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Committee on the Honouring of Obligations and Commitments by Member States of the Council of Europe (Monitoring Committee)

Honouring of obligations and commitments by Ukraine

Information note by the co-rapporteurs on their fact-finding visit to Kyiv¹ (7-8 December 2009)

Co-rapporteurs: Ms Renate WOHLWEND, Liechtenstein, Group of the European People's Party, and Ms Sabine LEUTHEUSSER-SCHNARRENBERGER, Germany, Alliance of Liberals and Democrats for Europe

¹ This information note has been made public by decision of the Monitoring Committee dated 17 December 2009.

I. Introduction

1. In the framework of the monitoring procedure, I conducted a fact-finding visit to Ukraine from 6 to 9 December 2009. Ms Sabine Leutheusser-Schnarrenberger was not able to join me on this visit, as a result of her new responsibilities as Federal Minister of Justice of Germany. The main aims of this visit were to discuss: the legal framework for the Presidential elections in January 2010, especially the recent “Law on amending some legislative acts on the election of the President of Ukraine” that was adopted by the Verkhovna Rada on 28 July 2009; the developments with regard to the drafting of a Unified Election Code; the developments with regard to the reform of the Prokuratura (the Draft law of Ukraine on the Office of the Public Prosecutor); and the Draft Law on the Judicial System and the Status of Judges in Ukraine. The statement made after this fact-finding mission is attached in Appendix 1.

2. During my visit, I met with the Speaker of the Verkhovna Rada, Mr Volodymyr Lytvyn; the Minister of Justice, Mr Mykola Onishchuk; the Deputy Chairperson of the Supreme Court, Mr Pylypchuk; the Secretary of National Constitutional Council, Ms Maryna Stavniychuk; the Chairman and members of the Working Group of Verkhovna Rada on the preparation of the draft Election Code; the Chairman of the Judiciary Committee of the Verkhovna Rada; members of the Ukrainian Delegation to the Parliamentary Assembly; members of the High Council of Justice appointed by the Verkhovna Rada; as well as representatives of civil society and the diplomatic community in Ukraine. The programme of my meetings is attached in Appendix 2.

3. I would like to express my gratitude to the Verkhovna Rada and the Representative of the Secretary General of the Council of Europe in Kiev for the programme and support extended to the delegation. In addition, I am grateful for the assistance provided by Mr Klein, Co-Secretary of the Monitoring Committee who accompanied me on this mission.

4. The visit took place against the background of the preparations for the election of the President of Ukraine, which is scheduled for 17 January 2010 and especially the debate regarding the controversial changes to the electoral framework for these elections that were adopted by the Verkhovna Rada in July 2009. As the campaign for the elections had started and a number of political leaders are candidates in these elections, as well as to avoid interfering with the work of the ad hoc Committee of the Parliamentary Assembly to observe the presidential elections in Ukraine –of which I am a member– I did not request meetings with any of the political leaders who are also candidates in these elections, with the exception of our host, Mr Lytvyn, whom I met strictly in his capacity of Speaker of the Verkhovna Rada.

II. Legal framework for the Presidential elections on 17 January 2010

5. In the previous information note on Ukraine², we outlined a number of concerns with regard to the electoral framework for the forthcoming Presidential Elections in Ukraine on 17 January 2010, and called upon the Verkhovna Rada to urgently adopt the necessary amendments to the electoral legislation. In addition, we recommended to also incorporate into the law on the election of the President of Ukraine the positive changes that were made to the electoral framework for parliamentary elections in Ukraine, as these changes had resulted in the last two parliamentary elections being generally conducted in line with Council of Europe standards.

6. On 28 July 2009, the Verkhovna Rada adopted the “Law on amending some legislative acts on the election of the President of Ukraine”. However, instead of improving the electoral framework for the Presidential elections, as requested, inter alia, by us, these amendments constituted, in the view of the Venice Commission³, a step backwards in comparison to previous legislation and in a number of instances run counter to European standards.

7. In its joint opinion on this law (CDL-AD(2009)041) with the OSCE/ODIHR, the Venice Commission noted a significant number of shortcomings which regard to, inter alia: the electoral complaint procedure, the tabulation of election results, the composition of election commissions, the transparency of the electoral process and the integrity of the voters’ list.

8. The constitutionality of the legislative amendments contained in the Law on amending some legislative acts on the election of the President of Ukraine was appealed to the Constitutional Court by President Yushchenko and a group of 48 MPs. On 19 October 2009, the Constitutional Court announced its judgment on this appeal in which it ruled that, inter alia, the following provisions were unconstitutional:

² Doc. AS/Mon(2009)24

³ CDL-AD(2009)041

- the fact that citizens residing abroad should be registered in the Consulates of Ukraine in order to have the right to vote;
- the fact that members of precinct election commissions (PECs) and district election commissions (DECs) should be residing in the relevant territory of the DEC or PEC;
- the provisions by which no complaints to the central election commission (CEC) concerning the election process are allowed on the day of elections and afterwards;
- the provisions by which the courts stop considering complaints against the election process two days after the end of voting;
- the provisions which eliminated the possibility to challenge the election results established by the PECs and CECs before the courts.

9. While this judgment addresses a number of serious concerns, in the opinion of the Venice Commission, it also leaves a number of important issues unaddressed such as, inter alia:

- the obligation of the DECs to establish election results independent of the number of PECs in their territories in which the results have been cancelled;
- the reduced deadlines for the filing of complaints (brought back from 5 to 2 days);
- the possibility to add voters to the voters' list on election day by election commissions;
- the reduction of issues that can be appealed to the higher level election commissions, including the CEC (although they can still be challenged in the courts);
- the interdiction on domestic non-partisan election observers.

10. Of the issues that have not been invalidated by the Constitutional Court, the possibility for the election commissions themselves to add voters to the voters' list on election day is of special concern increases the possibilities for electoral fraud and runs counter to Assembly recommendations. These concerns are highlighted by the allegations by one of the parties in these elections that close to half a million of voters have "disappeared" from the voters' list in the areas where they traditionally have a strong support. However, it should be noted that the same party also controls the local entities in this region responsible for providing the updated information for the voters' list in these regions, which raises some questions with regard to these allegations.

11. This shortcoming in the legal framework for these elections is all the more of concern in the light of the limitations to the appeal and election disputes resolution process, as well as questionable provisions regarding the determination and tabulation of the election results, that were enacted in July 2009 and which were not struck down by the Constitutional Court. These provisions raise the – theoretical - possibility of a President being declared elected in a situation where there are considerable doubts regarding the validity of the election results as a result of allegations of widespread and massive electoral fraud⁴. One has only to recall the Presidential elections in 2004 to recognise the potential dangers of such provisions.

12. In the week before my visit, an attempt was made to pass a compromise text on amendments to the legal framework for these elections that would address the decision of the Constitutional Court as well as the remaining concerns of the Venice Commission. However, this attempt failed as a result of objections of the Party of Regions and the Bloc Yulia Tymoshenko. During my visit, I was informed that another attempt to pass these amendments might be made in the week following my visit. I stressed that, while I would welcome the adoption of amendments that would address the decisions of the Constitutional Court and the remaining concerns of the Venice Commission, that date would constitute the last possibility for changes to the legal framework, given the requirement that in general this framework should not be changed after the election process has started. However, I would like to underscore that such amendments, given that - and under the condition that - they are called for by the international community to address serious shortcomings in the existing legislation, are not *per se* against international standards that demand a stable legal framework for elections.

13. While I deeply regret the allegations of possible electoral fraud during the presidential elections of 17 January 2010, as well as the serious shortcomings in the legal framework for these elections, I would like to highlight that all elections that have taken place in Ukraine since the last Presidential elections in 2004 were considered by international observers, including our Assembly, to have been conducted in line with international standards. I therefore have great expectations that this trend will also prevail during the upcoming elections and that any allegations of potential fraud will turn out to be unfounded.

⁴ CDL-AD(2009)041 § 74 - 76

III. Unified Election Code

14. The above-mentioned last-minute enacting of controversial changes to the legal framework for the presidential elections clearly show that the habit of playing with the rules instead of by the rules is still very much alive in Ukraine. Moreover, the changes introduced to the legal framework also highlighted, and deepened, the contradictions and ambiguities in the different laws that govern elections in Ukraine. This underscores the need to adopt a Unified Election Code that is in line with European standards, as recommended for some time by the Assembly.

15. As mentioned in our previous information note, the Verkhovna Rada has established a special working group, consisting of representatives of all parties in the Verkhovna Rada and outside experts, who, in close co-operation with the Venice Commission, have been preparing a draft Unified Election Code.

16. Regrettably, during my meeting with the members of this group I was informed that the group has not been able to meet the last few months as a result of the political environment in the run up to the Presidential elections. However, in a positive development, the group has practically finalised the draft Unified Election Code. The only outstanding issue that remains to be agreed upon is the election system for the Verkhovna Rada, which requires consensus by the leaders of the main political forces in Ukraine. Such a consensus has been impossible to reach in the context of the current elections. The members of the working group agree that such a system should be based on a regional proportional system with open lists, as recommended by the Assembly. The members expressed their hope that the political climate after the Presidential elections would be conducive for such a consensus to emerge between the main political forces, in which case the draft Unified Election Code could be submitted to the Verkhovna Rada in February 2010. It was then planned to organise, in close co-operation with the Venice Commission, a series of regional roundtables on this proposed draft. Some of the members of the working group suggested that the adoption of the Unified Election Code possibly would have to wait till after the next parliamentary elections to ensure that it would be supported by all main political forces.

17. I stressed that it would be unacceptable that the Unified Election Code would not be in place well before the next elections to take place after the Presidential elections of January 2010, and especially before the next parliamentary elections in Ukraine. In that respect, I stressed that the finalisation of the drafting of the Unified Election Code, as well as the subsequent adoption process in the Verkhovna Rada, should not be stretched for too long.

IV. Draft law on the Office of the Public Prosecutor

18. When acceding to the Council of Europe, Ukraine committed itself to: “the role and functions of the Prosecutor’s Office will change (particularly with regard to the exercise of a general control of legality), transforming this institution into a body which is in accordance with Council of Europe standards”⁵. This commitment still remains to be fulfilled by Ukraine.

19. A key problem in this regard is the general oversight function of the Prosecutor General which is a remnant of Soviet legislation and which runs against European standards⁶. Regrettably, in December 2004, as part of the resolution of the crisis that ensued after the flawed second round of the Presidential Election, constitutional amendments were passed which made, inter alia, the oversight function a permanent function of the prosecutor’s office, in effect maintaining a Soviet type Prokuratura in Ukraine. This was considered to be “unacceptable” by the Venice Commission, as well as the Assembly, which noted that under the current legal provisions, the Prosecutor’s Office is “ a very powerful institution, whose functions considerably exceed the scope of functions performed by a prosecutor in a democratic law abiding state”. The Assembly, as well as the Venice Commission, have therefore strongly recommended that the Ukrainian authorities remove the oversight function from the Prosecutor’s Office in the ongoing constitutional reform process.

⁵ Assembly Opinion 190 (1995) § 11-vi

⁶ In this context, it is important to note paragraph 16 of the Venice Commission’s opinion on this law (CDL-AD(2009)048): “In the opinion of Consultative Council of European Prosecutors, the constitutional history and legal tradition of a given country may ... justify non penal functions of the prosecutor. This reasoning can, however, only be applied with respect to democratic legal traditions, which are in line with Council of Europe values. The only historical model existing in Ukraine is the Soviet (and czarist) model of “prokuratura”. This model reflects a non-democratic past and is not compatible with European standards and Council of Europe values. This is the reason why Ukraine, when joining the Council of Europe, had to enter into the commitment to transform this institution into a body which is in accordance with Council of Europe standards”.

20. On 14 March 2009, the Verkhovna Rada passed in first reading a draft law on the Public Prosecutor. In the opinion of the Venice Commission on this law⁷, this draft not only considerably strengthens the Soviet style Prokuratura model of the Public Prosecutor's Office, it also fails to address any of the major criticisms made in earlier opinions of the Venice Commission on the law on the Prosecutor's Office. The fact that the draft establishes the Prosecutor's Office as separate from the judiciary or the executive (as a kind of forth power) and confers extensive powers to the Prosecutor General to act without the authority of the court is of concern in this respect. In addition, the draft undermines the independence of the individual prosecutors.

21. During the visit, I was informed that, taking into account the harsh criticism in the Venice Commission opinion, it is unlikely that the draft law will be considered in second reading, which is to be welcomed. The Ministry of Justice is also in the process of preparing a draft law on the Prosecutor's Office, as it was instructed to do so in the "Government's Action Plan on the Implementation of the Criminal Justice System Reform Concept Paper". I urged the Minister of Justice to submit this draft law to the Verkhovna Rada in the very near future, so that progress can be made in fulfilling this outstanding accession commitment by Ukraine.

V. Reform of the justice system

22. The Verkhovna Rada's Judiciary Committee approved, in June 2008, the "Draft Law on the Judicial System and the Status of Judges". This law is a consolidation of two earlier draft laws, one on the judicial system and one of the status of judges, that were previously sent to the Venice Commission for opinion and which the Venice Commission, inter alia, recommended to combine in order to improve their coherency and clarity. The opinion on the consolidated law, which was requested by the Verkhovna Rada, is not yet finalised, however from the individual comments of the Venice Commission members responsible for the drafting of the opinion, it can be concluded that the consolidated law does not differ much from earlier texts and that most of the serious reservations with regard to these laws were not addressed. In particular, concerns remain regarding the transparency and over-politicisation of the appointment process of judges, the overbroad judicial immunity for judges, as well as an over-complex and ineffective system of self-government of the judiciary. One of the underlying reasons for the complexity of the law, as well as some of the concerns raised by the Venice Commission, is due to the provisions in the current Constitution of Ukraine which would need to be changed to achieve a law that would be fully in line with European standards.

23. The government has finalised a draft Criminal Procedure Code which is also one of the outstanding commitments of the country. I expressed my hope that the government would submit this draft Criminal Procedure Code as soon as possible to the Verkhovna Rada. The latter should adopt the draft in first reading and send it to the Venice Commission for opinion without any further delay.

24. In my meeting with the Minister of Justice, I was informed about the status of the different legal reforms that are recommended by the Assembly as part of Ukraine's commitments to the Council of Europe. The Minister understood the importance of timely action with regard to the draft laws for the prosecutor generals' office, as well as criminal procedure code. In his view, the government draft for the Prosecutor General's Office could be submitted immediately after the Presidential elections, while he expected that it would be possible to submit the draft Criminal Procedure Code before that date.

VI. Anti-Corruption Measures

25. While the adoption of laws and reform packages is crucial for the county to meet its accession obligations and commitments, the actual implementation of these laws and reform packages is of equal importance. However, this often turns out to be another obstacle for reform. This was clear from the challenges to the coming into force, on 1 January 2010, of the three anti-corruption laws that were adopted by the Verkhovna Rada. In a surprising move, the Supreme Court of Ukraine has challenged the constitutionality of these laws before the Constitutional Court, and a proposal for a draft law that would delay the coming into force of these anti-corruption laws indefinitely was submitted by a member of the Our Ukraine faction.

26. In my meeting with the Deputy Chairman of the Supreme court, I was informed that the main reason why the Supreme Court challenged these laws was the fact that they explicitly prohibit the funding of the courts from other sources than from the government budget. In general, judges felt that such prohibition would undermine the functioning of the courts. I stressed the importance of the implementation of the anti-

⁷ CDL(2009)100

corruption laws and underlined that the funding of the courts outside the government budget, i.e. with private means, would be a continuous potential for corruption and run counter to European standards.

27. To my great regret, the President of Ukraine vetoed the recently adopted anti-money laundering law that was drafted with the assistance of the Council of Europe. This veto was all the more surprising, and disappointing, to me as I had been informed by his legal adviser, and Secretary to the National Constitutional Council, that the President would sign this law, only a few hours before the President announced his veto.

VII. Draft Law on Order of Organising and Conducting Peaceful Events

28. After my return from Ukraine, the Venice Commission and the OSCE/ODHIR Expert Panel on Freedom of Assembly adopted their joint opinion on the Draft Law of Ukraine on Order of Organising and Conducting Peaceful events. This law was prepared by the Ministry of Justice and, after approval by the Cabinet of Ministers, was submitted to the Verkhovna Rada, which adopted it in first reading on 3 June 2009.

29. In their joint opinion⁸, the Venice Commission and the OSCE/ODIHR concluded that, while the law clearly endeavours to establish a liberal legal framework for the freedom of Assembly, it contains a significant number of shortcomings and is excessively detailed and therefore open for abuse. The Venice Commission and the OSCE/ODIHR therefore proposed a considerable number of recommendations which would need to be implemented to ensure that the law would be in accordance with European standards.

30. Given that the draft law in its current format, if adopted, could potentially infringe on the principle of freedom of assembly in Ukraine, I urge the Verkhovna Rada to address all concerns, and adopt all recommendations made by the Venice Commission and OSCE/ODIHR, and to resubmit it for opinion of these bodies, before adopting the law in final reading.

VIII. Conclusions

31. Regrettably, very little tangible progress has been achieved since my last visit to Ukraine. For a large part this is due to the imminent Presidential elections and the polarised political environment in the running up to them. However, these continuous delays and lack of progress should not be allowed to linger on forever. A major obstacle to the required reforms in recent years has been the adoption process in the Verkhovna Rada which either failed to adopt the required legislative packages, or adopted amendments to them that run counter to European standards.

32. Therefore, the Speaker and I came to an agreement that the Verkhovna Rada adopts, immediately after the Presidential Elections and in close consultation with the Monitoring Committee, a specific roadmap, including realistic timetables, for the adoption of the legal reforms - including Constitutional reform - that are part of Ukraine's commitments to the Council of Europe. However, I also stressed that the adoption of these laws alone would not imply that Ukraine's monitoring could be ended and that, for that to happen, it is also necessary that these reforms are implemented and that the country in general lives up to its obligations as a member state of the Council of Europe. This agreement is an important development that could potentially give new impetus to the reform process in Ukraine as well as the fulfilment of its commitments to the Council of Europe.

33. I intend to return to Ukraine in the framework of the monitoring procedure immediately after the Presidential elections, in order to facilitate the establishment of the roadmap and relevant time-tables, as well as to study additional policy areas, including those related to the fight against corruption and minority policies.

⁸ CDL-AD(2009)052

APPENDIX 1

Statement by Mrs Renate Wohlwend, co-rapporteur of the Monitoring Committee

Legal reforms should be adopted without further delay, says PACE co-rapporteur for Ukraine

Strasbourg, 10.12.2009 – Renate Wohlwend (Liechtenstein, EPP/CD), co-rapporteur of the Parliamentary Assembly of the Council of Europe (PACE) for the monitoring of Ukraine, announced on Tuesday an agreement on the establishment of a clear roadmap for the adoption of the legal reforms demanded by the Council of Europe.

Speaking to journalists at the end of a two-day visit to Ukraine, Mrs Wohlwend said: “In my meeting with the speaker of the Verkhovna Rada, Mr Volodymyr Lytvyn, we agreed that, immediately after the Presidential elections, the Rada would establish, in close consultation with the Monitoring Committee of the Assembly, a specific roadmap, including realistic timetables, for the adoption of the legal reforms that are part of Ukraine’s commitments to the Council of Europe.” However, she stressed that the adoption of these legal reforms alone would not imply that Ukraine’s monitoring could be ended. “For that, it is also necessary that these reforms are implemented and that the country in general lives up to its obligations as a member state of the Council of Europe,” said the co-rapporteur.

Mrs Wohlwend also expressed her concern about recent challenges to the coming into force, on 1 January 2010, of the anti-corruption laws that were recently adopted by the Verkhovna Rada. Ms Wohlwend was informed by the Supreme Court about the concerns of judges that the provisions that prohibit funding for the court system other than from the state budget would undermine the functioning of many courts in Ukraine. However, Mrs Wohlwend stressed that such a prohibition was essential for the efficient fight against corruption, which continues to be a major problem in Ukraine. At the same time, she also recognised the challenges facing the courts, and called upon the authorities to ensure that sufficient funding is made available to ensure the efficient functioning of the court system.

The co-rapporteur also expressed her disappointment and deep regret over the failure of the Verkhovna Rada to adopt, last week, a package of amendments that were intended to address the concerns of the Venice Commission about the heavily-criticised changes to the Law on the Election of the President of Ukraine that were adopted in August 2009, as well as to ensure the implementation of the Constitutional Court ruling that declared a number of the August 2009 changes unconstitutional. “I understand that there will still be an attempt to adopt these amendments in the coming week, and I call upon all political forces not to obstruct their adoption as they are important to ensure a democratic election process in January,” Mrs Wohlwend said.

APPENDIX 2

Programme of the fact-finding visit to Kyiv (7-8 December 2009)

Mrs Renate WOHLWEND, member of Parliament
Mr Bastiaan KLEIN, co-secretary of the Monitoring Committee

Monday, 7 December 2009

- 09:15 Briefing by Mr Ake PETERSON, Representative of the Secretary General of the Council of Europe in Kyiv
- 10:15 Meetings with NGO representatives:
- Mr Oleksadr CHERNENKO, Committee of Voters of Ukraine
 - Mr Igor KOLIUSHKO, Centre for Political and Legal Reforms
 - Mrs Natalia BELITSER, Phylp Orlyk Institute for Democracy
 - Mr Roman ROMANOV
 - Ms Viktoria SJUMAR, Mr Roman GOLOVENKO, Institute of Mass Information
 - Mr Ivan LOZOVYI, Strengthening Democracy Institute
 - Mr Denys KOVRYZHENKO, Legislative Initiatives Laboratory
 - Mr Dmytro GROISMAN, Vinnytsia Human Rights Group
- 12:30 Meeting with Mr Volodymyr LYTVYN, Chairman of the Verkhovna Rada
- 14:30 Meeting with the Chairman and members of the Verkhovna Rada working group on drafting a unified election code
- 15:30 Meeting with the Chairman of the Judiciary Committee of the Verkhovna Rada
- 16:15 Meeting with members of the High Council of Justice appointed by the Verkhovna Rada
- 19:30 Informal dinner with ambassadors hosted by Ms WOHLWEND on behalf of the Parliamentary Assembly

Tuesday, 8 December 2009

- 10:00 Meeting with the members of the Ukrainian delegation to the Parliamentary Assembly
- 11:00 Meeting with Ms Maryna STAVNICHUK, National Constitutional Council
- 14:15 Meeting with Mr Petro PYLYPCHUK, Deputy Chairperson of the Supreme Court of Ukraine
- 18:00 Press conference
- 19:00 Meeting with Mr Mykola ONISCHUK, Minister of Justice of Ukraine