



## **SIGMA**

### **Support for Improvement in Governance and Management**

A joint initiative of the OECD and the European Union, principally financed by the EU

# **UKRAINE GOVERNANCE ASSESSMENT**

(Update – February 2007)

## Background

At the request of the Ukrainian government, and with the financial support of DFID (the UK Department for International Development) and SIDA (the Swedish International Development Agency) and the European Commission agreement, Sigma carried out a governance assessment in Ukraine at the beginning of 2006. The assessment was developed following Sigma's scope, methodology and baselines usually used in assessing public administrations in candidate countries. The final report was delivered in March 2006 and its main conclusions were presented in a seminar held in Kiev in July 2006.

Three working groups, with subgroups, have been set up by the Main Civil Service Department (MCSD) in order to follow-up Sigma's recommendations. For the time being there is no evidence of any practical results from the activities of these working groups. However, they did analyse Sigma's recommendations and have produced some operational proposals in different areas which have now been further elaborated on by the related sectors within government. For instance, with regard to public expenditure management systems, public internal control and external audit the drafted recommendations, as authorised by the Minister of the Cabinet of Ministers № 56656/30/1-05 dated 09.12.2006, will be taken into consideration by the Ministry of Economy, Ministry of Finance, KRU and Ministry of Foreign Affairs in their respective areas of responsibility. On the subject of public procurement recommendations, the working group has prepared a note with regards to the policy in that area and a time schedule for its implementation. With regards to civil service reform, Sigma's recommendations are planned to be integrated into the new version of the programme of public service development for 2005-2010 which is due to be submitted to the Cabinet of Ministers in the first half of the year 2007.

The purpose of this document is to look at and summarize the most relevant changes since the assessment was released. It is worth mentioning that the period we are taking into account is too short for any significant changes to have been made and the update has been done without complementary local missions in almost all of the areas. Furthermore, the political situation and the serious difficulties related to the transition between governments has not helped in creating the desired impulse and political and social consensus for reforms.

### 1. Main developments

#### *a. Policy making system*

Ukraine voted for a new Parliament on 26 March 2006 and later on a new Government which only took office after a long, hard process of negotiation. This election was the first main test to the amendments introduced into the Constitution by Law 2222-IV which through the modification of the role of the main political institutions - the President, the Verkhovna Rada and the Government - has deeply changed the nature of the regime. According to these amendments – whose constitutionality is still being discussed in the political and judicial arena – the political system in Ukraine has turned from a presidential-parliamentary regime into a parliamentary-presidential one.

Even if the elections were carried out without major problems and were generally considered democratic and fair, the difficulties in reaching an agreement on a political majority in the Parliament able to support a new government has shown, in practice, the weaknesses that have been stressed regarding the Constitution. Actually, problems are being aggravated as one can conclude from the latest developments regarding the adoption of the Law on Cabinet of Ministers. Among other issues, this law will reduce the power of the president and once again it is the debate on its conformity regarding the Constitution that is dominating the political agenda.

In fact, the Law on Cabinet of Ministers has turned Ukraine into a parliamentary republic, changing the constitutional nature of the regime, which will be a pure parliamentary regime if this law definitively comes in force. Such a move was considered as being unconstitutional and so it was a presidential obligation to refuse to sign it and to challenge its validity in the Constitutional Court.

Meanwhile, arguing that the Parliament has modified the vetoed law in such a way that it does not take account of the President's proposals, the President has vetoed the new law too. Amplifying confusion and a constitutional crisis, the chairman of Parliament, disobeying a decision from the court, ordered the official publication of the highly controversial Law on Cabinet of Ministers in

“*Holos Ukrayiny*”, the official journal of the Parliament. Actually, the law has been published and came into force on 2 February. However, the Government and the Parliament are aware of some illegalities of the adopted law and, as has been stated, they will discuss some amendments to it soon.

Consequently, in the absence of a clear and largely supported Constitution, the governance system is becoming weaker and the possibilities of a frank institutional co-operation and integrated policy making process are rather low. Even considering that these kinds of problems are common in transition phases in many countries, strong political will across the spectrum is more than ever necessary to create the basic conditions that allow political power to put the problems of development at the centre of political action.

Due to continuous confrontation and lack of transparency, trust between the main political institutions and actors has been broken and confidence between politicians and citizens has been eroded. Under such conditions and considering that constitutional conflicts are turning into a political and legal labyrinth – where the Constitution becomes a battlefield instead of a ground for solid guidance to political institutions and citizens – the conclusion is that it will be very difficult to improve the rule of law in Ukraine. As has been stated by the Parliamentary Assembly of the Council of Europe, “*it is evident that Ukraine cannot move ahead with any serious reform project as long as it does not resolve its constitutional crisis*”.

*At this moment it is possible to conclude that the policy making system has not improved since the 2006 assessment and that the theoretical difficulties which were foreseen in this area have turned into a real problem. Currently, the newly emerging circles of the decision-making process in Ukraine are vague and it is not clear who should take this or that decision, or even how and why. Conflicts of competence are intensifying every day eroding the State authority and the rule of law while the policy making system is largely blocked.*

#### ***b. Administrative legal framework***

Constitutional and political difficulties are seriously affecting the capacity to produce desired results in developing the administrative legal system. Moreover, a major concern is rising regarding the rule of law in Ukraine. In fact, not having a clear Constitution and legitimate institutions working within a stable legal framework and agreed competences diminishes constitutional, legal and political guidance and can easily erode the trust of citizens in the overall political and legal system and respect for the rule of law.

However, it is possible to mention some positive developments which have taken place during this period in the area of the general legal administrative framework. Firstly, the constitutional court is now fully operational (even if its power has been reduced regarding the capacity for assessing constitutional amendments in such a way that different analysts are considering it as unconstitutional). Secondly, the Minister of Justice has shown interest in adopting a Code of Administrative Procedures and a working group is now preparing a new draft of it. Seemingly it will be adopted by the end of 2007. Thirdly, the administrative justice system is being developed, though slowly: the number of judges of the High Administrative Court has increased from 39 to 51 (out of 65 foreseen) and 33 were appointed to the Appeal Courts (out of 66 foreseen). For the Local Courts only 11 out of 215 judges have been appointed. Finally, according to the “*Opinion on the Draft Law of Ukraine Amending the Constitutional Provisions on the Procuracy*”, adopted by the Venice Commission at its 68<sup>th</sup> plenary session (13-14 October 2006), the new draft is welcomed and is considered as an “important step in the right direction” even some improvements have been recommended, namely in the subsequent law to be adopted regulating the General Prosecutor’s Office.

However, with regard the integrity system, the situation has not improved and is far from being comfortable. According to the recently delivered Monitoring Report of the ACN (Anti-Corruption Network for Eastern Europe and Central Asia) on Monitoring of National Actions to Implement Recommendations Endorsed During the Reviews of Legal and Institutional Frameworks for the Fight Against Corruption, out of 24 recommendations 12 were rated as “non compliant”, 9 as “partially compliant” and 3 as “largely compliant”. Not one has been rated as fully compliant.

Anyway, it is worth mentioning that the MSCD is developing an interesting training program on anti-corruption and ethics for public officials, in particular for those who work in areas with a risk of corruption. A draft Good Practice Code was developed as well and its adoption is expected during 2007.

*There are some contradictory signals in the evolution of this field. On the one hand, the political dispute over the constitutional system is weakening political institutions, the governance system and the rule of law; on the other hand, some positive developments are being made in some specific issues that need to be confirmed because some of them are related to draft laws whose contents, adoption and implementation require further analysis.*

### **c. Civil Service**

No substantive developments have been noticed in this area namely regarding the adoption of a new Law on Civil Service and in reforming the salary system.

Looking at the assessment's recommendations, just one measure is worth mentioning, that which is related to the institutional accountability of the Main Civil Service Department (MCSD). To redefine the MCSD's lines of accountability – meaning that the MCSD should be under the entity holding overall responsibility for the public administration and the civil service – was suggested in the assessment report within other measures aimed at reinforcing its leading role and effectiveness in administrative reform. Nowadays, following a Cabinet resolution, the MCSD is subordinated to the Minister of the Cabinet of Ministers and this can be considered as a positive step. However, the previous Presidential decree subordinating the MCSD to the President is still in force. Further developments are needed in order to clarify this issue and to review the role of the MCSD.

A cause for concern is the risk of increasing politicization in Ukraine's public administration. According to the parliamentary agreement that has led to the adoption of the Law on the Cabinet of Ministers, government and opposition are supposed to share the right to appoint people for some positions in several institutions on a political basis. This is, for instance, the case of the Accounting Chamber. This is a step in the wrong direction and would affect the credibility of those institutions and of the relevant functions they are supposed to perform in favour of the citizens.

*The main weaknesses related to the civil service system have not been solved and the new government must include this issue in its main priorities. Without a modern and effective civil service system, it will be impossible for the government to design, develop and control public policy implementation efficiently.*

### **d. Public Internal Financial Control and External Audit**

Public Internal Financial Control (PIFC) has been further developed in accordance with the Action Plan of November 2005 with the implementation of the paper "Concept of Development of Public Internal Financial Control" (May 2005). A Sigma recommendation for a revision of the concept paper and action plan has not been given a follow-up. One of the objectives of Decree n° 1673, 29 November 2006, "On the State of Financial and Budgetary Discipline, Measures for Strengthening Fight Against Corruption and Control over Use of Public Property and Financial Resources" is the development of an action plan for reforming the PIFC in compliance with international standards. Following this decree, the revision of the above Concept paper and Action plan seems needed. However, there is no a common understanding as yet regarding the solutions to be adopted in order to fulfil the conditions required by European standards. The roles of the Ministry of Finance and the Main Control and Revision Service (KRU) in developing and implementing a coherent and efficient system of internal control are diffuse. In any case if you concentrate both the control and audit function as well the inspection function in KRU, this could lead to damage of both functions and the overall credibility of the control systems.

Moreover, the persistent and increasing doubts on the current public procurement legislation and related institutional arrangements, together with the weaknesses of the PIFC system, allows criticism regarding the future capacity to control spending in EU funded projects.

Concerning external audit, an action plan is being prepared following Sigma's assessment and the Accounting Chamber is also involved in a Working Group set up by the MCS D to coordinate the issues related to public finance in general.

There are also major concerns related to the independence of the Accounting Chamber. In fact, a parliamentary agreement seems to aim at sharing public positions between majority and opposition, including in the Accounting Chamber. If this should be the case, a large number of people will be removed from office before finishing their term. Consequently, job insecurity and increasing politicization in appointments will have a negative effect on the independence and the credibility of the Accounting Chamber.

*The awareness of the problems in this area has increased but some misunderstandings regarding the better solutions to be adopted in order to align Ukrainian legislation and organisation with European standards could disturb the move towards the desired direction. Increasing politicization of the Accounting Chamber would be a retrocession as well.*

#### ***e. Public Procurement System***

The Sigma review of the public procurement system in 2006 concluded that recent changes gave rise to a number of serious concerns. The most important implications foreseen were that the system (i) will not promote efficient, transparent and cost-effective public procurement; (ii) may risk undermining the credibility and integrity of the entire public procurement system; and (iii) may not contribute to Ukraine's ambitions for closer integration with the European Union, future membership of WTO, and a possible signatory to the Government Procurement Agreement.

Looking at the major events and findings after the release of the Sigma Report it should be mentioned that a new amended Public Procurement Law (PPL) was adopted by Parliament on 1 December 2006, but history repeats itself since this draft was not a result of a submission of a government's draft prepared by the Ministry of Economy. The series of previous amendments to the PPL that introduced the wide range of critical features into the public procurement system were enforced by the Parliament in conflict with both the government and the President. In August 2006, the Ministry of Economy was requested by the government to prepare a new PPL aligned with European standards and such a draft was submitted to the Parliament on 5 October 2006. However, the Parliament established a working group composed of members in favour of the current situation in order to unify all MP's proposals related to this subject. The working group prepared a new draft essentially in contradiction to the government's draft which was adopted - without any public consultation - by a strong majority in the Parliament on 1 December 2006 and then sent to the President for promulgation by 27 December 2006. In contrast to the situation in the beginning of 2006, the President did not veto the draft PPL as he had done in January 2006. Instead, the President promulgated the PPL on 5 January 2007, which means that this amendment will come into effect on 12 March 2007 with the exception of certain provisions that will become effective by 1 September 2007. To Sigma's understanding, in response to strong criticism raised against the new PPL, externally (e.g. the World Bank), and internally within the administration and the private sector, the Parliament and the Government - independently of each other - have created two working groups which have been given the task of preparing a new PPL. This step has been taken less than two months after the adoption of the new PPL, which indeed reflects the turmoil in which the public procurement system is found to be in, thus the situation remains chaotic. Furthermore, Sigma is informed that the MP and chairman of the working group appointed by Parliament is also the chairman of the Supervisory Council of the Tender Chamber.

The main additional problems identified in the new draft PPL are the following: (i) increased complexity by reduction of thresholds for the application of the law and use of simplified procedures; (ii) the status and reporting line of the Inter-Agency Commission on Public Procurement (which will replace the Special Control Commission on public procurement at the Account Chamber) is not clear; (iii) the extension of power and functions granted to the Tender Chamber.

*Although there are some positive elements in the new amended draft PPL, the overriding impression is clearly negative; the draft strengthens the role and power of the Tender Chamber and its business associates, does not manage to improve the institutional structure or to remove*

*significant deficiencies in the procedural framework. Moreover, the additional power granted to the Tender Chamber creates an environment for providing extraordinary conditions and opportunities for abuse and extortive pressure against both contracting entities and tenderers, including the Inter-Agency Commission on Public Procurement, whilst mechanisms for public control of the Tender Chamber's activities remain absent. In fact, the Tender Chamber has the right to file a legal proceeding against a decision made by the Commission or the Anti-Monopoly Committee. The Inter-Agency Commission consists of representatives from the Anti-Monopoly Committee, the Ministry of Economy, KRU, the Accounting Chamber, the Ministry of Finance, 2 representatives of the Parliament and 3 representatives from Tender Chamber. The participation of KRU and the Accounting Chamber in the Inter-Agency Commission is highly questionable in the light of their specific mandates and responsibilities. Consequently, their participation may be a problem which goes beyond the issue of conflict of interest by leading to a situation where the credibility of these two institutions is at risk. Based on certain estimations made by KRU regarding the cost for participation (publication of notices, cost for standard documents and consultancy etc.) in a tender proceeding, where the value-added can be strongly questioned, the procurement system in aggregation may potentially generate an extra annual cost of EUR 200 Million, which is a cost on the top of the bureaucratization of the process, in particular applicable to public enterprises.*

## **2. Conclusion**

One year is a short period to achieve fundamental changes in the governance system, to develop a proper legal framework and to implement relevant institutional arrangements. One must recognize that in order to improve the situation described in the 2006 Sigma assessment report requires time, hard work and proper political conditions. The fact that during this period Ukraine has had parliamentary elections and a very complicated process in reaching a new majority and a new government just emphasizes the difficulties of this transitory period. Thus, the expectations of deep changes within such period were not high.

However, it is worth stressing that political changes usually generate a new and strong impetus for the carrying out of fundamental political, economic and social reforms. Apparently, mainly due to the lack of clarity in the Constitution and to the persistent misunderstandings regarding political roles, Ukraine is largely investing this creative impetus in internal fights for division of power, instead of on crucial reforms aiming at developing substantive policies and improving the system of governance. Although fundamental changes have happened in Ukraine's political system during this period, they are not having any visible and positive impact in the assessed areas. On the contrary, confidence in political institutions and the rule of law are deteriorating.

Even considering incipient positive steps in some assessed areas – whose sustainability needs to be further monitored – the general feeling is that the political situation is undermining the capacity to solve the real problems of citizens and companies and to lead the country's development. Ongoing institutional disputes may reduce trust in political institutions and in the judiciary, which will negatively impact on the rule of law. The State is becoming weaker and, consequently, it will be more difficult to mobilize people and to generate social support for essential reforms.

So, without overcoming the current political problems – in which constitutional reform and political culture play a highly relevant role – only some minor improvements are possible in the areas covered by Sigma's 2006 assessment. Looking at what was presented as the political commitment in order to reach the so called European values, principles and standards in governance, it seems that at the moment drawbacks are more relevant than improvements. So, the main conclusion is that, in spite of some initial expectations regarding engagement with the assessment's recommendations, Ukraine's governance system is nowadays moving away from those aimed values, principles and standards.