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Initial Comments on the draft RoP – from EUI and A4U points of view (standpoints)

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1 The Draft Rules of Procedure (RoP) of the Cabinet of Ministers Comments from the A4U Project perspective

The new draft RoP represents an important step in the improvement of the functioning of the Ukrainian government. Its implementation is expected to increase the quality of governance. This, however, will essentially depend on the pace and quality of the introduction of PAR (considered i.e. the new and special role of the State Secretaries /StS/ within the governmental decision and lawmaking processes and/or the practical implementation of rules on strategic planning and policy making).

From the A4U Project perspective, especially its analyses and recommendations on the improvement of inter-ministerial coordination of AA/DCFTA-implementation (that remain non-consumed by the Beneficiary of the Project), **the most important deficit of the draft is the lack of any precise reference to European affairs coordination responsible bodies – including GOCEEI and the relevant government committee (GC-EAI) and their specific role in the governmental proceedings intended to coordinate, shape and monitor this very specific and important policy area that is declared political priority.** One can obviously assume that, at least a certain part of their tasks is included in the wide range of responsibilities attributed in the RoP to the Secretariat of the Cabinet of Ministers (SCMU) as the main CM supporting body. However, according to the wording of the regulation it is mainly the SCMU State Secretary that represents the Secretariat in the governmental proceedings/procedures covered by the RoP that are expected to play an essential role in the efficient and smooth AA/DCFTA-implementation.

Taking into account the special (not only organizational) role of the StS in the RoP and the fact that the special task and role of the expected leaders (DPM, GOCEEI-Director General) of the coordination and implementation of Ukrainian European obligations are described in few other non-harmonized regulations (on GOCEEI, GC-EAI, DPM) – some of the RoP paragraphs risks to further “cement” existing weaknesses if not further diluting existing non-effective systemic solutions analyzed in several A4U papers. To avoid this to happen it would be at least – in the first step – recommended to attribute in the RoP to the DPM chairing the GC-EAI a special role in the meetings of the CM (section 3) consisting in a regular presentation of the state of the AA/DCFTA-implementation and its main actual bottlenecks accompanied by the “European assessment” of (only) controversial documents and/or issues submitted by other CM-members. This role could also be reflected by additional competencies in the setting up of the final agenda for the meeting of the CM. It has also to be underlined that actually there is no clear procedural and timing linkage between the decisions/recommendations of the GC-EAI meetings and the agenda of the CM meeting.

Another problem that concerns first of all the role of the GC-EAI, that according to the RoP will still remain only one of the few governmental committees (section 4) with very limited substantive and decisional competencies (i.e. § 31 decisions of the GC are adopted by way of consensus that is not the usual way how governmental committees are operating, especially those dealing mainly with inter-ministerial substance). Even with special tasks foreseen in the RoP for the First DPM and other DPMs in § 4 (i.e. ensuring implementation of the Program of Activity of the CM, facilitation of reconciliation of divergent viewpoints of the CM-members) the existing institutional framework for efficient AA/DCFTA-implementation remains insufficient and different from best international practices. The legal and real position of GOCEEI/GC-EAI/DPM triangle – as described in A4U papers – remains insufficient to assure the efficient leadership of coordination of AA/DCFTA related tasks and duties.

Today, the responsibility and competences of the AA/EI coordination system are spread among several institutions. An undefined part of the coordination process takes place beside the main coordination track. The GOCEEI/GC-EAI/DPM triangle do not enjoy the necessary position and reputation as the most important leader and key player that is crucial for effective coordination. The work on the RoP constitutes an important opportunity to review and reshape the existing European affairs coordination system in order to eliminate its weaknesses (this will not happen through the creation of strategic directorates general in the SCMU and the line ministries). It is i.e. strongly recommended to consider the complexity of the implementation of AA/DFCTA processes to channel and streamline related key and strategic decisions/processes into one compact coordination framework. The RoP can be used for this purpose. If not, this could be done by the adoption of a unique regulation clearly defining the: supreme coordinator reporting directly to the PM and the government, main coordination body composed of all relevant stakeholders, its competencies covering the full spectrum of AA-related matters (i.e. in relation to the parliament), tasks, deliveries and procedures, apparatus assisting the coordinator and the coordination body.

The RoP in its available version reinforces one of the source of weaknesses of the legal and operational framework for the European coordination that does not provide an efficient system of cooperation that is needed to manage complex EI/AA affairs. The RoP adds to the existing framework based on few specific regulations defining separately the way of functioning, the tasks and responsibilities of its main actors (DPM, GOCEEI, GC-EAI) new stipulations that may require further explanations and/or can be used by the ministries according to their own interpretations. This results from the fact that these above-mentioned regulations have, first, a prevailing descriptive character defining tasks with almost no reference to precisely described coordination instruments/procedures. This is why it would be recommended to attribute to the GC-EAI in the RoP a higher legal status in comparison to the existing regulations and to clearly distinguish it from other GCs through the attribution of well-defined coordination powers and a special legal authority. It is also important to regulate the competencies of other essential European key players, such as the deputy ministers on European integration (DPEI) if they are still supposed to play a key role especially in the reformed line ministries.

The RoP foresees that *“issues referred to joint competency of several government committees can be considered at a joint meeting”*. The current Ukrainian practice is that (because of the

above described institutional weaknesses) many issues fitting into this description are rather treated by separate committees, chaired by different DPMs or line ministries themselves.

As a result, there is no complex European coordination managed by one precisely defined governmental body.

A further RoP regulation stipulates in § 10 that *“when implementation of a task is assigned to several ministries, organization and coordination of work to deliver it (...) shall be ensured by Minister identified as the first on the list of implementers”*. The practical application of this paragraph in the AA-implementation in case of cross-cutting chapters/issues and view the expected coordinative role of DG-GOCEEI/GC-EAI is not obvious. The general observation regarding chapter 2 (Inter-ministerial coordination) is that it does not indicate forums and procedures for settling of inter-ministerial problems/disputes. The newly introduced meeting of StS – preparing the CM sessions – has been in this context attributed rather technical/operational than decisional competencies.

It would be recommended to include into the list of obligations of the SCMU StS vis-à-vis a newly appointed Prime Minister the provision with information/analytical materials on the current state of AA/DCFTA-implementation (§ 15).

The importance of the European Integration process – as it is (used to be) the case of several AA-implementing or EU-membership negotiating countries – is almost not anchored and defined as basis for any legislative, strategic planning, policy initiatives in the RoP. The only, decidedly non-sufficient, reference is made in § 69 providing a list of European requirements that have to be included when drafting a resolution of the CM. The conformity check that has to be assured by GOCEEI – that plays a crucial role in legislation process – is in the RoP (as many other supporting functions) attributed in general to the SCMU (§ 74). It is worth considering including by the occasion of this task the name of DG-GOCEEI, to formally reinforce the institutional position of the Office that has become one of five Directorates General within the SCMU. The current legal status of the Office that is the source of several weaknesses (as analysed and described i.e. in A4U concept papers) has remain unchanged.

It is also recommended to attribute to the GOCEEI/GC-EAI/DPM triangle special competencies regarding the cooperation with the Verkhovna Rada (Chapter 2) and/or establish a special path/procedure underlining the importance of all the European – AA-implementation relevant – legislation. Such a step could be used in order to enforce inter-ministerial coordination in this essential area that today constitutes one of the major weaknesses of the existing institutional/organizational solutions. This can be done i.e. on the basis of regulations existing in EU-member states and/or aspiring countries as well.

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2 Comments to draft revised Rules of Procedure Cabinet of Ministers (version 06-11-2018)

The comments below **pertain mainly to the strategic planning and policy related aspects** of the draft revised Rules of Procedure of CABMIN:

Key points:

1. The draft revised RoP of CABMIN have greatly increased the coherence of strategic planning and policy development processes.

There is now a clear linkage between strategic objectives, government priorities, mid-term planning, policy submission and the budget formulation process. The RoP also prescribes more explicitly the necessities for policy implementation planning. Together, these changes together would help to bring greater results-focus to the activities of government.

2. The draft revised RoP is does not contain a strong focus on EU integration and relations.

Although the RoP mentions European integration frequently in various articles of the RoP, there is currently no dedicated section on European integration. Given the importance of the AA/DCFTA and the complexity of adopting the EU acquis, a dedicated section on EU integration would raise the issue to the forefront rather than leaving it hidden amongst the details of the RoP.

3. The draft revised RoP shows a tentative rather than truly cooperative relation between CABMIN and the President.

The relation of CABMIN and the President in the RoP can be characterized as collegial but tentative. The section on the cooperation with the President is written in careful, procedural language, that oscillates from very detailed procedural articles (articles 103 and 104) to vague language (article 106). The section does not contain an explicit statement on the authorities of CABMIN and the President in key policy areas nor does it indicate that there is a close and collaborative working relation with the President on such policy areas.

4. There is no substantive role for SCMU in guarding the quality of policy concept submissions, which deprives CABMIN of objective, critical and countervailing advice.

CABMIN requires for its decision-making process access to objective assessment of policy concepts that is not prepared by the ministry and which reviews the policy concepts from a broader perspective. This helps CABMIN to make informed and sound decisions. CABMIN would now have no access to such advice. The SCMU, in turn, would be weakened by the absence of this authority and this would limit the SCMU's standing in ensuring coherent and joined-up public policy.

5. The proposed revised RoP requires a high level of policy development capacity at the ministries which may not always be present.

There is likely a significant gap between the

actual practices and capacity of government in policy development and the changes proposed by the draft revised RoP. Bridging this gap would likely require significant training and reform efforts to support the ministries in strengthening their policy development, coordination and implementation planning capacities.

6. **No transition regime was included to help the public administration adjust to the new RoP.** The RoP, in this version, does not seem to include a transition regime that indicates how the public administration system will migrate from the current RoP to the new RoP. Given the complexity of some of the implications of the RoP sections, the current government practices and the existing capacity levels, it is likely that many government organizations will require some time to fully adjust to the new RoP. A transition regime to manage this adjustment period would be useful.

Comments by article and annex:

- **The principles of cooperation may be interpreted as a license not to cooperate. (Article 10)**

This is a very useful article aiming to ensure proactive cooperation between ministers, which would trickle down in their respective organizations. This is important to reduce the current incidence of silo-behavior of ministries. Although article 10.1 states the need to ensure “alignment” of actions and although it mentions “constructive cooperation”, it may be worthwhile to bring constructive cooperation forward in the article. This is because article 10.1 with its primary focus on “alignment” combined with articles 10.2 (don’t interfere) and 10.3 (lead minister is responsible) could easily be interpreted in a way to encourage further silo behavior.
- **Tight deadline for the approving of a mid-term plan one month after Verkhovna Rada approval of the Programme of Activity. (Article 45.1)**

This deadline is quite short, and it would require both a well-working machinery of government familiar with making such complicated documents and the satisfactory resolution of any political issues during this time.
- **Mid-term plan content should not fully prohibit inclusion tasks of specific legislation of specific activities as this may be politically necessary on occasion. (Article 45.1)**

The article mentions that the mid-term plan “should not contain tasks on drafting specific legislation or carrying out specific activities.” This could be unrealistic from a political point of view, where political demands included in the Programme of Activity of CABMIN, such as the adoption of a specific law, become a government priority which would subsequently need to be reflected in the mid-term plan. This prohibition on legislative of

specific activities in the mid-term plan seems too restrictive and instead it could be allowed on occasion for certain circumstances and under specific conditions set by the government.

- **Strict and mandatory linkage of policy concepts to mid-term plan is likely not tenable in reality (article 48.1)**

This article prohibits the preparation of policy concepts for items that are not listed in the mid-term plan. Although it is preferable to allow only policy concepts for items listed in the mid-term plan to ensure both strategic focus and resource conservation, political realities as well as unexpected events may occasionally necessitate that this rule be deviated from. In anticipation of such a situation, it is suggested to reword this article to allow incidental deviation under certain conditions. The same applies to the implementation period of a policy concept which should be allowed incidentally and under certain conditions be allowed to extend beyond a five-year period.

- **Policy options are eliminated from the policy development and decision-making processes at an early stage, which may lead to policy options becoming a pro forma effort (art 49, 50 and annex 6)**

According to the draft revised RoP, policy option generation, elaboration and selection happens at the ministries before a concept paper is drafted. Policy concepts and the CAMBIN decision-making about these concepts only covers the selected optimal policy option. This means that the policy options exist only at the level of the ministry, which may not have an incentive to identify policy options especially if already has a preferred policy option or if staff are overloaded with work. This also applies to white paper drafting. It is therefore quite possible that policy options as method to increase the quality and effectiveness of policy concepts will not have the intended impact, as ministries prefer to handle policy options only as a pro forma matter. This subsequently reduces the quality of policy concepts and white papers and it could result in the emergence of the same old and ineffective policy ideas that have been around for a long. The SCMU could have a role in substantially assessing policy options generation elaboration and selection efforts to ensure that this is not merely a pro forma effort.

- **Stakeholder consultation prescriptions could be seen as cumbersome, leading to ministries bypassing such consultations or handling these as a pro forma matter. (Article 52 and 53)**

It is undoubtedly the case that the quality of policy concepts will increase after stakeholder consultation has taken place. However, the wording of article 52 and 53 is such that it prescribes a lengthy and exhaustive stakeholder consultation process for all policy concepts. It is suggested to remove a lot of the “how-to” detail here and shift this to a supporting SCMU guidelines and to allow some variation in how much stakeholder

consultation has to take place based on SCMU guidelines. This will reduce overall administrative and process burden for the ministries and concentrate the stakeholder consultation efforts when truly needed and impactful, rather than devolving into a pro-forma hurdle.

- **Lead ministry does all the policy development work with other ministries potentially not contributing. (article 54)**

Article 54 contains the idea of a working group to participate in the drafting of a policy concept, consisting of representatives of the lead ministry and the other ministries involved in the work.

This is the foundation for joined-up policy development. However, the wording of this article is

such that the lead ministry does all the work with other ministries merely “participating” and

“being consulted”, which could easily be construed as passive presence rather than proactive

cooperation. We would suggest rewriting this article to encourage more active, positive cooperation between ministries, especially on cross-cutting policy issues and to ensure that other ministries understand that they too are responsible and accountable for such policies.

- **The proposed forecasting of impact approach may not be effective (Article 56 and 57, annex 8)**

The forecasting of policy impacts is an important aspect for CABMIN to consider when making decisions about a policy concept. It is also useful in attempting to reduce perverse effects and other risks of policy by not working in a joined-up manner. However, it is not evident that the proposed approach for forecasting impact will work as intended. The proposed process and procedures for this as outlined in articles 56 and 57 are rather extensively and they prescribe a detailed process that would perhaps be better suited for a SCMU guidelines, similar to the manner in which budgetary and regulatory impact determination is to be based on methodologies to be prepared by the relevant authorities.

Annex 8 is an interesting attempt to provide government with an instrument to collect and collate impact assessments, but this instrument could easily be misused due to not understanding its format (because it can be confusing to complete table columns objectively, consistently and accurately, and because there are 3 similar tables to be completed) and because it becomes easy for non-lead ministries to influence the process, while the lead ministry will have to actively find or negotiate remedies to issues identified

by others. This dynamic is already visible with inter-ministerial consultation with the current RoP.

- **It is unclear what the mandatory annex of “Explanatory note” to policy concepts is. (Article 59)**

The explanatory note is mentioned in article 59 and in article 58.2, but it is not explained what this is. Annex 10 is not available in the translated version.

- **No substantive role for SCMU in the quality control of policy concept submissions, which undermines the position of the SCMU and which deprives CABMIN of objective, critical and countervailing assessment of submitted policy concepts (articles 60, 61, 62 and annexes 12 and 13)**

In articles 60 and 61, the secretariat of CABMIN has received only a limited role in guarding the quality of policy concepts submitted to CABMIN. The secretariat is only allowed to monitor compliance with procedural aspects (completeness of the dossier, presence of signatures and, annexes etc.) but they are not allowed to advise on the substantive content of the policy concept submission or the quality of the process in preparing it. This deprives CABMIN of objective, critical and countervailing assessment of submitted policy concepts, which is a role that normally would fall to the SCMU. Such a role would not conflict with the primacy of the ministries in the policy development process.

The limited role of the SCMU with regard to the substantive content of policy concepts is not carried through consistently, as the SCMU does have authorities that go beyond mere procedural, administrative checks. They are required to prepare a forecast of impact (Annex 12 but the content of annex 12 is not available yet), but this is unlikely to be a full substantive assessment of the policy concept given the concept of “forecast of impact” at shown in annex 8. Article 62.2 (or 62.3 due to translation typo) allows the SCMU to prepare recommendations for a decision of the government committee, but this is only when explicitly requested by the PM and only in case a policy concept is referred to a government committee due to divergence and reservations. We also note that article 100.2 provides SCMU a role in assessing reports for hearings that includes an assessment of objectivity and accuracy of information and article 102 that provides SCMU a substantial role in audits.

- **Policy alignment is not systematically checked between ministry portfolios, from the view point of the citizens (article 97 and annex 20).**

The wording of the article indicates that ministries will focus on the alignment of their policies within their portfolios. It is possible, given the wording of the annex document, that ministries will report alignment issues with regards to negative impact of public

policies of other ministries on their own policies. However, this would only be reported if the ministry identifies that there is a negative impact from the policies of another ministry. However, there may be negative impacts for citizens due to misalignment of public policy that are not identified or recognized as issues by the relevant ministries. It is possible that this would be covered by section 5 in annex 20 on stakeholders, but it is not specified in article 97.2 that ministries should engage with stakeholders. It is possible that ministries will conduct this exercise with only nominal effort. We would suggest expanding this check to be more comprehensive as it is a good measure to identify perverse effects of public policy and increase coherence of government policy from the viewpoint of the citizen.

- **Submitting separate policy effectiveness evaluation reports to CABMIN for each ministry policy will likely overburden the CABMIN (Article 98 and annex 21)**

There is no doubt that CABMIN needs to be informed about the effectiveness of active public policies. Annex 21 provides a template for such reports to CABMIN. These reports are quite detailed, and they should be prepared, but it is recommended that a consolidated and summarized report is sent to CABMIN, possibly clustering policies together that serve common overarching policy goals. This would be more meaningful to CABMIN and it would reduce their work burden. The separate reports could still be prepared by the ministries and reviewed by the SCMU if needed.

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