vague and permissive regulation and disproportionately low fines for any violations encourage parties to obscure their sources of funding. A thorough revision of the legislation on party and campaign funding is still required.

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<sup>1</sup> <https://rm.coe.int/16806c9a94>.

<sup>2</sup> The initially proposed caps for private donations (20 average monthly wages for individuals and 40 average monthly wages for legal entities) have been increased tenfold and currently amount to about €50,000 for individuals and about €100,000 for legal entities per year.

<sup>3</sup> Law no. 154 as of 20.07.2017, (<http://lex.justice.md/index.php?action=view&view=doc&lang=1&id=370943>).

<sup>4</sup> The caps for private donations were reduced to 50 average monthly wages for individuals (more than €13,000) and 100-monthly average wages for legal entities (more than €26,000) per election campaign.

<sup>5</sup> See the Constitutional Court decision of 6 September 2016 and the analysis of political party financing in the Republic of Moldova in 2016, issued by Promo-Lex ([https://promolex.md/wp-content/uploads/2017/05/raport\\_EN\\_web.pdf](https://promolex.md/wp-content/uploads/2017/05/raport_EN_web.pdf)).

In **Ukraine**, the law on political parties limits contributions by individual citizens to not more than 400 times the minimum wage (€41,290). Legal entities cannot make contributions exceeding 800 times the minimum wage (€82,580). In October 2015, a law was passed to determine state funding for political parties that won not less than 2% of the popular vote in the last general election. These measures are broadly in line with Council of Europe standards. But Ukrainian politics has hardly become more open and accountable. The NACP has so far failed to use its powers to hold party leaders and accountants liable for violating legislative requirements.<sup>6</sup> About a quarter out of 352 political parties registered in Ukraine fail to submit mandatory reports to the NACP,<sup>7</sup> while the NACP does not have sufficient resources to verify the submitted reports properly.<sup>8</sup> In 2017, the NACP levied UAH 338,000 (\$13,000) of fines and confiscated UAH 1.3 million (\$51,000) of illegal contributions.

### *Media-ownership transparency*

In **Georgia**, there are plans to present legislation to assure transparency of media ownership to parliament in 2017. This issue attracted a lot of attention in 2016-17, notably in the case of the largest private TV station, Rustavi 2, which was critical of government policies. The government tried to use a legal dispute between its former and current owners to change ownership in order to obtain a more government-loyal editorial policy. While the Georgian court ruled in favour of the government-backed owners, the European Court of Human Rights in Strasbourg took an unprecedented decision to suspend the enforcement of the Georgian court decision, until there is a decision at the Council of Europe level.

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<sup>6</sup> Monitoring Report by the Center of Policy and Legal Reform, December 2016 ([http://pravo.org.ua/img/zstored/files/FD\(2\).pdf](http://pravo.org.ua/img/zstored/files/FD(2).pdf)).

<sup>7</sup> See <https://nazk.gov.ua/news/nazk-rezultaty-analizu-zvitiv-politychnyh-partiy-pro-mayno-dohody-vytraty-i-zobov'yazannya>.

<sup>8</sup> See <http://pravo.org.ua/ua/news/20872827-nazk-ne-mogee-pereviriti-faktichni-vitrati-politichnih-partiy-rezultati-zvitu-pro-diyalnist-agentstva-za-2-roki>

In **Moldova**, a detailed 2012 study<sup>9</sup> argued that a lack of transparency in media ownership leads to concentration in the hands of interest groups, jeopardising media pluralism. In 2015, the parliament passed the amendment to the Broadcasting Code, introducing transparency on media ownership,<sup>10</sup> but failed to prohibit the registration of media ownership in offshore companies.<sup>11</sup> Private radio and TV broadcasters were obliged to disclose the identity of their beneficial owners and their shares in the company. This information was made public in November 2015<sup>12</sup> and confirmed that the media market is facing a media ownership concentration,<sup>13</sup> with over 80% of TV stations owned by politicians or people close to political parties.<sup>14</sup> These generated a highly politicised and polarised media sector, where owners often interfere in editorial policy. The sanctions for breaching the provision on transparency of media ownership were introduced only in March 2017.<sup>15</sup> However, the existing regulation on media transparency ownership remains inadequate as it allows the

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<sup>9</sup> Transparency of Media Ownership in the Republic of Moldova ([http://www.ijc.md/Publicatii/studii\\_mlu/transparenta%20media%20eng/studiu-transparenta-eng.pdf](http://www.ijc.md/Publicatii/studii_mlu/transparenta%20media%20eng/studiu-transparenta-eng.pdf)).

<sup>10</sup> Law no. 28 as of 05.03.15 introduced the provision on transparency of media ownership (art. 66, pct. 6).

<sup>11</sup> “The Law on Media ownership transparency voted in Parliament without the amendment on offshore zones” (<http://media-azi.md/en/stiri/law-media-ownership-transparency-voted-parliament-without-amendment-offshore-zones>).

<sup>12</sup> Mold-street.com, “TV owners in Moldova: American billionaires, local businessmen, Russian banks and millionaires from Tiraspol” (<https://www.mold-street.com/?go=news&n=4266>).

<sup>13</sup> Until May 2017, 5 out of 5 TV stations with a nationwide coverage were owned by a single person- the leader of the ruling Democratic Party.

<sup>14</sup> Nations in Transit 2017, Moldova (<https://freedomhouse.org/report/nations-transit/2017/moldova>).

<sup>15</sup> A gradual sanction was introduced, starting with a fine of about €750 up to license withdrawal (Law no. 50 as of 30.03.2017).



circumvention of legislation by using intermediate entities,<sup>16</sup> or offshore companies.

**Ukraine** adopted a law to ensure the transparency of ownership of broadcasting companies in September 2015.<sup>17</sup> As a result, all national TV radio broadcasters are now obliged to disclose information about their final beneficiaries and their political affiliations, including the commercial and political ties of their families. Around 75% of the audience in TV and radio broadcasting is between the hands of four owners: Kolomoisky, Pinchuk, Firtash and Akhmetov, which indicates relatively high media ownership concentration. Another positive development in the media sector is new legislation that resulted in the establishment of the first public broadcasting company in January 2017.

### *Corporate governance, beneficial ownership of companies.*

Disclosure of beneficial ownership in companies is important to ensure business integrity and to prevent conflicts of interest and illicit enrichment of public officials.

**Georgia** made commitments to explore the feasibility of establishing a public central register of beneficial ownership information for domestic companies, and seeks bilateral arrangements to ensure full access to the beneficial ownership information of companies incorporated in partner countries. Georgia already has an online public register indicating ownership of companies registered in Georgia. But if the company is owned by an offshore-registered entity, no information about the real owners of the shares is publicly accessible. Only broadcasters are obliged to disclose their beneficial owners; Georgia banned ownership of broadcasters by offshore-registered firms in 2011.

In **Moldova**, under the Anti-money laundering and Counter-Terrorism Financing legal framework the reporting entities must identify and verify the beneficial owners when suspicious transactions or transactions exceeding a certain amount are

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<sup>16</sup> In May 2017, the media monopolist Vladimir Plahotniuc gave up the ownership rights of two TV companies he owned to his image adviser, Oleg Cristal.

<sup>17</sup> “Media Ownership in Ukraine” (<http://ukraine.mom-rsf.org>).

involved.<sup>18</sup> In addition, Moldovan banks have been obliged to make public the identity of their shareholders and beneficial owners since October 2014.<sup>19</sup> However, the 2015 bank fraud scandal and the Laundromat case brought to light the political dependency of the reporting institutions, which have failed to apply the existing tools and intervene according to their mandate. The bank fraud also brought to light the problem of offshorisation faced by the business and banking sectors. This resulted in stricter conditions on transparency of beneficial ownership imposed by the IMF and the EU for resuming the financial assistance.<sup>20</sup> In 2016, the National Bank launched a process of comprehensive identification of ultimate beneficial owners of all Moldovan banks, which was due for June 2017, but not completed yet. The new law on money laundering, adopted in December 2017, entered into force in February 2018. It bans the registration of legal entities that refuse to submit the information on their ultimate beneficial owners or provide incomplete or false information.

**Ukraine** was the first country in the region to establish the mandatory universal disclosure of beneficial ownership of legal entities. Such information is accessible to anyone. In February 2015, the parliament extended the scope of information to be disclosed by public officials in their electronic annual declarations, notably to include the legal entities in which they or their family members are beneficial owners. In addition, Ukraine became the first country to integrate its national central register of beneficial ownership with the Open Ownership Register – a global register of ultimate beneficiaries.<sup>21</sup>

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<sup>18</sup> Occasional transactions amounting more than 50,000 MDL (about €2,500) and wire transfers of more than 15,000 MDL (about €750).

<sup>19</sup> <http://www.bnm.org.ro/content/recomandari-cu-privire-la-identificarea-beneficiarului-efectiv-aprobate-prin-hca-al-bnm-nr>.

<sup>20</sup> <https://www.imf.org/en/Publications/CR/Issues/2017/05/01/Republic-of-Moldova-First-Reviews-Under-the-Extended-Credit-Facility-and-Extended-Fund-44870>

<sup>21</sup> TI Ukraine (2017) Information about beneficial owners will be listed in a public register (<https://ti-ukraine.org/en/news/information-about-beneficial-owners-will-be-included-in-a-public-register/>).

## *Public procurement*

This has been always a major arena for corrupt behaviour. The three Association Agreements and DCFTAs contain commitments to approximate EU legislation in this field to a substantial degree.

**Georgia's** public procurement system has seen progressive reform and development since its first law in 1998 and reforms in 2005 and 2006. The system is being aligned on international best practice, with a leading role for its independent State Procurement Agency. The system has been entirely electronic since 2010, and has won awards for its outstanding quality by the UN and EBRD.

**Moldovan** public procurement legislation has been under continuous adaptation since its first law adopted in 1997. Digital e-procurement was under preparation for some years and was launched for piloting in 2017<sup>22</sup>, with first totally electronic public procurements made in March 2018.<sup>23</sup> It is expected that the system will be fully deployed by the end of 2018.<sup>24</sup> The latest law of April 2016 comes close to key EU directives.<sup>25</sup> However, these significant legislative improvements were undermined by delays in recruiting key personnel for the Agency for Solving Complaints, which eroded confidence in the newly-created institution.<sup>26,27</sup>

In **Ukraine**, government policies are currently engaged in a programme of public procurement reform in line with European practice. A system of transparent electronic tendering (called

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<sup>22</sup> <https://mtender.gov.md/>.

<sup>23</sup> <http://mf.gov.md/ro/content/au-fost-realizate-primele-tranzac%C8%9Bii-de-achizi%C8%9Bie-public%C4%83-deplin%C4%83-%C3%AE-sistemul-mtender>.

<sup>24</sup> Deadline established by the two-year Action Plan of the Public Procurement System Development Strategy for 2016-2020, (<http://lex.justice.md/index.php?action=view&view=doc&lang=1&id=368482>).

<sup>25</sup> <http://www.gov.md/en/content/government-approved-new-rules-public-procurement-systems-work>.

<sup>26</sup> <https://www.zdg.md/editia-print/investigatii/licitatii-pentru-familia-sefului-de-la-achizitii/>.

<sup>27</sup> Iurie Morcotilo, Position paper "Republic of Moldova - one year without an institution for solving complaints in public procurement" ([http://www.expert-grup.org/media/k2/attachments/Noti\\_de\\_pozitie\\_ANSC.pdf](http://www.expert-grup.org/media/k2/attachments/Noti_de_pozitie_ANSC.pdf)).

Prozorro) has been introduced since April 2016, which has won an international 'World Procurement Award'. Anyone, including civil society and general public, can check analytical data in real time. Ukraine also acceded to the World Trade Organisation (WTO) Agreement on Government Procurement (GPA). This allowed GPA countries to bid for Ukrainian public contracts and gave Ukrainian businesses access to public procurement markets in EU member states. Outstanding problems include the quality of the tender committees, and controls over execution of the contracts. To engage citizens in controlling the process, the Prozorro website provides information on how to submit appeals and complaints.

The overall picture is one of high quality systems in Georgia and Ukraine, but delay in reform measures in Moldova.

### *Minimisation of regulatory obligations*

It is well recognised that business regulations that require inspectorates to verify their implementation are a major source of corruption. Visits of the 'inspector' often lead to calls for bribes for the needed certificate to be delivered. In the typical post-Soviet state enterprises are subject to a continuous stream of inspectors. This introduces a serious trade-off for policymakers. De-regulation may help reduce corruption, but under some circumstances it can translate into under-regulation, for example in unsafe food and work practices.

**Georgia** is the outstanding case of a country whose reformist government under President Saakashvili, starting in 2004, adopted a radical de-regulatory approach under the slogan, "if an agency cannot be reformed, abolish it". In practice, the traffic police, labour inspectorate, technical safety checks for cars and the food safety inspectorate were all abolished. The traffic police was replaced by a patrol policy with reformed functions, increased remuneration and extensive training for police to live up to international standards. On the other hand, the Association Agreement and DCFTA with the EU have introduced legal approximation requirements to conform to EU regulations, many of which have to be backed up by state control mechanisms and inspections, in particular for food safety and the labour market, where Georgia has had to re-introduce inspectorates that had been abolished. There is no particular evidence that corruption is being re-introduced as a result, but the

risk that this may happen is understood, and the search for minimal or more efficient regulations remains an acute concern.

In **Moldova**, the general trend is to adopt European standards. This is mainly due to the insistence of the national standardisation body. According to the Cost of Doing Business survey for 2016, the share of companies inspected and length of inspections decreased significantly after a moratorium on state inspections was applied during 2016. This also cut by half the number of companies fined. However, the number of companies that paid bribes during inspections has increased compared to 2015, with notable black spots in environmental and standards-monitoring bodies, etc. However, there is considerable resistance to reform of traditional regulatory regimes, such as technical standards for industrial and food products based on former Soviet GOST standards.

In 2017, **Ukraine** abolished about a half of mandatory licenses and permits for some industry sectors and introduced the principle of “silent consent”, whereby companies wishing to engage in a certain activity need only to make a declaration to the state, instead of requesting permit. The former Soviet system of GOST standards has been dismantled, and a completely new system of technical regulations was introduced, together with new institutions and online services. In 2017, the Government launched an automatic system of VAT reimbursement – one of the notorious corruption risks for companies. Over 2014-2018, the Cabinet of Ministers approved a number of measures aimed to improve the country’s ranking in the World Bank ‘Doing Business’ report. The process of harmonisation with the EU norms and practices requires further efforts.

## Conclusions

From the above it is clear that anti-corruption policy has extremely wide-ranging and cross-cutting aspects. It is far from being a single policy that is switched on or off. This paper has identified 20 headings that range across the broad matters of political will and strategy down to many quite technical fields of legislation. It is admittedly hazardous and probably contentious to distil this mass of information into overarching assessments. Nonetheless, having assembled the information item by item, an attempt can be made.

Table 4.5 therefore offers a very simple summary of all the 20 elements treated in this paper. Of course, each item deserves a more refined assessment, which the texts above have provided within the limits of a compact paper, rather than a whole book. Still, the table allows an enumeration of the number of headings that seem to be 'more or less' OK, versus those that remain problematic. The picture that emerges is:

- Georgia scores 17 out of twenty, by far the best score;
- Ukraine scores 10 out of twenty, with partial progress qualified by remaining political ambiguities;
- Moldova scores 4 out of 20, with many, deep problems remaining.

Of the three countries, Georgia has clearly been the front-runner in combatting corruption. This was due to radical policies, ruthlessly implemented by the Saakashvili administration following the Rose Revolution. Despite scepticism over whether this would be sustained under subsequent governments, in fact the achievement of a largely de-corrupted society appears intact. The encouraging lesson from Georgia is therefore that 'it can be done', albeit with the caution that this was achieved with a particularly strong political will and radical measures that many countries are unwilling to implement.

For their part, Moldova and Ukraine have been trying to catch up, with much legislative activity following internationally accepted templates for institutional initiatives and specific legislative measures. There have been more reforms in Ukraine than in Moldova; or, on the negative side, Moldova is a more extreme case of oligarchic 'state capture' than the bigger and more complex Ukraine. However, in both cases there remains ambiguity over whether sufficient political will exists at the highest level to follow this considerable legislative activity with adequate implementation. Establishment of the institutional and legislative 'infrastructure' for anti-corruption policy has been an important and necessary achievement in both Moldova and Ukraine. But this infrastructure still lies in wait of adequate political momentum to give the declared policy significant strategic impact.

*Table 4.5 Summary assessments of anti-corruption policies*

	Georgia	Moldova	Ukraine
<b>Strategies and institutions</b>			
Political will	OK	Not OK	Not OK
Anti-corruption strategies and plans	OK	OK	OK
Anti-corruption institutions	OK	Failings	Improving
Integrity of public service	OK	Improving	Improving
Integrity of judiciary	OK	Not OK	Incomplete
Role of civil society	OK	Undermined?	Undermined?
<b>Legal provisions</b>			
Criminalisation of corruption	OK	OK	OK
Corporate liability for corruption	OK	OK	OK
Illicit enrichment	OK	Lax	OK
Sanctions	Disproportionate	Lax	Lax
Asset declarations	OK	Stalled	Uncertain
Confiscation of assets	OK	Lax	Improving
Statute of limitations	OK	OK	OK
Immunities	OK	Unclear	Not OK
Whistle blowers	OK	Lagging	OK
<b>Broader corruption-related issues</b>			
Financing of political parties	OK	Not OK	OK
Media ownership transparency	Not OK	Not OK	OK
Corporate governance	Lags	Not OK	OK
Public procurement	OK	Lags	OK
Regulatory simplification	OK	Improving	Improving

*Note:* 'OK' should only be interpreted as 'more or less' OK, since each entry can be subject to qualifications. The intention is only to provide a broad brush summary.

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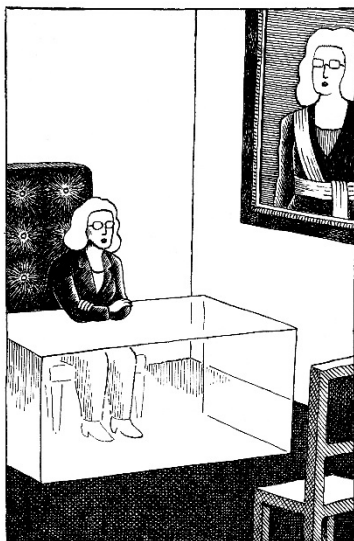
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## 5. CAN GREATER GENDER EQUALITY IN SENIOR ROLES HELP REDUCE CORRUPTION?

SERENA ROMANO

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### Introduction

Based on the definitions of “corruption” adopted by major international institutions and of “women in power” adopted by the United Nations, this contribution explores whether an increase in the number of women in power positions in Georgia, Moldova and Ukraine might help reduce corruption in those countries. It also analyses the effect of corruption on poorer women. This chapter refers to the analyses of the linkage between gender and corruption in the main literature, draws some conclusions

and proposes a methodology for possible areas of future research.

The link between gender and corruption is strong, as corruption reinforces and amplifies the gender inequalities that already exist in all societies. Although corruption affects all individuals it will touch women and girls of all status more as their social, economic and physical capacity to defend themselves is generally weaker. Furthermore, since women form the majority of the global poor, the problem is even more serious in the less developed countries.

The presence of women in senior positions may help to curb corruption. On this point, some scholars have argued with some

success that women intrinsically have a higher sense of integrity than men and thus appointing women to powerful positions in public administration and in politics will help reduce corruption. Others have countered that in countries where democratic institutions are solid and women are more easily promoted to senior levels, corruption is reduced by the institutions that favour transparency, a free press and assured punishment for corrupt practices rather than the mere presence of women in power roles.

It should be emphasised, however, that, more fundamentally, the debate about the linkage between women and corruption should focus on how women – and men – are selected for and appointed to senior positions. Only if their appointment allows them to be sufficiently independent of the entity that appoints them – for instance political parties – will women be able to act effectively against corruption.

## Definition of “corruption”

The meaning and characteristics of corruption are widely studied and analysed by international institutions and development agencies in order to better understand and address a phenomenon that is considered a hindrance to development and economic growth in poor and rich countries alike.

The definitions of corruption, which focus mainly on the concept of abuse of trust, cover many different practices: for instance, the Swedish International Development Agency (Sida) defines corruption as “an abuse of trust, power or position for improper gain. Corruption includes, among others, offering and receiving bribes – including bribery of foreign public officials – embezzlement, conflict of interest and nepotism.”

Transparency International (TI) considers *corruption* as “the abuse of entrusted power for private gain”. It also classifies corruption as grand, petty and political, depending on the amounts of money lost and the sector in which it occurs. For TI, *grand corruption* consists of “acts committed at a high level of government that distort policies or the central functioning of the state, enabling leaders to benefit at the expense of the public good”. *Petty corruption* refers to “everyday abuse of entrusted power by low and mid-level public officials in their interactions with ordinary citizens, who

often are only trying to access basic goods or services in places like hospitals, schools, police departments and other agencies". *Political corruption* is a "manipulation of policies, institutions and rules of procedure in the allocation of resources and financing by political decision makers, who abuse their position to sustain their power, status and wealth".

The OECD, the Council of Europe and the UN conventions,<sup>1</sup> which are intended to combat criminal offences, do not define "corruption", but rather establish a range of corrupt offences. The OECD Convention establishes the offence of bribery of foreign public officials, while the Council of Europe adds trading in influence and bribing domestic public officials. In addition, the UN Convention refers to embezzlement, misappropriation of property and obstruction of justice. Thus, the conventions set international standards on the criminalisation of corruption by proposing specific offences, rather than through general definitions or offence of corruption.

Because corruption is so difficult to prove, definitions of corruption that are too general or vague to be able to produce prosecutions or convictions.

Lately the traditional definitions of corruption are being expanded to include actions that are disproportionately experienced by women, such as sexual extortion and human trafficking.

There is no consensus, however, among international institutions nor among countries as to which specific acts should be included in the definition of corruption.

## **Definition of "women in power"**

The Beijing Declaration and Platform for Action was adopted in 1995 by 189 governments in the context of the Fourth World Conference on Women. In its Area (G) on women in power and decision-making, the Declaration specifically calls on governments to take measures to ensure women's equal access to and full

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<sup>1</sup> The OECD Convention on Combating Bribery of Foreign Public Officials, the Council of Europe's Criminal Law Convention on Corruption and the United Nations Convention against Corruption.

participation in power structures and decision-making and increase their capacity to participate in decision-making and leadership. By making specific recommendations at all levels and in all areas, the Declaration defined how women's political, social and economic participation can determine their involvement in positions of power. The European Commission and the European Institute for Gender Equality (EIGE) have adopted Area (G) of the Beijing Declaration and established a database to monitor the numbers of men and women in key decision-making positions in order to provide reliable statistics that can be used to monitor the current situation and trends through time. Data regarding women in power and in decision making cover mainly the domains of politics, public administration, the judiciary, business and finance, social partners and NGOs. A study carried out by Romano, Musialkowski and Shalayeva (2015) complements EIGE's information by providing data on women's status in the Eastern Partnership countries<sup>2</sup> that match the EU-28 data and allows for direct comparison and benchmarking with the 28 EU member states.

Women in Georgia, Moldova and Ukraine have begun to access the structures of power, albeit in a still limited fashion: the proportion of women senior ministers was as high as 31.1% in Moldova in 2015 compared to 21.1% in Georgia and 5.9% in Ukraine. However, whilst the only woman in the Ukrainian cabinet was the Minister of Finance, in Moldova six women out of 22 were senior ministers, the highest number in the Eastern Partnership countries. These statistics are positive but it must be stressed that four out of the six Moldovan senior ministers were attributed socio-cultural portfolios with limited money-spending and power-yielding force. This choice, adopted by many heads of government around the world who face the electoral pressure to include women in their cabinets, excludes women from the important responsibilities related to finance and the economy and assigns them ministerial roles in the same socio-cultural fields that women traditionally play in.

In the same three Eastern Partnership countries, in 2015, only one parliamentary political party was led by a woman in Georgia, one in Ukraine and none in Moldova. It is not surprising then that

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<sup>2</sup> Armenia, Azerbaijan, Belarus, Georgia, Moldova and Ukraine.

the corresponding proportion of women in their national parliaments is also low: 21.8% in Moldova, 12.1% in Ukraine and 11.3% in Georgia, compared with an EU-28 average of 28%.

The only data that can be meaningfully related to the linkage between women in power and corruption in the countries covered by this note are the number of women in the highest-ranking civil servant positions. At the first level of those positions,<sup>3</sup> there were 40% of women in Moldova in 2014, 24.4% in Georgia and 22.2% in Ukraine in 2015, compared with a 31% EU-28 average.

As will be analysed further on, the level of corruption reported in the three countries is high. Public servants and politicians in Central and Eastern Europe are particularly susceptible to misconduct due to poorly defined professional requirements, inadequate accountability, weak control mechanisms and low wages. Their underlying legal and institutional infrastructure is weak and insufficient to fight corruption (OECD, 2008).

## **Linkages between women and corruption**

### ***Corruption at senior levels***

Corruption can appear at any level of the public service hierarchy; from the economic point of view, the most significant practices of corruption will take place at the highest levels of power. In view of the small number of women who hold positions of power (in October 2016, women held 4.4% of Fortune 500 CEO roles), women are less likely to be involved in corrupt offences. Women are still generally absent from the informal all-male circles of power, the “old boys” clubs, where decisions, legal or not, are formed and taken. The general absence of women in illegal activities, combined with other factors, has led some scholars to infer that women are immune to corruption and thus to recommend their substantial insertion in the public service in order to fight corruption. Whilst this thesis has some weight, recent studies have brought to the light the idea that when more women participate in public services it is

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<sup>3</sup> For definitions, see Mapping table in Romano et al. (2015, p. 78).

because the institutions of the country in general, and democracy, in particular, function better.

The following passages review the major arguments that have been advanced concerning the correlation between women and corruption.

In A widely quoted World Bank paper by Dollar, Fisman and Gatti (1999) hypothesised that women are more trustworthy and public-spirited than men and thus they should be particularly effective in promoting honest government. On the parallel assumption that men are more individually-oriented (selfish) than women, the authors demonstrate that women are less likely to sacrifice the common good for personal material gain. To prove their point, the authors correlated a larger representation of women in parliament<sup>4</sup> with a lower level of corruption, as measured by the International Country Risk Guide's corruption index<sup>5</sup> (ICRG).<sup>6</sup> They concluded that, at the country level, higher rates of female participation in government are associated with lower levels of corruption. Dollar et al. therefore counsel that bringing more women into government may bring significant benefits for the society.

These findings were reinforced by Swamy, Knack, Young and Azfar (2000), who considered women to be less involved in bribery and less likely to condone bribe-taking, based on the literature, which sees a greater participation of women in the labour market as producing lower levels of corruption. Their paper also pointed to the short-run policies designed to increase the role of women in commerce and politics, which may reduce corruption at macro levels. Using data from 18 surveys in 1981 and 43 surveys in 1990-

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<sup>4</sup> The measure of female involvement in government comes from the Inter-parliamentary Union's survey, "Women in Parliaments: 1945-1995" and is based on the proportion of parliamentary seats held by women in the upper and lower houses in a large cross-section of countries.

<sup>5</sup> According to the authors, the index captures both the likelihood that high government officials will demand special payments and the extent to which illicit payments are expected throughout low levels of government.

<sup>6</sup> A number of variables were also added by the authors to reduce the statistical likelihood of omitted variable bias, as well as dummy variables to include specifications.

91 from the World Values Surveys on the attitudes and values of people in various societies in the world, Swamy et al. concluded that self-reported corruption at the micro-level shows differentials between women and men<sup>7</sup> and that the attitudes analysed point to a greater acceptability of bribe-taking on the part of men. This is further analysed in a micro-evidence example related to bribe-paying at corporate level in Georgia. Based on a World Bank study of 350 firms that reported an average incidence of corruption as high as 9% of turnover, evidence was found that male owners or managers of firms were more likely to pay bribes than women owners or managers.

Using the Graft<sup>8</sup> and Transparency International indexes to measure a combination of petty and grand corruption, and quantifying women's involvement in politics and commerce by assessing their presence in national parliaments, governments, as high-level bureaucrats and in the labour force, the authors found that these variables were correlated. Based on these results, they suggested that women could have an impact on corruption not only because they would accept less bribes, but also because they could influence the enactment of legislation against corruption control, reduce the incidence of corruption in judicial or executive branch appointments, or encourage the media to focus on the issue. Considering that a positive role in curbing corruption can be played by political parties (when there is a large number of them that control and expose each other's corrupt practices), by an independent judiciary or by independent media, Swamy et al. posited that the more women are appointed to high-level positions in these institutions the more effectively corruption could be curbed. The paper concluded that there is a sufficiently strong case for a negative correlation between women and corruption, thus leading the authors to favour the choice of policy initiatives to reduce corruption.

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<sup>7</sup> They recognised the methodological difficulty of gauging corruption practices that are acknowledged and self-reported or incidental and reported.

<sup>8</sup> The authors cite the Graft index developed by D. Kaufman, A. Kraay and P. Ziodo-Lobaton, "Aggregating Governance Indicators", mimeo, World Bank, 1999.

Gokcekus and Mukherjee (2002) statistically assessed whether the negative correlation between women's presence and corruption is applicable in public-sector organisations. Using World Bank survey data<sup>9</sup> of nearly 4,000 public officials in six countries (including Moldova), they checked the correlation between the percentage of women in public sector organisations, on the one hand and, on the other hand i) the severity of corruption and ii) its probability of being reported. The analysis by Gokcekus and Mukherjee shows that increasing the proportion of women public officials in countries where it is very low reduces the severity of corruption and raises the chances that it will be reported. However, empirical evidence also shows that when women's presence surpasses a 45% threshold a reversal occurs: corruption grows again and its chances of being reported are reduced. The example of Moldova,<sup>10</sup> where at the time of the study more than 40% of public officials were women, is emblematic: findings showed that raising the proportion of women public officials actually increases the severity of corruption.

More recently, some authors have fundamentally disagreed with the view that such positive correlation between women and corruption exists. Esarey and Schwindt-Bayer (2015) argue that, in governments, a link exists between a large women's representation and a low level of corruption only when the risk of corruption being detected and punished by voters is high: in other words, when voters can identify corrupt officials and punish them at the ballot box. Esarey and Schwindt-Bayer explain this conditional relationship via two theoretical mechanisms. First, on the basis of prior research indicating that women on average are more risk adverse than men, they consider that women are more responsive than men to an increased probability of being caught and punished and this more strongly deters them from engaging in corruption. Secondly, on evidence indicating that voters hold female candidates and officeholders to a higher standard than men, it makes the risk of engaging in corruption more salient to women.

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<sup>9</sup> [www1.worldbank.org/publicsector/civilservice/surveys.htm](http://www1.worldbank.org/publicsector/civilservice/surveys.htm)

<sup>10</sup> In Moldova, among the 672 officials surveyed in 16 organisations, 296 were women, corresponding to 44% of the total sample.



The same authors identified four contexts in which voters should be able to hold elected representatives accountable for corruption and, in turn, make corruption riskier: i) when corruption is not pervasive, ii) where freedom of the press is respected, iii) in parliamentary systems and iv) when electoral rules establish direct relationships between voters and members of parliament. They checked the level of corruption in these different contexts using a dataset of 80 democracies over 20 years to test the hypotheses. Following existing research, they measured corruption perceptions using three of the most commonly employed measures: Transparency International's Corruption Perceptions Index (TI CPI), the World Bank Governance Indicators Control of corruption measure (WBGI), and the Political Risk Services' International Country Risk Guide's (ICRG) corruption indicator. They found no evidence that corruption is associated with female participation in government in countries where corruption is pervasive. In other words women will engage in corruption as much as men in those countries because, according to the authors, they do not perceive a risk associated with it. In countries with a free press that can investigate and report on political corruption cases, a negative empirical association exists between women and government and corruption, which does not exist when the press is less free. The same relationship applies to countries with a parliamentary system, which makes it easier to punish parliamentary representatives for corrupt practices, as opposed to presidential systems. The authors also posit that in the case of electoral rules that create strong ties between political representatives and allow voters to punish corrupt political elites, the correlation between women and corrupt practices is negative. They therefore suggest that institutional reforms against corrupt practices should be implemented in parallel with efforts to reach gender parity in governments, in order to better fight the phenomenon of corruption.

Goetz (2003) also disagrees with the assumption that women may be inherently more virtuous than men. She points out that women's caring roles in the private arena, which have kept them confined at home for many centuries, are now ironically being flagged as evidence of good governance, to usher women's massive entry into politics and the administration which would warrant that they clean up men's seedy practices. She warns against recruiting

women for the wrong reasons and putting yet another heavy burden on their shoulders to justify their presence in arenas that are otherwise the sole purview of men. Rather, she argues that women's sense of integrity would be due to their fresh entrance into politics and public administration, their lack of experience with corrupt practices and links to the business world and a sense of pride and public-spirit. This last trait is also witnessed, according to Goetz, quoting other authors,<sup>11</sup> when a new group of people are hired to address degraded public services. New incentives and accounting systems produce a sense of collective calling and an excellent performance from the new staff that has little to do with gender. Goetz goes one step further, arguing that women are in a trickier situation than men in dealing with corruption. Forcing their entrance into patronage networks may risk putting their sexual propriety on the line. Goetz recounts stories of senior women officials in South Asia lamenting being shunted into the least interesting and attractive positions, linked to their gender, such as social development concerns. Their capacity to move to different positions in the administration was limited by their inability to curry favour with senior men, as this could only be misconstrued, or to offer bribes to party workers or senior bureaucrats. Goetz argues that what matters is not women's access to a position but rather the means of that access and the nature of the institution in which they function that will allow women to effectively address corrupt practices.

A more recent study (Jha Kumar and Sarangi, 2015) provides evidence that women's presence in parliaments has a causal and positive impact in reducing corruption while other measures of female participation in economic activities are shown to have no effect. In addition, the authors demonstrate, contrary to conventional wisdom, that the theory that women are less corrupt than men holds true even at higher levels of gender parity.

To establish causality, the authors compare a wide range of data sets such as the presence of women in the labour force, including the share of women in clerical positions and the share of

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<sup>11</sup> Merilee S. Grindle and Mary E. Hilderbrand, "Building sustainable capacity in the public sector: What can be done?", *Public Administration and Development*, Vol. 15, No. 5, 1995.

women in senior positions such as lawmakers and senior managers. The first type of data measures the presence of women in potential bribe-taking positions, the second indicates their positions in decision-making posts and hence whether they are potentially capable of influencing legislative decisions and decisions on corruption. In their view, in some circumstances lawmakers could more easily be bribe-takers whilst senior managers could more likely find themselves in the role of bribe-givers. Other variables assessed by Kumar Jha and Sarangi relate to political rights, civil liberties, openness to trade and gender equality and were selected to control whether there is less corruption in countries where women fully enjoy civil rights. This is done by using the civil liberties index<sup>12</sup> developed by Freedom House to measure the degree of liberal democracy by taking into account the personal and social freedom of women, including their choice of partner and family size. None of these relationships appears to be statistically meaningful except, as previously observed, the correlation between corruption and the number of women in parliament.

Another interesting finding is related to gender differences. In previous studies, some authors such as Goetz (2003) argued that women, being less involved in socio-economic roles, may also be less involved in corrupt practices so that they would tend to be more virtuous. However, they posited that such an effect might wear off as soon as greater equality between women and men is reached. Kumar Jha and Sarangi point to the contrary. Their findings show, in fact, that there is less corruption in societies where women enjoy greater equality of status, possibly because they are better able to affect policy-making. In the authors' analysis, such a difference with men might lead to women reducing corruption. The authors acknowledge the need, however, to conduct further research to understand how women effectively reduce corruption.

As for the countries that are the subject of this note, studies on women and corruption could only be found for the Republic of Moldova. Based on the data disaggregated by gender from an opinion poll carried out in that country in November 2000 with 504 businesses and 502 households, Lilia Carasciuc (2000) remarks that

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<sup>12</sup> Published by Freedom House (<https://freedomhouse.org/report/freedom-world-2016/table-scores>).

Moldovan women see corruption as a more acute problem than do men, that they are less likely to accept bribes and that they reported feeling more angry and humiliated about paying bribes. In general, Carasciuc considers that women have towards the issue of bribes more negative feelings than men. A more recent survey by Barbarosje, Aliona, Vlădicescu and Terzi-Barbarosje (2016), analysed perceptions and experiences of civil servants working in three central public administration institutions in Moldova with regard to the level of corruption, its forms, the transparency of the decision-making process and the impact of these phenomena on the career development practices among men and women. Whilst some differences emerged between men's and women's perceptions regarding corruption, the persons interviewed share the opinion that the corruption phenomenon in the central public administration is determined by factors other than gender. They considered that low salaries and poor living standards in Moldova equally affect all civil servants, regardless of their gender. Rather, they felt that involvement in corruption-related activities depends on the position held by the individual in the institution, the political allegiance of the employee and his or her personal relationships and connections with the heads of the institutions analysed.

In conclusion, the issue of the relationship between women and corruption generates contradictory views and positions. It also makes it difficult to find a clear demonstration of the hypothesis that an increase of women's presence in senior positions in a given country will decrease its level of corruption. In addition, corruption is difficult to measure because it is not reported. What is generally reported are measures based on the international investors' perceptions, which do not really account for what is happening in the field (Goetz, 2003).

Rather, a reduction of corruption can be the result of several intertwined factors, including a greater presence of women in senior roles. Promoting the presence of women at all levels and applying gender mainstreaming to the public administration may have a substantial impact on the entire society and have the effect of reducing corruption. As gender-mainstreaming changes the way in which decisions are taken, it may, together with a greater presence of women, disrupt the existing pattern and extent of corrupt practices, establishing a negative correlation with corruption. As

analysed in the literature discussed above, this process would be enhanced by the workings of a truly free press. For example, the enforcement in 2012 of Italian Law 120/2011, which provides for the mandatory representation of women on the boards of companies listed on the stock exchange and of publicly-owned companies, prompted an uproar amongst male board members who requested that female candidates could only be appointed if a curriculum vitae describing their abilities had been submitted. Women candidates complied but retorted that the same rule should apply to men candidates. If it can safely be said that one of the positive consequences of Law 120 was to improve the transparency of board appointments, which had so far been opaque, can it be held that this is due to women's higher moral ground? It is more probably due to the gradual implementation of a democratisation process, triggered by a law that fosters greater equality between women and men.

In itself, the argument that women's gender generates higher probity (UNDP and UNIFEM, 2010) has little significance. Integrity, as mentioned by Helen Clark (quoted in Dawson, 2012) who served for nine years as prime minister of New Zealand, may be more a function of opportunity and the way society operates than of gender.

### *Corruption related to development and poverty*

Corruption is a major impediment to development and economic growth in developing countries and the relationship between women and corruption is closely linked to development and poverty. International institutions and development agencies have consistently described the damaging effects of corrupt practices on poor women. Indeed, corruption disproportionately affects those living in poverty and further marginalises poor women, who are already vulnerable, putting basic public services and goods out of their reach, and leaving them lagging in the economic, social and political development of their country (Sida, 2015).

Since women make up the majority of the world's poor, corruption disproportionately affects women and girls and impedes progress towards achieving the UN's Millennium Development Goals (UNDP, 2010). In many settings and in many ways, women are more exposed to corruption and its consequences than men. When poor women do not have funds to spare for corrupt officials

or persons holding positions of any level of power, they risk being exposed to physical abuse, sexual extortion and exploitation; women's lower status and position in society also makes them disproportionately vulnerable to corruption and its social and personal effects (Transparency International, 2014).

In this light, Transparency International (2014), UNDP and Sida have contrived to identify four areas in which women are especially subject to corruption and its effects.

Firstly, women are particularly vulnerable to corruption when accessing basic services and markets: corruption creates additional obstacles for women to access and use public goods. Women, particularly in rural areas, have more occasion than men to require the assistance of public services for themselves and for the people that they take care of, children or the elderly. Services in healthcare, education, water, sanitation and electricity may generate corrupt practices. Other administrative services such as licences, residency and identification papers also susceptible to corruption. Poor women who cannot afford to pay bribes may be forced into unwanted sexual relationships, girls may be forced to abandon school. In turn, this deprives women of the opportunities to access the labour market and eventually reach positions of power.

Corruption shrinks public revenue and welfare budgets and thus limits the provision of essential public and state services on which women rely more than men.

Corruption also hampers women from accessing credit, conducting business and obtaining a job. In the informal sector, which is largely constituted by women and is more subject to corrupt practices, women will be under more pressure than men to give in to corruption. Women also tend to lack the information, the experience and resources to engage effectively with corrupt networks.

Secondly, women become more exposed to corruption when they try to engage with the political arena. Corrupt political parties create an unfair environment for women, as they, less often than men, will agree to participate in vote-buying and will also have less opportunities to be promoted through personal connections. Women in general are discouraged from joining politics, a field where career advancement is often gained through 'old boy' networks. When promotions are not based on merit, corrupt

practices have opportunities to thrive. In these circumstances, corruption, directly and indirectly, reduces the number of women in politics.

A third area relates to the violation of specific rights of women and girls. In many poor countries women and girls may be forced into early marriage or may have to defend their rights in case of divorce, domestic abuse, rape or adultery. Judiciary systems and officials that are corrupt may not effectively protect women's and girls' rights when accepting money or favours from their adversaries. In this competition for money or favours, the losers will be the women and girls who do not have the financial resources to fight a corrupt legal system.

The 2013 Global Corruption Barometer reports that the police and the judiciary are perceived as the most corrupt institutions in the 109 countries surveyed.

The fourth area is linked to negligence and mismanagement. Women who are refugees or displaced persons are often subject to sexual abuse or other forms of exploitation as they can fall prey to men aid workers and peacemakers. In a nutshell, corruption reinforces existing gender discrimination.

## **Proposed areas of further research and methodology**

The analysis presented above shows that, based on some evidence, corruption may to some extent be reduced by the presence of women in power. Scholars differ in their explanation as to why this occurs or whether in fact a direct correlation exist. For example, Esarey points to an indirect, non-causal correlation between the progress of democratic institutions and the women's capacity to reduce corruption. It is also interesting to consider, as mentioned by Goetz, the importance of how women are appointed. Indeed, she questions whether women who come through a democratic process that connects them to a social base will monitor the results that they will deliver. Along a similar line, Esarey and Schwindt-Bayer (2015) consider that the more accountable elected representatives are towards their voters, the less likely it is that women become involved in corrupt practices.

We have also seen that poverty creates further imbalances between men and women, which disproportionally affect the latter when corruption is pervasive.

In light of the above observations, the link between women and corruption might be studied by analysing how women accede to senior positions in countries where, once in power, they have the possibility to reduce corruption. In other words, provided that the rules to appoint, promote and sanction their careers are meritocratic and transparent, women may well be the key to unlocking a closed system of (mainly) male power and ushers in a more egalitarian system that has regard for both sexes and not just an elite mainly composed of men.

Further research could therefore be undertaken by comparing the level of corruption with the way in which women are selected and appointed in the fields of politics, the judiciary and public administration.

The following sections propose an analysis and methodology, for further study on how women in politics, in the judiciary and in the public administration are selected and appointed.

### *Women in politics*

Politics is an area where women may have a substantial possibility of positively impacting corruption, both passively, by refusing to get involved, and actively, by promoting anti-corruption legislation. By way of example, in Italy, Paola Severino introduced, during her mandate as Minister of Justice in Mario Monti's government in 2012, decrees that stipulate that any parliamentarian who is definitively sentenced to more than two years in prison should be expelled from parliament and prohibited from public office. Under the terms of the so-called Severino law, Mr Berlusconi, a former Italian Prime Minister, was expelled in November 2013 from the Italian Senate and banned from holding public office for six years. The Decrees, co-drafted by Ms Severino and promulgated under her name, provide for a wide range of anti-corruption measures that have improved the transparency of public office and increased the penalties related to corruption crimes in Italy. Ms Severino, a lawyer and university professor, was not from the circles of political power.



However, if women are appointed purely to fulfil a party's objectives and not to pursue their own political agenda, their capacity to deter corrupt practices may be limited. A first area of research should include an analysis of the process by which women are selected to stand in an election and an enquiry into how different electoral systems may enhance or reduce the opportunity for candidates to act.

The first area of research should analyse the manner in which women are elected to define which electoral system offers the greatest opportunity for women to act.

- Feminist movements and a gradual acceptance by society have led to the understanding that a government can only effectively represent a society if all groups and their interests are reflected in the decision-making process. One of the central questions regarding women's representation is when they will make a difference. Whilst a few women in high-level positions will often be marginalised if surrounded by a majority of men, the size of the minority is crucial in order to bring about fundamental change for women in politics. If the minority reaches 30% – or the critical mass – then the group of women is able to begin taking actions in its interest (Dahlerup, 1988). It is estimated that gender balance is basically attained when women reach the level of 40% of an electoral assembly and that gender parity really exists at 50% of the representation (European Institute of Gender Equality, 2015). These percentages have been taken into consideration by governments that wished to introduce quotas for women's representation in order to ensure the effectiveness of their measures. It is now recognised that reaching a percentage of women lower than 30% of an electoral assembly limits their impact on the decisions of that assembly. In this respect, it will be interesting to analyse the implementation of Moldovan Law No. 180 of 15 May 2014, adopted in April 2016 which sets a minimum of 40% women represented on the electoral lists of political parties, the composition of the government and in the permanent bureau of the elected parliament (Emerson and Cenuşa, 2016)
- Research should therefore focus on several selected parliaments (a minimum of five) that have reached – or

almost reached – the 30% threshold. According to the Inter-Parliamentary Union, the criterion is met by 49 parliaments, from 61.3% of women representation in Rwanda to 29.5% in the Philippines.

- Although the percentage of women elected in the last parliamentary election in the researched countries falls short of 30% (according to the database maintained by the Inter-Parliamentary Union, it was around 12% in Ukraine, 16% in Georgia and 22% in Moldova, against the EU-28 average of 28%, attested to by EIGE), the three countries should be added to the research as elements of comparison.
- The next factor to research should be the type of electoral system that makes women more effectively able to act against corruption. Recent literature has focused on the electoral systems that produce the highest women's representation. For instance, plurality-majority or majoritarian systems were found to be the least favourable to women's representation. Conversely, countries that have proportional representation systems tend to have a higher representation of women. In mixed systems, women are considerably more likely to obtain seats via party lists, rather than winning individual seats. In addition, proportional representational systems encourage the adoption of quotas, for instance via a 'zipper system', which requires parties to alternate between female and male candidates on their lists (EIGE).
- However, this analysis tends to concentrate on which system will increase women's representation in Parliaments to reach the magical 30% quota that allows women to act. It does not take into consideration whether the electoral system itself can provide sufficient independence to an elected candidate to allow her to take measures, for instance to curb corruption. However, when deputies are elected directly and are accountable to their electorate, as in majoritarian systems, they have more opportunities to act according to their own will and beliefs than in proportional representation systems where they need to abide more to the party line.
- It is therefore proposed to select, for the analysis, parliaments that have members elected according to proportional representation systems and mixed systems and that have 30%

women's representation.<sup>13</sup> If this proves too difficult, to add for research purposes one or two countries<sup>14</sup> that have a proportional representation system with a women's representation close to 30%.

Georgia and Ukraine have a majority system whereas Moldova has proportional representation, although a major debate is taking place in these countries to switch to a majoritarian system. In Moldova the discussion centres on the introduction of uninominal voting in the 2018 the legislative elections.

- Once the different parliamentary systems have been identified and analysed, the legislation of these countries should be examined to search for major legislation concerning corruption, legality, transparency in public administration and governance enacted in the country in the five years previous to the study and to assess whether, and how, women were involved in its promulgation.
- In addition, Transparency International's Corruption Perceptions Index (CPI) during the same five-year period should be monitored to check for variations subsequent to the implementation of such measures. The 2016 CPI, which ranges from 0 (highly corrupt) to 100 (very clean), is low for Ukraine (29) and Moldova (30), less so for Georgia (57).

The conclusions should be drawn on:

- women's capacity to curb corruption and to promote legality and transparency in the public administration and governance;
- women's capacity to take decisions in favour of their electorate and for the public good; and
- how electoral systems that make parliamentary representatives more accountable to citizens can ensure a sufficient presence of women to curb corruption.

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<sup>13</sup> The UK for instance has a majoritarian representation system and 30% of women in parliament (House of Commons).

<sup>14</sup> France also has a majoritarian representation system but 25.8% of women in parliament.

### *Women in the judiciary*

The hypothesis that women judges can significantly curb corruption, if they operate in an independent judiciary system needs testing.

The application by the judiciary of the anti-corruption laws is a bulwark against corrupt practices, provided that judges are truly independent from the other powers of the state. In this light, it has been posited that if in general women tend to condone corruption less than men do, the same must hold true in the judiciary. Although in many EU member states the initial access to the judiciary is based on an applicant's success in passing the entrance exams (in which women, have excelled), the number of women judges in senior positions remains low in the EU. This is also true in Georgia, Moldova and Ukraine. In Georgia, although a system of exams based on qualifications results in a higher number of women judges than men (51% to 49%, respectively), the senior judicial posts are still mainly populated by men. In comparison with Armenia in 2013, women judges, who are selected through exams, interviews and the Armenian President's agreement, constituted 24% of the total number of magistrates. In both countries' courts, chambers and tribunals are headed by men (Romano et al., 2015).

- Therefore, a second area of research could focus on how senior judges are appointed and how judges become presidents of chambers and tribunals. The independence of justice should also be evaluated in parallel with the mechanisms of promotion in the judiciary, in order to assess their impact on the process of reduction of corruption.
- Given that very limited research was undertaken on women in the judiciary in the EU-28 member states or in Georgia, Moldova and Ukraine, it is proposed to review the way in which judges are appointed in a number of EU countries (at least five) and to also review for comparison the same mechanisms in Georgia, Moldova and Ukraine.
- Based on the analysis of existing laws and regulations, literature and interviews from relevant stakeholders, the exercise should be conducted to evaluate whether the appointment system is objective, transparent and based on merit.

- In the same countries, the promotion mechanisms should be analysed, in particular as regards the process by which judges become heads of chambers, tribunals and courts. In this light, data should be collected on the number of judges and presidents of the highest courts, disaggregated by sex.
- The analysis should also compare the information and data collected with the available information on the independence of the judiciary, such as the index of Judicial Independence of the World Economic Forum (2001-2014), which covers 46 countries. Although Georgia, Moldova and Ukraine are not included in the WEF study, these three countries should also be analysed based on independent reports either from national NGOs or from organisations such as Human Rights Watch.
- The results should be compared with indexes such as the one compiled by Transparency International,

The conclusions should be drawn on the basis of the following three questions:

- Which appointment systems facilitate women's access to the judicial professions?
- How should promotions be made in the judiciary to ensure a fair representation of women in senior promotions?
- Which measure should be taken to protect the independence of judges?

### *Women in public administration*

The third area of research should focus on how women are appointed in public administration.

The staff of public administration, at all levels, can be a crucial tool in combating corruption. In this sector, too, women can be of significant importance, since in the EU-28 countries, as well as in Georgia, Moldova and Ukraine, a great number of women work in public administration. In most countries recruitment is done predominantly but not exclusively by way of state exams. As already seen, however, the higher echelons of the administration are still populated mainly by men. Therefore, a third area of research could focus on the mechanisms of access, selection and promotion

in public administration to gauge their transparency and their respect of the merits and independence of candidates.

The share of ministers and top-ranking bureaucrats is another measure of women's participation in politics (Swamy et al., 2000). Increasing the number of women in public administration has a positive effect on public-sector responsiveness to women's needs. For example, high numbers of female teachers improve the retention of girls in school (UNESCO, 2003). As elsewhere, power structures in public administration are mostly male-dominated. Increasing the number of women in public administration can, here also, help to weaken power mechanisms. Here again, however, the same types of conditions will apply as elsewhere: women should represent a critical mass of at least 30% of personnel, they should be sufficiently represented in the higher levels of public administration to be able to make a difference and their appointment should be objective, transparent and meritocratic.

It is therefore proposed to select a minimum of six administrations, including in Georgia, Moldova and Ukraine, such as a ministry, an independent authority or a government agency, in which at least 30% of positions have already been staffed with women and at least one of their highest-ranking civil servant positions is held by a woman, for purposes of analysing the following questions:

- How are job applicants recruited and hired? Is the hiring system transparent, objective and unbiased towards women and based on merit?
- How are civil servants promoted and according to which rules? And are the rules transparent, objective, unbiased towards women and based on merit?

Interviews will be conducted with a selected number of representatives (a minimum of four from senior positions and four from middle management) from the relevant administrations to collect their views on their ability to combat corruption.

Finally, the results would be compared with indexes such as Transparency International's, with the aim of drawing conclusions on the following questions:

- Do hiring systems in the public administrations analysed favour women and do they have, both from the information

collected and the interviews held, the ability to curb corruption?

- Do the rules related to promotion analysed in the public administrations favour women and do they have, both from the information collected and the interviews held, the ability to curb corruption?

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## 6. INCOMPLETE HEGEMONIES, HYBRID NEIGHBOURS: IDENTITY GAMES AND POLICY TOOLS

ANDREY MAKARYCHEV

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### Introduction

This paper applies the concepts of hegemony and hybridity as analytical tools to help understand the structural changes taking place within the Eastern Partnership (EaP) countries and beyond. The author points to the split identities of many post-Soviet societies and the growing appeal of solutions aimed at balancing Russia's or the EU's dominance as important factors shaping EaP dynamics. Against this background, he explores how the post-Soviet borderlands can find their place in

a still hypothetical pan-European space, and free themselves from the tensions of their competing hegemons. The EaP is divided into those countries that signed Association Agreements with the EU and those preferring to maintain their loyalty to Eurasian integration. Bringing the two groups closer together, however, is not beyond policy imagination.

The policy-oriented part of this analysis focuses on a set of ideas and schemes aimed at enhancing interaction and blurring divisions between these countries. The author proposes five scenarios that might shape the future of EaP countries' relations with the EU and with Russia: 1) the conflictual status quo in which

both hegemonic powers will seek to weaken the position of the other; 2) trilateralism (EU, Russia plus an EaP country), which has been tried and failed, but still is considered as a possible option by some policy analysts; 3) the Kazakhstan-Armenia model of diplomatic advancement towards the EU, with some potential leverage on Russia; 4) deeper engagement by the EU with the Eurasian Economic Union, which has some competences for tariffs and technical standards; and 5) the decoupling of security policies from economic projects, which is so far the most difficult option to foresee and implement in practice.

## **The concept of hybridity**

This concept is widely used to describe an important institutional feature of most of the post-Soviet regimes. Less studied are cultural elements of hybridity, mostly related to in-between identities of borderlands located at the intersection of different civilizational (societal, religious, ethnic and linguistic) spaces and flows. This paper first discusses how cultural hybridity impacts upon institutional politics in the countries of the EU-Russia common neighbourhood. It then looks at how the EU and Russia as two major powers in the post-Soviet region deal with the hybrid – and thus unstable and dislocated – identities of their neighbours.

The concept of hybridity is not only used to describe post-Soviet liminal countries, but also the EU's and Russia's policies. For example, Richard Youngs conveys the idea of a new EU "hybrid geopolitics ... mixing offensive and defensive tactics, and of the Union using its distinctive tools aimed at deepening cooperation with Eastern Partnership (EaP) states, interdependence and political transformation, both more instrumentally and more variably to further immediate-term security interests. The category, i.e. of "hybrid geopolitics", is 'redux' liberal in the sense of the EU using core liberal-cooperative practices in ways that are more selective and calibrated than in previous European policies, and superimposed with a layer of geo-strategic diplomacy."<sup>1</sup> In the meantime, EU-Russian relations may also be dubbed hybrid, in the sense that they are grounded in two overlapping systems of interaction – an old one inherited from the times of the Cold War,

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<sup>1</sup> Richard Youngs, "[Is 'hybrid geopolitics' the next EU foreign policy doctrine?](#)", London School of Economics and Political Science blog, 19 June 2017.

with hard security concerns and spheres-of-influence type of thinking, and an allegedly emerging new approach that Andrey Kortunov relates to the still hypothetical reinvigoration of “common spaces” or “regimes of communication”.<sup>2</sup>

Unlike some realist voices, this paper assumes that the comeback to the Cold-War-style spheres of influence is not a viable option for the EU-Russia common neighbourhood. As the recent dynamics in the Russia-loyal Kazakhstan, Armenia and – to some extent – Belarus shows, institutional partnership with Russia does not preclude them from looking for better and deeper relations with the EU. One observes a similar shift towards an enhanced relationship with Brussels in Azerbaijan’s foreign policy. Moldova is a different example of searching for a new balance in the EU-Russia conundrum: under Igor Dodon’s presidency, Chisinau overtly shows interest in freezing its previous commitments taken within its Association Agreement with the EU and build new bridges to the Eurasian Economic Union (EAEU). Of course, one should not project this demand for compromise and equilibrium to all post-Soviet areas, yet the examples given above attest to a need for more nuanced political arrangements to avoid further escalation of confrontation in the wider Europe.

The search for new solutions should take into account some characteristics shared by the EU and Russia, despite the dissimilarities in their foreign policies. Both Brussels and Moscow have developed and put into practice certain combinations of inclusive and exclusive policy tools, and their hegemonic roles are doomed to remain incomplete.<sup>3</sup> The idea of incompleteness – and, therefore, fluidity and volatility – of the post-Soviet transformation and the hegemonic roles of Russia and the EU in this process have been already discussed by analysts from different perspectives.<sup>4</sup> In the context of my analysis, incomplete hegemony might be understood as a two-pronged concept. On the one hand, it suggests

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<sup>2</sup> Andrey Kortunov, “[Gibridnoe sotrudnichestvo - Kak vyiti iz krizisa v otnosheniyakh Rossii s ES](#)”, Moscow Carnegie Center, 29 August 2017.

<sup>3</sup> Andrey Makarychev and Vlad Strukov, “(In)complete Europe vis-à-vis (in)complete Russia”, PONARS-Eurasia website, 5 June 2017.

<sup>4</sup> See Andrew Wilson, “[Partners for Life: Europe’s Unanswered ‘Eastern Question’](#)”, European Council on Foreign Relations, 27 October 2017.

that there are no 'natural' borders delimiting the area of their normative (in the case of the EU) or civilisational (in the case of Russia) extension. These borders are shifting depending on different circumstances, including those beyond the reach of either Russia or the EU (for example, China's policies are of the highest importance in this respect). On the other hand, both hegemonies are incomplete in the sense that neither the EU nor Russia can fully and comprehensively (i.e. institutionally, normatively, economically or security-wise) integrate their neighbours within their normative and civilisational projects. Thus, Ukraine, Moldova and Georgia demand much more – including the membership perspective – than the EU can supply at this juncture. The same goes for Armenia, which expects Russia to stop arms sales to Azerbaijan, and for South Ossetia and Transnistria, which wish – to no avail so far – Russia to absorb them. Concomitantly, each of the two dominant actors faces the necessity to meet elevated expectations of some of their neighbours, on the one hand, and set certain limitations in associating with them, on the other.

This paper primarily focuses on the most recent experiences of those countries that are experimentally looking for carving out policy niches for their own subjectivities in a situation of EU-Russia institutional and political split. Some post-Soviet states (such as Armenia<sup>5</sup>) and non-recognised territories (such as Transnistria<sup>6</sup>) wish to assert themselves as “bridges between Eastern and Western Europe”, yet these self-descriptions largely remain linguistic metaphors lacking practical content and substantiation. In manoeuvring between the two hegemonic projects, countries located in-between look for solutions and compromises that transcend the binary either-or logic conducive to deep political rifts and ruptures, and it is these endeavours that are of primary interest to the present analysis.

Two questions in particular are addressed at this point:

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<sup>5</sup> Aram Terzan, “The evolution of Armenia's foreign policy identity”, in Kornely Kakachia and Alexander Markarov (eds.), *Values and Identity as Sources of Foreign Policy in Armenia and Georgia*, Tbilisi: Universal Publishing House, 2016, p. 148.

<sup>6</sup> Rory Maclean, “Heroic Adventures in Transnistria”, *New Eastern Europe*, No. 4 (IX), 2013, p. 158.

- 1) How far might these in-between identities and the concomitant policy practices lead these countries and how sustainable will these hybrid models will be in mid-/long-run?
- 2) Will the multiple areas of overlapping EU-Russian policies, interests and jurisdictions require Moscow and Brussels to change their policy tools and power resources?

In tackling these questions, most of the attention is focused on Moldova and Armenia, but with reference to the experiences of Georgia and Ukraine as well.

The empirical base includes primary (official documents, statements and speeches) and secondary (media) sources in English and Russian languages, as well as interviews with experts (policymakers, scholars, civil society activists, journalists) conducted during fieldwork in Georgia (n=10), Ukraine (n=10), Moldova (n=10) and Armenia (n=10) in the summer of 2017.

## **Hybridity in the common neighbourhood**

This paper defines hybridity through a set of characteristics of post-Soviet transformation that allow for co-existence of different political features and cultural trends, including those that in certain contexts might be seen as contradictory to each other. The post-Soviet region in this respect may be addressed as a peculiar and paradoxical combination of archaic forms of social, economic and cultural practices, on the one hand, and a post-modern de-ideologisation (the proverbial end of 'grand narratives'), with the ensuing fluidity and uncertainty of most of the forms of political identification. It is this mix of seemingly hardly compatible types of policy practices and power relations that defines the high volatility of political processes in many of these countries, and multiple U-turns in their foreign policy orientations. Examples are Moldova's fluctuation from a 'soft balancing' between Moscow and Brussels under Vladimir Voronin's presidency to the drastic shift towards explicitly pro-EU policies in 2009, followed by the rise of pro-Russian forces and the subsequent presidency of Igor Dodon since 2016. Georgia too went through a series of U-turns from the nationalist leadership of Zviad Gamsakhurdia in the early 1990s to a more balanced presidency of Eduard Shevardnadze, followed by

the ‘Rose Revolution’ and the ascension to power of Mikhail Saakashvili, whose trajectory in a matter of years transformed Georgia from a pragmatic partner of Moscow in 2004 to Russia’s enemy in 2008. The rise and fall of the “Orange coalition” in Ukraine, its electoral defeat by the Moscow-friendly Viktor Yanukovych and his deposition as a result of the Euromaidan of 2013-14 attests to the high turbulence in Ukrainian politics as well, which the Ukrainian political analyst Volodymyr Gorbach terms an “unfinished revolution”<sup>7</sup> – an idea that again, albeit in a different context, points to the incompleteness of many political characteristics of the post-Soviet transformation.

Important elements of these transitory complexities are relatively vague and blurred political loyalties. Being considered as a Moscow-loyal, President Voronin ultimately refused to sign the Kozak memorandum drafted in the Kremlin as the basis for the settlement of the conflict in Transnistria. By the same token, President Shevardnadze, being very close to Moscow in many respects, left open doors for cooperation with NATO and the EU. Moscow was able to prevent the pro-EU drift of yet another ally Viktor Yanukovych, but at a high price of forcing him to abandon the Association Agreement (AA) with the EU and thus provoking a deep political crisis in Ukraine with global security consequences.

In a general sense, the high political volatility in the post-Soviet countries can be explained by the complexities of their nation building. More specifically, the most substantial element of this complexity is the disharmony between political identity as a system of loyalties and sympathies, ethnicity, the institution of citizenship and religious affiliations. For example, Georgia and Moldova reveal meaningful contradictions between the idea of (re)building nation states and religious loyalties largely influenced by (and associated with) the Russian Orthodox Church (ROC). Besides, in Moldova one may see disconnections between political identities and citizenship in the sense that the possession of Romanian passports does not necessarily define pro-Russian or pro-EU sympathies of its holders.

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<sup>7</sup> Volodymyr Gorbach, “[Незавершена революція](#)”, Ukrainskiy Interest web portal, 1 December 2017.



An illustrative example of the post-Soviet hybridity is Georgian identity: “de-Sovietisation is part of Georgia’s efforts to join the EU”<sup>8</sup>, but Georgian sympathies towards Stalin, with their strong nationalist roots, are quite strong in the society as well. This bifurcation is exacerbated by the precarious European identity of Georgians: “During the different periods in its history, Georgia has been the part of the Persian and Ottoman Empires, the Mongolian and Russian Empires, and the Soviet Union; but Europe has hardly ever been involved. Thus, saying that Europe is a natural habitat for Georgia and that its people aspire to go ‘back’ to Europe, is only loosely related to the actual course of Georgian history.”<sup>9</sup> As a Georgian expert argues, European identity in this country is not based on “cultural appeal, values and norms; rather people are drawn to the economic prosperity that is perceived as a result of a deeper cooperation between Georgia and the EU”.<sup>10</sup> As for the political meanings of the institution of citizenship, there are two competing – yet co-existing – narratives in Georgia – a liberal, pro-Western one grounded in civic identity, and “ethno-religious national narrative”<sup>11</sup> based on the values of ethnicity and religion.

Against this backdrop, to properly analyse the post-Soviet reality on the ground, a new understanding of hybridity is needed – not only as a characteristic of political systems, but also as an in-between cultural positioning with meaningful political effects. As any type of diversity, cultural hybridity may have various effects – it might be conducive to the building of a civic nation where ethnic identity would not be the key criteria of belonging to the nation, but it can also lead to separatism, which is particularly dangerous if supported or ignited from the outside.

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<sup>8</sup> Ana Dabrundashvili, “Shadows of Joseph Stalin”, *New Eastern Europe*, N 3 (VIII), 2013, p.45.

<sup>9</sup> Ibid.

<sup>10</sup> See Levan Kakhisvili, “Accounting for the “selfless” self-perception among the Georgian public”, in Kornely Kakachia and Alexander Markarov (eds.), *Values and Identity as Sources of Foreign Policy in Armenia and Georgia*, Tbilisi: Universal Publishing House, 2016, p. 77.

<sup>11</sup> Tamar Patariaia, “The civic dimension of Georgian national identity and its influence on foreign policy”, in Kornely Kakachia and Alexander Markarov (eds.), *Values and Identity as Sources of Foreign Policy in Armenia and Georgia*, Tbilisi: Universal Publishing House, 2016, p.94.

Speaking about how in-between identities trigger institutional effects, one needs to see a wider picture of the post-Soviet political space. Most of these countries have all the institutions central to democracy (elections, separation of powers, civil society organisations, the media), but their functioning is a far cry from European standards. All of them consider their national identities European by culture, history and geography, yet the political distance from EU norms and standards of democracy might be quite substantial. This ambiguity expands the space for manoeuvring: Armenia – a member of the Eurasian Economic Union and the Collective Security Treaty Organization (CSTO) – continues to develop relations with the EU and NATO; and Moldova – a country that signed an AA and a DCFTA (Deep and Comprehensive Free Trade Agreement), and was a pioneer in enjoying a visa-free regime with the EU – under Dodon's presidency is increasingly leaning towards Moscow.

Ukrainian and Georgian hybridities manifest themselves in a symbiotic co-existence of strong pro-European drive – basically engendered by a consistent desire to break away from Russian patronage – with the resilient attraction of the nation state as the locus of power and the embodiment of ethnic/national authenticity. In particular, Georgia's identity combines a clear sympathy and penchant towards Europeanisation (presupposing liberal reforms) with the strong attachment to Orthodoxy with its obvious conservative underpinnings. Yet the nation-state model of governance, with the inherent conservative momentum, contradicts the overwhelmingly liberal logic of EU-led supra-national integration. The Georgian Orthodox Church, the most trustworthy institution in the country, shares a lot in its conservative and Western-sceptic rhetoric with the ROC, which only adds to the ambiguity mentioned above. In Ukraine the ROC, widely referred to in the official discourse as the Church of the intruding country, is a major Orthodox institution whose parishes outnumber those of the Ukrainian Orthodox Church of the Kyiv patriarchate. A specific element of hybridity in Ukraine is the proliferation of the practices of dual citizenship as an effect of policies of neighbouring countries – Hungary, Poland, Bulgaria and Russia aimed at distributing national passports or ID cards (*Karta Polaka*) in addition to the pre-existing Ukrainian citizenship.

Moldova is an interesting example of a country where the redrawing of borders in the past (i.e. geopolitical and territorial reshuffling) caused strong hybridising effects in cultural and political domains. The country's strong connections to both Russia and Romania unleashed deep splits in national identity.<sup>12</sup> In the meantime, Moldova is an illustrative story of the fragility of 'successful' Europeanisation<sup>13</sup>: the electoral victory of the Alliance for European Integration could not drive this country away from the oligarchic 'state capture' and corruption scandals. The presidency in Moldova – as exemplified by Igor Dodon's tenure – is not a consolidating institution, but rather a divisive one. To this one should add the spill-over effects of the events in Ukraine – an anticipation of possible political destabilisation and the growing uncertainty when it comes to security.<sup>14</sup> As a result, not much room is left in Moldovan politics for value-based policies – the country incarnates a post-Soviet, post-ideological and post-normative regime of power, with pragmatic considerations (economics, finances and security) trumping any possible ideational allegiances. The widespread practice of double citizenship adds to the existence of multiple zones of shifting loyalties and dislocated identities. For example, it is imaginable that Moldovan holders of Romanian passports would not necessarily be pro-European when it comes to their voting preferences. This type of post-political and even post-national citizenship is primordially a matter of practical convenience, which distinguishes Moldova from, for instance, the Baltic states where – especially in Estonia and Latvia – post-Soviet citizenship was closely associated with political loyalty to the nation states that regained their independence.

Religion is another factor that adds to the hybridity of Moldovan identity. The role of the ROC in the country is huge: most of the parishes in Moldova are controlled by the Moscow Patriarchy, which, according to the testimonies of many Moldovan experts, is

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<sup>12</sup> Rumer, Eugen, "[Moldova between Russia and the West: a Delicate Balance](#)", Carnegie Endowment for International Peace, 23 May 2017.

<sup>13</sup> Dovile Suslita (ed.), "[Экономические Вызовы, Стоящие Перед Украиной и Молдовой на Пути в ЕС](#)", Eastern European Study Center and Foreign Policy Association, Chisinau, November 2015, p.16.

<sup>14</sup> *Glavkom*, "[Угроза пророссийского переворота в Молдове. К чему готовиться Украине?](#)", 13 January 2017.

more a political than a theological institution, and is widely known for using religious ceremonies to propagate the doctrine of the Russian world. Therefore, clashes between the 'pro-European' and 'pro-Russian' standpoints hide a much more complex picture of numerous conflicting affiliations and disconnections involving issues of ethnicity, religious affiliation and citizenship.

Armenia – sharing with Moldova an in-between manoeuvring in search of its own system of multiple balances – is different from the three countries that signed AAs and strengthened their relations with the EU through visa-free agreements in at least one important respect: it did not lose territory to separatists. On the contrary, it supported the de-facto second Armenian state in Nagorno-Karabakh, a territory that before 1991 was administratively part of Azerbaijan. Against this background, Armenian foreign policy choices are more geopolitical than normative, which is predetermined by its complicated neighbourhood, including locked borders with Turkey and Azerbaijan. In these conditions the EU appears as one of few options to balance Russia's influence. In the Armenian discourse there is a feeling of belonging to a cultural space of Europe from which the Armenian nation state is distanced, if not detached geographically.<sup>15</sup> As an interviewee in Yerevan put it, "we are Europeans even if Europe does not know that".

In the meantime, Armenian mainstream discourse vehemently discards any meaningful anti-Russian attitudes in this country, preferring to see them as marginal and politically insignificant. Moreover, as another interviewee in Yerevan said, "we are not Georgians – we don't contradistinguish Russia and Europe". For Armenia, Russia is a security guarantor, while the EU is an economic partner. Within the CSTO, Armenia tried to offer its experience of international peacekeeping: "The self-sufficiency stems from Armenia's expanding capacity to participate in peacekeeping operations separate from its role as a member of the Russian-dominated CSTO and distinct from its security partnership

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<sup>15</sup> Alexandr Iskanderian, [ЕАЭС - не интеграционный проект, это форма подтверждения лояльности России](#), Yerevan: the Caucasus Institute, 22 November 2015.

with Russia”.<sup>16</sup> In the security terrain, this is exactly what defines Armenia’s attempts to diversify its external communication under the condition of heavy dependence on Russia.

## Hybrid hegemonies: The EU and Russia

The academic literature is replete with realist and geopolitical approaches to a plethora of issues pertaining to EU-Russian interactions in the common neighbourhood area. A Russian expert, for example, argues that the EU is driving towards a more geopolitical – as opposed to pragmatic – approach to its eastern neighbours.<sup>17</sup> However, the EU’s and Russia’s policies towards their common neighbours, being undoubtedly hegemonic, in many respects remain incomplete, which may be understood as a structural impediment to hegemonic impositions from either of two major power centres – Moscow and Brussels – due to the hybrid nature of societies forming the neighbourhood area. By the same token, EU and Russian policies themselves might be approached from the perspective of hybridity, which in this specific context means a complex structure of hegemony without one single logic behind it.

From a practical perspective, the EU and Russia have their own advantages. The EU acts through a variety of channels, thus combining diverse forms of influence – through the mechanisms of official agreements, state-based policies and the multiplicity of non-state actors involved, including foundations, professional associations, think tanks, and so forth. Russia, for its part, is stronger in non-democratic environments dealing with opaque and often corrupt interest groups. This section discusses the EU’s and Russia’s hegemonic strategies in their complexity and multiplicity, and from the viewpoint of their hybrid nature.

### *Europeanisation as a hegemonic strategy*

The hybrid structure of political identities and affiliations in countries of common neighbourhood is a serious challenge to the

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<sup>16</sup> Richard Giragosyan, “[Peacekeeping Contributor Profile: Armenia](#)”, Providing for Peacekeeping website, November 2015.

<sup>17</sup> Andrey Deviatkov, “Восточное партнерство ЕС: геополитика побеждает прагматику?”, *Eurasia Expert*, 19 June 2017

EU's policy in its eastern neighbourhood. In the meantime, Brussels' incomplete hegemony stems from the very limited nature of EU external projection, which puts a premium on norms, values, rules and institutions, and intentionally downplays the role of coercive instruments.

One of the lessons of EaP implementation is that the EU failed to duly understand that elite groups in some post-Soviet countries rhetorically used pro-Europe/pro-democracy narratives for attaining three practical goals having very little to do with Europeanisation. First, in their role as EU political partners and promoters of EU-compatible agenda, they aimed at receiving immunity and impunity from criticism, if not a *carte blanche*, from the West for their actions. As Andreas Umland argues, the clan-like system in Ukraine reproduces itself under European slogans.<sup>18</sup> Second, many post-Soviet elites were eager to obtain palpable material advantages from the EU and its member states, including new funding. Third, they need EU backing for boosting their independence and autonomy – that might contravene EU's 'post-sovereign' approach – “in order to ease their dependence on Russia”.<sup>19</sup> As seen from the elites' perspective, this strategy was quite rational and effective in the short run. However, the long-run result was widespread disappointment in societies not only with local political elites due to multiple corruption charges, but also with the EU that supported these elites and turned a blind eye in the meantime on their wrongdoings.

Evidence of the EU's lack of institutional resources in projecting its normative power eastward is most apparent in recent changes in electoral laws in Armenia, Moldova and Georgia. Despite the dissimilar trajectories of these changes, none of them was aimed at improving the quality of democratic governance, but – as consensually understood by policy experts – at securing the

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<sup>18</sup> Andreas Umland, “[Сегодня клановая система в Украине воспроизводит себя под европейскими лозунгами](#)”, *UkrLifeTV*, 27 June 2017.

<sup>19</sup> Oscar Pardo Sierra, “No man's land? A comparative analysis of the EU and Russia's influence in the Southern Caucasus”, *Communist and Post-Communist Studies* 44, 2011, p.242.

power base of the ruling elites.<sup>20</sup> In the words of the EU's official statement concerning the 2017 Moldovan changes in electoral rules, "we continue to share the view of the Venice Commission and the OSCE Office for Democratic Institutions and Human Rights that the proposed changes raise serious concerns regarding effective democracy in the current political context".<sup>21</sup> Other political voices in Europe equally condemned the new Moldovan legislation.<sup>22</sup>

Thus, it is hard to establish a solid and unambiguous connection between EU policies – including the visa-free decision<sup>23</sup> – and domestic transformation in Moldova. On a more general note one may say that the pro-EU enthusiasm of 2009, when the Alliance for European Integration came to power in Chisinau, transformed in a matter of a few years into disappointment and disillusionment that created a fertile ground for Russian interference. As observed by Moldovan interviewed in Chisinau: "The EU is viewed through the prism of allegedly pro-European politicians who monopolised the representation and interpretation of the idea of Europe... All these years since 2009 the EU tried to dissuade us from criticising the government formed upon the Alliance for European Integration, and convince us 'to give them a chance'."

After the 2009 electoral success of the Alliance for European Integration, the EU aimed at "building Moldova into the success story" of Europeanisation, constantly praising the pro-EU government as effective and "European". However, this didn't prevent the society from huge disappointment with Europe, as expressed by another Moldovan interviewed: "This sounds unbelievable, but in the process of system transformation, the return to the previous system and subsequently a refusal to further pass on

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<sup>20</sup> "[Change of Electoral Systems in EaP Countries: Bolstering Dictators or Causing Maidan](#)", *Moldovan Politics*, 29 June. 2017.

<sup>21</sup> Federica Mogherini and Johannes Hahn, "[Statement by the HR/VP Mogherini and Commissioner Hahn on the amendments to the electoral legislation in the Republic of Moldova](#)", European Union External Action Service, 21 July 2017.

<sup>22</sup> European People's Party, [Moldova's New Political System – a Blow to Democracy](#), EPP Press Release, 20 July 2017.

<sup>23</sup> Denis Cenuşa, "[Moldova after three years of visa-free regime with EU and new European realities](#)", IPN News Agency, 18 April 2017.

power is more probable.”<sup>24</sup> Many Moldovan intellectuals themselves recognise that the country is getting more conservative and patriarchal, and its low living standards stimulate mass migration.<sup>25</sup> Institutions of the state are subdued to practices emerging from the shadow, if not criminal, businesses that operate widely throughout the country (neutralisation of opponents, cleaning of political field, blackmail, money laundering through sophisticated financial schemes, etc.). Another hot point is the debate about amendments to the Moldovan legislation complicating the operational activity of local NGOs: “The proposed provisions are contrary to the AA between the Republic of Moldova and the EU, which encourages the involvement of all relevant stakeholders, including civil society organizations, in developing policies and reforms in the Republic of Moldova”.<sup>26</sup>

Against this background there are strong voices arguing, in the words of one interviewee, that “power in Moldova has been captured by Vlad Plahotniuc, who is neither a democrat nor a reformer and who, under the cover of false pro-European rhetoric, is petrifying the weaknesses of the state”.<sup>27</sup> Plahotniuc tried to pragmatically monopolise the pro-European flank of Moldovan politics, but by so doing he, as some analysts think, turns Moldova further away from European standards,<sup>28</sup> which creates fertile ground for Russia.<sup>29</sup> As a Russia-loyal journalist in Moldova mentioned in an interview, “the European vector was non-existent in Moldova... There are only business interests here, no ideologies

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<sup>24</sup> Pawel Kowal, “The Moldovan Gambit”, *New Eastern Europe*, N 4 (IX), 2013, p. 59.

<sup>25</sup> Nicoleta Esinencu, “A Proud Moldovan? New Eastern Europe”, N 4 (IX), 2013, pp. 179-180.

<sup>26</sup> Foreign Policy Association of Moldova, “[Declaration: The attempt to limit foreign funding of NGOs endangers the functioning of democracy in Moldova and cannot, under any circumstances](#)”, 11 July 2017.

<sup>27</sup> Kamil Calus and Wojciech Kononchuk, “[Explaining Oligarchic Moldova](#)”, Carnegie Europe, 4 May 2017.

<sup>28</sup> Vladimir Soloviov, “[For Moldova’s journalists, surveillance is the new norm](#)”, *Open Democracy*, 7 April 2017.

<sup>29</sup> Vladimir Plahotniuc, “[An East-West Flashpoints that Need More Attention](#)”, *The Hill*, 24 July 2017.



at all” – a post-political milieu that is quite convenient from the vantage point of projecting Moscow’s interests.

In Armenia, with all its dissimilarity from Moldova, the EU faces the same type of trouble attesting to the very limited nature of EU influence over domestic transformation. The shift from the semi-presidential system, with elections part proportional representation/part first-past-the-post, to a parliamentary republic with a full proportional representation system, is widely assessed as a “reform from above”, and even as a “counter-revolutionary putsch from above aimed at creating a one-party state”.<sup>30</sup> For example, the Armenian government received from the EU €7 million for the purchase of special electronic equipment used during the parliamentary elections, yet afterwards refused to engage with the EU-initiated debate on the quality of the electoral process, accusing the EU envoy in Yerevan of interference in Armenia’s domestic affairs.<sup>31</sup>

Brussels, however, has been obliged to adjust its policies to the new commitments and obligations undertaken by Yerevan after its refusal to sign the AA. In 2013 the Armenian government proposed a shorter version of this document as a compromise, but the EU initially rejected this text, insisting on an ‘either all or nothing’ principle. After that Brussels adopted a more flexible approach and agreed to renegotiate the agreement, which was ultimately signed in November 2017.

### *Russia’s neighbourhood strategies*

Russia’s toolkit for dealing with its ‘near abroad’ looks more diverse than the EU’s. It includes two pillars – Eurasian integration and the idea of the Russian World, which embraces ethnic, religious and linguistic dimensions – that are absent in the case of the EU. Besides, as Russia’s support for military insurgency in eastern Ukraine made clear, the Russian World ideology might have a substantial military

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<sup>30</sup> Ingar Solty and Davit Stepanyan, “[Post-democracy in Armenia? How the New Constitution will Depoliticize Armenian Society](#)”, *Open Democracy*, 25 November 2015.

<sup>31</sup> Nana Sahakian and Astghik Bedevian, “[EU Envoy Rejects Criticism from Armenian Government](#)”, 2017.

component – again, non-existent in the EU. Nevertheless, as many experts conclude, the overtly militarised imperial *Realpolitik* brings scant palpable results to Moscow.<sup>32</sup>

Indeed, from the geopolitical perspective, Russia's hegemony in the near abroad looks like a series of policy improvisations lacking any coherent or consistent design. The Kremlin vociferously proclaims the South Caucasus its sphere of interest, but in the meantime has withdrawn its military infrastructure from Adjara (Georgia) and Quabala (Azerbaijan). Moscow was fully aware of the negotiations that Viktor Yanukovych was conducting for years between its satellite Ukraine and the EU on the AA and DCFTA, but did nothing to clarify the way Russia understands its interests were being affected by this agreement. The same happened with Armenia: Russia abruptly reconsidered its de-facto disregard of Yerevan's intention to use the EaP for qualitatively boosting relations with the EU, and at the very last moment started pressuring President Serzh Sargsyan to prevent the AA from materialising. Moreover, Moscow – despite its insistence on being taken seriously when it comes to post-Soviet neighbours – failed to capitalise on the EU's readiness to conduct the trilateral EU-Russia-Ukraine negotiations. Due to inadequately justified and artificially elevated demands from Moscow, the talks ultimately failed in 2015, and the trilateral format discredited itself, largely to Russia's disadvantage.

As a result of this chronic inconsistency, Russia is gradually losing influence in what it considers its 'sphere of vital interests'. Paradoxically, Russia – whose government tends to see the world basically through a geopolitical prism – is in some respects outperformed by the EU, an actor that by no means perceives itself in geopolitical terms. The vulnerability and weakness of Russia's policies to a large extent stem from its geopolitically self-defeating policy of aligning with secondary actors and simultaneously losing ground in its relations with more important ones. Geopolitically, relations with Georgia are more important than with Abkhazia and – moreover – South Ossetia; relations with Chisinau are more important than with Tiraspol or Komrat, and relations with Kyiv are

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<sup>32</sup> Pavel Luzin, "[The Caucasus: Imperial Realpolitik or Historical Retreat](#)", *Intersections*, 7 December 2015.

more important than with Donetsk or Luhansk. The same logic, by the way, can be applied to Russia's European policies: Moscow in fact exchanged normal and stable working relations with power holders in France and Germany for directly identifying Russia's interests with second-ranking (at best) anti-establishment forces. The priority given to often marginal and peripheral groups seems to be a major factor compromising Russia's geopolitical positions in a wider Europe. As a result, Russia lacks an effective long-term strategy in its so-called near abroad. Russia can contribute to splitting societies along the pre-existing divisive lines (for example, in Moldova), but it can't efficiently play a consolidating game, basically due to the lack of a strong normative appeal.

The deficiency of Russia's normative strategy became particularly evident in August 2008, when it recognised the two break-away Georgian territories. This political gesture was an abrupt departure from the previous strategy that Russia tried to implement within the global framework of its normative stance, which included two main pillars. First, Russia acted out of its consensually recognised status as the successor of the Soviet Union, which initially was interpreted in Moscow more from the viewpoint of Russia's special responsibilities rather than extraordinary rights. In accordance with this logic, Russian troops in Georgian territory received international legitimacy as peacekeepers. Secondly, Russia consistently insisted on the inappropriateness of instigating independence movements and fuelling separatism within sovereign polities. In accordance with this logic, Moscow not only considered Abkhazia and South Ossetia legal parts of Georgia, but also imposed sanctions upon them.

In August 2008, both pillars were either destroyed or significantly reconfigured. By applying military force, Russia first shifted its discourse from responsibilities to the right to intervene. Second, by recognising the separatist entities, the Kremlin forfeited its previously earned normative capital and the reputation as the most consistent advocate of the principle of territorial integrity of states. The trajectory that Moscow has chosen to follow has driven it from the principled non-recognition of break-away territories to recognition and then – in 2014 – to the annexation of Crimea where separatism was almost non-existent before Russia's interference. Russia's collective self, both national and imperial, started

symbolically appropriating territories beyond national borders. Crimea and *Novorossiia* are two recent examples of this proclivity to refer to neighbouring lands as allegedly central – if not constitutive – of Russia's sense of identity. This possessive feeling, being a sign of a deep non-self-sufficiency, can be extended to the entire Ukraine, a country that many Russians consider as their subaltern, yet – paradoxically – in the meantime as an indispensable element of the proverbial Russian World.

From a global geopolitical perspective, this devolution produced disastrous effects: from a member of the G8 and a strategic partner of both the EU and – even though only verbally – NATO, Russia turned into an object of harsh international criticism, economic and political sanctions, and found itself in a situation of political isolation vis-à-vis the West. It is this situation that Russia exploited to a full swing debunking the 'European choice' of its neighbours as a rhetorical cover for interest-based group policies of personal enrichment. Moreover, Russia entangled itself in a knot of unresolvable controversies: it wishes to de-legitimise the West from a normative perspective, but in the meantime is eager to legitimise its Ukraine policy among Western governments and opinion-makers.

A good example of the geopolitically dichotomist thinking is the following statement made by a Moscow-based policy analyst: "The crucial question is whether we consider Georgia completely lost for Russia and the Russian world. If this is the case, the best strategy would be to arrange a referendum on incorporation of South Ossetia into Russia and then to fend off with a well-equipped border against an inimical country. But if this is not the case, we should think of a strategy of extended dialogue with Georgia, keeping Abkhazia and South Ossetia as Russia's allies".<sup>33</sup> The question is still pending.

In Moldova, Russian policy has developed under the impact of two political failures. The first painful episode was the fiasco with the Kozak memorandum that was ready for signing but at the very last moment rejected by the President Vladimir Voronin under US pressure. The second episode of unsuccessful policy was the

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<sup>33</sup>Aleksei Fenenko, [Final igry: Rossii nuzhno opredelitsia v otnoshenii Gruzii](#), *Nezavisimaya Gazeta*, 20 April 2016.

mission of Sergey Naryshkin, who in December 2010 visited Chisinau in his capacity as the head of presidential administration. Naryshkin's unofficial arrival was meant to create a left-centric coalition of the Communist Party and Democratic Party under Russian mediation.<sup>34</sup> These two examples show Russia's weakness as a mediator in political clashes in Moldova. Yet even in Transnistria, as some journalists suppose, "Russia in fact decides close to nothing. It preferred to detach itself from the development over there. The pro-Russian orientation in Transnistria is a matter of imagery. In the future it can re-orient to the EU, if needed".<sup>35</sup> For example, Russia did nothing to avoid conflict between the 'Sherif' group and Evgeniy Shevchuk in Tiraspol, preferred not to interfere and observed at a distance Shevchuk's escape from Transnistria to Chisinau in June 2017. Even with a pro-Russian president as the head of state, Moscow can do little when Russian diplomats are expelled from Chisinau, or the Moldovan Foreign Ministry declared Vice Prime Minister Dmitry Rogozin *persona non grata*. Therefore, Russia does not always meet the high political expectations of its clientele and effectively interfere.

Many analysts refer to these shortcomings to make a case for the fragility of Russia's hegemonic (im)positions in Moldova; some authors argue that Moscow lacks a policy of its own, instead is simply trying to fill the vacuum left by Brussels.<sup>36</sup> My argument is different, however: Moscow has too many policies that might contradict and potentially block each other.

Russia's first policy boils down to 'disciplining' Moldova by creating impediments for bilateral cooperation (such as sanctions) and then lifting them as a political resource, thus investing in relations with loyal politicians (such as Igor Dodon) giving them a chance to publicly claim that they can deal with Moscow and tackle

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<sup>34</sup> [Moldavskie SMI](#): Naryshkin priekhal v Kishiniov, chtoby razvalit' Alians za evrointegratsiyu, December 2010; Mark Solovoiv. [Pravda o provable levotsentristskoi koalitsii, ili Kto torpediroval missiyu Sergeya Naryshkina](#), *ENews*, 13 February 2011.

<sup>35</sup> Aleksandr Rybin. [Pridnestrovie: Moskva teriaet kontrol'](#), *Gazeta.ru*, 17 July 2017.

<sup>36</sup> Elkhan Nuriyev, "Russia, the EU and the South Caucasus: Forging an Efficient Over-Arching Cooperative Regional Security Scheme", *Connections. The Quarterly Journal*, spring 2015, p. 59.

the most controversial issues annoying Moldova. The two cases in point are restrictions imposed against Moldovan wine in the Russian market and complications for Moldovans working in Russia. The rise of Dodon as a political leader is illustrative of this type of policy: in his capacity as leader of the Socialist Party, prior to his presidency, he met in Moscow with the head of Russian Migration Service Konstantin Romadanovsky with whom he has settled the judicial issues concerning dozens of hundreds of Moldovans working illegally in Russia. By taking a permissive stand, Russia polished the political credentials of Dodon in Moldova and simultaneously tried to diminish the importance of the visa-free agreement with the EU by showing the attractiveness of the Russian labour market.<sup>37</sup> Later Russia lifted its earlier reservations and agreed to accept Moldova's participation in two free trade areas – but only when Dodon came to power in Chisinau.<sup>38</sup> Moreover, Dodon received a chance to directly associate himself with Putin as a strong leader who was the only foreign head of state attending the May 9 military parade in Moscow in 2017.<sup>39</sup>

Secondly, in communicating with Chisinau, Moscow plays the Eurasianist card, and does it in two different ways. It supported pro-Eurasianist sympathies in Transnistria and Gagauzia in 2014, implying a possible integration with the Russian-sponsored Eurasian Union.<sup>40</sup> Another channel for Eurasianist ideas in Moldova is the activity of several Russian-affiliated organisations (such as the local branch of the Izborsk Club<sup>41</sup>) and individuals (such as Yuriy Roshka, the most active promoter of Alexander Dugin's ideas in Moldova). The Eurasianist discourse as articulated by Dugin himself in Moldova is a hybrid appeal that contains both right-wing/conservative and leftist ingredients. This Eurasianist blend of stereotypes and misperceptions includes statements that can be

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<sup>37</sup> "[Igor Dodon proviol vstrechu s Moldavskimi sootchestvennikami v Moskve](#)", *Actualitati*, 3 November 2014.

<sup>38</sup> Vladimir Solovoi, "[Vishenka na torte](#)", *Kommersant*, 30 November 2016.

<sup>39</sup> "[Moldovan President Calls EU Aid Geopolitical Assistance](#)", *Radio Free Europe*, 18 May 2017.

<sup>40</sup> Vasily Kashirin, "[Gagauzia ne vyzhivaet – ona zhiviot](#)", *EurasiaInform*, 16 January 2014.

<sup>41</sup> <http://izborsk.md/>

easily disproven empirically – such as, in particular, the case of Dugin’s assertions that the EU completely disregards issues of social justice, or that the populations of Greece, Romania and Bulgaria are eager to leave the EU. But this discursive mixture has more consumers – and therefore more chances for circulation – in normatively de-politicised societies, which tend to be politically inert and insensitive to value-based narratives. Paradoxically, Dugin’s and Roshka’s appeals to “salvaging the souls” as the top policy priority for the “Eurasian alternative” might have some audience in post-political (even post-democratic) social and cultural environments, with disillusionment in the material benefits of European democracy and the search for an alternative illiberal identification.

Positively assessing the operation of the Izborsk Club in Moldova, Roshka, a leading Moldovan Eurasianist, called for a hybrid trans-ideological consensus, based on two pillars that share anti-liberal views: “genuinely left and genuinely right/conservative intellectuals and politicians”. On the left side Roshka imagines issues of social justice and anti-colonial struggle against the US-based oligarchic elite, while on the right-wing flank, he sees the accentuation of cultural and civilizational issues. In his account, Moldova can be a pilot project of a Russia-patronised “Eastern Civilization”.<sup>42</sup> On a different account, he claimed that “there are no more left and right, only different shades of patriotism”.<sup>43</sup> This makes the Eurasianist message sent to Moldova a hybrid of leftist resistance to capitalism (anti-oligarchic rhetoric and references to “people’s interests”) and civilizational conservatism/traditionalism (including anti-secularism and anti-nationalism).

At this point, the most interesting is Dugin’s and Roshka’s insistence on “Moldovan-Romanian common cultural and philosophic legacy” as a basis for the national conservative revival (“We are interested in strengthening Moldovan and Romanian

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<sup>42</sup> Yurii Roshka, [“Kvoprosu razrabotki natsional’noi idei v Moldove”](#), *Katehon*, 4 April 2016.

<sup>43</sup> Yurii Roshka, [“Dugin i moldavskaya natsional’naya idea](#), *Sputnik Moldova*, 30 July 2016.

identity as part of a single civilization.”<sup>44</sup>). This argument, first, contradicts the logic of supporters of federalisation in Moldova<sup>45</sup> based on the stimulation of anti-Moldovan and anti-Romanian discourse in Transnistria. Second, the premium placed by Eurasianists on the Moldovan-Romanian cultural, civilisational and religious unity does not sit well with the proponents of the Russian World in Moldova. In this sense the Russian World represents a separate policy (or a set of policies) aimed at culturally distinguishing Transnistria as an island of Russian language and culture endangered by the so-called Romanisation.<sup>46</sup> Dodon’s openness to discuss a return to Cyrillic transcription of the Moldovan language<sup>47</sup> in this context is not only a cultural, but a political gesture as well.

Yet, of course, each of the policies briefly introduced above – the “Eurasian pathway” or the Russian World – is not only about narratives and public debates. Many Russian discourse-makers play more than one role in Moldova. For example, Alexey Martynov, Director of the Moscow-based International Institute of Newest States, who in 2015 was detained at the Chisinau airport and denied entry to Moldova, is known less as a specialist in policy analysis and more as a person close to authorities in Tiraspol, which explains the fact that he has been awarded a medal of honour in Tiraspol.<sup>48</sup> In a similar way, the authorities in Chisinau banned Sergey Mokshantsev, Director of the local branch of the Russian Institute of Strategic Studies (RISI), from entering Moldova. His organisation has a strong reputation of being in close touch with the Russian government and intelligence community.<sup>49</sup> RISI directly called

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<sup>44</sup> [“Moldova predvybornaya: liberalov – za skobki”](#), *Direktiva Dugina*, 27 July 2016.

<sup>45</sup> [“Igor Dodon: Federalizatsiya – edinstvenniy sposob sokhranit’ Pridnestrovye i Gagauziyu”](#), *Actualitati*, 26 May 2017.

<sup>46</sup> Nikolay Svetlanov, [“Rossiya i Pridnestrovie”](#), *Zavtra*, 5 May 2016.

<sup>47</sup> [“Igor Dodon. Eto Zapad govorit vam kritikovat’ Prezidenta”](#), *NewsMaker*, 22 June 2017.

<sup>48</sup> Irina Ivashkina [“Rossiiskiy politolog Alexei Martynov ob’javlen personoi non-grata v Moldove”](#), *NewsMaker*, 13 August 2015.

<sup>49</sup> [“Glave Dnestrovsko-Prutskogo tsentra RISI zapretili v’ezd v Moldovu”](#), *NewsMaker*, 22 May 2015.



upon the Kremlin to recognise the independence of Transnistria.<sup>50</sup> It is telling that the opening of the RISI Center in Tiraspol was staged not as an academic, but rather as an openly political event attended by the head (*bashkan*) of Gagauzia Mikhail Formuzal, the head of Transnistrian government Tatiana Turanskaya and the Foreign Minister of the unrecognised republic Nina Shtansky, along with the Defence Minister Aleksandr Lukianenko, the archbishop of Tiraspol and Dubossary Savva, as well as representatives of social movements “Motherland – Eurasian Union” and “Our Serbia”.<sup>51</sup>

The Priznanie (“Recognition”) Foundation funded by Moscow is another hybrid actor that serves more as a partisan platform for influencing public opinion and giving the floor to a wide range of Russia-friendly speakers – from the former President Vladimir Voronin<sup>52</sup> to the former head of Transnistria Evgeniy Shevchuk – than as an independent unit.<sup>53</sup> Priznanie operates as a testing ground for identifying the most promising Moldovan politicians worthy of support from Moscow, and in the meantime as a litmus test for their loyalty to Moscow.<sup>54</sup> The foundation also pledged to support those Russian-language media in Moldova that face so-called discrimination,<sup>55</sup> thus in practice investing its resources in one of the Russian World’s policy priorities.

In Georgia, Russia uses a similar set of policies, relying on a local clientele group of Russian loyalists reproducing Putin’s discourse and customising it for local conditions.<sup>56</sup> These tactics

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<sup>50</sup> “[Direktor RISI prizyvaet vlasti Rossii priznat’ nezavisimost’ Pridnestrovya](#)”, *Basarabia.md*, 29 May 2015.

<sup>51</sup> “[V Tiraspole otkrylsia Informatsionniy Tsentr RISI](#)”, Ministry of Foreign Affairs of Transnistrian Moldovan Republic, 11 March 2014.

<sup>52</sup> “[Vladimir Voronin: Budushee Moldovy – za aktivnym i umelym sovmescheniem dvukh integratsionnykh protsessov](#)”, SNG i Evropa, 16 October 2009.

<sup>53</sup> “[Rossiiskiy fond ‘Priznanie’ organizoval seminar ekspertov za Shevchuka](#)”, AVA, 24 September 2011.

<sup>54</sup> “[Rossiiskiy fond ‘Priznanie’](#): Za Partiyu Kommunistov gotovy progolosovat’ bole poloviny izbiratelei Respubliki Moldova”, *Forum*, 4 November 2009.

<sup>55</sup> [Rossiiskiy fond ‘Priznanie’ ne odobryaet, Terra](#): Territoria Moldneta, 28 January 2010.

<sup>56</sup> “[Activist: Russia stepping up anti-EU, pro-Eurasian Union efforts in Georgia](#)”, *Democracy and Freedom Watch*, 21 August 2015.

include over-securitisation of the situation on the ground (for example, related to hyper-dramatisation of conflictual elements of relations with Turkey) and the propagation of Kremlin-compatible anti-Western narratives.<sup>57</sup> Another important pillar of the Moscow-translated discourse are the constant appeals to geopolitical pragmatism, as opposed to embracing EU-generated norms and values. In particular, using its support groups and individual speakers in Georgia, Moscow claims that Russia's retreat from Georgia would automatically mean a fertile ground for Turkish expansion,<sup>58</sup> and that NATO has much less to offer Georgia than Russia.<sup>59</sup> Russia is portrayed as a friendly country where many Georgians in the past made their names and careers, which adds a strong nostalgic element to Russian propaganda.<sup>60</sup>

Armenia in this context differs from Moldova and Georgia, since it has chosen to exchange its AA with the EU with the enforced membership in the Eurasian Economic Union. Nevertheless, with all institutional connections to Moscow, Armenian political debate includes issues questioning the efficacy of its pro-Eurasian turn: "Russia faces negative consequences of the fall of world oil prices, paralleled by Western sanctions, which led to the 39% drop of remittances from Armenians working in Russia, and to an 18% drop in export volumes. Therefore, the anticipated benefits of Armenia's membership in the Eurasian Economic Union have not so far materialised."<sup>61</sup> Moreover, the April 2016 resumption of hostilities with Azerbaijan boosted the voices in the Armenian society who are doubtful of the expediency of security cooperation with Russia: "It was Aliiev who received endless compliments and assurances in eternal friendship. No one considered appropriate to court Yerevan:

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<sup>57</sup> ["Gruzinskiy ekspert: Izoliatsiya Rossii i izmenenie eyo orientatsii stanet katastrofoi dlia Zapada"](#), The Gorchakov Foundation, 17 April 2016.

<sup>58</sup> [«V Gruzii priznalis': Krome Rossii, nas zaschitit' nekomu»](#), ERR.

<sup>59</sup> ["Jondi Bagaturia: Druzhit' s Rossiei vygodnee, chem s NATO"](#), *Sputnik Gruzia*, 27 May 2016.

<sup>60</sup> [«Ekspert: Gruzia byla samoi bogatoi respublikoi v SSSR»](#), *Sputnik Gruzia*, 18 August 2016.

<sup>61</sup> ["Gayane Abramyan. Armenia vozobnovila peregovory s Evropeiskim Soyuzom"](#), *InoSmi*, 9 February 2015.

Armenia has no place to go anyway".<sup>62</sup> Thus, Russia's role in the security sphere in Armenia is not undisputable.<sup>63</sup> Armenia should not count on Russia too much as a key strategic ally, according to Deputy Foreign Minister Shavarsh Kocharyan.<sup>64</sup> He warned that "[n]ot only did Russia not come up with clear support towards Armenia, but high-level Russian officials including Deputy Prime Minister Rogozin made statements that Russia would continue to provide Azerbaijan with modern assault weaponry, part of which was actively used against Armenian forces during the four-day military escalation."<sup>65</sup> Some Armenian political analysts deem it dangerous to rely only on Russia, and call for diversification of foreign policy partners to include the EU and Iran.<sup>66</sup>

As for the reverberations of the Russian World ideas in Armenia, the space for this policy is very limited, which became evident in the very critical reception given to a proposal made by the deputy head of the State Duma to introduce Russian as the second official language in Armenia.<sup>67</sup> One Armenian politician dubbed as a "mental disorder" a suggestion by the Russian Minister of Education to use Cyrillic in all CIS countries,<sup>68</sup> which attests to the strong resistance by the Armenian polity to attempts at Russification.

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<sup>62</sup> Vladimir Golyshev, "[Nepriznannaya Armenia](#)", *Radio Svoboda*, May 7, 2016.

<sup>63</sup> Emma Gabrielyan, "[Armenia-NATO Partnership Has Strategic Significance](#)", 14 June 2017.

<sup>64</sup> "[Our expectations from Russia should not be exaggerated – deputy PM](#)", 29 June 2017.

<sup>65</sup> Benyamin Poghosyan "[Commentary: Armenia's Russian Hug](#)", *Common Space*, 14 July 2017.

<sup>66</sup> Anahit Shirinyan, "[Armenia Should Strengthen Ties with the EU and Iran](#)", Chatham House, London, 10 March 2016.

<sup>67</sup> "[Duma Speaker suggests making Russian official language in Armenia](#)", *MediaMax*, 17 July 2017.

<sup>68</sup> Irina Dzhorbenadze, "[Armenia ispugalas' yazykovoi ekspansii Rossii](#)", *RosBalt*, 22 June 2017.

## Options and scenarios

Russia – supported by realist thinkers in the West – claims that the only alternative to spheres of influence would be continuing military conflicts in the whole post-Soviet area. Some authors deem that Russia's legitimization of spheres of influence has already yielded fruit: "Allegedly, Russia has an indirect veto right on the EU's and NATO's expansion policy in its near abroad and no longer tolerates Western expansion in the former Soviet states."<sup>69</sup> Yet, as this paper has argued, it is the phenomenal hybridity of the post-Soviet states and societies, along with hybrid forms of interaction and blurred lines of identification that make the practical implementation of spheres of influence and other realist schemes impossible. This is exactly what constitutes the most dramatic element of the whole story of post-Soviet transition: most of the post-Soviet countries as they exist nowadays can't be smoothly integrated with either the EU or Russia. Both dominant actors are incapable and often hesitant to fully absorb or incorporate these countries, thus making their political trajectories even more complicated. The territorial division of a wider Europe into spheres of influences looks from the vantage point of this analysis impractical. The crux of the problem – *pace* John Mearsheimer – is not Western discord with Russia's insistence on a new division within a wider Europe, but the impossibility of any form of territorial partitions and divisions in principle. The language of political realism – with Russia's "orbits", "doorsteps" and "backyards", the revitalisation of the concept of 'buffer state' and the explicit 'right-wrong' distinction<sup>70</sup> – is desperately obsolete, at least in this part of the world. The same goes for the advocacy of status-quo policy and the idea of 'red lines' as its conceptual substantiation.<sup>71</sup>

Neither the EU's 'complete hegemony' in the form of full membership for EaP states, nor Russia's monopoly over its near abroad seems to be a feasible policy option. Equally unimaginable

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<sup>69</sup> David Matsaberidze, "Russia vs. EU/US through Georgia and Ukraine", *Connections. The Quarterly Journal*, spring 2015, p. 86.

<sup>70</sup> John Mersheimer, "[Don't Arm Ukraine](#)", *New York Times*, 8 February 2015.

<sup>71</sup> Taras Kuzio, "[When an academic ignored inconvenient facts](#)", *New Eastern Europe*, 21 June 2016.

is Russia's open and unequivocal identification with the basic norms of Europeanisation. Under these circumstances, several other options can be discussed.

*Option 1* is the maintenance of the unsatisfactory status quo, with alternating cycles of the EU's and Russia's reactions to each other's policies. Thus, NATO's indecision at the Bucharest summit of April 2008 was perceived by Moscow as a sign of weakness that (indirectly) paved the way to Russia's military operation against Georgia in August of that year. This war intensified the EU's launch of the EaP, which a few years later led to Russia's heavy pressure over Kyiv (and Yerevan). Consequently, the Euromaidan was a response to Ukraine's (temporal) deviation from the European route, followed by the Russia-instigated anti-Maidan, the annexation of Crimea and EU sanctions against Russia. This scenario implies indirect communication through mutual reactions to the moves of each other: Russia and the EU in this case build their policies via constant reciprocal retaliations.

This option is basically guided by the logic of Russia's intransigent view of any forms of EU institutional presence in the post-Soviet space as "not just as contradicting (Moscow's. – A.M.) interests, but as being bluntly anti-Russian... (which – A.M.) only increases Russia's concerns about the EU's ambitions and actions in the post-Soviet space, including through targeted EaP states. Despite the obvious scope for economic linkages, chances are low to see in the foreseeable future the post-Soviet space as a space of EU-Russia cooperation. In the future, sharp competition and protectionism will determine economic relations between Russia and the EU in the post-Soviet space."<sup>72</sup> Under this narrative of confrontation, Russia will continue looking to debilitate the EU by supporting non-mainstream parties in Europe (mainly national conservative, but also leftist), thus attacking European unity and solidarity. Concomitantly, in its post-Soviet neighbourhood Russia will invest in relations with the most Eurosceptic and anti-European parties and groups.

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<sup>72</sup> Dmitry Danilov, "[EU-Russia Relations in the Post-Soviet Space](#)", in Olga Potemkina (ed.), *The EU Global Strategy: Implications for Russia*, Moscow: Institute of Europe, Russian Academy of Science, 2017, pp. 17-24.

In this situation, the EU might pursue a policy of 'benign neglect' of the Eurasian Economic Union, indirectly obliging Russia take ever greater commitments and obligations towards common neighbours, which ultimately might lead to a cul-de-sac and Moscow's 'imperial overstretch'. The EU might ultimately profit – though indirectly – from the vicious circle of financial responsibilities to its satellites that Moscow is already trapped in. Indeed, in the absence of functional and effective soft power, Moscow needs to offer purely material bonuses and advantages to its partners and interlocutors, which eventually might be burdensome to the Russian budget, if implementable at all.

This scenario, however, still implies a danger of escalating the mutually containing moves and entanglements in an endless series of reactions and reciprocation. Therefore, the remaining scenarios will be grounded in a different logic that does not envisage immediate and direct ripostes to the other party's policies, but rather, envisages positive interaction between Moscow and Brussels.

*Option 2* is a comeback to the trilateral format and direct talks on conditions and mechanisms of compatibility between implementation of EU-led and Russia-led integrative processes. Some political leaders in post-Soviet countries verbally support this option, yet so far, all attempts to coordinate the EU's and Russia's policies have failed whether in a bilateral format (the Meseberg memorandum on Transnistria signed by Russia and Germany in 2010), in regional organisations or within ad-hoc trilateral working groups (such as the EU-Russia-Ukraine negotiations<sup>73</sup>) –. In the latter case, Russia's strategy ultimately led to the discontinuation of tripartite talks, which demonstrated that Moscow didn't care much about the future potential of this format and was not seriously interested to reproduce it in other situations (in Moldova or Armenia, for instance). Russia did stay in touch with its EU partners over coordinating their policies in Eastern Europe, yet this cooperation had clear limits, mostly set by the Russian side. Perhaps the continuing EU-Russia consultations on the Western Balkans in the context of EU enlargement can serve as a potentially better

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<sup>73</sup> [The trilateral talks on DCFTA implementation](#), 21 December 2015.

example that can be replicated in the common neighbourhood as well.<sup>74</sup>

Yet, even without formal negotiations, there is still some – although modest in scope – space for compromises. For example, Moscow de facto accepted the perspective of a parallel functioning of different “norms of technical regulations” in Moldova, and reduced its demand to Chisinau to abstain from introducing discriminatory measures against Russian agricultural producers and the exchange of customs information.<sup>75</sup> In the security sphere – when it comes to Donbas, Transnistria or Nagorno Karabakh – Russia and the involved EU member states are in direct touch with each other, which might be regarded as a specific form of a multilateral format.

*Option 3* can be titled the “Kazakhstan-Armenia model” in the sense that these Russia-loyal countries have signed – apparently without open conflicts with Moscow – cooperation agreements with the EU, which however are consistent with their previous commitments vis-à-vis the Eurasian Economic Union. Following Armenia’s example, Belarus also started to talk about a new format of relations with the EU. “Signing an agreement on partnership and cooperation is a matter of a short-term perspective”, said the Foreign Minister of Belarus Vladimir Makey.<sup>76</sup> And Azerbaijan too in early 2017 resumed negotiations with the EU on a new partnership agreement.<sup>77</sup>

Kazakhstan was the first post-Soviet country to move in the direction of balancing its Eurasian commitments with strengthening the EU vector. Luc Devigne, Deputy Managing Director for Europe and Central Asia in the European External Action Service,

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<sup>74</sup> “[Regular EU-Russia Expert Consultations held on Western Balkans and EU Enlargement](#)”, Permanent Mission of the Russian Federation to the European Union, 1 December 2017.

<sup>75</sup> Andrey Devyatkov, “[Nash chelovek? Chego dobivaetsa Moskva ot moldavskogo prezidenta Dodona?](#)”, Moscow Carnegie Center, 1 June 2016.

<sup>76</sup> Quoted in: Vitaly Martunyuk, “[Eastern Partnership summit: Compromise for the sake of continuation](#)”, *Ukrainian Prism*, Foreign Policy Council, 27 November 2017.

<sup>77</sup> “[Azerbaijan, EU to discuss new partnership agreement](#)”, *Radio Free Europe/Radio Liberty*, 22 September 2017.

mentioned that “the EU’s relationship with Kazakhstan has never been any stronger or any better”.<sup>78</sup> This success story is grounded in a carefully crafted policy of the government of Kazakhstan to create a positive image of this country in the West not only as a stable partner of European and Euro-Atlantic institutions, but also as a modernising economy open to foreign markets. The Kazakhstani government used a variety of tools to create a basis for its acceptance in Europe as a Central Asian leader and to lobby for boosting investments and technology transfer from the EU and particularly from Germany. The Eurasian Club in Berlin and Eurasian Council on Foreign Affairs were instrumental in advertising and promoting Kazakhstan in the EU. Given Central Asia’s interest in the EU, the examples of Kazakhstan and Armenia potentially might be replicated, for instance, by Kyrgyzstan which also looks for its own balancing mechanisms when it comes to relations with major foreign actors.

The 2017 Armenia-EU agreement on enhanced partnership (CEPA) was almost consensually characterised as a “win-win” compromise suitable to Yerevan, Moscow and Brussels. Russia’s mainstream discourse looks quite constructive as well: it not only accepts the very idea of ‘external diversification’ preventing the reduction of foreign policies “to a diametric choice between Russia and the West, or a competition of value systems”, but also praised Armenia for “becoming a space for dialogue between Russia and the EU” that rejects an “either/or” approach to integration, and moves both Moscow and Brussels in a “both/and” direction.<sup>79</sup> Within this discourse Armenia can be portrayed as a country that “now achieved what Ukraine and Georgia could not: the benefits of both EEU and EU integration”.<sup>80</sup>

In the Armenian discourse on the CEPA agreement, the key words are “geopolitical pragmatism”, “manoeuvring” and “realism”, although many voices in Armenia celebrated the

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<sup>78</sup> Georgi Gotev, “[Commission: Kazakhstan proves good relations with both EU and Russia are possible](#)”, *Euroactiv*, 6 October 2017.

<sup>79</sup> Sergey Markedonov, “[Armenia’s ‘Both/And’ Policy for Europe and Eurasia](#)”, Moscow Carnegie Center, 7 December 2017.

<sup>80</sup> Ibid.



agreement as a further drift away from Russia's patronage<sup>81</sup> and as an alternative – rather than a supplement – to the EAEU. CEPA – apart from its institutional effects – became a turning point for legitimising a Russia-sceptic discourse grounded in a number of arguments replicable beyond Armenia. Russia is treated as an internationally sanctioned country, which prevents it from investing in partners' economies and offering reduced gas prices, notwithstanding earlier promises. It is a mainstream point in Armenian discourse that the country primarily needs what Russia can't supply – modernisation, structural reforms and anti-corruption measures. Due to new customs duties, Armenia's trade with Georgia and Iran is tending to decrease, weakening trans-border cooperation. Armenian experts openly complain about the lack of any Russian assistance in the conflict over Nagorno-Karabakh; moreover, Russia is accused of selling arms to Azerbaijan, which, as seen from Armenia, leads to further militarisation of the region and contradicts Russia's role in the Minsk Group. Apart from that, Moscow is widely seen as an inefficient soft power, with a poor record of successful cultural and humanitarian projects.<sup>82</sup> As one can see, the list of claims toward Russia is quite long, and CEPA became an important point for articulating a strategic alternative to the status of Yerevan as Moscow's satellite, with possible spill-over effects in other Russia-dependent countries.

*Option 4* would be the launch of a process of EU's recognition of the Eurasian Economic Union as a legitimate interlocutor (at least) and (perhaps in the long-run prospect) an economic partner. This scenario, as it is discussed nowadays, looks feasible under two conditions. The first one is de-politicization of the whole spectrum of European relations from both sides, which in particular implies the bracketing out of the Russia-Ukraine military conflict from the political agenda. Secondly, this option requires the recycling of the old doctrine of “engaging Russia” – in fact, a new edition of *Wandel durch Handel* that unfortunately didn't work earlier.

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<sup>81</sup> Garegin Khumarian, “[Rossiya vzroselaya devochka, i dolzhna ponimat', chto muzhchiny ukhodyat ne 'k', a 'ot'](#)”, 30 November 2017.

<sup>82</sup> [Politica cu Natalia Morari](#), TV8, 4 December 2017.

Nevertheless, this option has many proponents in Europe. For example, the recent Friedrich Ebert Stiftung report claimed that the EU “perhaps had gone too far in its actions and failed to consult with Russia on an equal basis. Instead, the EU presented Russia with a *fait accompli*... (Therefore. – A.M.) the EU should involve Russia as a neighbour with its own interests in negotiations about a vision for this region’s future... Russia’s interests in the region are to be recognized and taken seriously”.<sup>83</sup> This approach is similar to multiple voices coming from Moscow: “The Ukrainian crisis shows that there is an urgent need to identify viable and acceptable-to-all strategies for economic integration across the triangle EU-EaP-EAEU... The “Lisbon to Vladivostok” working group of the German business is regularly conducting meetings with the Chambers of Commerce of Poland and Ukraine to convince them to support deepened cooperation between the EU and the EAEU”.<sup>84</sup>

Support for this policy of rapprochement, however, is based on empirically questionable premises: “Recently, Russian leadership has been sending clear signals that it is committed to economic transformation and seeks to diversify and reform the rent-dependent and corruption-ridden economy... In the long run, economic liberalization and convergence (or at least closer cooperation) with the EU may also promote political liberalization”.<sup>85</sup> Apparently, the demand for modernisation and structural reforms is much more articulated in Armenia or Kazakhstan than in Russia. What is even more important is that option 4 is not easy to imagine, unless there were some *de facto* slide towards the ‘Transnistrianisation’ of the region of Donbas, signalled by a true cease fire, withdrawal of heavy weapons and safe opening for cross-border movement of people and trade.<sup>86</sup>

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<sup>83</sup> Miriam Eisleb, Alexandra Vasilieva and Simon Weiss, “[The Incomplete Policy. There Ideas for the Future of Eastern Partnership](#)”, Friedrich Ebert Stiftung, Vienna, November 2017.

<sup>84</sup> Yurii Kofner, “[Eastern Partnership and EAEU: from competition to cooperation](#)”, Greater Eurasia web portal, 24 November 2017.

<sup>85</sup> Alexandra Vasilieva, “[Engage! Why the European Union Should Talk to the Eurasian Economic Union](#)”, Friedrich Ebert Stiftung, Vienna, September 2017.

<sup>86</sup> I am thankful to Michael Emerson for drawing my attention to this important point.

Arguably, the rationale for a potential policy change towards EAEU should be related not to “engaging Russia” (time and again), but in stimulating alternative visions of regionalism that hypothetically can counter-balance Russia’s predominance and prevent the Russia-centric bias in this organization. In this respect Kazakhstan plays the pivotal role. In particular, “Kazakhstani Eurasianism does not view itself as a geopolitical space distinct from both Europe and Asia, but as embodying the positive meeting space between Europe and Asia, drawing on both”.<sup>87</sup> In cultural sphere Kazakhstan has declared the transformation of its alphabet into Latin graphics, thus clearly distancing from the idea of Russian World to which the Kremlin strongly committed itself.

Against this backdrop, option 4 makes sense basically as a policy of establishing some kind of working relations with EAEU with a premium put on the role of Kazakhstan, as mainly Brussels’ deal with Astana rather than with Moscow. The choice of Kazakhstan as EU’s main Eurasian interlocutor might be duly appreciated by Astana and supported by analytical and expert resources of such organizations as Eurasian Club and Eurasian Council on Foreign Affairs. In the meantime this type of policy would imply that the EU is more sympathetic with the Kazakhstani vision of Eurasianism rather than with its Russian (more imperialist) version, which appears to be only logical in the circumstances of Russia’s detachment from most of the policy tracks earlier developed in conjunction with the EU. Unlike Russia, Kazakhstan never downgraded the importance of modernization and economic openness<sup>88</sup> as structural conditions of its engagements with Europe, and pursued a security policy – with denuclearisation at its core<sup>89</sup> – its Western partners find responsible and contributing to peace and stability.

**Option 5** seems to be the most complicated one. It implies that the EU and Russia would refuse to compete with each other over

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<sup>87</sup> Svante Cornell and Johan Engval, “[Kazakhstan in Europe: Why Not?](#),” Institute for Security and Development Policy website, 2 October 2017.

<sup>88</sup> Danila Bochkarev, “[Modernisation is a genuine goal for Kazakhstan](#)”, *Euractiv*, 21 August 2017.

<sup>89</sup> Erlan Idrissov, “[Kazakhstan shows denuclearization work](#)”, *Global Times*, 8 October 2016.

establishing control of specific territories, and try to find more innovative non-territorial (or trans-territorial) forms of responsible influence over their common neighbours. This scenario requires functional division of areas of interest and responsibility between the two dominant actors. More specifically, this option would necessitate decoupling security affairs (where Russia might play the first fiddle) from economic integration (where the EU might become the engine), and multilateral policies aimed at avoiding clashes between the two.

Of course, *option 5* looks unrealistic without a mutual structural adjustment of EU's and Russia's policies in economic and security spheres. It also seems to be unfeasible in situations when Moscow wouldn't accept the EU as the most attractive economic and normative model for most of the common neighbours. In the meantime, the chances for this scenario would increase with the stronger commitment of Russia's neighbours to a neutral status, along the lines of Finnish, Swedish or Swiss non-bloc security policies, which would debunk Moscow's obsession with the alleged threats triggered by a hypothetical NATO enlargement.

Potentially – in the long run – this scenario might lead to more sophisticated networking relations of engagement and communication in the post-Soviet space. As Clifford Kupchan posits, “the time for formal association mechanisms that clearly define which countries are ‘in’ or ‘out’ of a given regional grouping has passed. Today, strategies such as China's Belt and Road Initiative (BRI) that allow states to flexibly join parts of an initiative without necessarily committing to it irreversibly, foregoing competing offers, or integrating all aspects of their socio-political life have the upper hand”.<sup>90</sup> Should this model be considered as beneficial for the EaP, it might open new chances for EU's other engagements in the East, including Central Asia and China.

Of course, some of these options may overlap and form more intricate policy combinations. The Kazakhstan–Armenia model might in due course boost chances for an EU-EAEU deal, which could bring Eurasia-loyalists more in line with EU economic rules and technical standards without politically antagonising Moscow.

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<sup>90</sup> Clifford Kupchan, “[EU's neighborhood policies: Revamping Fundamentals](#)”, Valdai Club web portal, 29 November 2017.

Moreover, at certain point there might be chances to balance the EU-centrism of a (still potential) wider European economic area by the important roles that Turkey and the post-*Brexit* UK can play in its reification, which might correspond to Russia's vision of a multipolar Europe without damaging EU's positions.

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## 7. POLITICAL AND ECONOMIC GOVERNANCE IN THE BALKANS VS EASTERN EUROPE

MICHAEL EMERSON & GERGANA NOUTCHEVA

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### Introduction

This chapter seeks to compare the quality of governance of the non-EU member states of the Western Balkans (hereafter known simply as the Balkans) and of Eastern Europe, namely Georgia, Moldova and Ukraine, which share Association Agreements with the EU, including Deep and Comprehensive Free Trade Areas (hereafter the 'DCFTA states'). Both groups of states aspire to full membership of the EU. While the EU differentiates between the two groups, acknowledging the

'European [i.e. EU membership] perspectives' of the former, but not of the latter, the commitments to adopt or approximate to EU law and policies made by both groups have much in common. This makes comparisons between the Balkans and the DCFTA states both feasible and politically significant.

These comparisons are facilitated by numerous sources, qualitative assessments and formal rankings or ratings. Particular use is made of two sources: on the one hand the regular annual reports on the Balkans and Turkey prepared by the EU institutions, and on the other the three 'Handbooks' on Georgia, Moldova and Ukraine published by CEPS and its partners (see list of references).

Overall, these assessments reveal that the political and economic governance in the two groups is comparable, even when taking into account the wide range of ratings seen within each of the two groups between their respective states.

Concretely, the EU has now established what independent observers can recognise as a three-tier graduation of accession prospects for the Balkans and Turkey. In February 2018, the European Commission proposed that 2025 be viewed as a feasible accession date for Serbia and Montenegro, which signalled these two countries as the Balkan front-runners, or tier one, even if the EU Council has not endorsed this date. A second tier was established by the Council in June 2018, when 2019 was signalled as a possible, conditional date for opening accession negotiations with Albania and Macedonia. The third tier then consists of Bosnia and Kosovo, which have no dated prospects, and Turkey, whose negotiations are deemed to be at a standstill. By comparison, combining both political and economic indicators, Georgia is comparable but slightly more advanced than the Balkan tier-one states, while Moldova and Ukraine are roughly comparable to the Balkan tier-two states, and ahead of the tier-three states. This is the broad picture, which is of evident political significance, although there is room for debate about the many indicators used in this paper, justifying more nuance in finer-grained conclusions.

The overall picture calls into question the objectivity of the EU in extending membership perspectives to the Balkans as a group, while denying it to the DCFTA states as a group. It also calls for a more careful consideration of the common assumption that the incentive of membership determines the effectiveness of reform processes and the extent of convergence of these neighbouring states on EU values and laws. It further questions the pertinence of the EU's neighbourhood policy which, it has been argued, has become obsolete.<sup>1</sup> At the end of this chapter, we develop three options for how the EU might respond to this state of affairs.

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<sup>1</sup> See Steven Blockmans, *The Obsolescence of the European Neighbourhood Policy*, CEPS, Brussels, 2017.

## Political governance

The political geography of the EU's immediate vicinity features three groups of countries that in official EU doctrine differ with regard to their EU integration prospects. The Balkans are by far the most privileged group that received the conditional promise of EU membership as early as 2000. Three of the Eastern Partnership (EaP) countries (Georgia, Moldova, and Ukraine, but not Armenia, Azerbaijan and Belarus) come next, having taken up the EU's offer of deep and comprehensive free trade and close political association, which nevertheless falls short of full EU membership. The countries from the Middle East and North Africa (MENA) are in third place with a lower likelihood of achieving as advanced a degree of EU integration as the eastern neighbours, owing to various domestic and regional obstacles, or lack of interest on the part of the countries concerned.

The EaP neighbours are thus in a middle category, but are themselves now split between countries that harbour EU accession aspirations and have signed advanced association agreements with the EU, and those unwilling or unable to undertake such close contractual commitments with the EU. The EaP countries are also 'European' states, which if democratic are eligible to apply for full EU membership according to Article 49 of the Treaty, unlike the southern neighbours.

The EU membership perspective has been considered the strongest external driver of domestic political change in countries surrounding the EU. Scholars have argued that the quality of democratic governance in the wider neighbourhood strongly correlates with the strength of the incentives offered by Brussels (Boerzel and Schimmelfennig, 2017). Countries that enjoy a credible prospect of EU accession experience more sweeping democratic change. It has been argued that countries that have association and partnership agreements with the EU are not undergoing the same degree and pace of democratic improvement as the EU accession candidates (Boerzel and Schimmelfennig, 2017). These arguments now seem to warrant some qualification, however.

A closer look at the political governance map of the EU's neighbourhood in 2018 reveals a much more plural environment; one that defies both the regional divisions drawn by the EU's official

enlargement and neighbourhood policies and scholarly expectations that the EU membership prospect generates political change unequivocally. A key point here has to be the credibility of the membership perspective. Almost two decades after the EU extended the membership prospect to the Balkans, accession is still not in sight, even for the front-runners of the region. After more than a decade since the EU launched the ENP, the political realities are quite mixed, with frontrunners and less advanced states in each region challenging attempts at regional stereotyping – see Table 7.1.

*Table 7.1 Democracy scores in the EU neighbourhood*

	2006	2008	2010	2012	2014	2016	2018
Albania	7.25	7.5	7.55	7.25	6.7	6.95	7.1
Croatia	9.1	8.85	8.5	8.4	8.45	8.4	8.4
Bosnia and Herzegovina	6.8	6.7	6.5	6.4	6.35	6.3	6.1
Kosovo			6.95	6.7	6.6	6.65	6.5
Macedonia	7.55	7.75	7.95	7.6	7.2	6.65	6.5
Montenegro	7.4	7.85	7.8	7.6	7.9	7.85	7.6
Serbia	7.4	7.75	8	8.05	7.95	7.85	7.7
<b>Western Balkans</b>	<b>7.58</b>	<b>7.73</b>	<b>7.61</b>	<b>7.43</b>	<b>7.31</b>	<b>7.24</b>	<b>7.13</b>
<b>Turkey</b>	<b>7.05</b>	<b>7.05</b>	<b>7.65</b>	<b>7.65</b>	<b>7.55</b>	<b>7.25</b>	<b>5.6</b>
Armenia	5.2	6	4.92	5.25	5.35	5.23	5.1
Azerbaijan	3.8	3.8	3.92	4.02	3.92	3.48	3.4
Belarus	3.97	3.93	4.08	3.93	3.93	3.93	4.3
Georgia	6.1	6.85	6.05	6.15	6.5	6.7	6.8
Moldova	5.4	6.85	6.65	7.05	7.15	6.7	6.2
Ukraine	7.1	7.35	7	6.1	6.1	6.75	6.9
<b>Eastern neighbourhood</b>	<b>5.26</b>	<b>5.80</b>	<b>5.44</b>	<b>5.42</b>	<b>5.49</b>	<b>5.47</b>	<b>5.45</b>
Algeria	4.23	4.27	4.37	4.3	4.8	4.8	4.8
Egypt	4.12	4.4	4.22	4.08	4.92	3.93	3.7
Jordan	4.1	3.98	4.02	3.92	4.1	4.03	4.4
Lebanon	5.6	6.25	6.25	6.15	6	5.7	4.9
Libya	3	2.98	3.2	3.1	4.13	2.38	2.6
Morocco	4.48	4.4	4.05	3.9	4	3.83	3.8
Syria	3	2.6	3.23	3.18	2.03	1.7	1.8
Tunisia	3.83	3.95	3.78	3.85	5.8	6.3	6.5
<b>Southern neighbourhood</b>	<b>4.05</b>	<b>4.10</b>	<b>4.14</b>	<b>4.06</b>	<b>4.47</b>	<b>4.08</b>	<b>4.06</b>

*Note:* These results are broadly consistent with those from another frequently quoted source, Freedom House.

*Source:* Bertelsmann Stiftung, Democracy Status.

One of the most pronounced tendencies is the steady decline in political governance standards in all the countries to which the EU has extended a membership perspective. Turkey's democratic backsliding is the most spectacular, but the Balkan accession

candidates also appear to be profoundly affected by a democratic malaise that promises to prolong if not completely derail their EU membership trajectory. The frontrunners in the region by political criteria – Serbia and Montenegro – are not spared the regional trend, even though their decline is less steep compared to the other Balkan states, Albania, Bosnia and Herzegovina, Kosovo and Macedonia. Very recent developments in Macedonia suggest an improvement in political governance, which remains to be confirmed in new data.

Against this negative trend, the recent democratic gains among the EaP frontrunners between 2012 and 2016 may be puzzling for scholars. However, these were years when the DCFTA agreements were being concluded, and this was an incentive that carried some weight. The three DCFTA countries – Georgia, Ukraine and Moldova – have not only improved the quality of their democratic governance in that period but have also caught up and overtaken the Balkan laggards. They have also widened the gap between frontrunners and less advanced states within the EaP group and have effectively detached themselves from the other eastern neighbours. Of the non-DCFTA countries, Azerbaijan and Belarus have remained authoritarian regimes, on a par with the average of the southern neighbourhood throughout the last decade. Only Armenia saw a new burst of democratic activism, in April 2018.

The relatively positive quality of democracy in the DCFTA countries is impressive against the background of general authoritarianism in the EU's borderlands and heightened geopolitical tensions in the eastern neighbourhood during this period. Not only has Russia sought to actively derail these countries' pro-Western trajectories by imposing costs on their pro-EU policies, but EU-Russian relations have also taken a distinctly antagonistic turn with the mutual imposition of quid-pro-quo sanctions and a return to open confrontation over various crises in the common neighbourhood.

One of the main manifestations of poor governance across the wider neighbourhood has been widespread corruption and impunity for officeholders. Weak rule of law and inefficient law enforcement institutions have been commonplace in nearly all neighbouring states and have allowed incumbents to act with impunity while in office. Control of corruption has thus proven

difficult, yet the evidence from both regions shows that Georgia distinguishes itself not only from its DCFTA partners, but also from all the Balkan states, including even the Balkan EU member states, by achieving ratings closer to the average of OECD and EU countries. On the other hand, Moldova and Ukraine are ranked below the least performing Balkan states on this count (see Tables 7.2 and 7.3 with consistent findings from two different sources).

*Table 7.2 Corruption rankings out of 180 countries worldwide, 2017*

Croatia	57
Bulgaria	71
Montenegro	64
Serbia	77
Kosovo	85
Bosnia	91
Albania	91
Macedonia	107
Turkey	81
Georgia	46
Moldova	122
Ukraine	130

*Source:* Transparency International.



Table 7.3 World Bank's Enterprise Survey – corruption ratings

	Bribery incidents <sup>1</sup>	Bribery depth <sup>2</sup>	Gifts to tax officials <sup>3</sup>	Gifts for government contracts <sup>4</sup>	Gifts for construction contracts <sup>5</sup>	Gifts to officials <sup>6</sup>	Corruption constraint <sup>7</sup>
OECD	2	1	1	11	2	8	11
Bulgaria	n.a.	n.a.	6	28	17	n.a.	n.a.
Serbia	n.a.	n.a.	7	40	16	n.a.	n.a.
Albania	n.a.	n.a.	18	34	38	n.a.	n.a.
East-Central Europe	17	14	13	26	25	20	22
Georgia	2	1	0	1	12	2	3
Moldova	31	22	14	11	49	16	38
Ukraine	50	45	50	99	73	73	38

<sup>1</sup> Bribery incidence - % of firms experiencing at least one bribe request.    <sup>2</sup> Bribery depth - % of public transactions where bribe requested.

<sup>3</sup> % of firms expected to give gifts in meetings with tax officials.

<sup>4</sup> % of firms expected to give gifts to secure government contracts.

<sup>5</sup> % of firms expected to give gifts to get a construction contract.

<sup>6</sup> % of firms expected to give gifts to public officials to get things done.

<sup>7</sup> % of firms identify corruption as a major constraint.

Source: OECD (2016), based on WB Enterprise Surveys conducted in Georgia, Moldova and Ukraine in 2013.

A similar but somewhat different picture emerges from rule of law rankings in Table 7.4. Here again, Georgia is way ahead of all the Western Balkan states and ranks among the EU member states of the Balkan region (similar to Croatia, and much better than Bulgaria). The two other DCFTA states, Moldova and Ukraine, are ranked close to Serbia, which on this count, however, is not the regional front-runner.

*Table 7.4 Rule of law rankings*

Croatia	35
Bulgaria	55
Montenegro	-
Serbia	76
Kosovo	-
Bosnia	56
Albania	68
Macedonia	57
Turkey	101
Georgia	38
Moldova	78
Ukraine	77

*Source:* World Justice Project, Rule of Law Index, 2017-2018.

These developments challenge the dominant assumption in policy circles and academia alike that a credible EU membership perspective consistently generates a domestic environment conducive to democratic change. The EU accession prospect has not spurred a robust democratisation dynamic in the Western Balkan countries, which after initial gains on political rights and civil liberties in the early 2000s have regressed over the last decade in every aspect of democracy. The reasons for that are well known. On the EU side, interest in the stability of the region has trumped concerns about growing authoritarian tendencies there (BiEPAG,

2017; Richter, 2012). Most of the EU's accession leverage has gone on pressuring Balkan strongmen to deliver on security by de-escalating latent conflicts and moving towards a normalisation of neighbourly relations (Vachudova, 2014) and cooperating with EU governments on migration and counter-terrorism issues (Bechev, 2016). Thus, Brussels has insisted on advances in the normalisation of relations between Belgrade and Pristina in the framework of EU-facilitated High-Level Dialogue between the two parties, putting aside questions of democracy and rule of law. Similarly, the cooperation of the Balkan governments was instrumental for the closure of the so-called Balkan migrant route in 2016, thus bolstering EU border security and avoiding criticism of domestic political governance issues.

As a result, democratic backsliding in the region has gone unchecked, leaving local leaders to get away with deteriorating media freedom, political control over nominally independent institutions and extreme forms of political graft. In other words, the EU has not consistently applied political pressure to sanction democratic regression in the region but has sent the wrong signal to a Balkan political elite only too ready to cling to power and enjoy the spoils of public office (Pomorska and Noutcheva, 2017). Domestic political actors in the region have used the space offered by the EU's hesitation in applying negative democratic conditionality to block or reverse democratic reform.

On the domestic side, there has been no consistent, robust societal push to dislodge vested interests in the status quo, even though sporadic societal protests have occasionally voiced the public's discontent with the ruling political class. On the whole, Balkan societies have been too preoccupied with economic survival and closing the wounds of the 1990s conflicts to resist the capture of state resources by predatory elites. Furthermore, the EU's democratic credentials have suffered as a result of democratic challenges within the EU. Hungary and Poland's democratic backsliding and the EU's reluctance to stand up for its fundamental political values has shaken the image of the EU as a democracy promoter abroad.

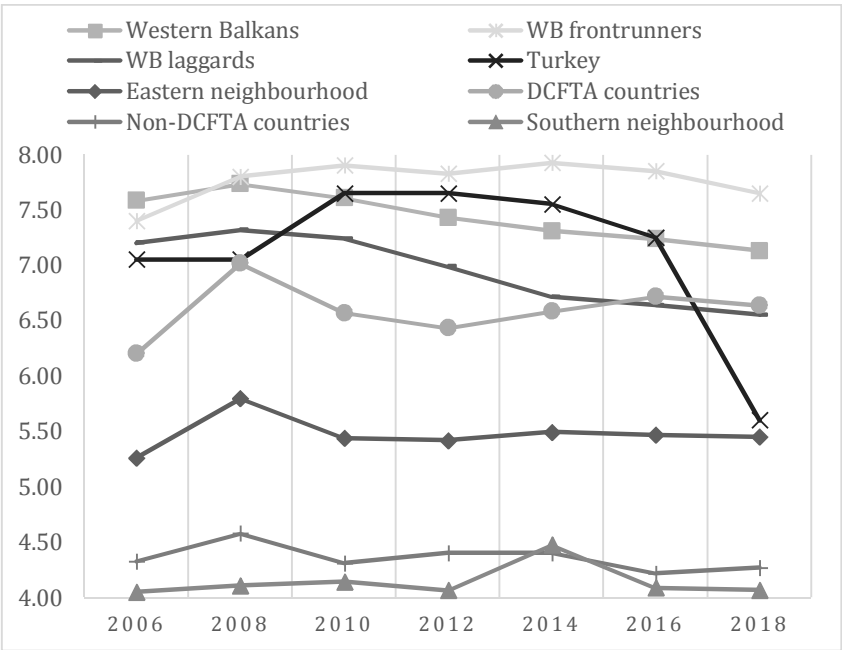
The experience of the three DCFTA countries, however, suggests that a particular constellation of domestic and regional factors can enable a push for democracy from within in the absence

of a strong external ‘carrot’, even though the process can be fragile and subject to reversal as the democracy data for the last two years indicates – see Figure 7.1. The motivation to proceed on the democracy path in the three DCFTA countries, notwithstanding the weak EU incentives and strong Russian disincentives, is linked to a combination of elite calculations and societal values. At the elite level, the determination to break free from Russia’s sphere of influence is amplified by Russia’s aggressive strategy in its ‘near abroad’. The more Russia multiplies attacks on the statehood and sovereign rights of these countries to determine their future path, the greater the resolve of these states’ leadership to pursue a rapprochement with the EU, which goes with embracing EU values (Delcour and Wolczuk, 2015). A similar dynamic can be observed at societal level. In countries such as Georgia and Ukraine – both of which have been the targets of Russian military aggression, societal orientations have turned decidedly away from Russia and in favour of the EU and its softer ways of pursuing the political and economic transformation of the region (Shevel, 2014; Popescu, 2018). Russia has thus had an indirect and unintended positive effect on the democratisation dynamics of the DCFTA countries.

In general, the EU is seen slightly more positively in the eastern neighbourhood (44%) than in the Western Balkans (42%) even though Kosovo (90%) and Albania (81%) are individually the most convinced EU-enthusiasts – see Figure 7.2. The majority of citizens in Georgia (59%) and Macedonia (54%) also view the EU favourably. The most negative perceptions of the EU, however, are paradoxically registered in the Balkan frontrunners, Serbia and Montenegro, where as many as 30 and 22 percent of the population respectively sees the EU in a negative light. Collectively, the EU has a negative image among more citizens of the Balkans (19%) than of the eastern neighbourhood (13%). In both regions, younger cohorts, more educated people and people with higher social status tend to view the EU more positively. In the Balkans, EU membership is most often associated with freedom to study and work in the EU (35%), economic prosperity (31%) and freedom to travel (30%) (Balkan Barometer 2017). In the EaP countries, the EU is clearly associated with the political values it stands for, in particular human rights (77%), rule of law (74%); freedom of speech (74%), democracy (70%), freedom of religion (72%), respect for other cultures and

minorities (67%), freedom of the media (73%) (EU Neighbours East, 2017). Importantly, in the EaP region where the EU is not the only integration alternative, the EU is seen as a more attractive and trustworthy integration project compared to the Russia-led Eurasian Economic Union, even among the members of the latter – see Figure 7.3.

Figure 7.1 Political governance in the Western Balkans and the European neighbourhood



Notes: Rating on a scale of one (the lowest value) to 10 (the highest value).

Western Balkans: Croatia and all candidate and potential candidate countries from the region. Kosovo is included with a separate rating as of 2010 onwards.

WB frontrunners: Serbia and Montenegro.

WB other: Albania, Bosnia and Herzegovina, Kosovo and Macedonia. Kosovo is included with a separate rating as of 2010 onwards.

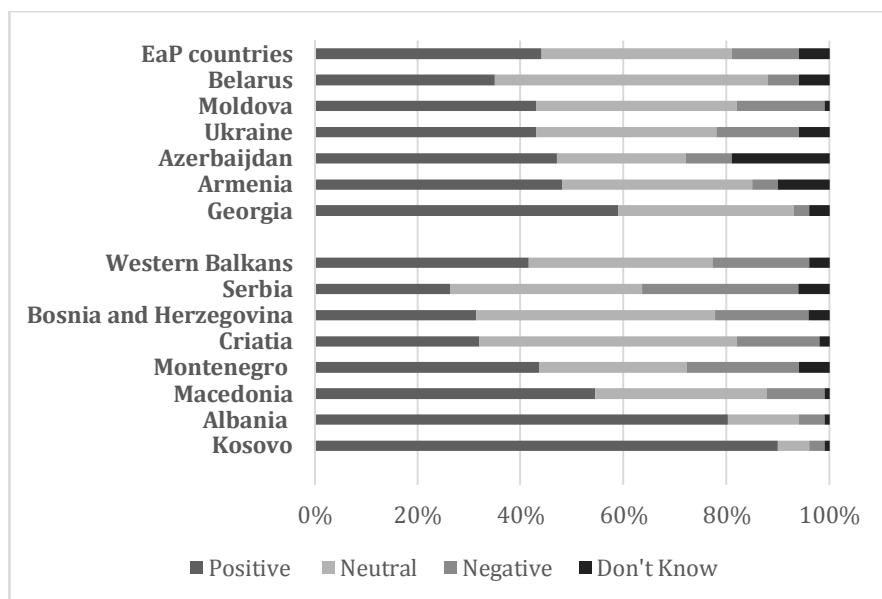
DCFTA countries: Ukraine, Georgia, Moldova.

Non-DCFTA countries: Armenia, Azerbaijan and Belarus.

Southern Neighbourhood: Israel and Palestine are not included in the average score.

Source: Bertelsmann Stiftung Transformation Index, Democracy Status.

Figure 7.2 The EU's image in the Balkans and the Eastern Neighbourhood, 2017



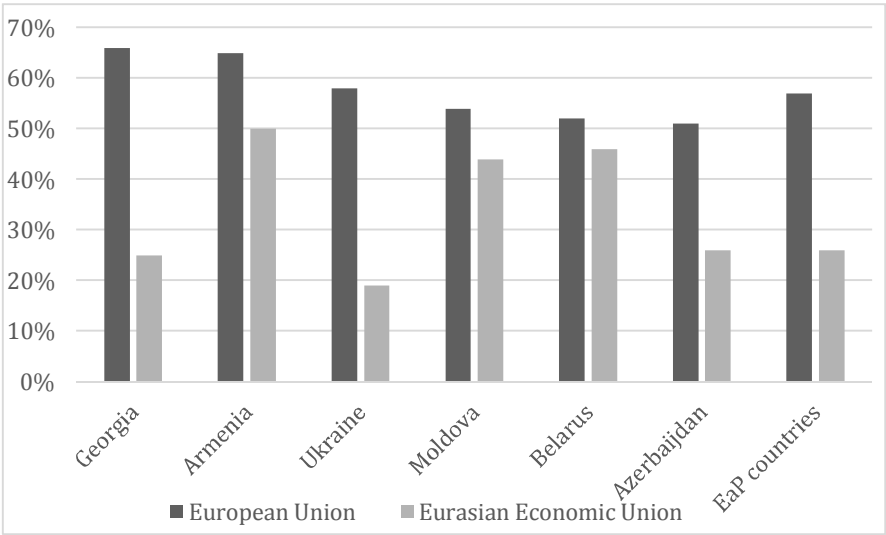
*Note:* Question posed to Balkan citizens: “Do you think that EU membership would be (is, for Croatia) a good thing, a bad thing, or neither good nor bad?”

Question asked to EaP citizens: “Do you have a very positive, fairly positive, neutral, fairly negative or very negative image of the European Union?”

*Sources:* Data on the Balkans – Balkan Barometer 2017: Public Opinion Survey, Regional Cooperation Council, 2017.

Data on the EaP countries – EU Neighbours East, Annual Survey Report: Regional Overview, June 2017.

Figure 7.3 Trust in the EU and the EEU in the EaP countries, 2017



Note: Percentages of citizens polled.

Source: EU Neighbours East, Annual Survey Report: Regional Overview, June 2017.

Overall, it can be said that high quality democracy has not taken root anywhere in the two regions where democratic breakthroughs are frequently followed by democratic reversals. The political changes are particularly worrying across all the Balkan countries but are less discouraging in the DCFTA countries. The aim to anchor the political trajectories of the Balkan accession candidates to the EU comes as the region is edging closer to authoritarianism; the challenges to political reform are thus formidable. Political improvements in the eastern neighbourhood are fragile and have occurred in a less favourable geopolitical climate, so they are no less worthy of EU support and encouragement. The moment is thus ripe for the EU to live up to its international reputation of democracy supporter and make a difference where only it can do so.

## Economic development and governance

**GDP per capita.** The gap in GDP per capita between the Balkan economies and the DCFTA economies on the one hand and those of the EU member states on the other is substantial. The present situation is that the average GDP per capita, PPP-adjusted, of the

Balkan states is roughly one-third of the EU 28 average, whereas for the DCFTA economies it is roughly one-fifth.

A key issue for comparison is how far the countries of these regions have progressed in converging to European levels of economic performance since the end of the communist period in or around 1990. Over the period 1990 to 2016 the EU28's average grew 2.6 times. Convergence for the non-EU economies means therefore increasing GDP per capita faster than this reference (see Table 7.5). While data is not available for all economies, it is observed that Albania and Turkey both scored significant catch-up progress, whereas Macedonia and Belarus were roughly stable on this account.

The DCFTA states performed poorly by comparison. There will have been many political and economic reasons for this. One factor stands out, however, namely the relative severity of the post-Soviet versus post-Yugoslavia economic shocks. While Yugoslavia considered itself in political terms to be 'communist' until its disintegration, in reality it had long been experimenting with elements of market economics. Liberalising reforms had already been at work. The immediate post-Yugoslav reality was not one of systemic economic collapse as in the case of the post-Soviet states. The economic losses of the 1990s were thus less, although both regions had to suffer the costs of wars that followed political disintegration.

All three DCFTA states suffered deep economic losses immediately after independence. Ukraine especially has fallen behind compared to the EU and other CIS states (but several of the latter enjoyed petro-state advantages). The poor performance of Ukraine would seem to be explained by an accumulation of factors. Its industrial structure was most vulnerable to the break-up of the Soviet economy, with many crucial supply chain linkages to Russian industry eroded from the onset of independence, and finally destroyed with the conflict that started in 2014. In addition, Ukraine suffered extremely poor economic governance and denial of reform measures at least until the first Maidan of 2006. But serious economic reforms did not really begin until after the second Maidan of 2014, and even these have so far been incomplete, while corruption remains rampant.



Georgia and Moldova also suffered deep economic losses. In Georgia it was not until 2006 that a radical reformist agenda was adopted, and has been broadly sustained since. As a result Georgia has the highest GDP per capita of the three DCFTA states, but this only puts it on a par with the weakest of the Balkans. As for Moldova, a strong pro-European reform agenda was adopted over the past decade, but this has tended to be much less strong in practice than political pronouncements, and the economy remains the poorest in Europe by a significant margin.

For all three DCFTA states the present situation signals a huge underperformance of their economies.

*Table 7.5 GDP per capita, ppp, 1990 and 2016 (\$)*

<b>Balkans</b>	<b>1990</b>	<b>2016</b>	<b>DCFTAs</b>	<b>1990</b>	<b>2016</b>
Albania	2,722	11,540	Georgia	5,174	10,004
Bosnia	n.a.	12,172	Moldova	n.a.	5,332
Kosovo	n.a.	10,063	Ukraine	6,763	8,269
Macedonia	5,256	14,492	<b>DCFTA average</b>		<b>7,868</b>
Montenegro	n.a.	17,633			
Serbia	n.a.	14,515	<b>EAEU/other</b>		
<b>Balkan average</b>		<b>13,403</b>	Armenia	2,418	8,832
			Azerbaijan	5,502	17,256
Croatia	n.a.	23,422	Belarus	5,399	18,060
Turkey	6,146	25,247	Russia	8,012	24,788
			Kazakhstan	8,435	25,285
<b>EU average</b>	<b>14,994</b>	<b>39,610</b>	<b>EAEU/other average</b>		<b>18,844</b>

Source: World Bank.

**United Nations Development Programme (UNDP) Human Development Index.** Most of the countries from the two regions belong to the group of countries with “high human development” as measured by UNDP’s Human Development Index, which takes into account not only the economic level of a nation, but also the health dimension assessed by life expectancy at birth, and the education dimension assessed by years of schooling – see Table 7.6. Montenegro distinguishes itself here with “very high human development”, outperforming EU member states Romania and Bulgaria, whereas Moldova is at the bottom with “medium human

development". Georgia ranks close to a Balkan front-runner, Serbia, while Ukraine ranks close to a Balkan laggard, Bosnia.

*Table 7.6 Human Development Index, 2015*

	HDI	Ranking
<b>Very High Human Development</b>		
Croatia	0.827	45
Montenegro	0.807	48
Romania	0.802	50
<b>High Human Development</b>		
Belarus	0.796	52
Bulgaria	0.794	56
Serbia	0.776	66
Georgia	0.769	70
Turkey	0.767	71
Albania	0.764	75
Azerbaijan	0.759	78
Bosnia and Herzegovina	0.750	81
Armenia	0.743	84
Ukraine	0.743	84
<b>Medium Human Development</b>		
Moldova	0.699	107

*Source:* UNDP, Human Development Report, 2016. No data available on Macedonia and Kosovo.

It is notable that the ranking of the Balkan and DCFTA states is more similar according to this Human Development Index than according to GDP per capita data. This suggests that human capital levels have proved much more resilient than the macroeconomy, as the relatively high educational achievements of the Soviet Union could be carried over into the independent states to a higher degree than their economic structures.

*European Bank for Reconstruction and Development (EBRD) Transition indicators.* Given that both regions have had to make a difficult transition from socialist to market economies, the EBRD has developed a comprehensive set of transition indicators to measure how successful this process has been. The results are given in Table 7.7, for several groups of countries: the Balkan non-member states,

the three DCFTA states, the two strongest performing South Mediterranean states, and for reference, selected EU 'new' member states.

The averages of the non-EU Balkans and DCFTA states are virtually the same, ranking 5.04 for the DCFTAs, which is slightly better than the 4.99 for the six Balkan states. However, the Balkan average is weighed down by the worst-performing Kosovo, which is a special case since it does not have the full attributes of statehood. Excluding Kosovo, the five Balkan states score 5.13, slightly above the DCFTAs.

Both groups have quite a wide dispersion of performance. The best performing state is again Georgia, scoring 5.41, slightly ahead of the best performing Balkan states – Montenegro at 5.38, Serbia at 5.36, and Macedonia at 5.26.

The two less well-performing DCFTA states, Moldova and Ukraine, score close to or a bit better than the less well performing Balkan states (Albania and Bosnia), and much better than Kosovo.

Comparisons may also be made with the EU's 'new' member states, among which Estonia is the best performer, and Croatia and Bulgaria the poorest performers. For their part Georgia, Montenegro, Serbia and Macedonia are ranked a little behind Bulgaria. The two best performing Mediterranean states, Morocco and Tunisia, are ranked in the same league as the weakest performing Balkan and DCFTA states.

The overall message from this mass of transition indicators from the EBRD is that the Balkans and DCFTA states are comparable on average. More precisely the best of the DCFTAs (Georgia) is comparable to the best of the Balkans, and the other DCFTAs states (Moldova and Ukraine) are comparable to middle-ranking Balkan states.

Table 7.7 EBRD transition indicators, 2017

	<b>Competitive</b>	<b>Well-governed</b>	<b>Green</b>	<b>Inclusive</b>	<b>Resilient</b>	<b>Integrated</b>	<b>Total</b>
<b>Estonia</b>	7.58	7.58	6.44	7.30	8.19	7.77	<b>7.47</b>
<b>Croatia</b>	5.75	5.14	6.03	6.03	6.61	6.85	<b>6.06</b>
<b>Bulgaria</b>	5.96	4.69	5.82	5.33	6.54	6.86	<b>5.86</b>
<b>Montenegro</b>	4.89	5.12	5.15	5.62	5.93	5.59	<b>5.38</b>
<b>Serbia</b>	4.94	4.39	5.77	5.16	5.55	6.39	<b>5.36</b>
<b>Macedonia</b>	5.39	5.20	4.91	4.72	5.31	6.04	<b>5.26</b>
<b>Albania</b>	4.41	4.31	4.85	5.11	4.86	5.76	<b>4.88</b>
<b>Bosnia-H</b>	4.74	3.66	4.85	4.83	5.35	5.47	<b>4.81</b>
<b>Kosovo</b>	3.37	3.73	3.80	4.70	5.09	4.89	<b>4.26</b>
<b>Georgia</b>	4.54	5.98	4.58	5.14	5.71	6.54	<b>5.41</b>
<b>Ukraine</b>	4.68	3.58	5.54	5.88	4.60	5.04	<b>4.88</b>
<b>Moldova</b>	4.87	3.94	4.14	5.19	5.27	5.64	<b>4.84</b>
<b>Morocco</b>	3.98	4.35	5.47	4.16	6.06	5.45	<b>4.91</b>
<b>Tunisia</b>	3.94	4.33	4.78	4.72	4.75	4.70	<b>4.53</b>

*Note:* The six EBRD transition indicators are composed of the following sub-components:

*Competitive:* Market structures for competition and business standards and capacity to add value and innovate.

*Well-governed:* National-level governance and corporate-level governance.

*Green:* Mitigation of climate change, adaptation to climate change, and other environmental areas.

*Inclusive:* Gender equality, regional disparities, and opportunities for young people.

*Resilient:* Financial stability, and resilient energy sector.

*Integrated:* Openness to foreign trade, investment and finance, and domestic and cross-border infrastructure.

*Source:* EBRD Transition Report, 2017-18.

*World Bank, Ease of Doing Business.* The conditions for doing business in both regions are improving, with Georgia and Macedonia catching up with the developed economies and earning a place among the top performers in the World Bank Ease of Doing Business ranking – see Table 7.8.<sup>1</sup> Yet improvement is not uniform – the Ukrainian and the Bosnian economies are the worst in the two regions in terms of regulatory environment and hardly an attractive place to stimulate investment and local business initiative.

*Table 7.8 Ease of Doing Business ranking, 2017*

<b>Economy</b>	<b>Rank</b>
Georgia	9
Macedonia	11
Russian Federation	35
Belarus	38
Kosovo	40
Montenegro	42
Serbia	43
Moldova	44
Romania	45
Armenia	47
Bulgaria	50
Croatia	51
Azerbaijan	57
Turkey	60
Albania	65
Ukraine	76
Bosnia and Herzegovina	86

*Legend:* Economies are ranked on their ease of doing business, from 1-190. A high ease of doing business ranking means the regulatory environment is more conducive to the start-up and operation of a local firm.

*Source:* World Bank.

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<sup>1</sup> We must express some reservations with regard to this source, however. For example, the high ranking of Macedonia seems anomalous since most of the components (not shown here) of the survey are much less favourable than the overall ranking in Table 7.8.

**Financial-economic ratings.** There are several reputed international rating agencies (Moody's, Standard and Poor, Fitch), which rate states according to their credit worthiness, relying on a mix of financial and macroeconomic criteria, including political assessments that may affect credit worthiness. Since the assessments supplied by the several rating agencies are largely convergent, we present here only the current ratings of one of them – Moody's.

The highest ratings carry the A or coveted AAA rating, which only the strongest market economies are granted, and which means that they are considered risk-free for an investor in their bonds. None of the Balkan and DCFTA states achieve this rating.

All of those in the B or C categories are considered risky or speculative investment prospects, with the graduations indicated in Table 9. Two states are in the best of the 'speculative' ratings, Serbia and Georgia, with Georgia one notch higher than Serbia. Montenegro and Albania are the best of the next 'highly speculative' category, followed by Bosnia and Moldova. Finally, Ukraine alone is in the 'extremely speculative' category, meaning that investors must beware of a serious risk of losing their investments.

Overall, this is a further instance in which Georgia scores on a par or even slightly ahead of the best of the Balkans, while Moldova is on a par with the weaker of the Balkans, with Ukraine's current financial difficulties putting it in a category below.

*Table 7.9 Credit ratings of Balkan and DCFTA states*

Serbia	Ba3	Speculative
Montenegro	B1	Highly speculative
Albania	B1	Highly speculative
Bosnia	B3	Highly speculative
Georgia	Ba2	Speculative
Moldova	B3	Highly speculative
Ukraine	Ca	Extremely speculative

*Note:* The letters A, B and C are in declining order of quality, as are the numbers 1, 2 and 3.

*Source:* Moody's.

***Economic governance according to EU standards.*** Since all the Balkan and DCFTA states aspire to full EU membership, it is logical that all have made commitments to comply with EU regulations and standards. While the two groups differ in terms of the EU's willingness (or not) to acknowledge their membership perspectives, in practice both groups are engaged in similar programmes of progressive compliance with the EU *acquis*. For accession candidates the process is structured around 'chapters', which take EU policies block by block. However, it is largely the same 'chapters' that are found in the DCFTA agreements, and the EU's regular progress reports for the Balkans, Turkey and the DCFTA states largely cover the same ground. This means that there is a well-structured basis for comparison between all individual states and the two groups.

The Commission facilitates this task through the methodology they have adopted for distilling the essence of this very complex material in summary 'coded language'. Each chapter in their assessments concludes with a grading of three degrees of preparedness for EU membership, with 'some', 'moderate', or 'good' levels of preparedness. As explained in Annex A, we translate these grades into numerical terms: 1, 2 or 3, which permits summation and comparison.

For the DCFTA states the Commission and the EEAS make comparable but briefer assessments on the essential issues of substance, namely how far the EU *acquis* has been legislatively approximated and how far effectively implemented, but abstains from the 'coded language' summaries. The work carried out for the three Handbooks and notably their forthcoming second editions (see references), does permit comparability of these findings with the Balkans, however. In particular, the Handbooks provide a more detailed monitoring of implementation of the EU *acquis*. This has made it possible for the authors to apply numerical ratings on the same scale as for the Balkans.

The detailed ratings for 20 economic chapters of common applicability to both groups are set out in Annex Table A.2, together with more details on the methodology used. The summary results for the economic chapters are given in Annex Table A.1 and Figure 4, which may be read alongside the political ratings.

In the economic rankings Georgia ranks with or above the highest performers of the Balkans (Montenegro, Serbia and Macedonia), whereas Moldova and Ukraine rank ahead of Albania, and probably Bosnia for which EU has not published full data. The high rating for Georgia is explained by its top marks for several chapters: anti-corruption, openness of goods and services markets, and quality of customs services and public procurement.

*Common instruments of economic policy.* In practice the EU has been applying an increasing number of common instruments of economic policy to both the Balkans and DCFTA states, despite the political (or rhetorical) differentiation between the two groups on account of the membership perspectives categorisation. There has been an ‘under the political radar’ convergence in actual EU policies towards the two groups (i.e. the many rather technical measures are not promoted together as a strategy). The Association Agreements and DCFTAs have operationally raised Georgia, Moldova and Ukraine into much the same category as the Balkans, while the enlargement process for the Balkans has itself not advanced.

As listed in Table 7.10, and elaborated more fully elsewhere (Emerson, 2018), the basis for this commonality has been the creation of deep free trade areas of somewhat different content with the EU: thus the Stabilisation and Association Agreements (SAAs) with the Balkans, the customs union with Turkey and the DCFTAs for Georgia, Moldova and Ukraine. The core tariff-free trade elements are being complemented by the pan-Euro-Mediterranean (PEM) Convention for common rules of origin and diagonal cumulation of value added, common product standards, specific blocks of sectoral policies, including for energy and transport, financial and investment mechanisms (EIB, EBRD, EU budget), etc.



*Table 7.10 Instruments of EU economic policy used in the Balkans, Turkey and DCFTA states*

- Deep FTAs – various form, SAA, Customs Union, DCFTA
- Pan Euro-Med Convention for Preferential Rules of Origin and Diagonal Cumulation (PEM)
- European Standards Organisations (CEN, CENELEC, ETSI)
- Sanitary and Phytosanitary Regulations (SPS)
- European Accreditation, Multilateral Agreements (EA-MLA)
- Agreements for Conformity Assessment and Analysis (ACAA)
- European Association of National Metrology Institutes (Euramet)
- Union Customs Code (UCC)
- Common Transit Convention
- New Computerised Transit System (NCTS)
- Authorised Economic Operators (AEO)
- Shared Border Crossing Points
- Energy Community Treaty
- Central and South Eastern European Connectivity network (CESEC)
- European Network of transmission System Operators for Electricity (ENTSOE)
- Transport Community Treaty
- Pan-European Corridors
- Trans-European Transport network (TEN-T)
- European Civil Aviation Agreement (ECAA)
- Civil Aviation Agreements (CAA)
- Agencies of the EU – e.g. European Environmental Agency
- Programmes of the EU – e.g. Horizon 2020, Erasmus+
- Visa-free travel
- European Investment Bank (EIB)
- European Bank for Reconstruction and Development (EBRD)
- EU Budget grants

## Comprehensive comparisons and policy implications

When putting together the findings on both political and economic governance, an overall pattern emerges. The two groups, the Balkan and DCFTA states, are comparable, with differentiations within each of the two groups, however. As regards the Balkans the EU has now in June 2018 established for policy purposes what may be described as a three-tier system. Serbia and Montenegro were already established as frontrunners given their accession negotiations already underway (tier one), while Albania and Macedonia are now out in a tier two with the conditional possibility of opening accession negotiations in 2019, which leaves Bosnia and Kosovo in a tier 3 with no dates suggested for the opening of accession negotiations. This three-tier structure provides a more precise structure for making comparisons with the DCFTA states.

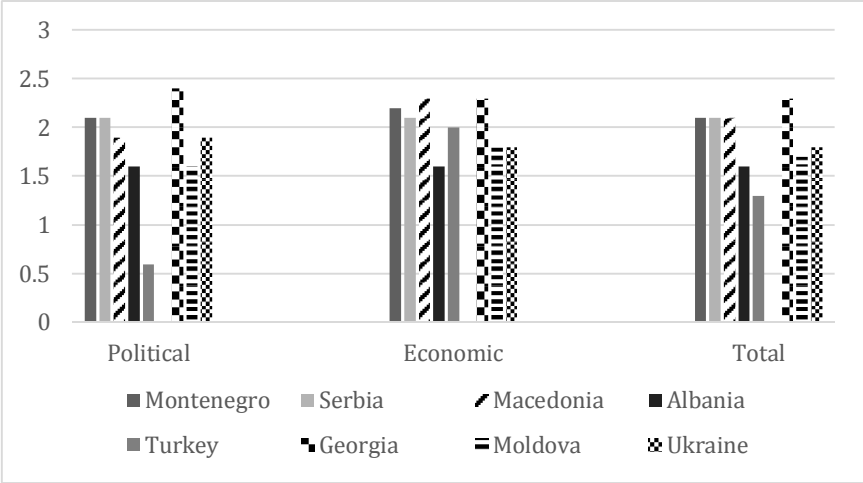
More precisely, on the *political criteria*, Georgia scores the highest rating ahead of the Balkan tier-one frontrunners (Montenegro and Serbia). While the quality of its democracy is not outstanding, its anti-corruption policy has been uniquely successful, and this weighs in the overall political rating. They are followed by Macedonia and Albania as tier-two Balkan states, comparably, alongside Ukraine and Moldova. Turkey now comes last by a substantial margin because of its departure from basic democratic norms in recent years. Regarding societal perceptions, the DCFTA states view the EU more favourably than do the Balkans on average, especially Georgia by a large margin, and much more so than for Serbia, Bosnia and even member state Croatia. The EU is also much more favourably viewed by Georgia and Ukraine than the Eurasian Economic Union, but only a little more so in the case of Moldova (see Figures 7.2 and 7.3 above).

On the *economic governance criteria* Georgia again has the highest rating, in this case alongside Macedonia, followed by Montenegro and Serbia. Turkey scores relatively well here too. Moldova and Ukraine are ahead of Albania and Bosnia as weaker performing Balkan states. On the other hand, the macroeconomic performances of the DCFTA states, measured in GDP per capita, are still way behind the Balkans. Their relatively favourable governance

ratings, if sustained, should lead to a macroeconomic catch-up in due course.

In Figure 7.4 below, we combine the political and the economic governance ratings, with both aggregates given equal weight. The leader is Georgia, ahead of the three most-advanced Balkan states (Montenegro, Serbia of tier one, and Macedonia of tier two). Moldova and Ukraine come next, scoring above tier-two Albania, and well above tier-three Turkey. Note that Bosnia and Kosovo have not been included in these aggregate data. The data for Bosnia are incomplete, but together with Kosovo, the country would most probably feature in tier three. Thus, while the best-performing DCFTA state (Georgia) is ranked above the tier-one Balkan states, Moldova and Ukraine are comparable to the tier-two Balkan states, and well ahead of the tier-three Balkan states.

Figure 7.4 Political and economic governance ratings



Source: Own calculations. See Annex A for methodology and Annex Table A.7.1 for data.

There are policy implications for the EU to consider in light of these findings, which have so far not been put together with such a striking result.

The overarching issue is what to do now that two groups of EU neighbours, the Balkans and DCFTA states, share five very important characteristics:

- Direct neighbourhood/proximity to the EU;
- Common objective of full membership of the EU;
- Entitlement as European democracies to apply for EU membership (Article 49 of the Lisbon Treaty)
- Progressive adoption of the EU's political and economic norms and standards, and
- Comparability of political and economic governance performance.

How should this anomaly be viewed and handled looking forward? There are several conceivable ways in which the EU could treat the Balkans and DCFTA states in a fairer and more equal manner.

Firstly, *one approach* might see the EU become more consistent in its political stances towards the Balkan and DCFTA states. Concretely this could mean extending the 'membership perspective' ranking to Georgia, given its relatively favourable performance, and as an incentive to the other DCFTAs. In addition to the standard (Article 49) argument, the geopolitical case in favour of this approach has been enhanced by the realities of Russia's multiple interventions all over Europe, including but going way beyond what it terms its 'near-abroad'. The AA/DCFTA process is a bulwark against Russian aggression in the overlapping neighbourhoods, but it needs strengthening. The EU aims to boost the resilience of the political regimes of its close partners and neighbours through its foreign and security policy. In the absence of a membership perspective the states feel condemned to live in limbo between the EU and Russia, which makes them vulnerable to de-stabilisation.

Strong as this enhanced geopolitical argument may be, the objections to further EU enlargement even into the Balkans have also strengthened. In the view of some member states, EU enlargement has already gone far enough. While the Commission recently made a political gesture towards Serbia and Montenegro citing 2025 as a possible accession date for accession, this was not taken up by the foreign ministers' Council in its detailed conclusions on the Western Balkans and Turkey of 26 June 2018, which were endorsed by the European Council on 29 June. Albania

and Macedonia did receive some conditional encouragement, since the Council's conclusions "sets out the path towards the opening of accession negotiations in 2019". Turkey's accession process is said to have "effectively come to a standstill". The spoken and unspoken objections to further enlargement now run deep. In his speech to the European Parliament in April 2018, President Macron argued that there should be no more enlargement before institutional reforms in the EU itself. The rise of authoritarian populism in some new member states (namely Hungary and Poland) is a warning that even full EU membership is no longer the guarantee of liberal political values once supposed. There are also many vulnerable democracies among the would-be member states, and the EU itself is in a fragile state, including some old member states (as Brexit and Italian populism etc. demonstrate).

Another, *second approach* would therefore be to recognise that since even the existing membership perspectives for the Balkans have ceased to be fully credible, the case for extending application of the concept does not make sense. Elements of political discourse have become obsolete, but the perceived political costs of changing rhetorical doctrine (about membership perspectives, for example) deter any change, either to renounce the membership perspective for the Balkans, or to extend it to the DCFTAs. At the same time, however, the concrete policies of the EU are increasingly being applied equally to both the Balkans and the DCFTAs and bring both groups into closer functional integration with the EU (as illustrated in Table 10). The EU institutions are at work below the radar of high politics, yet with much substance. Implicitly, the DCFTA states are being invited to observe that concretely their group is being treated on a par with the Balkans, and each state of either group has an open road to advance as far and fast as they wish, only falling short of full membership for the time being. In particular, they are being invited to set aside their focus on the membership perspective question, since this is not now of operational significance. Further, they are invited not to view the refusal of a membership perspective as disinterest, but just the reality that the EU has to first work out some very substantial challenges for its own future. The advantage of this approach is that it is actually working in practice to a useful degree.

Nevertheless, this second approach has its weakness. It does not appear to be a strategy and is not presented as one. It is also very

difficult to communicate – all too nuanced and complicated. It leaves the field wide open for populist arguments that have no place for such complications. It also carries a higher risk of reversal and backsliding of the reform trajectories of the front-running states.

In a *third approach*, the process could be given more strategic content and profile. But how could this be done? One idea would be to consolidate the many existing instruments (as in Table 10) into an extended, more standardised and institutionalised system, which would be given a name such as a Wider European Economic Area, or Space, or Community, for example. The system would have privileged access to the EU institutions and would be profiled as a distinct tier to European integration. This would connect with the current renewal of interest in the longstanding debate about multi-tier or multi-speed Europe. This debate can focus either on developing a more restricted top-tier group, or on a wider outer-level group, or both. Today the focus is mostly on the top-tier questions, which is proving to be extremely difficult to implement, including in the sectors already subject to selective membership (the euro, Schengen, and defence). Yet the question of an outer tier is growing in pertinence, not only for the Balkan and DCFTA states, but also for Turkey and in due course, Brexit-UK. There will be predictable resistances to a common institutionalisation, as various neighbouring states give priority to their bilateral relationships with the EU, and try to cut their own special deals. When it comes down to practical instruments of cooperation, however, these naturally become highly standardised. And the EU institutions are very wary about making special deals with one state that will be used as a precedent in negotiations with others. So for reasons of both administrative and legal simplicity, and also of political negotiation, there is a case for rationalisation and some kind of soft institutionalisation, with degrees of flexibility. The clinching argument is the current strategic context, with the EU and wider space of European values being under serious threat from within and outside. The EU thus needs to get its act together more decisively in its neighbourhood.

Such important changes to the EU's current enlargement and neighbourhood doctrines would encounter resistance for sure, given the huge political investments that have been made in the status quo. This status quo is obsolescent, however. As shown

above, the actual policies of the EU towards the Balkans and DCFTA states have been evolving more than the outmoded rhetorical doctrines and now converge in content, but so far ‘under the radar’ of high politics. This convergence could be strengthened and given more explicit strategic articulation.

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## Annex A. Methodologies

The purpose of Tables A7.1 and A7.2 in this Annex is to compare the respective governance performance of the Balkans, Turkey and the three states of Eastern Europe that have Association Agreements and DCFTAs with the EU (Georgia, Moldova and Ukraine). The data in the tables are derived from the sources indicated below, which provide a substantial basis for comparisons, supplemented by qualitative judgements. The list of policies detailed in Table A7.2 are a large selection of chapter headings in the three Handbooks on Georgia, Moldova and Ukraine, excluding chapters that are not relevant for the present purpose. There is corresponding material in the Commission's 2018 Communication on EU Enlargement Policy.

For the Balkans and Turkey, the large majority of chapters in the Commission's 2018 Communication allow for simple translation of the standardised wording used in the Commission's summary assessments into the numerical ratings given in the table. However, the Commission abstains from using this summary wording for the political chapters. Yet the descriptive material provided allows such ratings to be estimated, especially since other sources have developed numerical ratings that have been factored in to the judgements made by the authors in Tables A7.1 and A7.2. These other sources include Freedom House, Bertelsmann Stiftung, EBRD, Transparency International, and the World Justice Project.

For the DCFTA states, the materials assembled in the 2<sup>nd</sup> editions of the Handbooks allow comparable ratings to be made (by the authors). The Commission publishes annual implementation reports on these agreements, but makes no summary assessments in the same manner as for the Balkans and Turkey. The political reasoning of the Commission is that these three states are not granted by the EU the status of 'membership perspectives', but this does not invalidate the assessments made (by the authors) since the content and normative basis of the DCFTAs is so similar, indeed often identical, to the chapters of accession negotiations.

*Table A7.1 Summary political and economic governance ratings*

	<b>Political</b>	<b>Economic</b>	<b>Total</b>
Montenegro	2.1	2.2	2.1
Serbia	2.1	2.1	2.1
Macedonia	1.9	2.3	2.1
Albania	1.6	1.6	1.6
Turkey	0.6	2.0	1.3
Georgia	2.4	2.3	2.3
Moldova	1.6	1.8	1.7
Ukraine	1.9	1.8	1.8

*Note:* The political rating averages the ratings for the five chapters, and the economic rating for the twenty chapters listed in Annex Table A.7.2.

*Table A7.2 Comparative ratings of political and economic governance of the Balkans and DCFTA states*

	Montene.	Serbia	Macedon	Albania	Turkey	Georgia	Moldova	Ukraine
<b>Political principles, the rule of law</b>								
Political institutions	2.5	2.5	2	2	0.5	2	1.5	2
Human rights	1.5	1.5	1.5	1.5	0.5	1.5	2	2
Rule of law	2	1	1.5	1	0.5	1.5	1	1.5
Anti-corruption	1.5	1.5	1	1	1	3	0.5	0.5
Visa regime, movement of people	1	2	1.5	1	0	1.5	1.5	1.5
	<b>8.5</b>	<b>8.5</b>	<b>7.5</b>	<b>6.5</b>	<b>2.5</b>	<b>9.5</b>	<b>6.5</b>	<b>7.5</b>
<b>Deep &amp; Comprehensive Free Trade</b>								
Market access	2	2	2	1.5	3	3	2	1.5
Customs services	2	3	3	2	3	3	2	1
Technical standards (TBT)	2	1.5	2	1.5	3	2	2	2
Food safety (SPS)	2	2	3	1	1	1	2	1.5
Services	2	2	2	2	0.5	3	1	1.5
Public procurement	2	2	2	1	2	3	2	2
Intellectual property rights (IPR)	3	3	2	1	3	2.5	1.5	1
Competition policy	2	1.5	2	1.5	1	2	2	1.5
Statistics	2	2	2	2	2	2	1.5	2
	<b>19</b>	<b>19</b>	<b>20</b>	<b>13.5</b>	<b>18.5</b>	<b>21.5</b>	<b>16</b>	<b>14</b>

<b>Economic Cooperation</b>								
Macroeconomics	2	2	3	2	2.5	2.5	1.5	1.5
Financial services	2	2	2	2	3	2	1.5	1.5
Transport	2	2.5	2	1	2	2	1	1
Energy	3	2	2	2	2	2	2	2
Environment	1	1	1	1	1	2	2	1.5
Digital (ICT)	2	2	2	2	1	2	2	2
Consumer protection	2	2	2	0.5	3	1	1	1.5
Company law	3	3	3	2	3	1.5	1.5	2.5
Agriculture	2	1	2	1	1	1	1	1.5
Employment, social policy	1	2	2	1	1	2	2	1.5
Education, culture	3	3	2	2	2	2.5	1.5	2.5
Civil society	1	0	2	1	0.5	3	3	2.5
	<b>24</b>	<b>22.5</b>	<b>25</b>	<b>17.5</b>	<b>22</b>	<b>23.5</b>	<b>20</b>	<b>21.5</b>

*Notes:* Numerical ratings for the Balkans and Turkey relate to degrees of 'preparation for EU membership' (Commission terminology). 0 = no preparation; 0.5 = early preparation, 1 = some preparation, 2 = moderate preparation, 3 = good preparation.

For the DCFTA states the same numerical ratings are used to assess degrees of achievement in terms of meeting the EU *acquis*, norms and standards contained in the Agreements, which are largely the same as in the 'chapters' of EU accession negotiations, referring to the same EU *acquis*.

*Sources:* For the Balkans and Turkey, European Commission, 2018 Communication on EU Enlargement Policy, 17 April 2018. For the DCFTA states, GE, MD, UA, Handbooks, 2nd editions.

## 8. DEMYSTIFYING THE ASSOCIATION AGREEMENTS

KATARYNA WOLCZUK

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### Introduction

This chapter the three Handbooks on the Association Agreements with Georgia, Moldova and Ukraine. It examines the role of the Association Agreements in the Europeanisation of the three countries, drawing attention to the dual role of the Agreements as frameworks for both economic integration and modernisation. The paper analyses the content of the Handbooks and draws attention to the complex and varied nature of the legal commitments made by the association countries. In the final section, it focuses on the process of

implementation of the Agreements and the considerable challenges this presents for the EU and the three countries in question.

The EU is the most legalised international organisation in the world. Not only it has an extensive and sophisticated corpus of law (*acquis communautaire*), but it is also engaged in the export of its laws to other states. The EU's foreign policy exemplifies a "transformative engagement through law" (Magen, 2007: 362).

The scope and intensity of the export of the *acquis* varies greatly across the countries and regions. The latest and most interesting widening of the EU legal space involves a select group of eastern neighbours – Georgia, Moldova and Ukraine. The

mechanism is the Association Agreements (AAs) including Deep and Comprehensive Free Trade Areas (DCFTAs).

The conclusion of the AA-DCFTAs represents a shift in the EU's eastern policy: they offer advanced market access while ensuring long-term modernisation and development of these neighbouring countries, thereby underpinning their 'European choice'. However, this fundamental change takes the EU and partner countries into uncharted territory: a sophisticated and complex corpus of rules developed within the EU is now being used to modernise countries struggling to reform (with the partial exception of Georgia) on their own accord. In other words, a body of detailed and complex legislation is imported by a third country for the purposes of cooperation and development.

From the EU side, it offers an alternative to enlargement, while the partners are driven by a plethora of political, security, cultural and economic motives, comparable to East-Central European countries. But in contrast to the latter, they are to be included in the EU's legal space below the "threshold of membership" (Wolczuk, 2016).

Because of their ambition and complexity, the Agreements pose a challenge of an entirely new order for policymakers and experts. To understand the impact of the AA-DCFTA, they need to grasp the content of the agreement and its domestic implementation. This is not an easy task: to gauge the transformative power of the EU's foreign policy one needs to examine changes to the institutions and decision making of the partner countries.

The trilogy of Handbooks is indispensable in this respect. The Handbooks were delivered under the auspices of the Centre for European Policy Studies (CEPS) by national teams of researchers in Georgia, Moldova and Ukraine with the support of the Swedish International Development Agency (SIDA).<sup>1</sup>

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<sup>1</sup> It is not the first time that SIDA has offered crucial support for Ukraine's integration with the EU. In 2007, the organisation supported a study, "Free Trade between Ukraine and the EU an Impact Assessment", delivered by the International Centre for Policy Studies (ICPS), Kyiv Ukraine.

Each handbook offers a systematic, accessible guide to the content of the Agreements and sheds light on the implementation process. No similar guidance has been produced, despite significant demand: an EU expert working on the implementation of the AA in Ukraine referred to the Handbook as a “bible”.<sup>2</sup>

This review has several aims: first, to elucidate the significance of the AA-DCFTAs and to explain the challenges to understanding their content; second, to analyse the content and assess it from a comparative perspective; and, finally, to explore the process of implementation and, while doing so, to identify key challenges.

## Step change: From the ENP to DCFTA

The need for the Handbooks reflects a major upgrade in the EU’s relations with the three countries in question. The AAs are novel types of agreements, so the literature on the other integration-oriented agreements, such as the EFTA or Swiss-style sectoral agreements, are of relatively limited relevance. The AAs need to be studied in their own right.

For over a decade, the eastern neighbours have participated in a framework of relations with the European Neighbourhood Policy (ENP). The ENP was described as “a bureaucratic response to a political question”.<sup>3</sup> The political question was where the final borders of the EU should be drawn. Avoiding a direct answer, the ENP facilitates the projection of the EU’s ‘normative power’ in the Union’s neighbourhood by offering the neighbours credible and effective integration without membership. By lowering the barriers between the EU and its neighbourhood, the ENP serves as an alternative to enlargement, with the aim of reducing the membership aspirations of neighbouring states. The policy allows the extension beyond the borders of the EU of its internal modes of governance, while minimising the effects on the internal functioning of the Union. If during enlargement the EU endeavoured to create “ideal members” (Mayhew 2000), the ENP aims to create ideal neighbours. Thus, from the very beginning,

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<sup>2</sup> Author’s interview, Kyiv, February 2017.

<sup>3</sup> Author’s interview with a European Council official, March 2006.

ambiguities and tensions were built into what carried the promise of being the most ambitious and sophisticated *foreign* policy ever launched by the EU.

The ENP has been met with scepticism regarding its structural features and effectiveness. From the early days of the ENP the view prevailed that in the absence of membership conditionality, the incentive package of the ENP would not be sufficient to drive domestic legal reform in neighbouring countries, let alone emulate the success of the eastern enlargement (Kelley, 2004; Cremona and Hillion, 2006). Its key instrument was the ENP Action Plans, which contained general reform guidance for the neighbouring countries. They tended to contain only vague references to adopting key aspects of the *acquis*. Both the obligations and incentives were underspecified.

Indeed, the comprehensive literature review on the ENP by Konstanyan (2016) confirms the validity of this scepticism. A weak system of incentives in the absence of a membership perspective has been consistently identified as the key flaw of the ENP. The ENP policy has not been able to stimulate comprehensive domestic change; at best, some results were delivered at a sectoral level, mainly when the EU provided clear sector-specific conditionality and tangible rewards (for example, the success of visa liberalisation in Moldova, granted by the EU in 2014).<sup>4</sup> Nevertheless, closer interactions under the ENP generated strong domestic demand for reform templates amongst some of the eastern neighbours.

While a membership prospect did not emerge, and if anything is more remote than ever, the EU has proceeded to a new phase of relations with its eastern neighbours. But this time it was only with a select, 'willing', group, which had actually indicated an interest in deepening relations through fostering a new Agreement. Ukraine demanded such an agreement for half a decade before the EU agreed to launch negotiations in 2007. Despite its initial recalcitrance, in recognition of the need to respond to demand from the neighbours and strengthen the offer, the EU agreed to move to a new legal framework – the AA-DCFTA.

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<sup>4</sup> For an overview of the well-structured and comprehensive process of setting conditions and monitoring see [https://ec.europa.eu/home-affairs/what-we-do/policies/international-affairs/eastern-partnership/visa-liberalisation-moldova-ukraine-and-georgia\\_en](https://ec.europa.eu/home-affairs/what-we-do/policies/international-affairs/eastern-partnership/visa-liberalisation-moldova-ukraine-and-georgia_en).



This new legal framework represents a fundamental shift from the original ENP formula relaying on ‘soft law’ with ‘low precision and high selectivity’ to ‘high precision and low selectivity’. The upgraded integration offer to Ukraine was then rolled out to other Eastern Partnership countries. At first, four countries negotiated the agreements with Armenia dropping out as a result of receiving a sudden offer from Russia to join the Eurasian Economic Union in September 2014 (Delcour and Wolczuk, 2015; Dragneva and Wolczuk, 2017).

## Why the AA-DCFTA?

The new agreements – Association Agreements with a deep and comprehensive free trade area at their core – are to advance a new type of relations between the EU and the vanguard of the ‘willing’ neighbours. They offer advanced and multi-faceted relations but without reaching the threshold of membership as encapsulated in the formula of “economic integration and political cooperation”. The Agreements provide a vehicle for an unprecedented degree of wholesale export of law – 90-95% of trade-related *acquis* is included in the DCFTA part of the AA (Duleba et al., 2012).

The AA-DCFTA is a truly innovative legal instrument in the EU’s external relations because of its comprehensiveness, complexity and conditionality. The AAs belong to a very small group of ‘integration-oriented agreements’. Because of the advanced nature of integration this entails, the AA-DCFTAs are an exceptional phenomenon in the EU’s external action. They compare to the European Economic Area (EEA) Agreement, which extends the entire EU Internal Market *acquis* to the participating states, such as Norway, although with greater selectivity, as they do not go as far as the EEA Agreement.

The extensive reliance on the *acquis* in the Agreements serves two interrelated purposes:

### *Access to the single market*

The main justification for EU’s export of the *acquis*, especially in the area of the internal market, is a *functional* one. Acquiring a stake in the internal market requires “progressive convergence with internal market rules, coupled with stepped-up consultation and co-

operation, as well as adaptation of institutional practices to EU standards" (Dodini and Fantini 2006: 511). The Union cannot open up its internal market to countries that are too 'different' without jeopardising the achievement of its economic integration and high degree of cohesion between the member states.

Because this access depends on compliance with the rules and standards of the internal market, the countries in its neighbourhood adopt significant parts of the trade-related *acquis*. This includes institutional harmonisation in the economic sphere, which is wide in scope and encompasses all major horizontal policy areas, although the degree of harmonisation differs across policy areas, being the highest for technical standards (TBT), sanitary and phytosanitary standards (SPS), public procurement and competition policy.

The *complexity* of the AA lies in its comprehensive nature and ambition: the aim is to achieve partners' economic integration in the EU internal market. For the EU, this kind of arrangement poses a challenge: how to ensure uniform interpretation and application of EU rules within a shared legal framework with non-members. To this end, the Association Agreement contains principles, concepts and provisions of EU law which are to be interpreted and applied *as if the third State is part of the EU*, according to van der Loo *et al.* (2014). So, this challenge is addressed by adopting a robust institutional system, explicit conditionality, wide-ranging mechanisms for legal approximation and a refined system for dispute settlement.

### ***Transfer of EU rules is equated with broad developmental benefits***

Implicit in the ENP is the EU's reliance on the inherent 'power of attraction' of the EU as a model of development that inspires others to emulate it. As a result, there is a strong correlation between the *acquis* and modernisation. The EU-Ukraine Handbook (2016: 2) aptly defines the Agreement as a "charter to Ukraine's modernisation through alignment on EU norms, which generally correspond to best international practice".

The beneficial effects of rule transfer are not limited to welfare-enhancing benefits from trade but include increased

investment, enhanced competition and reduced corruption, which lead to better governance, higher economic efficiency, growth and welfare in partner countries. The process of alignment with the regulatory mechanisms developed in the EU is expected to transform the public policies of the neighbouring states, resulting in growth, stability and prosperity.

Therefore, the EU goes beyond this immediate *functional justification* in emphasising the broad developmental benefits in transferring EU rules. According to the Commission officials, Dodini and Fantini, these states face the choice of either adopting the EU *acquis* or developing a regulatory framework from scratch. In their view, the EU model is superior to that of other international actors in terms of, first, the quality and density of its regulation; second, the comprehensiveness of the reform it entails, and, third, the degree to which it avoids controversies surrounding the activities of some international institutions (Dodini & Fantini 2006: 513).

In the case of the DCFTA, the attractiveness of EU rules stems from being offered as a ready-made corpus of rules in the absence of effective domestic policymaking. In particular, the internal market *acquis* – the densely institutionalised area of European integration – is regarded as a template for successful socio-economic modernisation, in the view of a Commission official.

Indeed, the application of EU law has some bearing on almost every aspect of public policymaking and implementation. However, the nature of the rules creates challenges for the post-Soviet states. So far, the granting of access to the internal market and institutional harmonisation has been employed by the EU to deepen economic cooperation between developed market economies, which chose to eschew EU membership, but were keen to gain access to its single market, such as Norway or Switzerland. Now, the EU endeavours to export a highly regulatory model requiring an effectively functioning state to countries without the institutional capacities to enact such a model (Wolczuk, 2009). The difficulty is compounded by the lack of the legislative and administrative capacity to enact the *acquis* and the high costs involved in making regulatory adaptations in several sectors, such as environmental protection.

Given these challenges, some European officials argued that it is more appropriate to regard the DCFTA as a gradual process of economic integration, rather than a defined project of full market integration (Dodini & Fantini 2006: 512). The analysis in the Handbooks is evidence of the gradual and long-term nature of the process.

## Understanding the agreements

Despite or rather because of them being amongst the most sophisticated and complex legal agreements in the world, the AA-DCFTAs have been relatively neglected in scholarly and expert analysis (for exceptions, see van der Loo, 2015; van der Loo *et al.*, 2014). Because of Russia's endeavours to punish Ukraine for its "European choice",<sup>5</sup> the geopolitical prism – a tug of war between the EU and Russia – has dominated analysis. Often highly normative (yet not always well informed) views prevail. For the supporters, the AA-DCFTA seems a quick-fix solution for the modernisation of the eastern partners, whereas critics decry it as an act of legal imperialism on behalf of the EU (Sakwa, 2014). Few experts and scholars have actually made the effort to trace the origins of the Agreements, let alone to familiarise themselves with their contents.

There are prosaic reasons for the neglect – the agreements are exceedingly long and complicated. These documents are state-of-the-art in terms of EU's export of the *acquis* but largely impenetrable to readers not steeped in the arcane subject of EU law.

At first glance, the main part of the agreement is fairly accessible – there are 486 articles in the EU-Ukraine agreement – many of them of a general nature, not that different from the Partnership and Cooperation Agreements (PCAs). But some of the articles already refer to specific EU Directives (e.g. art. 148 on public procurement in the EU-Ukraine AA-DCFTA). More frequent are references to the Annexes for the detailed list of actual commitments with regard to legal approximation. In this way, it is the Annexes in general and, in particular, the Annexes related to "Trade and Trade-

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<sup>5</sup> There is often little appreciation that, with regard to trade, Moldova and Georgia had been actually punished by Russia even earlier (see Cenusa *et al.* 2014).

Related Matters” that make the Agreements stand out – the shift in terms of precision, details and the extent to which commitments are binding is striking in comparison to the PCAs. By extending the legal boundaries of the EU to neighbouring countries, the agreements thoroughly underscore the nature of the EU as a law-based community. Yet their role and significance for the domestic reforms can only be gauged through analysis of the content – namely, the actual commitments made across a number of sectors.

## *Content*

While the Agreements are necessarily couched in legal terms, their sheer length and complexity it makes them inaccessible, even for professional readers. This is where the Handbooks come in: they demystify the AA by explaining, in an accessible style, the content of its numerous chapters and what each entails for the partner countries. The Handbooks aim to make it possible for anyone to gain a basic understanding of “what each chapter in the Agreement means, in terms of both the nature of the commitments that the parties undertake and the prospects for their implementation” (EU-Ukraine Handbook, 2016: ix). In essence, they act as a one-stop-guide to the content of the Association Agreements.

The three Handbooks have an identical structure and consist of four parts:

- Part I. Political Principles, Rule of Law and Foreign Policy
- Part II. DCFTA
- Part III. Economic cooperation
- Part IV. Institutional Provisions

**Part I** deals with the political (i.e. non-economic) content of the AAs and focuses on issues ranging from democracy, human rights, rule of law, anti-corruption policy and foreign and security policy. Arguably this is the ‘soft law’ part of the Agreement. Yet with values being defined as an essential part of the Agreement (EU-Ukraine Handbook, 2016: 10), art. 478 of the EU-Ukraine AA stipulates that violations of these principles can result in suspension of the Agreement.

The DCFTA is the focus of **Part II**, which deals with the ‘hard core’ of the economic content of the agreements. Crucially for the reader, this part of the Handbooks offers an integrated analysis –

both the main part of the agreements as well as extensive Annexes are covered in each chapter. This is of considerable assistance when analysing the agreements, otherwise the reader would be constantly flicking between the main part and very detailed and lengthy Annexes (some of which, rather unhelpfully, do not have page numbers).

The most advanced mechanisms of legislative approximation are found in this Part. This is because, as noted above, 'deep' economic integration requires extensive legislative and regulatory approximation, including sophisticated mechanisms to ensure uniform interpretation and effective implementation of relevant EU legislation. In particular, unlike the PCAs, the agreements are future-oriented and include several mechanisms to deal with the dynamic evolution of the EU *acquis* that has been incorporated.

An important feature (and difference from the EEA) is that the DCFTA is premised on far-reaching conditionality: market access is subject to specific and continuous compliance monitoring. National governments are obliged to provide reports to the EU in line with approximation deadlines specified in the Agreement. The monitoring procedure may include "on-the-spot missions, with the participation of EU institutions, bodies and agencies, non-governmental bodies, supervisory authorities, independent experts and others as needed" (art.451, EU-Moldova Association Agreement).

The fact that the DCFTAs are subjected to permanent scrutiny reflects the essential differences between the eastern neighbours, Moldova, Ukraine and Georgia, on the one hand, and the EEA countries such as Norway, on the other, in terms of economic development, quality of governance, the rule of law, etc. This strict conditionality stems from the EU's cautious approach to opening up its single market to post-Soviet countries, which have a less developed political and economic system than the EEA countries.

**Part III** deals with economic cooperation – this is a broad chapter including 14 'sectoral' chapters, such as energy, transport, financial services, agriculture and civil society, etc. Once again, this Part straddles the main parts of the Agreements as well as the Annexes, thereby, once again, saving a great deal of work for the reader, especially when dealing with particularly complex areas, such as services. This is a very-wide ranging Part, which is

testimony to the sheer breadth of the agreement – it is indeed an all-encompassing and comprehensive treaty.

**Part IV** is on the Legal and Institutional Provisions. The AA has a sophisticated dispute resolution mechanism and institutional set-up (chapters 29 and 30, respectively). Within the institutional set-up, a key body is the Association Council. The Council meets at ministerial level – it operates as a forum for exchange of information and is also competent to update or amend the agreement's Annexes to keep pace with evolutions in EU law.

The dynamic nature of the AA makes it distinct from its much simpler predecessors. Whereas the PCA was essentially a fixed and static agreement – the common bodies could not change and adapt its content – the AAs provide opportunities for updates and amendments. But, as noted in the Handbooks, the revisions are only possible with regard to the Annexes – the Council cannot change the main body of the text (as this would trigger a complex procedure of ratification by the two sides, with a particularly drawn-out procedure in the EU).

This raises some interesting questions on the nature of commitments across different sectors. For example, commitments with regard to public procurement are listed in the main body of the agreement (e.g. art.148 of EU-Ukraine agreement). This means that with regard to public procurement, neither side can deviate from the commitments.

In other sectors, such as TBT or SPS, the actual scope of legal approximation can be elaborated and negotiated. This is not an accidental inconsistency. The costs of compliance with SPS and TBT are very high and need to be aligned to the priorities and capacities of the partner countries. In contrast, public procurement *acquis* is much more straightforward and easier to implement, while at the same time being highly sensitive in political terms. It is therefore eminently sensible to place those commitments in the main body to eliminate any scope for self-serving interpretations by the domestic governments (often driven by vested interests and high rents gained when awarding public contracts).

But even when the commitments are yet to be elaborated, the partner countries face tough scrutiny. Only the Association Council (or the Trade Committee) can decide on a progressive market opening when assessing sufficient implementation and

enforcement by the partner countries. Significantly, recommendations or decisions of the joint institutional bodies as well as a failure to reach decisions cannot be challenged under the specific DCFTA dispute settlement procedure. This means that the non-DCFTA parts of the agreement are more open to negotiations than the DCFTA and the 'market opening' conditionality is very strict. The EU decides on the pace and scope of market opening, thereby providing associated countries with strong incentives to comply in key sectors as a matter of priority.

### *Three agreements: What's the difference?*

At first glance, there is a high degree of uniformity across the three agreements. Indeed, the Ukrainian DCFTA, negotiated from 2008 to 2011, served as a template for its Moldovan and Georgian counterparts. But the agreements are not identical – there are national imprints in their contents.

The differences can only be gauged by comparing commitments and implementation at a sectoral level. It is not only the content of the agreement, but its actual implementation which determines the scale of alignment with the *acquis*. So while the identical structure and headings in each of the Handbooks<sup>6</sup> may give an impression of uniformity, the Handbooks actually highlight important differences.

For example, at first, the Moldovan agreement seems less onerous than the Ukrainian DCFTA. Important differences are, *inter alia*, that approximation clauses in the area of competition and 'internal market treatment' in the area of establishment of business are not foreseen under the Moldovan DCFTA. In addition, the provisions on trade-related energy and intellectual property rights are less detailed in the EU-Moldova agreement.

However, the Moldovan agreement turns out to be very ambitious when it comes to agriculture and SPS. The scope of legal approximation in SPS is not specified in the Agreement itself. Instead, the Agreement left it to be agreed within three months after it enters into force. As is evident from comparing the three

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<sup>6</sup> The structure of the actual Agreements are not identical: for example, in Moldova's Agreement, the DCFTA is the 5<sup>th</sup> chapter, while in Ukraine's it is the 4<sup>th</sup>. However, the Handbooks' structure is identical.



Handbooks, Moldova has, like Georgia and Ukraine, adopted a maximalist approach to the SPS sector. The list was worked out in 2015 and jointly adopted at a meeting of the SPS in June 2016. As argued above, this staggered, country-specific approach to legal approximation is eminently sensible given the sheer scale of this sector and its importance for all the countries. Moldova's list of SPS legislation is very ambitious, covering 235 EU directives and regulations (EU-Moldova Handbook, 1916: 65).<sup>7</sup> Many of the directives relate to animal-based products, for which the adoption of SPS is the most onerous and costly, and yet the implementation periods are relatively short: up to five years (i.e. 2020). In a similar vein, Moldova adopted a very maximalist approach to approximating agriculture-related directives. Is it going to work? The Handbook notices that perhaps "Moldova has made too many commitments too fast" (EU-Moldova Handbook, p.176). Indeed, the excessively ambitious list may lead to implementation delays and failures, hence – in the longer term – weakening the resolve to implement the Agreement.

As the reading of the EU-Georgia Handbook reveals, Georgia has been most cautious about commitments, but, once again, there are big differences between the sectors. As the EU-Georgia Handbook notes, Georgia undertook serious and, indeed, by post-Soviet standards, an unprecedented, unilateral liberalisation of the economy. The country stands out amongst the post-Soviet states because Georgia implemented radical economic liberalisation in the 2000s. This reduced corruption and created a favourable business environment – it is one of the very few success stories of this kind in the international arena, resulting in Georgia shooting up the global rankings.

Georgia was not too keen on the DCFTA, favouring instead a simple, classic FTA. Yet the DCFTA was the only proposal on table. The elimination of tariffs means that there was not much left with regard to tariff liberalisation in EU-Georgia trade. In terms of regulatory frameworks, both Georgia's geographical location as well as pre-DCFTA reforms account for the more limited demand for, and receptivity to, EU rules. Being further away from the EU

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<sup>7</sup> Ukraine has committed to implementing about 255 EU directives and regulations, and Georgia 272 acts.

and having weaker prospects for strong trade ties with the EU, Georgia has developed a regional commercial hub function.

This domestic agenda shaped the content of the EU-Georgia Association Agreement, but not in a way that is easy to grasp for the non-specialist reader – it requires careful reading of hundreds of pages in the agreement. At first glance, the EU-Georgia Agreement has much in common with the two other agreements. But there are important differences, not only due to pre-DCFTA reforms, but also the underlying reform strategy pursued by the Georgian authorities. With de-regulation so vigorously pursued by Georgia for over a decade, any re-regulation is carefully evaluated, and if needed, opposed or at least slowed or watered down. For example, Georgia's opening of its services market has gone beyond compliance with WTO commitments. While Ukraine has far-reaching harmonisation requirements in the service sector (see EU-Ukraine Handbook, 2016: 78-9), Georgia's undertakings are rather vague – indeed, the Agreement does not strictly oblige Georgia to approximate the EU legislation and “the potential scope of further liberalisation is not specified in the Agreement” (EU-Georgia Handbook, 2016: 71).

Georgia's interest lies predominantly in reaching international – and not necessarily EU – standards *per se*. This explains the more cautious approach throughout the Georgian Handbook. For example, with regard to TBT, it is argued that “it is advisable to proceed with the approximation of EU technical regulations in a gradual and careful manner, taking into account the local production and trade structure of Georgia, as quick and careless approximation could result in trade-restrictive outcomes” (EU-Georgia Handbook, 2016: 57). Similar caution is evident in the SPS chapter of the Handbook. While the content of the agreements may not be significantly different, it is clear the Georgian DCFTA is not a ‘blueprint’ for reforms to the same extent as in Ukraine and Moldova, but more a stepping stone towards the West (especially in the context of diminished chances of NATO membership).

In terms of ‘starting points’, it is clear that Georgia is an outlier amongst the post-Soviet countries, most of which persist with having complex and inconsistent regulatory frameworks. In Moldova, for example, “there are contradictions in the current Moldovan legislation, which obstruct EU entities from opening

representative offices, even if technically it was permissible from the first day of Moldova's accession to the WTO [in 2001]" (EU-Moldova Handbook 2016: 76). This means that over a decade and half, Moldova had been reluctant to revise its legislation in line with WTO commitments and it was only the EU's pre-negotiation conditionality that triggered the process of modernisation of its regulatory framework in earnest. In many respects, the Moldovan economy still faces a real challenge of adjustment to competitive conditions, something Georgia already experienced in the 2000s. Therefore, it remains to be seen if, for example in the case of the service industry in Moldova, the DCFTA will result in greater compliance than the accession to the WTO. Overall, for Moldova and Ukraine, the agreements offer much more reform guidance and hence the demand for 'reform templates' is much stronger. The AA-DCFTA provides both stimulus and obligation, i.e. a renewed impetus for domestic change and compliance.

## Challenges of implementation

In each of their Parts, the Handbooks provide an overview of the implementation of the AA. Indeed, the picture is exceedingly complicated and requires sector-by-sector analysis. The Handbooks provide ample evidence of this being a process whereby the implementation of the DCFTA and sectoral commitments is strongly conditioned by the priorities, capacities and resources of the associated countries. In this way, the Handbooks reveal diverse implementation pathways.

In Moldova and Georgia, the so-called 'key recommendations' issued by the EU prior to the launch of DCFTA negotiations provided a substantial impetus to legal approximation in certain areas, such as SPS. Paradoxically, while Ukraine was a frontrunner in terms of opening the negotiations first, the EU used the opening of negotiations as a 'carrot' to trigger pre-negotiation compliance in Moldova and Georgia (as well as Armenia). As a result, these countries became more advanced in some sectors than Ukraine.

For all three countries, agriculture is a key economic sector. Yet the adoption of international standards for food safety has been slow and challenging. The Soviet system relied on the GOST-based system. Replacing it with EU standards has proven more complex

and difficult to achieve than expected in the post-Soviet countries (even those that made a commitment to move to a WTO-compliant system upon joining the WTO). The implementation of SPS remains a major challenge for all its partners. The implementation of the AA requires partner countries to bear significant economic and social costs, which governments cannot fail to take into account. But there is an underlying problem of vested interests and considerable inertia amongst state bureaucracies.<sup>8</sup> In addition, institutional coordination is a particularly significant problem in these countries. State institutions in charge of food safety suffer from limited resources and administrative capacity, and a lack of modern technical equipment. While Moldova took a maximalist approach to SPS, the biggest and most urgent challenge to Moldova's development is the adaptation of fragmented and isolated rural areas to the requirements of a modern economy.<sup>9</sup>

Overall, the implementation is complicated by two interrelated factors.

The first is the suitability of the *acquis* to serve as an appropriate blueprint for reforms in non-member states at a different stage of development. This suitability was already questioned during enlargement. As Grabbe (2003) pointed out, the EU's rules were never designed as a development agenda for poorer countries; instead they are the results of negotiations, agreements and compromises between the member states on common rules for themselves developed in an incremental way over decades of European integration.

This generates a pivotal (yet rarely confronted) question as to how the *acquis*, developed in the process of economic integration of EU member states, can be transferred selectively to non-member states to facilitate their participation in the internal market. Indeed, some Commission officials argued that in the neighbourhood context transferring the *acquis* wholesale would be unwise, unrealistic and – in some aspects – unaffordable (Dodini and Fantini, 2006; Herdina, 2007).

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<sup>8</sup> On the role of the oligarchs see, for example, Kononczuk *et al.*, 2017.

<sup>9</sup> Interestingly, Moldova has made even more extensive commitments with regard to TBT. This is all the more surprising given the size of the country and its economic profile.

However, there is no theory of *selective* rules transfers in terms of impact both on the internal market and domestic change in non-member states. This means that for the AA-DCTA countries, EU and domestic officials and experts are tasked with devising feasible and cost-effective pathways to implementation. The modes of implementation, and hence pace of integration with the EU, need to be worked out on a country-by-country, sector-by-sector basis. The Handbooks chart the emerging differences in the national approaches and the differentiated progress.

The second issue is related to the very high costs of implementation in some of the sectors, such as SPS and environmental protection. Given the absence of the membership perspective, many scholars argue that the rules transfer should be preceded by carefully calculated cost-benefit analyses (see Kolesnichenko et al., 2008; Adarov and Havlik, 2016). The *selective* rules transfer allows the costs to be offset against the more immediate benefits in terms of increased exports. As was the case during enlargement, the AA-DCFTAs rely on deferred gratification: ‘rule transfer now, benefits later’. In other words, they require the front-loading of costly and politically sensitive reforms.

However, the value of aligning with the *acquis* differs from sector to sector, and – within sectors – between different issues. But this requires detailed knowledge of the *acquis* which is an inherently dynamic concept with no fixed-in-stone meaning and content (Magen, 2007). Yet partner countries have limited knowledge and capacity to make an informed assessment of the optimal sequence for legal approximation. Therefore, much guidance and assistance are needed from the EU during the implementation of an AA-DCFTA. It is important to avoid the risk of overburdening the governments in some of the poorest countries in Europe with multi-stranded, overambitious reforms. However, somewhat surprisingly, there has been very little comprehensive, deep regulatory impact assessment across different sectors.<sup>10</sup> Therefore,

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<sup>10</sup> One example of an assessment of the costing of compliance with the environmental obligations of the AA-DCFTA is a study done within an assistance project to Ukraine (Semėnienė et al., 2014). Based on the experience in accession countries, it is estimated that for full environmental clean-up in line with the EU norms, the DCFTA countries would require public and private

unsurprisingly, as a rule, the Handbooks do not discuss the costs of implementation.

This is especially important in the political and economic context of the eastern neighbourhood states. What are nominally technocratic issues in the EU can be highly consequential in distributive terms in partner countries. This is because of ‘dual’ realities: formal institutions that are captured by vested interests. Regulation of issues such as food safety standards, public procurement, anti-monopoly or state aid goes to the heart of the functioning of the political regime, especially where they are based on the principles of patronage and rents rather than the independence of regulating bodies. In each associated country, the implementation of the AA creates winners and losers, and it is the latter who tend to mobilise to block the implementation.

Having said that, the EU can successfully guide reforms in non-members in a structured and sequenced way. Moldova’s notable achievement of visa liberalisation in 2014 – followed by Georgia and Ukraine in 2017 – demonstrates what can be achieved with a clear focus, prioritisation and targeted assistance, even with relatively limited resources.

In recognition of these challenges, the EU-Ukraine Handbook soberly notes that “the Agreement, with its DCFTA, is no magic wand with which to cure Ukraine’s political system and economy of all their problems. However, its provisions do engage with a substantial part of Ukraine’s political and economic reform agenda” (EU-Ukraine Handbook, 2016: 3). This is an apt summary, given Ukraine’s long-standing lack of a reform agenda.

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Overall, the Handbooks offer a one-stop guide to the Association Agreements – the authors painstakingly analysed the incredibly complex Agreements to deliver a compact and accessible overview to all those who need to grasp their contents. The national teams also shed light on the salience of the content for domestic reforms. Even though the Handbooks are not meant to be read like a book, the reader who does so is rewarded with a panoramic

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investment in the region of €1000 per capita, of which about 70% would be needed from public funding.

overview of the sheer scale and ambition of the AA-DCFTA. The Handbooks offer a plethora of pivotal insights into the Agreements while at the same time they throw up a number of important questions.

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At a time when many regions of the world, including Europe, are seeing a resurgence of authoritarianism, three countries of Eastern Europe – Ukraine, Georgia and Moldova – are struggling to counter this trend with the aim of developing European-style democracies in the framework of their Association Agreements with the European Union.

*The Struggle for Good Governance in Eastern Europe* offers an in-depth analysis of this challenge, with expert contributions on the workings of these countries' democratic and judicial institutions, their anti-corruption policies and the hazards they must overcome, including the strong presence of oligarchs. Other themes include how these countries are adapting to their precarious geo-political positioning between the EU and Russia and how the quality of their political and economic governance compares with the Balkan states.

This book complements three landmark handbooks (now in their 2nd edition and also published by Rowman & Littlefield International) explaining the progress achieved in implementing the comprehensive Association Agreements that each of these countries has entered into with the EU.

The struggle to advance good democratic governance in these close neighbours of the EU represents a test case of the highest strategic significance for both the EU and the three states themselves. For the most part, the jury is still out over its outcome.

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