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

Technical Paper/Expert Opinion on DRAFT ANTI-CORRUPTION STRATEGY OF UKRAINE

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I. INTRODUCTION

No country is free from corruption – everyone, politicians, government officials, business leaders, journalists and neighbours are affected by this social disease. Beside economic¹ corruption, it also has social² and political³ consequences, which all together hinder or at least slow down economic and social development of the countries burdened by it. The negative effects were not so much recognised until 1994, when a large increase of governments' and international organisations' efforts to raise awareness about the negative impacts became very visible. Foremost, governments and international organisations have to realize that corruption is a very dangerous phenomenon. Only afterwards, the interests and the needs for effective national and international anti-corruption legislation, policies and measures start to develop.

For years, the only way to fight corruption was its suppression by law enforcement and judiciary. Criminal offences were established by different criminal codes; their perpetrators were investigated by police officers, prosecuted by prosecutors and judged by judges. This was sufficient for decades, and then two findings arose:

- corruption is much more than a simple sum of so-called corruption offences listed in the national criminal legislation; there are some forms of this phenomenon, which cannot be criminalised very simple (i.e. favouritism, nepotism,..);
- corruption as a type of social illness, which cannot be repressed by a simple criminal prohibition; it requires a diversified programme of mechanisms for combating it.

It also became very clear that corruption is not simply a matter of a domestic policy – it is now matter of survival in the international arena, since its level has become an index for national competitiveness and international organisations started to strengthen regulations on corrupt countries. Therefore, the need for comprehensive and balanced approach in the fight against corruption slowly emerged as an internationally recognised standard. At the beginning, there were only some areas that appeared very promising in the fight against corruption. Experts were usually citing the need for integrity, long-term engagement and consistency, involvement of all parts of society, improvement and enforcement of anti-corruption legislation, etc. However, taking into account all knowing features of corruption, the recognition emerged that this phenomenon cannot be fought without serious and planned *prevention*. It took some years when this idea was brought into life in certain countries by introducing so-called national anti-corruption policies in order to achieve the final goal of the fight against corruption: to systematically and consciously reshape a country's national integrity.

¹ Lowering tax revenue, inflating costs of social services, distorting allocation of resources in the private sector.

² Humiliating ordinary citizen and undermining social stability.

³ Eroding public trust in the government and weakening the state.

Just until recent adoption and implementation of anti-corruption policies became an obligation for countries; therefore, a lot of them still lack a coordinated and comprehensively satisfying anti-corruption strategies due to still insufficient awareness of the corruption problem, not understandable self-confidence, resignation or even tolerance of corruption, absence of empirical data and scientific studies, etc. But, when 15 most developed European and non-European countries were asked⁴ what they consider to be most effective tools in the fight against corruption, they have given the following answers:

- law enforcement and independent investigation techniques,
- preventive management methods and financial controls,
- transparency (declaration of assets, open administration, public exposure),
- raising the awareness and skills of the officials,
- remuneration of public officials.

Basically, that means that countries started to look systematically in which ways the systems and circumstances might provide conditions that restrain the growth of corruption. There is only one way in which this task can be comprehensively achieved, especially in the form of one document, through overarching anti-corruption strategies.

II. UNITED NATIONS CONVENTION AGAINST CORRUPTION AND PREVENTIVE ANTI-CORRUPTION POLICIES

For a long time, international legal instruments did not mention introduction of those policies, or just some of their elements were mentioned. Only years after this method was mentioned and described in an international mandatory legal instrument – in Article 5 of the United Nations Convention against Corruption (UNCAC), opened for signature in 2003.

Article 5 of the UNCAC states:

1. *Each State Party shall, in accordance with the fundamental principles of its legal system, develop and implement or maintain effective, coordinated anti-corruption policies that promote the participation of society and reflect the principles of the rule of law, proper management of public affairs and public property, transparency and accountability.*
2. *Each State Party shall endeavour to establish and promote effective practises aimed at the prevention of corruption.*

3. *Each State Party shall endeavour to periodically evaluate relevant legal instruments and administrative measures with a view to determining their adequacy to prevent and fight corruption.*
4. *State Parties shall, as appropriate and in accordance with the fundamental principles of their legal system, collaborate with each other and with relevant international and regional organizations in promoting and developing the measures referred to in this article. That collaboration may include participation in international programmes and projects aimed at the prevention of corruption.*

Leaving aside legalistic expressions this article is mandatory asking State Parties of the Convention to do the following, and in accordance with the fundamental principles of their legal system:

- to ensure not only the adoption but also the implementation of preventive anti-corruption policies;
- policies have to be effective and coordinated – in their adoption and implementation,
- in these policies the whole society must be recognised as very important element for their implementation,
- main principles of these policies are asking for their adoption and implementation in the way, which will follow and support the rule of law, demand from governments to manage public affairs in a transparent, ethical and honest way, take care about public ownership in an open, responsible and fair manner and to promote general integrity, transparency and accountability,
- there are not only policies, which are important but also practices, which effectively prevent corruption,
- anti-corruption measures have to be periodically assessed to determine the level of their usefulness,
- international co-operation is very important element in the prevention of corruption.

The above mentioned conditions have to be fulfilled by any existing or a new anti-corruption strategy in order to ensure compliance with the UNCAC, and should serve as guidance in the preparation of new policies or in enhancing the older ones.

III. ANTI-CORRUPTION POLICIES IN THEORY AND PRACTICE

Policy papers (strategies) usually have specific forms, which are the same if they are drafted in the same country. Those forms have been developed through decades of drafting and implementing of different policy papers, and depend on the aims of those papers. Sometimes they are just lists of

⁴ In 1999 by the OECD.

intents⁵ of the country in a specific area, the other times they are very strong and more concrete documents with an easily recognisable goal to really change circumstances and conditions in the area, which they are dealing with. “Lists of intents” usually do not bring any practical results in the area they are dealing with – they serve more to political purposes in a way that politicians are trying to convince their voters. This is always a very short-term exercise, and in the end, real and strong policies are adopted and the previous lists of good wishes abandoned⁶. Policies are most often followed by action plans, which are usually using the structure generally following the structures of the policies in order to ensure their implementation.

There are some more features according to which one anti-corruption policy can differ from the other in many different points, mainly regarding:

- the institution responsible for drafting and/or changing of the text of the policy (in some countries policies are drafted by NGOs, or by a group of experts of one branch of power – usually the executive one, by multidisciplinary group of experts from the public and/or non-governmental sector, or by representatives of politics),
- the institution responsible for the adoption of the policy (government or the parliament),
- the institution(s) responsible for the implementation of the policy and its – their powers (just coordination or also sanctioning),
- basic goals of the policy (only law enforcement ones, preventive ones, combined),
- areas of the policy (law enforcement, prevention, education, raising of awareness, combinations),
- sectors in which the policy should be implemented (public sector only, some or all sectors of society),
- the level of inclusion of civil society in the preparation and implementation of the policy, etc.

Despite the fact that the decision on the structure of strategies is with their respective authors, serious policy papers would have to have at least the following elements and characteristics:

- the most important part of the strategies should be their goals given in an abstract form and actions (needed to achieve these goals) in a concrete form. The rest – introduction, principles, description of the situation, its reasons and consequences, description of the legal documents, etc. – can be given in a very short and concise manner.
- following crucial points of the strategies must also not be forgotten; it has to be clearly indicated, which authority adopts them, under which procedure, which authority is authorised

⁵ They are also called “lists of good wishes”.

for their implementation, what is the procedure that will ensure their implementation, and what are the liabilities for no implementation or bad implementation of the strategies. General time span for their implementation and necessary revision should also be given.

IV. EUROPEAN COUNTRIES AND ANTI-CORRUPTION POLICIES

European countries have started to work on their anti-corruption policies years before the adoption of UNCAC. Due to this fact policies had a different content and quality, but at least they served as an incentive for some activities in the area of corruption prevention. In a short period of time, after the adoption of UNCAC in August 2006, at least 22 European countries had their own anti-corruption policy of a very different quality again. It is also worth mentioning that in some countries the strongest initiative for the drafting of anti-corruption policies came from the civil society. In Bulgaria the first⁷ ever strategy was prepared by the NGO. Council of Europe's Group of States against Corruption – GRECO as the strongest monitoring body in Europe in the area of anti-corruption found out in its first evaluation round⁸ that countries like Bulgaria, Finland, Greece, the Netherlands, Norway, Poland, Portugal, Slovenia, Spain, Sweden and USA still lack a coordinated and comprehensively satisfying state programme of anti-corruption strategies. Only a year or two after the evaluation at least Bulgaria, Poland and Slovenia adopted their strategies and fulfilled their international obligations. Even countries with existing strategies GRECO has recommended several improvements in order to achieve the highest possible level of compliance with international standards and practise.

V. ANTI-CORRUPTION STRATEGY OF UKRAINE

Up to this day, Ukraine has adopted several anti-corruption policy documents, the last one in 2006 in a form of a concept paper "On the way to integrity", which gave more than decent directions for the prevention of corruption in Ukraine. The new document entitled "Anti-Corruption Strategy of Ukraine" (hereinafter: the Strategy) does not define its relation to the previous strategic documents. Therefore, it is not clear whether it replaces them or it presents an addition to them. This is a very important distinction – and a problem since it is not known what forms present anti-corruption strategic documents of the country. It is also not clear what were the strengths and the weaknesses of the previous strategies and further, which measures from those strategies will have to be continued.

⁶ For example, that was a case with Croatia, which first adopted an »empty« and general anti-corruption strategy, which was replaced by a very solid document in 2006

⁷ A very comprehensive and qualitative one.

⁸ In the period between 2000 and 2003.

This document will try to generally assess the Strategy in the light of theoretical deliberations from chapters II and III of this expert opinion. First, some general comments will be given to each of the Strategy's chapters, followed by some concrete remarks to their content. At the end, a general opinion on the value and usefulness of the Strategy will be given in the conclusive part.

V.1. Introduction

The introduction is a typical introductory text with descriptions of different threats of corruption and with presentation of the need to adopt an anti-corruption policy paper. The list of factors that should be taken into account, mentioned in the fourth Paragraph, is not exhaustive enough (at least political will and political conditions are missing) and it is not clear what the term "mentality peculiarities" stipulates.

V.2. General

The most important part of this Chapter is the announcement of the Strategy's content in the first Paragraph: principles, goal, tasks, priorities, tools and expected results. This is basically fulfilling structural requirements from Chapter III of this evaluation, but it should be mentioned that only one single goal is mentioned. Although this is possible, strategies usually intend to achieve several different and concrete goals. In the second part of this Chapter descriptions of situation in the area of corruption are given and some reasons for the existing level of corruption in Ukraine are mentioned.

The third Paragraph fits much better into the introductory part than into this one.

V.3. Principles of ensuring governmental anti-corruption policy

The first problem is the title of the Chapter and the content based on it: no country can efficiently fight corruption when its strategy is limited only to governmental anti-corruption efforts. As described in Chapter II of this evaluation the whole society has to be included in the drafting and implementation of the national anti-corruption policies. Yet this Chapter is clearly describing only governmental efforts and such a strategy can not be effective in practice.

It is very positive that strict observation of legal norms in the fight against corruption is set as one of the most important principles. Other principles are very technical. Usually, national anti-corruption strategies underline also the importance of more general principles (e.g. political will, respect of

human rights, equality before the law,...). This way, national anti-corruption strategies gain importance and they reach much higher in comparison with the strategies based on technical principles only.

V.4. Goal and priorities of state anti-corruption policy

The first Paragraph is based on a wrong presumption that a high level of democracy is linked to a low level of corruption. In some cases this might be true, but it is not an absolute rule.

One single goal of the Strategy is mentioned here again but it is given in such a disorganised and non-focused manner that it does not have any real substantial meaning.

In this Chapter, 8 priorities are mentioned. Under each priority there is a thorough description of reasons why these 8 elements were chosen to serve as priorities and not only that: sometimes more detailed goals (for the achievement of listed priorities) are given, sometimes reasons for the situation in a specific area are described, sometimes their consequences are mentioned,..... Due to this (dis)organization this Chapter is not structured in the best possible manner and it is thus not very clear what are the true priorities, what is their substance, what are the measures for their implementation, what are the possible risks and what are the benchmarks for their assessment. Some excellent ideas can be found in the Chapter but they are hidden and not transparent enough. Due to an incomplete structure of the Chapter they thus cannot be seen as a result of a coherent and comprehensive approach in building systematic response to the threat of corruption.

In this Chapter, the following 8 priorities are mentioned:

1. Continuation of reforms

Usually the reforms of a “political system” are mentioned before reforms of “governmental institutions”, since a “political system” is a more general term than “governmental institutions”.

Professionalization of civil service is indeed one of the most essential requirements in the effective fight against corruption but some additional elements would have to be mentioned: political neutrality, merit-based employment and promotion, conflicts of interests, ethics of public office, declarations of financial interests and strategy etc.

The part on “political will” should be moved to Chapter 2, since the existence of sincere and real political will to fight corruption is always one of the starting principles for each national anti-corruption strategy.

In the last two paragraphs the problem of the so-called “internal affairs units” is mentioned and there is a conclusion that “independent structural units” (with sufficient level of independence) have to be established. There is a serious contradiction in the last paragraph: it is foreseen that those bodies do not have law enforcement functions, but it is planned that they take part in uncovering and suppression of corruption offences. This is not possible. If those bodies are established in order to resolve the mentioned offences, it is clear that they would have to have some investigatory powers.

2. Proper legislative procedure

It is not clear whether this is a task, a priority or a goal.

3. Anti-corruption education and awareness

This sub-chapter contains one priority, some goals and one measure for the achievement of the priority/goals: education. It is a logical sub-chapter but the measure is planned in the theoretical terms only, there is no information on the practical approach.

In addition some minor questions exist:

- It is extremely difficult to achieve any results in the area of psychology with legal means such as the Strategy (“development of a solid psychological orientation towards a positive nature of a lawful way of life” in the first Paragraph), therefore it would be better to omit that.
- It would be good to educate people not only on the social but also on the economic price of corruption (orientations for the anti-corruption education, second point).

4. Efficiency of public administration

This priority would fit much better in the first priority mentioned (3.1., Continuation of reforms), since by itself it does not say much.

5. Law enforcement reform

This is a very sound sub-chapter but measures for its implementation are missing again. In addition, some minor problems appear:

- It would be better to use the term European and Euro Atlantic “standards” and not “criteria”,
- In the first step of the implementation of this priority the latter should not be limited only to reference to the “European legislation” since the UN Convention against Corruption also needs to be mentioned.

6. Institutional reform of investigating bodies

Again, this sub-chapter is reasonable in substance, but it already begins with the notion that it is just “a way to improve efficiency of a law enforcement system”. It is thus obvious that this sub-chapter is not a priority but rather one of the measures for the implementation of the previous priority (3.5.). Therefore, it would be good to include it into the text of 3.5.

7. Acceleration of judicial reform

A set of different goals within this priority is mentioned here but there is again nothing on the ways how to achieve them.

8. Interaction between government and civil society

This sub-chapter is dealing with several different ways of improving relations between the governmental authorities and the civil society. The first one, access to public information, is extensively and very reasonably described but again there are no measures for its implementation.

In the second part there is only a short list of other possible forms of cooperation between the government and the civil society.

V.5. Mechanisms to implement the Strategy

This Chapter has a very interesting structure: in the first part there are some ideas on the implementation of the Strategy followed by a set of “priorities for funding”, which is highly unusual. Normally, funding follows substantial priorities. In Chapter 3 of this document a list of substantial priorities is given but then in the next Chapter (4) a list of new priorities under the title of “funding priorities” appears. So, it is not clear at all, what are the real priorities of the present Strategy. Some

“priorities” mentioned here are very sound and they would have to be mentioned in the Chapter 3 already (i.e. new drafts, creation of the State register etc.), some of them are already part of the previous Chapter and some of them cannot be priorities at all.

In addition: usually the terms “public officials” or “civil servants” are used. The term of “public servants” has no standardised meaning.

V.6. Public and Civil Control over implementation of the Strategy

In this Chapter two forms of control over the Strategy’s implementation are mentioned: the public and the civil one.

The public control part includes only a list of responsible institutions with some (modest) descriptions of their tasks. There is no reference made to the concrete monitoring mechanism/s for the implementation of the Strategy.

Some forms of possible civil control are mentioned accompanied by some principles of such control but – again – there are no concrete monitoring mechanisms mentioned.

At the end of this Chapter there is a reference to additional policy documents at the implementation level (programs, plans,..) and an explicit notion that this Strategy has been adopted for an indefinite period of time. Especially that last part goes contrary to all existing national anti-corruption strategies, which always give a clear point on the period of time that the strategies apply to.

VI. CONCLUSION

In the addition to the comments and remarks provided in the previous paragraphs the following can be said:

- The Strategy is very narrow in scope. There is nothing on the prevention and suppression of corruption in many important areas: private sector, civil society, political parties’ and electoral campaigns financing, media, criminal law area (this would be very important since Ukrainian citizens expect much more from their law enforcement bodies and judiciary in this field!), reporting of assets and interests, codes of conduct, conflicts of interest, maybe even lobbying..... Such an approach gives the impression that this is really only a governmental (and not even that) anti-corruption policy.
- The Strategy is very general. There – contrary to what is mentioned in the first Paragraph of Chapter 2 - are no concrete goals, tasks, priorities, tools and expected results mentioned.

Even when they are mentioned and described somewhere this is not done in a comprehensive and understandable manner. Therefore, it is extremely difficult to expect that this Strategy can really serve as an effective starting point for the organised and structured application of the anti-corruption measures in Ukraine.

- The Strategy fulfils hardly any of the requirements/best practises from Chapters II and III of this evaluation. It is so different from them that it is impossible to make any comparison with other national anti-corruption strategies.

Concluding, the best possible thing for Ukraine would be to prepare a new anti-corruption policy paper based on all previous ones, including this Strategy. The new policy paper will have to include analyses of the achieved results from previous strategies, reasons for their (non)implementation, timeframe, important topics for the future, basically everything that usually forms a national anti-corruption strategy. The Strategy will have to be expanded also to other areas, thus also the private sector and the civil society will have to be included into its drafting. If Ukraine will maintain an approach according to which this document will stay at a very general level (and will be supplemented by series of action plans, programs etc.), at least the part on the implementation mechanism/s will have to be concretized, including the specific powers of the Government Agent in this area and forms of responsibility for feeble implementation of the policy. The new document will also have to find a place for representatives of private sector and civil society in the implementation mechanisms.