

Annex 1 - Action Fiche for Ukraine

1. IDENTIFICATION

Title/Number	Support to the Justice Sector Policy Reforms in Ukraine CRIS ENPI/2010/21849		
Total cost	EU contribution €10 million		
Aid method / Method of implementation	Project approach – centralised (direct) management		
DAC-code	15130	Sector	Legal and Judicial Development

2. RATIONALE

2.1 Sector context

The proposed project is consistent with the key sector policy and strategic documents of the Government of Ukraine. A concept note *"For the improvement of the judiciary in order to ensure fair trial in Ukraine in line with European standards"* was approved by the Ukrainian President in 2006. It resulted in amendments to the laws regulating judicial operations: *"On the Organisation of the Courts"* and *"On the Status of Judges"*.

The drafts were merged and the unified draft law still awaits its second reading by the Parliament. In the meantime, it has undergone screening by the European Commission for Democracy through Law (Venice Commission), which presented its opinion in February 2010. Despite minor improvements, the unified draft provides no remedies for the following shortcomings the Ukrainian judiciary is riddled with:

- the system of Ukrainian courts is unnecessarily complex;
- judicial appointments should be more transparent;
- the executive should have no influence over the courts' funding, logistics and administration. The Ukrainian agency of court administration should become a part of the judicial branch, controlled and supervised by an independent body.

Other main problems affecting the target groups/stakeholders also include inadequate policy, lack of technical and organisational skills to perform their respective roles in a competitive, efficient, and effective manner. There is no consolidated view of the reforms shared by all beneficiaries. The current sector set-up prevents its stakeholders from effective functioning. The judiciary is fragmented and thus weakened by infinite "struggles for power": the High Council of Justice v. Supreme Court; Supreme Court v. High Courts, High Council of Judges v. High Council of Justice, etc. Reportedly, many of the top judicial appointments were and continue to be politically- and/or business-motivated. As per "Priority identification and needs assessment for sector-wide programme on Assistance to Judicial Reforms in Ukraine"¹, the Government continues its relentless attempts to influence judiciary through manipulating its finances. Prejudiced court decisions, rampant corruption, biased investigations all stem from

¹ by Wolfgang Tiede and Mikhailo Buromensky, October 2008

little accountability and transparency of the sector. The Prosecutor's General Office still remains largely unreformed and struggles to preserve and widen its prerogative to overturn court decisions and to interfere with law-enforcement investigations. The law-enforcement is notorious for its inefficiency and instances of human rights violations. Degrading prison conditions, curtailed procedural freedoms of the legal profession, inadequate enforcement of already handed down court decisions, and intricate legislative process render the sector inefficient. Detrimental working conditions and enormous workloads (i.e. more than 30 court cases a day for an average local court judge) make the sector less attractive to female job seekers. The volatile political situation adds additional stress with major political parties trying to secure the influence on the sector operators in the aftermath of the presidential race 2009 – 2010 where the current Prime Minister and the President faced each other as opponents. It seems that none of the sector stakeholders are truly willing or capable to reform "from within" and to coordinate with one another. The project therefore is called to facilitate a consolidated, well-orchestrated joint sector-wide reform effort by all stakeholders.

The suggested approach is fully compatible with the new modalities of the EU-Ukraine cooperation including the Eastern Partnership (EaP) as well as the new EU-Ukraine Association Agreement (AA) under negotiation. In particular, it will contribute to EaP Priorities such as governance and to Association Agenda priorities, namely 2.1) Democracy, rule of law, human rights and fundamental freedoms and 3) Co-operation on Justice, Freedom and Security issues.

2.2 Lessons learnt

The proposed project was elaborated based on the assessment of the problem and stakeholders' analysis, and it builds on the results of the past and ongoing EU and other donor funded projects in Ukraine. The EU Delegation to Ukraine commissioned two independent assessments of Ukraine's justice sector readiness for the sector-wide reforms. "Priority identification and needs assessment for sector-wide programme on Assistance to Judicial Reforms in Ukraine"² looked into the country's preparedness while "Multi-project result oriented monitoring (ROM) of rule of law projects in Ukraine"³ looked into the EU assistance delivered to the sector to date. Both assessments concluded that the sector stakeholders should be assisted in preparing their reform strategies and implementation plans, and that the probability of the beneficiary ownership of the assistance results is high.

Lessons learned from ongoing and past EU, EU Member States and other donor projects were incorporated in the project's design. For instance, the sector was broadened far beyond the judiciary as such to include law-enforcement, penitentiary and the legal profession. Besides, emphasis is placed on the Government-led coordination of the sector, which will ensure all stakeholders' coherence with the reform policies.

The process has been assisted by a mission from the DG EuropeAid, Directorate for Quality Support.

2.3 Complementary actions

The project is complementary and builds on the results of the following EU and other donor funded projects. The synergies among the ongoing and future projects are ensured through the

² by Wolfgang Tiede and Mikhailo Buromensky, October 2008

³ by Philippe Bories, Result Oriented Monitoring team in Ukraine, November 2008

monthly donor-led coordination events. EU is a staunch advocate of the Ukrainian-led coordination that should ultimately take off. The Joint Programme of the European Commission and the Council of Europe "*Judicial Selection and Appointment Procedure, Training, Disciplinary Liability, Case Management and Alternative Dispute resolution Methods*" has opened the sector for the substantial (€2.2 million) EU and other donor assistance. The programme was much praised by the Supreme Court of Ukraine and other beneficiaries.

The Joint Programme paved the way for the four-year long, \$4.5M Canada-Ukraine Judicial Cooperation Project (CUJCP) that started in late 2006. It links high-level Ukrainian and Canadian counterparts in the judicial system, furthering cooperation between the two countries while providing analysis, technical support and modelling of judicial reforms through exposure to Canadian and international concepts and best practices. The Canadian identification team had been advised by the EU Delegation on the project's design and modalities.

Both the CUJCP and the USAID (spell out MCC)-funded Rule of Law project helped "bridge" the gap in-between the Joint Programme and two major EU programmes that started in 2008 with an aggregate amount of €11M. Nevertheless, the EU remained very active in the sector through its project on Improved International Cooperation in Criminal Matters by Ukrainian Law-enforcement (UPIC). Both Canadian project and UPIC contributed to the development of the Concept of Criminal Justice Reform in Ukraine⁴

EU Member States have become involved with sector reforms through two twinning projects (€3.1M) aimed to assist with structural changes and better procedures of the Academy of Judges of Ukraine and the Ukrainian Police. The Austrian Federal Ministry of Justice and the French Ministry of the Interior bring first-hand European experience to the mix of donor assistance that, before the twinings, was primarily rendered by international organisations or venerable international consultancies like WYG Int.⁵ The direct Member State involvement increases credibility of the assistance and thus ensures better ownership by the Ukrainian beneficiaries. The project, in its turn, will provide its support to new twinings with the High Administrative Court of Ukraine and the Troops of Internal Security, which are being programmed.

If any of the sector stakeholders will be appointed as a Comprehensive Institution Building (CIB) coordinator (e.g. the Ministry of Justice given its responsibility for approximation process) or a core institution under the CIB programme, the sector will enjoy direct operational synergy with the CIB programme of the Eastern Partnership initiative (EaP). However, any additional CIB funding to the sector will not be committed to the sector during the project's lifetime.

2.4 Donor coordination

The project will become an integral part of the joint donor-coordinated approach. EU-led donor coordination in the sector has proven its effectiveness since its establishment in 2004. At present, the USAID Rule of Law project holds regular monthly information exchange

⁴ Adopted by a decree of the President of Ukraine of 8/04/2008 and approved by the Government's decree 'On Approval of the Action Plan for Implementation of the Concept of Criminal Justice Reform in Ukraine' • 1153-r of 27/08/2008

⁵ <http://www.wyg.com>

meeting of Rule of Law Project Implementers in Ukraine. The linkages among donor activities are ensured from a new project design to its implementation. The Government-led donor coordination along the lines of the OECD Paris Declaration on Donor Aid Effectiveness exists yet still is at its initial stages. For a number of technical reasons, subgroup C2 "Justice and adaptation of Ukrainian Legislation to that of the EU" has failed to function to date. The EU Delegation continues to be its main proponent.

To ensure that the project does not overlap with other donor activities both ongoing and planned, the identification process was conducted in full consultation with the beneficiary institutions, the EU Member States missions in Ukraine, and the other donors in the good governance sector, i.e. USAID, UNDP, World Bank.

3. Description

3.1 Objectives

The overall objective of the project is to accelerate sustainable sector policy reforms of the justice sector of Ukraine. The specific objectives are to align major sector stakeholders' policies and reform priorities in a coherent sector-wide reform strategy, supported by an implementation plan and a multi-annual financing programme secured by a Government's decision and to create a viable sector coordination structure.

The project should address a clear need for a uniform consolidated view of the reforms shared by all beneficiaries.

3.2 Expected results and main activities

Expected results are:

1. Effective Government-led sector coordination is established and operational. Stakeholder responsibilities and "division of labour" are shared by all and secured in a form of a memorandum of understanding that should lay a foundation for the stakeholders' cooperation around the sector policy development.
2. Each sector stakeholder has developed its chapter of the sector strategy in cooperation with other sector stakeholders and under coordination and guidance of the dedicated entity in the Government of Ukraine. The strategy implementation plan with sector-wide and each stakeholder-specific benchmarks is created.
3. Sector strategy implementation plan is supported by its implementation mechanism that, in the long run, should be supported by a multi-year financing programme enacted by the Government of Ukraine or by a separate law that provides for multi-year budget allocations in accordance with part seven, Article 23 of the Budget Code of Ukraine.
4. The stakeholders possess adequate capacities to implement the sector strategy and are willing and capable to jointly implement the sector reforms. The main institutional weaknesses of each stakeholder are identified and the main needs for technical assistance are addressed.
5. A framework for the sector performance monitoring system is set up (e.g. a sound methodology for collecting statistical data, with a view to measure indicators of progress).

The following elements will constitute the indispensable elements of the sector strategy (the list is not inclusive and will be regularly reviewed and updated within the lifetime of the project):

1 The Ukrainian Judiciary's increased independence from external influences should be achieved through its own independent budgeting and financing. The Judiciary should increase its accountability through improved financial and human resource management and a creation of an efficient system of unbiased appointments to judicial posts and dismissals, and impartial case distribution among judges.

2 The Government has to commit itself to ensuring that when developed, the Justice Sector reform strategy should be mandatory supported by a multi-annual financing programme.

3 The Ministry of Justice has ensured that the relevant Justice Sector reforms legislation is developed and passed through the Parliament of Ukraine to ascertain that the sector reform strategy meets no opposition from any quarter of the Ukrainian "power triangle": the President, the Parliament and the Government. The Ministry of Justice implemented an effective system of enforcement of court decisions that brings Ukraine's enforcement results on a par with the best European examples.

4 The system of pre-trial investigations has to be modernised in accordance with the best European practices. The Judiciary, the Ministry of Interior (MoI), State Security Service of Ukraine and the Prosecutor's General Office (PGO) should commit themselves to arriving at an efficient "division of labour" as regards their pre-trial investigative prerogatives. Human and material capacities of the MoI, SBU and PGO should improve to better address the change of their role as integral parts of the justice system of Ukraine.

5 The Ukrainian Penitentiary System should become an indispensable part of the sector with stronger ties to the other stakeholders. It should commit itself to ensuring its increased transparency and accountability, alignment of its legislative framework with EU and international standards, and increased respect for human rights as regard the conditions of the juveniles in conflict with the law.

6 The Ukrainian public is empowered to shape up, monitor, and provide its feedback on the state and directions of the sector-related reforms through self-governance organisations of legal professionals (lawyers' unions), specialised civil society and media outlets. The strategy should foresee a mechanism of regular public hearings on the state of reforms with the equal representation of the above groups.

The main activities include:

Component 1: Coordination of sector reforms, stakeholder and donor alignment, sector performance monitoring managed by the Government of Ukraine. Advice and expertise on the creation of a single sector and donor-coordination entity is provided (either the Bureau for European and Euro-Atlantic Integration of Ukraine or the Ministry of Economy or any other state body of the Government's choice). The European best practices on inter-Ministerial cooperation and information sharing is provided. Activities aimed at making its coordination entity effective are conducted so that the existing Government-lead donor coordination in the sector is fully functional and effective. Advice on drafting and negotiating of a Memorandum of Understanding is provided. EU visibility-related activities will promote the EU role as the Memorandum's mediator and will safeguard the stakeholder's commitments to the

Memorandum's implementation. A framework for the sector performance monitoring system will be set up.

Component 2: Sector strategy development and its implementation: Advice and assistance will be provided on the creation of each stakeholder's strategy component, the coherency of the strategy at the sector level, the creation of the strategy implementation plan with sector-wide and each stakeholder-specific benchmarks. The main institutional weaknesses of each stakeholder will be identified and addressed by the means of the project or any ensuing assistance.

3.3 Risks and assumptions

Assumptions:

1. Political and economic stability will prevail in Ukraine;
2. The Government and Parliament will continue supporting legal and judicial reforms, which will be advancing at a satisfactory speed;
3. All key players and institutions involved are willing to co-ordinate their actions and co-operate in operational matters.

Risks related to each assumption:

1. Stakeholders' commitment to the project may dwindle as a result of the uncertainty over what directions the future reforms may take. The competing political forces have different views on the reforms' directions and timeliness.
2. The sector may become overly regulated by the executive with the Government attempting to increase its influence over the sector or even sabotage the stakeholders' joint effort for the sake of its own political ends.
3. The stakeholders may opt to preserve the "status quo" to secure their positions of power to the detriment to the sector's development.

The following risk management arrangements are proposed to mitigate the risks:

1. The stakeholders have confirmed their commitment to the project's ideas by the means of a formal letter from each institution. The project will ensure that the stakeholder institutions get involved to their full capacity streamlining their structures, dedicating necessary human/material resources, and acquiring necessary knowledge and skills to achieve the project's objectives. These improved structures, resources, skills and experience will then be utilised in the course of future sector policy reforms.
2. Working as a team over the joint sector reform strategy will create horizontal "peer-support" mechanisms among the stakeholders. This will guarantee reciprocal controls, assists to fend off outside influences, and also add up a spirit of competition to the stakeholders' joint undertaking. The project's reliance on national expertise and also on the stakeholders' own capacities invoked and supported in the course of the project shall guarantee its sustainability and financial efficacy.
3. The stakeholders' commitment is planned to be secured by a memorandum of understanding ratified by major sector stakeholders and acknowledged by the EU tentatively within the first year of the project's implementation. It should establish the

strategy's scope, define stakeholders' responsibilities, and establish necessary procedures to ensure timely development of the strategy.

3.4 Crosscutting Issues

The project fosters EU cross-cutting issues, in particular good governance. Judicial reform will contribute to a more efficient, transparent, accountable and independent judiciary, and will foster respect for human rights. The project will ensure that civil society is actively involved in the reform process, strengthening thus the political dialogue between the Government and CSOs/NGOs. The Ukrainian Judiciary - predominantly male - will be also induced to streamline its recruitment and promotion procedures to ensure fairer representation of both genders. For instance, in the Constitutional Court of Ukraine the female/male ratio is: 2 to 15; the Supreme Court of Ukraine has 16 female justices out of 73.⁶

3.5 Stakeholders

The key target groups and stakeholders are as follows:

The Government of Ukraine represented by its dedicated body (the Bureau for European and Euro-Atlantic Integration of Ukraine or/and the Ministry of Economy of Ukraine), the Ukrainian Judiciary (Supreme Court), the State Court Administration, the Prosecutor General Office, the Ministry of Justice, the Ministry of Interior, the State Security Service, the State Penitentiary Service, the Parliament (Committee on Justice and the Ombudsman's office), Lawyers' Organisations of Ukraine, and specialised civil society and media outlets. Each major stakeholder represents an indispensable stage in the process of administration of justice in the majority of jurisdictions in Ukraine while the Government of Ukraine is playing a role of the reform coordinator.

The stakeholders were consulted and most of them have confirmed their commitment to the project's implementation by a formal letter from each institution.

4. IMPLEMENTATION ISSUES

4.1 Method of implementation

The project will be implemented through direct centralised management.

1. Restricted calls for proposals to relevant EU Member States institutions (e.g. the "European Assistance Mission to the Albanian Justice System "EURALIUS") and to EU Member States public bodies (through a consortium) are considered the implementation option for the bulk of the project resources.

2. Service contracts will be used for Monitoring activities, Audits and Evaluations, Communication/Visibility action and Identification of follow-up actions.

Oversight of the project will be entrusted to a Steering Committee chaired by the Government's dedicated body and its members will include representatives of the sector's stakeholder institutions. The Steering Committee will meet at least twice a year to assess progress of the reforms promoted by the project. Where appropriate due to external factors or a change of circumstances, the Steering Committee may propose modifications to the

⁶ <http://www.yur-gazeta.com/article/1065>

implementation of the project for consideration by the European Union.

4.2 Procurement and grant award procedures

Direct centralised management:

All contracts implementing the action must be awarded and implemented in accordance with the procedures and standard documents laid down and published by the European Commission for the implementation of external operations, in force at the time of the launch of the procedure in question.

1) Contracts

All contracts implementing the action must be awarded and implemented in accordance with the procedures and standard documents laid down and published by the Commission for the implementation of external operations, in force at the time of the launch of the procedure in question.

Participation in the award of contracts for the present action shall be open to all natural and legal persons covered by the ENPI Regulation 1638/2006. Further extensions of this participation to other natural or legal persons by the concerned authorising officer shall be subject to the conditions provided for in article 21(7) of the ENPI Regulation.

2) Specific rules for grants

The essential selection and award criteria for the award of grants are laid down in the Practical Guide to contract procedures for European Commission external actions. They are established in accordance with the principles set out in Title VI 'Grants' of the Financial Regulation applicable to the general budget. When derogations to these principles are applied, they shall be justified, in particular in the following cases:

- Financing in full (derogation to the principle of co-financing): the maximum possible rate of co-financing for grants is 80%. Full financing may only be applied in the cases provided for in Article 253 of the Commission Regulation (EC, Euratom) No 2342/2002 of 23 December 2002 laying down detailed rules for the implementation of the Financial Regulation applicable to the general budget of the European Union.

- Derogation to the principle of non-retroactivity: a grant may be awarded for an action which has already begun only if the applicant can demonstrate the need to start the action before the grant is awarded, in accordance with Article 112 of the Financial Regulation applicable to the general budget.

4.3 Budget and calendar

Indicative breakdown of overall amount by main components

Component	(EUR)
Coordination of sector reforms, stakeholder and donor alignment, sector performance monitoring managed by the Government of Ukraine - Grant agreements	1,000,000

Sector strategy and implementation – Service contracts/Grant agreements	8,600,000
Monitoring, Audit and Evaluation, Communication/Visibility, Identification of follow-up action, Operating costs, Contingencies, Other – Service contracts	400,000
Total	10,000,000

The foreseen project's operational duration is 48 months from the signature of the contracts and/or agreements.

4.4 Performance monitoring

Objectively verifiable indicators (OVI), both qualitative and quantitative, will have to be part of the methodologies included in the technical proposals for each project component. The overall project's OVI are:

- Improved procedures for investigating of a crime/ offence or handling a court case by all sector stakeholders;
- Decreased number of appealed cases, complaints on delayed or rejected justice by any of the sector stakeholders (stakeholders);
- Decreased number of recorded human rights violations by law-enforcement.

Given the demand-driven character of the programme, the final OVIs must be designed properly and should be further revised at the start of the project's last year of operations to make sure that they are ambitious and realistic.

The monitoring of the day to day implementation will be carried out by the European Commission under its standard procedures, based on benchmarks to be agreed with the project beneficiaries. It includes periodic assessment of progress and delivery of specified project results towards achievement of project objectives.

Key indicators for performance monitoring will include such items as number of benchmarks achieved, quantity and quality of sector strategy contributions by each stakeholder, number of component objectives attained.

4.5 Evaluation and audit

Mid-term and final evaluation of the project implementation will be commissioned by the European Commission to assess project performance, achievements and impact. A provision is set aside for this purpose within the allocated budget.

4.6 Communication and visibility

Proper communication and visibility of the project will be achieved via widespread dissemination of project achievements and results (to be developed by the implementing partner following the EU visibility guidelines, and annexed to the Description of the Action), as well as international visibility to be achieved through public events (project's opening, annual and closing conferences) and updates published on the EU Delegation's website. A reasonable communication budget will be set aside for promotion of the action.

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