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**Support to Good Governance: Project against Corruption in Ukraine
(UPAC)**

**TECHNICAL PAPER REGARDING MODELS OF ANTI-CORRUPTION BODIES
IN UKRAINE**

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1. INTRODUCTION

The objective of this paper is to summarise key issues in considering an optimal model of the system of anti-corruption institutions in Ukraine. It follows a Round Table discussion that took place on 22 April 2008 in Kyiv organised as part of Council of Europe Project against Corruption in Ukraine (UPAC).

UPAC aims to contribute to the prevention and control of corruption so that it no longer undermines the confidence of the public in the political and judicial system, democracy, the rule of law and economic and social development in Ukraine. Its three principal objectives are as follows:

To improve the strategic and institutional framework against corruption in Ukraine

To enhance capacities for the prevention of corruption

To strengthen the anti-corruption legal framework and effective and impartial enforcement of the criminal legislation on corruption

1.1 What are Anti-Corruption Bodies?

Confusion exists with regard to the very concept of *anti-corruption bodies*. It is therefore advisable to begin the discussion with a clarification of the key terms.

Most comprehensively, as “anti-corruption bodies” we consider the variety of bodies that have a role in the fight against corruption. This includes bodies that do not necessarily include the term ‘anti-corruption’ in their name. In fact, it is important to realise that globally, agencies that do have the term ‘anti-corruption’ in their name address *only a portion* of the wide range of issues and/or sectors that need to be taken into account in order to build an effective national anti-corruption system.

As the notion of anti-corruption itself comprises a broad range of issues and/or sectors, it is furthermore advisable to “dis-aggregate” or “unbundle” the concept and speak of specific issues or tasks that need to be considered in order to define a strategy and/or institutional framework for the effective fight against corruption.

1.2 Types of Anti-Corruption Bodies:

Within the anti-corruption community, there is a broad consensus that the fight against corruption must include elements of prevention, repression, and education (although arguably, educational and other public outreach efforts are essential components of both preventive and repressive measures). Anti-corruption bodies, therefore, can be broadly categorized as either preventive or repressive or law-enforcement types.

2. MULTI-PURPOSE BODIES

There do exist institutions designed specifically to improve the fight against corruption that combine preventive and repressive elements (investigation). The most famous of these is the Hong Kong Anti-Corruption Commission, established in 1974. The spectacular success of Hong Kong has given rise to efforts to reproduce this model elsewhere in the world, the great majority of which have been modest successes at best.

The reasons for the lack of success of Hong Kong model copies have been analysed in a number of studies. The most important ones include:

- Insufficient analysis of the national context (including the constitutional and legislative framework and political developments) for the applicability of the Hong Kong model in other countries;
- Too-wide a remit of responsibilities for the new body, not supported by commensurate human and financial resources to carry out all the mandated tasks;
- Unrealistic expectations, guided by the misconception that a single agency—even with extraordinary powers—can “cure” corruption without a broader system of effective preventive and repressive elements effectively performing their tasks.

The last point above deserves additional comment. Unrealistic expectations with regard to an “anti-corruption body” can be closely related to overall misconceptions about “anti-corruption” as an idea, and a failure to “dis-aggregate” or “unbundle” the idea into its “constituent parts” – the broad range of sectors, institutions, and processes that require attention from a preventive perspective, as well as the range of law enforcement measure, that together form a system that is resistant to, and effectively able to tackle corruption.

3. PREVENTIVE BODIES:

In order to speak about “preventive anti-corruption bodies” one must first recognize preventive anti-corruption functions. It is the functions that matter most, while the institutional/organisational arrangements to perform those functions should be derived from the demands of the functions.

3.1 Functions related to the implementation of (national) anti-corruption strategies and programs

In a number of countries where corruption has been recognized as a significant problem and the fight against corruption has been placed high on the public policy agenda, there have been elaborated comprehensive national anti-corruption strategies and action plans. The idea behind a strategy is that—considering the broad range of sectors and issues that need to be addressed, and the interdependence of issues that require coordination of measures among the various relevant sectors—such a document helps to identify and *prioritise* the set of measures/reforms that need to be implemented. Such a strategic approach recognises not only that the fight against corruption requires a complex and multi-sectoral set of responses, but also that these responses need to be sequenced from an operational perspective and from the perspective of limited human and financial resources required to implement the inevitably broad range of reforms.

Monitoring the implementation of anti-corruption strategies and programs

Where this type of a strategic framework exists, there arises a need to monitor the progress of its implementation and the effectiveness of the proposed reforms. This task is often the principal function of a number of anti-corruption agencies, committee, or commissions. These bodies tend to be composed of high-level government officials, parliamentarians, or well-respected independent public figures, including representatives of civil society organisations. The idea is to have a visible high-level body whose evaluation of the progress made and recommendations will carry sufficient “weight.” The process inevitably needs to be public.

Reporting on the implementation of anti-corruption initiatives

In order for monitoring to be carried out effectively, all institutions that have obligations under the anti-corruption strategy or program need to report periodically on their progress. The sum of the individual reports is typically further shaped into a manageable single document and possibly preliminarily evaluated/checked against the deadlines and benchmarks outlined in action plans. This function is typically performed by the monitoring body’s secretariat or support unit, although a number of other institutional arrangements can be equally appropriate.

Periodic updating of anti-corruption strategies and action plans

No reform strategy is ever perfect, but as implementation of reforms progresses, new issues will arise, or as additional diagnostics bring to attention new circumstances, it will become necessary to revise and update parts of the strategy. In addition, new sector-specific reform policy proposals may be presented by international donors, implementers, or national civil society organisations and think tanks, which can greatly improve specific parts of the strategy. The need for updates is even more frequent with regard to action plans, as these should reflect the current status in conjunction with the monitoring process (minimum once per year). Updating of action plans can be a fairly straightforward, almost “mechanical” process if no substantive changes are made; if this is the case, the task can be performed, as above, by the monitoring body’s secretariat or support unit, or another appropriate body.

Substantive updates to the strategy, and corresponding amendments to the action plan, however, do require an appropriate level of expertise and a public consultative process involving all relevant stakeholders—from state institutions implementing reforms, to donors (current and potential), to civil society.

The body responsible for strategy update can also be responsible for carrying out some of the diagnostics itself. It is important to know that in addition to the most commonly used perception surveys, there is a wealth of other more reliable diagnostic tools, including risk assessments, performance surveys, etc.

The body responsible for this function, therefore, should have and/or be prepared to develop anti-corruption policy capacities to support these activities over the medium-to long-term, recognizing that the fight against corruption is a long-term process that requires continual assessments of the institutional framework and other vulnerable processes, and evaluation of existing arrangements to prevent, detect, and prosecute corruption.

Coordination of anti-corruption reforms

As reforms progress, there will inevitably emerge a need to coordinate activities, particularly among sectors and institutions whose effectiveness depends on one another, or with regard to sequencing reforms that cannot be performed simultaneously in view of resource limitations or other operational considerations. Coordination is also strongly advised with regard to donor-supported activities, especially those carried out by external implementers, be they international organisations or national NGOs. There is no set prescription as to the agency or body that should undertake these functions, provided that it is done in close communication with the body or bodies carrying out the previous three. Arguably, greater efficiency can be achieved if a number of the above tasks are performed by the same body, but national circumstances may provide convincing reasons to organise the work separately.

Participation in international anti-corruption mechanisms

An appropriate national representative should be designated to participate in GRECO, the OECD Anti-Corruption Network (ACN), and other international anti-corruption mechanisms to which Ukraine is a party. Such representatives are typically heads of one of the bodies responsible for the functions described above (or one body that performs a number of the above functions). The key consideration is that the representative is intimately involved in and knowledgeable about the national anti-corruption efforts, and have the authority to both represent Ukraine in the international fora and also communicate back to national decision-makers the recommendations and obligations arising from these mechanisms.

3.2 Recommendations for Ukraine:

In a number of countries, many (if not all) of the above functions relating to the implementation of national anti-corruption strategies and programs are undertaken by a single, often independent state agency. While there are compelling reasons to combine these tasks—not the least of which are efficiency and ease of coordination—it is conceivable that other institutional arrangements can be equally effective in a specific national context. It is beyond the scope of this paper to offer a specific recommendation as to the best model for Ukraine, the following considerations should be taken into account in making the decision:

- The monitoring mechanism should be a high-level body that should, at a minimum, include some independent (non-governmental) members, and perform its reviews publicly.
- Anti-corruption policy development requires extensive expertise and human resources. The extent to which Ukraine invests in building up the necessary capacities will be an indication of the seriousness with which it tackles corruption.
- There needs to exist a single coordinating mechanism for anti-corruption activities. At the April 22 round table, it emerged that there were several anti-corruption coordination initiatives underway by different state agencies. While different agencies may (and should) have specific anti-corruption programmes, the coordination of these efforts needs to be centralised within one preventive-type body (distinct from law-enforcement functions), otherwise there will be a significant duplication of efforts and unnecessarily increased administrative burden on national agencies.

3.3 Other preventive functions:

It is essential to remember that the full range of preventive anti-corruption functions extend far beyond the functions related to the implementation of anti-corruption strategies and programs enumerated above. There are a number of regulatory regimes necessary to reduce opportunities for corruption, the most common ones relating to public procurement, conflict of interests, asset declarations of public officials, political party and campaign financing, among others. The freedom of information regime is likewise considered as having an important anti-corruption function, providing access to state documents that may reveal potential corruption. Bodies overseeing the implementation of these regimes—as well as numerous other supervisory bodies—together with bodies dedicated to other explicit anti-corruption policies, collectively form the overall institutional framework of preventive anti-corruption bodies. Each of these bodies therefore requires considered attention in terms of assuring its capacity and independence.

While it is beyond the scope of this paper to map out the necessary preventive functions and assess the extent to which appropriate institutional framework has been created to meet the requirements of these functions, it is highly recommended that this kind of assessment be undertaken within the anti-corruption policy review process. A number of concerns have already been identified in the GRECO report.

3.4 Recommendations for Ukraine:

Ukrainian authorities should consider the effectiveness of the variety of preventive functions and bodies noted in sections 3.1 and 3.2 with regard to obligations imposed by the United Nations Convention Against Corruption (UNCAC) Article 6, Preventive anti-corruption body or bodies:

1. Each State Party shall, in accordance with the fundamental principles of its legal system, ensure the existence of a body or bodies, as appropriate, that prevent corruption by such means as:

- Implementing the policies referred to in article 5 of this Convention and, where appropriate, overseeing and coordinating the implementation of those policies;*
- Increasing and disseminating knowledge about the prevention of corruption.*

2. Each State Party shall grant the body or bodies referred to in paragraph 1 of this article the necessary independence, in accordance with the fundamental principles of its legal system, to enable the body or bodies to carry out its or their functions effectively and free from any undue influence. The necessary material resources and specialized staff, as well as the training that such staff may require to carry out their functions, should be provided.

It is important to realise that there is no obligation to create a single independent preventive anti-corruption body as such. It is even more important to realize that each of the above noted bodies has a critical role to play in a system of corruption prevention, and that each of these deserves equal attention in providing the conditions for them to carry out their functions effectively, including resources and appropriate levels of independence.

4. LAW ENFORCEMENT BODIES

In a number of ways, the detection, investigation, and prosecution of corruption does not differ from that of many other, particularly financial, crimes. The particular challenges relate to the concealed nature of corruption, and the possibility in a significant portion of the cases of no individual victims—the “victim” of the crime is the public interest and the public purse.

In a country where the system of preventive anti-corruption bodies is not fully robust, even the most competent law enforcement agencies would have a difficulty in addressing the sheer number of cases that arises due to the opportunities for corruption. To make matters more difficult, law enforcement organisations in countries in transition are themselves undergoing reforms and often do not possess the full range of capacities necessary to meet the challenge. Furthermore, in a great number of cases, law enforcement agencies are plagued by corruption within their own ranks, and are subject to political influence that discourages them from pursuing particular, typically high-level political corruption, cases. In these contexts, it is a considerable challenge to identify the appropriate set of measures to increase the law enforcement agencies’ capacities to perform their duties. However, some general principles applicable also (if not especially) in countries where corruption is a serious problem, have been defined in international standards:

Specialisation:

The Council of Europe Criminal Law Convention on Corruption (Article 20), Specialised authorities:

Each Party shall adopt such measures as may be necessary to ensure that persons or entities are specialised in the fight against corruption. They shall have the necessary independence in accordance with the fundamental principles of the legal system of the Party, in order for them to be able to carry out their functions effectively and free from any undue pressure. The Party shall ensure that the staff of such entities has adequate training and financial resources for their tasks.

United Nations Convention against Corruption (Article 36), Specialised authorities:

Each State Party shall, in accordance with the fundamental principles of its legal system, ensure the existence of a body or bodies or persons specialized in combating corruption through law enforcement. Such body or bodies or persons shall be granted the necessary independence, in accordance with the fundamental principles of the legal system of the State Party, to be able to carry out their functions effectively and without any undue influence. Such persons or staff of such body or bodies should have the appropriate training and resources to carry out their tasks.

In addition to meeting international obligations, there are additional reasons for investing in specialisation of law enforcement capacities with regard to the fight against corruption.

- Due to the often complex nature of the crimes where corruption plays a part, a high level of skills is needed, and no law enforcement body in the world has the resources to build such high competencies across the organisation;
- High levels of resources may be needed, including specialised expertise (e.g. relating to financial investigations), that is likewise most efficiently used when concentrated within a specific unit;
- Confidentiality of investigations is more easily protected (and breaches detected) when communicated within a smaller group rather than through an extensive chain of command;

- The increased public profile of such specialised units can serve to protect them from political influence and interference (“the untouchables”).

Independence:

In addition to specialisation, both the Council of Europe and the UN conventions speak of “necessary independence in accordance with the fundamental principles of the legal system of the [country]”. This formulation has sometimes been taken to mean that the establishment of a fully independent law enforcement body is advocated. This is not the case. The very useful OECD publication *Specialised Anti-Corruption Institutions: Review of Models* clearly elaborates on this point: “...[O]ne of the prominent and mandatory features of specialised institutions is not full independence but rather an adequate level of *structural and operational autonomy* secured through institutional and legal mechanisms aimed at preventing undue political interference as well as promoting ‘pre-emptive obedience’” (p. 17). The Explanatory report to the Council of Europe Criminal Law Convention on Corruption further elaborates that “the independence of specialised authorities for the fight against corruption, should not be an absolute one. Indeed, their activities should be, as far as possible, integrated and coordinated with the work carried out by the police, the administration or the public prosecutors office. The level of independence required for these specialised services is the one that is necessary to perform properly their functions”(par. 99)¹.

The concern for possible interference in the work of law enforcement officials is exacerbated by the hierarchical organisation of these bodies, particularly in cases where superiors are permitted to directly interfere in the investigation or prosecution of cases handled by lower-level officials. However, this is a risk inherent in any hierarchical structure, even one that is independent from the “main/traditional” law enforcement bodies. The risk can be addressed in other ways, however. The OECD elaborates on the above points regarding the value of specialisation, explaining that “...special anti-corruption departments or units within the police or the prosecution service can be subject to separate hierarchical rules and appointment procedures; police officers working on corruption cases, though institutionally placed within the police, should in individual cases report only and directly to the competent prosecutor” (Ibid).

4.1 Lessons from practice:

In an effort to improve the law enforcement capacities to tackle corruption, law enforcement organisations in countries in transition in particular have implemented a number of models of specialisation. While it is beyond the scope of this paper to provide a comprehensive overview (and while such an overview conveniently exists in the form of the OECD publication *Specialised Anti-Corruption Institutions: Review of Models*), a few general trends are worth noting:

Pre-trial investigation:

- In a number of instances—including the agencies in Latvia and Lithuania recognized as successfully in adapting the Hong Kong multi-purpose anti-corruption agency model—the new bodies that have been created with regard to anti-corruption law enforcement approaches have focused on detection and *investigation* of corruption;

¹ See <http://conventions.coe.int/Treaty/en/Reports/Html/173.htm>

- As in the Ukraine, in most countries there are a number of different agencies mandated to *investigate* corruption; conflicts of jurisdictions/competencies are not uncommon, and these are typically responded to by:
 - Revising the legal framework to clarify the different bodies substantive jurisdictions, where possible;
 - Empowering the responsible prosecutor to determine the competent agency for a particular case; or,
 - A combination of the two (absolute clarity on substantive jurisdiction may not be achievable with regard to cases where, for instance, there are elements of both corruption and organised crime).
- New specialised units are most often mandated to investigate or prosecute only the most serious and complex cases, or cases of high public importance, such as those involving high level public officials;
- New specialised units often have the combined mandate for both corruption and organised crime cases;
- New specialised units responsible for investigating corruption are often structured as separate units within the police organisations, not subject to the normal institutional hierarchy; examples of higher levels of independence also exist in Lithuania and Latvia, where the investigation services are part of an independent specialized anti-corruption agency.

Prosecution:

- There also increasingly exist models of specialised prosecution units, operating independently within the prosecution service (i.e. not subject to the regular hierarchy) and reporting directly to the Prosecutor General.
- The heads of the specialised units typically have the rank of Deputy Prosecutor General;
- New specialised units often have the combined mandate for prosecuting both corruption and organised crime cases;
- There exist different models of cooperation with investigators in the pre-trial phase:
 - Specialised units typically collaborating only with investigators from specialised police units;
 - Specialised units having their own investigators;
- Specialised prosecution units increasingly have, on a permanent basis, experts from other fields such as economy, finance, banking, customs, IT, auditors, etc.
- It also appears to be an emerging practice to use mixed teams of investigators and other experts, led and directed by the prosecutor.

It should also be noted that measures to tackle corruption within their own ranks is one of the priorities of many national law enforcement agencies.

4.2 Recommendations for Ukraine:

The review of the existing arrangements in Ukraine should be included as part of the overall review of needs and policy options for law enforcement taking place at the moment. During the April 22nd Round Table, there was discussion of a comprehensive reform of the criminal justice system, which includes most notably a review of the constitutional position and powers of the prosecution service. In doing so, attention should be paid to the particular challenges associated with the fight against corruption, some of which had been outlined in the GRECO evaluation report for Ukraine, and include, among others, lack of clarity of competencies between the Security Services and the specialised anti-corruption division under General Department of Organised

Crime, difficulties in coordination among the various law enforcement bodies, as well as a lack of clarity between administrative violations and criminal offences relating to bribery.

5. RECOMMENDED NEXT STEPS IN CONSIDERING THE APPROPRIATE INSTITUTIONAL ARRANGEMENTS FOR ANTI-CORRUPTION FUNCTIONS IN UKRAINE

Defining appropriate institutional arrangements for the fight against corruption in any country is a challenging task, particularly in view of the extensive range of preventive functions outlined in section 2. Because of the complexity of the issue, it is important not allow *terminology* (“anti-corruption”) to obscure the full range of *functions* that need to be defined and performed in order to create institutional framework truly effective in fighting corruption. The following set of steps is recommended in order to avoid these potential pitfalls and identifying the institutional framework appropriate for Ukraine, rather than simply transplanting potentially inappropriate models from other countries.

5.1 Definition of functional needs:

- Mapping of the wide range of preventive and repressive functions that need to be performed for the successful fight against corruption; the GRECO evaluations are a useful starting point but the effort ultimately needs to be much broader;
- Assessment of existing arrangements: what functions are currently being carried out by which institutions;
- Identification of gaps: what functions are not covered by existing institutions, and how effectively is the performance of those that are covered;
- Consideration of whether it is more effective and efficient to improve existing structures, to add new/additional functions to existing structures, or to create new institutions.

The process above will provide an overview of the range of the *functions* of a new anti-corruption structure or structures, or a basis for redefining existing structures. Great caution is advised in deciding to create a new institution, however: the costs of failure of poorly conceived institutions are very high, including the devaluation and (further) erosion of public trust in state institutions in general.

This is not to say that new institutions should not be created. On the contrary, there are experiences where creating a new body was the best possible way to meet the challenge, particularly when the existing institutions that are supposed to be carrying out a particular function are very large or difficult to reform for other reasons.

The actual *models* for a new structure should follow from the identified functions and be defined with due consideration of the constitutional, legislative, and institutional framework of Ukraine. In addition, the following issues should be considered with utmost care:

5.2 Coordination with existing bodies:

As noted in several places in the above discussion, there already exists duplication of anti-corruption efforts in Ukraine and a disruptive lack of coordination particularly among law enforcement agencies. It is essential that modes of cooperation be clearly defined and formalised, possibly through inter-agency cooperation agreements.

5.3 Resources needed to perform functions:

To be effective, a new agency or unit must be adequately resourced to effectively perform its functions. This includes not only an adequate operational budget, but also financing and regulations that permit the retention of highly qualified staff and their continuing education and specialisation.

5.4 Independence:

Discussed in some detail in section 4 above, operational independence of both preventive and repressive anti-corruption bodies is essential for its effectiveness. In determining the appropriate framework for safeguarding the appropriate levels of independence, the following aspects should be considered with care:

- Legal basis
- Institutional placement
- Appointment and removal of director
- Selection and recruitment of personnel
- Budget and fiscal autonomy

5.5 Accountability and transparency:

Issues of accountability are closely tied considerations about independence noted in the previous point. Accountability arrangements need to be proportional to the levels of independence and range of powers an agency has, and be defined in line with principles of the rule of law and human rights. Accountability arrangements include submitting regular performance reports to executive and legislative bodies, and making them public. While law enforcement bodies are limited in transparency by operational constraints (e.g. confidentiality of investigations) and human rights principles, preventive bodies on the other hand should be as transparent as possible in their operations. Showing the citizens of Ukraine the steps being undertaken to fight against corruption—if done properly—will also serve an educational function in demonstrating the complexity of the challenge, the seriousness with which the Ukrainian government is tackling the challenge, and as encouragement to citizens to support and participate in the multitude of small steps needed to tackle corruption over time.