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# **Kosovo without a strategy against corruption** (The failure of the Government to approve the Anti-Corruption Strategy and KLI's comments regarding the Draft Anti-Corruption Strategy)



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## ABOUT KLI

KLI, Kosovo Law Institute, is a non-governmental and non-profit organization of public policy, a think tank specialized in the justice sector.

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## Contents

1. Foreword.....	4
2. General comments .....	6
3. Inadequacy of whistleblower protection measures.....	7
4. Access of PRB in criminal files.....	8
5. Independent Oversight Board for the Civil Service of Kosovo .....	9
6. Case Management Information System .....	9
7. Law on Criminal Record.....	10
8. Publication of the hearings schedule .....	11
9. Declaration of conflict of interest .....	11
10. Handling of criminal reports.....	11
11. President of the Commercial Court.....	12
12. Supervision of the Constitutional Court.....	13
13. State Bureau for Verification and Confiscation of Unjustified Assets .....	14
14. "Absence" of the law on beneficial ownership and media ownership .....	14
16. Action plan.....	15
17. Recommendations.....	17

## 1. Foreword

The fight against corruption was one of the main promises with which the Vetëvendosje Movement came to power. “Justice and Employment” was the main slogan of this party during the electoral campaign. When the Kurti II Government has been three years since coming to power, major reforms such as Vetting in the Justice System, Reform in the prosecutorial system, reform in the civil justice through the adoption of the Civil Code, etc., have not yet been implemented.

Despite the fact that the Kurti II Government had proclaimed the fight against corruption as the main goal, at the end of the third year of government, Kosovo still does not have a Strategy for the Fight against Corruption and the public is still not clear what the path will be that the Government will follow in relation to the fight against corruption within the powers and responsibilities that this government has in preventing and fighting corruption. The absence of this Strategy for such a long time and the failure of the working group to draft a document based on the applicable law in Kosovo, and which document does not interfere with the independence and integrity of independent institutions, builds the belief that the government itself and the working group have serious problems to understand their competences and to fulfill the obligations arising from the Government Program for fighting corruption.

Law No. 08/L-017 on the Agency for the Prevention of Corruption entered into force in August 2022. The state strategy and action plan against corruption in accordance with Article 24 of this Law is drawn up and approved by the Government of the Republic of Kosovo. While the implementation of the Anti-corruption Strategy is monitored by the Corruption Prevention Agency.

The Government of the Republic of Kosovo, in the meeting held on February 22, 2023, decided to establish structures for the drafting of the State Strategy and Action Plan against corruption. This structure consisted of the Ministerial Commission, the Coordinator and the Working Group. In which case the working group consisted of important state actors, including independent agencies and other institutions as needed. This working group, according to this decision, had to draft this Strategy by December 1, 2023.

Throughout the time that the Draft National Strategy against Corruption and Action Plan 2023-2026 (Hereinafter: Draft Strategy) has been drawn up, KLI has participated in all the meetings where it has been invited and has also sent written comments, aiming to contribute to the drafting of a Strategy that responds to the need to fight corruption. Despite this, the narrative of the Draft Strategy became known to KLI only at the meeting on November 7, 2023, during which meeting, initially, it was said to be the last meeting related to this Draft Strategy. KLI gave comments in this meeting and

processed the same in writing. KLI never received an answer of how these comments were handled.

Unfortunately, even after December 1, 2023, when according to the Government's decision the Strategy would have been drafted, the public did not receive an answer as to why more than 9 months were not enough to draft and finalize this Strategy, despite the fact that the approval of this Strategy remains a legal obligation.

In this document, KLI presents its comments on the Draft Strategy, which it has sent in writing to the Office of the Prime Minister, for which comments KLI has never received feedback on how they were handled.

## 2. General comments

KLI after analyzing the draft of the Strategy has noticed that it lacks the argumentation of the issues which are subject to treatment in the Strategy. Only exceptionally and only in generalized terms does the Draft Strategy cite any reports. However, the Draft Strategy does not describe the issue and problem through empirical and analytical data, does not use other supporting documents, analyzes or approved documents that are related to the issues addressed in the Strategy. Mainly, in its entirety, the Draft Strategy abstracts the need for arguing the problems it claims. Thus, even the activities listed in the Action Plan of the Draft Strategy do not derive from a logical flow, that the activity was with measures to avoid the problems identified, proven, analyzed and argued. In the issues which are the object of treatment of this document, the lack of this approach is clearly presented.

The Draft Strategy itself underlines that "the Government has led the process and has based the Strategy on the risk-based approach". However, the argumentation of this approach is not observed in almost the entire Draft Strategy.

The Government of Kosovo has approved the Rule of Law Strategy. This strategy was derived from the Rule of Law Sector Functional Review Process, which has scanned all issues related to the rule of law, including the prevention and fight against corruption. The findings of this process, coupled with the further research of certain aspects, would be a good basis for arguing the relevant issues in the Draft Strategy. However, this Draft Strategy does not refer at all to the Rule of Law Strategy nor to the policy documents resulting from the Functional Review Process of the Rule of Law Sector.

On the other hand, in many cases, there are factual inaccuracies that make this Draft Strategy unstable. Such, for example, is the case when it is said that there are no provisions for the obligation to return answers related to the result of criminal charges, the lack of provisions regarding the beneficial owner, etc. Or, it is the case when it is said that some problems will be dealt with through the Law on Criminal Evidence, which then includes issues that have nothing to do with this Law.

On the other hand, the Draft Strategy also has problems related to the way it treats some of the concepts. Such is the case regarding the monitoring of the work of KJC and KPC by the Constitutional Court or the mixing of concepts related to the beneficial owner and media ownership. Despite the fact that the Draft Strategy underlines the need to extend only to those segments that can be handled by government mechanisms and tools, the same Draft Strategy contains issues that are within the competence of the institutions of the justice system.

Consequently, in some cases, the Draft Strategy mentions issues that have already been completed. Whereas, it is assumed that the Draft Strategy and Action Plan only extend into the future and not deal with issues that have already been completed.

All these issues are elaborated in detail later in this document.

In order to build an adequate Strategy against Corruption, the Government by its decision has established the structures for the drafting of this Strategy. Beyond just the narrative drafting of the Draft Strategy, it was assumed that these structures would conduct adequate research in order to draft a Strategy based on evidence, analysis and arguments. This approach should not have been followed in the case of this Draft Strategy.

For this reason, IKD assesses that after addressing the following issues, the Draft Strategy should be subject to redrafting and re-commenting, so that it follows the required standards. The meritorious consultation with all members of the working groups and stakeholders remains essential, while the need for the development of public consultations, in accordance with the Regulation on Minimum Standards for the Process of Public Consultations, obligation.

### **3. Inadequacy of whistleblower protection measures**

On page 7 of the Draft Strategy, it is emphasized that "...public administration cannot function efficiently without whistleblowing mechanisms, which: 1) ensure law enforcement for whistleblowers and 2) provide easily accessible digital tools for reporting corruption or other forms of abuse and violations in the ranks of public administration...".

Regarding the digital platform, it should first be noted that there is no report that states that the implementation of the Law on the Protection of Whistleblowers is challenged by the lack of digital tools for whistleblowing. These data are not even presented in the Draft Strategy. However, despite this, still the creation of such a platform is something positive and as such should remain in the Draft Strategy.

Whereas, regarding the implementation of the Law on the Protection of Whistleblowers, KLI agrees with what is stated in the Draft Strategy on the importance of the implementation of the Law on the Protection of Whistleblowers. However, the Draft Strategy in this case is limited to highlighting the importance and does not present data or other actions related to the implementation of this Law. Clearly, building the whistleblowing platform alone is not sufficient for this purpose.

Civil society organizations have drafted numerous reports regarding the challenges related to the implementation of the Whistleblower Protection Law. The lack of

technical conditions for the implementation of this Law is one of the issues with which the implementation of this Law is challenged (See the report for more [Whistleblower Protection Law - challenges of implementation in practice](#); see, also the report [Whistleblowing and whistleblower protection](#)). Thus, there are a number of measures that must be taken in order to increase the efficiency of the implementation of the Law on the Protection of Whistleblowers. This goal cannot be reduced only to the digitization of this process.

For these reasons, in order to determine the concrete measures related to increasing the efficiency of the implementation of the Law on the Protection of Whistleblowers, the relevant documents that have monitored the implementation of this Law should be examined and after examining the case based on in concrete data, the actions to be taken should also be specified.

#### **4. Access of PRB in criminal files**

On page 16 of the Draft Strategy, it is stated that "...an IT solution will be developed to allow public procurement bodies access to criminal files, thus allowing them to identify business owners and businesses that are eliminated from public procurement tenders...".

Data from criminal records are considered sensitive personal data (See Law No. 06/L-082 on the Protection of Personal Data, Article 3.1.1.15). In order to protect this data, specific provisions have been defined in chapter IX of Criminal Code No. 06/L-074 of the Republic of Kosovo. Article 98 of this Code talks about the content and disclosure of data from the criminal file.

Determining the possibility of an institution to automatically have access to data from criminal evidence fundamentally violates personal data. Moreover, beyond the concrete procedures, the easy possibility to access these data essentially violates the provisions related to the obligation to protect personal data.

In the case of public tenders, it is sufficient for the contracting authorities to include as a criterion the deposition of the certificate from the criminal record, through which it can be seen whether a subject is convicted or not. This situation, besides enabling the achievement of the intended goal, does not affect personal data and the system for the protection of this data. Moreover, in the present case, through the deposit of the certificate in question, the data subject himself gives his consent for access to this data.

For this reason, KLI recommends that this issue be deleted from the Draft Strategy as well as its action plan.

## 5. Independent Oversight Board for the Civil Service of Kosovo

On page 10 of the Draft Strategy, it is stated that "Finally, the government has pointed out the absolute immunity that has been given to certain positions within the public service in decision-making, which generally damages the administration and allows paths for illegality and misuse. In particular, the Independent Oversight Board for the Civil Service has absolute immunity in making decisions related to matters arising from the employment relations of public officials. Therefore, the government has approved legislative changes in the Law on the Independent Oversight Board for the Civil Service, which prohibit immunity in decision-making and, consequently, increase the accountability of public institutions".

First of all, it should be emphasized that the Draft Law on Supplementing and Amending the Law on the I Independent Oversight Board for the Civil Service of Kosovo is a negative example regarding the reform in the administration of Justice. This is because this Law violates the equality before the law of civil officials and made practically non-functional a constitutional institution such as the Independent Oversight Board for the Civil Service of Kosovo (See also the report [Tendencies for politicization of IOBCSK](#) and [KLI Reaction](#)). This law is currently being reviewed by the Government of the Republic of Kosovo.

On the other hand, the fact that the members of this Council have absolute immunity does not stand. Immunity in the present case is functional immunity, which is conceptually different from absolute immunity. This has been sufficiently clarified, precisely for the specific case, by the Constitutional Court (See the case of the Court, [no. KO171/18, with the applicant the ombudsperson, judgment of May 20, 2019](#), par.252-245).

Abstracting all this, in front of this narrative of the Draft Strategy, this has not been translated into any activity of the Draft Strategy. Even, based on the fact that the Draft Law in question, which is being reviewed by the Constitutional Court, has already been approved, the Government no longer has an object for strategic planning. The Draft Strategy is supposed to refer to the future, the actions that will be taken, and not the actions that have already been taken.

## 6. Case Management Information System

On page 11 of the Draft Strategy, it is stated that "A significant obstacle to the overall efficiency of the judicial system is the proper use of the Case Management Information System (CMIS). CMIS, a substantial investment by the Norwegian Ministry of Foreign Affairs, was designed to bring operational changes to the day-to-day running of the courts. Despite being in use for several years, CMIS has not yet managed to increase

the efficiency of the judicial system and ensure the transparency of decision-making and its operation", while the Action Plan lists as an activity "Proposal for legislative initiation for CMIS".

The use of CMIS has so far advanced considerably, despite the technical problems that this system continues to face. There is no data, just as it is not given in the Draft Strategy, that this problem derives from the absence of any legal norm or due to some inadequate norm. Moreover, the Draft Strategy itself does not specify which Law will be adopted in this regard. For this reason, this issue for the purposes of the Draft Strategy is irrelevant. Therefore, KLI recommends that this part be removed from the Draft Strategy.

## **7. Law on Criminal Record**

On pages 11-12 of the Draft Strategy, it is stated that "the government will proceed with the adoption of the Law on the Central Criminal Evidence System, which will ensure absolute compliance with the system in the daily work of the court. This law will provide minimum guarantees and will allow a) court users and citizens to access the system to find information about their cases; 2) judges are obliged to publish the dates when the case is assigned to them and to act efficiently for the appointment of initial hearings (the same applies to prosecutors); 3) through the possibilities offered by the electronic signature, lawyers will be able to submit their defense materials online; 4) judges and prosecutors are obliged to declare possible conflicts of interest and act accordingly; 5) The Judicial Council and the Prosecution Council of Kosovo should be able to follow electronically the management of a case by a judge/prosecutor and base the performance evaluation and possible disciplinary measures on the data produced; 6) The Ministry of Justice has access to the final data produced (the number of judgments issued for a certain time) to plan its policies accordingly; and through these measures the citizens will regain trust in the institutions of justice".

Most of these issues have nothing to do with the Law on Criminal Records. Publication of hearings, electronic signature, declaration of interest, etc. are not related to the Law on Criminal Records. This issue should be reflected in the Draft Strategy, in such a way as to specify which issues are intended to be addressed through this Law.

In this regard, on page 13 it is stated that the Government "[will] approve the Law on the Central Criminal Evidence System". On October 26, 2023, the Assembly of the Republic of Kosovo has already approved this law. While the Draft Strategy is supposed to refer to the future, it should not contain issues that have already been concluded.

## **8. Publication of the hearings schedule**

The issue of publication of court hearings is mentioned on page 11 of the Draft Strategy. Data from KLI monitoring prove that this issue is a problem. However, the problem does not derive from the lack of legal norms, but from the lack of adequate compliance with the obligation defined by Article 10 of the Regulation on the Organization and Internal Activity of the Courts of the Republic of Kosovo.

Thus, it is up to the KJC to address this issue within its own mechanisms and there is no object in what the Government can do in this regard.

## **9. Declaration of conflict of interest**

On page 12, the Draft Strategy emphasizes the need for "judges and prosecutors to be obliged to declare potential conflicts of interest and act accordingly".

This obligation for judges already exists. The Criminal Procedure Code defines the grounds for the dismissal of judges and prosecutors, the procedures for dismissal, requests for dismissal, etc. In addition, there is also the Law on No. 06/L -011 on the Prevention of Conflict of Interest in the Exercise of Public Function, which defines the provisions related to the conflict of interest, procedures, declaration, management of the conflict of interest, responsible authorities, etc. For this reason, this issue is sufficiently settled. In the absence of a reflection of a concrete need for completing or changing the current regulations, this matter now remains without object. Therefore, KLI recommends that this issue be deleted from the Draft Strategy.

## **10. Handling of criminal reports**

On page 12 of the Draft Strategy, it is stated that "numerous cases of criminal charges, especially those coming from the government, have never been addressed by the Prosecutor's Office, nor has an explanation been given as to why no action has been taken." This will be resolved through this law, by providing timely responses to all citizens who initiate criminal complaints, restoring citizens' trust in justice institutions and ensuring their transparency and efficiency.

This issue is factually incorrect. Along with other articles, article 84 of the Criminal Procedure Code No. 08/L-032 specifies that the procedure for filing a criminal report. Among other things, paragraph 4 of this article specifies that "[w]ithin eight (8) days from the filing of the criminal report, the state prosecutor sends the decision with the reasons for filing the criminal report to the injured party or the victim, the person or

the body that has filed the criminal report. The decision to drop the criminal report is delivered to the person against whom the criminal report was filed." Among other things, this article also defines the possibility of appealing to the Appellate Prosecutor's Office in case of criminal charges [paragraph 5] or in case of no action within six months [paragraph 8]. For this reason, it does not hold that there are no provisions that determine the obligation of the Prosecution to notify the party regarding the result of handling a criminal report.

Further, in this paragraph it is stated that "...this will be resolved through this law...". It is not clear which law the Draft Strategy is talking about here. The preliminary paragraph deals with the Law on Criminal Records, which clearly has nothing to do with this issue.

Moreover, the criticism directed at the State Prosecutor in this case is in line with the continuous statements of the Government regarding the justice system, which statements represent pure interference in the work of the justice system. Furthermore, it is contradictory that in the same paragraph a constitutional institution such as the State Prosecutor is criticized, and in the same paragraph the aim is to raise public confidence in justice institutions.

In terms of advancing this issue, it would be welcome if the strategy would list as an activity the amendment of the Criminal Procedure Code, in such a way that control leaves the Appellate Prosecutor's Office and turns into judicial control. Thus, the violation of the Constitution of the Republic of Kosovo, which consists in the lack of access to justice to prosecutorial decisions, would be addressed. On this issue, see more KLI reports: [Fighting corruption without judicial control](#) and [\(Non\) Implementation of the Rule of Law Strategy in Practice](#) page.19-20.

### **11. President of the Commercial Court**

On page 12 of the Draft Strategy, it is stated that "[concentration of fact-finding and appellate jurisdictions within a single judicial entity damages internal checks and balances. The strategy aims to ensure a clear division of roles between first-instance courts and appellate courts, as well as an appropriate distribution of capacity-building efforts".

The issue of whether the Commercial Court should function with one or two presidents has been the subject of detailed discussion in the working group for drafting the Law on the Commercial Court, after which discussion the model was chosen for the Commercial Court to function with two chambers and a president.

The Law on the Commercial Court entered in force in February 2022. Thus, the Commercial Court is still a new court. Beyond the dilemmas related to whether the Commercial Court should have one or two presidents, which dilemmas have been addressed in the working group, no other problems have appeared. For this reason, while it is in its initial stages, entering into the process of supplementing and amending the Law on the Commercial Court would only harm this Court.

But, if there are really strong reasons to do this, the Draft Strategy should contain concrete data and arguments, which has not happened in this case.

For this reason, KLI recommends that this issue be removed from the Draft Strategy.

## **12. Supervision of the Constitutional Court**

On page 12 of the Draft Strategy, it is stated that "The repeated pattern of complexities arising from the process of appointing the Chief State Prosecutor, as well as its interaction with the judicial process in the Constitutional Court, underline the necessity of addressing the issue of direct constitutional supervision of the rules, regulations and decisions of both councils within the judicial system... The strategy will include measures aimed at establishing direct constitutional supervision of by-laws and decisions of the judicial system...". Further, on page 13 of the Draft Strategy, it is underlined that the Government "...[will] ensure constitutional supervision of the decisions approved by the KJC and the KPC". One of the activities defined in the Action Plan of the Draft Strategy is "Drafting and approving amendments to the Law on the Constitutional Court to ensure the supervision of the rules and decisions of the KJC and the KPC".

The Constitution of the Republic of Kosovo in Article 4 has defined the provisions related to the separation of powers. In front of the legislative, executive and judicial power, there are two institutions that operate outside of this division: the President of the Republic of Kosovo and the Constitutional Court. Thus, the determination of the Constitutional Court as a supervisory institution of the institutions of the justice system is contrary to the Constitution of the Republic of Kosovo.

Moreover, this model defined in the Draft Strategy is also contrary to the very concept of constitutional judiciary. Article 4.6. of the Constitution of the Republic of Kosovo defines that "the Constitutional Court is an independent body for the protection of constitutionality and makes the final interpretation of the Constitution", while Article 113.1. of the Constitution of the Republic of Kosovo stipulates that "the Constitutional Court decides only on cases brought before the court legally by the authorized party". Thus, it is not in the nature of an institution like the Constitutional Court to serve as a supervisory body of another institution of KJC and KPC.

On the other hand, it should be emphasized that the decisions of KJC and KPC are not outside the orbit of the supervision of the Constitutional Court. However, this supervision is exercised in the way constitutional justice is developed, through initiated cases. Thus, in each case, each of the parties authorized to bring a case before the Constitutional Court, can also bring a case against the decision of the KPC and KJC. Attention should be drawn here to the fact that this Court has annulled the decision of the KPK on the proposal of the Chief State Prosecutor (See Court case, [no. KI99/14 and 100/14, with applicants Shyqyri Sylva and Laura Pula, Judgment of July 8, 2014](#)), KJC decision on the proposal of the President of the Supreme Court (See court case, [no. KI34/17, with applicant Valdete Daka, judgment of June 12, 2017](#)), KJC decision on the appointment of the President of the Court of Appeal (See court case, [no. KI55/77, with applicant Tonka Berisha, Judgment of July 17, 2017](#)) etc. Thus, the decisions of KJC and KPC are not excluded from the jurisdiction of the Constitutional Court. However, the action of the Constitutional Court in these cases acts in accordance with the concept of the normal functioning of the Constitutional Court and not through an unknown model in contemporary Constitutional Justice, that of defining the Constitutional Court as a supervisory institution of another institution.

### **13. State Bureau for Verification and Confiscation of Unjustified Assets**

On page 13 of the Draft Strategy, it is stated that the Government "will establish the State Bureau for the Verification and Confiscation of Unjustified Assets". The Law on the State Bureau for Verification and Confiscation of Unjustified Assets has already been approved, and the same is being reviewed by the Constitutional Court.

In this situation, this issue is already concluded in terms of the Government's role, due to the fact that the Government has sponsored the already approved Draft Law and even if we assume the fact that the Constitutional Court confirms the constitutionality of this Draft Law, the Government has no further role in the establishment of the Bureau, but that the central role is held by the Commission for the Supervision of the Bureau. In this situation, the Government has no object for planning any issue, due to the fact that this process is a completed process.

For this reason, since this issue has already been concluded and the Government has no further role in this regard, KLI recommends that this issue be removed from the Draft Strategy.

### **14. "Absence" of the law on beneficial ownership and media ownership**

15. On page 17 of the Draft Strategy it is stated that "In the absence of the law on beneficial ownership, the state administration and citizens (including civil

society) find it impossible to know who is behind a certain business". The fact that there is a "lack of law on beneficial ownership" in Kosovo does not stand. Law No. 05/L -096 on the Prevention of Money Laundering and Combating the Financing of Terrorism in article 2.1.1.36 defines detailed provisions regarding the meaning of the beneficial owner. Also, CBK has also approved the [Guidance on Identification of Beneficial Owners](#). Therefore, this definition of the Draft Strategy actually does not stand.

If related to the issue of beneficial owners, the provisions in question have any potential problems related to the effectiveness of these provisions or their implementation in practice, the Draft Strategy should clarify this problem and show exactly which issues are problematic and which legal provisions should to be completed or changed. However, in the specific case, only the lack of provisions related to the beneficial owner was found, which, as said, does not stand.

On the other hand, on page 17 of the Draft Strategy, it is stated that "Recent developments in the media sector have also proven the importance of making beneficial ownership transparent in the media as well." In the present case, there is a clarification between two concepts: Beneficial owner and media ownership.

The issues related to the beneficial owner are mainly aimed at preventing money laundering and terrorist financing (for more see: [Beneficial ownership of legal entities](#)). On the other hand, the issue of media ownership is related to the need to prevent monopoly in the media market, in order to implement media pluralism. For this reason, these two concepts should be distinguished in the Draft Strategy.

Further, in this part of the Draft Strategy it is stated that "...We have witnessed recent developments where a certain media has broadcast the news that the terrorist (who participated in the attack in Banjska in the north of Kosovo) was glorified in Serbia...". Regarding this case, it is positive that the mechanisms have worked, in such a way that the Independent Media Commission has undertaken the actions defined by law. Beyond that, there is no other way to do it. The citation of only one case, for which the institutions have acted in accordance with the constitutional and legal powers, does not build any valid argument regarding any eventual problem identified, which could present the phenomenon. For this reason, KLI recommends that this part and other parts of this nature be removed from the Draft Strategy.

## **16. Action plan**

The activities that are intended to be undertaken are defined in the Action Plan of the Draft Strategy. However, in the submitted draft, the Responsible Institutions for the

implementation of these activities, the time frame and cost have not been determined. These columns in the accepted draft are blank.

In order to provide the opportunity for giving meritorious comments, the Action Plan of the Draft Strategy must also contain this data, on the basis of which the comments will then be drafted.

## **17. Recommendations**

1. Based on the fact that the previous structures have failed to draft the Strategy within the deadline set by the Government, the latter issues a new decision on drafting the Draft Strategy.
2. The drafting of the Strategy should be done respecting the Constitution and the basic concepts of the Kosovar constitutional order.
3. The new government drafts the Draft Strategy from scratch.
4. The Draft Strategy should not violate the independence of the judicial and prosecutorial system and should not contain language that encourages distrust in the institutions of the justice system.
5. Drafting of the Strategy should be preceded by an analysis of the problems and not presented data unsupported by facts and arguments.
6. The Draft Strategy should be based on accurate analytical and substantive data.
7. The Draft Strategy should be in harmony with the Rule of Law Strategy.
8. Drafting of the Strategy should be done in meritorious consultation with all relevant actors, including international partners.
9. Institutions mandated for drafting the Draft Strategy to analyze the issues, in such a way that the Draft Strategy does not incorporate issues which are currently regulated by law.
10. The Draft Strategy is subject to the public consultation process, in accordance with the Regulation on Minimum Standards in the Public Consultation Process.
11. The Government to approve the State Strategy and Action Plan against Corruption.