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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 the fact-finding visit to Kyiv and Lviv (5-8 April 2011)¹

Co-rapporteurs: Mrs Mailis REPS, Estonia, Alliance of Liberals and Democrats for Europe, and Mrs Marietta de POURBAIX-LUNDIN, Sweden, Group of the European People's Party

¹ This information note has been made public by decision of the Monitoring Committee dated 30 May 2011.

I. Introduction

1. The visit to Ukraine took place from 5 to 8 April 2011. In line with the suggestion of the committee, it was decided to visit the different regions in Ukraine in the context of our fact-finding visits to the country. This time, we visited Lviv in addition to our programme in Kyiv. Due to the fact that the new composition of the Estonian parliament was sworn in on precisely the same dates as the planned visit, Ms Mailis Reps had to cancel her participation in this visit.

2. The main topics for this visit were the constitutional situation in Ukraine and the measures to be taken to bring the new constitutional framework in line with European standards and norms and the elaboration of a new legal framework for elections, especially in the perspective of next year's parliamentary elections. In addition, as mentioned above, the visit also aimed to gain a better understanding of the different regional perspectives in Ukraine, as well as to check the state of implementation of reforms with a view to strengthening local and regional self-government in the country. The statement issued at the end of the visit is attached in Appendix 1.

3. In Kyiv, we met, inter alia, the President of Ukraine and members of his administration, the Speaker of the Verkhovna Rada, the Minister of Justice, the President of the Constitutional Court, the Chairman of the High Council of Justice, the Head of the Secret Services (SBU), the Chairman and members of the Committee on Justice of the Verkhovna Rada, the Chairman and members of the Ukrainian delegation to our Parliamentary Assembly, as well as representatives of the international community in Ukraine. In Lviv, we met the Deputy Governor of the Lviv Oblast, the Deputy Mayor of Lviv, the Chairman of the City Council of Lviv, representatives of the different political factions in the City Council of Lviv, as well as members of civil society. The programme of our visit is attached in Appendix 2.

4. We would like to thank the Verkhovna Rada, the office of the Governor of Lviv Oblast, and the Representative of the Secretary General of the Council of Europe in Kyiv and his staff, for the excellent programme. We would also like to thank the Ambassador of Sweden for the hospitality extended to our delegation.

II. Constitutional reform

5. On 1 October 2010, the Constitutional Court of Ukraine, following an appeal by 252 MPs from the ruling coalition, ruled that the procedures for the adoption of the 2004 Constitutional Amendments had violated the Constitution and therefore declared these amendments unconstitutional. Furthermore, it ordered the Parliament to bring the current legislation back in line with the previous Constitution of 1996. This decision raised a series of questions in the Assembly, which therefore, in Resolution 1755 (2010), adopted on 5 October 2011, considered that "... *this decision should now prompt the Verkhovna Rada to initiate a comprehensive constitutional reform process with a view to bringing Ukraine's constitution fully in line with European standards*". In addition, the Monitoring Committee decided to request an opinion of the European Commission for Democracy through Law (Venice Commission) on the new constitutional situation in Ukraine and on what measures would be needed to bring this constitutional framework in line with Council of Europe standards. This opinion² was adopted by the Venice Commission on 18 December 2010.

6. In its opinion, the Venice Commission recalled its criticism of the 1996 constitution –which is now again fully in force– which concentrated the powers in the hands of the President and resulted in a constant clash between the executive and legislative branches of power. For that reason, the Venice Commission and PACE, at that time, advocated constitutional reform to strengthen the powers of the Parliament. The constitutional changes of 2004 introduced a mixed Presidential-Parliamentarian system which, while strengthening nominally the powers of the Parliament, did not resolve the systemic conflict between the different branches of power and has hindered the democratic development of the country over the recent years. However, with the return to the 1996 Constitution these systemic weaknesses have not been resolved in the Constitution and a comprehensive reform of the political system, with a view to strengthening the role of the Parliament, is still necessary. As noted by the Venice Commission: "*The fundamental problems with Ukraine have been dysfunctional institutions, lack of checks and balances especially with respect to the president and constant clashes between the state organs*". Therefore, in the current political context, the "*excessive strengthening of the President's powers can become an obstacle for building genuinely democratic structures and may eventually lead to an excessively authoritarian system*".

7. In addition, as mentioned in Resolution 1755 (2010), several of the reforms that are needed to meet Ukraine's accession commitments and obligations to the Council of Europe, are constrained by constitutional

² CDL-AD(2010)044

provisions. These constitutional limitations, which we outlined in our last report to the Assembly³, were for the largest part **not** resolved by the reinstatement of the 1996 Constitution.

8. While the Venice Commission noted that the Constitutional Court decision was unusual, it did not assess the decision on its merits. However, it underscored that the decision of the Constitutional Court raises questions about the legitimacy of past actions, as they were based on an invalid Constitution, as well as about the legitimacy of institutions elected under the old constitutional framework, including the Parliament and President. Lastly, the Commission notes that the new constitutional situation is based on a court decision and not on a democratic process, as required by European standards.

9. The Verkhovna Rada adopted, reportedly with violations of rules of procedure and without proper democratic consultations, a new Law on the Cabinet of Ministers, in order to bring this law in line with the new constitutional framework. In its opinion, the Venice commission noted that this new law has reduced the powers of the Parliament and, in some instances, may exceed the bounds of the constitution.

10. Clearly, the position of the Assembly, as expressed in Resolution 1755 (2010), that the Constitutional Court decision should now be the starting point for a constitutional reform process remains fully valid. Profound constitutional reforms are necessary for the country to be able to meet its accession commitments and obligations to the Council of Europe. To our satisfaction, this view appears to be shared by the authorities, who have publicly started consultations on the constitutional reform process.

11. The President of Ukraine, as well as several other members of his administration, have repeatedly highlighted that the constitutional reform would be carried out in close consultation with the Council of Europe, and in particular with the Venice Commission.

12. For this purpose, the President of Ukraine established the Ukrainian Commission for Strengthening Democracy and the Rule of Law. This commission, which is chaired by our colleague Mr Holovaty is tasked with, inter alia, the co-ordination of the various reforms necessary to honour the country's commitments and obligations to the Council of Europe and to ensure that the constitutional reform process is carried out in line with European norms and standards. Upon the request of President Yanukovich, the Ukrainian Commission for Strengthening Democracy and the Rule of Law drew up a proposal for a Constitutional Assembly. The proposal for a Constitutional Assembly –which would have a consultative role in the drafting process of the Constitutional amendments– were warmly welcomed in the opinion⁴ of the Venice Commission on this issue which was requested by the authorities.

13. The importance given to co-operation with the Council of Europe was also clear from the decision of President Yanukovich to appoint the former Deputy Head of the Presidential Administration in charge of constitutional reforms under President Yuschenko, Ms Marina Stavniychuk, to the same position –and with the same responsibilities– in his administration. Ms Stavniychuk is also a member of the Venice Commission, which should facilitate the cooperation with the Presidential administration on the forthcoming reforms.

14. We warmly welcome the latter's willingness to ensure that the reforms initiated comply with Council of Europe standards. However, we are concerned that the structures set up, and the persons appointed, to co-ordinate these reforms could potentially end up competing with each other and confuse the efforts of the authorities. A day after the inauguration of the Ukrainian Commission for Strengthening Democracy and the Rule of Law, which is tasked with elaborating the reforms to meet the commitments to the Council of Europe, the President signed a decree in which he already enumerated all these reforms and in which he tasked the Minister of Justice to co-ordinate their implementation. In a similar fashion, the President asked the Commission for Strengthening Democracy and the Rule of Law to elaborate a model for a Constitutional Assembly but, in decree 224/2011, also expressed his support for the work of a Scientific Group on Constitutional Assembly Preparation, led by former President Kravchuk. These two examples highlight our concerns. All efforts should be made to avoid confusion and competition between different initiatives and co-ordination bodies.

III. Electoral reform

15. As underscored in Resolution 1755 (2010), as well as in several of our previous reports, the reform of the electoral system, and the adoption of a Unified Election Code, is essential for the consolidation of democracy in Ukraine. These reforms, and the need for a Unified Election Code, have become all the more

³ Doc. 12357 (2010)

⁴ CDL-AD(2011)002

important in the perspective of the upcoming parliamentary elections that will take place next year. The questionable state of the legal framework for elections in Ukraine, and the risk this entails for the electoral process in a country that has a habit for playing with the electoral rules for short-term electoral gain, was highlighted during the local elections in October 2010, which were widely criticised for their shortcomings and considered a step backwards in comparison with previous elections.

16. As mentioned in our last report⁵, the Verkhovna Rada had established a special working group to draft a new unified election code. This cross party working group, which was composed of representatives of most political forces as well as experts and representatives of civil society, collaborated closely with the Venice Commission as well as other international actors, such as the OSCE/ODIHR. Regrettably, the work of this group was, for the most part, boycotted by the Party of Regions. The working group finalised its work and tabled a draft Unified Election Code for adoption in the Verkhovna Rada at the end of 2010. However, this draft Unified Election Code would not appear to be on the agenda anymore and President Yanukovich has announced that his administration will draft its own proposal for a new electoral code. He subsequently established a special working group, composed of a wide range of representatives and experts, to draft his administration's proposal for a new election code.

17. This Presidential working group was initially given support by the international community. However, its working methods have recently raised serious concerns. As a result of the non-transparent working methods of this group, the National Democratic Institute (NDI) and the International Republican Institute (IRI) have suspended their participation in its work. In our meetings with them, NDI and IRI underscored their concerns about the lack of transparency and accountability in the group and their clear impression that the real drafting of –and all relevant decision-making with regard to– the new election code takes place behind closed doors outside the framework of the working group. In addition, they lamented the lack of balance between the different political forces in this group.

18. Several other interlocutors echoed the same concerns as NDI and IRI, which gives us the impression that the authorities are not very serious about entering into a dialogue with all political forces on the drafting of a new election code. Instead, the process would appear mostly aimed at giving legitimacy to a draft election code that has already been drawn up in private. In this respect, we would like to stress that a wide consensus on, and trust in, the new election code, is essential for the conduct of genuinely democratic elections in Ukraine next year.

19. Two further developments with regard to the electoral reform process are of concern. Firstly, the Assembly and the Venice Commission, as well as other actors, have been recommending for quite some time that the country should adopt a Unified Election Code to replace the current situation where each type of election is governed by its own separate legal framework. The provisions of these legal frameworks are often incompatible and in contradiction with each other. The recommendation to adopt a Unified Election Code was reiterated in Assembly Resolution 1755 (2010) of October last year. Until recently, the authorities fully and publicly supported the Assembly's recommendation. However, to our great regret, the Minister of Justice, who is responsible for the co-ordination of the electoral reform, told us during the last visit that the authorities are no longer interested in an unified election code and only intend to propose a new draft for an electoral framework for parliamentary elections. He stated that this was reflected in the mandate of the Presidential working group on electoral reform. Given that recent polls show a clear decrease in popularity of the authorities, many interlocutors interpreted this change of heart as a sign that the authorities are considering the possibility to play with the electoral rules, if needed, for election related strategic reasons.

20. Secondly, the Assembly, as well as a number of other international institutions, has recommended that a new election system be agreed upon as part of the electoral reform. The fully proportional closed list system, which was in use until the reinstatement of the 1996 Constitution, was not considered to be beneficial for democratic consolidation in Ukraine as, de facto, it concentrates the political power in the country in the hands of a few individuals. Similar criticisms can be made about the mixed proportional-majoritarian system that was re-introduced with the reinstatement of the 1996 Constitution. For its part, the Assembly has recommended that an electoral system be adopted that consists of a proportional system based on open lists in multiple regional constituencies. The introduction of open lists and multiple regional constituencies would, *inter alia*, increase party democracy and voter transparency, while ensuring regional representation. This model has also been supported by other international organisations and bodies. In addition, during previous visits, all political parties informed us that they favoured a system that would include the key tenets of the system proposed by the Assembly. However, during this visit, the Minister of Justice informed us that the mixed proportional-majoritarian election system that has now once again come into force is non-negotiable for the ruling majority and will be maintained. We would like to highlight that,

⁵ Doc. 12357 (2010)

irrespective of the election system that the country chooses, this system should be acceptable to, and trusted by, all electoral stakeholders in order to ensure the conduct of genuinely democratic elections.

21. The latest developments with regard to electoral reform are of serious concern, especially taking into account the October 2010 local elections, during which significant shortcomings were noted and considered as a step backwards in comparison with the last Presidential elections. We would like to reiterate that the conduct of genuinely democratic elections, together with clear respect for personal freedoms and human rights, were key achievements of the country over the last years. We consider any regression in that regard unacceptable.

IV. Draft law on languages

22. An element of tension and political controversy in Ukraine has been the status of the Russian language. This is an issue that should be treated with the utmost caution as it could potentially affect negatively the East-West divide in the country. This underscores the sensitive nature of the Draft Law on Languages, which was sent for opinion to the Venice Commission by the Speaker of the Verkhovna Rada on 27 November 2010. In its opinion⁶ on this draft law, the Venice Commission concluded that the draft fails to provide a balanced legal framework for the use and protection of Ukraine's languages. Moreover, the Venice Commission noted that, in practice, this law would constitute a step towards official bilingualism, in contradiction with the Constitution of Ukraine. It would indeed appear that this draft law mostly aims at protecting the Russian language at the cost of other languages in the country.

23. During our visit, we understood that the authorities no longer wish to pursue this draft law for adoption and that, given its sensitivity, this issue is, for the moment, no longer on the agenda. However, this position is criticised within the Party of Regions and the Communist Party of Ukraine. The authorities have confirmed that, in its current format, the draft is no longer on the agenda for adoption by the Verkhovna Rada. Moreover, they assured us that the opinion of the Venice Commission will be fully taken into account when redrafting this law at a non-specified future date. Given the importance of this subject, we intend to return to issues of languages, education and national identities during one of our next visits to the country.

V. Legal reforms

24. The authorities have indicated that they plan a major reform of the criminal justice system in the summer. This reform would include the adoption of a new Criminal Procedure Code and a Law on the Bar association, the reform of the Procuratura and the reform of the law enforcement agencies - including the secret services. These are important reforms that should be given the full technical support of the Council of Europe. At the same time, care should be taken by the authorities to ensure that these reforms will be properly debated in the Verkhovna Rada and that democratic procedures will be respected. We would strongly recommend that the haste with which the previous reforms of the Justice system were adopted be avoided this time round. This is crucial for ensuring the broad acceptance of these reforms among the different political forces, as well as the public at large.

25. On 10 December 2010, in response to concerns expressed by various national and international partners, including by our Assembly, President Yanukovich dismissed Mr Horoshkovskyi, Head of the SBU, as member of the High Council of Justice. Although this does not resolve all our concerns with regard to the independence of the judiciary in general, and the High Council of Justice in particular, it is an important step that should to be welcomed.

VI. Other issues

26. During our visit to Lviv, we were impressed by the vibrancy of the local political scene. Problems in the co-operation between the different political forces on the local level seem to be mostly the result of national political considerations and are not driven by local political issues. This demonstrates the real potential for political co-operation on the local level and, as a result, highlights the importance of local and regional self-government in Ukraine's political context. However, while Ukraine has signed and ratified the European Charter for Local Self-Government, all political forces –without exception– informed us that the executive power is still too much concentrated at the central level and that devolution of powers and resources is still very much lacking. This is clearly an area in which further reforms and more political will are necessary. We intend to follow this issue closely during our forthcoming visits.

⁶ CDL-AD(2011)008

27. Recently, the Prosecutor General opened criminal cases against a number of former government officials belonging to the opposition, including against Ms Timoshenko for “excess of authority” and “abuse of office”. We stress that no-one should be above the law, especially government officials, but the fact that only former government officials that belong to the opposition are charged could indicate political revenge or selective justice, which would be unacceptable if that were the case. These concerns seem to be reinforced by the fact that the charges do not allege corruption but rather challenge the correctness of political decisions taken by the former government officials when in office, which, in effect, would amount to criminalising political decisions.

VII. Conclusions

28. The authorities continue to deploy considerable efforts and manifest political will to honour their accession commitments and obligations to the Council of Europe. The initiation of a profound constitutional reform process should be welcomed in this context. At the same time, care should be taken to ensure that this constitutional reform is based on thorough consultation with and wide consensus within, Ukrainian society. Furthermore, competition and diverging messages and actions between the different mechanisms that have been put in place to co-ordinate the reform efforts should be avoided at all cost.

29. Developments with regard to electoral reform are of serious concern, especially in the context of the upcoming parliamentary elections in 2012. Any regression in terms of democratic standards of future elections would be unacceptable.

30. The reform of the criminal justice system announced by the authorities is to be welcomed. Care should be taken to ensure that these reforms are carried out in full compliance with Council of Europe standards and that democratic norms and proper deliberation are fully respected when adopting these reforms. We call upon the authorities to seek the opinion of the Venice Commission on the draft laws that are being developed before they are adopted in final reading by the Verkhovna Rada. The fact that the reform of the Criminal Justice system reportedly will take place before the end of this year, as well as the pace of developments in the field of electoral and constitutional reform, could have an impact on the date for our next full report on the honouring of obligations and commitments by Ukraine.

31. Our visit to Lviv confirmed the importance of visiting the different regions of Ukraine to familiarise ourselves with the regional perspectives and differences. At the same time, the visit also underscored the important reforms that are still needed in the field of strengthening local and regional self-government.

32. We intend to make our next visit to the country in the autumn of 2011.

APPENDIX 1

Ukraine: authorities should demonstrate good faith in drafting of new election code

Strasbourg, 08.04.2011 – “I am convinced that Ukraine’s rightful place is in Europe, and welcome its willingness to live up to European ideals and standards,” said Marietta de Pourbaix-Lundin (Sweden EPP/CD), co-rapporteur for the monitoring of Ukraine by the Parliamentary Assembly of the Council of Europe (PACE), following a visit to Kyiv and Lviv. She welcomed the continuing efforts of the authorities to meet Ukraine’s commitments to the Council of Europe and to respond to Assembly recommendations. However, at the same time she also stressed that some recent developments gave rise to concern.

“The authorities do not seem to be very serious about entering into a dialogue with all political forces on the drafting of a new election code, and instead seem only to be willing to discuss the details of a code they have already drafted in private,” said Ms de Pourbaix-Lundin. She underscored that consensus on, and trust in, the new election code by all political forces would be essential to ensure genuinely democratic elections in Ukraine next year.

In addition, Ms de Pourbaix-Lundin expressed her disappointment with the fact that the authorities were willing to discuss a new election code for parliamentary elections only, and not the establishment of a unified election code that would apply to all elections, as strongly recommended by, *inter alia*, the Venice Commission and the Assembly.

With regard to constitutional reform, the co-rapporteur underscored that the return to the 1996 Constitution had not removed the obstacles to fulfilling Ukraine’s commitments to the Council of Europe that were highlighted in the recent resolution of the Assembly. “This is understood by the authorities and in that respect I applaud their initiative to set up a Constitutional Assembly to guide the constitutional reform process,” said Ms de Pourbaix-Lundin. In that respect she also urged the authorities to ensure that the different co-ordination and consultation structures that were recently established work hand in hand to avoid confusion about the direction of the reform process.

In addition to holding meetings with the authorities in Kyiv, Ms de Pourbaix-Lundin visited Lviv to gain a better understanding of the regional perspective on the reforms and political developments. At the end of her visit there, Ms de Pourbaix-Lundin welcomed the young and dynamic political scene in Lviv and stressed that more profound reforms were needed to ensure genuine self-government at the regional and local level.

The next report on the honouring of obligations and commitments of Ukraine is foreseen for the first half of 2012.

APPENDIX 2

Programme of the fact-finding visit to Kyiv and Lviv (5-8 April 2011)

Mrs Mailis REPS, member of Parliament
Mrs Marietta de POURBAIX-LUNDIN, member of Parliament
M. Bastiaan KLEIN, Secretary of the Monitoring Committee of the Parliamentary Assembly

Tuesday, 5 April 2011

- 15:00 Meeting with Mr HOROSHKOVSKYI, Head of the Security
- 16:00 Meeting with Mr LAVRYNOVYCH, Minister of Justice, Head of the working group in charge of the reform of the electoral legislation
- 18:00 Meeting with Mr HOLOVATY, Head of the Commission for strengthening Democracy and the Rule of Law
- 20:00 Dinner hosted by the Swedish Ambassador

Wednesday, 6 April 2011

- 09:00 Meeting with Mr LYTVYN, Speaker of the Verkhovna Rada
- 09:45 Meeting with the members of the Ukrainian delegation to the PACE
- 10:30 Meeting with members of the Committee on Justice of the Verkhovna Rada
- 12:00 Meeting with Mr YANUKOVYCH, President of Ukraine
- 14:00 Meeting with Mr KOLESNYCHENKO, Head of the High Council of Justice
- 15:15 Meeting with the National Democratic Institute (NDI) and the International Republican Institute (IRI)
- 17:00 Meeting with Mr HOLOVIN, Chairman of the Constitutional Court
- 18:30 Meeting with Ms TYMOSHENKO

Thursday, 7 April 2011

- 07:30 Flight to Lviv
- 11:00 Meeting with the Deputy Governor of Lviv's Oblast
- 12:15 Roundtable with local NGOs
- 15:00 Meeting with Mr Vasil KOSIV, Deputy Mayor of Lviv
- 15:45 Meeting with Mr Vasyl PAVLYUK, Chairman of the City Council of Lviv
- 16:15 - 18:30 Meeting with representatives of the political factions of Lviv's City Council

Friday, 8 April 2011

- 11:00 Press conference