Association with the EU: how does Ukraine fulfil the benchmarks for signing the Agreement?

Independent monitoring report

As of 18 June 2013

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On cover page:
A fragment of the 'Euro-tree' during celebration of the Europe Day in Ukraine
(Explaining the reasons for Ukraine's European integration,
the description on the star says: 'We want freedom and worthy life like in Europe')
Independence Square (Maidan), Kyiv, 18 May 2013
Courtesy of the Facebook movement "We are Europeans"
(https://www.facebook.com/groups/euinua/)

EXECUTIVE SUMMARY

It has been six months since the Council of the EU set forth the conditions for signing the Association Agreement with Ukraine on 10 December 2012. Today we have to state that the progress in compliance with the benchmarks is not sufficient to expect the Agreement to be signed at the Eastern Partnership Summit in Vilnius on 28-29 November 2013.

We assess that neither of eleven criteria for the signature of the Agreement has seen tangible progress. Four of them show certain progress; five, minimum progress; and two, no progress. The chart below gives visual demonstration of the evaluation. Yellow colour represents certain progress; orange, minimum progress; and red, no progress. Green would indicate tangible progress.

1 **Election legislation, electoral practices and balanced media access**
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Addressing the consequences of politically motivated criminal prosecution is fundamental for signature of the Agreement. Release of Yuri Lutsenko is an important positive move yet insufficient as long as Yulia Tymoshenko remains in prison. In particular, leaders of the most powerful EU member states have spoken clearly about it.

The area of elections shows very controversial tendencies. The government made amendments in the parliamentary election legislation that are contradictory and insufficient. Re-election is expected in five single-mandate districts where results of the recent parliamentary election were not established. At the same time, court stripped several current MPs of their mandates on very dubious reasons. Recent local election in some towns did not show progress in the electoral practices. Postponement of Kyiv mayor election is unacceptable.

The Venice Commission expressed a positive opinion on two important drafts of constitutional amendments (in the area of judicial branch and Accounting Chamber), yet the actions of the Constitutional Assembly remain not inclusive and transparent enough. The current version of the law on national referendum raises many concerns as it allows amending the Constitution in an unconstitutional manner bypassing the parliament.

Implementation of the new Criminal Procedure Code has delivered significant positive results along with the launched system of free legal aid and the national preventive mechanism against torture. Yet the success is not stable here, while the free legal aid and the national preventive mechanism remain critically underfunded by the government.

Respective draft laws are being developed or agreed in almost all other reform areas. Fight against corruption is the only area where a number of important laws were adopted. Even they need improvement though, and there is still no progress in establishing independent institutions for anti-corruption policies and investigation into publicly disclosed corruption of high-ranking officials.

No action can be seen at all on the way to meet a number of EU conditions. It concerns in particularly the Election Code, review or cancellation of the national referendum law, preparation for establishment of the National Bureau of Investigation, amendment of articles 364-365 of the Criminal Code, substantial review of the law on the judiciary, approval of the new version of the law on the prosecutor's offices, improvement of detention conditions and reform of the police.

However, even this limited progress would not be possible without the Association Agreement signature perspective and related EU conditions. European integration has finally taken a priority place on the domestic policy agenda. Amid fierce political confrontation the government and the opposition cooperate in the parliament on European integration laws. Both parties declare their commitment to ensure signature of the EU Association Agreement this November.

The entire process, however, lacks transparency and inclusion. Following the decree of the President, the government regularly (monthly) updates the EU about the actions taken but does not disclose them publicly. Civil society experts are engaged insufficiently in preparation and discussion of draft laws approved often hastily bypassing established procedures. A deep expert cooperation between the government and institutions of the EU, OSCE and the Council of Europe (in particular, the Venice Commission) is a positive signal. However, it should also include political parties, dedicated NGOs and think tanks.

Postponing the decision from May to autumn, the EU gave Ukraine another chance. Immediate and decisive actions are needed to achieve tangible process in all areas within the next months.

We should bear in mind that the EU conditions require change in practices, not just the formal adoption of laws. The EU criteria list does not indicate a number of laws to be approved. It indicates breakthrough changes to be attained. Several dozens of laws can be taken without a tangible result. Many areas need not only new laws but proper compliance with the existing legislation, no abuse and political pressure on legal institutions, etc. Therefore, the root causes in every area requiring reforms should be understood to evaluate the situation without bias and identify appropriate priorities.

At the same time, it would be obviously unrealistic to demand and expect that just in a few months Ukraine would resemble an established democracy. The EU is known not to be expecting an instant and complete solution of all actual problems. Conclusions of the Council of the EU say that to sign the Agreement the EU needs to see «determined action and tangible progress», i.e. a trend, positive change and determination of Ukraine. However, it is already clear today that there won't be tangible progress in all the areas.

Despite our critical evaluation of the Ukrainian realities, we believe the EU would make a strategically right decision if it signed the Association Agreement even if tangible progress is achieved only on few key issues. We see that the Agreement signature perspective, clear criteria, a high-level political dialogue and expert cooperation deliver positive results. This tendency needs to be further intensified. The EU would have the best leverage on the political developments in Ukraine by signing the Agreement and at the same time preserving certain controlling mechanism.

Key recommendations (until September 2013)

The following recommendations are essential and also realistic for implementation over the next several months:

- Find a mutually acceptable mechanism to release Yulia Tymoshenko on any of the options (pardon, medical treatment abroad, amnesty, decriminalisation, etc);
- Ensure free and fair elections in the five single-mandate districts where the 28 October 2012 election results were not established;
- Resolve the conflict over the attempts to strip MPs of their mandates, based only on the mandate deprivation grounds fixed in the Constitution;
- Schedule elections of Kyiv mayor and city council;
- Actually launch a fundamental electoral reform based on a broad consensus, with actual involvement of, and consideration of the opinion of, the opposition, dedicated NGOs, the Venice Commission, the Council of Europe, OSCE / ODIHR
- Cancel the Law of Ukraine On National Referendum or drastically amend it to align with the Constitution of Ukraine and European standards;
- Amend the laws on the judiciary and the status of judges, in particular: to maintain genuine independence and self-governance of judges introduce competitive appointment of judges to courts at different levels increase the role of the Supreme Court of Ukraine in the introduction of consistent judicial practices harmonize the disciplinary responsibility of judges with European standards
- Adopt a new law on the prosecutor's offices based on the draft approved by the Venice Commission
- Address the underfunding of the free legal aid system in the current year and allocate adequate funding in the state budget 2014
- Amend the internal rules and regulations of correctional institutions and pre-trial detention centres or align them with laws of Ukraine, recommendations of the European Committee for the Prevention of Torture, the European Court of Human Rights, the European Prison Rules, recommendations of national preventive mechanism monitors.

A detailed review and recommendations as to the actions needed in all areas covered by the monitoring report are below in individual thematic chapters.

INTRODUCTION

It is known that Ukraine can sign the Association Agreement with the European Union at Vilnius Summit this November, which would boost reforms, economic development and welfare of Ukrainians. The signing of the Agreement depends, however, on whether Ukraine meets a number of conditions set by the European Union, particularly in three areas: election legislation, selective justice and implementation of reforms agreed with the EU before.

The EU identified particular benchmarks in these areas in the Council of the EU conclusions on Ukraine dated 10 December 2012, structured them in the non-paper ("Füle's List" initially including 19, later 11 benchmarks) and agreed with the President of Ukraine at the summit on 25 February 2013.

These EU documents underline that Ukraine is not facing any new conditions but is expected to deliver on the commitments undertaken before. The EU does not expect an instant and complete solution of all actual problems. Conclusions of the Council of the EU say that to sign the Agreement the EU needs to see "determined action and tangible progress", i.e. a trend, positive change and determination of Ukraine.

In early 2013, the Ukrainian government announced plans to meet the EU conditions. In particular, on 13 February the Cabinet of Ministers approved a Plan of priority measures of Ukraine's integration to the EU for 2013. On 22 February, the Verkhovna Rada approved a statement on implementation of European integration aspirations of Ukraine and conclusion of the Association Agreement with the EU. On 12 March, the President enacted a Decree on urgent measures for European integration of Ukraine. The plans were developed in cooperation with the EU yet did not fully meet the EU expectations in terms of their substance and timelines.

This report is coming out in June 2013 when too little time is left until the Vilnius Summit (November 28-29) and even less until the EU makes the decision about signature of the Agreement with Ukraine.

This report seeks to present an independent expert opinion of the progress achieved as of the first half of June 2013. Our goal is also to draw attention of all involved parties to address the key issues needed to meet the signing benchmarks over the next months.

As of the first half of June 2013, we believe that none of the eleven criteria for signature of the Agreement has seen tangible progress. Four of them show certain progress; five, minimum progress; and two, no progress. The chapters below give visual demonstration of the assessment. Yellow colour represents certain progress in the particular area; orange, minimum progress; and red, no progress. Green would indicate tangible progress.

1. ELECTORAL LEGISLATION AND PRACTICE, BALANCED MEDIA ACCESS

Importance of fully implementing recommendations of OSCE-ODIHR mission and of addressing the observed shortcomings, to establish a reliable electoral system based on an Election Code and clear rules for balanced media access for electoral competitors.

... How the inconclusive results in the five single-mandate constituencies will be addressed

[Council of the EU, 10.12.12]

Fully implement the recommendations of the final report by the OSCE-ODIHR on the 28 October 2012 Parliamentary elections, in an inclusive dialogue with the opposition, including by early steps to establish a reliable electoral system based on an Election Code; and implement clear rules for balanced media access for electoral competitors.

... Address the shortcomings observed in the Parliamentary elections, including related to the impossibility to establish results in five single mandate constituencies.

[EU non-paper to Ukraine ("Füle's List")]

Electoral legislation reform

The Ministry of Justice drafted a law on amendment of some laws of Ukraine for improvement of electoral legislation that include ***amendments to the law on parliamentary election of Ukraine***[1]. The draft law was sent to the Council of Europe / Venice Commission, OSCE/ODIHR and the EU for evaluation. It contains a number of positive innovations, particularly it:

- better regulates single-mandate districts: boundaries of the districts must be continuous and consider interests of national minorities;
- restricts right to nominate a candidate to the district election commissions only for the parties that have a parliamentary faction or run under a list of candidates in the national district - the move eliminates the abuse related to too many representatives of "technical parties" in the district election commissions;
- explains a number of provisions on how to settle election disputes by defining agencies where actions or inactions can be appealed against in the election process.

At the same time, the draft contains some controversial and even dangerous innovations that only formally meet the recommendations of the OSCE/ODIHR Election Observation Mission Final Report. In particular:

- the transfer of authorities to register candidates in single-mandate districts from the Central Election Commission to respective district election commissions. It creates risk of subjective decisions that reject or cancel registration of individual candidates by controlled district election commissions;
- fixed limits of election funds (UAH 100 million for parties in the national district and UAH 4.5 million for single-mandate candidates), powers of respective district election commissions to oversee receipt and use of funds of single-mandate candidates. On the one hand, the proposed amounts are fairly big and can easily cover all election expenses, so they will hardly produce substantial effect. On the other hand, there is a higher risk of selective application of laws by district election commissions that do not have sufficient human and technical resources for effective control over campaign finance;
- deprivation of the voters located outside Ukraine or outside their district with unchanged election address of the right to vote in single-mandate districts. This prevents so called "election tourism" on the one hand, but can conflict with the voting rights equality principle fixed in the Constitution, on the other hand;
- a number of progressive innovations in terms of the media coverage of the election – in particular, the requirement to provide equal campaigning and political advertising opportunities, division between commercial and political advertising, the requirement for balance access to programmes for all candidates, intolerance to hiding or misrepresentation of important election-related information – can be undermined by the control mechanism given to the National Broadcasting Council that cannot be seen as an independent institution under present Ukrainian conditions. Thereby, the recommendations of OSCE/ODIHR in respect to engagement of independent NGOs to monitor the balance and use of media during elections and supervision on basis of such independent monitoring have not been implemented.

The draft law still does not cover a number of recommendations outlined in the OSCE/ODIHR Election Observation Mission Final Report that include: review of the conditions to declare the voting at a precinct invalid or to cancel voting results; review of the reasons to restrict the eligibility to be a candidate; review of the size of the electoral deposit and grounds for its return; introduction of proportional penalties for violation of the election laws; establishment of a respective institutional mechanism to monitor potential administrative power abuse.

The opinion of the Venice Commission about the draft is expected in June. Given the observations above, it is highly likely to contain a number of critical judgments. The draft has been submitted also to parliamentary factions for consideration yet there is no wide public discussion seen about it at the moment. An alternative draft of amendments to the law on parliamentary elections (technical and legal improvements of the election process) was submitted to the Verkhovna Rada (registration number 2908) by MP Ruslan Kniazevych (Batkivshchyna faction) but has not been considered yet.

The major shortcoming of the governmental legislative initiative is that it ignores fundamental issues of electoral reforms:

[1] http://www.minjust.gov.ua/42963

- need to harmonise the electoral legislation. The draft ***Election Code*** was developed by a working group headed by Yuri Kliuchkovsky (Institute of Electoral Legislation) with financial support of the EU back in 2010 and received a generally positive opinion of the Venice Commission. Approval of the Election Code is directly mentioned among the EU requirements and recommendations of OSCE/ODIHR. However, the government denies this possibility as such[2];
- the change of the parliamentary election system to the proportional representation system with open regional lists, in line with previous recommendations of the Venice Commission and PACE. The most recent parliamentary election held according to a mixed-voting system showed that the single-mandate component is the most vulnerable;
- introduction of a two-round mayor election system.

Alarming are the statements of some public figures about the possible change of the presidential election system - by electing the President in the parliament or holding direct elections only in one round. Attempts to implement such changes will undermine the public trust to the presidential election 2015 and may lead to manipulations of the election process.

Five "problematic" single-mandate districts

Five single-mandate districts failed to establish final results of the parliamentary election 2012. To address the situation, the government developed and submitted on 13 May 2013 to the Verkhovna Rada draft law №2971 on parliamentary re-election in some single-mandate districts caused by impossibility to establish reliable voting results and parliamentary election results of 28 October 2012. The draft was sent also to the Venice Commission for opinion.

The draft did not clearly determine the number of districts where re-election are proposed. Therefore, if approved, it would create a risk of holding re-elections not in five but in any number of districts, stripping any single-mandate district candidate of mandate by court ruling (under Dombrovsky-Baloga scheme).[3]. It caused criticism on the part of opposition and independent single-mandate MPs. On the next day, on May 14, 2013, a group of independent MPs not affiliated with any faction presented an alternative draft (registration number 2971-1) about re-election only in five districts.

Taking these circumstances into account, the Verkhovna Rada set up a working group to improve the draft, comprising representatives of all factions. The working group developed a compromise draft law №2971-d dated 5 June 2013 that specified numbers of five districts (№№ 94, 132, 194, 197 and 223) where re-election will take place on 18 August 2013. This law will lose validity on the day following the day when authorities of re-elected MPs take effect; this will ensure its one-time application.

[2] Interesting is that in his annual Address to the Verkhovna Rada "On domestic and foreign situation of Ukraine in 2013" the President offered to "intensify the work to create the Election Code that would enable to establish uniform infrastructure of the election process and unify the most of electoral rules and procedures" http://www.president.gov.ua/docs/poslannia2013.pdf, p.189.

[3] For more information please read the article of Serhiy Rakhmanin: http://gazeta.zn.ua/internal/zakonoplety-i-zakonopletki-_.html

The election procedures in those five problematic districts and at interim parliamentary election due on 7 July 2013 (district 224, Sevastopol) will be an important indicator of how Ukraine is improving its election practices and not only electoral laws.

Stripping MPs of mandates by rulings of the Supreme Administrative Court

In early 2013, the Supreme Administrative Court stripped Oleksandr Dombrovsky, Pavlo Baloga and Serhiy Vlasenko of their parliamentary seats. The opposition saw the move as an attempt to review the election results with help of controlled courts.

As to Vlasenko, the court decided to strip him of the parliamentary seat because of his dual mandate: along with his work in the Verkhovna Rada he allegedly was working as a lawyer defending Yulia Tymoshenko. The trial revealed that the committee for parliamentary procedures approved the decision to file a lawsuit privately without having invited Serhiy Vlasenko to the committee's meeting. The court did not consider the evidence that Vlasenko was not a lawyer but a public defender of Yulia Tymoshenko.

As to single-mandate district MPs Oleksandr Dombrovsky and Pavlo Baloga, the Central Election Commission decided to register them as MPs despite some challenges in establishing voting results and recorded violations. The Supreme Administrative Court decided (beyond court timelines) to strip these MPs of their mandates, defying the Constitution, which clearly outlines the procedure for termination of authorities of an MP. The Speaker Rybak requested the Constitutional Court to judge whether the decision of the Supreme Administrative Court in regard to Baloga and Dombrovsky complied with the Constitution.

Local elections

Another issue adding to the general crisis of trust to the election system is the unresolved situation with local government (mayor and city council) election in Kyiv. On 2 June 2013, the authorities of the current Kyiv City Council expired. On 31 May 2013, the Constitutional Court ruled to hold regular election of Kyiv mayor and Kyiv City Council in October 2015. At the same time, the chance to hold early election remains.

Resolution of the Kyiv election situation and procedures of this election and other local elections in Ukraine this year will also be an important indicator of how Ukraine is improving its election practices. Yet the current legislation on local elections is the most problematic in Ukraine. It allows wide administrative leverage and does not guarantee equal opportunities for parties to election process during their campaigns. In particular, all these shortcomings became once again evident at local elections in a number of settlements on 2 June 2013.[4]

[4] In particular, observers of Civil Network OPORA recorded defiant attempts of ballot stuffing in Vasylkiv town that are still not investigated.

Media

In December 2012, the government introduced a draft law on ***public broadcasting***, but it does not meet European standards (in particular, in terms of funding, a supervisory body and independence of public broadcasters). Its consideration has not shown any progress. An alternative draft of MPs who had introduced a similar draft in the previous parliament was registered too. Both should be sent to the Council of Europe for consideration.

Even more urgent is the need to give the exact ***legislative definition of the "balanced media access"*** (both private and governmental media) and establish procedures and an agency to be responsible for monitoring of compliance with these requirements. Respective amendments need to be introduced into the laws on elections and on TV and radio broadcasting. OSCE/ODIHR Election Observation Mission Final Report advises to consider the use of media monitoring done by NGOs funded by independent donors because the National TV and Radio Broadcasting Council lacks independence. The advice concerns the need to establish a "co-regulation" mechanism engaging representatives of TV and radio broadcasters, journalist organizations and other NGOs. For example, there was an attempt made to monitor independently TV news over the last months of the recent pre-election campaign that resulted in more balanced coverage of political news and establishment of a public council at a leading TV channel, Inter. However, the public council ceased to exist at the beginning of 2013 after the channel was sold to a new owner. The above and other issues with the broadcasting legislation are expected to be addressed in the new version of the Law *On TV and Radio Broadcasting* that is being finalized by the working group of the Parliamentary Committee for the Freedom of Speech and Information supported by a Council of Europe/EU project.

In March-April 2013, two draft laws on "reforming" ***(deregulating) the governmental and municipal press were registered with the Verkhovna Rada.***[5] They suggest a detailed mechanism for the national authorities or local governments to withdraw as founders/owners of print media outlets and hand them over to employees or sell. An alternative draft law on reforming governmental and municipal print media was also developed by the government that followed an instruction of the President. The latter ordered to submit the draft to him for consideration before early April, but the Cabinet is still considering it.

The government submitted to the Verkhovna Rada the draft law *On amending some laws of Ukraine* ***to ensure transparency in ownership relations in respect to mass media*** (№2731 dd. 4 April 2013) to the Verkhovna Rada for consideration. The draft outlines only limited actions to ensure transparency of ownership of TV and radio companies and cannot be seen as effective. The described change to ensure ownership transparency of print media is not relevant as the press outlets have lesser influence on the public compared with audiovisual media, and the press market is highly segmented by numerous publications.

[5] Draft law №2600 On Reforming Print Media introduced by MPs Mykola Tomenko, Rustam Raupov, Mykola Kniazhytsky, Igor Miroshnichenko, Stepan Kurpil and Mykola Bagrayev; and draft law №2600-1 introduced by MP Mykola Kniazhytsky.

Back in January 2013, MPs Mykola Tomenko and Mykola Kniazhytsky (Batkivshchyna faction) registered draft law №2074 on amending some laws of Ukraine to ensure transparent ownership of mass media and implementing the public policy principles in the area of TV and radio broadcasting that suggested identifying beneficiary owners of broadcasters.

None of the above drafts has seen even the first reading. Ensuring transparent ownership in TV and radio broadcasting is an objective pursued by the working group established to prepare a new version of the Law *On Television and Radio Broadcasting* (see above).

Overall evaluation: no progress (minimum positive development with indications of regress)

2. SELECTIVE JUSTICE, IMPLEMENTATION OF JUDGMENTS OF THE EUROPEAN COURT OF HUMAN RIGHTS, DETENTION CONDITIONS

To address the cases of politically motivated convictions without delay as well as to take further steps to reform the judiciary to prevent any recurrence.

... an early implementation of all judgments of the European Court of Human Rights

... an early implementation of the recommendations by the Council of Europe related to detention conditions and medical assistance to persons in detention

[Council of the EU, 10.12.12]

Address the cases of politically motivated convictions, in consultation with the mission of Presidents Cox and Kwasniewski, ensure the early implementations of all judgments of the European Court of Human Rights and implement the recommendations of the Council of Europe related to detention conditions and medical assistance to persons.

[EU non-paper to Ukraine ("Füle's List")]

Politically motivated criminal prosecution ("selective justice")

The pardon by the President (Decree №197 of 7 April 2013) of former Interior Minister Yuri Lutsenko and former Environment Minister Heorhiy Filipchuk was an important step towards mitigating effects of politically motivated criminal prosecution. Ukraine, however, is still facing this problem as Yulia Tymoshenko has been kept in prison and tried in other cases so far.

In particular, proceedings are underway in Shcherban's murder case, which raises doubts over its impartiality and compliance with other principles of fair trial. For example, the prosecutor's office and court keep interrogating witnesses in public court sessions, though this can be done at the pre-trial stage only in exceptional cases as the Criminal Procedure Code prescribes. Instead, all witnesses for prosecution are interrogated without a reasonable basis, possibly with the view to compromise publicly the defendant.

Implementing judgments of the European Court of Human Rights

Below are main issues, which make the European Court of Human Rights (ECHR) state that Ukraine violates the European Convention on Human Rights:

- failure to implement rulings of domestic courts[6];
- excessive length of civil proceedings and pre-trial investigation into criminal cases and no legal mechanism to appeal against such length[7];
- breach of human right to liberty and personal security;
- cruel treatment of those in detention, no effective investigation into claims against such treatment[8];
- improper living conditions for people in custody and improper healthcare facilities and medical assistance in prisons;
- no effective probe into criminal cases of deaths or disappearances.

By and large, Ukraine is facing a pressing issue of implementation of ECHR judgments, as regards general measures and pilot judgments of ECHR (requiring to amend laws and practices to eliminate systemwide problems) rather than individual measures (requiring compensation and redress of infringed rights). E.g. so far Ukraine has had no outstanding liabilities of compensation under judgments of ECHR[9].

An exemplary case can be implementation of ECHR rulings on high-profile cases of Yuri Lutsenko and Yulia Tymoshenko. The European Court recognized their arrests illegal. The government took ineffective efforts to appeal against the court judgment on Yuri Lutsenko by referring the case to the ECHR Grand Chamber, but the court rejected the referral and the judgment took final effect on 19 November 2012. So far the judgment has been implemented in terms of compensation only. Individuals whose actions or inaction caused infringement of Lutsenko's rights and freedoms have not been brought to account. Such measures would be important to prevent recurrence of such violations[10].

Up to date there has been no information on appeals against Yulia Tymoshenko's judgment. If neither party appeals against it, it will take effect on 30 July 2013, three months after the announcement.

A strong focus should also be placed on implementation of the ECHR judgment in the case Oleksandr Volkov v. Ukraine adopted on 9 January 2013. Having taken final effect on 27 May 2013, it rules, among other things, to reinstate the applicant in the post of a judge of the Supreme Court of Ukraine. The government, however, seeks to avoid implementing the judgment. In particular, Justice Minister Olexandr Lavrynovych stated that there were no mechanisms to implement it. Today there is a risk that two other candidates can fill vacancies in the Supreme Court, thus making it impossible for Oleksandr Volkov to be reinstated in his position in near future[11].

[6] In particular, the ECHR pilot judgment in the case Ivanov v. Ukraine. It is about implementation of rulings delivered by domestic courts on late social payments. Previously, Ukrainian courts delivered many rulings in favor of applicants, but the rulings were not implemented. Not all affected parties filed claims with the ECHR. Those who did could receive compensation in several years, after the court examined their cases. In 2012, the government addressed the issue of a huge number of similar cases filed with the ECHR. It obtained a ruling from the Constitutional Court of Ukraine that the government can refuse de facto to pay late social payments if the budget has not enough resources to cover them (http://www.pravo.org.ua/politicreformandconstitutionslaw/humanrights/847-2012-02-13-12-47-27.html, http://www.pravo.org.ua/politicreformandconstitutionslaw/humanrights/832-2012-02-02-10-02-33.html). They did so instead of recognizing that the national budget could not endure this social burden and introducing respective unpopular amendments into laws. The national budget for 2013 earmarked UAH 153.9 million to implement all court judgments. Experts say this sum is insufficient - http://helsinki.org.ua/index.php?id=1363685304; This year has shown that the procedure to implement rulings of domestic courts (outlined in the law on government-guaranteed implementation of court judgments) does not work in fact. So referring to the European Court of Human Rights has remained the only way to enforce court judgments - http://helsinki.org.ua/index.php?id=1370341052

[7] In particular, the pilot judgment of ECHR in the case Kharchenko v. Ukraine.

[8] In particular, the pilot judgment of ECHR in the case Kaverzin v. Ukraine. A problem was inaction of the prosecutor's office, which failed to make proper investigations into illegal actions of police. Nevertheless, the new Criminal Procedure Code and the National Preventive Mechanism are expected to address the issue of extremely cruel tortures. They outline procedures where evidence of a defendant is void unless given in presence of a lawyer. It means that from now on investigators will not have to force those detained to make their confession.

[9] Unofficial sources say that the state budget has insufficient money earmarked for this purpose and will soon run out of it.

[10] In April 2013, Ukraine's Commissioner for the ECHR filed an action plan with the Council of Europe's Committee of Ministers to implement the ECRH judgment in the case Lutsenko v. Ukraine. The action plan included respective general and individual measures. The Committee examined how Ukraine implemented the judgment at its session on June 6, 2013 and urged the country to take more specific general measures to align Ukrainian justice system with the European Convention for the Protection of Human Rights and Fundamental Freedoms.

[11] General measures required by this judgment re highly important, in particular, as regards the ways to bring judges into account under disciplinary procedures and dismiss them.

In Ukraine, the Government Commissioner for the European Court of Human Rights oversees implementation of ECHR judgments. This person also acts as an agent of the country in cases filed with the ECHR against Ukraine. This situation presents an evident institutional conflict of interests. In its Resolution 1914 (2013), PACE recommended that Ukraine should take overseeing of ECHR judgment implementation away from the Commissioner and set up a separate national agency responsible for implementation of the judgments. We are not aware of any progress in this issue for the time being.

PACE also recommended (Resolutions 1823 (2011) and 1914 (2013)) that Ukraine should settle an issue of parliamentary control over implementation of ECHR judgments. Now draft law №0928 by Serhiy Holovaty expects to see its second reading. Approved in its first reading, the draft law suggests adding provisions on parliamentary control and regular reporting by the government on this issue to the Law *On implementation of judgments and application of practices of the European Court of Human Rights*. Currently, the Parliamentary Committee on the Rule of Law and Justice is formally responsible for overseeing the implementation of ECHR judgments. But no information is available on their practical actions.

Detention conditions and medical assistance to prisoners

Conditions in prisons and detention centres have been hugely criticized by human rights activists[12]. By and large, it is enough for Ukraine to amend internal rules and regulations of correctional institutions in a move to improve the situation significantly. Approved by the State Penitentiary Service of Ukraine, these rules and regulations have not been revised for many years – contrary to applicable laws, judgments of the European Court of Human Rights[13], recommendations of the European Committee for the Prevention of Torture[14], European Prison Rules and proposals of human rights activists.

On March 18, 2013, the Ministry of Justice approved new internal rules for pre-trial detention centres (Order 460/5). Adopted without public hearings, the rules were blasted by activists[15].

On May 16, draft law №1131 submitted by the government passed the first reading. It suggested amending the Penal Code[16]. Despite some positive changes (permission to use mobile phones and wear civilian clothes, regulation of the child allowance, granting the status of a children's institution to the child care centres in correctional institutions, etc), a number of suggested regulations actually dishonour the convicts and offer grounds to punish them for minor things[17].

On April 29, 2013, the Cabinet approved the National Target Programme to Reform the State Penal Service of Ukraine[18]. The Programme is based on the Public Policy Concept on Reforms of the State Penal Service of Ukraine approved by the President on 8 November 2012[19]. The government failed to discuss the draft programme with the public and human rights specialists in the penitentiary area (similarly, other regulations in this area have seen no public hearings).

The Programme fails to refer to recommendations of the European Committee for the Prevention of Torture and the European Prison Rules. Its measures fail to address such issues as a complaint system, normal correspondence, prohibition of unpaid work, which is a quite widespread practice nowadays, and other human rights issues. Economic objectives involving prisoner's work remain a priority for the penal system in Ukraine[20]. Seeing work as a duty conflicts with advanced international penal standards. Businesses operated by the correctional institutions are seen in Europe as a place where convicts can learn useful skills and later apply them when they get out of prison, not as a place where the government earns money.

As to the medical assistance to prisoners, the Programme covers only procurements of equipment and ambulances as well as development of procedures to help convicts affected by TB. Yet, greater number of medical devices would not reduce the dependence of doctors on prison managers, nor could it eliminate the possibilities for doctors to refuse to treat convicts or hide beatings. Proper medical assistance to prisoners is possible if medical units in penal institutions become accountable to the Ministry of Healthcare as prescribed by the European Committee for the Prevention of Torture and the European Prison Rules.

Overall evaluation: certain progress

[12] Particularly, see section on prisoners' rights in the Annual Report on Human Rights in Ukraine in 2012: http://helsinki.org.ua/index.php?id=1362663498; report of NGO 'Donetsk Memorial': http://ukrprison.org.ua/files/docs/1338374423.pdf

[13] In this area, a number of ECHR judgments remain unimplemented, particularly judgments on prisoners' rights to correspondence and family visits (Trosin v. Ukraine case); inadequate lighting in prison wards (Ustiantseva v. Ukraine case); use of handcuffs (Kaverzin v. Ukraine case); ventilation, lighting, meals, condition of toilet facilities, quality of medical assistance (Iglina v. Ukraine case).

[14] There are many recommendations, in particular recommendations to take off window grates, revise shower standards (current rules allow prisoners to take shower once a week only), etc.

[15] http://www.civicua.org/news/view.html?q=2007122, http://helsinki.org.ua/index.php?id=1368422849, http://ukrprison.org.ua/expert/1365497506

[16] http://w1.c1.rada.gov.ua/pls/zweb2/webproc4_1?pf3511=45216

[17] http://gazeta.ua/articles/politics/_rada-proignoruvala-zauvazhennya-ekspertiv-schodo-zakonoproektu-pro-v-yazniv/498712 ; http://gazeta.ua/articles/life/_timoshenko-pokazala-vsyu-penitenciarnu-sistemu-v-yaznyam-poslablyat-rezhim-pokar/498736

[18] http://zakon2.rada.gov.ua/laws/show/345-2013-%D0%BF/print1366834218838913

[19] http://zakon4.rada.gov.ua/laws/show/631/2012/print1366826062139193

[20] Provisional expenditures earmarked in the state budget to implement the programme are UAH 3,882.03 million, fund from "other sources not prohibited by the law" make UAH 2,129.7 million. The latter is about so called investors who will invest in production facilities of penal institutions where cheap labour of prisoners is widely used. Distribution of expenses for the programme's objectives show the real priorities of the reforms: the upgrade of technical surveillance means – UAH 1,107.01 million, production facilities funding – UAH 730.48 million, overhauls (which is also an area where changes are needed from the human rights perspective) – UAH 400.52 million, healthcare system in prisons – UAH 179.57 million, probation (an important priority able to lessen the burden on prisons) – UAH 0.64 million.

3. CRIMINAL PROCEDURE CODE, PREVENTION OF TORTURES, SELF-GOVERNANCE OF THE BAR

Effective implementation of the new Criminal Procedure Code, legislation on the Bar, as well as the National Preventive Mechanism against torture.

[Council of the EU, 10.12.12]

Ensure the necessary resources to implement effectively the Criminal Procedure Code, the legislation on the Bar and the National Preventive Mechanism against Torture; and ensure the early establishment of related mechanisms.

[EU non-paper to Ukraine ("Füle's List")]

Implementing the new Criminal Procedure Code

The new Criminal Procedure Code (the Code) took effect on 20 November 2012. Monitoring findings provided by the Centre for Political and Legal Reforms show that a trend of criminal justice humanisation has been evident since that time. It is about a considerable reduction of people kept in detention centres (by 35%, or by 11,000 people as at 1 April 2013 vs. 1 December 2012), fewer detentions (45% down vs. 2012 and 70% down vs. 2011), fewer searches (30% down vs. 2011), fewer wiretaps (20% down). On the other hand, now Ukraine sees more home arrests and other alternative preventive measures as well as reconciliation cases[21].

The trends, however, are not stable. They are threatened by investigators and prosecutors willing to follow the old procedures. No information has been available so far on an increase in not-guilty verdicts, but final conclusion can be made at the end of the year (closer to the first anniversary of the Code).

Free legal aid

Implementation of the Code is closely related to implementation of the law on free legal aid adopted on 2 June 2011. The law changed approaches to legal services provided at the expense of the government from 1 January 2013. It expanded a list of population categories entitled to free legal services, primarily at the beginning of criminal proceedings. Now lawyers are appointed by the centres of free secondary legal aid (not investigators as it was before); legal fees have been increased considerably. Altogether, 27 centres established across Ukraine and 3,016 lawyers selected on a competitive basis provide free legal aid 24/7[22]. Once law enforcement authorities detain a person, they notify respective centres, which send a lawyer immediately. The new Code prescribes that testimony of detainees given in absence of their lawyers cannot be used against them. Therefore, the free legal aid system ensures early access to legal defence for detainees, in line with the best European practices.

[21] See more in the Monitoring Report "Implementation of the new Criminal Procedure Code: first outcomes" on the website of the Centre for Political and Legal Reforms: http://www.pravo.org.ua/files/___2013-3.pdf

[22] See more in the briefing note on the system of free secondary legal aid from 1 January to 31 May 2013: http://legalaid.gov.ua/images/Dovidka_BPD_31_05_13.pdf

Yet, proper operation of the system is at risk because of insufficient government funding. The state budget for 2013 earmarked UAH 43.8 million for the free secondary legal aid, which is just 21.2% of actual needs. A total budget deficit to cover expenses related to the free legal aid is UAH 163.1 million in 2013.

National Investigation Bureau

An important step towards implementation of the Code is the National Investigation Bureau to be established to probe into crimes committed by high-ranking public servants, police and prosecutor's office employees. Final provisions of the Code suggest that the Bureau be established within five years. Now these functions are done mostly by prosecutor's offices.

Steel, there is no certainty about principles of establishment of the new authority: its subordination, staff, mandate (whether it will probe into all crimes, as envisaged by the Code, or only some of them, for example, corruption and tortures), etc. The Centre for Political and Legal Reforms analysed practices of similar agencies across Europe and sent its proposals to the Presidential Administration last year. Though, no progress has been observed as yet.

National Preventive Mechanism against Torture

In 2006, Ukraine ratified the Optional Protocol to the UN Convention Against Torture and undertook to create a national preventive mechanism (NPM) within a year. But only on 2 October 2012 Ukrainian Parliament adopted a law, which designated Ukraine's Parliament Commissioner for Human Rights (Ombudsman) as a national preventive mechanism. Acting so, the Ombudsman should take regular visits to places of confinement[23] to prevent tortures and other cruel, inhuman or degrading treatment or punishment of prison inmates.

All monitoring visits of the NPM are done without warning administrators of respective correctional institutions of the time, place and date of the visits. As a rule, representatives of human rights organisations are engaged as the Ombudsman's monitors. Following the visits they prepare reports outlining violations against human rights and freedoms identified in the institutions and recommendations to rectify them. The reports are sent to heads of respective ministries or agencies, urging to notify the Ombudsman within one month of actions taken to implement the recommendations[24]. In 2012, they visited 169 institutions subordinated to different national agencies; in 2013, 142 institutions, and all the visits involved

[23] There are more than 6,000 Ukrainian institutions which can be regarded as places of confinement. These institutions are now subordinated to eleven ministries and agencies.

[24] See more on the NPM in the Annual Report of the Verkhovna Rada Commissioner for Human Rights: http://www.ombudsman.gov.ua/images/stories/062013/Dopovid_062013.pdf, pp.9-69.

representatives of civil organisations[25]. Prison administrations never opposed to such visits.

This year, the Ombudsman's budget, however, does not earmark money to engage human rights organizations into such visits under the NPM (presently, the funding is provided by the International Renaissance Foundation). The Department of the National Preventive Mechanism in the Ombudsman's Secretariat estimated that UAH 800,000 are needed for proper operation of the mechanism.[26]

Self-governance of the Bar

On 5 July 2012, the Verkhovna Rada of Ukraine passed the Law *On the Bar and Advocacy* establishing advocacy principles in Ukraine in line with universally acknowledged international democratic standards. Key new elements of the law were essentials identified to set up the self-governing Bar in Ukraine and measures to strengthen guarantees for the advocacy.

Notwithstanding this progressive law, the newly established Higher Qualification and Disciplinary Bar Commission raises doubts over its compliance with the principles of independence and self-governance. In particular, the recent cases of persecution of disloyal lawyers through cancellation of their licenses gained a wide publicity[27].

Overall evaluation: certain progress

[25] Data of the NPM Department of Ombudsman's Secretariat as of 11 June 2013.

[26] Expenses on 200 monitoring visits (trips), training sessions, annual conferences and publication of guidelines and reports.

[27] See more on the conflict in Ukrainian bar: http://helsinki.org.ua/index.php?id=1366370996

4. JUDICIAL REFORM AND PROSECUTION REFORM

Additional steps on judicial reform, including through a comprehensive review, in close consultation with the Council of Europe and Venice Commission, of the law on the prosecutor's office; the Criminal Code, the role of the High Council of Justice, as well as the law on the judicial system and the status of judges

[Council of the EU, 10.12.12]

In the context of taking additional steps on judicial reform, undertake a comprehensive review and submit legal proposals, in close consultation with the Council of Europe/Venice Commission, on the law of the functioning of the Prosecutor's General Office; the Criminal Code, the role of the High Council of Justice, as well as the law on the judicial system and the status of judges.

[EU non-paper to Ukraine ("Füle's List")]

Laws on prosecutor's offices

Prosecution reform has remained an outstanding commitment for Ukraine since its accession to the Council of Europe in 1995. Ukraine's Constitution adopted in 1996 deprived the prosecutor's offices of two Soviet-era functions: overseeing adherence and application of laws and preliminary investigation. Prosecutor's offices, however, still perform these functions on the basis of transitional provisions of the Constitution. Apart from its excessive authorities, Ukrainian prosecution system depends heavily on politics and show non-transparent procedures of profession admission, promotion, disciplinary responsibility and dismissal of prosecutors. The national prosecutor's offices are used very often to put pressure on political opponents or business competitors.

In late 2011, the Commission for Strengthening Democracy and Enhancing the Rule of Law under the President of Ukraine developed a draft law seeking to reform prosecutor's offices dramatically[28]. In October 2012, the Venice Commission welcomed the draft law[29]. On 17 April 2013, the Verkhovna Rada Committee on Legislative Support to Law Enforcement discussed preparation of the draft law №0886 for its second reading and approved a comparative table based on the version approved by the Venice Commission. Currently, the Committee is gathering conclusions and proposals to finalize the comparative table and submit it for discussion at committee hearings[30].

At the same time, the Presidential Administration and Prosecutor's General Office are developing their views on the draft law text approved by the Venice Commission. Obviously, the draft law can be passed into law only if the parliament groups reach a compromise.

[28] http://www.pravo.org.ua/2011-07-05-15-26-55/2011-07-22-11-19-37/836-skhvaleno-proekt-zakonu-pro-prokuraturu.html ; http://www.pravo.org.ua/2011-07-05-15-26-55/2011-07-22-11-19-37/970-reforma-prokuratury-rivniannia-z-kilkoma-nevidomymy.html

[29] http://www.pravo.org.ua/2011-07-05-15-26-55/2011-07-22-11-19-37/1209-venetsianska-komisiia-skhvalyla-pozytyvnyi-vysnovok-na-zakono-proekt-pro-prokuraturu.html

[30] http://komzakonpr.rada.gov.ua/komzakonpr/control/uk/publish/article?art_id=55464&cat_id=44731

Judicial reform

On 7 July 2010, the Verkhovna Rada adopted the Law *On the Judiciary and the Status of Judges*. Several months later the Venice Commission concluded that the law failed to comply with a number of European standards. Under the law, the High Council of Justice and Higher Qualification Commission of Judges play the crucial role in appointment, promotion and disciplinary responsibility of judges. These authorities appear to be very dependent on political power. The following practices prove the fact: frequent transfers of judges from Donetsk and other eastern regions to Kyiv courts, including higher level courts, their appointment as court chairmen and court vice chairmen[31]; selective application of disciplinary measures to judges, etc. By and large, the new law created a powerful leverage to put political pressure on judges[32].

In late 2012, the Presidential Administration developed **a draft law on amending the Constitution of Ukraine to strengthen judicial independence**. The Constitutional Assembly under the President of Ukraine developed its version of the draft law on respective amendments, but the Assembly's Chairman referred the draft law developed by the Presidential Administration to the Venice Commission for its opinion. The Venice Commission issued a positive opinion with some comments. The draft law finalized on the basis of the comments is expected to be submitted to the President and further to the Verkhovna Rada.

The draft law sent to the Venice Commission is intended to make progressive changes in the Constitution, in particular in regard to membership in the ***High Council of Justice***: 12 of 20 its members should be elected by the congress of Ukrainian judges. Also, the draft law suggests the lifetime appointment of judges without the probation period, which now makes five years, and establishment of the judiciary without the parliament's involvement. At the same time, the remaining (contrary to what is declared) excessive presidential powers to appoint, transfer and dismiss judges and participation of the Prosecutor General of Ukraine in the High Council of Justice remain a concern.

Moreover, the dependence of high judicial self-governing authorities, in particular the congress of judges, can neutralize the positive constitutional changes as the government will continue using these authorities to influence the High Council of Justice and the Higher Qualification Commission of Judges.

Therefore, Ukraine should, without waiting for the constitutional changes to take effect, develop ***amendments to the law on the judiciary and the status of judges*** to secure true judicial independent bottom-up self-governance and proportional representation of judges in the high judicial self-government authorities. These amendments should include, in particular:

- competitive approach to appointment of judges to different courts;
- simplified system of judicial self-governing authorities, proportional representation of judges in the authorities;
- stronger role of the Supreme Court of Ukraine in development of consistent judicial practices and enhanced access to justice;
- a standalone disciplinary commission of judges, competitive and legally based disciplinary procedures, a system of proportional penalties[33].

As back as 2011, the Commission for Strengthening Democracy and Enhancing the Rule of Law under the President of Ukraine developed a new version of the law of the judiciary and the status of judges. Approved by the Venice Commission[34], the version covered the above amendments. However, the President, the Cabinet and the Parliament has shown no interest in it as yet.

Criminal Code

No progress has been made to amend articles 364-365 of the Criminal Code regarding ***decriminalisation of actions resulting in economic damages to the country***, which were based on political or administrative decisions without corruptive or other criminal motives. In 2012-2013, the opposition developed several draft laws on the issue, but all of them were rejected by the Verkhovna Rada. More importantly, each of the draft laws had material shortcomings. The best of them was draft law №2023 submitted by the MPs of Batkivshchyna faction. It suggested amending the Criminal Code and the Criminal Procedure Code in order to include into the national laws provisions of article 19 of the United Nations Convention against Corruption. Yet the Verkhovna Rada has not held the first reading of the draft law up to date. Moreover, the respective Parliamentary Committee on the Legislative Support to Law Enforcement recommended that the draft law be rejected. Therefore, the issue is still pending. A proper guideline in this case should be the Report on the relationship between political and criminal ministerial responsibility adopted by the Venice Commission in March 2013[35].

The Criminal Code needs wider review, humanisation of penalties for offences other than grave and the gravest crimes and decriminalisation of acts which are not socially dangerous. Adopted on 16 May 2013, the law on amending some laws of Ukraine to bring them in line with the Criminal Procedure Code of Ukraine ensured technical harmonisation of the Criminal Code and the new Criminal Procedure Code. The Criminal Code, however, has not been amended to include ***criminal misdemeanours*** (as an individual type of criminal offences) outlined in the Criminal Procedure Code. A respective task group was established in the Presidential Administration in May 2012; the Centre for Political and Legal Reforms developed a detailed comparative table of necessary amendments as back as July 2012. The President publicly spoke on the needed reform in April 2013[36]. Nevertheless, a respective draft law has not been submitted to the Verkhovna Rada as yet.

Overall evaluation: minimum progress

[31] http://www.pravo.org.ua/2010-03-07-18-06-07/laworganisandstatussuddiv/863-2011-11-26-10-12-19.html

[32] See more on weaknesses of the judicial system at http://www.pravo.org.ua/2010-03-07-18-06-07/lawreforms/1303-sudy-i-pravosuddya-vid-radianskoi-modeli-do-sohodennia.html; http://www.pravo.org.ua/2010-03-07-18-06-07/lawreforms/1299-pravo-na-spravedlyvyy-sud.html

[33] The ECHR judgment of January 9, 2013 in the case Oleksandr Volkov v. Ukraine also urged Ukraine to reform its system of disciplinary liability. The judgment has taken final effect but remains unfulfilled.

[34] http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD%282011%29033-e

[35] http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD%282013%29001-e ; http://www.kommersant.ua/doc/2144484

[36] http://forbes.ua/nation/1352167-kogo-portnov-predlagaet-ne-sazhat

5. REFORM OF THE POLICE

Reform of police

[Council of the EU, 10.12.12]

Prepare and submit proposals on a reform of the police.

[EU non-paper to Ukraine (Füle's List)]

On 6 April 2012, the President issued Decree №252 establishing the Committee for the reform of the law enforcement authorities. So far the Committee has not presented the results of its work. In early 2013 the First Deputy Minister of Internal Affairs announced the plans to transform militia into national police[37] but no actions have been taken so far.

According to President's Decree №127 dd. 12 March 2013 *On the Decision of the National Security and Defence Council of Ukraine dd. 12 March 2013 On Urgent Measures for European integration of Ukraine,* the Secretary of the National Security and Defence Council of Ukraine shall ensure, within the framework of the Committee's work, preparation of draft laws that will reform the law enforcement authorities in line with the European standards before *October 1, 2013, to* submit them for consideration of the Venice Commission.

In his annual address to the Verkhovna Rada on 6 June 2013 *On domestic and foreign situation of Ukraine in 2013*[38] (section 3.7 *Reform of the system of law enforcement authorities),* the President actually skipped the issue of the law enforcement reform.

Considering organizational difficulties and political sensitivity of the reform, it is necessary to develop an agreed vision of the reform with engagement of the parliamentary opposition and thematic NGOs as well as expertise of the Venice Commission.

Overall evaluation: no progress

[37] http://www.viche.info/journal/3502/ ; http://www.unian.ua/news/546182-v-ukrajini-zamist-militsiji-hochut-zrobiti-5-politsiy.html ; http://news.liga.net/ua/news/politics/794177-v_ukra_n_bude_stvorena_nats_onalna_pol_ts_ya_zamgolovi_mvs.htm

[38] http://www.president.gov.ua/docs/poslannia2013.pdf

6. CONSTITUTIONAL REFORM

Constitutional reform in line with international standards

[Council of the EU, 10.12.12]

In the context of an overall constitutional reform in line with international standards, bring forward work of the Constitutional Assembly, in close consultation with the Council of Europe/Venice Commission, in a transparent manner and seeking inclusiveness.

[EU non-paper to Ukraine (Füle's List)]

Constitutional Assembly

On 30 September 2010, the Constitutional Court of Ukraine issued a ruling overturning the constitutional amendments 2004 and restoring the Constitution of 1996. The ruling was strongly criticized inside and outside the country. The Parliamentary Assembly of the Council of Europe (PACE) issued Resolution №1755 dd. 4 October 2010 *The functioning of democratic institutions in Ukraine*, in which it urged the Verkhovna Rada of Ukraine to initiate a comprehensive constitutional reform to bring Ukraine's Constitution fully in line with the European standards.[39].

At the beginning of 2012, the President established the Constitutional Assembly as an advisory authority to deliver proposals on amending Ukraine's Constitution. The members of the Assembly include experts from the National Academy of Science, other scientific institutions, higher education institutions, parliamentary and extra-parliamentary political forces, non-governmental organisations and independent analytical centres as well as former representatives of the Cabinet of Ministers of Ukraine, Constitutional Court of Ukraine and the Verkhovna Rada of Ukraine. The Constitutional Assembly is headed by Leonid Kravchuk, former President of Ukraine (1991-1994).

Being an initiator of the Constitutional Assembly the President still failed to explain to the public the grounds for the constitutional reform and its key areas. As a result, it gave rise to many doubts and questions[40]. Representatives of the opposition parties refused to participate in the Constitutional Assembly and questioned its legitimacy and independence. At the same time, they did not propose an alternative platform for a wide discussion of the constitutional reform[41].

At present seven commissions of the Constitutional Assembly have prepared proposals on the Draft Concept for Amending Ukraine's Constitution. The Draft Concept is expected to be considered at the nearest meeting of the Constitution Assembly[42].

[39] http://www.pravda.com.ua/articles/2010/10/6/5451629/

[40] http://www.pravo.org.ua/politicreformandconstitutionslaw/2011-12-14-18-24-53/1206-start-chy-falstart-konstytutsiinoi-reformy.html

[41] http://www.pravo.org.ua/politicreformandconstitutionslaw/2011-12-14-18-24-53/932-2012-05-21-14-02-06.html

[42] Annual Address of the President to the Verkhovna Rada of Ukraine On domestic and foreign situation of Ukraine in 2013, page 228: http://www.president.gov.ua/docs/poslannia2013.pdf

Still, it is not yet clear when it will take place[43]. So far the Constitutional Assembly has been engaged twice to agree draft amendments to the Constitution prepared by the President's Administration: as to broadening the supervisory remit of the Accounting Chamber and as to strengthening the judicial independence. In the second case the Constitutional Assembly developed their own amendments to the Constitution but the Head of the Assembly submitted to the Venice Commission the draft developed by the President's Administration.

Establishing cooperation between the Constitutional Assembly and the Council of Europe/Venice Commission is one of the biggest achievements in this process as all draft amendments to the Constitution are submitted for an opinion to the Venice Commission. Still, the level of inclusiveness of the Constitutional Assembly and the public discussion on the concept for reforming the Constitution are not wide enough. The Assembly also lacks transparency as it has not developed the work methodology and does not disclose its plans of activity to the public.

Law on national referendum

On 6 December 2012, the Verkhovna Rada of previous convocation adopted the Law *On National Referendum*, which does not correspond to the Constitution and the European standards and gives unlimited opportunities for administrative abuse and manipulation. This Law can be used to amend the Constitution of Ukraine using unconstitutional methods and bypassing the Verkhovna Rada of Ukraine[44]. The existence of the law is a problem in itself not to mention the possible application of it. The law should be either cancelled or amended to meet the Constitution of Ukraine and the European standards. The Venice Commission is expected to give its opinion on the law in June 2013.

Overall evaluation: minimum progress

[43] http://www.unian.ua/news/574511-kravchuk-konstitutsiyna-asambleya-sche-ne-gotova-zasidati.html

[44] See detailed aalysis of the law: http://gazeta.zn.ua/POLITICS/parlamentskie_vybory_proigrali___ne_beda,_lishim_parlament_polnomochiy.html

7. PREPARING FOR THE FREE TRADE AREA WITH THE EU

Necessary reforms to prepare for establishing a Deep and Comprehensive Free Trade Area

[Council of the EU, 10.12.12]

Identify and initiate the necessary reforms to prepare for the establishment of a Deep and Comprehensive Free Trade Area with the EU

[EU non-paper to Ukraine (Füle's List)]

Development of the National Programme for Implementation of the Association Agreement remains the key objective of preparation for the Association between Ukraine and the EU. This Programme should specify detailed actions to ensure implementation of the Agreement, in particular, in regard to establishment of a Deep and Comprehensive Free Trade Area. This includes regulatory impact assessment / analysis of the implementation effects of the corresponding legal acts of the EU, the deadlines for performing the commitments, key performers and sources of financing[45].

Other tasks relating to the Programme include: identifying the national system for coordination of implementation of the EU-Ukraine Association Agreement and for coordination and effective use of international technical and financial assistance[46].

According to the information available, already for quite a while the Ministry of Economic Development and Trade has been cooperating with other central executive authorities to develop and agree the drafts of the Programme for implementation of the Association Agreement and a legal act on the national coordination system. They have agreed to cooperate with the EU at the expert level as to preparation of the Programme for implementation of the Association Agreement, but still, no information about any further progress is available. As it is important to prepare a high-quality Programme to ensure successful implementation of the Agreement the process of Programme preparation should be made public. In particular, it is necessary to engage Ukrainian independent experts who know and understand the EU requirements for preparation of such national programmes.

Overall evaluation: minimum progress

[45] For more details about the National Implementation Programme see: National Convention of Ukraine on the EU: recommendations of working groups, page.14-26: http://www.euconvention.org.ua/data/files/129_nc_recommendations_2011-2012u.pdf ; Analysis of the experience of organisation of implementation of Assocation Agreements with the EU by the Central and Eastern European and Western Balkan countires: http://dl.dropboxusercontent.com/u/654017/Int_exp.pdf

[46] For more information about the problems of coordination of the European integration policy and international assistance see: EU-Ukraine Association Agreement: guideline for reforms, page 38-46: http://www.kas.de/wf/doc/kas_32048-1522-13-30.pdf?120912135109

8. FIGHT AGAINST CORRUPTION

To take forward the fight against corruption

[Council of the EU, 10.12.12]

Improve legislation on the fight against corruption in line with GRECO's recommendations and Progress Reports on the implementation of the Action Plan on visa Liberalisation.

[EU non-paper to Ukraine (Füle's List)]

Anti-corruption legislation and meeting GRECO's recommendations

Within the last two months the Parliament has adopted a number of anti-corruption laws, based on the drafts jointly agreed by the opposition and the government. These laws include:

- On amendments in some legislative acts of Ukraine to harmonise the national legislation with the standards of the Criminal Law Convention on Corruption (draft law №2802, adopted on 18 May 2013);
- On amendments in the Criminal Code and Criminal Procedural Code of Ukraine (as to the EU-Ukraine Visa Liberalisation Action Plan implementation) (draft law №2803, adopted on 18 April 2013; the text of the Law was amended on 22 May 2013 as the previously adopted text contained mistakes);
- On amendments in some legislative acts of Ukraine as to implementation of public anticorruption policy (draft law №2837, adopted on 14 May 2013);
- On amendments in some legislative acts of Ukraine (as to the EU-Ukraine Visa Liberalisation Action Plan implementation relating to the issue of liability of legal persons) (draft law №2990, adopted on 23 May 2013).

The adopted laws bring a number of positive changes, in particular:

- aligning of corruption offences in the Criminal Code with international standards;
- removal of corruption offences from the Code of Administrative Offences;
- strengthening provisions on confiscation of corruption proceeds in line with international standards;
- clarifying a number of provisions in the Law on Principles for Preventing and Combating Corruption;
- opening up of the Register of persons who were held liable for corruption offences;
- extending scope of the asset declaration form (property, incomes and expenditures of officials);
- decreasing amount of expenses subject to declaring by public officials
- introduce of an anti-corruption expertise (screening) of draft laws in the parliament;
- introduction of the corporate liability for corruption but also other criminal offences as required by several international conventions to which Ukraine is a party.

Still, all these recently adopted laws are still not fully in line with international standards and with non-official comments of the EU to the initial drafts prepared by the government. It looks like new amendments are required to the recently adopted laws.

This happened because the parliament hastily adopted all the draft laws in the first and immediately in the final reading, without usual proper second reading procedure that includes proper discussion, submission of amendments and polishing of the text.

Some of the deficiencies of the adopted laws:

- introduced system of verification of asset declarations is weak, as it assigns this role to internal units of public authorities, which are not independent from the officials whom they are supposed to monitor and control. The adopted system is inadequate and inefficient as there is no need to verify all declarations (several million declarations annually); it is enough to make them public and ensure public oversight. All the high-ranking public officials' declarations should be verified (by an independent authority), while declarations of other officials should be verified on a sample basis only;
- according to adopted amendments, asset declarations should be published on the official web-sites "or" in official print outlets – this does not solve the problem of lack of access to such declarations, because publication on-line is still optional;
- threshold for declaring expenses is still too high (decreased by amendments from approximately EUR 15,000 to EUR 8,000 one-time lump sum expense);
- some GRECO and EU recommendations have not been fully taken into account: definition of conflict of interests, protection of whistleblowers, definition of illicit enrichment, criminalisation of the "promise" of undue advantage, extraditing corrupt officials, and imposing liability of legal entities.

Law on public service

In November 2011, the parliament adopted the new law on public service despite strong criticism of the EU[47]. The Law does not meet the European standards and best practices, in particular, in such issues as entering and executing the public service; classification of positions (dividing positions into groups and sub-groups, differentiating between political and administrative positions, appointing assistants (advisors) to politicians); termination of the public service; labor remuneration, salary elements, transparency and financial incentives for public servants; disciplinary liability, etc. In general, considering the above mentioned recommendations of the EU it will be necessary to conceptually review the law on public service and adopt the new version of the law. Still, so far we have seen no initiatives to review the Law. It is to come into force as of beginning of 2014[48].

[47] In particular from SIGMA experts (Support for Improvement in Governance and Management – a joint initiative of OECD and EU).

[48] In addition, the law resulted in financial losses. In 2010 the EU agreed to provide EUR 70 Mio to implement the sectoral budget support programme designed to reform the public administration system in Ukraine. The agreement was supposed to have been signed before the end of

Anti-corruption policy institutions

The critically important issues still remain open: establishing an independent anti-corruption policy coordination body and a specialised agency for investigating corruption offences.

The new Law *On amendments in some legislative acts of Ukraine as to implementation of public anticorruption policy,* adopted on 14 May 2013 (draft law №2837), significantly reduces the number of anti-corruption authorities (excludes tax police, customs authorities and the Military Police of the Armed Forces of Ukraine). Thus, the authorities empowered to fight corruption include prosecutor's offices, specialised organised crime divisions in the Ministry of Internal Affairs of Ukraine and anti-corruption and organised crime units in the Security Service of Ukraine. Thus, detection of corruption offences is carried out by specialised units of the law enforcement bodies, none of which can be regarded as politically independent.

According to the new Criminal Procedural Code Ukraine shall establish the National Investigation Bureau within the next 5 years. It is supposed to become an independent specialized authority investigating corruption offences. The challenge is really serious as it affects the prospects of implementation of the EU-Ukraine Visa Liberalisation Action Plan and draws attention of the EU in terms of the Association Agreement. Thus, it is necessary to speed up preparation of the corresponding draft law on the National Investigation Bureau in line with the experience of the EU member states and with engagement of experts from the Council of Europe (see chapter 3 above).

Anti-corruption practice

Political will remains the key issue of anti-corruption policy despite all the amendments in the legal framework. With the existing regulatory framework it is possible to investigate the facts of corruption released in mass media. The Prosecutor's General Office and the Security Service of Ukraine have the corresponding authorities. As no investigations have been taken so far it proves that the country's leaders lack political will to fight against high-level corruption.

Overall evaluation: certain progress

2012. The terms of financing required to develop clear plans as to adoption of the law on public services and administrative and procedural code in line with the European standards, the plan for institutional development in the area of administrative justice and provision of administrative services, and the corresponding performance evaluation indicators. As a result of adoption of the new law on public service Ukraine has lost the opportunity to receive these funds.

9. PUBLIC FINANCE MANAGEMENT REFORM

Public finance management reform, including the broadening of the remit of the Accounting Chamber

[Council of the EU, 10.12.12]

Continue to take forward Public Finance Management Reform, including by the approval of a strategy

[EU non-paper to Ukraine (Füle's List)]

Strategy for public finance management reform

Since 2010 EU has stopped allocating funds to Ukraine under the sectoral budget support modality because of incompliance of Ukraine's public finance management system, including the legislation regulating the public procurement system. As a result, Ukraine has lost about EUR 400 million under the current programmes and EUR 160 million under the new programmes.

The Ministry of Finance established the working group to develop the strategy for public finance management and the plan of actions ensuring its implementation according to the *Plan of the Priority Measures for Ukraine's integration to the EU for 2013*, approved by Resolution of the Cabinet of Ministers №73 dd. 13 February 2013. The draft strategy was supposed to have been developed by 10 June 2013, but as of 12 June no information is available about it.

State aid

On 5 April 2013, the government submitted two interconnected draft laws to the Verkhovna Rada: *On state aid to undertakings* (№2749) and *On amending Article 35 of the Budget Cod*e (№2750). On 4 April 2013, the government approved the Action Plan on institutional reform of state aid monitoring and control.

According to the draft law №2749, the Antimonopoly Committee is authorized to monitor state aid, consider and approve state aid provision and implement the corresponding procedures. At the same time, the law does not outline the criteria for analyzing the impact of state aid on competition but contains general wording only. As a result, the law loses its content sense as it establishes only procedures for document management in relations between the executive authorities and the Antimonopoly Committee.

Draft law №2750 connected with the previous draft law is of technical nature and the Plan for institutional reforms contains mostly actions outlined in the draft law *On state aid to undertakings.*

Regulations on public procurement

The current laws on public procurement give wide opportunities to purchase from one participant that is actually outside tender procedures. Another problem is complete lack of transparency in public procurements of public sector institutions, as they are not obliged to disclose information about their procurement transactions.

Draft law №2207 *On Amending the Law of Ukraine On Public Procurement* (as to strengthening transparency of public procurements) has been designed to solve the problem. The draft law was submitted by a group of members of parliament from the opposition. The idea is to oblige public sector, utility and budget-supported institutions and institutions with the state ownership exceeding 50% to publish information about their procurement operations. The first reading of the draft law was scheduled for 22 May 2013 but it did not take place.

According to the available information, based on Article 8 of the Law of Ukraine *On Public Procurement,* the Ministry of Economic Development and Trade is cooperating with experts of EU and US technical assistance projects to develop the Strategy for public procurement development in Ukraine. It is expected that the Strategy will create a framework for improving the regulations in the area of public procurement in line with the EU-Ukraine Association Agreement.

Overall evaluation: minimum progress

10. BROADENING THE REMIT OF THE ACCOUNTING CHAMBER

Public finance management reform, including the broadening of the remit of the Accounting Chamber

[Council of the EU, 10.12.12]

Support the constitutional changes broadening the remit of the Accounting Chamber.

[EU non-paper to Ukraine (Füle's List)]

According to the Constitution effective in 2005-2010 the Accounting Chamber was authorized to control both the expenditures and the revenues of the State Budget. In 2010 the Accounting Chamber lost the right to control revenues as the Constitutional court issued a ruling restoring the Constitution of 1996 (see chapter Constitutional Reform above).

In January 2013, the President submitted draft law №2049 *On Amendments to Article 98 of the Constitution of Ukraine* for consideration of the Verkhovna Rada. The law returns the authorities to the Accounting Chamber to control both the State Budget revenues and expenditures. On 16 April the draft law was submitted to the Constitutional Court of Ukraine and on 21 May 21 the Constitutional court issued its positive conclusion. The draft law is expected to be soon considered by the Verkhovna Rada of Ukraine.

At the same time, the draft law does not broaden the remit of the Accounting Chamber to cover local budgets. Thus, it ignores one of GRECO's recommendations. Therefore, it is quite possible that after adoption of amendments to Article 98 of the Constitution of Ukraine the government will have to amend this article of the Constitution again.

In addition, now it is already necessary to develop the draft law amending the law on the Accounting Chamber according to the specified constitutional changes and in line with the EU and GRECO recommendations.

Overall evaluation: certain progress

11. IMPROVING BUSINESS AND INVESTMENT CLIMATE

To take determined action to improve the deteriorating business and investment climate

[Council of the EU, 10.12.12]

Take determined action to improve the business and investment climate, including by the establishment of a business climate dialogue with the EU and by following up on the issues identified within the dialogue.

[EU non-paper to Ukraine (Füle's List)]

On 19 December 2012, the Cabinet of Ministers approved the Action Plan to encourage the activity of foreign investors (Resolution of the Cabinet of Ministers №1074). The document outlines many objectives to amend the national legislation, which are of high importance for the European investors. In addition, on 30 January 2013 the protocol decision of the Cabinet of Ministers approved the plan of actions to improve Ukraine's position in the ranking of the World Bank and the IFC's Doing Business ranking. Actions are envisaged to simplify: business start up, construction permits, protection of investors' rights, registration of property, tax payments and insolvency problems.

On 25 February 2013, on the margins of EU-Ukraine summit in Brussels, the Ministry of Economic Development and Trade of Ukraine and Directorate General for Trade of the European Commission signed the Arrangement on the establishment of an informal business climate dialogue aimed at identifying priority actions to improve the business climate.

The EU is worried about a number of protectionist actions implemented by Ukraine. For example, Ukraine increased duties on cars, imposed licensing for importing drugs, reduced import of coal and coke and introduced specific requirements to alternative energy projects, etc. The main issue is not the fact of introducing the actions as such but the manner of introduction – suddenly, unexpectedly, without any information and real consultations. Although all necessary procedures are outlined in the national law in line with the WTO requirements they are not followed. In general, it is essential to start an effective dialogue with the EU to prevent such unexpected problems.

The EU also expects Ukraine to develop an action plan to improve its business climate, in particular in the area of VAT refunds and advance payment of profit tax.

The efficiency of the EU-Ukraine business dialogue will depend on effectiveness of the mechanism for implementing the decisions made within this dialogue.

Overall evaluation: minimum progress

CONCLUSIONS

Ukraine would not have been able to achieve even the limited progress in place without the Association Agreement signature perspective and related EU conditions. European integration has finally taken a priority place on the domestic policy agenda. Amid fierce political confrontation the government and the opposition cooperate in the parliament on European integration laws. Both parties declare their commitment to ensure signature of the EU Association Agreement this November.

The entire process, however, lacks transparency and inclusion. Following the decree of the President, the government regularly (monthly) updates the EU about the actions taken but does not disclose them publicly. Civil society experts are engaged insufficiently in preparation and discussion of draft laws approved often hastily bypassing established procedures. A deep expert cooperation between the government and institutions of the EU, OSCE and the Council of Europe (in particular, the Venice Commission) is a positive signal. However, it should also include political parties, dedicated NGOs and think tanks.

Postponing the decision from May to autumn, the EU gave Ukraine another chance. Immediate and decisive actions are needed to achieve tangible process in all areas within the next months.

We should bear in mind that the EU conditions require change in practices, not just the formal adoption of laws. The EU criteria list does not indicate a number of laws to be approved. It indicates breakthrough changes to be attained. Several dozens of laws can be taken without a tangible result. Many areas need not only new laws but proper compliance with the existing legislation, no abuse and political pressure on legal institutions, etc. Therefore, the root causes in every area requiring reforms should be understood to evaluate the situation without bias and identify appropriate priorities.

At the same time, it would be obviously unrealistic to demand and expect that just in a few months Ukraine would resemble an established democracy. The EU is known not to be expecting an instant and complete solution of all actual problems. Conclusions of the Council of the EU say that to sign the Agreement the EU needs to see "determined action and tangible progress", i.e. a trend, positive change and determination of Ukraine. However, it is already clear today that there won't be tangible progress in all the areas.

Despite our critical evaluation of the Ukrainian realities, we believe the EU would make a strategically right decision if it signed the Association Agreement even if tangible progress is achieved only on few key issues. We see that the Agreement signature perspective, clear criteria, a high-level political dialogue and expert cooperation deliver positive results. This tendency needs to be further intensified. The EU would have the best leverage on the political developments in Ukraine by signing the Agreement and at the same time preserving certain controlling mechanism.

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The Civic Monitoring of Benchmarks Implementation for Signing EU-Ukraine Association Agreement is carried out by leading independent experts to provide for professional evaluation and recommendations as to implementation of the Association Agreement conditionality.

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