

<p>EU-UKRAINE CIVIL SOCIETY PLATFORM</p>		<p>ПЛАТФОРМА ГРОМАДЯНСЬКОГО СУСПІЛЬСТВА УКРАЇНА-ЄС</p>
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ENVIRONMENTAL PROTECTION IN THE EU - UKRAINE ASSOCIATION AGREEMENT

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I. MAJOR CHALLENGES PRESENTED BY THE IMPLEMENTATION OF THE ASSOCIATION AGREEMENT ENVIRONMENTAL COMPONENT

The implementation of the Association Agreement (AA) environmental component should be subject to the goal of reforming the environmental management system to improve the environmental condition and protection in Ukraine and to transit to sustainable development. Therefore, it is important to pay constant attention to the strategic level of environmental reforms and not just the technical issues of implementation of annexes and directives. A number of challenges arise in the course of the implementation of the AA environmental component that need to be analysed so as to minimise or avoid them during the further implementation of the AA.

(1) Challenges to strategic approaches

One of the reasons behind the insignificant progress in the implementation of the AA environmental component is the non-priority status of environmental issues on the agenda of both the Government and the Parliament. Despite the serious environmental problems and cross-cutting nature of environmental issues, economic, financial, energy and social issues are always more important. The package of EU requirements for Ukraine included environmental obligations only once. However, it was just at the implementation stage of the Association Agenda (the requirement to prepare a comprehensive environmental policy strategy in the so-called Füle Matrix¹), but since the signing of the Association Agreement there have been no environmental requirements in any packages, such as the visa one.

Such an approach is clearly seen in strategic planning at the national level. For example, environmental issues had no “separate” goal in the draft Government Medium-Term Action Plan up to 2020 (2017)². They were included in the “Efficient Governance” and “Security and Defense” sections.

The existence of a strategic vision in reforming the environmental sector in general and its particular divisions is especially important. Realising the magnitude of the current problems and related reform objectives, “selective” reforms may be considered appropriate to overcome the most pressing problems. **However, this approach can only lead to fragmented reforming** that will not be properly applied in the country due to neglect of certain features of the national system and reforms in

¹ http://www.kmu.gov.ua/control/publish/article?art_id=243877832

² http://www.kmu.gov.ua/control/uk/publish/article?art_id=249634799&cat_id=244828445

other relevant areas. A good example in this context, with proper implementation, may be the waste sector, where first a waste management strategy is developed and as a next step the development and adoption of specific regulations necessary for implementation of the directives listed in the “Waste and Resource Management” section. The Ministry of Ecology and Natural Resources of Ukraine has started using this approach: firstly, policy analysis, prioritisation, concept, and strategy followed by the development and adoption of specific regulations. At the same time, **the situation with the main instrument of environmental policy - Environmental Policy Strategy of Ukraine, which has been permanently under review since early 2015, remains critical. Thus, the current goals and objectives of the Strategy are ignored and no new goals are adopted.**

The European integration process, including AA implementation, must be consistent with other reforms taking place in the country in certain areas. That is, AA implementation should facilitate the implementation of progressive pro-European reforms. The reforms, in turn, should comply with best European practice and should apply European norms and standards, including with regard to good governance. Good environmental governance requires a transformation of the environmental management structure into a highly integrated and inclusive system involving all interested parties, which will make and implement high quality solutions based on publicly available information. The harmonisation of the procedures for public participation in strategic decision-making commenced by the Ministry of Ecology and Natural Resources of Ukraine is a positive step.

It is also necessary to pay attention to ensuring that all environmental provisions in the AA are implemented, and not only the legislation approximation procedure. The provisions in Chapter 6 are extremely important in terms of reforming the environmental sector, and the environmental issues included in the scope of free trade are important because of the need to implement certain environmental standards and assess the impact of trade on sustainable development in Ukraine.

Not all directives and regulations adopted by and implemented in the EU are included in the list of those required for implementation in Ukraine, despite the fact that the issues they cover are pressing matters for Ukraine. In this context, we may mention the Registration, Evaluation, Authorisation and Restriction of Chemical (REACH) regulation.

It is important to develop national documents aimed at institutional, organisational, and substantive implementation of the AA. In this context, the Order of the Cabinet of Ministers of Ukraine of 2014 “On the Implementation of the Association Agreement between Ukraine, of the one Part, and the European Union, the European Atomic Energy Community and their Member States, of the other Part”, which stipulates a number of implementation measures, is an important document. However, despite its periodic updates, the action plan should be substantially revised with a view to updating it and include the issues that were missed (e. g., the Plan stipulates no measures aimed at implementation of the provisions of Chapter 6 of the AA, but only specific directives) as well as indicators of the measures of performance. It should also take into account the challenges and obstacles to implementation.

Other important planning documents are the implementation plans for each specific directive or regulation analysing the situation with the level of implementation of certain provisions and including a list of rule-making, institutional, organisational and other measures necessary for the implementation. These plans were a good start for a successful process. However, the deadlines for their implementation have not been met and some plans contain errors, so they also need updating.

(2) Challenges to institutional issues

The issue of providing institutional support for implementation of the AA is important provided certain bodies responsible for the implementation, proper distribution of powers between the authorities and their cooperation and coordination, as well as the availability of financial, human and other resources, are vested with the necessary authority. **Implementation of the Agreement, including in the environmental area, is constantly fraught with various institutional challenges, which, if tackled successfully, could speed up the implementation process, making it more efficient and effective.**

The main body responsible for the implementation of the AA environmental component is the Ministry of Ecology and Natural Resources of Ukraine, which is the top performer of most plans implementing environmental directives and regulations. However, it is important to note that the provision of an integrated approach to environmental management is the responsibility of the entire Government for the efficiency of environmental reform; and without this the relevant ministry will not be able to implement the necessary changes. This, inter alia, relates to the **specifying of the necessary human and financial resources and the mechanism for reviewing them**, since although the **Ministry of Ecology is responsible for the adaptation and implementation of the greatest number of EU directives and regulations among all the sectors of the Agreement, its resource base remains insufficient. It is necessary to strengthen the institutional capacity and allocate such a priority as paramount for the dialogue between the parties.**

It is also important to point out the need for effective cooperation between the Ministry of Ecology and other central authorities which are listed as being co-responsible for the implementation of this or that directive. In addition, the environmental unit contains a number of directives to be implemented by other bodies, yet the environmental component necessitates close cooperation with the Ministry of Ecology for the timely and effective implementation of such directives.

The **Government Office for European and Euro-Atlantic Integration** should be the platform for dialogue and cooperation between different authorities. The Government Office is charged with another important duty: to provide its opinion on statutory compliance with Ukraine's obligations in European integration, including international legal commitments, and EU law. Therefore, the Government Office should have sufficient expertise in environmental matters so that such opinions are not a formality but truly ensure compliance with EU law. The appointment of a separate Vice Prime Minister for European and Euro-Atlantic Integration was politically important.

The issue of the Parliament's competence with regard to analysing EU integration bills submitted by the deputies is of special concern. Although each bill is subject to review by the Main Academic Expert Department and the Main Legal Department, the issue of compliance of such a bill with the relevant EU directives or regulations remains.

(3) Challenges to the approximation process

There are objective limits to implementation, i.e. specific conditions that complicate the implementation of EU norms and standards in Ukraine since Ukraine is not an EU member state and currently is not a candidate for EU accession. Therefore, the process of their implementation in Ukraine differs considerably from equivalent processes in the Member States or candidate states.

The institutional challenges are associated with the specific aspects of the reporting mechanism used by the Member States to report on progress in the implementation of directives, of the supervisory functions of the European Commission and the Court of Justice concerning the Member States' non-compliance with the EU law, cooperation with the Member States and the need to take joint actions, as well as the creation of special bodies to assist in implementation. In particular, the directives provide for a reporting mechanism to the European Commission for member States as regards specific measures and the implementation of the directive as a whole. The mechanism for reporting on AA implementation is inadequate. In addition, a number of directives provide for the establishment of special bodies that support and assist EU Member States in the implementation. Ukraine is not able to use the results of such bodies or be involved in their work. The implementation process in Ukraine is deprived of the traditional control function of the Commission and the proceeding supervision of the Court of Justice.

Challenges related to the legal nature of the sources of EU law concern the special aspects of the application of EU regulations, the need to take into account the decisions of the Court of Justice of the European Union as a source of EU law, inclusion of international obligations of the EU Member States and the EU itself into relevant directives and regulations, as well as the wording of certain provisions in EU acts. Given the legal nature of the regulation as a source of European law, its implementation in Ukraine requires special approaches, other than the implementation of directives. The provisions contained in the directives sometimes apply only to the Member States of the European Union; their immediate implementation is impossible, especially where they refer to

setting the goals, the scope of the directive or the powers / duties of Ukraine as a state. Ignoring the practice of the Court of Justice may lead to something like a “Ukraine-specific” EU law emerging. However, taking into account the decisions of the Court of Justice in the implementation of the *acquis communautaire* in Ukraine is not directly provided for by either the bilateral agreement between Ukraine and the EU or the national legislation of Ukraine (except for certain provisions on the free trade zone).

Technical challenges regard the quality of translation of the EU acts and the need to ensure the implementation of the latest (most recent) EU directives / regulations in Ukraine. EU legislation in all areas is a dynamic and not a steady process. No implementation mechanism has been provided for the latest versions of acts and for involving Ukraine in debates on the most pressing issues in a particular area. In these conditions, Ukraine will always “hurry after” the EU and will not have the proper level of implementation of legislation in a particular area. To ensure the effective implementation of the directives in Ukraine, accurate translation of the terms of the European legislation or their adequate substitutes, if no such terms exist in the Ukrainian language, is required.

II. REVIEW OF THE IMPLEMENTATION OF CHAPTER 6 OF THE EU - UKRAINE ASSOCIATION AGREEMENT

The Association Agreement is a powerful incentive for reforming the environmental policy based on present-day principles, as well as for ensuring its integrated nature and efficiency. EU - Ukraine cooperation in the framework of the Association Agreement is crucial for the success of the reform of environmental governance, which requires fundamental changes to the approach to policy planning, development and adoption of legislation, transforming environmental institutes and management principles, adequate resources, and reaffirming the political commitments to make environmental and climate change issues a priority on the country's agenda.

Chapter 6 of the Agreement (“The Environment”) outlines the main areas of cooperation to introduce changes to the existing environmental governance and is crucial to understanding the strategic essence of environmental reforms. As of 1 November, 2014, **provisional application of certain sections / articles of the Agreement** began, including Chapter 6, with the exception of Articles 361, 362(1)(c), 364, 365(a), and 365(c)³. However, hoping that the ratification process will be completed in the near future and the Association Agreement will take full effect, such important issues as strategic planning with regard to environmental and climate policy implementation cannot remain unaddressed at this stage of implementation of the Agreement.

In particular, Article 361(a) contains a commitment to develop the “**comprehensive strategy on environmental issues**”. Currently, the status of the main environmental policy documents (**State Environmental Policy Strategy of Ukraine**⁴ and the **National Action Plan**⁵, which would be the main instruments for ensuring appropriate reforms) remains uncertain. The Strategy adopted (in 2010) the goals of the State Environmental Policy of Ukraine until 2020. With a view to updating the objectives and their coordination with the international obligations of Ukraine (including under the Agreement), their implementation⁶ was analysed and the appropriate adjustments were made in 2014-2015. After a number of departmental approvals and public discussions, neither of the documents with the proposed changes has been submitted to the Cabinet of Ministers of Ukraine and the Verkhovna Rada of Ukraine for review. In 2017, the Ministry of Ecology again updated the content thereof to conform to recent changes in international politics and national legislation. However, the procedure

³ Note Verbale of the General Secretariat of the EU on the provisional application of the Agreement// http://www.kmu.gov.ua/control/uk/publish/article?=-1&art_id=247667894&cat_id=223223535

⁴ The Law of Ukraine “On the Fundamental Principles (Strategy) of the State Environmental Policy of Ukraine until 2020” // <http://zakon3.rada.gov.ua/laws/show/2818-17>

⁵ Resolution of the Cabinet of Ministers of Ukraine “On Approval of the National Action Plan for Environmental Protection for 2011-2015” // <http://zakon2.rada.gov.ua/laws/show/577-2011-%D1%80>

⁶ Assessment of Implementation of the State Environmental Policy Strategy of Ukraine until 2020 and the National Action Plan for Environmental Protection for 2011-2015. // <http://www.menr.gov.ua/press-center/news/150-news28/3362-otsinka-vykonannia-stratehii-derzhavnoi-ekologichnoi-polityky-ukrainy-na-period-do-2020-roku-ta-natsionalnoho-planu-dii-z-okhorony-navkolyshnoho-pryrodozohy-seredovyschcha-na-2011-2015-roky>

for completion of consultation, coordination and adoption obviously requires a significant acceleration.

The scheduled institutional reforms have so far been implemented on an individual basis. We are in the process of reforming the State Environmental Inspectorate by means of its abolition and the creation of a new body – *the State Environmental Service of Ukraine (DerzhEkoBezpeka)*⁷ – a single supervising authority in the environmental area (instead of the existing seven) and the transfer of all supervisory functions to the newly established body, including in its competence the requirements of Directive 2010/75/EU on industrial emissions and the implementation of environmental monitoring functions.

The issue of **distribution of powers between national, regional and local environmental authorities** is under transformation. Most modern environmental governance issues (from legal support to the proper organisation of environmental monitoring) result from unjustified administrative reforms of the last decade. These include the abolition of the territorial offices of the Ministry of Ecology⁸ and transfer of their powers to Regional State Administrations, which led to the breakdown of the environmental connections between the centre and the regions, thus undermining the influence of both the Ministry of Ecology at the national level and that of local nature conservationists.

As for **decision-making and implementation to ensure good environmental governance**, the problem of effective public engagement, which is a potentially powerful mechanism for integrating environmental policy with sectoral policies and an instrument to improve the quality of public decisions, deserves special attention. Unfortunately, such dialogues are just occasional at the moment and need better structuring and coordination on the part of the Ministry of Ecology.

As for the **procedure facilitating the integration of environmental policy in other areas of national policy**, it requires legislated changes in strategic planning, as currently the requirement for the integration of environmental policy into sectoral policies is not mandatory for consideration. The latest planning documents⁹ do not provide for the introduction of the environmental component to the sections on policy implementation in the transport, energy, agriculture, tourism, economic development, and national security sectors. The main mechanisms to ensure environmental policy integration, i. e. draft laws on Strategic Environmental Assessment (SEA) and Environment Impact Assessment (EIA), are being approved with major obstacles. Integrated environmental governance is a prerequisite for the transition to a green economy and it should ensure participation, transparency, accountability and better integration of environmental policy.

As for the **development of sectoral strategies** prior to the stage of drafting legislative acts, the first draft of the **National Strategy for Waste Management**¹⁰ has been developed. After the adoption of the Law of Ukraine “On Amendments to Certain Legislative Acts of Ukraine Concerning the Implementation of Integrated Approaches to Water Management by Basin Principle”, the priority is in building a long-term development strategy for the water sector. To this end, it is planned to initiate a National Dialogue on water policy, to draft and adopt the Concept of Reforming the State Water Resources Agency of Ukraine, as well as to develop and adopt the appropriate Water Policy Strategy at a later stage and in accord with the results of the National Dialogue. As for other topics to be the scope of the Strategies (improving air quality; the marine environment; nature protection; industrial pollution and industrial accidents), we are working on preparing components for the strategies and search for partners to perform the relevant works.

Significant assistance with the implementation of environmental reforms is provided by regional technical assistance projects funded by the EU and its Member States: EAP GREEN, SEIS, CLIMA EAST, EUWI II and the Emerald Network, aimed at the 6 EaP countries. The outstanding milestone

⁷ The Concept of Public Environmental Supervision (Control) System Reformation // <http://www.menr.gov.ua/press-center/news/123-news1/5358-kontseptsiya-reformuvannia-sistemy-derzhavnoho-nahliadu-kontroliu-u-sferi-okhorony-navkolyshnoho-seredovshcha-v-ukraini>

⁸ Decree No. 159 of the Cabinet of Ministers of Ukraine dated 13.03.2013 “On Liquidation of Territorial Bodies of the Ministry of Environmental Protection” // <http://zakon3.rada.gov.ua/laws/show/159-2013-%D0%BF>

⁹ Draft Government Medium-Term Action Plan until 2020 //

http://www.kmu.gov.ua/control/uk/publish/article?art_id=249634799&cat_id=244828445

¹⁰ <http://www.menr.gov.ua/garbage/5440-anatovana-struktura-natsionalnoi-stratehii-povodzhennia-z-vidkhodamy-vynesen-na-hromadske-obhovorennia>

in the regional cooperation in the framework of the Eastern Partnership (EaP) was the adoption of the Declaration on Environment and Climate Change by the Ministers of the EU Member States and the Eastern Partnership countries. Ukraine is actively involved in the preparation of a regional plan for the implementation of the Declaration and should also decide on its national measurement.

The Paris Agreement¹¹ has entered into force. Among other states, it was ratified by Ukraine in 2016¹². The implementing decisions of the Paris Conference of the Parties (CP 21) provide for a number of “early” measures to be taken before 2020, aimed at forming a new international climate law, reducing greenhouse gas emissions and adapting to climate change, increasing national contributions of the parties, as well as at launching early effective mechanisms of interstate cooperation. Implementation of the Association Agreement in Ukraine, particularly of its trade part, and Chapter 1 (“Energy”) and Chapter 6 (“Environment”), creates the preconditions for the **Common Pan-European Energy and Climate Space**, which will include Ukraine and other members of the pan-European energy and climate community, in addition to the EU and EEA¹³. Article 365(c) provides that the objectives of cooperation in matters related to climate change be specified in **Annex XXXI**. However, the provisions thereof are obsolete and do not comply with current EU legislation and policies, international agreements and initiatives in this area. The aforesaid Annex must be subject to substantial revision.

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IV. ASSOCIATION AGREEMENT IMPLEMENTATION AT REGIONAL LEVEL

All the reforms that have currently been implemented with a view to implementing the environmental component of the Association Agreement have a regional (sub-national) context. Ukraine agrees to gradually align its legislation with EU legislation. However, without proper implementation and compliance at the regional level, such legislation may remain a document for internal use. Following the development and adoption of appropriate regulations in a given area, the local authorities will have powers defined by legislative acts or regulations that will have an effect on the implementation of the Association Agreement.

Considering the decentralisation process that is presently gaining momentum and will have a significant impact on the redistribution of powers in the coming years, the opinion of local authorities, especially in the context of the functions that they will be assigned, should be taken into account when developing the laws and regulations.

The inability of the public administration system to properly ensure the performance of the functions and exercise of powers in the field of environmental protection is a challenge that arises at the national, regional and local levels¹⁴. Currently, in the absence of a single vertical implementation of sector policies, local administrations are in charge of the implementation of national environmental policy at the regional level. **There is no proper understanding of environmental integration between the areas of the environment, economic development, infrastructure, military and social spheres, etc. at either the national or regional levels.** Local state administrations continue to use the definition of socio-economic development programs with no environmental component. Although local natural resources are used to ensure the functioning of regional infrastructure, economy, energy and other facilities and hazardous industries cause environmental damage.

When implementing the Agreement at the regional level, it is also necessary to take due account of the reform of the State Ecological Inspectorate. The concept of the reform provides, among other things, for boosting the efficiency of environmental control in the process of decentralisation by transferring certain environmental control functions to local communities (these may include: land contamination, control of the natural protected areas of local significance, hunting, poaching, waste

¹¹ http://unfccc.int/files/essential_background/convention/application/pdf/english_paris_agreement.pdf

¹² <http://zakon3.rada.gov.ua/laws/show/1469-19>

¹³ The idea of such a pan-European space was suggested in 2005 by the scientists of the Centre for European Policy Studies (CEPS), Brussels.

¹⁴ NGOs Report “Public Assessment of National Environmental Policy” for 2015 / ed. S. Shaparenko. – Kyiv: IE “Klymenko”, 2016. – P. 24.

management) and by organisation of the institute of public inspectors for environmental protection (the so-called “environmental sheriffs”) at local communities.

Another important aspect of implementation is providing information about progress in European integrations, which has not yet become a major topic of discussion, or of plans and AA implementation activities at the regional level. **The low level of the local authorities’ awareness of the process of implementation of the AA environmental component must be noted, as it currently focuses mainly on aligning certain sections of Ukrainian law with European standards.** Local authorities are not involved in national policy development and law-making for the purposes of implementation of the AA environmental component. This may have a negative impact on the following stage, i. e. the stage of practical implementation of accepted standards.

V. PROPOSALS TO IMPROVE THE IMPLEMENTATION OF THE ENVIRONMENTAL COMPONENT OF THE ASSOCIATION AGREEMENT

Implementation of the environmental component of the Association Agreement is gaining momentum: there are certain achievements but certain obstacles are still in the way. However, both parties to the Agreement (Ukraine and the EU) can take steps to speed up the process and make it more effective.

Proposals re strategic approaches

- For the Ministry of Ecology to publish the terms and procedures for completion of consultations, coordination and adoption of the draft of the revised National Environmental Policy Strategy and the draft document itself.
- For the Ministry of Ecology to prepare a strategic vision of the environmental management institutional reform to build a unified system for implementation of the state environmental policy, with due consideration for the decentralisation processes, and to bring it up for discussion.
- With regard to the implementation of the AA environmental component, attention should be given not only to legislation approximation, but also to other provisions in the Association Agreement regarding environment, in particular, the Articles contained in Chapter 6, as well as to the provisions pertaining to implementation of the international environmental conventions and to the issues of sustainable development in the context of free trade zones.
- The issue of implementation of the Association Agreement environmental component should be listed among the priorities in the strategic government documents or the Parliament plans, taking into account the cross-cutting nature of environmental issues, little progress in the implementation of the environmental *acquis communautaire*, and the environmental situation in Ukraine.
- In implementing the Association Agreement, greater attention should be paid to the regional context, namely, to improving the information on the challenges and benefits of implementing the European legislation and the involvement of local authorities in policy development and on taking their interests into consideration while developing plans, programs, and legislation aimed at implementing the Association Agreement in terms of environmental protection.

Proposals regarding institutional issues and cooperation

- In accordance with Article 366, to provide an ongoing dialogue under the principles of openness, publicity and broad opportunities for public participation.
- To publish the reports of the Ministry of Ecology on the implementation of the AA’s environmental component on the website of the Ministry or the government portal.
- To intensify the work aimed at establishing an ongoing dialogue with interested parties, including the wider public, on strategic issues concerning the environmental policy reforms.
- Open a dialogue with the public regarding the preparation for the upcoming Eastern Partnership Summit and the National Component of the Luxembourg Declaration Implementation Plan.

- It is necessary to strengthen institutional capacity for the proper implementation of the AA's environmental component, including through suitable examination for compliance with EU law of the adopted laws and regulations.

Proposals on topical studies

- The Cabinet of Ministers of Ukraine, the Ministry of Ecology and other relevant central executive bodies should study the options for legislative consolidation of the environmental policy integration requirement with sectoral policies.
- To introduce to the agenda the proposals on implementation mechanisms for the EU sections and legislative acts relevant for Ukraine that are not included in the AA, including on the handling of chemicals (Directive on the Registration, Evaluation, Authorisation and Restriction of Chemical (REACH)).
- Bilateral and multilateral cooperation on climate should start simultaneously with the formation of a new package of normative decisions of the Meeting of the Parties to the Paris Agreement. Without effective technical and financial assistance from the EU and G7 states, Ukraine will not be able to effectively implement a proper climate policy.
- It is necessary to open an extended climate dialogue with the EU within the Ukraine-EU Civil Society Platform. It should be multi-level and should be implemented in various forms and between interested parties, including business associations, environmental associations of citizens, scientists and experts. The primary steps in this context are the development of the Climate Dialogue Agenda and formation of proposals on the Agenda for consultations on the new wording of Annex XXXI.

Proposals re legislation approximation

- *Acquis communautaire* implementation plans, as well as the developed and adopted laws and regulations, should be aimed at achieving the goals of the directives in a given area and not only at retransmitting certain provisions of the directives into Ukrainian law. Since the directive does not require a literal transfer of its provisions into the national law, the peculiarities of the national legal system should be taken into account for the purposes of its implementation and the exact mechanisms that would be effective when used in this country should be chosen.
- Problems associated with the legal peculiarities of the implementation of European standards in Ukraine need to be tackled, in particular, to provide for a special mechanism for implementation of the rules into the national legislation of Ukraine, to consider the availability of newer versions of the document, and to provide for a special reporting mechanism for each specific directive / regulations.
- Documents adopted to ensure proper implementation of the AA, namely the Action Plan and implementation plans for each specific directive or regulation should be updated in view of the current challenges and gained experience in the course of AA implementation.