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TECHNICAL PAPER ON THE DRAFT CABINET OF MINISTERS OF UKRAINE'S RESOLUTION CONCERNING ANTI-CORRUPTION POLICY

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1 INTRODUCTION

Different countries are preventing corruption in many different ways. The first international legal instrument after Council of Europe Criminal Law Convention on Corruption (ETS 173), which brought basic rules on the topic is the UN Convention against Corruption (UNCAC). There is a whole chapter devoted to prevention of corruption and one of the articles, Article 6, is explicitly describing the obligation of Convention's state parties to have a specialised and independent (in compliance with domestic legal standards) anti-corruption preventive body. Despite the fact that this expertise is written by the Council of Europe's expert it also makes sense to evaluate the draft Cabinet of Ministers of Ukraine's Resolution concerning Anti-Corruption Policy and attached document through the eyes of UNCAC.

2 DRAFT CABINET OF MINISTERS OF UKRAINE'S RESOLUTION CONCERNING ANTI-CORRUPTION POLICY

For the purpose of this part the "core" of the Draft Resolution, namely the decision of the Ukrainian government itself preceding the attached documents (Regulations on the Government Agent on Anti-Corruption Policy Issues and Summary of Amendments in Various Government's Acts Proposed by the Draft Resolution) will be analysed.

On the basis of the given text of the decision it is obvious that the task and responsibility for drafting and implementation of national anti-corruption policy is attached to the existing body - the Ministry of Justice, whereas the task to organise those efforts is given to a new structure within the Ministry - Government Agent on Anti-Corruption Policy Issues that will be supported by a new service within the Ministry - Service of State Anti-Corruption Policy with 20 working posts.

It is important that resources for the new structure(s) within the Ministry are also ensured - the budget (from the budget of the Ministry of Justice), working posts and contact persons in other central bodies of executive power and in the prosecutorial service. It would be an improvement if the invitation for cooperation would be further extended to judicial and legislative branch of power (as in 5.4.), too.

Several questions appear concerning the position, tasks and responsibilities of the future state anti-corruption preventive body, which will be exposed in details in the next chapters but here it has to be mentioned already that it is surprising that the government itself has to bring a decision on the internal (re)organisation of one of its ministries. Of course, this remark does not tackle the substance of the decision itself since there can be different reasons for it (legislative arrangements in Ukraine, importance given to the subject by the government, assurance of resources...), which also do not take away anything from the importance of the decision.

3 REGULATIONS ON THE GOVERNMENT AGENT ON ANTI-CORRUPTION POLICY ISSUES

From the introductory part (No.1-3) it is easy to understand that the main task of the new Agent will be organisation and coordination of Ukrainian efforts in the area of drafting and implementation of the national anti-corruption policy. On the basis of such decision it is also obvious that the Agent will not have any decision-making powers and (based on No.2) no real independence (beside international and national legislation s/he will have to follow decrees of the President of Ukraine and acts of the Cabinet of Ministers), with other words: the Agent will be a civil servant holding formally very high position (equal to the post of Deputy Minister) but without any real

powers. Therefore, it is not easy to understand why the Agent would have to be appointed and dismissed by the Cabinet of Ministers itself and not by the Minister of Justice him/her – self. The Minister is the one who is proposing the appointment and the dismissal of the Agent to the Cabinet. Conditions for the appointment, which have to be fulfilled by the candidates, are given (in No.4; expert hopes that substance of the term “higher legal education” is known in Ukraine and that it means at least University degree), however, conditions/reasons for Agent’s dismissal are not given and his/her term of mandate remains unknown. Theoretically, that means that the Minister of Justice can propose the dismissal of the Agent completely discretionary. In order to strengthen the position of the Agent it would be necessary to fix his/her mandate and reasons/conditions for his/her dismissal in advance.

Tasks of the Agent (No.4) are again pointing out his/her coordinative role: the Agent is submitting (for consideration), organising, taking measures to coordinate, engaging... The most important is the first paragraph: the Agent is *submitting for consideration by the Minister of Justice proposals concerning elaboration and implementation of measures pertaining to the formulation and realisation of the anti-corruption policy...* Such description of Agent’s tasks means that it is not him/her who will decide on the text or adopt anti-corruption policy. Moreover, words “*for consideration by the Minister of Justice*” do not tell anything about the person or institution that will adopt (Minister is only considering it) the final text of the policy and have the decisive power on its implementation. It is hard to foresee how the system of implementation will work if the Minister of Justice will have to consider every proposal for the implementation of the policy. Such rigidity will disable any effective implementation and it is in contravention with the fourth paragraph according to which the Agent him/her-self will be authorised to coordinate activities of other bodies.

Some of the tasks are simply copied in the part (No.5) on the Agent’s competences (5.1. = 4.1., 5.2.=4.4., 5.3.=4.2., 5.6.=4.3, 5.9.=4.5), underlining again the nature of the Agent’s tasks. There are also some details, which raise concern:

in 5.4. only cooperation with legislative branch of power is mentioned: a comprehensive state anti-corruption policy has to include all branches of power and all areas of life, but cooperation with judiciary is not mentioned in any single sentence of the whole Resolution (executive branch is mentioned, civil society, mass media and general public, too). Judiciary is not immune to corruption and has to be included. The paragraph 5.4. is a perfect place for inserting it.

in 5.9. it is not clear what is “the public council” mentioned here.

Rights of the Agent are mentioned in No. 6 and are somehow more concrete than his/her tasks and responsibilities:

paragraph 6.1. establishes the power of the Agent to require information from central and local executive bodies and from other state authorities and local-self government bodies: it is very wide power since all state authorities (law enforcement and judicial, too?) will have to submit him/her information but more details need to be given. For example, what does it mean “established procedure” – who establishes it, where, when...? It would be much better if the following would be given here already: nature of the procedure (written or oral), timeframe for fulfilment of the Agent’s demand, decision on the possible costs of his/her demand, possible reasons (i.e. different securities) for declination of the demand, consequences for not following the demand of the Agent, ...

paragraph 6.3. gives the Agent the power to engage other specialists but again some details are missing: on basis of what reasons the heads of other organisations would be in position to reject his/her engagement, what would be the specialists’ labour position when working for the Agent, who would have to pay them ...

in paragraph 6.5. it would be advisable to mention categories of persons, which the Agent would be in position to convene,
in 6.6. the “established procedure” is mentioned again - who establishes it, where, when...?

why is the Minister of Justice the one who can retain academics, etc and not the Agent him/her-self - since s/he has the power to require information almost from everybody, to engage specialists.... It seems that s/he could easily have the power to retain academics, too.

The Agent has to have real powers to head the service of state anti-corruption policy, as mentioned in No.7

There is no need for a detail given in No.9 - this is a practical issue, which does not belong into such a document.

4 SUMMARY OF AMENDMENTS IN VARIOUS GOVERNMENT'S ACTS PROPOSED BY THE DRAFT RESOLUTION

Second sub-paragraph of the first paragraph refers to “*legal normative acts of ministries and bodies of the executive which concern any rights and freedoms of persons*” when describing the obligation for the anti-corruption screening. It has to be mentioned that possibilities for corruption arise also in legal documents, which do not have anything to do with basic human rights and freedoms (i.e. budgetary rules, rules on public-private partnerships, public procurement...). Therefore, it would be recommendable to delete the words “*which concern any rights and freedoms of persons*”

According to tasks (4/2, 4/3) and competences (5.3, 5.6) of the Agent it is him/her that is conducting anti-corruption screening. This fact is not mentioned (and it should be!) in the Summary.

5 CONCLUSION

Decision of the Ukrainian government to establish the Government Agent on Anti-Corruption Policy Issues seems to be a positive step in the right direction (as given by international treaties), although on the level of details it raises many questions that might harm the value of the general idea.

First of all, the expert is not convinced if the position of the Agent and his/her tasks are such to give him the character of a specialised anti-corruption preventive body as mentioned in Article 6 of the UNCAC - s/he has no decision-making powers, no independency (not even the functional one), for all important decision the Minister of Justice is authorised, the level of his/her tasks varies a lot (sometimes very strong - i.e. possibility to ask for all information - and sometimes very weak), procedures for his/her appointment and dismissal give rise to the idea that this will be a very important position but this is not confirmed by his/her tasks and responsibilities.. That gives the overall impression that this is yet another high-positioned civil servant without real powers to make a change in the Ukrainian anti-corruption efforts.

Text of the Resolution could (and should) be further improved and there are two possible solutions:

to establish or oblige a body or part of it, which would be really responsible for drafting and implementation of the state anti-corruption strategy, or
to allocate the task of coordination of state anti-corruption efforts within the executive branch of power to the organisational part of the Ministry of Justice.

If the first idea will be pursued, then the following has to be done:
to establish a new state independent body with the task to prepare the state anti-corruption policy in cooperation with all branches of power, civil society, private sector, media and send it for adoption to the parliament and ensure implementation of the same policy, or
to entrust an existing independent state body with the same tasks.

This is the only way to achieve full compliance with the UNCAC.

If the second idea will be pursued, then, at least, the following has to be done:
to make clear that the Agent's role is simple coordination of anti-corruption preventive efforts within the executive branch and cooperation with other players in the country (legislative and judicial branch, civil society...),
to (re)define conditions for appointment and dismissal of the Agent in a very clear manner,
to (re)define tasks and competences of the Agent in compliance with his role (see the first bullet-point),
to (re)define powers of the Agent in a very clear way,
to (re)define lines of communication, authority and responsibility within the Ministry of Justice involving the Agent,
to establish channels of communication with other anti-corruption players.

Political will of the government to make a step forward in prevention of corruption in Ukraine is visible and it has to be commended, but unfortunately the present draft Resolution concerning Anti-Corruption Policy does not represent its best materialisation. There are so many possibilities open for the improvement that it would be regrettable if they would not be used in a form of a new text of Resolution.