INTERNATIONAL Renaissance FOUNDATION

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

Independent monitoring report

As of 01 October 2013

CIVIC MONITORING OF BENCHMARKS IMPLEMENTATION FOR SIGNING EU-UKRAINE ASSOCIATION AGREEMENT

SECOND COMPREHENSIVE REPORT

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CONTENTS

EXECUTIVE SUMMARY

Signing of EU-Ukraine Association Agreement at Eastern Partnership Summit in Vilnius in November 2013 is dependent on Ukraine's fulfilment of the preconditions made by the conclusions of the Council of the EU of 10 December 2012, which were tabled as a non-paper ('Fule's list' of 11 criteria) and agreed with the President of Ukraine at the summit of 25 February 2013. The EU does not expect sudden and full resolution of all the problems in Ukraine. As it is said in the conclusions of the Council, the EU expects to see 'determined actions and tangible progress', i.e. trend, positive dynamics and serious commitment of Ukraine.

As of 1 October 2013, the monitoring confirms that Ukraine has achieved **certain progress** with regard to most of the 11 benchmarks since the first comprehensive monitoring report released on 18 June this year. Over the last few months, to a large degree as a reaction to the unconstructive pressure from Russia, the **consensus among the political elite** developed regarding the priority of implementing measures for Ukraine signing the Association Agreement with the EU. As a result, a positive trend emerged, in particular in adopting some necessary laws by Ukrainian parliament.

Notwithstanding, **as of today there is no confidence that this trend and present achievements are sufficient** to guarantee the signing of the Agreement this November. There might be different interpretations of the current situation as to how "tangible" the progress is and whether the glass is half empty or half full. In political discourse, interpretation currently prevails over facts. In the end, the institution that sets such criteria – the Council of the European Union, made up of representatives of all EU member countries - will assess the progress. A working group has been active since the end of September and on 21 October the Council of the EU will review the issue of signing the Agreement with Ukraine. If a consensus is not reached, the decision to sign the agreement could be made at the next meeting of the Council on 18 November (10 days prior to the Vilnius summit).

Review of the actual progress

While the government of Ukraine and EU Commissioner for Enlargement and Neighbourhood Policy Stefan Fule express great optimism and positive assessments, much of it is based on what still is expected (like adoption of the new law on prosecutor's office, which has yet to be submitted to the parliament). At the same time, the European Parliament once again postponed the report of the Cox-Kwasniewski mission to 15 November. On the one hand, this means that the EU is not removing the principle issue of Yulia Tymoshenko as a condition for signing the agreement, and on the other hand, there is still time to resolve this issue.

As far as the elections are concerned, the parties hereto have finally begun open discussion of reform of electoral laws (upon the initiative of the EU), though there are so far no concrete results. The most positive sign in this sphere is that by-elections have been set for 15 December 2013 in 5 single mandate districts where no results were established in last year's parliamentary elections. However, the case of two MPs elected in single mandate districts whose mandates were revoked by questionable rulings of the court has not been resolved; moreover, one more such case occurred. The local elections in Kyiv were postponed by a controversial ruling of the Constitutional Court.

Progress was made in the execution of the pilot judgment of the European Court of Human Rights in the case of Yuriy Mykhaylovych Ivanov v. Ukraine. The corresponding amendments were made to the legislation on the execution of rulings by Ukrainian courts regarding the arrears of state social benefits payments. Still, several important judgments of the European Court of Human Rights have not been executed – in particular, in the cases of Yuriy Lutsenko, Yulia Tymoshenko, Oleksandr Volkov and Oleksiy Verentsov.

There are several positive results from the introduction of the new Criminal Procedure Code (in particular, the considerable decline in the number of individuals held in pre-trial detention centres), as well as the introduction of a system of free legal aid and a national preventive mechanism against torture. Also, some improvements have been made to the Penal Code as it applies to the detention of the imprisoned.

Constitutional amendments regarding the reform of the judicial system that received positive opinions from the Venice Commission and the Constitutional Court have been submitted to the parliament of Ukraine for consideration. However, there has been blatant disregard of the need for parallel introduction of fundamental changes to the law on the judiciary, without which these constitutional amendments may only strengthen the political dependence of the courts, particularly on the president.

A new draft law regarding the prosecutor's office, which in October should receive the opinion of the Venice Commission, is currently being prepared for submission to the parliament. At the same time, the establishment of a State Investigation Bureau and reform of the police is on hold. Although a number of important laws in the fight against corruption were adopted, they still need improvement.

It is anticipated that the Concept of Amendments to the Constitution will be drafted by mid-October and submitted for a second consideration by the Constitutional Assembly. The critical opinion of the Venice Commission published back in June regarding the current law on national referenda in Ukraine, which allows for unconstitutional introduction of amendments to the Constitution, was completely ignored by the Ukrainian government.

Amendments have been made to the Constitution expanding the powers of the Accounting Chamber of the Verkhovna Rada to control not only expenditures but also revenues to the national budget. At the same time, the chamber's authorities do not apply to local budgets. The government approved, but has not yet made public, the Public Finance Management Strategy. There seems to be no progress in the drafting of a programme for the implementation of the Association Agreement with the EU and eliminating the concerns of the EU in the sphere of trade regarding the protectionist measures of Ukraine.

General remarks

It should be admitted that while some things of concern regarding democracy and rule of law in Ukraine have indeed appeared in the recent years (e.g. selective politically motivated prosecution, unfair electoral practices, constitutional regress, political pressure on the judiciary etc.), lot of other issues which are raised now in the context of EU conditions for signing the Association Agreement have a history behind, going

back to many years (e.g. like lack of stable electoral legislation and of safeguards for judicial independence, unreformed prosecution and the police, deficient implementation of ECHR judgments, anti-corruption policy, public finance management and business climate, protectionism in trade policy etc.). The poor level of implementation of the EU-Ukraine Action plan (since 2005) and subsequent Association Agenda (since 2010) was pretty much obvious. Still, since 2007 EU was negotiating the Agreement with Ukraine without highlighting most of these problematic issues as preconditions for signing the Agreement.

Given such a background, it should be noted that, no matter how one assesses the level of tangibility of the progress in place, it certainly would not have been 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 Association Agreement this November.

At the same time, one should bear in mind that the EU conditions require change in practices, not just the formal adoption of laws. Many areas need not only new laws but proper compliance with the existing legislation, no abuse and political pressure on legal institutions, etc.

It should also be pointed out that the government does not report to the society about its performance on the benchmarks for signing Association Agreement with the EU. According to the President's Decree of 12 March 2013 about urgent measures of European integration of Ukraine, the government regularly (monthly) informs the EU about steps taken, but this information remains closed. Thus, the present independent expert monitoring provides for the only one comprehensive public report on fulfilment of conditions for signing EU-Ukraine Association Agreement.

Recommendations to the government and political forces of Ukraine

The monitoring experts formulated a **package of proposals (European integration package) with 20 recommendations** to be as soon as possible fulfilled in order to strengthen confidence in the positive decision of the EU regarding the signing of the Association Agreement with Ukraine:

1. To find a mutually acceptable mechanism for resolving the Tymoshenko case via mechanisms discussed with the Ukrainian leadership and Yulia Tymoshenko by the Cox-Kwasniewski mission;
2. To pass a new Law on the parliamentary elections taking into account the conclusions of the Venice Commission and the position of thematic NGOs;
3. To create a working group in the relevant parliamentary committee to draft and get approval of the Election Code no later than March 2014;
4. Verkhovna Rada to adopt a decision on holding local elections in Kyiv;
5. To safeguard free and fair by-elections in 5 single mandate districts on 15 December 2013;
6. To resolve the conflict over revocation (by questionable court rulings) of mandates of several MPs;
7. To adopt the Laws on public television and radio (draft No.1076, taking into account the expertise of the Council of Europe) and on reform ("denationalisation") of print media (draft No.2600);

8. To adopt amendments to the Penal Code of Ukraine to improve the conditions of detention of prisoners (draft No.3200);
9. To stipulate the appropriate financing of the system of free legal aid in the 2014 State Budget;
10. To make amendments to the Law on national referenda according to the opinion of the Venice Commission from June 2013;
11. To adopt the new Law on the prosecutor's office taking into account the soon expected recommendations of the Venice Commission;
12. To adjust the proposed amendments to the Constitution regarding the strengthening of guarantees of the independence of judges – as to reduce the role of the president in the resolution of staffing issues and to introduce genuine judicial self-governance;
13. To initiate changes to the Law on the judiciary and the status of judges in accordance with the judgments of the European Court of Human Rights and the recommendations of the Venice Commission;
14. To adopt the Law on peaceful assembly (draft No.2508-a) to fulfil the judgment of the European Court of Human Rights in the Verentsov case;
15. To complete the drafting of the Concept for the Reform of the Police, with involvement of expertise of NGOs and European institutions;
16. To adopt the Law on amendments to certain legislative acts in the sphere of the state anti-corruption policy (draft No.3312) and fulfil the recommendations of GRECO, OECD and European Commission in the realm of anti-corruption legislation and institutions;
17. To make amendments to the new Law on public service based on the recommendations of the SIGMA programme;
18. To make changes to the Law on public procurement to improve the transparency of purchases of state-owned enterprises (draft No.2207);
19. To adopt the Law on state aid (draft No.2749) taking into consideration the clauses of the future EU-Ukraine Association Agreement;
20. To resolve the issues identified within the Informal Dialogue between Ukraine and the EU on Business Climate (in particular, to cancel the recycling duty on cars and other protectionist measures and to develop an action plan to remedy the situation of VAT refund and advanced payments of income tax).

Recommendations for the EU

Notwithstanding all the critical assessments of Ukrainian realities, the monitoring experts believe that the EU would make a strategically right decision if it signed the Association Agreement with Ukraine – and at the same time preserved certain controlling mechanism so that **concrete benchmarks on democracy and monitoring of their achievement by the government are further maintained**.

Also, **the EU should more actively stimulate a broad and structured dialogue between all stakeholders** (government, opposition and civil society), particularly in the sphere of electoral legislation and judicial reform. To be more specific, the Informal Dialogue between Ukraine and the EU in the sphere of Judicial Reform should be expanded (for the time being, only the Presidential Administration and the Cabinet of Ministers are represented from Ukrainian side).

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. The draft law was sent to the Council of Europe / Venice Commission, OSCE/ODIHR and the EU for evaluation.

On 15 June 2013, the Joint Opinion of the Venice Commission and OSCE / ODIHR on the draft law was adopted, and it contained a great deal of critical remarks. Already in June, the Ministry Justice revised the draft law and published it on the website of the Ministry of Justice and the governmental website "The Civil Society and the Government" for public discussion[1]. The revised version of the draft was also submitted for re-examination to the Venice Commission, OSCE / ODIHR, and the EU. The Joint Opinion of the Venice Commission and OSCE / ODIHR is expected on 12 October, while the preliminary version of the opinion – by the end of September.

In the revision process, a number of recommendations of the Venice Commission and OSCE / ODIHR regarding the draft law remained unaccounted for, including those recommendations that:
- require amending the Constitution of Ukraine (in particular with respect to such requirements for parliamentary candidates as the possibility to run for the Parliament for individuals who have committed intended crimes, including grave ones, as well for those who have not resided in Ukraine for the past five years);
- imply harmonization and coordination of the electoral legislation regulating the procedures of local, parliamentary, presidential elections, and in some ways, referenda, in particular by means of adoption of the Election Code;
- according to the government, require further exploration (introduction of public funding of political parties, participation of foreigners, including foreign media, in election campaigning, etc.).

A positive development was launching wide public discussion on the proposals for reforming the electoral legislation involving political parties and relevant NGOs. A significant role was played in that respect by the roundtable of 20 June organised by the

[1] The report on the results of this draft law's public discussion was published on the official website of the Ministry of Justice on 27 August 2013: http://www.minjust.gov.ua/43884

EU Delegation to Ukraine and the US Embassy in cooperation with the Venice Commission and OSCE, attended by heads of executive agencies, MPs of Ukraine, representatives of the opposition and the civil society.

Currently, a series of roundtables is being conducted, in compliance with the approved schedule (order of the Ministry of Justice of 19.07.13 No.712/7) [2], involving experts of the Venice Commission, OSCE / ODIHR, the EU Delegation to Ukraine, the Council of Europe Office in Ukraine, and other international missions and organizations, as well as Members of Parliament of Ukraine, representatives of the civil society, renowned experts in the field of electoral legislation, academics, and the media:

- On 13.08.13, the roundtable on amending the Constitution of Ukraine (amending the provisions of the Constitution of Ukraine (paragraphs two and three of Article 76) regarding requirements for candidates for the Parliament of Ukraine) was held. The transcript of the roundtable can be accessed on the website of the Ministry of Justice ;
- On 11.09.2013, the roundtable on codification of the electoral legislation was held;
- For early October, the roundtable on revision of the Law of Ukraine "On Elections of Members of Parliament of Ukraine" based on outcomes of the campaign of parliamentary elections in 2012 is scheduled;
- In mid-November, it is planned to conduct the roundtable on financing of political parties and electoral campaigns.

However, a practical mechanism for further consideration of the outcomes of these expert discussions remains unclear, and neither does the subsequent sequence of actions to improve the electoral legislation, including with regard to the relevant conclusions of the Venice Commission and OSCE / ODIHR.

In particular, significant discrepancies can be observed regarding the prospects of codifying the electoral legislation. The draft ***Election Code*** has been developed by a working group led by Yuriy Klyuchkovsky (the Election Law Institute), funded by the EU back in 2010, and it received a generally positive assessment of the Venice Commission. Adoption of the Election Code is explicitly stated as one of EU requirements and an OSCE / ODIHR recommendation, but the government rejects this option in principle[3];

The key result of the thematic roundtable of 11 September was that most participants agreed that unification of the electoral legislation was necessary, as well as its harmonisation with regard to all types of elections – presidential, parliamentary, local, and, perhaps, referenda[4]. Of course, this is best achieved by means of codification. However, the government insists that the development of the Election Code should be preceded by the appropriate revision and harmonisation of all laws on elections, and this

[2] See the approved Scheduled Plan of Roundtables (Ministry of Justice of 19.07.13 No.712/7) – http://www.minjust.gov.ua/news/43847

[3] Interestingly, the President in his annual address to the Verkhovna Rada of Ukraine "On the Domestic and International Situation of Ukraine in 2013" suggested "intensifying work on development of the Election Code that would allow establishing a unified infrastructure for the election process and unifying most of electoral rules and procedures" – http://www.president.gov.ua/docs/poslannia2013.pdf, p.189.

[4] See the transcript here – http://www.minjust.gov.ua/news/44182

will take time. Thematic NGOs, instead, insist on the necessity of codifying the election legislation[5].

In the context of the upcoming elections to be held in early 2015, thematic NGOs are also concerned about the prospects of the legislation on presidential elections. On the one hand, the relevant current law has many shortcomings, on the other hand the legal framework of an election should be well known at least one year before the election, i.e. it must be adopted no later than early 2014. However, drafting of the respective changes has not yet started. On 9 September 2013, MP Knyazevych (the Secretary of the Parliamentary Committee on State Building and Local Self-Government, "Batkivshchyna" faction) submitted draft Law No.3224 on Amendments to the Law of Ukraine "On Elections of the President of Ukraine" (regarding technical and legal improvements to the electoral process)[6]. However, it had not been coordinated with other members of parliament, or with experts. The prospects of its support by the parliament remain unclear[7].

Even more problematic is the law on local elections, under which, according to the thematic NGOs, it would be de facto impossible to conduct fair elections free from abuse.

The Five "Problematic" Single-Mandate Constituencies

At five single-mandate constituencies, no final results of the 2012 parliamentary elections have been established. The draft law on repeated parliamentary elections at certain single-mandate constituencies (No.2971) submitted by the Government was not supported by the parliament. Instead, after several months of coordination efforts within the working group involving representatives of all factions, the parliament passed a compromise law on 5 September 2013 (registration number 2971-d of 5 June 2013), which identifies the numbers of the five constituencies (No. 94, 132, 194, 197, 223) where the re-election procedure will be held[8]. The re-election date is 15 December 2013, and the Law becomes invalid on the day following the date when the Members' of Parliament of Ukraine elected at these re-elections take office, thus ensuring its single-use application.

The nature of the elections at the five problematic constituencies will be an important indicator showing to what extent Ukraine is improving its electoral practices, not only the electoral legislation.

On 7 July 2013, the midterm election for the Parliament of Ukraine was held at constituency No.224 (in Sevastopol) following the resignation of the previously elected in this constituency MP P.Lebedev because of his appointment to the Cabinet of Ministers (he was appointed Minister of Defence). According to assessments of the thematic NGOs, the election was held with a number of infringements that, however, did not fundamentally affect the outcome of the vote. However, the campaign to discredit

[5] http://www.en.pravo.org.ua/index.php/150-constitutional-issues/551-statement-of-non-governmental-organizations-on-need-to-codify-electoral-legislation
[6] http://w1.c1.rada.gov.ua/pls/zweb2/webproc4_1?pf3511=48222
[7] http://www.kommersant.ua/doc/2276282
[8] The governmental draft No.2971 had not clearly determined the number of constituencies where re-election were proposed; therefore, if approved, it would have created a risk of holding re-elections not in five but in any number of constituencies, after stripping any constituency-elected MP of mandate by court ruling (see below description of the scheme applied to MPs Dombrovsky, Baloga, Markov, and others).

independent public monitors deployed at these elections with participation of individual MPs and members of the Central Election Commission raised concerns[9].

Revocation of MP's Mandates with Rulings of the High Administrative Court

In 2013, the High Administrative Court of Ukraine revoked MP mandates of five members of parliament: O.Dombrovsky, P.Baloha, O.Vlasenko, A.Verevsky, I.Markov (the latter two were members of the pro-presidential Party of Regions faction). Most of these rulings were regarded by the opposition as an attempt to revise the election outcome with the hands of the controlled courts, and in respect of I.Markov (September 2013) - as an attempt to put pressure on the pro-ruling party members who disagreed with decisions of the faction.

MPs Dombrovsky, Baloha, and Markov were elected in single-mandate constituencies, and despite certain problems regarding identification of voting results at their constituencies and recorded violations, the Central Election Commission decided on their registration as MPs. The High Administrative Court ruled (beyond the legally determined period of consideration of appeals about election irregularities) to revoke these MPs' mandates[10] – contrary to the requirements of the Constitution that unambiguously spells out the procedures for termination of an MP's authority[11].

On 24 April 2013, the Constitutional Court of Ukraine rejected initiating constitutional proceedings on the proposal of 61 MPs of Ukraine regarding an official interpretation of the relevant provisions of the Constitution – because "the issues raised in the constitutional petition were not within its jurisdiction"[12].

On 3 July 2013, the Speaker of the Parliament, in line with the ruling of the High Administrative Court of 2 July 2013, ordered to annul individual voting cards of P.Baloha and O. Dombrovsky.

Regarding Mr.Vlasenko, the court decided on revoking his MP mandate because he allegedly combined parliamentary work with advocacy work acting as Yulia Tymoshenko's defender. During the trial, it was found out that the parliamentary Rules and Regulations Committee had made a decision to send a petition to the court at a closed meeting, without inviting Mr.Vlasenko to the meeting. The Committee members did not

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[9] http://www.cvu.org.ua/nodes/view/type:news/slug:206, http://oporaua.org/news/3917-zajava-opory-shchodo-perebigu-dnja-golosuvannja-ta-pidrahunku-golosiv-na-promizhnyh-vyborah-narodnogo-deputata-ukrajiny-v-okruzi-224-m-sevastopol

[10] O.Dombrovsky and P.Baloha – on February 8, I.Markov – on September 12.

[11] Article 81: "< ...> Powers of a Member of Parliament of Ukraine shall be terminated early in the following cases:
1) resignation by individually submitting the application;
2) entry into force of a guilty verdict against him/her;
3) court declaring him/her incapacitated or missing;
4) termination of his/her nationality or leaving for permanent residence outside of Ukraine;
5) death.
The decision on early termination of powers of a Member of Parliament of Ukraine shall be adopted by the majority of the constitutional composition of Verkhovna Rada of Ukraine.
In case of a default to fulfil the requirement of incompatibility of the MP's mandate with other types of activity, powers of an MP of Ukraine shall be early terminated pursuant to legislation by court" (http://zakon2.rada.gov.ua/laws/show/254%D0%BA/96-%D0%B2%D1%80/print1361276416000843).

[12] http://zakon2.rada.gov.ua/laws/show/v017u710-13

take into account the evidence showing that Mr.Vlasenko was not an attorney but a volunteer defending Mrs.Tymoshenko.

As to Mr.Verevsky, he was stripped of his powers as a result of a failure to terminate his business activity, and the legitimacy of the High Administrative Court's ruling against him was not questioned by anybody.

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[13].

Media

In December 2012, the Government submitted to the Parliament a draft law on ***public broadcasting***, but it was not in line with European standards (in particular, in terms of financing, establishment of the supervisory authority, and ensuring independence of public broadcasting services). Besides, an alternative draft law by the MPs who had submitted a similar draft law in the parliament of the previous convocation was registered as well.

The governmental draft law "On Public Television and Radio Broadcasting of Ukraine" (No.1076) was approved in the first reading on 3 July 2013. On 11 September, the Parliamentary Committee on Freedom of Speech and Information at its session reviewed over 100 amendments submitted by MPs and approved the draft law for the second reading. However, after discussions at the plenary session of 19 September, the draft law was returned for another second reading due to lack of an agreed position of factions regarding its content. Reconsideration of the draft law is expected to be held at the plenary session of 8-11 October.

On 9 September 2013, the Office of the OSCE Representative on Freedom of Media published its opinion on the government's draft law on public broadcasting, where it expressed a number of critical remarks regarding the draft law's text[14]. None of the draft laws have been officially submitted for examination to the Council of Europe.

[13] In particular, observers of Civil Network OPORA recorded defiant attempts of ballot stuffing in Vasylkiv town that are still not investigated.
[14] http://www.osce.org/ru/fom/104653

Another important requirement is ***ensuring 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 issue of ensuring balanced news and coverage of election campaigns is expected to be resolved in the new edition of the Law "On Television and Radio Broadcasting", drafting of which is being finalized by a working group at the parliamentary Committee on Freedom of Speech and Information with the support of the Council of Europe project funded by the EU and the Government of Canada.

In March and April 2013, two draft laws by MPs on "reforming" ***(privatisation) of state-owned and municipal media***[15] were registered in the parliament. They stipulate a detailed mechanism through which public authorities or local governments seize to be founders / owners of print media which should be given over to the employees or sold. The alternative draft law, "On Reform of State-Owned and Municipal Print Media", was also developed by the government on instructions of the President who ordered the respective draft law to be submitted to him in early April (but it was never submitted to the Parliament). On 5 September, the draft law filed by the group of MPs (No.2600) was sent back to the parliamentary committee for revision. On 19 September, the revised draft law was approved in the first reading, and the timeframe for its preparation for the second reading was shortened. It is expected that the draft law will be adopted during the plenary session week of 8-11 October.

The draft Law of Ukraine "On Amending Certain Laws of Ukraine to ***Ensure Transparency of Media Ownership***" submitted by the Government was adopted on 4 July 2013. The amendments only anticipate limited measures to ensure transparency of broadcasters' ownership that cannot be considered efficient (e.g., due to lack of requirements regarding disclosure of the end beneficial owners). Moreover, the amendments regarding transparency of print media ownership are irrelevant due to the much weaker impact of the print media on the society compared with audiovisual media, and due to press market's fragmentation into numerous outlets.

Recommendations:

1. **To pass a new Law on the election of people's deputies taking into account the conclusions of the Venice Commission and the positions of civil society organisations;**

[15] No.2600 "On Reforming Printed Media", submitted by MPs M.Tomenko, R.Raupov, M.Knyazhytsky, I.Miroshnychenko, S.Kurpil, and M.Bahraev, and No.2600-1, submitted by MP M.Knyazhytsky.

2. **To urgently assign the task of improving the electoral legislation to the thematic committee of the Verkhovna Rada where a working group should be established, with participation of the Ministry of Justice and other stakeholders, for drafting and approval of a roadmap for development of the Election Code and its adoption by late March 2014 (one year before the presidential election);**
3. **To safeguard free and fair by-elections in 5 single-mandate constituencies on 15 December 2013;**
4. **The Verkhovna Rada of Ukraine should no later than in mid-November 2013 pass the resolution on holding local elections and elections of mayors (including in the city of Kyiv);**
5. **To adopt the Laws on public television and radio (draft No.1076, taking into account the expertise of the Council of Europe) and on reform ("denationalisation") of print media (draft No.2600).**

2. Politically motivated prosecutions, 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. However, the issue of politically motivated criminal prosecution in Ukraine remains unsolved as long as Yulia Tymoshenko is still in jail with ongoing criminal proceedings against her in a number of other cases, including those reopened after being closure in 2005, as well as cases concerning the events of 1995-1996.

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 national courts[16];
- excessive length of civil proceedings and pre-trial investigation into criminal cases and no legal mechanism to appeal against such length[17];

[16] In particular, the ECHR pilot judgment in the case Yuriy Mykhaylovych Ivanov v. Ukraine. It is about implementation of rulings delivered by domestic courts on late social payments. Previously, Ukrainian courts delivered many rulings in favour 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
On 19 September 2013, the Parliament adopted the Law "On Amendments to Certain Laws of Ukraine on Enforcement of Judgments" that requires restructuring of the public debt that arose before enactment of the Law due to court judgements. The amount of debt repayment will be determined annually by adopting the Law on the State Budget.

- breach of human right to liberty and personal security;
- cruel treatment of those in detention, no effective investigation into claims against such treatment[18];
- 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).

An illustrative example demonstrating the quality of enforcement of the ECHR judgements is execution of judgements in the high-profile cases of ***Yuriy Lutsenko and Yulia Tymoshenko***. The European Court of Human Rights ruled that arresting them while their cases were heard by the Ukrainian courts was unreasonable and therefore constituted a violation of the European Convention on Human Rights. The government unsuccessfully contested the judgement regarding Mr. Lutsenko, the ECHR refused to submit the case to the Grand Chamber, and the judgement became final on 19 November 2012. The Government did not dispute the ECHR's judgement on Yulia Tymoshenko, and it entered into force on 30 July 2013.

So far the judgment on Yuri Lutsenko 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[19].

The situation is similar regarding enforcement of the ECHR judgement on Yulia Tymoshenko (except for the fact that in this case no compensation has been requested or awarded). On 1 August 2013, Mrs.Tymoshenko turned to the Supreme Court of Ukraine, via the High Specialized Court for Civil and Criminal Cases (hereinafter – HSC), with an application for review of the sentence passed by Pechersky Court on 11 October 2011 in connection with the ECHR judgement. After some delay, on 6 September 2013 the HSC refused in consideration of the application, to forward the

[17] In particular, the pilot judgment of ECHR in the case Kharchenko v. Ukraine. Lots of the shortcomings of the legal system of Ukraine that were the reasons for violations of the Convention were resolved by adopting in 2012 the new Criminal Procedure Code.

[18] 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.

[19] In April 2013, Ukrainian government Commissioner for the European Court of Human Rights submitted to the Committee of Ministers of the Council of Europe the Action Plan to Implement the ECHR Judgement in the Case "Lutsenko vs. Ukraine" that included the respective individual and general measures. Ukraine's implementation of the said ECHR ruling was analysed at the session of the Committee of Ministers of the Council of Europe on 6 June 2013. Based on the review, the Committee of Ministers of the Council of Europe, in particular, noted the necessity to take more specific general measures to ensure compliance of the Ukrainian judicial system with provisions of the European Convention on Human Rights and Fundamental Freedoms.

application to the Supreme Court[20]. The HSC panel of judges decided that all violations of the Convention identified by ECHR were associated with her arrest and detention prior to passing the sentence, and not with the judgement in the criminal case on its merits. Therefore the HSC ruled on the merits of the application, thus having incorrectly interpreted the ECHR judgement as the latter does not assess the legality of national court judgements but rather establishes violations of the rights guaranteed by the Convention.

The HSC also rendered a dubious interpretation of the ECHR's assessments of the first instance court judge's actions, noting that when deciding on the restraint measure for Mrs.Tymoshenko the latter was guided by provisions of the criminal procedure law that were in force at the time of adjudication. In fact, the ECHR stated directly that the said judge, when ruling on detention of the applicant, acted arbitrarily, contrary not only to the articles of the Convention, but also to the national legislation because the real reason for detention was different from the officially announced ones.

On 26 September, the Committee of Ministers of the Council of Europe expressed its concern regarding the HSC's refusal to review the case, without any significant check on the possible impact of the violations of the Convention on the proceedings. Accordingly, the Government of Ukraine is to submit to the Committee of Ministers of the Council of Europe information about the applicable measures that can be taken by the authorities so that all the appropriate conclusions are drawn following the Court's judgement[21]. Thus, the Council of Europe considers that, contrary to the Government's statements, the ECHR judgement regarding Yulia Tymoshenko has not been enforced.

In the same resolution, referring to the ECHR judgement in the case of Yuriy Lutsenko, the Committee of Ministers of the Council of Europe reiterated its request for information from the Government of Ukraine on measures to bring the Ukrainian judicial system in line with the European Convention on Human Rights, besides the reform of the Criminal Procedure Code[22]. The Council of Europe noted that (contrary to the position of the Ukrainian government) the mere adoption of the new CPC is insufficient for enforcement of the general measures in the cases of Lutsenko and Tymoshenko.

Currently, the European Court of Human Rights is considering the second Tymoshenko case as to whether actually her trial was fair. The ECHR may pass its judgement in 2014.

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[20] See the HSC press release:
http://sc.gov.ua/ua/golovna_storinka/pressluzhba_vicshogo_specializovanogo_sudu__ukrajini_z_rozgljadu_civilnih_i_kriminalnih_sprav_povido.html

[21]
https://wcd.coe.int/ViewDoc.jsp?Ref=CM/Del/OJ/DH%282013%291179/24&Language=lanEnglish&Ver=original&Site=CM&BackColorInternet=DBDCF2&BackColorIntranet=FDC864&BackColorLogged=FDC864

[22]
https://wcd.coe.int/ViewDoc.jsp?Ref=CM/Del/OJ/DH%282013%291179/24&Language=lanEnglish&Ver=original&Site=CM&BackColorInternet=DBDCF2&BackColorIntranet=FDC864&BackColorLogged=FDC864

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, the previous Minister of Justice, Oleksandr Lavrynovych, said that there was no mechanism to implement such a judgement, though the parliament may remove the name of Mr.Volkov from its respective resolution, as it has been done in pursuance of judgements of the High Administrative Court regarding some other judges. However, this has not been done.

Also important are the general measures to implement this judgement – in particular, as regards necessity to reform the procedures of bringing judges to disciplinary liability and their dismissal. Adoption of the proposed constitutional amendments aimed at strengthening the safeguards of judicial independence will bring provisions of the Constitution in accordance with the European Court's judgement, but for a full implementation of the ECHR judgement it is necessary to introduce profound amendments in the legislation, in particular the Law on the Judiciary and the Status of Judges (see Section 4 below).

The Committee of Ministers of the Council of Europe in its decision of 26 September 2013, on the implementation of the judgement in the case of Oleksandr Volkov[23] urged Ukrainian authorities to fulfil its obligation of restoring the applicant as a judge of the Supreme Court without further delay and noted the availability of vacancies at the Supreme Court. The Committee of Ministers also emphasized the urgency of implementing the general measures arising from the ECHR judgement; the Ukrainian authorities must submit an amended action plan for implementation of the respective measures by the end of October 2013.

In ***the case of "Verentsov vs. Ukraine"***, the European Court noted a number of violations of the Convention resulting from contravention of the applicant's right to peaceful assembly due to the lack of clear and predictable procedures of organising and conducting such assemblies. The European Court emphasized that as at the national level there is a gap in the legislative regulation of exercising the right to freedom of assembly that has not been resolved for 20 years, therefore this issue is a systemic problem for Ukraine. Accordingly, the Court urged the government to immediately introduce the necessary reforms in the national legislation and administrative practice in order to bring them in conformity with requirements of the Convention and the European Court's case law. The only way to solve this problem is to adopt a law that would regulate the issue of peaceful assemblies. On 4 July 2013, a group of MPs from different factions submitted to the Parliament of Ukraine draft law No.2508-a "On Peaceful Assembly". This draft law is also supported by the government and virtually all other stakeholders, except for some radical NGOs. However, the draft law has not even been discussed yet in the first reading.

In Ukraine, ***implementation of ECHR judgments is overseen by the Government Commissioner for the European Court of Human Rights***. This person also acts as an

23 https://wcd.coe.int/ViewDoc.jsp?id=2103787&Site=CM&BackColorInternet=C3C3C3&BackColorIntranet=EDB021&BackColorLogged=F5D383

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[24]. 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[25], recommendations of the European Committee for the Prevention of Torture[26], European Prison Rules and proposals of human rights activists. After a year of the National Preventive Mechanism's functioning (see Section 3 below), the Office of the Ombudsman concluded that there are systemic problems with respect for human rights at places of confinement where a large number of people find themselves in the conditions that can be qualified as ill-treatment (i.e., actually torture)[27].

In September 2013, another *report by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment* was published, based on the findings of its visit to Ukraine in December 2012[28]. The report pointed to numerous systemic problems existing in the national criminal penitentiary system: the

[24] 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;
the Report by the Ombudsman of the Verkhovna Rada of Ukraine on Human Rights "Monitoring of Confinement Facilities in Ukraine: the status of the national preventive mechanism's implementation" for 2012: http://www.ombudsman.gov.ua/images/stories/26062013/Dopovid_NPM.pdf

[25] 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) – see: http://khpg.org/index.php?id=1370666586

[26] 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..

[27] http://www.ombudsman.gov.ua/index.php?option=com_content&view=article&id=2790:2013-06-25-13-01-06&catid=14:2010-12-07-14-44-26&Itemid=75

[28] http://www.cpt.coe.int/documents/ukr/2013-23-inf-eng.pdf (the original in English), http://www.khpg.org/index.php?id=1379842217 (the translation into Ukrainian).

conditions of detention in prisons, torture, unacceptable treatment of the inmates by staff, prison labour conditions, corruption, the situation of those sentenced to life, and even poor terms and conditions of prison staff's service. As noted in the Report, the Committee will shortly publish its public statement on Ukraine caused by poor cooperation to improve the situation in prisons, in particular by facts of harassment of prisoners before, after and even during the visit so they would not complain to the Committee members. Ukraine has become the fourth country in respect of which the Committee issues a public statement throughout the entire history of the Committee's work[29]. The negligent approach of the State Penitentiary Service to cooperation with the Committee is evident not only from the large number of outstanding recommendations that the CPT made in the previous years, but also by the extremely weak response of the State Penitentiary Service to the comments made in the latest report by the Committee and its outright slipshod approach to providing an adequate translation of the Report and its recommendations into Ukrainian[30].

On 18 March 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[31]. As a result, the State Penitentiary Service held a meeting with participation of the civil society and set up working groups at its regional offices and pre-trial detention centres to identify problems regarding application of the new rules. However, the findings of these groups are yet unknown, and numerous critical comments to the Rules remain unaccounted for. The situation can be repeated in case of the new draft I*nternal rules for penitentiary establishments* developed in summer 2013[32]. They may be adopted any time soon, despite complaints of human rights activists about the lack of transparency and of public involvement in the development of this "Bible" for all penitentiary institutions.

A positive step was adoption on 5 September of the Law on Amendments to the Penal Code of Ukraine regarding the procedures and conditions of serving sentences (registration number 1131)[33]. In the second reading, essential flaws were eliminated that could allow administrations to humiliate prisoners and punish them for petty irregularities. The law brings in some positive elements, including liberalisation of visits by family members, attributing the status of child care facilities to prison child centres and so on. However, these changes are definitely not sufficient. On the same day (5 September) MP Iryna Lutsenko (Yuriy Lutsenko's wife) along with other members of "Batkivshchyna" faction submitted draft law No.3200 on amendments to the Penal Code of Ukraine concerning improvement of the conditions for prisoners[34]. The draft law, in particular, proposes allowing prisoners to use mobile phones (the provision of draft law 1131 that was eliminated in the second reading), more liberal regulations for visits, safeguarding the rights to health care, pensions, reducing the scale of abuse in the application of parole procedures, etc.

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[29] The first country in respect of which the Committee made the decision to issue a public statement was Turkey (1996) due to inaction of the authorities in fighting ill-treatment at police departments, the second one was Russia (2001) in connection with the practice of mass tortures at detention centres in Chechnya, the third one – Greece (2011) due to the appalling conditions of detention in special centres for migrants.

[30] See more details: http://ukrprison.org.ua/expert/1379999651

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

[32] http://www.kvs.gov.ua/peniten/control/main/uk/publish/article/678075

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

[34] http://w1.c1.rada.gov.ua/pls/zweb2/webproc4_1?pf3511=48169

Some other positive trends regarding detention conditions result from the decreasing number of prisoners (reduction of the number of prisoners per 100 thousand population to 299 persons, while in 2003 this figure was 401)[35], mainly due to a significant decrease in the number of persons in pre-trial detention facilities (as a consequence of the new Criminal Procedure Code – see Section 3 below). It leads to a relative increase of cell room and of per capita investments in renovation and medical care. Some improvements are also due to increased public control in the form of the National Preventive Mechanism, and the situation is slowly but gradually changing for the better due to anticipation that at any time the institution may be visited, without a warning, by employees of the NPM Department and civil society representatives[36].

On 29 April 2013, the Cabinet of Ministers approved the National Target Programme to Reform the State Penal Service of Ukraine[37]. 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[38]. 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[39]. 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.

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[35] http://ukrprison.org.ua/statistics/1376062438

[36] http://www.ombudsman.gov.ua/index.php?option=com_content&view=article&id=2790:2013-06-25-13-01-06&catid=14:2010-12-07-14-44-26&Itemid=75

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

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

[39] 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.

Recommendations:

1. **To find a mutually acceptable mechanism for resolving the Tymoshenko case via mechanisms discussed with the Ukrainian leadership and Yulia Tymoshenko by the Cox-Kwasniewski mission;**
2. **To enforce the judgments of the European Court of Human Rights (in particular, in the cases of Lutsenko, Tymoshenko and Volkov) by amending legislation to ensure true independence of judges (see the recommendations in Section 4 below);**
3. **To adopt the Law on peaceful assembly (draft No.2508-a) to fulfil the judgment of the European Court of Human Rights in the Verentsov case;**
4. **To adopt amendments to the Penal Code of Ukraine to improve the conditions of detention of prisoners (draft No.3200);**
5. **To amend the internal regulations of penitentiary institutions and pre-trial detention facilities bringing them in conformity with the laws of Ukraine, recommendations of the European Committee for the Prevention of Torture, the European Court of Human Rights, the European Prison Rules, and recommendations of the National Preventive Mechanism monitors;**
6. **To reallocate funds within the National Target Programme for Reform of the State Penitentiary Service for the period of 2013-2017 prioritising human rights rather than security considerations or the desire to generate income for penitentiary institutions.**

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 45%, or by 13,900 people as at 15 August 2013 vs. 1 December 2012), fewer detentions (45% down vs. 2012 and 70% down vs. 2011), fewer searches (25% 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[40].

The trends, however, are not stable. They are threatened by investigators and prosecutors willing to follow the old procedures. It is alarming that there is no significant increase in the proportion of acquittals in courts.

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[41]. 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.

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

[40] For more details, see: Monitoring report 'Implementation of new CCP of Ukraine during the first half of 2013' on the website of the Centre for Political and Legal Reforms: http://www.en.pravo.org.ua/files/CPC_Implement_Report_Center_July_2013-eng-final.pdf

[41] For more details, see: Background Information about the System of the Free Secondary Legal Aid Functioning from 1 January to 30 September 2013: http://legalaid.gov.ua/images/news/System_BPD/300913_dovidka_BPD.pdf

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. It seems that the logic of the Presidential Administration is that this work should only be launched after enactment of the Law on the Prosecutor's Office.

On 1 August 2013, MP Kozhemyakin submitted to the parliament a draft law on the National Investigation Bureau. It is unlikely that this draft will be supported by the Cabinet and the Presidential Administration. Moreover, it is also criticised by experts, as it suggests too broad powers (in fact, all the cases that are now pursued by prosecutor’s offices in respect of any criminal offences committed by senior officials, judges, or law enforcement officials), as well as staffing of the new institution with the current prosecutors only.

On 16 September 2013, the Speaker of Parliament Volodymyr Rybak stated that the issue of the "Independent Investigation Bureau" was one of three priority issues that had been prepared for consideration among the others, so in early October the Parliament was supposed to decide on it[42]. But, he never went back to this issue in his later public comments.

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[43] 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

[42] http://www.kommersant.ua/doc/2280406?isSearch=True

[43] The total number of the institutions in Ukraine that based on their formal features can be regarded as confinement facilities exceeds 6,000. These facilities are currently run by 11 ministries and agencies.

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[44]. In 2012, they visited 169 institutions subordinated to different national agencies; in 2013, 247 institutions, and all the visits involved representatives of civil organisations[45]. 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[46].

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[47]. This is an evident violation of the right to profession.

Recommendations:

1. **To ensure adequate funding for the free legal aid system;**
2. **The management of law enforcement agencies authorized to apprehend persons (police, tax service, the security service, prosecutor's offices) must control their staff's compliance with the requirements of the law regarding immediate notification of the legal aid centres about any detention, and bring them to liability for failure to notify;**
3. **To draft the Law on the National Investigation Bureau involving international and national experts;**
4. **To put an end to the practice of imposing disciplinary sanctions upon lawyers who express their views.**

[44] For more details, see: "The Report of the Ombudsman "Monitoring of Confinement Facilities in Ukraine: the state of the national preventive mechanism implementation" for 2012: http://www.ombudsman.gov.ua/images/stories/26062013/Dopovid_NPM.pdf
[45] Data of the NPM Department at the Ombudsman's Office as of 26.09.2013.
[46] The cost of 200 monitoring visits (trips), holding trainings and annual conferences, publication of methodology materials and reports.
[47] For more details about the conflict at the Bar see, e.g.: 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")]

Law on the prosecutor's office

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[48]. In October 2012, the Venice Commission welcomed the draft law[49].

Presidential Administration of Ukraine had prepared a new bill based on the above draft law and forwarded it to the Venice Commission for review in August 2013[50]. The bill envisages the following:

- The rules for profession admission - a competitive selection process to be introduced and higher standards for the candidates to be established;
- The function of representing the interests of the citizens and the government in court to be constricted;
- 122 prosecutor' offices shall be eliminated - in particular, all environmental and transport prosecutor's offices will be disbanded;
- The procedure for dismissal of prosecutors shall become more complicated and require a corresponding decision by the Prosecutors' Qualifications and Disciplinary Commission;
- The Council of Prosecutors and Prosecutors' High Qualifications and Disciplinary Commissions shall be introduced into the prosecution system, similar to the organisations functioning in the system of Bar and Bench. The

[48] 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
[49] http://www.pravo.org.ua/2011-07-05-15-26-55/2011-07-22-11-19-37/1209-venetsianska-komisiia-skhvalyla-pozytyvnyi-vysnovok-na-zakonoproekt-pro-prokuraturu.html
[50] http://zib.com.ua/ua/print/37035-proekt_zakonu_pro_prokuraturu_tekst.html

Council shall include 11 members elected by the Conference of Prosecutors – the highest self-governance body of the prosecutors.

However, the bill raises criticism by the experts due to the following considerations:

- Excessive and unrestricted authority of the Prosecutor General;
- Dependence of the prosecutors from all superior prosecutors, primarily from the Prosecutor General;
- Lack of public accountability and oversight in the work of the prosecution;
- Some remnants of the function of "general supervision" over the observance and application of laws[51].

It is expected that the Venice Commission will issue the opinion about the draft law at its plenary meeting on 11-12 October 2013. There is a high probability that the Parliament will adopt this draft law entirely in October this year. The trivia is whether they will take into account the recommendations of the Venice Commission.

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[52]; selective application of disciplinary measures to judges, etc. By and large, the new law created a powerful leverage to put political pressure on judges[53].

In late 2012, the Presidential Administration developed a ***draft law on amending the Constitution of Ukraine 'to strengthen independence of the judges'***. 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 President submitted to the Parliament a slightly revised draft, following the opinion of the Venice Commission, in early July 2013 (Reg. No. 2522). On 5 September, the Parliament sent the draft to the Constitutional Court seeking their opinion. The procedure for amending the Constitution requires obtaining a positive opinion of the Constitutional Court (the above opinion was issued on 19 September[54]) and a prior approval by the Parliamentary majority followed by the adoption of the law at the next session by at least two-thirds of the constitutional composition of the Verkhovna Rada. This means that the law cannot be adopted as a whole before February 2014.

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[51] For details see: http://www.pravda.com.ua/columns/2013/09/26/6998705/

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

[53] For details on the drawbacks of the judiciary see: 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

[54] http://www.ccu.gov.ua/uk/doccatalog/list?currDir=220985

Currently, the draft provides for amending the Constitution in terms of establishment of the *High Council of Justice* where 12 members of 20 shall be elected by the judges (at the Congress of Judges of Ukraine). Besides, they propose to introduce permanent appointment of judges without a "probationary" period (which is now five years), remove the Parliament's function for organizing the judiciary, provide for a competitive procedure for selection of judges, increase the minimum and maximum age requirements for judges (25 to 30 years – minimum and 65 to 70 years - maximum age for employment) and candidate judges' experience (3 to 5 years of experience in law). However, the President's retention (despite declarations) of excessive powers to organise the judiciary (appointment, transfer and dismissal of judges[55]) and ignoring some recommendations of the Venice Commission (such as about excessive judicial immunity) raise concern.

Moreover, today's dependence of the highest judicial self-government authorities, including the Congress of Judges of Ukraine, completely eliminates any positive constitutional changes because the authorities at the political level will continue using these to affect the establishment of the High Council of Justice and the High Qualification Commission of Judges[56].

The draft No.2522a on changes to the Constitution poses another issue because it does not provide for the possibility of Ukraine's recognizing the jurisdiction of the International Criminal Court[57]. The reasons behind it are unclear since it is one of the well known and outstanding priorities of the Ukraine-EU Action Plan (2005-2009) and the Association Agenda (since 2009). Given that the EU countries once initiated the establishment of the ICC, they view it as their 'baby', therefore this decision of Ukraine will cause irritation. It is likely that later one will have to make changes to the same chapter of the Constitution.

The opposition (Arseniy Yatseniuk, *Batkivshchyna* faction) also announced that they have prepared relevant draft amendments to the Constitution in terms of the judiciary. Specifically, these changes include the introduction of the impeachment procedure for local judges, abolishment of the Constitutional Court and transfer of its functions to the Supreme Court of Ukraine and expansion of other powers of the Supreme Court[58]. Thus, it is likely that the Parliament debate on the constitutional regulation of the judiciary is just beginning.

To ensure true independence of judges, it is absolutely necessary to revise the ***Law On the Judicial System and the Status of Judges*** without waiting for changes to the Constitution primarily to allow for independent judicial self-government authorities. In particular, there is a need for the following changes:

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[55] Upon the recommendation of the High Qualifications Commission and the High Council of Justice; the most questionable here is the role of the President in terms of the transfer of judges, i.e. causing interference in their career advancement.

[56] For a detailed analysis of this and other draft amendments to the Constitution regarding the independence of judges, see: http://www.en.pravo.org.ua/index.php/150-constitutional-issues/553-constitutional-amendments-how-to-avert-the-threat-to-judicial-independence

[57] Its competence includes prosecution of persons responsible for genocide, war crimes and crimes against humanity.

[58] http://www.pravo.org.ua/2010-03-07-18-06-07/lawreforms/1504-eksperty-obhovoryly-problemy-ukrainskoho-pravosuddia-u-konteksti-ievropeiskykh-standartiv.html

- simplified system of judicial self-governing authorities, proportional representation of judges in the authorities;
- a standalone disciplinary commission of judges, competitive and legally based disciplinary procedures, a system of proportional penalties;
- competitive approach to appointment of judges to different courts;
- stronger role of the Supreme Court of Ukraine in development of consistent judicial practices and enhanced access to justice[59].

Back in 2011, the Commission on Strengthening Democracy and the Rule of Law under the President has developed a new version of the Law on the Judicial System and the Status of Judges to include the above changes and followed by a positive opinion of the Venice Commission[60]. However, the draft remains without use neither by the President nor the Government or the Parliament.

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[61]. 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[62].

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

[59] See the results of independent monitoring of case law of the High Qualifications Commission of Judges and the Supreme Council of Justice on bringing judges to disciplinary liability and dismissal for violation of oath: http://www.pravo.org.ua/files/A_D_NEW_final.pdf ; 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.
[60] http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD%282011%29033-e
[61] http://www.pravo.org.ua/2011-07-05-15-26-55/2011-07-22-11-16-35/1286-povernuty-na-doopratsiuvannia.html
[62] http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD%282013%29001-e ; http://www.kommersant.ua/doc/2144484

2012[63]. The President publicly spoke on the needed reform in April 2013[64]. Nevertheless, a respective draft law has not been submitted to the Verkhovna Rada as yet.

Recommendations:

1. **To expand the Informal Dialogue between Ukraine and the EU in the sphere of Judicial Reform to involve opposition and civil society to build up a firm consensus on judicial reform (for the time being, only the Presidential Administration and the Cabinet of Ministers are represented from Ukrainian side);**
2. **To adopt the new Law on the prosecutor's office taking into account all the soon expected recommendations of the Venice Commission;**
3. **To adjust the proposed amendments to the Constitution regarding the strengthening of guarantees of the independence of judges – as to reduce the role of the president in the resolution of staffing issues and to introduce genuine judicial self-governance;**
4. **To initiate changes to the Law on the judiciary and the status of judges in accordance with the judgments of the European Court of Human Rights and the recommendations of the Venice Commission, in order to:**
   - **simplify the system of judicial self-governing authorities, change the approach to the formation of the congress of judges, eliminating de-facto appointment of it, and provide for proportional representation of judges in the judicial self-government authorities;**
   - **create a standalone disciplinary commission of judges, competitive and legally based disciplinary procedures, a system of proportional penalties;**
   - **introduce competitive approach to appointment of judges to different courts;**
   - **strengthen the role of the Supreme Court of Ukraine in development of consistent judicial practices and enhanced access to justice.**

[63] The Centre for Political and Legal Reforms developed a detailed comparative chart of necessary amendments as back as July 2012.
[64] 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)]

In January 2013 the First Deputy Minister of Internal Affairs announced the plans to transform militia into national police[65], but no actions have been taken so far.

Back 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. 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 *by 1 October 2013*, to submit them for consideration of the Venice Commission.

Instead, according to the Ministry of Interior, the development of the law on the enforcement authorities should be preceded by the approval of the *Concept of the Law Enforcement Authorities Reform*[66]. The work on the Concept is ongoing: in May 2013, MOI offered their comments and suggestions on the draft received from the Office of the National Security and Defence Council of Ukraine. On 8 September 2013, MOI expected the Concept to be approved at the meeting of the National Security and Defence Council planned for September 2013. Then, based on this Concept, they would complete and appropriately submit draft legislation to reform the enforcement authorities of Ukraine. The drafts would also be sent for assessment by the Council of Europe experts[67]. As of 26 September, none of the National Security and Defence Council decisions have been issued to approve the Concept.

In his annual address to the Verkhovna Rada on 6 June 2013 On domestic and foreign situation of Ukraine in 2013[68] (section 3.7 Reform of the system of law enforcement authorities), the President actually skipped the issue of the law enforcement reform.

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[65] 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

[66] According to the Consept of Criminal Justice Reform approved by the Presidential Decree No. 311 on 8 Apr 2008 and the Action Plan of the Concept, approved by the Cabinet Resolution No. 1153-r on 27 Aug 2008 - http://mvs.gov.ua/mvs/control/main/uk/publish/article/887741; Development of the Concept and its approval by the Parliament's resolution in 2010 was envisaged in the National Program of Economic and Social Development of Ukraine 2010, approved by the Law of Ukraine on 20 May 2010. The Presidential Decree No. 24/2011 *On the Action Plan to Implement the Responsibilities and Commitments of Ukraine Resulting from its CoE Membership* dd. 12 Jan 2011 envisaged the development of the Concept during one year after adoption of a new Criminal Procedure Code (adopted on 13 Apr 2012). All the above legislation remains unaccomplished.

[67] http://mvs.gov.ua/mvs/control/main/uk/publish/article/887741

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

In the summer of 2013, the police officers of Vradiyivka village (a capital town of one rayon in Mykolaiv Oblast) gang raped and attempted to murder a 29-year-old local female resident. The police refused to detain the suspects sparking mass defiance among the residents which culminated in an attempt to take the local police station by storm on 1 July. These events have received national attention followed by a wave of protests and manifestations of solidarity with the Vradiyivka residents in many parts of the country. The Interior Minister reported on the state of affairs before the Parliament. The suspect police officers were arrested including a deputy rayon police chief (suspected of concealing a crime). The local prosecutor, the chief of rayon police department as well as the Head of the MoI Directorate in Mykolaiv Oblast (one of the police-rapists was his godson) and his deputy were dismissed. Meanwhile, the protest by Vradiyivka residents in Kyiv was dispersed by the police on 18 July. These developments have intensified the debate about the need to reform the police with the purpose to restore public confidence[69].

Considering the Eastern European experience, the reform of the enforcement agencies should be based on three "Ds": Depolitisation, Decentralisation and Demilitarisation. Thus, the current reform of the Ukrainian military and centralised and politically dependent police forces should aim at creating a public police service focusing on the interests of the community and operating under the coordination and management of a civilian Ministry of Interior[70].

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.

Recommendations:

1. To complete the drafting of the Concept for the Reform of the Police, with involvement of expertise of NGOs and European institutions;
2. To develop a draft Law on the Police on the basis of the approved Concept.

[69] http://en.wikipedia.org/wiki/Rape_of_Iryna_Krashkova
[70] For more details see "Police Status: International Standards and Foreign Legislation" (Banchuk et. all), http://www.pravo.org.ua/files/ebook/PS_05__4_2.pdf, p.6 - 7.

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[71].

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[72]. 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[73].

Currently, the Constitutional Assembly committees have prepared proposals to the draft Concept of Amendments to the Constitution of Ukraine[74]. On 21 June, the Constitutional Assembly considered the draft Concept and decided to take it as a basis for further development[75] due to a lack of preparedness, internal inconsistency of the document (conflicting methodology, formats, terminology and internal contradictions

[71] http://www.assembly.coe.int/Main.asp?link=/Documents/AdoptedText/ta10/ERES1755.htm
[72] http://www.pravo.org.ua/politicreformandconstitutionslaw/2011-12-14-18-24-53/1206-start-chy-falstart-konstytutsiinoi-reformy.html
[73] http://www.pravo.org.ua/politicreformandconstitutionslaw/2011-12-14-18-24-53/932-2012-05-21-14-02-06.html
[74] The mechanism of adding the chapter on Judiciary to this draft is yet unclear. Some members of the Assembly's Justice Committee mentioned that the Committee had never drafter or approved that chapter.
[75] http://www.president.gov.ua/news/28243.html

in various parts of the text). The relevant working group shall prepare a revised draft Concept before 15 October 2013[76].

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.

On the other hand, the very act of sending the Concept for revision can be considered as an argument in favour of the Assembly still being independent in its actions to some extent. It is also interesting that the draft Concept offered mixed (parliamentary and presidential) model of government with increased parliamentary control over the Cabinet.

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.

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 Parliament[77]. 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.

On 14 June 2013, the Venice Commission has provided an extremely critical opinion on the Law, recommending making profound changes. On 21 June, the Constitutional Assembly supported the recommendation to improve the Law On the National Referendum, including the recommendations of the Venice Commission. The Constitutional Assembly also decided that its work shall be guided by the fact that the constitutional amendments should be made only in the manner prescribed by the Constitution[78].

However, as of 1 October 2013, no steps to revise the Law On the National Referendum have taken place despite the recommendations of the Venice Commission.

[76] http://cau.in.ua/ua/results/id/rishennja-koordinacijnogo-bjuro-konstitucijnoji-asambleji-vid-17-veresnja-2013-roku-18-690/

[77] For a detailed analysis of the Law, see: http://gazeta.zn.ua/POLITICS/parlamentskie_vybory_proigrali___ne_beda,_lishim_parlament_polnomochiy.html

[78] http://www.president.gov.ua/news/28244.html

Recommendations:

1. **The Constitutional Assembly shall finalize the internally coherent draft Concept of Amendments to the Constitution taking into consideration the views of the independent experts to the best extent possible;**
2. **To make amendments to the Law on national referendum according to the opinion of the Venice Commission from June 2013.**

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)]

Association Agreement Implementation Programme

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[79].

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[80].

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.

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 Code (№2750). On 4 April 2013, the government approved the Action Plan on institutional reform of state aid monitoring and control.

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[79] 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 Association Agreements with the EU by the Central and Eastern European and Western Balkan countries: http://dl.dropboxusercontent.com/u/654017/Int_exp.pdf

[80] 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

Ukraine's commitments under the draft Association Agreement between Ukraine and the EU suggest establishment of an independent agency of monitoring and oversight for the state aid, holding an inventory of existing schemes of state aid and most importantly, bringing the provision of aid in line with the EU rules. Draft No.2749 refers only to the oversight, monitoring and holding an inventory of the aid while the mechanism of adaptation of existing state aid is lacking. At the same time, the draft contains no substantive criteria for analysing the impact of state aid on competition except for some general language. Moreover, it does not take into account the provisions of the Agreement that horizontal and sectoral rules of state aid may be the grounds for declaring state aid compatible with proper implementation of the Agreement.

These shortcomings do not just deprive the draft of substantive sense - they also create a significant risk to the Ukrainian exporters to the EU, since companies may use state aid that does not meet the European standards resulting in their exposure to the EU sanctions.

Draft law No. 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.

Recommendations:

1. The government, in close coordination and involving non-governmental experts, shall develop the Implementation Programme of the Association Agreement using the model previously tested by all the other Eastern European countries which are/were in an association relationship with the EU;

2. To adopt the Law on state aid (draft No.2749) taking into consideration the clauses of the future EU-Ukraine Association Agreement (Articles 262, 267) and particularly the Law should provide for the basic principles of state aid policy based on the horizontal and sectoral EU rules.

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 GRECO Recommendations

Since the adoption of the Law "On Combating Corruption" in 1995, the anti-corruption legislation remained without significant changes to the late 2000s. The Civil Law Convention on Corruption of the Council of Europe was ratified in 2005 which allowed Ukraine to join the Group of States against Corruption (GRECO) in 2006. Besides, the Parliament ratified the UN Convention against Corruption and the Council of Europe's Criminal Law Convention on Corruption in 2006 which, however, came into force only in 2009 when the so-called First Anti-corruption Package was adopted: the Law On Preventing and Combating Corruption (replacing the previous Law of 1995), On the Liability of Legal Persons for Corruption Offences and On Amendments to Certain Legislative Acts of Ukraine regarding the Liability for Corruption Offences. Entering into force of this package of laws was postponed twice and all three laws were recognized expired in December 2010[81].

Finally, a new wording of the Law On Principles of Preventing and Combating Corruption and On Amendments to Certain Legislative Acts of Ukraine regarding the Liability for Corruption Offences have been approved in April 2011. The drafts of the above laws were introduced by President Yanukovych (the draft law On the Liability of Legal Persons replacing the Law of 2009 has not been proposed).

The first assessment report by GRECO in 2007 offered Ukraine 25 recommendations to bring the anti-corruption legislation and policies in line with the EU standards and practices. Since then, GRECO has reviewed already four reports on the progress of implementation of these recommendations by Ukraine (the largest number of the reports ever offered to any member of GRECO). The final report of March 2013 stated that 11 recommendations remained unfulfilled at the time. The Ukrainian government will be reporting on the implementation progress by the end of 2013. In October 2011, GRECO adopted the next evaluation report on Ukraine in respect of financing of political parties and criminalisation of corruption also featuring 16 recommendations on these issues.

Since 2004, Ukraine has been monitored under the Istanbul Action Plan of the OECD's Anti-Corruption Network for Eastern Europe and Central Asia. The third round of monitoring of Ukraine was launched in 2013 (the report is due in March 2014).

[81] At the same time, delays with signing and publication of the Law making the above tree laws of 2009 void actually made them effective on 1 Jan 2011. They remained in effect for five days resulting in a number of legal issues.

GRECO and OECD recommendations on combating corruption have been integrated into the Visa Liberalisation Action Plan (Block 3 "Public Order and Security"), offered to Ukraine by the EU in late 2010.

Legislative Changes in 2013

In pursuance of these recommendations, the Government introduced four anti-corruption drafts to the Parliament in 2013. They were adopted after consultations with the opposition. 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)[82];
- 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)[83];
- On amendments in some legislative acts of Ukraine as to implementation of public anticorruption policy (draft law №2837, adopted on 14 May 2013)[84];
- 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)[85].

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

- 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 (from 150 000 UAH to 80 000 UAH, i.e. 8 000 EUR);
- 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;
- clarifying and aligning with international standards a number of provisions in the Criminal Code, Code of Administrative Offences, Law on Principles for Preventing and Combating Corruption, including provisions on confiscation of corruption proceeds.

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

[82] Draft Law No. 2802, adopted on 18.04.2013, effected on 18.05.2013.
[83] Draft Law No. 2803, adopted on 18.04.2013, will be effected on 15.12.2013; On May 22, the text of the law has been corrected due to the mistakes made in the previously adopted version.
[84] Draft Law No. 2837, adopted on 14.05.2013, effected on 09.06.2013.
[85] Draft Law No. 2990, adopted on 23.05.2013, will be effected on 01.09.2014.

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;
- publication on-line is still optional for asset declarations;
- threshold for declaring expenses is still too high (approximately 8 000 EUR one-time lump sum expense);
- too many offences creating conditions for corruption are recognized as corruption offences (late filing of tax declaration, engaging in other paid work, failing to report a conflict of interest, etc.) instead of establishing a clear list of corruption crimes and guiding the efforts of relevant actors responsible for fighting corruption to eliminate them. Working on such minor offences "makes the police statistics look good" while the real corruption cases remain largely outside their attention;
- no liability has been provided for breaching some restrictions and bans (receiving services or property from legal or natural persons in favour of a government agency, etc.);
- 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.

To address the shortcomings of recently adopted amendments to the anti-corruption legislation, the Ministry of Justice has prepared another draft with new changes in August. In contrast to previous practices, this draft and attached comments were published on the website of the Ministry[86]. The draft law On Amendments to some Legislative Acts on Implementing the Recommendations of the European Commission in terms of the National Anti-Corruption Policy was approved at the Cabinet meeting on 11 September 2013[87] and submitted to the parliament on 23 September (Reg. No. 3312)[88].

However, the draft (according to the version published on the website of Ministry of Justice) does not eliminate all the problems listed above and provokes more critical comments. In particular, the draft law has

- Retained the asset declarations publication mechanism (btw contrary to the instruction of the President to set up a single portal for electronic filing of tax declarations);

[86] http://minjust.gov.ua/44047

[87] www.kmu.gov.ua/control/uk/publish/article;jsessionid=72DF429ABDFA3E375AD2C096A2BC72E7?art_id=246676741&cat_id=244274160

[88] http://w1.c1.rada.gov.ua/pls/zweb2/webproc4_1?pf3511=48484

- Introduced administrative liability for knowingly submitting false information when declaring assets and income. At the same time, there is no mechanism to establish intent behind submission of such information and the suggested fine for the violation is very low (up to 425 UAH / ap. 40 EUR);
- Retained the requirement to verify all declarations without exception;
- Declaration verification function is vested with the agencies of the Ministry of Revenue and Duties while the Law on Principles for Preventing and Combating Corruption looses provisions concerning the content of such verification, leaving it to the discretion of the Ministry of Revenue and Duties;
- Established an excessive amount of alternative (non-criminal) penalties for corruption offences;
- Not eliminated duplication between administrative and criminal liability for corruption offences;
- Provisions on the liability of legal persons do not fully comply with the international standards;
- Contains no provisions aimed at implementation of other EU requirements, based on the opinions of GRECO, in particular regarding: alignment of the "conflict of interest" concept with the Council of Europe standards, the establishment of an effective mechanism for detecting and resolving conflicts of interest and applying appropriate sanctions; establishment of an agency responsible for the coordination of anti-corruption policies; providing for anti-corruption specialisation of the enforcement agencies; reforming the legislation on financing of political parties and election campaigns.

Anti-corruption Policy Coordination

On 11 July 2013, the Cabinet restored the post of the Government Anti-Corruption Policy Commissioner (existed from 2009 to November 2011) and appointed Mr. A.Bohdan (who had held this position previously) as the Commissioner. Restoration of the post of the Commissioner cannot be considered as fulfilment of GRECO recommendations to establish an effective mechanism for anti-corruption policy coordination since no functions and powers of the office (yet not even the Commissioner's TORs) have been identified and no secretarial support has been provided. The institution is not independent: the Government may abolish this position at any time and the appointment procedure does not provide for any public announcement or the competition.

As previously, the President's National Anti-Corruption Committee founded back in 2010 stays inactive, and consequently it cannot be considered an effective agency for coordinating the development and implementation of anti-corruption policy. The amendments to the provisions of the National Anti-Corruption Committee according to which 1/5 of its members would have to consist of the representatives of NGOs have not been implemented.

Anti-corruption Investigation Agency

The new Law On amendments in some legislative acts of Ukraine as to implementation of public anticorruption policy[89] significantly reduces the number of anti-corruption authorities (excludes tax police, customs authorities and the Military

[89] Draft Law No.2837, adopted on 14.05.2013, effected on 09.06.2013.

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. None of these law enforcement bodies 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. However, the existing provisions of the CPC do not provide for any NIB specialization since it will receive the authority to investigate any crimes committed by senior government officials, judges and law enforcement officials (see Chapter 3 above). Meanwhile, the recommendations of GRECO and OECD propose a law establishing an independent specialised agency of anti-corruption investigations being structurally independent of the existing enforcement and security agencies and aiming at fighting high-level corruption. It should be provided with adequate guarantees of independence, powers and resources in accordance with the international standards and best practices[90].

Parliamentary Anti-corruption Expertise

Recently approved changes to the legislation establish procedures for parliamentary anti-corruption expertise of all the drafts reviewed by the parliament within the mandate of the parliamentary Committee for Combating Organized Crime and Corruption. The amount of work is very large as more than 500 drafts were to undergo the assessment as of early September. Relevant work has been organised in the Secretariat of the Committee assisted by the Civic Expert Council which also began its public anti-corruption assessment.

Practice of Fighting Corruption

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.

Public Procurement Legislation

Current legislation provides good opportunities for single-vendor procurement that is actually outside the tender procedure[91]. 137 billion UAH (ap. 13 Bio. EUR) were spent in that way in 2012 (more than two-thirds of total public procurement funds).

The Law "On Public Procurement" does not apply to procurement of goods, works and services by public, municipal enterprises and business entities where the public or municipal share is over 50 per cent and in case if the procurement is made with the

[90] www.oecd.org/corruption/acn/istanbulactionplan/46832397.pdf
[91] The single-vendor procurement procedure has been unjustly simplified by the Law On Amendments to Certain Legislative Acts of Ukraine on Public Procurement dated 8 July 2011.

companies' own funds rather than with government funds[92]. This makes completely non-transparent procurement of government enterprises which amounted to 163 billion UAH (ap. 16 Bio. EUR) in 2012 (while the volume of public procurement subject to the Law was 202 billion UAH / ap. 20 Bio. EUR).

In early 2013, the members of the opposition groups filed two drafts covering this area: No.2207 On Amendments to the Law of Ukraine "On Public Procurement" (to increase transparency of procurement practices)[93] and No.2443 "On Amendments to Certain Legislative Acts of Ukraine" (concerning the prevention of corruption and misuse of public funds during procurement)[94]. However, these drafts have not even passed the first reading at the parliament[95].

However, the Law "On Public Procurement" was amended on 7 June 2012, to include the introduction of an electronic reverse auction procedure (i.e. new electronic trading system). Under the new law, public procurement of specified products with the cost over 100,000 UAH (300,000 UAH in construction industry) or works over 1,000,000 UAH shall be carried out only through an electronic reverse auction[96]. On 30 July 2013, a resolution of the Cabinet of Ministers established the list of products to be procured at electronic reverse auctions[97]. However, the infrastructure for the introduction of electronic trading is not yet ready. The technical regulations of the electronic platforms have not yet been approved and the customers have not received their digital signatures, therefore the law on electronic auctions will not be able to function starting 1 January 2014, as declared[98].

In general, the experts and practitioners believe that a real reduction of barriers to entry the public procurement market, in particular for SMEs, requires primarily the establishment of an electronic licensing system (at the tax service and other registration authorities) as part of the larger task of developing e-government and administrative services in the country.

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 a Strategy for public procurement development in Ukraine. It is expected that the Strategy will create a framework for improving public procurement regulations in line with the EU-Ukraine Association Agreement. In addition, procurement is also discussed in a separate chapter of the Public Finance Management Strategy (see Chapter 9 below).

Law on public service

[92] According to the amendments to the legislation introduced by the Law "On Amendments to Certain Legislative Acts of Ukraine on Public Procurement" dated 4 July 2012

[93] http://w1.c1.rada.gov.ua/pls/zweb2/webproc4_1?pf3511=45670

[94] http://w1.c1.rada.gov.ua/pls/zweb2/webproc4_1?pf3511=45943

[95] The Parliamentary Committee on Economic Policy proposed the Parliament to adopt the draft No.2207 as the basis and returned the draft No.2443 for revision.

[96] Electronic Reverse Auction is the "backwards" auction - instead of bidding higher, the participants are bidding lower and decrease the price of the item to an acceptable level. The auction is administered by an operator through a website in the Internet and using digital signatures.

[97] The list contains 53 products and services, including, inter alia, cars and trucks, spare parts, oil, cash registers, furniture, wallpaper, carpets, tea, coffee, drinking water, sand, gravel, stationery, drives, hotel services, drinks and food.

[98] Initially, the developers of the law promised that it would work immediately starting 1 January 2013.

In November 2011, the parliament adopted the new law on public service despite strong criticism of the EU[99]. 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; labour 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.

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 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.

Recommendations:

1. **To adopt the Law on amendments to certain legislative acts in the sphere of the state anti-corruption policy (draft No.3312) and fulfil the recommendations of GRECO, OECD and European Commission in the realm of anti-corruption legislation and institutions;**
2. **To establish (appoint), based on the applicable law, an effective agency to coordinate implementation of the anti-corruption policies;**
3. **To draft, with participation of international and national experts, the law On the National Investigation Bureau (see Chapter 3 above) with the functions of a specialized agency to investigate criminal offences in the area of corruption;**
4. **To make amendments to the new Law on public service based on the recommendations of the SIGMA programme;**
5. **To make changes to the Law on public procurement to improve the transparency of purchases of state-owned enterprises (draft No.2207).**

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

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)]

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.

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 Ministry of Finance established the working group to develop a public finance management strategy and an action plan ensuring its implementation. Experts of SIGMA and European Commission were included into the working group. The Public Finance Management Development Strategy was approved by the Cabinet of Ministers of Ukraine on 5 August 2013[100]. However, as of 23 September, the decision has not been made public; according to unofficial information, this document is being finalized in discussions with the stakeholders. Besides, it remains unknown whether the approved text is in line with the recommendations of the OECD / EU SIGMA Program.

Recommendations:

1. **Finalize the Public Finance Management Strategy with full consideration of the recommendations by SIGMA.**

[100] www.kmu.gov.ua/control/uk/publish/article?art_id=246565050&cat_id=244274160

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 was pre-approved on 20 June and finally passed as the law on 19 September. The law will enter into force after it is signed by the President of Ukraine and published.

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.

Recommendations:

1. **To develop, introduce and adopt amendments to the Law on the Accounting Chamber in accordance with the revised Article 98 of the Constitution and taking into account the EU and GRECO recommendations.**

11. Improving Business and Investment Climate

Decisive action to improve the business and investment climate

[Council of the EU, 10.12.12]

Take decisive action to improve the business and investment climate, including establishing an informal EU-Ukraine dialogue on the business climate and resolving the issues identified in the framework of the dialogue

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

The World Bank Doing Business Report 2013 upgraded Ukraine's ranking from 152 (2012) to 137. The greatest progress (upgrade in the ranking from 118 to 50) has been established in terms of the complexity of starting a business[101]. However, Ukraine yet falls behind all the European countries (Poland - 55, Georgia - 9, Moldova-83, Belarus-58 and Russia-112).

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.

A number of protectionist measures recently introduced by Ukraine raise concern in the EU. These are, in particular, additional duties on imported cars[102], restricting imports of coal-coke, the requirement to use equipment made of local (Ukrainian) components in the renewable energy investment projects. On 2 September 2013, the EU published the 10th Report on potential measures to limit trade on behalf of the EU's trading partners. This includes Ukraine together with Brazil, Argentina and Russia which have been mentioned as the countries that had increased import tariffs in trade with the EU the most[103].

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 is also concerned by Ukraine's request to the World Trade Organization (WTO) submitted in the fall of 2011 to revise numerous tariff commitments that Ukraine took up during its accession to the WTO in 2008[104].

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[101] http://www.doingbusiness.org/data/exploreeconomies/ukraine/

[102] In particular, the Recycling Duty being in force since September 1, 2013, introduced in the Law "On Amendments to the Tax Code of Ukraine in terms of Payment of the Environmental Tax for Disposal of Decommissioned Vehicles and Improvement of certain Tax Norms" adopted by the Verkhovna Rada on July 4, 2013.

[103] http://europa.eu/rapid/press-release_IP-13-807_en.htm

[104] http://eeas.europa.eu/delegations/ukraine/press_corner/all_news/news/2013/2013_03_14_4_en.htm

On 25 July 2013, Kyiv hosted the first meeting of the informal dialogue between Ukraine and the EU on business environment with the participation of the Minister of Economic Development and Trade I.Prasolov and Deputy Director General of the Directorate General for Trade of the European Commission P.Balash. After the meeting, the EU representatives expressed their concern about the lack of results in solving the current problems (Ukraine's actions which the EU considers incompatible with its obligations under the WTO and privileged relations within the Deep and Comprehensive Free Trade Area)[105].

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.

Recommendations:

1. **Cancel the Law on Recycling Duty for Imported Vehicles and stop other protectionist measures in the framework of the informal dialogue with the EU on improving business climate;**
2. **Develop an action plan to improve the situation with VAT reimbursement and advance tax payments.**

[105] http://eeas.europa.eu/delegations/ukraine/press_corner/all_news/news/2013/2013_07_26_3_en.htm

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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.

For the time being, this monitoring is the only one public report on fulfilment of conditions for signing EU-Ukraine Association Agreement. There is no comprehensive public report from the government.

Blog of the monitoring: http://eu-ua.blogspot.com

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