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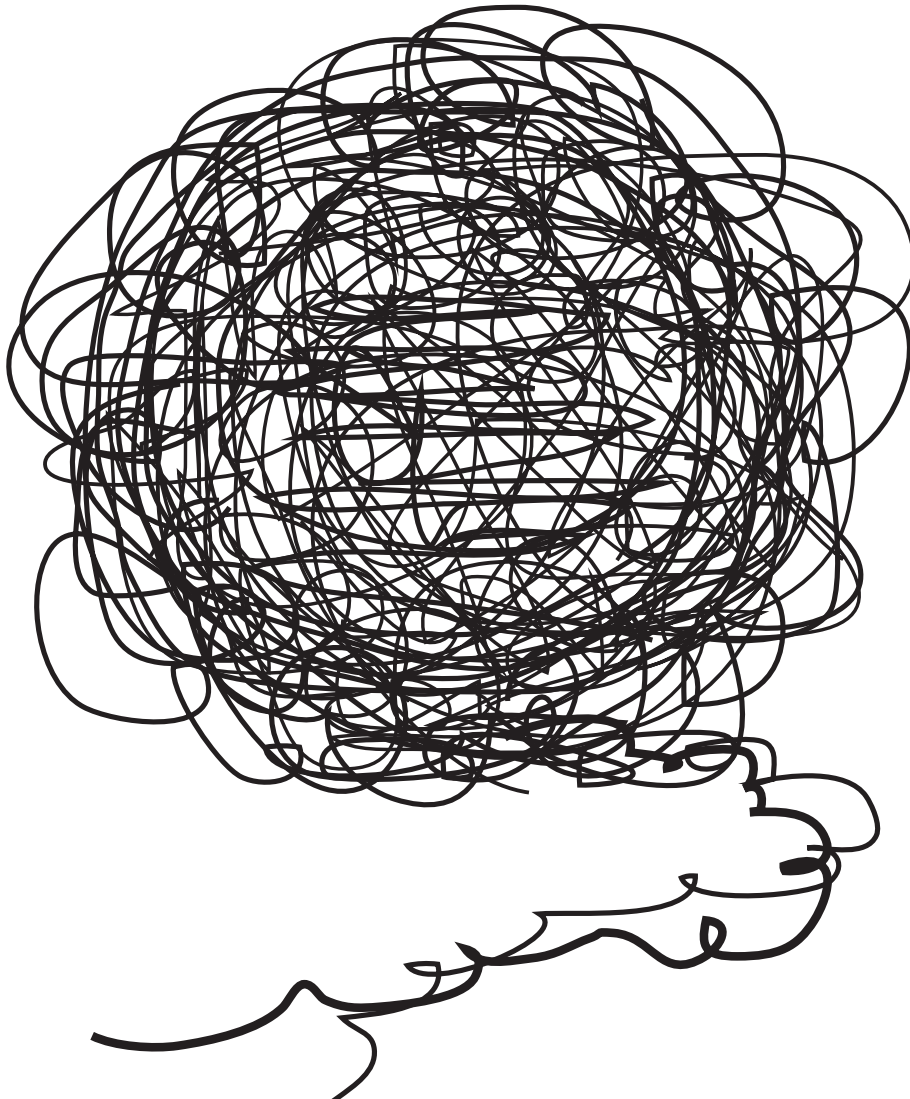
# Obstruction Of Justice

The case for firing Prosecutor  
General Viktor Shokin

Special coverage pages 4-15



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# Editors' Note

This seventh issue of the Legal Quarterly is devoted to three themes – or three Ps: prosecutors, privatization, procurement. These are key areas for Ukraine's future.

In the first one, prosecutors, all is not well. More than 110 lawmakers led by Yegor Sobolev are calling on President Petro Poroshenko to fire Prosecutor General Viktor Shokin. Not only has Shokin failed to prosecute high-level crime in Ukraine, but critics call him the chief obstructionist to justice and accuse him of tolerating corruption within his ranks. "They want to spearhead corruption, not fight it," Sobolev said of Shokin's team. The top prosecutor has never agreed to be interviewed by the Kyiv Post.

As for the second one, privatization, this refers to the 3,000 state-owned enterprises that continue to bleed money – more than \$5 billion alone last year – through mismanagement and corruption. But large-scale privatization is not likely to happen soon, at least until a new law on privatization is passed by parliament. The aim is to have public, transparent, competitive tenders – not just televised ones. The law, reformers say, needs to prevent current state directors from looting companies that are sold and ensure both state and investor rights.

As for the third one, procurement, much more progress has been coming in terms of e-procurement aimed at competitive and transparent state purchases of goods and services. If successful, it could eliminate a big black hole of corruption into which more than \$2.3 billion in taxpayer money is lost through overpricing and needless intermediaries.

The three Ps – prosecutors, privatization, procurement – show the battle for Ukraine's future rages on, with the nation's 43 million people having huge stakes in the outcome of all three contests.



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(Cover photo) What's behind drive to fire Prosecutor General Viktor Shokin? See stories on pages 4-15. (Volodymyr Petrov)

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# Sobolev's case for firing Shokin steadily gains momentum



*Yegor Sobolev, the lawmaker leading the charge to fire the prosecutor general, says that President Petro Poroshenko is resisting because “loyalty is more important for Poroshenko than real eradication of corruption.”*

By **Oleg Sukhov**  
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**In** July, Prosecutor General Viktor Shokin announced with great fanfare that a court had authorized the trial in absentia for disgraced ex-President Viktor Yanukovych.

But, almost two years after the EuroMaidan Revolution began, not a single indictment in corruption cases against the former president or his allies has been sent to court.

Yegor Sobolev, a lawmaker from the Samopomich party and chairman of the Verkhovna Rada's anti-corruption committee,

believes that Shokin is stalling all high-profile investigations and covering up corrupt prosecutors.

The only way out is to replace Shokin, a loyalist of President Petro Poroshenko, with a truly independent prosecutor able to deliver impartial justice, Sobolev says.

Andriy Demartino, a spokesman for the Prosecutor General's Office, declined to comment.

Inefficiency and sabotage at the Prosecutor General's Office has gotten out of hand to such

an extent that even diplomats are using tough language.

Geoffrey R. Pyatt, the U.S. ambassador to Ukraine, said on Sept. 24 that “corrupt actors” under Shokin “are making things worse by openly and aggressively undermining reform.”

This damning indictment of Shokin’s performance since he was appointed in February has given a boost to efforts by Sobolev and civil society to fire him.

Sobolev has so far collected 114 signatures in parliament for dismissing Shokin, still well short of the 150 signatures needed to put the issue on the agenda.

He said in an interview with the Kyiv Post that not a single signature has been collected since the Sept. 17 arrest of Radical Party lawmaker Ihor Mosiychuk on suspicion of bribery. Critics see the arrest as political revenge by Shokin for Mosiychuk’s support for his firing.

“After Ihor’s arrest everyone started thinking ‘what if this happens to me tomorrow?’” Sobolev said. “One of Shokin’s goals is to show to lawmakers what consequences could happen to those who submit signatures for his dismissal.”

He attributed the slow pace of the drive to oust Shokin to a lack of principled lawmakers.

Many lawmakers are reluctant to back the sacking of Shokin because they are part of the system that covers up corruption, Sobolev said.

The president refuses to fire Shokin because “loyalty is more important for Poroshenko than real eradication of corruption,” Sobolev says.

Shokin was a protégé of Poroshenko as early as 2005, when he was a deputy prosecutor general, according to Sobolev. At that time Shokin told Sobolev, then a journalist, that Serhiy Kivalov and other members of the Central Election Commission accused of vote rigging in favor of Yanukovich in the 2004 presidential election would be soon convicted.

“These cases didn’t lead to convictions,” Sobolev said. “This is the main reason why we voted against his appointment as prosecutor general. Unfortunately his work proved that we were right.”

Shokin’s choice of four people for the commission to select the chief anti-corruption prosecutor also proves that he is not



Deputy prosecutors Davit Sakvarelidze (C) and Vitaliy Kasko (R) listen to chairman of the parliamentary committee for preventing and fighting corruption Yegor Sobolev at the Verkhovna Rada’s anti-corruption committee on July 15. (Volodymyr Petrov)



## Hanna Shtepa

Senior Associate, Baker & McKenzie

### New Markets for Ukrainian Goods and Services

Given that the Ministry of Economic Development and Trade of Ukraine announced that all formal requirements required for Ukraine to join the WTO Government Procurement Agreement (the “GPA”) are expected to be completed by the end of this year, there are good chances that Ukrainian goods and services will have access to the public procurement markets of the major world economies (including the USA, EU, Japan, China and Canada) and enjoy the guarantees provided by the GPA as early as the beginning of 2016.

#### What would be available for Ukraine

The total public procurement market covered by the GPA is about 1.7 trillion US dollars. However, the scope of the public procurement market to be opened for Ukrainian goods and services in each particular country under the GPA is not yet publicly available and would differ depending on the country. In particular, each country participating in the GPA would specify the procuring authorities/entities, types of goods/services for procurement to which Ukrainian goods and services would have access under the GPA.

#### What should be done

In order for Ukrainian companies to benefit from the opportunities provided by the GPA, significant preparatory work should be done well ahead of any actual participation in the procurement procedures. In particular, companies wishing to participate should undertake the following steps:

#### 1. Ensure compliance of goods/services with local requirements

To be eligible for foreign public procurement, goods and services should comply with the legal requirements applicable to such types of goods and services in the country where the procuring entity is located. Depending on the national legal regime of the country of procurement and the type of goods procured, certification of the goods/services might be required. In practice, this may take a significant time as well as require the allocation of substantial administrative and sometimes financial resources. Even if certification of the goods or services is not generally required, it might be requested under the tender requirements by a particular procurement entity. Therefore, both the national legislation and the usual tender requirements for goods and services requested by the procurement entities should be studied in advance of the actual participation in public procurement procedures in any particular country.

#### 2. Understanding national public procurement procedures

The GPA does not set a unified procedure for international procurement but only establishes the main principles to be followed by its participants. As a result, national procurement laws and procedures apply to the public procurement falling under the GPA. Formal compliance with all requirements applicable under the national procurement laws and procedures is essential to ensure that the tender proposals of Ukrainian companies are not declared ineligible or disqualified on formal grounds, and that Ukrainian companies could use the procedures for challenging the tender results both under the national law and under the GPA. Given that, as a rule, the time allocated for submitting bids is very short, it is essential for companies wishing to participate in foreign bids to involve legal counsels knowledgeable on the local procedures and requirements to be in advance of the actual preparation of the tender proposals.

#### 3. Presence in the country of procurement

Given that public procurement in most countries is still not centralized and still very formalistic, having a physical/legal presence can significantly facilitate a successful participation in tender procedures abroad. This could be achieved by opening a representative office or a subsidiary in the country of interest, or engaging agents or counsels that could facilitate communication with the foreign procurement authorities.

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interested in fighting corruption, Sobolev said.

One of them, First Deputy Prosecutor General Yuriy Sevruk, has been accused of sabotaging reform at the Prosecutor General's Office. Another member - Yuriy Hryshchenko, head of the office's main investigative department - has been lambasted because he was the boss of prosecutor Volodymyr Shapakin, who was arrested in a bribery case in July.

"Shokin appointed people who are linked to corruption to choose an anti-corruption prosecutor," Sobolev said.

The three commission members delegated by the Petro Poroshenko Bloc - Volodymyr Horbach, Kateryna Levchenko and Yevhen Nishchuk - also raise doubts.

"These three people don't have efficient experience in fighting corruption," Sobolev said. "They didn't show in the past that they can and are ready to stop it, but they still have a chance to show it now."

Earlier this month Poroshenko claimed that the European Union had no complaints against the commission's composition, citing negotiations between Shokin and Jan Tombinski, EU ambassador to Ukraine. Activists accused Shokin of lying and deceiving the president after Tombinski issued a statement saying that civil society's concerns about the commission were valid.

Another complaint against Shokin is that not a single corruption case against Yanukovich and his allies has been sent to court.

Serhiy Horbatiuk, head of the prosecutorial department in charge of trials in absentia, told the Kyiv Post that the Yanukovich case would be sent to court after Spain makes a decision on extraditing ex-Finance Minister Yuriy Kolobov, a suspect in the same embezzlement case, to Ukraine.

Sobolev said that his anti-corruption committee had collected evidence on 200 cases of top officials' corruption in the period before and after the revolution.

"Not a single one of these investigations has been completed," he said. "Starting with Yanukovich's gang and ending with incumbent top officials, all investigations are being sabotaged."

Investigating corruption in its own ranks has also mostly remained a taboo for the Prosecutor General's Office.

Corruption accusations against ex-deputy prosecutor generals Anatoly Danylenko and Volodymyr Huzyr have not been investigated.

Shokin has also been accused of trying to protect two top prosecutors accused of bribery, Oleksandr Korniyets and Volodymyr Shapakin, by starting criminal cases against Deputy Prosecutor General Davit Sakvarelidze and his investigators who arrested them in July.

Some claim that Shokin had nothing to do with the matter but Sobolev believes the prosecutor general was in charge of sabotaging the Korniyets-Shapakin case.

The Prosecutor General's Office is very hierarchical, and nothing important can happen without the prosecutor general's permission, Sobolev argued.

Mustafa Nayyem, a lawmaker from the Petro Poroshenko Bloc, wrote in July that Shokin had taken part in the attempts to protect Korniyets and Shapakin and that they were his protégés.

"The cases haven't been sent to court yet," Sobolev said. "This is another signal that they want to spearhead corruption, not to fight it."

Serhiy Parashin, an ex-chief of the Chornobyl Nuclear Power Plant, told the Kyiv Post about a recent criminal case against the plant that he argues aimed to discredit its leadership.

He described the General Prosecutor's Office as a "tool for discrediting people and an instrument of self-enrichment, not a law enforcement agency."

"I hear things that can only happen in a mafia gang," he told the Kyiv Post.

Money is paid for opening and closing criminal cases, Parashin said. "Do you think they don't bring it to the very top?" he added.

To make sure that the General Prosecutor's Office is truly reformed and its head is independent, lawmakers including Sobolev drafted a bill last winter to choose an independent general prosecutor through a transparent competitive hiring process.

However, Verkhovna Rada Speaker Volodymyr Groysman has so far failed to submit the bill for voting, he said.

"Either society will make the incumbent president and parliament support this, or we will need a more principled president and parliament," Sobolev added.

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**NEWS ITEM:** In a nation swimming in corruption, Prosecutor General Viktor Shokin is performing dismally, failing to prosecute anyone for major financial crimes or high-profile murders. "Not a single one of these investigations has been completed," said lawmaker Yegor Sobolev. "Starting with (ex-President Viktor) Yanukovich's gang and ending with incumbent top officials, all investigations are being sabotaged."





# Lawmaker's arrest exposes Ukraine's lack of due process, selective justice

By **Oleg Sukhov**  
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The arrest of member of parliament Ihor Mosiychuk in the Verkhovna Rada on Sept. 17 made for great theater – and terrible justice.

But it is only the latest high-profile example of Ukraine's long and inglorious history of selective justice.

Mosiychuk, an opposition member of parliament, was arrested on suspicion of accepting bribes and is jailed in a pre-trial detention center. Prosecutor General Viktor Shokin personally turned up in parliament to present video evidence against Mosiychuk, a member of Oleh Lyashko's opposition Radical Party.

Mosiychuk's supporters portrayed the arrest as politically motivated revenge by Shokin and President Petro Poroshenko. It took place after the party, which had been collecting signatures for Shokin's dismissal, left the government coalition and formally joined the opposition on Sept. 1.

Responding to the accusations of selective justice, Shokin said on Sept. 21 that he had no "blacklist" of disloyal lawmakers to be arrested. He said that, to avoid such accusations, he would not seek to prosecute any member of parliament again until immunity is lifted for all lawmakers.

Meanwhile, associates of ex-President Viktor Yanukovich and allies of those currently in power are not being prosecuted for crimes, including alleged cases of embezzlement totaling billions of dollars and alleged murder of EuroMaidan Revolution demonstrators.

The uprising that sent Yanukovich fleeing on Feb. 22, 2014 was supposed to end selective justice and bring rule of law to Ukraine. It has done nothing of the kind, with Mosiychuk's arrest violating numerous rules of criminal procedure.

The Mosiychuk case is a worrying indicator that the present government is sticking to old, bad habits of using justice as a political weapon, Daniel Bilak, managing partner at the Kyiv office of British law firm CMS Cameron McKenna, told the Kyiv Post.

"It was great theater but it certainly didn't look like much justice," Bilak said, speaking about Mosiychuk's arrest. "This will send a signal to everybody that it's open season on political opponents."

He argued that such violations of due process could reverse Ukraine's movement towards rule of law.

"That's a very slippery slope, because if you can get away with it once,



Then-Verkhovna Rada members Petro Poroshenko (L), Arseniy Yatsenyuk and Mykola Martynenko (R) on Jan. 29, 2014. Lawmakers say Ukraine is obstructing a Swiss investigation into suspected multimillion-dollar bribery by Martynenko, a close ally of Yatsenyuk, Ukraine's prime minister. Martynenko denies the allegations. (UNIAN)

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you can do it again,” Bilak said. “Nobody is safe, and we’ll be back to the Yanukovich years.”

Irina Paliashvili, chair of the U.S.-Ukraine Business Council’s legal committee, agreed with Bilak, describing Mosiychuk’s arrest as an “in your face” violation of procedural norms, and a “circus.”

“Mosiychuk’s arrest is a throwback to our old traditions of selective justice,” she told the Kyiv Post.

The video Shokin presented in the Rada appears to show Mosiychuk specifying the size of bribes for lobbying for businesses’ interests, and then receiving cash. Mosiychuk denies the accusations, saying the video was manipulated.

The procedural violations were so obvious that they were even admitted by Verkhovna Rada Speaker Volodymyr Groysman, who said they were necessary to speed up the investigation.

One of the violations is that the issue of stripping Mosiychuk of immunity from prosecution was not considered by the Verkhovna Rada’s rules committee.

Another violation is that Mosiychuk was not given the floor to answer the accusations.

“Equality before the law and the right to be heard are fundamental principles of justice,” Bilak said. “Both of them seem to have been somewhat breached, based on what I’ve seen and heard.”

Law enforcement employees also had no right to conduct

surveillance of Mosiychuk because this is only possible after parliament authorizes a criminal investigation against a lawmaker, critics say.

Moreover, the video recording had not been independently verified and recognized by a court as proper evidence, Bilak said.

“From what I have seen, a judge would be within the law to release him on the basis that procedural norms and the laws were not followed,” Bilak said. “What’s the point of having immunity if it can be taken away at the whim of the speaker, president or prosecutor general?”

He argued that “due process is as fundamental an aspect of doing justice as having somebody going to prison for their crimes.”

“You cannot have one set of rules for some people and another set of rules for others,” Bilak said. “This puts the entire administration of justice into disrepute.”

And it’s not just politicians who are targeted now: Yevhen Zakharov, head of Ukraine’s Helsinki Human Rights Union, said that similar cases of selective justice have happened during numerous investigations against nationalists and fighters of volunteer units, who critics say are seen by the authorities as a challenge to their power.

Critics argue that the political nature of Shokin’s actions is clear from the contrast in the way Mosiychuk and Serhiy



Ihor Mosiychuk, a Verkhovna Rada member, at a hearing at Kyiv’s Pechersk District Court on Sept. 18. (UNIAN)





Lawmaker Serhiy Klyuyev at a session of the Verkhovna Rada on June 3. (UNIAN)

Klyuyev, an ex-member of Yanukovich's Party of Regions, were treated when they were stripped of parliamentary immunity. While Mosiychuk is accused of getting a Hr 100,000 bribe, Klyuyev is suspected of embezzling billions of hryvnias.

Darina Kaleniuk, executive director of the Anti-Corruption Action Center, told the Kyiv Post that the General's Prosecutor's Office had ignored the most substantial evidence against Klyuyev when it asked parliament in June to strip him of immunity. Given the weakness of the case it presented, it did not even request his arrest initially and did so only after he had fled Ukraine.

The General Prosecutor's Office justified its inability to arrest him by saying it could not conduct surveillance without parliament's approval and referring to other procedural formalities – something that critics say it openly violated in the Mosiychuk case.

Many other Yanukovich allies have also escaped justice one way or another.

The General Prosecutor's Office is investigating many of those who fled Ukraine after the EuroMaidan Revolution, but the cases are moving at a snail's pace. Not a single corruption case against top Yanukovich-era officials has been sent to court almost two years after the revolution began.

Despite vast journalistic investigations and, in some cases, past

criminal cases against them, Yury Boiko, Yevhen Bakulin, Serhiy Lyovochkin, Serhiy Kivalov, Mikhaïlo Dobkin and many other Yanukovich allies are not currently suspects in any criminal cases.

"Where there is big money, there is no morality," Kaleniuk said. "There are no enemies there, only partners. There could be a political agreement at the top level not to touch Party of Regions people, allow them to flee and let them hide the stolen stuff."

Yanukovich associates could also have some compromising information on the current government, and cases are being sabotaged to keep them silent, Kaleniuk said.

Just like the previous government's corruption, accusations against allies of the incumbent authorities are mostly ignored by prosecutors.

The Prosecutor General's Office has done nothing to investigate a procurement scheme said to involve Russian businessman Konstantin Grigorishin, a partner of Poroshenko, or graft allegations against State Fiscal Service head Roman Nasirov, an ex-lawmaker from the Petro Poroshenko Bloc. Nor are prosecutors probing a money-laundering scheme allegedly linked to Poroshenko's chief of staff Borys Lozhkin that is being investigated in Austria.

Ukrainian prosecutors have also failed to express any interest in a Swiss bribery investigation against Mykola Martynenko, a lawmaker from Prime Minister Arseniy Yatsenyuk's People's Front party.

"It would be logical if the prosecutor general sought to strip of immunity some bigger fish like Mr. Martynenko, as opposed to Mosiychuk, the sacrificial lamb," Kaleniuk said.

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# Failure to fight corruption threatens everything that government is doing

*'Corrupt actors' sabotage prosecution of legitimate criminal cases, U.S. Ambassador to Ukraine Geoffrey R. Pyatt writes. The case of ex-Ecology Minister Mykola Zlochevsky is an example that cost Ukrainians \$23 million.*



By **Geoffrey R. Pyatt**

There is one glaring problem that threatens all of the good work that regional leaders here in Odesa, in Kharkiv, in Lviv, and elsewhere are doing to improve the business climate and build a new model of government that serves the people. That problem threatens everything that the Rada, the Cabinet, the National Reform Council, and others are doing to push political and economic reforms forward and make life better for Ukrainians, and it flies in the face of what the Revolution of Dignity is trying to achieve.

That obstacle is the failure of the institution of the Prosecutor General of Ukraine to successfully fight internal corruption. Rather than supporting Ukraine's reforms and working to root out corruption, corrupt actors within the Prosecutor General's Office are making things worse by openly and aggressively undermining reform.

In defiance of Ukraine's leaders, these bad actors regularly hinder efforts to investigate and prosecute corrupt officials within the Prosecutor General's Office. They intimidate and obstruct the efforts of those working honestly on reform initiatives within that same office.

The United States stands behind those who challenge these bad actors.

We applaud the work of the newly established Inspector General's Office in the prosecutor's office led by Davit Sakvarelidze and Vitaliy Kasko. Their investigations into corruption within the PGO have delivered important arrests and have sent the signal that those who abuse their official positions as prosecutors will be investigated and prosecuted.

I encourage all of you to speak up in support of these brave investigators and prosecutors. Give them the resources and support to successfully prosecute these and future cases.

**Ex- Ecology Minister Mykola Zlochevsky at the Cabinet of Ministers on March 14, 2012. (Ukrafoto)**



We have learned that there have been times that the PGO not only did not support investigations into corruption, but rather undermined prosecutors working on legitimate corruption cases.

For example, in the case of former Ecology Minister Mykola Zlochevsky, the U.K. authorities had seized \$23 million in illicit assets that belonged to the Ukrainian people. Officials at the PGO's office were asked by the U.K to send documents supporting the seizure.

Instead they sent letters to Zlochevsky's attorneys attesting that there was no case against him. As a result the money was freed by the U.K. court and shortly thereafter the money was moved to Cyprus.

The misconduct by the PGO officials who wrote those letters should be investigated, and those responsible for subverting the case by authorizing those letters should – at a minimum – be summarily terminated.

Even as we support the work of the new Anti-Corruption Commission, and the recruitment of new prosecutors, we have urged Prosecutor General Viktor Shokin to empower his deputies Sakvarelidze and Kasko to implement reforms and bring to justice those who have violated the law, regardless of rank or status. We are prepared to partner with reformers within the PGO in the fight for anticorruption.

That's why, on Aug. 10, the U.S. signed a Joint Action Plan with Deputy Prosecutor General Sakvarelidze to provide \$2 million in U.S. assistance to support reform, anticorruption, and capacity building at the PGO.

It is critical that these reforms be undertaken in an open and transparent manner – consistent with the Procuracy Reform Law, international standards, and in coordination with national and international stakeholders – so that the Ukrainian people can have full faith and confidence in their laws and in those who have sworn to enforce them.

There are other cases as well, like those involving Former Deputy Chief Prosecutor Volodymyr Shapakin and Former Prosecutor Korniyets that clearly demonstrate that it is critical to cease intimidation and investigations of investigators, prosecutors and witnesses.

We want to work with Prosecutor General Shokin so the PGO is leading the fight against corruption. We want the Ukrainian people to have confidence in the Prosecutor General's Office, and see that the PGO, like the new patrol police, has been reinvented as an institution to serve the citizens of Ukraine.

*Geoffrey R. Pyatt is America's eighth ambassador to Ukraine. The remarks are edited from a speech Pyatt made at the Odesa Financial Forum on Sept. 24.*



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## Ensuring success of Ukraine's privatisation programme

Ukrainian Government has launched the largest privatisation programme held in the last 20 years in the course of which over 300 state-owned enterprises representing various sectors of economy are to be privatised in 2015-2016 ("Privatisation Programme"). Whether or not the Privatisation Programme will be successful will depend on a number of factors. Below is brief summary of some of the issues that will need to be considered, based on our past experience of participating in successful privatisations in other jurisdictions.

### Guarantees to potential investors

The classic and internationally-recognised way to ensure that the buyer is comfortable with the company that he is buying is for a seller to provide 'representations and warranties' — essentially a suite of statements confirming that certain facts are true (for example, 'the Government owns the shares which it is selling to the buyer'). Despite this concept being largely unknown under Ukrainian law and in civil law countries generally, the Government will need to be prepared to give such assurances nevertheless to attract high profile buyers and a serious price. With proper advice, the Government may mitigate the risk of being sued by the buyer for breach of such representations and warranties in a manner acceptable to it which would still attract serious investors. For example, the Government may use 'warranty & indemnity' insurance, an insurance product (typically underwritten in London), whereby its liability is limited — sometimes to as low as €1 — and a claim by the buyer would be brought to the insurance underwriter instead of the Government. In recent years there has been a growing interest in

this type of risk allocation, including in the context of privatisations.

### Future regulatory change

In heavily regulated markets such as energy or TMT, investors will expect the Government to give assurances that the Government will not amend the regulatory framework for a certain period of time, or otherwise do anything making the investor's investment less profitable. This is a common request in the context of privatisations, and the Government will need to give assurances to the buyer that its investment will be safe, but in a manner that will be acceptable to the Government too.

### Post sale obligations

The Government will naturally want investors to commit to certain post sale obligations, such as, for example, an obligation to invest in the company and/or retain a certain number of employees post sale. In the EU, both the Government and the buyer would need to bear in mind applicable state aid rules. It must therefore be clear and demonstrable that the Government is acting as an independent commercial company (the 'Private Investor Vendor Test') and that the privatisation process was open and non-discriminatory with the company being sold to the highest bidder.

### Governing law for transaction documents

Investors will likely push for the governing law of the privatisation sale and purchase agreement to be that of an independent country, and English law would be a typical choice in

transactions of this nature. Which law will ultimately govern the transaction documents will be, in our experience, a fundamental issue that will be heavily negotiated. There are, however, potential 'middle ground' solutions which are possible to ensure that both the seller and the buyer are happy.

### Asset deal

Despite assurances given to the investors, they may remain nervous on the basis that the companies being privatised will come not just with the assets that are of interest to the investors, but also with potentially unknown liabilities. In other countries, a method to circumvent these risks is to allow the buyer to purchase the assets from the company — rather than purchase the company (which comes with potential liabilities) itself. In Ukraine however there are obstacles, including those in a form of VAT payments (otherwise not required if the buyer purchased the company itself). To the extent that the Government desires to dis-apply the VAT charge in the privatisation context, this will in our view make the privatisation programme significantly more attractive to international investors, and will go a long way to maximise the purchase price that will be offered by potential buyers.

The existing regulatory framework in Ukraine does not offer off the shelf solutions with respect to the above issues. Nevertheless, with effort on both sides and further reform of the privatisation legislation some middle ground can be found to address these issues in a manner which would be attractive to foreign investors and at the same time would not expose the Government to unnecessary risk.

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Vitaliy Shabunin of the Anti-Corruption Action Center (C) protests corruption in the health-care sector on June 18. (UNIAN)

# Shabunin: Poroshenko blocks judicial reforms

By **Johannes Wamberg Andersen**  
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**Y**ou can't have your chocolate and eat it too, to mangle an old proverb. But that's exactly what President Petro Poroshenko wants, say anti-corruption activists who accuse him of obstructing justice and resisting change.

The public hungers for convictions and jail terms for those who committed major crimes against the state, especially under overthrown President Viktor Yanukovich.

Yet there have been no convictions. High-ranking officials suspected of corruption are walking free as

prosecutors remain instruments of a highly politicized – and politically subservient – criminal justice system.

This provides a damning indictment of the performance of Poroshenko, the first post-EuroMaidan Revolution president.

Keeping control of prosecutors, the Security Service of Ukraine and the courts is a key feature of Poroshenko's rule since his election in May 2014, said Vitaliy Shabunin, head of the board of directors of the Anti-Corruption Action Center. The nongovernmental group exposes corruption and lobbies for anti-corruption legislation.

“It is a pattern of behavior,” Shabunin said. “Poroshenko wants to retain control over prosecution.”

Such control effectively leaves the president in charge of who among the power elite gets investigated and who is left off the hook.

By foot-dragging in creating a genuinely independent prosecutorial service, however, Poroshenko risks a fall from grace similar to that of ex-President Viktor Yushchenko. After Yushchenko failed to live up to the expectations of the 2004 Orange Revolution that put him in power, he got only 5 percent of votes when he stood for re-election in 2010.

A Poroshenko spokesperson wasn't immediately available, but Poroshenko has repeatedly insisted that he will bring the justice system and public administration in line with European Union and Council of Europe standards.

Oleksiy Mushak, a Bloc of Poroshenko lawmaker, agreed that “society increasingly demands justice, so the authorities will have to deliver soon, including against Yanukovich era officials.”

Shabunin said Poroshenko's desire for a loyal prosecutor general also depends on rank-and-file prosecutors who obey orders from the top. This is why Deputy Prosecutor General Davit Sakvarelidze, who is trying to hire new and independent prosecutors, is so threatening to the status quo.

Shokin and the presidential administration are inserting their representatives on commissions to hire new prosecutors. “If the newly hired people have worked in the prosecution service before, then we're in deep trouble,” Shabunin said.

But the problems in the judicial system are more widespread than just prosecutors.

Shabunin said that the president can still order verdicts from judges just as his predecessors did. When verdicts aren't ordered from above, Shabunin claimed, they can still be bought. Lawyer Igor Fomin agreed with Shabunin,

saying that the problem of “ordering court rulings by phone has become even worse.”

Anti-corruption activists were earlier willing to give the president the benefit of the doubt. But no longer. “I had hoped he'd kept those instruments from the old regime in order to pursue swift reform,” Shabunin said.

What are Poroshenko's motivations? Possibly fear, Shabunin said.

“He couldn't have been a big businessman and serving as minister of economy under Yanukovich without partic-

**‘It is a pattern of behavior. Poroshenko wants to retain control over prosecution.’**

Vitaliy Shabunin,  
head of the board of directors  
of the Anti-Corruption Action Center.

icipating in corrupt deals,” Shabunin told the Kyiv Post. He believes that Poroshenko is driven by fear that past misdeeds might be exposed, an explanation for why no top officials from the administration of ex-President Viktor Yanukovich have been prosecuted, with many fleeing the country and, in some cases, keeping their assets.

They might know a lot about Poroshenko, who was a co-founder of the Party of Regions and an economy minister under Yanukovich. Shabunin is also worried about possible presidential misdeeds today.

While painting a bleak picture, Shabunin still believes that “the situation is much better compared with that under Yanukovich” because the authorities are more vulnerable and more sensitive to criticism, both domestic and foreign. “It's easier for us to have an impact,” he said.

*Kyiv Post writer Johannes Wamberg Andersen can be reached at [johannes.wa@gmail.com](mailto:johannes.wa@gmail.com)*

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Protesters burn hats on the effigies of Prosecutor General Viktor Shokin and his deputies Volodymyr Huzyr and Yuri Stolyarchuk at a rally in front of the Prosecutor General's Office on July 24. The action is a reference to the Slavic proverb "a thief wears a burning hat," which means that a criminal's behavior gives him away. (Volodymyr Petrov)

# Ukraine struggles to put an end to prosecutorial tyranny

By **Mariana Antonovych**  
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It's very difficult to regain lost trust. That's the problem facing Ukrainian prosecutors. They're not making it any easier by failing to prosecute anybody for major crimes against Ukraine, ranging from large-scale embezzlement to murder.

For years, prosecutors have been weapons of political persecution while simultaneously covering up or stalling criminal investigations of the high and mighty.

It's easy to see why Ukraine's army of 18,000 prosecutors are both despised and feared. For one reason, they obtain convictions against 99 percent of the defendants they take to court – courts in which judges, not juries, render verdicts. For another reason, prosecutors are not accountable to the public, giving almost no information about cases under active investigation or explaining why some cases are not investigated at

all and others are closed without criminal charges.

One big proposed change is to gradually strip prosecutors of their investigative powers and instead invest them in a State Investigative Bureau, which will probe crimes committed by high-ranking officials, judges and prosecutors, according to Oleksandr Banchuk from Center for Political and Legal Reforms.

In parallel, the newly created National Anti-Corruption Bureau will be responsible for high-profile graft cases.

The State Investigative Bureau also could, in theory, help Ukraine fulfill a ruling made in 2012 by the European Court of Human Rights that obliged the country to create a mechanism for investigating complaints against the justice system, Tetyana Mazur, director of Amnesty International Ukraine told the Kyiv Post.



“But we want to see (such an organ) being not just something new, but also effective,” which means it must have all of the necessary resources at its disposal, from new investigators with decent salaries, to sufficiently broad powers, she said.

The new investigative bureau is expected to have full autonomy from the prosecution service and the Interior Ministry, Olena Sotnyk, a lawmaker with the Samopomich party and one of the authors of the bill on State Investigative Bureau, said.

However, there’s no agreement yet on who will appoint the head of this powerful, new, professional investigative body.

Pro-presidential party leader Yuriy Lutsenko “believes that the president should appoint the head,” Sotnyk said. But given that president already appoints the heads of the prosecution and state security service, this could lead to too much presidential power, she said.

In the meantime, Deputy Prosecutor General Davit Sakvarelidze is working to get rid of corrupt and unprofessional prosecutors and hire better ones.

Since Sept. 5, prosecutors at local prosecutor offices have been undergoing two types of testing: an open competitive selection process for appointments to managerial posts, and re-attestation for regular prosecutors.

As a result of the competitive process, the present 2,250 managerial positions are to be shrunk to just 700.

When the testing is over, a commission consisting of three candidates appointed by parliament and four by the Prosecutor General’s Office will choose the three best-qualified candidates for each managerial post, while Ukraine’s Prosecutor General Viktor Shokin will make the final decisions.

Not surprisingly, Shokin has already filled his commission quota with prosecutors, rather than lawyers or human rights activists, Sergiy Grebenyuk from Egorov Puginsky Afanasiev & Partners law firm told the Kyiv Post.

Outside candidates will be allowed to compete for these posts only if some prosecutors flunk the retesting process. But whether this happens or not “will become clear no earlier than Dec. 15, when the testing is finished,” Banchuk added.

Another problem is that the retesting process lacks transparency, said Sotnyk. While the results are made public, there are no names, only candidate numbers, which makes it impossible for the public to track the process independently, lawmaker added.

Ukraine’s Constitutional Commission has also prepared a series of amendments that affect the judiciary system, including the prosecutorial system. These amendments would strip the prosecution of many of its current powers, leaving it with essentially one function: supervising pre-trial proceedings and pursuing prosecutions in the courts on behalf of the state, according to Grebenyuk.

One of the prosecutorial powers to be removed from the Constitution would be the ability to make prosecutorial inspections, which gave prosecutors the right to carry out searches and investigations into the management of companies, no matter their form of ownership.

These overriding powers encouraged corruption to flourish in the prosecutorial system and led to the duplication of powers of the prosecution and other supervising authorities, Banchuk said.

“Obviously, the prosecutors were not able to ensure and guarantee law and order in each sphere,” Banchuk said. “That is why inspections were selective.” This also promoted extortion, because unlike other

inspectors, prosecutors were not only able to impose fines, but could also open criminal proceedings against the management of companies, Banchuk added.

These measures would help produce positive reforms, but Amnesty International’s Mazur worries that too many of the changes are being made in isolation.

“You get the impression that the authorities don’t see a big picture of the criminal justice system at the end of this process,” Mazur said.

**‘You get the impression that the authorities don’t see a big picture of the criminal justice system at the end of the process.’**

**Tetyana Mazur,  
director of Amnesty International  
Ukraine**

“There’s no effective communication, no working group responsible for detailed discussion of this issue... All of these measures are being taken episodically, which creates a risk that these changes won’t work together like cogs in one mechanism.”

*Kyiv Post’s legal affairs reporter Mariana Antonovych can be reached at [antonovych@kyivpost.com](mailto:antonovych@kyivpost.com).*

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## Planes, trains & automobiles minister big on future, less so on past crimes or criticizing obstructionist oligarchs

Infrastructure Minister Andriy Pyvovarsky answers the Kyiv Post's questions on Sept. 22. "My mood is that every single day is my last day in office, so I have to complete as much as possible by the time I am done," Pyvovarsky says. (Pavlo Podufalov)

By Ilya Timtchenko and  
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Infrastructure Minister Andriy Pyvovarsky manages aviation, railways, roads, ports and postal services – just about everything that everybody in Ukraine uses.

It's way too much for one person, which is why Pyvovarsky is aiming to decentralize and privatize parts of the massive structure that has created illicit fortunes for well-placed insiders for more than two decades.

But when it comes to corruption, Pyvovarsky is not looking back, only ahead.

"My philosophy is that I should do anything possible to prevent such things in the future and make those changes institutional so that when I am gone... it will be difficult to go back to the old performance," Pyvovarsky told the Kyiv Post in an interview.

To achieve his goal, one of the strategies of the 37-year-old minister has employed is transparency. His ministry has one of the most modern and informative websites in the Ukrainian government.

It may be the best strategy for the times, but not a flawless one. He had difficulty providing the number of corruption cases filed with

prosecutors and didn't show much interest in following up about whether criminal charges were ever filed.

Since there is no way for anyone to manage the 600,000 state employees in his ministry, Pyvovarsky relies on key managers at state companies. He exercises more direct control over a 256-person analytical team that helps him identify problems and priorities.

"If there is a red flag then I know that there is something going wrong," Pyvovarsky, who was the director general of the Continuum Group and a former managing director of Dragon Capital, an investment bank, said. "They do their job properly... I don't need to push them around."

The thought of losing good people is one of his top concerns. He promised his team a fair and liveable wage, but admits that the state has not been able to come up with a fund to provide decent public sector salaries.

"We just need to come out of the closet and start paying bureaucrats well on the budget level," Pyvovarsky says. "If we have



competitive salaries, I can bring a lot talent from the street.” He said that an Hr 20,000 monthly salary should be the minimum.

Sector by sector, here's a rundown of Pyvovarsky's current challenges and thinking:

## Railways

The state enterprise Ukrzaliznytsia, with a bloated workforce of 285,000 people, makes up almost half of the ministry's employees and is expected to end the year with Hr 50 million in losses. But he's not going to seek privatization of the behemoth.

“There are quite a few bad examples of privatization of railways in the world,” Pyvovarsky said. “In case of Ukrzalizntysa, the infrastructure will never be private. It will be state-owned.”

His strategy is to streamline the management. “Corporatization will help us create a new structure, bring new people to the company that will be compensated fairly, will help us clean up the balance sheet,” he said.

Slimming the workforce would be a start, but Pyvovarsky said the reductions are not easy to carry out. “It's a process,” he says. “Until we educate the people, there will be populists who will be killing me.”

Yet another move would be inserting a board of directors to make decisions, rather than one “monarch” deciding everything.

Curiously, news outlets such as ICTV and Fakty – both owned by billionaire oligarch Victor Pinchuk, whose Interpipe business is a big customer of the state railways – have been harder on the minister than many other Ukrainian media outlets.

Pyvovarsky says he doesn't know why.

“It's a very interesting situation,” Pyvovarsky says, and one that he says confounds him since the Infrastructure Ministry has developed a mutually beneficial deal between Ukrzaliznytsia and Pinchuk's wheel and pipe company Interpipe.

“They buy scrap metal from Ukrzaliznytsia at market prices. We buy wheels from them at very favorable prices.”

## Aviation

Although most aviation exports put the blame for Ukraine's uncompetitive airlines industry on billionaire Ihor Kolomoisky's success in nearly monopolizing air travel through his Ukraine International Airlines, Pyvovarsky oddly has nothing bad to say about the oligarch.

Pyvovarsky even disputed the premise that Ukraine International Airline's dominant role forces air travelers to pay more for less. He said that Kolomoisky is not an obstacle to the development of a competitive air market. Instead, the minister blames the recession and Russia's war as the chief obstacles that limit choices.

“If you go to the website of Ukraine International, if you try to book tickets in advance, then you will see that in most cases it will be cheaper than any other foreign carrier,” Pyvovarsky says.

Not many aviation watchers agree with him.

Ukraine International Airlines operates 50 percent of aviation routes in Ukraine, giving it the right to fly 170 routes, with no competition in many of them, according to Oleh Marchenko, who consults airline companies as a partner with the Marchenko Danevych law firm. “In many cases, Ukraine International Airlines abuses its exclusive position by flying only half or less of the number of



## Sergey Denisenko

Counsel with AEQUO Law Firm

## Antimonopoly Committee. A new way of living

Latest months of the Antimonopoly Committee (the “AMC”) activity has brought more practical changes than recent years of shady stability and it looks like there is more to come. The new management team of the AMC is currently initiating a number of long-desired reforms of applicable Ukrainian competition legislation. Some of the initiatives are already in place and the market players are now treated according to the new rules.

On 15 September 2015 the AMC officially approved and enacted its Recommendations on fines calculation for infringements of the competition legislation providing for:

- principles of fines calculation; and
- “amnesty” for historical failures to file for Ukrainian merger clearance.

Up until now the AMC had no official document providing for methodology of fines calculation applied for infringements of competition legislation.

Furthermore, the AMC is currently promoting the Draft Law which provides for certain amendments into merger control regulations including the increase of financial thresholds applicable for transactions requiring prior clearance. Respective Draft Law has already received a positive expert conclusion of the AMC within the Parliament procedure and is currently being under review of the Parliament committees with high chances to be adopted by the end of this year.

In this respect and in view of contemplated increase of financial thresholds one may assume that the number of transactions requiring merger clearance in Ukraine will decrease, and thus the AMC will be more focused on failures to notify the transaction requiring prior clearance.

In view of the above and in preparation for further toughening of merger control regime, the AMC has launched an “amnesty” program whereby global corporates and Ukrainian business groups are now welcome to disclose their group structures to the AMC and voluntarily inform on any historical failures to notify certain transactions to the Ukrainian competition authority. Financial risk of any identified historical breaches of the Ukrainian merger control rules is limited to the following rather nominal penalty figures:

- Equiv. of EUR 850 per one breach (if voluntarily disclosed to the AMC within next 180 days) and
- Equiv. of EUR 4 270 per one breach (if voluntarily disclosed to the AMC within next 181-365 days).

We believe that respective amnesty program may present a good opportunity to disclose any previous transactions which for any reasons were not filed in Ukraine. Respective steps will contribute to bringing the corporate structure of the groups in full compliance with the Ukrainian merger control rules.

In order to benefit from the respective amnesty program the parties need to apply to the AMC with the application for merger clearance. The scope of the information required for such application will be nearly similar to the scope which is generally required for merger clearance notifications in Ukraine.

Importantly, the AMC is willing and ready not to publicize respective information regarding any such historical breaches by the applicants which apply for the amnesty program and request that their applications are treated with full confidentiality.

Currently the market players have very good chances to bring their corporate structures in compliance with the applicable merger control legislation. Respective procedure (if applied by the market players) will eliminate any future risks of imposition of fines for historical failures.

Respective initiatives clearly evidence on the AMC intention to reboot its relations with business based on the brand new principles including transparency, predictability and equality of the market operators. Moreover, it appears that current chances for successful practical implementation of competition reforms based on the above principles are better than ever before.

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permitted flights, while others cannot fly since they do not have rights,” Marchenko says.

Evgeniya Satska, a spokeswoman for Ukraine International Airlines, said Marchenko's figures are exaggerated. Satska says the airline operates only 37 percent of aviation routes in Ukraine and 113 routes.

The minister also defended Prime Minister Arseniy Yatsenyuk, saying that he was out of the picture regarding the temporary return as head of the State Aviation Service of Denys Antoniuk, a person known to be closely associated with Kolomoisky. Earlier, Odesa Governor Mikheil Saakashvili blamed Yatsenyuk for serving Kolomoisky's interests by reinstating Antoniuk.

“The investigation was done, he was dismissed for the duration of the investigation. Then the investigation was finished and there was some time taken to file the report. But by law, since the investigation was finished, he returned to work,” Pyvovarsky explained. “The report was issued, it was made public... the Cabinet of Ministers decided based on my request to fire the guy, and the guy was fired.”

## Ports

More has been achieved in the decentralization of Ukraine's aging port infrastructure.

“We conveniently and strategically sited ports, and yet people were bypassing us. In some cases people were going to the Baltic states, and then through Ukraine by Ukrzaliznytsya, which is stupid,” Pyvovarsky said.

The main reason for this ludicrous decision-making is that the bureaucracy was pushing businesses out of the way. “A system was created that institutionalized bribery,” Pyvovarsky said. “We deregulated the system.”

The second reason for the ports' unattractiveness is the massive depreciation of the seaport system. “We don't have enough storage facilities for grain, facilities for handling containers, storage facilities for ore, coal, etc.” Pyvovarsky said. “That's why we're fighting for the privatization of the stevedoring activities, for attracting new investments, attracting professional investors in the seaports that would help us improve the terminal infrastructure.”

The ministry has been fighting for the privatization of the 13 stevedoring companies for months now. The approval for privatization will have to come from parliament. Most deputies with whom Pyvovarsky spoke are interested in pushing through the bill. It is mainly the local bureaucracy at the ports that is creating difficulties.

“We will have some hiccups, but we will get through,” Pyvovarsky says.

If Ukraine does go through the privatizations, tens of billions of hryvnias will be saved, the minister estimates, since more freight will be transported by water, a more efficient form of transportation than roads.

## Roads

Ukraine's roads have been in awful condition since the collapse of the Soviet Union.

“Unless we fix the weight control issue on the roads we will not have good roads ever,” Pyvovarsky says. During the past two months, at least five state transportation inspectors have been severely beaten by lawbreakers who had overweight trucks. To fix the situation, Pyvovarsky wants to install electronic weight control to remove the human factor. “The penalties will be European,” the minister cautions.

Another systemic problem is low salaries for road inspectors.

“The average salary is Hr 1,200 per month and the guy can make it in one hour” in collecting bribes, Pyvovarsky says. The old inspection agency will be liquidated and will be substituted with a new one. “The Poles managed to resolve this issue, which means we can do it as well,” the minister says. “Compensation has to be fair for the inspectors.”

The minister envisions a three-stage process to improving Ukraine's roads. First, it must be clearly defined which government or private body owns which roads. Second, money should be redistributed according to the owner. Third, Ukravtodor will be decentralized into local government bodies.

Ultimately, the state enterprise will simply be another service oriented customer rather than the inspector and controller as well, a recipe for corruption.

## Postal service

Not many know, but Ukraine's state post office Ukrposhta is under the infrastructure wing as well. It also competes for the title of most corrupt state enterprise. “There are lots of opportunities for corruption,” Pyvovarsky says, such as the delivery of private parcels for free by Ukrposhta's trucks.

Pyvovarsky wants to corporatize Ukrposhta. Privatization won't be the solution since there is a significant social component that the private sector will not serve. “More than 30 percent of Ukrainians live in villages. And the Ukrainian post office is the only way to provide the administrative services and connection with the world,” Pyvovarsky says.

## Conclusion

The minister will be pleased if he meets, by the end of the year, these goals: a corporatized Ukrzaliznytsia and the beginning of a corporatized Ukrposhta; parliament approval of legislation for privatization of state-owned stevedoring port companies; a new Ukravtodor management to start decentralization; and, the adoption of European Union safety standards for automotive transport.

“My mood is that every single day is my last day in office, so I have to complete as much as possible by the time I am done,” Pyvovarsky says.

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# State enterprises drain billions of dollars each year, but resistance stalls privatization

By **Olena Gordiienko**  
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**In** 2014 alone, state enterprises officially lost **Ukr 115 billion** – more than \$5 billion, fueled by theft through one corrupt scheme after another.

"Every single company continues to be run in the interests of private individuals, unfortunately," Economy Minister Aivaras Abromavicius said in a video prepared for the Yalta European Strategy conference in September. "Almost every single state-owned enterprise sells goods through all kinds of middlemen companies registered in offshore zones. They also purchase a lot of inputs through companies controlled by them at inflated prices."

An estimated 3,000 state-owned enterprises – from idle silk producing farms to ports, transport and energy-providing monopolies abusing their positions – are managed by Ukraine's army of bureaucrats. They are not the only ones who feed off corrupt schemes. So do intermediary

merchants and, in some cases, oligarchs and tycoons who stand behind them.

If many of these enterprises became privately owned, they would bring tax revenues instead of financial losses and allow Ukraine's government to shed up to 50 percent of its total workforce of more than 1 million employees.

Removing these cesspools of corruption and bad management from the taxpayers' shoulders has proven to be difficult.

One of the holdups is a new privatization law moving through parliament aimed at ensuring transparency and competition, as well as protecting the rights of the state and investor.

Those who benefit from the status quo are putting up fierce resistance.

"Sabotage comes from the bureaucrats and merchants who feed from the schemes," Oleksiy Zubrytsky, an adviser

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## The Kyiv Post analyzed common and devastating scams in state enterprises and grouped them according to patterns. There are, however, many more to study.

### Fake partners and shady intermediaries

From just one contract alone, the management of Elektrovazhmash, a heavy equipment producer in Kharkiv, stole about three quarters of the annual profit, Economy Minister Aivaras Abromavicius said in a video prepared for the Yalta European Strategy conference in September. On Sept. 9, RBK Ukraine news agency published a contract purportedly between Elektrovazhmash and an offshore entity called Conor Trading L.P. The offshore then resold the equipment to a customer, showing that the heavy machinery producer lost \$1.6 million from the deal.

State Food and Grain Corporation and state alcohol monopoly Ukrspirt are two of the biggest in assets and losing money under the Agriculture Ministry.

The grain corporation worth \$1 billion could be bringing \$100 million annually in private hands, according to Oleksiy Zubrytsky, an adviser to the Agriculture Ministry. Instead, its losses amounted to Hr 3.5 billion, or \$220 million, last year. The audit shows \$300 million stolen from the company since the establishment of the state enterprise in 2010, including \$130 million last year through selling grain to four offshore companies that no longer exist. The state never received the payment.

It also used to be a normal practice for the state firm to buy grain from “dead” companies or individuals with advance payments, with neither grain or money received when the contract is due, Zubrytsky said. Now advanced payments are banned as well as contracts with unknown offshore companies.

### Tenders

“Procurement is a scheme for washing out the funds. Thanks to being monopolies they have a possibility to accumulate more than other companies, and then launder the money via overpriced tenders,” Olena Shcherban, attorney at the Anticorruption Action Center watchdog told the Kyiv Post.

Shcherban said that, unlike other entities that they selectively monitor, Energoatom, the state energy producer accounting for 50 percent of all Ukrainian electricity, is a winner in tender corruption. “We dispute 6-7 of

their procurement deals a year. There are a lot of criminal cases opened, particularly upon our appeals,” Shcherban said.

Energoatom constantly overprices its procurement offers from two to six times, losing hundreds of millions of hryvnias while buying pipes, protective clothes and equipment. The Anticorruption Action Center has spotted cases for Hr 481.6 million worth of non-transparent tenders over the last three years with involvement of Viktor Chebrov, head of competitive bidding committee. Chebrov is still working in the company and no criminal cases have ever been opened against him, Energoatom’s spokeswoman Ilona Zaiets told the Kyiv Post.

Ukrzaliznytsia, the unprofitable state railway monopoly, has Hr 245 billion in assets. Prydniprovskia Railway, a branch of Ukrzaliznytsia, alone lost Hr 239.8 million on buying electricity in 2012-2014. Deputy Infrastructure Minister Vladimir Shulmeister estimates the total state losses from such schemes to be in the billions of hryvnias.

Corporatization and change in management will contribute to more efficient and honest procurement, Shulmeister told the Kyiv Post. Privatization is not currently an option for the state railways, he said, noting the bad experience of other countries that have tried.

### Shadow privatization

“It’s happening already, either we want it or not,” Zubrytsky of the Agriculture Ministry said.

Workers of state entities illegally rent out land registered at the enterprise.

In other cases, a state company establishes a joint venture with a private entity and later fails to comply with obligations. The private company sues the state entity and wins assets as compensation. All that is left from the state entity is a bunch of papers in an official’s office. There are around 150 state enterprises under the Agriculture Ministry that used such schemes and slated for liquidation by the ministry.

Nashi Groshi, a TV news show, investigated the construction of a private luxury sport club on 11 hectares of Ukrzaliznytsia-owned land by ex-head of South-Western railway branch, Olexiy Kryvopishyn, with state money and materials. A pre-trial investigation is under way.

to Agriculture Minister Oleksiy Pavlenko, told the Kyiv Post.

More than 150 appeals sent to law enforcement agencies from the Agriculture Ministry are in different stages: pre-court investigations, indictments sent to court, other types of consideration.

“We haven’t received any response yet. The often asked question is why nobody of those who were shooting the Maidan is imprisoned? So this is our Maidan, nobody is imprisoned either” for embezzlement, Zubrytsky said.

Privatization is seen as the only viable solution for many state enterprises, where corruption permeates all levels, from department directors to engineers and accountants. Officially, workers are underpaid and overprotected, a contributing factor to the flourishing corruption schemes.

Apart from that, powerful business clans who stand behind some state enterprises resort to threatening any new technocratic manager who attempts to clean up the mess, Zubrytsky said.

Several draft laws will establish new rules on privatization to ban unfriendly buyers from the auction and cancel requirement to sell 5-10 percent stakes before the state can offer a controlling stake in an asset.

Other problems in the current law should also be addressed to make privatization more attractive to foreign investors. “There is almost no room for negotiations between an acquirer and the fund,” Sayenko Kharenko senior associate Oleksandr Nikolaichyk told the Kyiv Post. “In addition, investors lack information on the target since there is no effective way to perform a proper due diligence.”



**Ukrzaliznytsia, Ukraine's inefficient, overstuffed and outdated state railway monopoly, loses money every year through overpriced tenders, embezzlement and mismanagement. But there are no plans to privatize the behemoth and resistance has slowed the sale of 3,000 other state enterprises. (Volodymyr Petrov)**

Additionally, the guarantees that an investor receives are non-enforceable under Ukrainian law. "The acquirer will simply be unable to benefit from such protection in post-acquisition litigation," Nikolaichyk said.

The State Property Fund is responsible for due diligence and preparing the state assets for sale. Privatization could go more smoothly if every government body did their part, fund director Ihor Bilous, said in a Sept. 7 briefing.

Out of 302 state enterprises designated for privatization, 174 are controlled by ministries, of which only seven have been already transferred to the fund for actual sale.

"The ministries should transfer the assets to the fund and we will try to sell those under transparent procedures. Currently it's moving quite slow," Bilous said.

The Agriculture Ministry is ready to transfer all 101 enterprises designated for privatization to the fund, but many companies are "stuck in the procedures." Some 50 are still waiting for approvals from the Cabinet and parliament, others are in delay due to paperwork, often also sabotaged by officials on lower levels.



"One can work for years in an unregistered field, use unregistered buildings, but as soon as privatization is in question, property issues step forward," Zubrytsky said at a press briefing on Sept. 29. "Without changes to the legislation, privatization will not be conducted even next year. We believe it's necessary to radically simplify the procedure of privatization of the smallest and most loss-making enterprises."

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**NEWS ITEM:** The nation's 3,000 state-owned enterprises cost taxpayers \$5 billion last year. Often, according to the ministers who oversee the enterprises, the state firms are run by corrupt directors with powerful individual interests behind them. Corrupt schemes include buying goods through intermediaries at inflated prices and outright theft. Thus far, the forces resisting change have stalled a wholesale privatization drive that many think is the solution.

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# Putting an end to Ukraine's corrupt public procurement system

By **Mariana Antonovych**  
and **Olena Gordiienko**  
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Every year, Hr 50 billion – about \$2.3 billion – disappears into the big, black, corrupt hole of Ukraine's public procurement system. That's 20 percent of taxpayers' money that the government allocates to buying goods, labor and services for public needs.

Deputy Economy Minister Max Nefyodov wants to plug that hole for good.

In February, he gave up his managerial post

at Icon Private Equity fund to take on the challenge of fixing the state's broken public procurement machine with the reformist team of Economy Minister Aivaras Abromavicius.

"Losses through the public procurement sector are one of the main channels through which black cash gets into the economy," Nefyodov said in an interview with the Kyiv Post.

Almost every state-owned company in the country takes part in corrupt tenders, he said, creating built-in resistance to steering the system away from "preferred" suppliers who have set up well-oiled schemes to siphon off public cash into private pockets.

"In the end, it's the taxpayer who loses out," Nefyodov said.

As you might expect from someone coming from the private sector, Nefyodov has taken a businesslike approach to the problem. His team has achieved the kind of results that few other ministries can boast of in the year-and-a-half since the EuroMaidan Revolution. So far, the team has:

- Created ProZorro, a full-service electronic public procurement system, which started operating in pilot mode on Feb. 12;
- Held 12,260 electronic tenders worth Hr 3.72 billion as of Oct. 2;
- Saved the state Hr 306.4 million on procurement as of Oct. 2;
- Had public procurement legislation passed in parliament, and signed by the president on Sept. 25;
- Prepared a bill on electronic procurement for approval in parliament; and

On Sept. 11, deputy Economy Minister Max Nefyodov talks with the Kyiv Post about eliminating corruption in public procurement in Ukraine. (Volodymyr Petrov)



- Reached the final stage of negotiations on Ukraine's accession to the Government Procurement Agreement, which will open access to the World Trade Organization's \$1.7 trillion public procurement market for Ukrainian companies.

"It's really like you are a start-up founder and then you see people flocking to it ... and numbers growing... We're almost doubling every month," Nefyodov said proudly.

While managing the public procurement reform project as if it was a private entity, Nefyodov admits that when it comes to funding, the resemblance to the business sphere ends.

"Anyone could do it with money, but try to do it for free..." Nefyodov said, noting that "even with public procurement reform, the budget for it was zero."

While there are some things that can be certainly done for free initially, there comes a time when money is needed for the ProZorro electronic public procurement system developed by his team.

"It means that things that were done by volunteers, for example IT support, now have to be done by professional companies," Nefyodov said.

The price tag for developing the ProZorro software over the 18 months is \$1 million.

ProZorro has so far received funds from partners, who donated \$10,000 each to develop the system, along with \$50,000 from the Western NIS Enterprise Fund and \$17,000 from European Bank for Reconstruction and Development. The project is close to receiving \$60,000 from the Germany's GIZ state fund, Nefyodov said.

The new software was designed to tackle some of the key problems of the old state procurement system - low transparency, rigid barriers against free participation of business, and the low professionalism of procurement officers.

"The more we put procurement into an electronic format, the easier it is for everyone to work with it - including procurement officers, suppliers, regulators ... police, prosecutors, ministers, anti-corruption activists, journalists and others," Nefyodov told the Kyiv Post.

IT support isn't the only thing ProZorro needs to function properly, however. The system is now backed up with supporting legislation.

The new law on public procurement, which covers both paper and electronic procedures, adds transparency to tenders by making tender committee protocols and financial proposals publicly accessible, as well as introducing a transparent appeals system and demanding the disclosure of the bidder's final beneficiary.

Increased competition, which is also seen as crucial by Nefyodov, is encouraged through the "post-qualification clause" in the bill. The clause requires bidders to prove their eligibility to bid only if they win a tender.

"We want six, seven, 10 companies to participate in each tender, which would make it close to impossible for them to collude in the bidding process," Nefyodov said. "Even if something wrong happened, there would be lots of competitors that would have a clear incentive to file a complaint."

Apart from saving the state money, the new law improves Ukraine's chance of signing up to the WTO's procurement agreement. If the country accedes to the agreement in November as planned, small- and

medium-sized Ukrainian businesses will gain access to state procurement tenders held in all WTO member countries, opening up a massive new market to them.

Moreover, the e-procurement bill that Nefyodov is now shepherding through parliament will complete the transfer from paper to electronic procurement purchases, and allow ProZorro, currently operating in pilot mode, to go into more general use by the state.

At the moment ProZorro only covers deals that don't exceed a threshold of Hr 200,000 (\$9,070) for goods and services, or Hr 1.5 million (\$68,028) for labor.

If the electronic procurement bill is approved in November, Nefyodov expects the first set of procuring entities - ministries, regional administrations and the largest state companies - to be able to move to the new electronic system in full starting in January, when ProZorro's software will be fully implemented. Within nine months afterwards, all procurement in the country will be moved to the electronic format, the deputy minister hopes.

But the changes won't stop there.

"Electronic procurement is only a tool, and actually putting all procurement into electronic format is only 50 percent of the job," Nefyodov said. "That's because the interesting things - like monitoring and risk management systems - they only start after that."

Despite the lack of funding, resistance from vested interests, the untangling of red tape and need to lobby parliament to adopt innovative legislation, the tremendous effort has been well worth it, Nefyodov said.

"I think it was the right decision ... I do think that being in the ... public sector in Ukraine is currently the most challenging job you can have, and here you really can change something," he said. "I also understand that unless we build the country ourselves, unless we reform the economy, there just won't be any place for complex business, for investment funds, for investment banks, and for professionals in general."

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**NEWS ITEM:** On Sept. 27, adviser to the head of Dnipropetrovsk Oblast administration Yuriy Golyk and department head of Cherkasy Oblast administration Roman Karmannik debated on Facebook about who is switching to electronic procurement more quickly.

# ProZorro e-procurement improves transparency, reduces corruption and saves taxpayers \$14 million so far

By **Bozhena Sheremeta**  
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**P**ublic procurement has become a lot more transparent with e-procurement.

ProZorro, an online platform, was launched in February to shift state purchases online, with the aim of increasing transparency, saving money and reducing that corruption that costs the state \$2.3 billion in annual losses.

ProZorro was developed by activists, said Deputy Economy Minister Maxym Nefyodov. “It was designed in the fourth quarter of 2014 by Alexander Starodubtsev and Andriy Kucherenko and many other people,” he said.

More than 800 state agencies are already using the system.

While the Kyiv City State Administration and two ministries – infrastructure and energy – use it the most, the Defense Ministry has held the most expensive tenders by far. Its share is Hr 2.73 billion, or 74 percent, of the total amount.

A similar system in Georgia spurred the development of ProZorro in Ukraine.

In comparison to closed-door paper tenders, where administrators see all bidders and can adjust terms to manipulate who wins, administrators of the tender cannot see applicants in ProZorro.

In addition, the platform opens up data on the tender to anyone, not only to potential bidders. The terms of the tender and the bids are also visible to anyone, while competing bidders cannot see each other in the system.

The ProZorro system reviews the cheapest offer and, if it fits requirements, is automatically accepted.

The new way has worked well enough to save more than Hr 306.4 million, or \$14.4 million as of Oct. 2.

“In electronic format you can see everything,” says Natalia Abesadze, who is in charge of legal coordination at ProZorro.

Most state agencies can currently place tenders for goods and services worth up to Hr 200,000 and tenders for labor worth up to Hr 1.5 million. However, state enterprises that are monopolists – like Ukrposhta, Ukrzaliznytsya, Energoatom and others – are allowed to hold tenders that exceed these thresholds.

With adoption of the e-procurement bill, there will be no restrictions on tender amounts,

ProZorro is operated by Transparency International Ukraine. But by the end of the year, its databases will be transferred to a state enterprise managed by the Economy Ministry, while bidding platforms will remain in private ownership.

The team working on ProZorro consists of more than 100 people, including specialists in tech, support services and those who attract new suppliers for participation. Some are being paid for their work by Transparency International and others are being paid by providers that work with ProZorro. The Economy Ministry’s employees are also involved in ProZorro, but don’t get paid for the work by the government.

Andriy Kucherenko, who is in charge of IT system coordination at ProZorro, says state officials’ reaction to ProZorro varies.

“There are those who have a positive attitude towards the platform and become leaders in using it. For example, Defense Ministry, Infrastructure Ministry, Kyiv State City Administration, Energoatom and others,” according to Kucherenko. Other agencies are not as accepting and legislation will be needed to get them to use ProZorro.

Oleksiy Soloviov from Gide Loyrette Nouel said ProZorro is still a work in progress.

“The full integration of ProZorro into the legislation on public procurement will require assurance from its developers for its reliability and, most importantly, predictability,” says Soloviov. “Who will be the system’s administrator? Who will do the technical expertise and audit?”

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**Natalia Abesadze, a member of ProZorro team responsible for legal coordination, looks through a report on the electronic public procurement system on Sept. 29 in Kyiv. (Volodymyr Petrov)**





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# Time running out to sell Ukraine's ethanol-producing monopoly

By Ilya Timtchenko  
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An estimated 600 million hryvnias (\$28 million) in losses last year and 41 rundown factories – that's what Roman Ivaniuk inherited at the beginning of January, when he accepted his latest job as temporary general director of Ukrspyrnt.

Ukrspyrnt, the country's monopoly producer of potable ethanol, is one of Ukraine's most corrupt state-owned companies within the Ministry of Agriculture.

Its previous director, Mykhaylo Labutin, is wanted by Interpol for the misappropriation of at least Hr 300 million, among other charges. The





One of Ukrspyr't's 5,000 employees oversees ethanol production at a plant. Out of the 41 plants that belong to the state enterprise, only 17 of them are in constant operation. (Courtesy by Ukrspyr't)

state-owned firm is still not on the government's privatization list, but Ivaniuk is running it as if it is.

"I'm still a big believer that the most efficient owners of businesses are private entrepreneurs and private businesses," Ivaniuk says.

The 32-year-old director says it makes much more sense for such a business to be privately owned, with no prosecutors and tax inspectors sniffing around to see "if we're doing an efficient job or not."

In private hands, Ukrspyr't would be twice as efficient as it is now, the Volyn Oblast native says. "Big national companies have got to be privatized."

Previously employed as the management director of Concorde Capital, a Ukrainian investment bank, Ivaniuk had also worked at Ukrspyr't back in 2006, as head of its financial department. In 2014 he ran for parliament in the Oct. 26 elections for a party in the Bloc of Petro Poroshenko, but he failed to win a seat. He's in a different race now – one of five contestants vying for a permanent position as Ukrspyr't's general director.

If the state alcohol monopoly is finally sold off, Ivaniuk has a clear idea how it should be done. The state business has to be split into several groups of companies, with the stronger ones sold together with weaker ones as a package, he says.

"If there were four or five companies like Ukrspyr't... they couldn't control prices - they would have to fight for efficiency, modernize their production systems," Ivaniuk says.

Selling each company separately is not an option, since buyers could be found for no more than 20 plants, and the rest would have to be closed down completely. Ivaniuk sees this as a major problem.

"Can you imagine shutting down a factory in the middle of nowhere where only 600 people live, in a village, where 150 of the residents work at the Ukrspyr't factory?" Ivaniuk says. "That would mean you'd be closing down the village too."

Corporatization is another option, but the temporary director is not a big fan of that idea. Even after such an overhaul Ukrspyr't will still "be a package that belongs to the government, so all the problems that I face right now will still be there."

The biggest of those problems is, of course, corruption.

Ivaniuk says many of the middle managers and directors of ethanol plants have made

connections with local government officials over the years in order to create schemes to drain cash out of the business. "It's hard to just get the source of income out of their pockets," Ivaniuk says. "They use all their powers, all their deputies, all these committees to tell us that the ethanol plants have to be nationally-owned."

Meanwhile, some of Ukrspyr't's top customers - Ukrainian vodka producers such as Khortytsia, Nemiroff and Petrus - are fighting for the opportunity to produce ethanol themselves. Ivaniuk estimates that private companies could save around Hr 80-90 per decaliter if they were allowed to produce ethanol independently.

And ahead of its possible privatization, Ivaniuk is looking to make savings at Ukrspyr't as well. While he thinks the company would sell for perhaps \$300 million today, improvements in efficiency could triple its value over the next two years, he says.

While Ukrspyr't is waiting for parliament to approve its privatization, it is trying to rebuild links with the European Union and Turkey. "We use to export more than 10 million decaliters back in 2006-2007. Right now we export zero," Ivaniuk says.

However, the European Union countries and the United States are mainly interested in technical ethanol, or bio-fuel, compared to the potable ethanol Ukrspyr't makes that is used to produce liquor. "The market of Europe is 15 million tons of ethanol. Only 10 percent of that is potable," Ivaniuk says. Other ways ethanol is used are in various cleaning fluids such as windshield wash, or in medicines.

So Ukrspyr't's new management now wants to concentrate on bio-ethanol production. Even though most of it would be exported, it would also prove to be a good substitute at home for less efficient forms of energy - for example, it could be a good replacement for natural gas.

The state enterprise is experimenting with the fuel itself. "Two of our plants don't use natural gas anymore. Their efficiency is almost 40 percent," Ivaniuk says. The plan is to re-fit six other similar plants to use the replacement fuel.

Other efficiency measures have resulted in Ukrspyr't managing to decrease its use of raw materials by 20 percent. That, along with savings from the removal of 25 percent of the staff from the company's head office and the replacement of top management, should mean



**Ukrspyrnt's temporary general director Roman Ivaniuk meets with the Kyiv Post on Sept. 25. (Volodymyr Petrov)**

Ukrspyrnt makes “approximately Hr 300 million in gross profit by the end of the year,” Ivaniuk says.

Just by making it more difficult for middle managers to steal money during the purchase of raw materials, Ukrspyrnt is able to save around Hr 20-25 million per month, Ivaniuk says.

One way this was done was to establish a “purchasing commission” consisting of five people. “There is a collective decision, and all the (managers) that sign up to this agreement know they are responsible for these purchases,” Ivaniuk says.

Increasing operating capacity is another way to improve efficiency and fight corruption at the same time. Previously, plants were operating only at round 50 percent of their

capacity, while now it's more like 90 percent. Ivaniuk says the officially unused capacity of some companies was in fact being used – to produce alcohol illegally.

“That's why back in 2014 they used so much gas and wheat to produce one liter of product,” he says. “When you have an efficiently working plant, it means that you cannot simply produce illegal ethanol there.”

Yet more savings come from closer cooperation with farming companies. Right now only 17 of Ukrspyrnt's ethanol plants are fully functioning. To make use of the other three dozen plants, the monopoly is starting to strike deals with local farmers, in which the state enterprise provides storage services to agricultural companies, as a lot of its own storage capacity is empty.

Some of the farmers in turn sell grain at lower than market prices to Ukrspyrnt. This is for two reasons, Ivaniuk explains: first, grain producers often prefer to sell their grain right away, in bulk, and so save on transportation costs, and second, the quality of wheat needed to make ethanol can be lower, and the grain thus cheaper.

This is not another corruption scheme in which the government resells the grain at a higher price, he is quick to add, and his message to potential Western investors is: “Don't be afraid, because this is the time to pick up great assets at quite a reasonable price.”

Ivaniuk believes Ukrspyrnt can be sold off - but time is fast running out.

“We've been talking about the privatization of Ukrspyrnt for the last 10 years, and nothing has been done,” he says. “If the company is not sold by the third quarter of 2016, it will be a lost cause.”

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**NEWS ITEM:** Ukrspyrnt, the monopoly state-owned ethanol producer, has been a cash cow for government officials. This is one reason why those in power don't want to privatize it. Ukrspyrnt temporary director Roman Ivaniuk says that managers of ethanol plants “use all their force, all their deputies, all these committees to tell us that the ethanol plants have to be nationally-owned.”





# Toms promotes legal ombudsman as a fix to Ukraine's justice system

By **Olena Goncharova**  
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Few Ukrainians trust the police, prosecutors and judges who form the nation's judicial system, according to every respectable poll taken.

The solution?

A legal ombudsman. That is the answer touted by Bate C. Toms, an American lawyer and chairman of the British-Ukrainian Chamber of Commerce. The ombudsman would review court decisions, write explanatory opinions and make advisory reports to parliament.

"That's what we want – to take (their reports) to parliament and have parliamentary committees then consider impeachment of judges who render judgements that are indefensible," Toms explained in an interview with the Kyiv Post.

At the moment, complaining even at the highest level doesn't bring results as government claims to be unable to review and decide because officials are not lawyers.

Giving such power to an eminent jurist, selected by a nongovernmental organization created by leading business associations, would clean up the courts in a matter of months, Toms claimed.

Restoring trust to the judicial system is key to reviving private investment in Ukraine.

"Even more than war, we see foreign investment blocked abroad as there's total underconfidence in Ukrainian courts to fairly rule on

cases as the decisions have no conceivable basis in law," Toms says.

While a court system should be a separate branch of government, checks and balances from other branches are essential to holding all of them accountable.

Separation "doesn't imply that each branch can't review each other," Toms said. "It's all about checks and balances. In America, you can impeach a judge and in Ukraine, you can do as well. That's what the legal ombudsman is based on," Toms said.

Toms said the ideal ombudsman would be a jurist from outside the current legal system whose institution is funded by Western sources. The legal ombudsman, as well as the judges, should be paid well, so they can live reasonably.

"Everybody understands the cost of underpaying judges – it stimulates corruption," Toms said.

Toms is trying to build support for the idea. "This country could become so rich and grow so quickly if we had reasonable rule of law. In today's situation this one should work," Toms said. "This is different from business ombudsman – it's a lawyers' lawyer. He's there to intercept gross abuses of justice and stop decisions that have no genuine legal basis."

Toms said he can set up the institution within six months and has some candidates in mind for the post.

**Bate C. Toms, an American lawyer and chairman of the British-Ukrainian Chamber of Commerce says legal ombudsman would help to clean up Ukraine's court system. (Pavlo Podufalov)**



**NEWS ITEM:** Bate C. Toms, the head of the British Ukrainian Chamber of Commerce, thinks an advisory legal ombudsman to review the work of the courts will go a long way towards combating corrupt judges and rulings for hire. Others think that the courts and parliament will simply ignore the ombudsman.

Alina Sviderska, a lawyer and a project manager with EasyBusiness organization, said the idea of creating a legal ombudsman is a timely one.

“The legal ombudsman could be like the Venice Commission for business and the government organizations to address to,” Sviderska told the Kyiv Post. “But it will require political will to listen to such an ombudsman as we know certain cases have been reviewing for years in Ukraine due to political pressure.”

It won't be the cure-all, however, as the country still needs qualified investigators overseeing judges and many fixes to the rest of the criminal justice system, including an

overhaul of investigative bureaus and the General Prosecutor's Office.

Introduced in Sweden in the early 20th century, legal ombudsman helped transform the country from being the least corrupt and the most prosperous nation, Toms said. “It will work in today's Ukraine,” he said. “Nothing else will improve the court system.”

The legal ombudsman, combined with other reforms, will help assure investors that court rules can be satisfactorily justified under the law, according to Toms.

Toms also has been pushing for wider availability of political risk insurance, through a branch of World Bank, and the Overseas Private Investment Corporation, a U.S. government finance institution.

“Without increased investment, this country will have difficulties surviving,” Toms said. “We're in emergency situation. We need it immediately.”

Toms is also an adviser to Education Minister Serhiy Kvit and wants British and American laws schools to set up law programs with universities in Ukraine.

“One of the problems in legal education in Ukraine is that the number of scholarships abroad for Ukrainian law students have been drastically cut. People can no longer afford to go abroad for education,” Toms said. Therefore, he said, it's more economical to bring in professors from abroad.

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