**Background checking (vetting) of the persons applying to the high-level positions**

**Study Document based on EU, UK and other best practices**

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1. **Introduction**

Background checks or vetting procedures are usually in post-conflict, pre-transition and/or post authoritarian societies, where the corruption level, especially concerning high level officials, is high.

There is no EU level or universally accepted definition for high level positions specifically at risk to corruption. Therefore, states determine themselves how they should define ‘high level corruption’. However, preliminary criteria for high profile case are built on two different categories:

**I)** there **exists exhaustive list or case practice of position holders** that are characterized as high-level perpetrators. The determining element is position. It seems that a threshold has been used to identify and target top level officials, something that Armenia might wish to aim for (see Annex 1. – List of High Level Positions)

 **2)** the **persons carrying out control tasks and decision-making duties** should acknowledge that, most likely, these persons are under current definition of high level position which aims to cover similar activities having multiple and well-grounded requirements.

The first category of the definition must be understandable and meaningful so that authorities can identify cases that qualify as high-level corruption in Armenia.

1. **EU Legislation**

In Europe background checks are not permitted to some extent. In April, 2016 a new European Union (EU) data protection framework was adopted by EU Member States and 11 other countries maintaining cross-border data transfer “adequacy” regulations.  There are a number of general principles that can be consistently applied to background screening and it is best practice to ensure that such processes be managed to comply with the general privacy law in the EU.

**Personal Data Protection (Privacy) Law**

The cornerstone to data privacy law in the EU is the data protection principles (“Principles”) stating that any personal data is: processed lawfully, fairly and in a transparent manner in relation to the data subject (‘lawfulness, fairness and transparency’); collected for specified, explicit and legitimate purposes and not further processed in a manner that is incompatible with those purposes; etc.

Consent must be freely given, specific and informed and in the context of background screening; the candidate must know why they are being screened and by whom, what type of information will be verified, who will have access to the results, and in which jurisdictions their data may be handled. Further, the candidate must be able to revoke consent at any time.

Usually agencies in Europe and UK carry out the pre-employment screening of potential candidates for certain positions[[1]](#endnote-1). The requested data could include:

1. **Previous employment history and references** (was candidates truthful about their previous work, including reasons for leaving and disciplinary actions, if any undertaken)
2. **Educational and professional qualifications**- validates schools, colleges and universities attended, dates attended, plus degrees and other qualifications gained.
3. **Criminal record** **and administrative offences**
4. **Credit history**
5. **Driving record** (if applicable).
6. **Residential status** **verification**
7. **Eligibility for employment**

There could be additional requests to provide information on the following:

1. **Directorships and shareholdings** - highlights any conflicts of interest that might arise from current or past directorships and associated shareholdings.
2. **Director litigation and bankruptcy** - discloses defaults, court action, and the financial integrity of the company for which the candidate acted as a Director.
3. **Management and director disqualification**
4. **Media and Online Data**
5. **Country studies:**

Mostly in the EU Member States the specific procedures for the checking of the background of candidates for high level positions are considered as general procedures to hire any employee. For example[[2]](#endnote-2):

* 1. **GERMANY**

In Germany no specific legislation exists concerning background checks; the permitted room for maneuver must be determined on the basis of the existing legal situation.

Statutory constraints with regard to the acquisition and storage of personal data are in place, warranting the protection of the private sphere and the right of self-determination. The applicant need not tolerate any background checks that go beyond an employer’s permissible right to ask questions within the limits of the German Equal Treatment Act (AGG) and the personality right of the applicant.

The employer may – both before and after the job offer – request the original documents for perusal, and after being given the applicant’s written consent, may also contact schools, universities and former employers directly.

Potential employers may only demand limited information on previous convictions or on the applicant’s financial situation. Questions will only be permitted if the information is relevant to the advertised position, for example because particular trustworthiness and financial reliability are required. Scrutiny of any previous convictions will only be possible in rare cases through presentation by the applicant of a certificate of good conduct (Führungszeugnis).

The applicant’s career development and criminal history will only be allowed to be scrutinized in the existing employment relationship if this failed to take place already during the recruitment process, and if the concrete workplace is affected. Then, the written approval of the employee will be required, except in the case of legitimate suspicion of fraud on the part of the employee. Moreover, as a rule, the employer can request presentation of the employee’s work permit and residence entitlement without giving a reason. Creditworthiness checks like SCHUFA information or extracts from the commercial register are prohibited under the German Data Protection Act.

* 1. **FRANCE**

French law offers no explicit statutory framework for handling background checks. It contains provisions concerning admissible acquisition of data relating to applicants. Pursuant to article L.1221-6 of the French Labor Code, the employer can only obtain information about an applicant, which facilitates an assessment of their professional skills with regard to the position being offered. These professional skills must be directly required for the position. Social security enquiries about the applicant are generally prohibited, except if the applicant is not yet registered for social insuarances. In all other respects, personal particulars are allowed to be subject to comprehensive scrutiny. The employer can demand presentation by the applicant of the relevant job references, eg, of former employers, however, not the presentation of pay slips. In addition, the employer has the right to ask questions concerning previous positions and the grounds for their termination. The applicant’s consent relating to enquiries made to former colleagues is required.

Employers may make use of all information from the internet, irrespective of whether it was posted on social or work-oriented networks. In France, the employer is generally prohibited from reviewing any previous convictions as well as the applicant’s financial position. If applicable, the employer can – only by setting forth a legitimate interest – demand the current extract number three of the certificate of good conduct, which lists the heaviest penalties and can only be applied for by the applicant itself. An exception is made in the area of asset management, eg, in the banking industry. With applications in the areas of security or care, the employer additionally has the option, under administration law, of having police files reviewed by local government.

During the existing employment relationship, the employer as a rule (setting out its legitimate interests) can demand updated versions of the certificate of good conduct.

* 1. **ITALY**

In Italy, prior to the acquisition of personal data, there is no general duty to notify the applicant or to obtain the applicant’s approval. The person concerned should be informed in advance concerning the purpose of the background check, in terms of whether the data has to be surrendered voluntarily or obligatorily and with regard to the consequences of non-voluntary surrender (see article 13 of the Italian data protection law).

At the employer’s request, applicants must communicate their social security number to the employer. Publicly accessible data, for example a birth certificate, can be perused by the employer at any time without the approval of the applicant; detailed information can only be viewed with the approval of the applicant, the employer demonstrating a special interest. The employer can comprehensively scrutinize statements made by applicants about their educational background. Upon request, schools and universities are required to surrender their assessments (possibly via electronic information) to the corporation. This generally also applies to enquiries made by former employers. The employer may call on the applicant to handover documents on previous nationwide convictions and pending proceedings before the court in the potential employer’s district. However, the employer may not call for bank and credit card information.

The employer’s right to information also continues to exist during the current employment relationship to the same extent as prior to recruitment. In exceptional cases, dismissal is possible if, after examination of the data, it subsequently emerges that the employee fails to meet the requirements of the position. The employer may store data in the individual case, stating a legitimate purpose, for the duration of the employment relationship. In the event of unauthorized or unlawfully conducted background checks, the employer will be liable for prosecution under civil law and criminal law.

* 1. **DENMARK**

The employer’s right to information is determined in Denmark notably by way of the Danish Act on Processing of Personal Data, APPD. With the written approval of the applicant or employee, the employer can subject their personal data to scrutiny by means of a database governed by social security legislation. If the applicant refuses such scrutiny, the employer can refrain from recruitment for this reason, provided the employer has already informed the applicant of the consequences thereof.

With regard to educational background and previous activities, as a rule, the data from the application may be verified by the employer. Applicants can be called on to surrender contact data of former employers. Also in the existing employment relationship, scrutiny can take place if there is legitimate suspicion of fraud by the employee to the detriment of the corporation. If the employer acquires information via social networks, it must grant the employee the opportunity of answering. The applicant must disclose previous convictions if the offence is relevant to carrying out their duties and if there is a temporal proximity between the offence and the position. This is the case if an official permit regulated by statute for exercise of the function is required, for example relating to insurance clerks, attorneys or finance managers. The legal limits of data acquisition, notably the proportionality principle, are applicable in favor of the applicant and the employee. As a rule, the employer obtains information about relevant previous convictions from the public criminal records kept by the police with the written approval of the applicant.

* 1. **THE NETHERLANDS**

In the Netherlands, background checks regarding applicants and employees are generally permitted, but limited by the Data Protection Act (Wet Bescherming Persoonsgegevens). Background checks are only supposed to be carried out relating to necessary data for the firm offer of a position.

The information on professional experience and educational background listed in the application, can, however, be subjected to scrutiny by the employer by making enquiries to former employers.

However, it is up to applicants as to whether they provide information to the potential employer about their financial situation and credit rating. This principle also applies to any previous convictions. Exceptions apply relating to function-related previous convictions, for example, in the case of an applicant for a position as a primary school teacher previously convicted for the sexual abuse of children.

These principles relate to the duty to provide the requested information comprehensively, at any time during the current employment period, and to the extent that scrutiny of data relating to the employee’s position is relevant, and the interests of the employer outweigh those of the applicant. In the Netherlands, the right of the employer to be able to use all private and work-related information from the internet has existed hitherto. To date, notification about the found information has not been prescribed by statute.

* 1. **UNITED KINGDOM**

In the UK, what information businesses can and cannot use in background checks is readily defined by the government. The official government website.[Gov.uk](https://www.gov.uk/employers-checks-job-applicants) provides such information:

* UK employers must perform background checks to determine an employee’s eligibility to work in the UK or be fined up 20.0 GBP
* Jobs that involve healthcare and childcare are allowed to require criminal background checks however such checks require the individual’s consent before they are carried out.
* It is illegal to refuse to hire someone due to “spent convictions” on their criminal record
* Personal health information is only allowed in two cases: it’s a legal requirement, such as eye checks for truck drivers, or if the job requires it (for example, the company insurers require health checks on cycle couriers)
* Health checks that are performed must meet legal requirements and not discriminate based on certain criteria (more details below)
* Employers must follow data protection laws when conducting background checks.
* UK employers must verify the identity and immigration status of all employees, and must keep copies of all visas and work permits. Failure to do so can result in civil or criminal prosecution.
1. **Specific practices:**
	1. **Lithuanian Practice on Background Checking of the persons applying to the high-level positions.**

In Lithuania high level positions are linked to the corruption potential risks defined in Corruption Prevention Law Art. 9 “Provision of Information about a Person Applying for or Holding a Position in the State or Municipal Agency”.

 The provision of information about a person applying for a position in the state or municipal agency means is required by the law enforcement and control institutions. The collected information has to be provided to the head of the agency or a state politician, who has appointed or is appointing the candidate. The procedure is prescribed by law and can be carried out upon the request of the head of the agency concerned or a state politician or on the initiative of the law enforcement or control institutions, in order to ensure that only persons of impeccable reputation can hold office in the state or municipal agency.

The provision of such information shall be obligatory with regard to the applicants for a position in the state or municipal agency[[3]](#endnote-3).

High level positions listed as such in the Law of Corruption Prevention are those:

1. requiring the appointment by the Parliament, President, Chairman of the Parliament, the Government or Prime Minister,
2. or for the office of the head and deputy head of the state or municipal agency,
3. vice-minister,
4. under-secretary of state,
5. under-secretary,
6. deputy mayor if appointed by the municipality,
7. the head or deputy head of the agency accountable to a ministry.
8. The collection of the pre-screening information is the responsibility of Special Investigations Service of the Republic of Lithuania which has the right to request the following legal information of the providers:
1. the criminal record of the person to be examined;
2. prosecution for a criminal offense against the person subject to inspection;
3. punishment of the controlling person for the commission of administrative violations of law;
4. the fact that an investigative person is undergoing an operational investigation;
5. the recognition of an inspected person in accordance with the procedure established by the laws of a non-active or limited factor;
6. abuse of narrative, psychotropic, toxic substances or alcohol by an inspected person;

7.the fact that when entering the service of the state the person who checked falsified documents, concealed or submitted data which did not correspond to reality, which could not be accepted as a civil servant;
8. the application of preventive measures to the inspected person in accordance with the Law on the Prevention of Organized Crime of the Republic of Lithuania
9. cases in which the controlling party violated the requirements of the Law of the Republic of Lithuania on the coordination of public and private interests in the state service
10.  Service discipline (disciplinary) for the inspected person - strict reprimand or dismissal.

The final decision on the applicants’ reputation status after evaluating all relevant data provided by Special Investigations Service has to be communicated to the Head of the Appointing Body.

* 1. **Checking the background and reputation for candidates for judges or prosecutors (vetting procedure)**

The purpose of specific screening/vetting procedure in the domestic legislation is to check the background and professional preparedness of prosecutors and judges, to increase their moral integrity and ensure the independence from corruptive ties, as well political intervene.

One of the successful frameworks for the vetting process could be viewed is Albanian model. “The Law on Reassessment of Judges and Prosecutors”, known as the “vetting law” was passed by the Parliament in August 2016.

But similar vetting procedures also were carried out in some post-soviet countries as: Hungary, Czech Republic, Croatia, Serbia, Kosovo and Bosnia and Hercegovina. Lastly, in the neighboring country of Croatia, vetting measures have also failed to date, with only two legislative proposals related to abuses committed during the Communist era, with neither of them passing. The initiatives in Croatia and Serbia in vetting implementation were weak and misleading data and information collected (during the background checking).

**4.2.1. Bosnia and Hercegovina**

The vetting processes of judges and prosecutors who apply for posts includes:

* + a performance review,
	+ asset disclosure,
	+ and background checks.

Three High Judicial and Prosecutorial Councils restructured the court system and reappointed all judges and prosecutors between 2002 and 2004. The reform restructured all Bosnian court system and re-appointed all judges. The Counsels were made up of international and local personnel. Around 1000 jobs were posted again as vacancies for the transparent competition. Unfortunately, the vetting system failed in Bosnia and Hercegovina as no clear criteria of evaluation were established in the legislation. Some criteria as war crimes record, financial status, property declarations, integrity skills were difficult to evaluate because of the weak institutional set-up of Bosnia itself.

The judicial reform had the mild impact as the process was supervised by the international community and awareness on the accountability and transparency was raised as part of public confidence.

**4.2.2. Kosovo**

In Kosovo implementing vetting procedure approximately 900 judges and prosecutors were checked (re-evaluated). In the re-assessment process, 50 percent of judges and prosecutors passed professional conduct and work-related tests and therefore were re-appointed as judges or prosecutors.

The judges and prosecutors had to pass a professional competency assessment, present asset declarations, and pass background investigations.

The re-assessment procedure was carried out under the supervision of EUD Liaison Office for the purpose of setting up transparent and trust-worthy judicial system, to build public confidence and general trust of judiciary.

The vetting procedure was successful, but the result did not have an impact on other indicators such as lack of judicial independence, lack of clear indicators of vetting process evaluation and high level of corruption.

**4.2.3. Albania**

“The Law on Reassessment of Judges and Prosecutors”, known as the “vetting law” was passed by the Parliament in August 2016.[[4]](#endnote-4) The Law itself is comprehensive, but it is difficult to carry out its implementation.

This law provides for:

* 1. the organization of the re-evaluation process in particular for all judges and prosecutors;
	2. the methodology, procedure and standards of the re-evaluation process;
	3. the organization and functioning of the re-evaluation institutions,
	4. the role of the International Monitoring Operation, the other state organs, and of the public in the re-evaluation process.

The special Commissions (Appeal Chamber and international observers) under the Law were established to verify truth and accuracy of statements made by the assesse. The evaluation bodies have been provided full access to all databases maintained by specialized prosecution office:

a) Information on the judicial status of the assessed;

b) personal files of assessed, statistical data, legal documents and files selected for evaluation, self-assessments, supervisors’ opinions, data on training, and complaints against persons subjected to evaluation, results from the verification of complaints, as well as decisions on disciplinary measures against the assessed;

c) data in immoveable properties of the assessed registered with the cadaster or obtained through a notarial act not registered with the Immoveable Properties Registration Office.

To verify all necessary information about a candidate, the Commission or the Appeal Chamber has access and the right to request information from the cadaster and/or the Albanian notarial register[[5]](#endnote-5):

* + 1. bank accounts, tax information, vehicles database, border entry and exit data;
		2. data on ownership rights or interests on assets of every kind, moveable or immoveable, corporeal or incorporeal, material or immaterial, including those evidenced in electronic or numeric format, including but not limited to instruments such as loans, traveler’s cheques, bank cheques, payment orders, all types of securities, standing orders and letters of credits, and any interest, dividends, other income or value deriving thereof.
		3. data on possible business relationships, commercial activities or other professional activities.
		4. data that prove the existence of money in cash or other monetary market means or interests and/or payments, including but not limited to cheques, receipts, certificates of deposits, debit or credit cards, electronic payment cards, securities, and any other document that proves the existence of a monetary obligation or other deposited value and an obligation to pay to the assessed a corresponding amount in cash money or other form;
		5. data that prove the existence of trusts or other similar agreements.

According to Law Art. 39, The National Security Authority in collaboration with the working group within 60 days of the formation of the working group, shall review the background declaration and verify whether the information is accurate and whether the assesse has any inappropriate contacts with persons involved with the organized crime or alleged members of organized crime.

However, the vetting law, as preventive tool for corrupted judges and prosecutors, contain its weaknesses:

1. The law grants the possibility of resignation for judges and magistrates no later than three months from the entry into force of the law, translating into a ‘free pass’ to all judges or prosecutors that resigned in time,escaping, de facto, from the evaluation and assessment process.So far, more than a hundred judges and prosecutors in Albania have resigned from office, due to shifts in ‘career focus’ and/or worrisome ‘health issues’, with the number of resignations only expected to increase in the very near future.
2. The vetting law process doesn’t include the provisions offering guidelines on how to handle judges and prosecutors if they refuse to declare their assets but do not resign. Unfortunately, the whole institutional and legal set-up of the vetting law has been silent in regard to this issue.
3. **Armenian case (judiciary and prosecution)**

The judiciary in Armenia presents businesses with a high risk of corruption. Bribes and irregular payments are often exchanged to obtain favorable court decisions. The system is not independent: it is subordinate to elites, undermined by corruption, and a lack of training has resulted in a general incompetence of staff. In effect, manipulation of judges by the executive and widespread bribery and inefficiency are major concern. More than two-thirds of citizens perceive the judiciary to be corrupt.[[6]](#endnote-6) The Art.119 of Judicial Code of the Republic of Armenia stipulating the limitations on Appointment as a Judge, and a person may not be appointed as a judge, if:

1) He has been convicted of a crime, regardless of whether the conviction has expired or been removed;

2) His criminal prosecution has been terminated on a non-acquittal ground;

3) He is currently subject to criminal prosecution;

4) He has a physical handicap or illness that hinders his appointment to the position of a judge; or

5) He has not completed mandatory military service, with the exception of persons that were relieved of such service or had such service deferred in accordance with the procedure and on a ground stipulated by law.

In the draft of new Judicial code, Art. 124 is stipulated such provisions:

A person may not be appointed as a judge, if

1) He has committed a criminal conduct;

2) He has a disability.

3) He has not completed the mandatory military service.

4) He has lost the citizenship of Armenia;

5) He was a subject of a bankruptcy case, or the capacity limitations, or disappearance

6) Initiated criminal case against an applicant.

According the relevant bylaws regulating the employment of judges a candidate applying for a judge position has to provide such information. In addition, the candidate needs to agree to the inquiries to be made (previous workplaces, educational institutions, tax inspection), and provide statement on state fines.

Similar standards applicable to the candidates for prosecutors’ office (The Law on Prosecution, adopted 15 Nov 2017, will enter in force April 2018). In addition, in the Art 33-36 stipulated that candidate to the prosecutor’s position may not be appointed if they were previously dismissed from the police, investigator and relevant office because of implied disciplinary penalty.

Specific background checks for other candidates to high ranking positions in the Civil Service Law 2011 and in its Amendments in 2017 are not foreseen.

1. **POLICY OPTIONS RELEVANT TO ARMENIAN CONTEXT**
* High level positions are vulnerable to corruption in the post-soviet societies, not excluding Armenian context. The background checking/screening or vetting in fact is very complex process and it has to be evaluated properly keeping in mind the risks of unexpected consequences. To implement corruption prevention measure firstly a political decision is needed. There could be two options to discuss and take into consideration:

**OPTION 1:** Armenia could consider the possibility of re-appointment of judges/prosecutors and make room for political influence by independent institutions to empower the implementation of screening/vetting. This would be similar to the Romanian example.

**OPTION 2:** The high-level positions are indicated in Armenian legal framework, nevertheless there is a need for system/procedure for checking/evaluating the reputation/background of candidates applying to high level positions. The Governmental procedure could describe the positions mostly prone to corruption to require background prescreening, as one of the effective corruption prevention measures. This would be similar to the Lithuanian example.

 In the current legal framework establishing the National Corruption Prevention Agency there is no new investigation or intelligence functions prescribed. As candidates pre-screening activity requires the permission and entry into the confidential databases of the law enforcement agencies, banks information and the data protected under The Personal Data Protection Law, there are many amendments needed in all other relevant legislation before the corruption prevention measure could be fully implemented. The new function of the relevant anti-corruption law enforcement agency (such as Specialized Investigations Agency) in cooperation with New Armenian National Corruption Prevention Agency should be discussed if there will be new established system/procedure for checking/evaluating the reputation/background of candidates applying to high level positions. This measure could be discussed by the new Working Group established by Ministry of Justice in drafting of the new National Anti-Corruption Strategy 2018-2020.

The requested data should be analyzed could be as such: previous employment history and references, educational and professional qualifications, criminal record and administrative offences, credit history, driving record, residential status verification, eligibility for employment, shareholdings, litigation and bankruptcy, disqualification, media and online data.

**ANNEXES**

The suggested candidates to the following positions could be pre-screened:

High level positions prescribed by Armenian Law on Civil Service:

The scope of action of this Law covers high ranking public officials, as well as persons holding positions foreseen by the roster of public service posts in the following bodies:

1) Staff of the President of the Republic of Armenia;

2) Staff of the National Assembly of the Republic of Armenia;

3) Staff of the Government of the Republic of Armenia;

4) Staff of the Constitutional Court of the Republic of Armenia;

5) Staffs of the Ministries of the Republic of Armenia;

6) Staff of the Public Administration Bodies under the Government of the Republic of Armenia;

7) Staffs of the Permanent Bodies (committees, services, councils) established by the laws of the Republic of Armenia;

8) Staff of the Central Bank;

9) Staff of the National Security Council of the Republic of Armenia;

10) Judicial Department of the Republic of Armenia

11) Prosecutor’s Office of the Republic of Armenia

12) Staffs of state bodies functioning in the area of governance of the Ministries of the Republic of Armenia;

13) Staffs of the Marzpetarans (Regional Governors’ Offices) of the Republic of Armenia;

14) Staff of Yerevan Mayor’s Office;

15) Staffs of the bodies of local self-government of the Republic of Armenia;

16) Staff of the Human Rights Defender of the Republic of Armenia.

In the amendment of Civil Service Law:

* high-ranking officials;
* non-high-ranking-officials that are holders of the highest positions of civil service;
* holders of the highest positions of public service in the Staff of the National Assembly of the Republic of Armenia;
* the Republic of Armenia Ministry of Foreign Affairs General Secretary and the head of a separated subdivision of the Staff;
* holders of the highest positions of service in the Republic of Armenia Special Investigative Service, service in the Republic of Armenia Investigative Committee, and public service in the Department of the Republic of Armenia Investigative Committee the Republic of Armenia Special Investigative Service Chief of Staff and his deputy;
* heads and deputy
* heads of state bodies operating in the administration field of ministries of the Republic of Armenia; holders of the highest positions in judicial service; holders of the highest and senior positions in the special services, except for holders of senior positions in the national executive bodies of defense and national security and in the rescue services;
* holders of senior positions in the penitentiary service and the service ensuring compulsory execution of judicial acts; prosecutors; investigators of the national security
* bodies, tax and customs services, the Investigative Committee, and the Special
* Investigative Service; mayors of communities with a population of 15,000 or more;
* heads of the administrative districts of the City of Yerevan;
* and members of the Procurement Appeals Board.
1. http://www.eurobg.com/about-us.php [↑](#endnote-ref-1)
2. http://www.hireright.com/emea/ [↑](#endnote-ref-2)
3. http:www.stt.lt [↑](#endnote-ref-3)
4. http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-REF(2016)062-e http://legalpoliticalstudies.org/wp-content/uploads/2017/06/Policy-Analysis-An-Analysis-of-the-Vetting-Process-in-Albania.pdf [↑](#endnote-ref-4)
5. http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-REF(2016)062-e [↑](#endnote-ref-5)
6. http://www.business-anti-corruption.com/country-profiles/armenia [↑](#endnote-ref-6)