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(Detailed draft) Comments to the Draft Rules of Procedures of the Cabinet of Ministers

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Purpose of this document

The purpose of this document is to summarise the comments/recommendations of experts of the Association4You Project (the Project) to the draft Rules of Procedures (**version dated 06.11.2017**) (the Draft) of the Cabinet of Ministers (CM) for supporting the drafting process. The comments are based on international good practices and the experts' understanding of the Ukrainian situation.

The analysis focused on some key issues (that fall into the remit of the Project), although some other areas are also touched. The key areas are:

- The implementation of the EU-UA Association Agreement (AA) (including the DCFTA);
- The planning system;
- The policy development process.

The analysis also focused on the main body of the Draft without analysing the details of the annexes.

The comments are based on the (non- official) English translation of the Draft. Thus, some of them might be not appropriate or well established due to translation flaws.

General Comments

1. The Draft represent a major step forward in all key areas and if implemented could significantly improve the quality of governance in general and the implementation of the AA. The comments and recommendations of the Project are meant to further improve/fine tune the Draft.
2. The rules on strategic planning and policy making are generally in line with the good international practices. However, further clarification concerning the hierarchy of planning and policy documents is suggested (see detailed comments).
3. The rules on strategic planning and policy making are very detailed and rigid (not reflecting the different nature, complexity of issues and the available capacity at the ministries), thus the application of those rules might overburden the administration that might lead to ignoring the important requirements.
4. The Draft requires the development of policies (policy concepts) on a large scale. That is a very good move. On the other hand, there is no similar requirement for drafting legal (regulatory) acts. It would be essential to ensure that all important pieces of legislation are based on properly developed policies. Such policies should not be always as detailed as currently required by the Draft, but high-quality legislation cannot be drafted without proper analysis of the problems/options/objectives etc.
5. The Draft defines a wide range of responsibilities of the Secretariat of the Cabinet of Ministers (SMCU) for supporting the CM. As the core institution of the "Center of Government" the

SMCU probably should be mandated to more deeply participate in the policy development process providing opinion/advice on substantive issues to the developing ministry and or to the CM if needed. The "Center of Government" institutions in most countries are not just guardians of the processes but are responsible for coherence and coordination of policies. The Draft in some cases directly prohibits the SMCU for giving advice, making suggestion.

6. The Draft regulates the AA implementation related issues in most cases appropriately, some missing elements are mentioned in the detailed comments. However, two issues worth to mention:

   - The coordination role of Government Office for Euro-Atlantic Integration (GOEAI) is not mentioned at all. GOEAI is part of the SMCU but its role is unique. If not properly regulated GOEAI would not be able to fulfil its mandate.
   - The importance of the European Integration process (and within that the AA implementation) might suggest considering the development of a dedicated Chapter within the Draft to make the related rules more visible.

7. There are no comments made to elements of the Draft that might raise certain concerns but are in relation with the Constitutional/institutional setup (Articles 103-104 for example).

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Detailed comments with reference to the structure of the Draft

#	Ref. to the Draft	Comment/recommendation
1	**Art 8.**	• The wording indicates that the role of the State Secretaries' Meeting's role is limited to some issues. That meeting is – in many countries – the highest professional level coordination forum. It is suggested to expand the role to the discussion of all documents to be submitted to the CM meeting (with some exceptions maybe, like appointments) to enable the state secretaries settle all disputes that do not require political decision making. To discuss draft planning documents and reports implementation might be particularly important. • The conclusions of the meeting should be submitted to the Government Committees and to the CM.
2	**Art10.**	• The principle of cooperation is extremely important. The current wording seems to be relevant for "Ministers" only, while it is an obligation of every level of the administration. The Directors and Heads of Departments should be encouraged to horizontally cooperate. • Another problem is the emphasis on "constructive" cooperation and "non-interference". That can be easily interpreted as discouragement for expressing not supportive opinions, thus leading to the "silo mentality".
3	**Art12**	This Article summarises the main tasks of the SMCU. All the listed tasks are necessary, but probably some others would be equally important to mention: • Coordination of the EI process/AA implementation, • Checking and ensuring consistency of policy documents, • Producing briefing materials for the Prime Minister for the CM meetings.
4	**Art15**	The report to be produced for the new PM is very comprehensive, probably impossible (and not necessary) to put together within a few days. A more flexible wording is suggested.
5	**Art20.1.**	The draft agenda is prepared on the bases of submitted materials. In our understanding there is no such work plan that summarises all the tasks/deadlines defined in different documents adopted by the CM. To develop such "work plan", practically a list of all submissions in order of deadline could be a very useful management and monitoring tool both for the SMCU and the ministries. That workplan could tentatively plan the CM agenda for the coming months.
6	**Art20.3.**	For making the CM meeting more efficient and focused, items without any dispute (confirmed by the State Secretaries' Meeting) could be approved at the very beginning of the meeting "an bloc" (see Art24). The items for discussion could follow as suggested by the draft.
7	**Art24.3.**	This Art requires a rather comprehensive verbal presentation of proposals at the CM meeting. The CM meeting is for discussion and decision making, thus all the information should be included into the submission. The verbal presentation if any, should be very concise, focusing on the disputed policy or political issues.

8	**Art29**	The role of the Government Committees is rather technical according to the draft. The international practice is somewhat different. The Government Committee is to settle the policy or political disagreements, but not the legal-technical ones. That is the task of the State Secretaries' Meeting. In addition, the Government Committee could be a good forum for discussing planned policies while being developed, evaluating progress of the implementation of strategic documents. The EI Committee could for example discuss regularly the issues of the AA implementation (even without a specific submission to the CM meeting). The wording should probably allow such development.
9	**Art38.1.**	As a general rule the Resolutions of the CM enter into force on the date of the publication (unless stated otherwise). Since in most cases those who have to do/or not to do something based on the Resolution need some time to adjust and prepare, the general should be a 15 or at least 8 days transition (unless otherwise is necessary).
10	**Art39**	The review of this Article is suggested. The list of "Means" consist responsibilities of the CM, like approval, priority definition, issuing normative acts etc. But the rest of the listed tasks is the responsibility of the respective Minister/Ministry, like examinin g the state of affairs, formulating problems, searching for solutions etc. In its current form this Article could be misleading.

11	**Art41-47**	As mentioned among the General Comments, the rules regarding the planning system indicate significant progress. However more clarity is suggested by reviewing and restructuring the relevant articles. The problems/unclarities identified:
		  a. Strategic documents:
		      • it would be important to state that the "Strategy for development of Ukraine" is the longest term, most comprehensive basic document and **all other planning documents should be aligned with that** (top of the hierarchy).
		      • The development strategies in a particular area should be developed for at least 5 years, for a wide policy area (sector) or for cross-sectorial issues (like SME development or gender equality). Since developing such a Strategy requires a lot of resources a CM approval needs for starting the process. (The Art.42.2 "Strategy for public policy" is confusing, should be deleted probably). Such Strategies usually do not define specific activities, but there is no reason to prohibit it. They should be followed by an Action Plan (Implementation Plan) with defined activities. That requirement is missing.
		  b. Priority setting: According the Draft the priorities of the CM for its mandate are set by the "Programme of Activity", by the Mid-Term Plan" and also by the Government's key priorities (set by the Prime Minister – Art45.5). In its current for that is confusing. Logically the key priorities should be agreed upon in the coalition agreement and presented by the "Programme of Activity". The Mid-Term Plan should be a rolling (to be reviewed and adjusted annually) plan for implementing the "Programme of Activity". If the key priorities need to change a new political agreement is needed.
		  c. It should be stated (preferably a law should require that) that the Strategic documents adopted before the mandate of the new government starts should be taken into account when setting the priorities and if the new government wants to change the course of policy the Strategic documents has to be changed.
		  d. There is no need for prohibiting the definition of specific activities in the Mid-Term Plan.
		  e. The Art.44.3 seems to be unnecessary, the CM may establish a working group for any task.
		  f. The deadline for developing the Mid-Term plan is probably too tight, would not allow proper planning.

		g. The link between policy and budget planning is still weak in the Draft (like also in the Budget Code- see attached the Comments to the Budget Code), although is critical for good governance. Rules are needed for ensuring the consistency of the Mid-Term Plan and the Medium-term Budget should be developed in an integrated process (to be repeated annually). The Art 46.2 is not strong enough and the two documents are interrelated. h. Mid-term Plan of the Ministry: In addition to the listed items this Plan should deal also with the capacity issues of the ministry (headcount, training, organization, capacities provided by donors) for ensuring the capacity needed for the implementation of the Plan. The Plan should be developed as a draft after the annual budget guidelines are published but can be approved only after the annual Budget is approved by the VR.
12	**Art48.1.**	The system designed here seems to be unrealistic. There are always new issues/problems that require policy response from the Government. Thus, besides the list of policies (to be developed) in the Mid-Term Plan there should be room for others too.
13	**Art49**	Our understanding is that policy options are narrowed to one at a rather early stage of the process by the lead developer, thus at a later stage when the draft policy is discussed the non-selected option would not be visible and the room for real discussion limited.
14	**Art50**	• According this Article, the **lead developer** is obliged to do "everything" – the issues might be very different and the level of cooperation and number of participants too. The **Article 54** represent the right approach, but this two are not consistent at the moment. • More importantly this Article (and the respective Annex) suggests that all policy concepts should look like the same. In reality their complexity and importance might be very different also the available time and resources. The suggested solution is to introduce the principle of "proportionality". Although the key elements of all policy concepts should be (almost) the same the depths of the analysis, the number of options assessed etc. should depend on the issue. Flexibility is to be allowed.
15	**Art51-52**	These rules again seem to be very rigid, do not let the lead developer design the most appropriate format for the public cons ultation. Instead of the detailed rules here, the issuance of a guideline with many possible solutions is suggested.
16	**Art54**	• 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. • For enabling the SMCU to play its role we suggest inviting its representative into every working group. SMCU can decide to participate or not.
17	**Art56**	• We suggest rethinking the concept of "forecasting policy impacts". The main problem is that the impacts of a certain policy being drafted should be assessed (forecasted) on a much wider spectrum than defined by the Draft currently. Although the "proportionality" should be used for that element of the process too, the social or environmental impacts are relevant for

		almost all policies. The internationally used concept of "ex ante policy impact assessment" is suggested to introduce instead, however in a flexible way, with gradual implementation. • If the current logic remains, we suggest including the impact on the EI to be listed. • The idea of not sharing some elements of the forecast with the public could lead to serious political problems and seems to be against the logic of stakeholder/public consultation. • 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.
18	**Art57**	Our understanding is that according to the Draft only the forecast and not the entire draft policy is to be reconciled with other ministries. If this is the correct interpretation of the Draft, than it is a serious problem. For achieving well-coordinated policies across the whole Government, **the draft policies** should be reconciled with all **relevant** ministries. The SMCU and Ministry of Finance are to be considered as relevant for every draft policy. In case of policies with any impact on the EI process GOEAI is to be involved.
19	**Art58-62**	• The SMCU role is very much limited by these Articles and thus would be against the concept of the "Center of Government". SMCU should have the right to check – besides the procedural compliance – to assess the quality of the policy proposal (including the forecast), the coherence with strategic documents and other policies and to make proposals if appropriate. (see General Comments too). • 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. • The approach however is not consistent, concerning audits for example the SMCU role is very wide.
20	**Art66-92.**	We see a conceptual problem here. The policy making, and legal drafting process are completely separated by the Draft. The good governance (and high-quality legislation) would require just the opposite: **legal drafting (with some exceptions) should always be based on well developed, discussed and adopted policies.** In practical terms we suggest making it clear in the Draft any legal drafting should be based on the relevant policy concept. In case no such detail policy concept is available, but legislation is needed, a simplified "light policy" is to be developed before the commencement the legal drafting for clarifying the objectives to be achieved and the measures to be used. That approach would significantly influence the regulatory impact assessment (RIA). If proper policy concept has been drafted, including the ex-ante assessment, to develop the RIA report is rather easy. Otherwise the development of the RIA report is a huge administrative burden with rather limited positive impact.

21	**Art95**	SMCU should keep a registry of all such tasks and deadline and monitor the compliance. That registry could be the main source of the work plan suggested in relation to Art.20.1
22	**Art97**	- This is not clear: the alignment of policies should be ensured when they are drafted and adopted. That is to be also part of the monitoring of the implementation as a continuous task and not a one-off type annually. - 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. - As far as the monitoring is concerned, more detailed rule would be needed than the reference to the progress report. The main point here is that the monitoring is a management tool for identifying problems early enough and enabling intervention if needed.
23	**Art98**	- The evaluation of implemented policies seems to be rather narrow, focusing on "effectiveness. Effectiveness is important but there are a number of other factors to evaluate like efficiency, non-foreseen impacts etc. - Submitting separate policy effectiveness evaluation reports to CABMIN for each ministry policy will likely overburden the CABMIN (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.