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FOLLOW-UP REPORT ON MINISTRY OF JUSTICE STRATEGIC SCREENING

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Follow-Up Report to
MOJ Strategic Screening Report of 2015

The Report on Strategic Screening of the Role and Key Competences of the Ministry of Justice of Ukraine of 2015 (“The Report”) gave impetus for the initial restructuring of the Ministry of Justice (“MOJ”), as a result of which many of its structural units were renamed, joined or refocused (i.e. the setting up of Private and Public Law Departments, Strategic Planning Department etc.). The core of the advice in the Report was to ensure the Ministry focus on *policy making* for its core (“justice”) sector, rather than continue in its attempts of fine-tuning the legislative development instead of other line Ministries in other sectors. The Report encouraged the Ministry could continue to place emphasis on *gap analysis, impact assessment and monitoring* in national and international law-making and the implementation of EU law, as long as it concerned operations of the *rule of law* institutions, namely the judiciary and the wider “justice” sector. The Ministry was further advised to consolidate its role in the *management of its subordinate* sub-sectors (penitentiary, probation, enforcement, notaries, insolvency administration, legal aid, registers, etc.), and the handling of international mutual legal assistance.

The current remit, functions and structure of MOJ are, *by and large, in line* with the requirements for a modern European Ministry of Justice. On the other hand, the Report showed - and the current structure of MOJ continues to show - that certain MOJ elements do *not fully comply* with comparative European practices, traditions and trends.

While a *full-scale functional review* of the MOJ was not advisable at the material time in early 2015, it can be said that the relevant conditions - including, importantly, lesser internal institutional resistance and much stronger understanding of strategic directions for reform - exist for such an exercise. Any functional review *should be guided* by the recommendations in the 2015 Report, and the main *directions* for further reform set out below. When assessing the possible road-map for further *action*, one should bear in mind that some steps recommended back in 2015 required more *medium-term* (from 2 to 5 years) to *long-term* (more than 5 years) interventions. In addition, it should be borne in mind that the assignment of new duties and powers to the competence of MOJ is subject to higher bodies, such as Cabinet of Ministers of Ukraine (CMU), Verkhovna Rada and others.

1. Justice Sector Policy Making

A. The prevalent approach to a European Ministry of Justice is underpinned by its role in the planning, coordination, monitoring and implementation of *reforms* in the justice sector or its components, including the *judiciary*. Considering the structure of the Ukrainian government and the established division of powers, the MOJ should be more extensively involved in the development and implementation of the wider justice sector policies, notably the Justice Sector Reform Strategy and Action Plan 2015-2020 (JSRSAP). The MOJ has also *internalised* this policy through its own Strategic Development Plan 207-2019. According to these policies, not only MOJ should be a key player in charge of implementing some of the JSRSAP interventions *directly* in its domain (such as, for instance, Chapter 7 JSRAP, enforcement reform), but the Ministry should also play a role in the *wider coordination* of the JSRSAP implementation - for instance, in implementing activities requiring *legislative* changes with regard to the *courts* and other sub-sectors. Reforms in separate institutions of the justice sector (e.g. courts, public prosecutor’s office) influence the activities of other judicial and law enforcement institutions. Hence, strategic planning by the MOJ is necessary covering regulatory support, financial and human resources necessary for the successful reforms,

as traditionally performed by a MOJ and the Government (executive power). Coordination of provision and planning of *information services*, such as e-case in all types of process, in particular, is suitable primarily for MOJ. Good coordination between the *policy-making* (Judicial Reform Council under the Administration of President) and *operational levels* in the justice sector reforms (MOJ, High Council of Justice) is essential. It can be expected that the MOJ Strategic Planning Unit – which will soon evolve into a standalone *General Directorate of Strategic Planning, Coordination and European Integration* – will be a mainstay in the more practical and effective exercise by MOJ of this role.

B. The MOJ is directly responsible for policy-making and implementation in the area of *execution of criminal sanctions*. Moreover, the setting up of the probation system is going on in Ukraine. These aspects will undoubtedly make it necessary to assess and, if necessary, revise the criminal policy¹ pursued by the State. It should be considered whether the MoJ of Ukraine (as MoJ of Finland, Sweden, France, Estonia, Germany, Netherlands, Lithuania, United Kingdom, Belgium, Slovakia, etc.) should be assigned the responsibility for the initial analysis and assessment of the national criminal policy as well as for policy-making by suggesting amendments or supplements of criminal laws to the Government and the President (also see 2A and 2B).

2. Legislative Process²

A. Traditionally, the principle of evidence-based policy making requires that the MOJ (for example, in Finland, Estonia, Poland, Sweden, Lithuania, France, Germany, etc.) ensures that the *principal laws and codes* of the state remain *stable and systemic*. Therefore, internal MOJ law-making structures should be tasked with the supervision of specific key statutes, for example, Civil Code, Code of Civil Procedure, Criminal Code, Code of Criminal Procedure, etc. (also see 1B and 3B). The supervision of codes would cover the *monitoring, gap analysis and impact assessment* of their application practices, the drafting of amendments and supplementary provisions, as well as an obligatory *evaluation* of draft amendments and supplements, in addition to the submission of opinions. For the purposes of more *consultative* process in this constant supervision, the Minister may form special permanent Consultative Councils consisting of the best experts in specific areas – judges, prosecutors, advocates, scholars, MOJ experts etc. (the system exists in Finland, Estonia, Lithuania, Italy, and others).

B. In addition, the Ukrainian MOJ should strengthen its role in *pro-active, systematic* and obligatory *monitoring of implementation* of newly adopted legal acts in *new areas of regulation*. Each department of the MOJ should carry out the annual implementation monitoring of one or several legal acts within the area of its competence (also see A2 and C2). Two preconditions exist for the start of such monitoring: first, the MOJ should approve Methodological Recommendations (Guidance) relating to the procedure and scope of the monitoring; second, the MOJ (if needed, with international experts) should provide short trainings for staff involved in the monitoring (the system exists in Finland, Poland, Germany, Lithuania, and others).

3. Regulation and Oversight of Private Legal Professions

¹ Criminal policy is understood as crime prevention and control developed by the Government, the President and the Parliament by adopting criminal laws and implemented by the prosecutor's office and courts through the application of criminal laws.

² More specific recommendations how to improve legislative process were given in my separate Report on Legislative Process, produced by the Project in Autumn 2016.

A. The trend recommended in the Report to privatise (as many) legal professions should continue. MOJ should take planning steps for the consideration in the medium-term to *full transition* to the system of *private notaries*. In the transitional period, it is necessary to amend and settle regulation of notaries by establishing: (a) reviewed system of access to the profession (including exam and reviewed testing approach); (b) strengthen self-governance by outsourcing more powers (i.e. institution of disciplinary proceedings) to the Notary Chamber; (c) streamline the MOJ role related to the oversight, inspections.

B. The MOJ should plan next steps and carry out (within 2-3 years following the current enforcement system reform, which has created the “mixed system”) analysis and assessment of the performance and effectiveness of both limbs of the system – public and *private enforcement* officers (also see B1 and B2). In case of sufficiently objective results, a decision should be taken regarding the *final policy choice* of either public or private enforcement system should remain in operation.

4. Registers and E-Government

A. It is necessary to discuss and, if needed, create a wider Governmental Working Group (with the inclusion of e-Government agency and others) to carry out a *stock-taking of all registers*, assess the questions of distinguishing the Ministry role in *regulation and service provision*, quality control of services, interoperability of systems, data safety and security (cloud storage) etc. MOJ should be an important mainstay in the implementation of any future e-Government Strategy, given its natural role as a *bridge* between the executive and other branches of power in the reform process (also see 1A).

5. Directorates General

A. While the Report did not suggest “technocratic” (i.e. non-political) leading policy-making roles at the MOJ for reasons of lack of realistic expectation of such an approach being realised in practice at the material time in 2015, the Report did provide the Ministry with the solution for *consolidation of its main policy making areas*, such as *Private Law, Public Law, Rule of Law* (Justice Sector), etc. The subsequent restructuring of the MOJ took place in 2015, creating aforementioned new Departments. It is expected that in time these Departments may become Directorates General, headed by *non-political Directors*, selected through transparent and merits-based competitive process. In the meantime, the MOJ is creating 2 Directorates General and selecting its Directors – namely those for *Directorate General of Strategic Planning and European Integration (DGSP)*, and *Directorate General of Legal Awareness and Human Rights (DGLA)*. DGSP will act as a coordinator among thematic MOJ departments, helping provide a more systemic and evidence-based picture of MOJ and sector reforms, while ensuring more effective monitoring and evaluation (also see 1A, 2A and 2B above). DGLA will be the *first truly thematic* Directorate, in charge of developing policies for the legal aid system, academic and professional legal education. It is essential to make sure that the *role of Deputies* to the Minister of Justice (currently 6) is *reviewed*, to streamline their duties and powers, and ensure that their competences complement, *rather than overlap or compete*, with the role of future Directors General. It could be advisable for one Deputy Minister to be responsible for at least 2 main policy areas within the MOJ competence.

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