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Ukraine - Civil Society Report by Creative Union TORO

An input to the UNCAC Implementation Review Mechanism: First year of review of UNCAC chapters III and IV

-Executive Summary-

This is the executive summary of a Creative Union TORO report¹ that reviews Ukraine's implementation and enforcement of selected articles in the UN Convention against Corruption (UNCAC) Chapters III (Criminalization and Law Enforcement) and IV (International Cooperation). The report is intended as a contribution to the UNCAC peer review process of Ukraine covering those two chapters.

The UNCAC articles that receive particular attention in the report are those covering bribery (Article 15), foreign bribery (Article 16), embezzlement (Article 17), money laundering (Article 23), liability of legal persons (Article 26), witness protection (Article 32), whistleblower protection (Article 33), and mutual legal assistance (Article 46).

The report finds that the Ukrainian legal framework is partially compliant with UNCAC and that there are a range of legal and institutional gaps in implementing the UNCAC. The study expresses there are serious concerns about the standards of the judiciary and law enforcement authorities.

Ukrainian law was highly deficient and non-compliant with international law until the adoption on 7 April 2011 of a new anti-corruption law, with provision 12 on financial control effective only on 1 January 2012. Significant deficiencies in Ukraine's judicial and enforcement systems also tend to weaken that law.

Assessment of the Review Process

Conduct of Process

The following table summarises government choices with respect to transparency and civil society organisation (CSO) participation in the UNCAC review process.

Table 1: Transparency and CSO participation in the review process

Did the government make public the contact details of the country focal point?	Yes
Was civil society consulted in the preparation of the self-assessment?	No
Was the self-assessment published online or provided to CSOs?	No
Did the government agree to a country visit?	Yes
Was a country visit undertaken?	No
Was civil society invited to provide input to the official reviewers?	No
Has the government committed to publishing the full country report	Yes

¹ The full report is available at <http://www.uncaccoalition.org/en/uncac-review/cso-review-reports.html>. Its author is Halyna Kokhan, Creative Union TORO. A draft of the report was shown to the government and the final report will be used for continuing the dialogue and engagement with the stakeholders including the government beyond the first round country review process.

Availability of information

The government did not make its self-assessment report available. The information for this review was obtained from a limited number of sources, including the websites of the Ministry of Internal Affairs and the State Statistics Committee, as well as government reports prepared for international organizations to meet Ukraine's international commitments under the OECD Anti-Corruption Network's Istanbul Anti-Corruption Action Plan and GRECO rules. We noted that the majority of Ukrainian governmental websites contain outdated and inaccurate information, sometimes inconsistent as between agencies, and do not have efficient search systems.

Implementation and enforcement

On 7 April 2011, Ukraine adopted the Anti-Corruption Law of 2011 and made the first visible progress in the field of criminalisation of corruption-related offences in line with international standards. Acts of bribery involving public officials and illicit enrichment, as per UNCAC Articles 15-21, have only recently been covered under Articles 368 (receiving a bribe), 368-2 (illicit enrichment), 368-3 (commercial bribery of an official private legal entity, regardless of legal form), 368-4 (bribing a person who provides public services), 369 (offering or giving bribes), 369-2 (trading in influence) and 370 (provocation of bribery) of the Criminal Code of Ukraine. These articles are still not fully integrated into legal practice and into the Ukrainian enforcement system.

Due to formal drafting defects in the earlier Abolition Law N 2808-VI from 21 December 2010 (hereafter –Abolition 2010), there were no effective anti-corruption laws in Ukraine until recently, except for anti-corruption clauses in the country's criminal and administrative codes. The Abolition Law of 2010 was, however, effective in dissolving existing anti-corruption bodies, including the Government Commissioner for Anti-Corruption Policy and the Bureau on Anti-Corruption Policy that were in charge of anti-corruption policy in Ukraine 2010. After their dissolution the Ministry of Justice and the Security Service of Ukraine took over their functions.²

As a result, on 24 May 2011, GRECO's report noted Ukraine's failure to fight corruption and to meet European standards in 13 areas.³ Furthermore, on 31 May 2011, the Organization for Economic Cooperation and Development (OECD) presented its results of the Second Round of Monitoring on Ukraine's achievements in connection with the Istanbul Action Plan to combat corruption.⁴ According to the Report, Ukraine has fully met only one of the previous 24 OECD recommendations by passing the Law on Liability of Legal Entities for Corruption Related Offences (repealed by the Abolition Law of 2010).

Political statements by the President of Ukraine and a special chapter in the Anti-Corruption Law of 2011 (Articles 30-33) indicate a change of direction in Ukrainian anti-corruption policy, with political elites paying special attention to international collaboration in the field of prevention and criminal law enforcement against corruption. Passive bribery involving large sums and Illicit enrichment on a large scale have only recently become punishable by imprisonment from 3 to 12 years; in the past, such crimes were punished with administrative penalties.

The weakness and lack of independence of judicial and law enforcement systems, as well as immunity from prosecution for members of parliament in Ukraine, are considered the main obstacles to charging high-ranking officials with corruption. The reform of both systems-- independent election of judges and abolition of parliamentary immunity -- could close these gaps.

² But it still lacks by-laws on financial monitoring of candidates for state office and income of state officials, a special body on anti-corruption policy, conflict of interest prevention, etc.

³ Decisions. 51st GRECO Plenary Meeting. - Strasbourg, 23 - 27 May 2011 // http://www.coe.int/t/dghl/monitoring/greco/documents/2011/Greco%282011%297_DecisionsGR51_EN.pdf

⁴ Second Round of Monitoring of the the OECD Anti Corruption Network's Istanbul Anti-Corruption Action Plan // <http://www.oecd.org/dataoecd/11/55/41603641.pdf>

One of the biggest benefits of the new anti-corruption legislation is that it delineates the functions of the President of Ukraine, the Cabinet of Ministers, and the Prosecutor General in prevention, counteraction, and coordination of anti-corruption policy, while at the same time establishing a specially authorized body on anti-corruption policy. However, a law on the responsibilities and rights of the anti-corruption body and a number of regulations must still be adopted. The biggest deficiency is that this law does not solve the problem of the dependence of different branches of government on one another, which affects anti-corruption policy-making in Ukraine.

Since the adoption of the Anti-Corruption Law of 2011, despite some noteworthy cases against opposition leaders such as Yuliya Tymoshenko, Yuriy Lutsenko and some other ex-officials, investigation of corruption offences has still mainly focused on low-level offenders and administrative misconduct. There appears to be little political will and system capacity to prosecute high-level corruption, due to the dependence of law enforcement agencies on their patrons through appointment and parliamentary immunity. That is an obstacle to embarking on serious anti-corruption investigations. The small number of investigative journalists who write on anti-corruption issues also significantly influences the situation.

Recommendations for priority actions

In order of importance, the needed priority actions include:

1. Establish liability of legal entities through adoption of a Law on Amendments to Certain Legal Acts of Ukraine on Liability for Corruption.
2. Establish a new special body on anti-corruption policy.
3. Cancel parliamentary immunity
4. Reform judicial and enforcement systems in order to implement principles of transparency, democracy and independence.
5. Provide comprehensive training to investigation and prosecution staff and to state officials in the state bodies specialized on corruption issues, as well additional publications on this topic and feedback on its efficiency.
6. Implement the Anti-Corruption Law of 2011 and Public Information Law of 2011
7. Raise awareness within civil society of mechanisms for monitoring the authorities.

The full Creative Union TORO review report can be found at
<http://www.uncaccoalition.org/en/uncac-review/cso-review-reports.html>