

Experts' contribution to the Progress Report on the Implementation of the European Neighbourhood Policy in 2011 Country report on: Ukraine

Experts:

- Nataliya Andrusevych, Resource and Analysis Center "Society and Environment", www.rac.org.ua;
- Iryna Kravchuk, CSO "Ukrainian Alternative";
- Oleksii Khmara, Halyna Kokhan, TORO Creative Union - Transparency International - National Contact in Ukraine, www.toro.org.ua
- Liubov Akulenko, Victoria Gumeniuk, NGO "Centre UA", www.eu.prostir.ua/themes/rada.html
- Centre for political and legal reforms, www.cppr.org.ua

KYIV - 2011

POLITICAL DIALOGUE AND REFORM

Democracy and rule of law

We observe regression rather than progress in the area of political dialogue and reforms aimed at democracy strengthening, rule of law, and good governance.

The main trend of 2010 was the accumulation of power by the President (through the abolition by the Constitutional Court of the amendments to the Constitution made in 2004, adoption of the Law "On the Cabinet of Ministers of Ukraine", judicial reform, which made judges more dependent on political power, and a number of other measures aside from being legislative), whereas the major tendency of 2011 can be defined as power "cementation".

Another striking feature of state policy in 2011 is an incongruity of declared actions and statements, inconsistent activities in a form and substance. Accordingly, it was continually stated that Ukraine's foreign policy is EU integration, and just at the very moment, owing to a resolute policy, Ukraine was gradually setting aside from Europe. President established the Commission on Strengthening Democracy and the Rule of Law, but the fruits of its work, for instance, the Law "On the Judicial System and Status of Judges" are being ignored. President and other government officials emphasize the importance of civil rights and freedoms for the state development and are ready to implement them, but in the real world we observe political repressions, oppression of freedom of speech, assembly, and association. We can multiply the like examples.

Consequently, the government has made no steps in the direction of comprehensive *constitutional reforms*, elaborated for effective checks and balances system development between state authorities in accordance with the relevant recommendations of the Venice Commission, at the same time regular unconstitutional practice leveled checks and balances mechanism, provided by the current Constitution. Examples of unconstitutional practices include adoption of laws, some

provisions of which directly contradict the Constitution: controlled parliamentary voting;

voting cards, not the deputies in person; the President exercised a number of powers though it is not provided by the Constitution and other.

According to the amendments, made On February 1, the term limit of Parliament and local authorities has been increased from four to five years. According to the Constitution regardless of the new changes, the parliamentary *elections* would have been held in March 2011. The amendments were made at that very moment when the election campaign was to start. Thus, according to the Transitional provisions, it was determined that the new term limit of Parliament should be applied to its current one. It was also determined that the next regular parliamentary elections were to take place in October 2012.

Draft Law on Elections, which had been elaborated for two years within support of the European Commission and provided proportional system of voting preferences of the regional districts, was not taken as the basis for an election law working group. Instead, it developed its own project without taking into account the recommendations of PACE and the Venice Commission. On November 17, the Verkhovna Rada passed a new law on parliamentary elections. The law was passed on the very same day it was introduced. The law provides for a combined electoral system: half of the Parliament is elected by plurality in single member constituencies and the other half - by the proportional single nationwide constituency of rigid (closed) lists. This electoral system was used in the local elections in autumn 2010. The law was supported by opposition MPs. They motivated their decisions by the fact that representatives of the parliamentary majority agreed to exclude from the project at the stage of finalizing some provisions that could bring about election frauds.

Public administration reform, which was continued in 2011, mainly aimed at the executive power centralization and its rigid subordination to one of the political force. Thuswise, government committees and agencies were

eliminated, and all the bodies together with ministries were given the status of central executive bodies (CEBs). Inasmuch as government agencies were subordinated to the Cabinet, such measures were meant to weaken the constitutional role of government, increasing illegitimate influence of the Presidential Administration as well as to transfer statutory and personnel powers in the government to the President. These steps have led to the ministries' weakening, deterioration of developing policies process, and reduced openness of the government. Implemented measures are setting aside rather than bringing Ukraine to standards of good governance. On November 17 the Parliament passed a new law on "Civil Service", which does not take into account recommendations of SIGMA.

We can make a note of the following legislative decisions in *judicial sphere*. On February 3 the Verkhovna Rada adopted the Law, which postponed implementation of the provision of the Law "On the Judicial System and Status of Judges" on special training for candidates for the post of judges to adopt a special decision by the High Qualifications Commission. On October 20 the Ukrainian Parliament adopted the Law on Amendments (No 7451) to the Law of Ukraine "On the Judicial System and Status of Judges" on the status of the Supreme Court, which are actually aimed at the redistribution of votes in the Supreme Court to ensure the election of loyal candidates by Chairman of the Supreme Court. The Constitutional Court, which has been demonstrating loyalty to political power, confirmed constitutionalism of a number of dubious provisions of the Law "On Judicial System and Status of Judges", whereas most controversial provisions were rejected to be considered.

During 2011 we observe systematic transfer of judges, especially from the oblasts where the President received greatest support during the presidential elections. A large number of the transferred judges took up the posts of chancellor or their deputies.

The draft *Criminal Procedure Code* is complete. The project is published on the website of the Ministry of Justice and submitted for examination to the Council of Europe. On June 2 there was adopted the Law "On free legal aid", although its implementation was

postponed. On July 8 there was adopted the Law "On the court fee," which will be implemented on of after November 2011.

No significant progress in preventing and fighting *corruption* has been noticed during year 2011. Among positive issues we can name updating of the legislative base, which regulates 'fight against corruption' aspect.

In connection with the abolishment of the anti-corruption package of laws, which had been initiated by the government of President Yushenko, Ukraine remained without the special anti-corruption legislation in the period to 07.04.2011. The issue of corruption offences was regulated solely by the Criminal and Administrative Codes of Ukraine. Such situation was a reason for negative and critical evaluations by international organizations¹.

Adoption of a number of special anti-corruption laws „On Access to Public Information” as of 13.01.2011, „On Corruption Prevention and Counteraction” as of 07.04.2011, «On Amending Certain Legal Acts of Ukraine Regarding Liability for Corruption Offences” as of 07.04.2011, as well as approval by the Decree of the President of Ukraine of the National Anti-corruption Strategy for years 2011-2015 as of 21.10.2011 can be named as the positive achievements in fight against corruption. All these legal acts have to further improve the situation with the fulfillment by Ukraine of its international obligations in the area of fighting corruption, increase transparency of public authorities, quality of public services and contribute to reforms in various spheres of economy. Practical implementation of the adopted laws should take place in 2012.

At the same time it is worth mentioning a number of challenges, which Ukraine faces, in the part of implementing anti-corruption reforms. There is no special program for corruption counteraction in Ukraine, priorities defined in the National Anti-corruption Strategy are too general and aren't provided by resources. Legal acts, which would regulate conflict of interests, financial accountability of officials, procedures of selecting public officials, and creation and work of the special anti-corruption body, have

¹ Evaluation Report on Ukraine Transparency of Party Funding. Theme II, III. Adopted by GRECO at its 52nd Plenary Meeting, Strasbourg, 17-21 October 2011.

not been adopted as of December 1, 2011, which violates the requirements of the new anti-corruption legislation. Liability of legal persons for corruption offences has been abolished by the legislation, which goes contrary to the requirements of UNCAC.

There is no record of progress in providing for civil society organizations' participation in applying anti-corruption policy. From one point, favorable conditions have been created by the legislation of Ukraine for: ensuring citizens' right to public information access, conduction of civic anti-corruption expertise of draft legal acts by citizens or their unions; scope of authority of civil councils within public authorities in terms of civic control over the activity of public authorities has been increased. From the other point, it's extremely difficult to implement opportunities stipulated by law – there is no system of involving civil society organizations in the development of policy documents in anti-corruption sphere, moreover, suggestions of civic experts aren't taken into consideration by special authorities.

No reasonable strategy in conducting administrative reform in the state is displayed by Ukraine. The Law of Ukraine "On Public Service" has a number of corruption risks in the act – the confusing system of groups and ranks of public officials, exclusion of a number of high rank official positions from the list of public service positions, vague procedure of preventing and solving conflict of interests, non-transparent system of reporting on profits/expenses of public officials, etc.

To our assessment, Ukrainian *institutional structures* are not enough prepared for planning, monitoring and *implementation of Association Agreements (AA)*.

We observe that in 2011 Ukrainian government, civil society community and EU Commission are considering alternatives of institutional mechanism and preparation to implementation of AA. Monitoring and Evaluation (M&E) system is part of it. These initiatives on institutional building underlie the importance of the problem, but they are not properly coordinated between each other.

Implementation of Association Agreement evidently will be based on current institutional structures responsible for implementation of EU-Ukraine Association Agenda (AAg) that probably will remain the same or will be

improved or modified. We may conclude that a reporting and monitoring system for the implementation of AAg is mainly established, but this is still not enough for the monitoring and evaluation of an Association Agreement. An Association Agreement is a much more complex document and requires more capacity-building efforts from the Ukrainian Government and civil society, as well as support from EU.

The other problems are: a lack of agreement between key stakeholders concerning the M&E process; no shared understanding of basic concepts; no clarity of monitoring and evaluation requirements; confusion of auditing and controls for monitoring auditing; and no actual use of evaluation results. It is necessary to create a demand for accountability from civil society and Parliament.

These problems can't be attributed only to the Ukrainian side. The list of 78 AAg priorities for 2010 or 90 priorities for 2011 is just an extraction of the most important areas of work. The EU side is not inclined to define clear joint indicators or measures for the implementation of these priorities. The development of monitoring and evaluation capacities is not yet a priority of EU assistance.

The EU should create external demand for the development of evaluation capacities, through EU assistance in public administrative reform and public finance reform. We think that, first, an evaluation and performance oriented culture should become part of strategic governance and planning, and then performance budgeting should be adjusted to it.

Civil society should be an important driver of evaluation capacities development, by creating an evaluation demand for this kind of information. Ukrainian civil society now is more consolidated and organized. In Ukraine civil society is involved in the monitoring and evaluation of implementation of Association Agenda through the number of initiatives and forums:

- Civil society monitored the implementation of AAg in the project "Implementation of the EU-Ukraine Association Agenda: the Experts' View" (International Renaissance Foundation).
- Civic Expert Council within the Ukrainian Part of the EU-Ukraine Cooperation Committee is functioning since 2008.

- The project National Convention on the EU in Ukraine (18 October 2010 – 17 October 2012), implemented by the Research Center of the Slovak Foreign Policy Association in cooperation with the Ukrainian Center for Independent Political Research and National Institute for Strategic Studies.
- National Platform of Eastern Partnership Civil Society Forum was established, which is aimed at setting priorities for the activities of NGO's in the area of Eastern Partnership, and forming an action plan for NGO's with respect to European Integration.

These platforms can be a monitoring “watchdog” over the implementation of European integration. All information and reports about the implementation of AAg and AA have to be available to the public. We would consider reports of the project “Implementation of the EU-Ukraine Association Agenda: the Experts’ View” very useful source of information about implementation of AAg. But governmental pages do not have consolidated information about implementation of AAg, except information of separate ministries on their working plans including AAg. priorities.

Summing up, the *main challenges for a prospective monitoring and implementation system for AA will be:*

- the development of a legal basis for the implementation, monitoring and evaluation of AA;
- the establishment of an institutional framework for the coordination of implementation of AA, that will be responsible for M&E;
- the building of a shared understanding and the fostering of agreement between key stakeholders about the M&E process;
- creating a demand for accountability from civil society and parliament for evaluation;
- the development of an evaluation capacity in the ministries that will include necessary skills, data-systems and resources;

- providing transparency of implementation of AA.

Before deciding where to place monitoring and evaluation function of AA first Ukraine should take decision on institutional framework of implementation of AA “coordination centre” of European Integration.

In our opinion, the development and adoption of a separate implementation program AA by the Government– which has been proven by the experience of many CEE countries would be sound basis for planning, coordinating, monitoring of AA.

A Plan of Institutional Reforms in support of the implementation of the Association Agreement should be the main M&E capacity building instrument. It should include planning, coordination, implementing, and monitoring of AA.

TRADE-RELATED ISSUES, MARKET AND REGULATORY REFORM

Other key areas

The process of reforming public procurement system in 2011 has been slow and not always predictable. Allocation of technical assistance to Ukraine due to problems of public procurement system has been temporarily stopped by the European Union in the beginning of the year. After prolonged debates, warnings from international organizations and civil society organizations the Parliament adopted the new version of the law on public procurement. Even though a number of urgent problems of Ukrainian procurement are resolved by the new

law, there are still disputable issues, such as extensive opportunities for applying procedure of procurement from one participant, as well as vague definition of the notion 'enterprise', which allows 80% of business entities to fall out of scope of the law. According to civic experts' evaluations, annual losses of Ukraine due to the lack of the clear public procurement development strategy make up to 5 billion Euros. As of December 1, 2011 the Ministry of Economic Development and Trade of Ukraine has started consultations process with the interested parties on the possible strategy content.

TRANSPORT, ENERGY, ENVIRONMENT, THE INFORMATION SOCIETY, RESEARCH AND DEVELOPMENT

Environmental legislation has been subject to major negative changes since 1991. These changes were especially adverse in the areas of environmental impact assessment (EIA and public participation in decision-making. No changes for strategic environmental assessment, despite announced plans to ratify Kyiv Protocol on Strategic Environmental Assessment (2003). Legislation on access to environmental information was improved.

General legislative context

Most major environmental laws were amended, including the framework Law on Environmental Protection (1991) and Law on Environmental Expertiza (1995). A new Regulation on Ministry of Ecology and Natural Resources was adopted following re-organization of this ministry by the President of Ukraine in December 2010. At least three legislative innovations in other areas had significant impact on environmental legislation: adoption of Tax Code, Law on Regulating Urban

Development Activities, and Law on Access to Public Information.

Environmental Impact Assessment (EIA)

Since recently Ukraine is the only European country lacking adequate environmental impact assessment system for planned activities (projects) which may have negative impact on the environment. Until 2011, EIA system heavily relied on state-run *state environmental expertiza* in Ukraine. Changes introduced in 2011 practically eliminated procedure of state environmental expertiza in the country.

The changes into EIA legal framework were introduced in form of amendments to existing laws, most importantly: the Law of Ukraine 'On the environmental protection' (1991); the Law of Ukraine 'On the environmental expertiza' (1995). The amendments were be introduced by the Law on Regulating Urban Development Activities, adopted on Feb 17, 2011.

The remaining developer-run procedure to evaluate possible environmental consequences (as part of project planning) cannot ensure

effective, independent assessment of such consequences or prevent any impact.²

For these as well as some other reasons Ukraine's EIA system was found to be in non-compliance with international standards, and in June 2011 Meeting of the Parties of the Espoo Convention **issued a caution to Ukraine**³ for non-complying with its obligations under the Convention.

Public Participation

Ukraine practically eliminated public participation procedures in environmental decision-making. The key reason for that being that Ukraine eliminated environmental decision-making as such.

Public participation in environmental decision-making was closely related to EIA system, as it is the case in other countries. With the collapse of EIA system, public participation framework practically collapsed as well.

The Law on Regulating Urban Development Activities introduced a completely new permitting decision-making procedure, which includes construction expertiza (assessment) of planned projects and a permit. The new expertiza and permitting procedures provide for no public participation opportunities at all.

In July 2011 a Meeting of the Parties of the Aarhus Convention, taking into account these development, issued a caution to Ukraine, in particular due to non-compliance with the public participation provisions of the Convention. In addition, the Meeting of the Parties stressed a possibility to discuss suspension of Ukraine's rights under the Convention at its next session.⁴

Strategic Environmental Assessment (SEA)

No practical steps were taken to prepare for ratification. In fact, collapse of the EIA system can be considered as a negative factor for SEA

implementation. Kiev Protocol on SEA was not ratified by Ukraine.

Access to Environmental Information

At least two positive steps were taken which improved situation with access to environmental information: adoption of the Law on Access to Public Information (which covers all types of information) and significant changes to the Order of the Ministry of Ecology for classifying the information (new amendments significantly shortened the list of information which can be classified for "internal use only").

Development of national implementation instruments in line with multilateral environment agreements signed and ratified by Ukraine and the EU, as listed in the Annex (para.70).

While Ukraine has some national plans to implement certain MEAs, 2011 marked the worst situation with implementation of MEAs in Ukraine:

- Clear non-compliance decision and caution by Espoo Convention (June 2011)
- Clear non-compliance decision and caution by Aarhus Convention (July 2011)
- Clear non-compliance decision by Compliance Committee of the Kyoto Protocol with suspension of Ukraine's participation in emission trading scheme (September 2011).

² For details see a recent policy paper by Resource & Analysis Center "Society and Environment": *Environmental Impact Assessment in Ukraine: A European Solution (RACSE) (September, 2011); Executive Summary available at http://www.rac.org.ua/fileadmin/user_upload/document_s/papers/OVD.Rezjume.pdf (in Ukrainian).*

³ Caution is a strong political measure for the first time ever applied under the Convention. It is issued in form of a decision taken jointly by all states-parties to the Convention.

⁴ While Ukraine was not the only country getting a caution from this MOP (Kazakhstan and Turkmenistan also got caution), suspension of rights is unprecedented measure in the history of Convention.

FINANCIAL COOPERATION

The level of progress noted within the process of Comprehensive Institution Building programme (CIB) realization during the reported period does not allow to assess current results positively. The reasons are many-factored, being from different dimension, both conceptual and tactical.

Conceptual level:

At the moment CIB only meant to introduce a strategic framework for already known and used in Ukraine institutional building tools: Twinning, TAIEX and Sigma which are not used efficiently. Such approach significantly decreases the level of possible efficiency of CIB.

The most essential challenge of the whole CIB in Ukraine is that the European Commission does not imply the necessity of Ukrainian public institutions to be able to fulfill the norms of the European legislation. In case when the AA is signed (including DCFTA) Ukraine will be obliged to adopt and follow certain European directives in a number of sectors. And it would be logical to prepare Ukrainian institutions to fulfill this task, even if it looks the same as it was in the candidate countries before their accession.

CIB implies obligations of Ukrainian state institutions to reform themselves but it does not imply that the aim of these reforms is to be able to fulfill European directives. Consequently, the process of Institutional reforms Plans (IRPs) elaboration does not foresee that Ukrainian institutions are assessed against ability to follow European principles and standards. Thus, Ukrainian public institutions end up in the situation to elaborate their IRPs the way they see their development, without any objective needs assessment and further aiming at being capable to implement the EU norms.

Traditionally, Ukrainian public servants are good at taking obligations; the problems appear while their fulfillment.

The process of IRP elaboration revealed the following deficiencies:

- Ukrainian system of public administration is not ready for future implementation of Association agreement.
- Adopted IRPs are a kind of “wish lists”, which are not intended to be implemented and more importantly – will not increase the capacity of Ukrainian public institutions to fulfill the EU directives;
- Adopted IRPs are not related to the framework of Presidential economic reform programme “Prosperous society, competitive economy, effective state” though all they have some positions (intentions) to realize tasks of the Programme;
- The process of IRP’s elaboration and implementation is completely closed for independent non-governmental experts and civil society activists. Surprisingly, the IRPs’ provisions foresee the involvement of non-governmental experts in the process of their implementation.

Tactical level

For today two out of four IRPs are adopted; and those which are adopted are far away of being directed to institutional reforms.

Sanitary and phyto-sanitary

Positive points: The Ministry of agriculture and food of Ukraine is identified as the only responsible institution for IRP’s further implementation. But the situation could get worse, since launched administrative reform did not eliminate excessive state institutions in the field of sanitary and phyto-sanitary measures.

IRP provides a special coordination group of governmental institutions and independent experts that will make semi-annually progress assessment. However, till now independent experts are not involved in this process.

Accordingly, the IRP monitoring has law changes to be objective and independent.

egative points: The IRP foresees the process of its implementation according to the aims of the Presidential economic reform programme “Prosperous society, competitive economy, effective state”. But IRP’s actions have not yet been issued as actions of the Programme. Thus these documents are realized in parallel dimensions.

Expected results of IRP are too generalized. It is difficult to understand both the exact results and the timeframes: some of actions are foreseen for one year, others - for two years and more.

Migration

Positive points: The document includes many positive provisions (creation of electronic document management system, creation of single national database of migration flows management, etc).

Negative points: The State migration service of Ukraine is coordinated by the Minister of internal affairs of Ukraine. It is still unreformed and functions as a police service institution.

Many of IRP’s propositions are beyond the competence and cannot be implemented at the level of the Cabinet of Ministers of Ukraine decrees (*rozporadgennja*) (e.g. measures to improve living standards in order to prevent external and internal migration, etc.). These

measures should be the aims of the Presidential economic reform programme “Prosperous society, competitive economy, effective state” and IRP should improve migration legislation, procedures but not the principles of economic policy of the country.

This IRP does not imply special monitoring body creation.

State aid control

It is not adopted. The responsible institution for state aid control was not defined during the process of IRP elaboration. The main problem is that till now the law on state aid has not been adopted.

Coordination of the Association agreement Implementation Process

It is not adopted. It was repeatedly returned from Cabinet of Ministers of Ukraine for revision. The situation is difficult, as none of the state institutions cannot and are not ready to take on such responsibility and to lead the process of the future implementation of the Association agreement. At the moment Ukraine’s European integration policy is decentralized between state institutions and there is no central coordination unit or public body that can ensure its successful implementation.