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ANTI-CORRUPTION POLICY IN UKRAINE

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I. The context of the modern anti-corruption policy in Ukraine as conditioned by internal and external factors.

Legal and institutional preconditions for the anti-corruption policy. With the adoption of a number of anti-corruption laws in October, 2014, Ukraine has gone through the most massive and systematic reform of the anti-corruption legislation. Legislative changes have been made regarding the key sectors of anti-corruption activity in the state: 1) *developing and monitoring the state anti-corruption policy*; 2) *preventive anti-corruption activities*; 3) *corruption prosecution*.

In addition, on April 29, 2015, the Government approved the State Program on the implementation of the state anti-corruption policy in Ukraine (the Anti-Corruption Strategy) for 2015-2017. The legislation eliminates a certain dualism of the government bodies responsible for the anti-corruption policy that existed in 2014. Among other things, the position of the Government Commissioner on the anti-corruption policy has been eliminated, and two independent anti-corruption bodies responsible for different aspects of development and implementation of the state anti-corruption policy have been introduced:

- The National Agency for the Prevention of Corruption (NAPC) - the central executive body with special status, which provides development and implementation of the state anti-corruption policy;
- The National Anti-Corruption Bureau of Ukraine (NABU) - the state law enforcement agency charged with combating criminal corruption offenses committed by senior officials, authorized to perform state or local government functions, and threaten the national security.

Also, an advisory and consultative body under the President of Ukraine has been launched:

- The National Council for the Anti-Corruption Policy (the National Council) for systemic monitoring of the state of preventing and combating corruption in Ukraine, effectiveness of the anti-corruption strategy, measures taken to prevent and combat corruption, and submitting the President proposals on improving the coordination among the actors that take measures in preventing and combating corruption. The composition of the Council, as recommended by the GRECO, must be formed on a parity basis between the Government and NGOs.

In addition to the above-mentioned actors, the following institutions are involved in developing and implementing the state policy:

- Verkhovna Rada of Ukraine - through approval and adjustment of the anti-corruption strategy, annual parliamentary hearings on the anti-corruption policy, approval of the annual report on the state of corruption;
- The Cabinet of Ministers of Ukraine - through approval of the state program on implementing the anti-corruption strategy, adjusting it according to the results of parliamentary hearings on the state of corruption, adoption of the draft national report on the state of corruption.

Thus, Ukraine has created sufficient legal prerequisites for developing an effective state mechanism for preventing and combating corruption.

Political will to combat corruption. However, it should be noted that these legislative decisions were adopted not due to proactive stance of political will holders (the President of Ukraine, the Cabinet of Ministers of Ukraine, Verkhovna Rada of Ukraine) but rather under the pressure of the civil society, international community, and in the context of early parliamentary elections. Implementation of the new anti-corruption legislation is happening under the pressure of the public and international donors on the authorities. The biggest failures in the implementation of the anti-corruption legislation, indicating the lack of political will in the state leadership to effectively combat corruption, are:

- competitive selection of the candidates on the positions of the NAPC members as of February 5, 2016 is still in process. Today only three NAPC members of five have been selected. Systemic manipulations of the Government as to the competition management have influenced this. As a result, two attempts were made in the formation of the Selection Panel. The first one was conducted with a number of violations made during the procedure of selection and was accompanied with the lawsuits against the Government filed by the civil society. The Cabinet of Ministers of Ukraine under the pressure of civil society organizations and international structures made a decision to reelect the NAPC Selection Panel, which currently conducts the selection of the NAPC members.
- Implementation of the law on identification of the final beneficial owner (due to the inability of the Ministry of Justice of Ukraine to organize the work on the implementation of the Law, its entering into force was postponed for four months);
- One year delay in launching the National Council for the Anti-Corruption Policy due to the President's late appointment of the composition of the Council.
- No prosecution of people facing public allegations of committing corruption crimes, particularly those exposed to measures of arrest of funds and property by foreign competent authorities. More than a year after the change of power in the state, the society has not been presented with any evidence of an effective investigation of corruption offenses of people close to Yanukovich.

Thus, the lack of political will to fully implement the anti-corruption legislation leads to the reboot of the system for preventing corruption only in the legislature, on paper. As a result, expected changes from the anti-corruption reform that would lead to reducing corruption, establishing standards of fair conduct in the work of representatives of the authorities and business, minimizing corruption risks in their activities, increasing the transparency and accountability of both the Government as a whole and individual officials, are not implemented in reality. The general analysis of the system of preventing corruption in Ukraine allows to come to the conclusion that the current authorities do not demonstrate a determination to build a stable and effective system for preventing corruption. A lot of reforms have been launched, but they have not been brought to their logical conclusion; there is no clear sequence and prioritization of the legislative changes and their implementation. Despite the fact that some components of the anti-corruption policy are still in need of legal regulation, the key challenge is the practical implementation of the anti-corruption preventive mechanisms provided for in the legislation. The holders of political will appear to be uninterested and unprepared to implement anti-corruption reforms in practice. The lack of proper attention of the state leadership to this situation only confirms the fact that anti-corruption is not really a priority of their agenda.

Integrity of the civil service. Currently, the main regulatory document that defines the admission to the civil service, its passage and the dismissal from it is the Law "On civil service" from 1993. The need to reform the Ukrainian civil service appeared over 10 years ago and has been repeatedly mentioned since then. Back in 2007 GRECO in joint First and Second Rounds of evaluation

recommended Ukraine to introduce a reform that would cover the proper range of public officials (not only civil servants) in accordance with the principles established for reforming the civil service. Sustainable Development Strategy "Ukraine - 2020", approved by the Decree of the President of Ukraine on January 12, 2015 among directions for reforms envisions a public administration reform, aimed at building a transparent system of governance, creating a professional institute of civil service (separation of political and professional activity of fulfilling the state functions), and ensuring its effectiveness. After a long discussion and elaboration, the updated draft law "On Civil Service" was submitted by the CMU (reg. number 2490) to Verkhovna Rada of Ukraine on March 30, 2015. In general, the main task of the Government when it comes to the civil service is to ensure that the reform of the civil service is carried out, primarily through the approval and submission of the updated bill "On Civil Service" to Verkhovna Rada of Ukraine, its support and implementation. It is important to point out that the indicated law was passed by the Parliament in December 2015 under the considerable pressure of the public and international donors. So far, the law has not come into effect, so it is too early to evaluate its influence.

II. Sociological analysis of corruption. The Government Commissioner on the anti-corruption policy is responsible for organizing anti-corruption research in Ukraine in accordance with the Provision on the Government Commissioner. However, in 2014 no such research was undertaken. Funds from the State Budget of Ukraine have not been allocated for these objectives either. Therefore, in Ukraine there still is a lack of consistency in approaches of institutions responsible for the anti-corruption policy to organizing research on the anti-corruption issues. Until recently, this situation was connected with the fact that the state could not identify a single center for collecting, analyzing information on corruption and preparing proposals for the anti-corruption policy based on it. According to the Law "On Prevention of Corruption", the NAPC is such center.

A number of regional or sectoral studies have been carried out by institutes and civil society organizations, for example the monitoring of informal payments in health care institutions that was done by the Institute of Analysis and Advocacy, supported by the International Fund "Renaissance"; the Center for Political Studies and Analytics under the project "Creation of conditions to fight corruption in public procurement and political finance" is researching the issue of corruption in public procurement, and in the field of political corruption. In particular, the Center has carried out an All-Ukrainian expert poll "Defining the algorithm for the introduction of the system of state funding of political parties and electoral campaigns." The survey results are used in the joint project of the Intensive Care Reform Package and the Ministry of Justice on a new legislation on political party financing.

A clear indication that the population does not believe in the Government's desire to really fight corruption is the results of sociological research. A study conducted by the Kiev International Institute of Sociology and commissioned by "Dzerkalo Tyzhnya" mid-December 2014. The first thing you should pay attention to is that the population does not trust the Government: the President, the Prime Minister and the Parliament are rated respectively only sixth, seventh and tenth in the ranking of the public trust in key institutions. This figure is the people's perception of the lack of political will to carry out reforms in the country, and, in particular, the anti-corruption one. This thesis is confirmed by the public's negative assessment of the Government's anti-corruption efforts: 80% of respondents believe that the situation with corruption in the country has not improved or even worsened over the past year.

According to the research "The Level of Corruption Perception by Business" conducted by the Transparency International Ukraine, PryvatBank, Auditor Company "PwC Ukraine" and GfK Ukraine in August-October 2015, the level of corruption in state authorities remains unchanged. The survey was conducted among the managers of Ukrainian enterprises and was intended to reveal a comprehensive picture of the real situation with corruption in Ukraine after the Revolution of Dignity. According to the survey, 52% of respondents believe that the situation with corruption in

the past six months has remained unchanged, 30.6% said that the situation has worsened, 17.4% of respondents noted improvement. Business representatives who encountered corruption during the last six months have identified the following most corrupt government agencies: tax authorities (25%); the Agency for Land Resources (7.1%); the State Traffic Inspectorate (5.1%); the customs (4%); the Ministry of Interior Affairs (4%); regional administrations (3.7%); the Prosecutor's Office (3.3%); the police (3.2%); the sanitary-epidemiological service (2.9%); the State Registration Service (2.8%); courts (2.8%); the fire service (2.5%); medical institutions (1.7%); the State Architectural and Construction Inspectorate (1.6%); and municipal executive committees (1.4%).

A number of fresh corruption surveys initiated by the media or polling organizations only confirm the stated above tendency.

III. Criminalization of corruption and law enforcement.

Criminalization of corruption in accordance with international standards, and creating specialized law enforcement agencies controlled by the state and the society are a mandatory prerequisite for combating corruption successfully, including in its cross-border cases. The implementation state of the provisions of the anti-corruption conventions, establishing criminal liability, in the Criminal Code of Ukraine can be considered satisfactory. However, there are both cases of excessive criminalization (Articles 364-1, 365-2, 366-1 of the Criminal Code of Ukraine), which entails difficulties in the criminal justice training and cases of non-recognition as criminal punishable offences of acts, criminalization of which is directly provided by the relevant international conventions (it is primarily about individual financial crimes). The list of corruption offences defined in Art. 45 of the Criminal Code of Ukraine is still imperfect, because it contradicts the features of corruption offences defined in Art. 1 of the Law of Ukraine "On Prevention of Corruption".

In recent years, as a result of repeated amendments to the Criminal Code, Corpus delicti of corruption offences has been brought in line with international standards, in particular, regarding the objective side, the subjective side and the subject. However, in some cases, there is still some discrepancy.

Convention requirements on the use of criminal sanctions that take into account the gravity of corruption crimes have been fulfilled in Ukraine in a contradictory way. These sanctions do not take into account the gravity of these offenses in all cases, and the amount of the fines set in sanctions, public work, correctional work, arrest, restriction of liberty, and imprisonment are not coordinated among each other.

Penalties appointed by the courts for corruption offences are too often inadequate to their severity. Such judicial practice is not an exception, but a rule. For example, 19 people get a fine, seven individuals - restriction of liberty, and the other 53 (out of a total of 91 people) - imprisonment for up to 5 years for an offense under p. 3 of Art. 368 of the Criminal Code of Ukraine, while the sanction for this crime is imprisonment of 5 to 10 years.

Contrary to the Art. 30 of the UN Convention in many cases the Criminal Code of Ukraine does not provide deprivation for a certain period of people convicted of corruption offenses of the right to hold public office and hold office in any company which is wholly or partly owned by the state, etc.

Regarding the adoption of common measures that may be necessary to ensure possible forfeiture, Ukraine has fulfilled its international obligations.

However, the practice shows that in terms of ensuring the possibility of identification, tracing, freezing or seizing referred proceeds or property for the purpose of further confiscation, as well as managing frozen, seized or confiscated property, the undertaken measures are not sufficient.

Special units to combat organized crime of the Ministry of Internal Affairs of Ukraine, to combat corruption and organized crime of the Security Service of Ukraine proved ineffective in combating

corruption. Therefore, new specialized law enforcement agencies are being created, the National Anti-Corruption Bureau (NAB) of Ukraine, Anti-corruption Prosecution and others. The procedures for the selection and dismissal of their managers generally meet international standards.

The available statistical information on the use of criminal law against corruption shows the following:

- This information is clearly not sufficient, it is incomplete and does not allow to analyze the anti-corruption activities properly by its object, subjects and other indicators. For example, in the Form 7 of the composite report of the SJA of Ukraine on the composition of the sentenced for 2014, there is evidence of a conviction for corruption offenses of employees, students, even students of schools and liceums, but not judges, prosecutors, heads of central executive bodies and other specific categories of people authorized to perform functions of the state and local governments;
- There is no general information on the number of operational search cases lodged by the authorized entities in combating corruption and their performance at all. Thus, the society can not estimate the efficiency of the operational search units even roughly;
- This information is not standardized, there are no legal requirements regarding the manner of its collection, recording, organizing, processing, etc; every single government body (the Prosecutor's Office, the Interior Ministry, the Ministry of Justice, the State Court Administration, the Supreme Court, the High Specialized Court for Civil and Criminal Cases et al.) uses its own reporting form and statistical analysis.
- To increase statistical indicators in 2013-2014 the respective authorities, to show how "effective" their work is, tended to include into corruption offences even the ones that had nothing to do with corruption;
- In 2013-2014 senior government officials and civil servants of the 1 and 2 categories were brought to neither criminal, nor administrative justice for corruption crimes and offences related to corruption;
- In general, even after the transfer of proceedings and cases to court a significant percentage (15 or more) of criminal proceedings and administrative corruption cases was closed; in 2014 the number of people against whom administrative cases were closed was 29.5%;
- There is no accurate statistics for relevant criminal proceedings that were closed at the stage of preliminary investigation, and administrative cases which were closed during protocol-making, including as a result of corruption interference; a system for their accounting from the detection to sentencing (penalizing) has not been created;
- A lot of statistical data is not reliable. For example, according to the results of cases on administrative offenses related to corruption, in 2013, courts applied confiscation of items and money as an additional penalty for breach of restrictions on the use of official position (Art. 172-2 of the CUAO) 4815 times, though only 670 people were prosecuted under this article;
- The percentage of officials dismissed from their posts in connection with the prosecution for corruption offenses is extremely low; according to the Interior Ministry of Ukraine, in 2013 they accounted for only 18.1% and in 2014 - 13.3%; according to the SJA of Ukraine, out of people convicted under articles 364, 364-1, 365-2, 368-369 of the Criminal Code in 2013, 76,8% of people convicted of corruption offenses were deprived of the right to occupy certain positions or engage in certain activities as a basic/additional penalty; in 2014 - 67.4% of such people. Consequently, the remaining convicts continue their corrupt activities or have the ability to do so;

- The information on the loss and damage caused by corruption offenses and offenses related to corruption, the state and amount of their compensation are highly contradictory and obviously false; there is no proper account of such loss, damage, including compensated, as well as information about the confiscation of items and proceeds from criminal corruption offenses;
- Reports on funds and other property obtained as a result of corruption offenses or offenses related to corruption, returned to Ukraine from abroad, and their disposal do not exist; such centralized accounting is not conducted.

Recommendations:

- The key holders of political will, the President of Ukraine, factions of political forces in the Parliament of Ukraine, the Cabinet of Ministers of Ukraine, need to convincingly demonstrate the presence of political will for reforms in the anti-corruption area and others. For this purpose, measures should be taken immediately to implement the new anti-corruption legislation and ensure the full operation of new anti-corruption bodies: the National Anti-Corruption Bureau, the National Agency for Preventing and Combating Corruption, and the National Council for Anti-Corruption Policy. Another indicator of the political will of the authorities would be the proactive approach to implementing anti-corruption reforms instead of simply reacting to criticism from the society and international organizations.
- Ensure timely and proper implementation of the State Program for the implementation of the state anti-corruption policy for 2014-2017 (the Anti-Corruption Strategy), in a joint effort with experts of the civil society and international organizations.
- Conduct a transparent competition for the appointment of NAPC members, implement a set of practical steps for the early commencement of the Agency to fulfill its main tasks, including providing the necessary logistical and expert support.
- Launch immediately and in full the system of electronic declaration assets and expenditure of public servants.
- Ensure active role of the National Council for Anti-Corruption Policy in shaping and monitoring the implementation of the anti-corruption policy.
- Promote the quality implementation of the law "On Civil Service".
- Ensure proper operation of the National Anti-Corruption Bureau of Ukraine, including the formation and functioning of the Special Anti-Corruption Prosecutor's Office.
- Harmonize the legislation of Ukraine in order for all corruption offenses to receive a special investigative jurisdiction of the anti-corruption investigation agencies.