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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-rapporteur on his fact-finding visit to Kyiv (19 to 21 March 2018)

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I. Introduction

1. This was the first visit since the adoption of Resolution 2145 (2017) on the Functioning of Democratic Institutions in Ukraine on 25 January 2017. Since the adoption of this Resolution, Mr Jordi Xuclà's mandate was revoked by a decision of the Monitoring Committee in line with article 3 of the Code of Conduct for Rapporteurs of the Assembly and he was replaced by me, Mr Eerik-Niils Kross, in October 2017. The preparations for this fact finding mission were started together with co-rapporteur Mr Axel Fischer (Germany, EPP/CD). However, Mr Fischer ceased to be a member of the Assembly in January 2018 and would only be replaced during the April 2018 part-session of the Assembly. As the preparation for this fact finding visit had already started, and given the long time since the last visit, I was authorised by the Committee to make this fact finding visit alone.

2. During this visit we met with, inter alia, the Speaker of the Verkhovna Rada; the Deputy Foreign Minister; the Deputy Minister of Justice; the Deputy Minister for Education; the Prosecutor General; the Deputy Head of Administration of the President of Ukraine; the President of the Central Election Commission; the Ukrainian Parliament Commissioner for Human Rights (Ombudsperson); the Deputy Director of the National Anti-corruption Bureau of Ukraine; the Deputy Head of the National Agency for Prevention of Corruption; the First Deputy Head of the Specialized Anti-Corruption Prosecutor's Office; the Chairperson of the Committee of the Verkhovna Rada of Ukraine on Science and Education; members of the Committee of the Verkhovna Rada of Ukraine on Corruption Prevention and Counteraction; the Chairperson and members of the Ukrainian Delegation to PACE; the leaders, or their representatives, of the parliamentary factions in the Verkhovna Rada; as well as members of the diplomatic community and representatives of civil society organisations in Ukraine. The programme of our visit is attached to this note in Appendix 1.

3. I would like to thank the Verkhovna Rada for the organisation of our programme, and the Head of the Council of Europe Office and his staff for the support given to our delegation. Lastly I wish to express our gratitude to the Ambassador of Estonia in Kyiv for the hospitality extended. The statement issued at the end of the visit is attached in Appendix 2.

¹ Document declassified by the Monitoring Committee at its meeting on 29 May 2018.

II. Recent political developments

4. As mentioned in the most recent report² on the functioning of democratic institutions in Ukraine, the unity between the Ukrainian political forces that emerged after the so-called Revolution of Dignity has all but disappeared. Regrettably, fragmentation and infighting, between and within the ruling majority and opposition, again characterises the political environment in Ukraine, leading to delays in adoption of laws and implementation of reforms. The current ruling majority of Bloc Petro Poroshenko and the People's Front of former Prime Minister Yatsenyuk holds 219 seats in the 450 seat Verkhovna Rada (parliament). All combined, the opposition has 152 seats in the Verkhovna Rada and 52 members are formally non-affiliated. Another 28 seats are left vacant as they represent districts where no elections could take place due to the on-going conflict in Eastern Ukraine and illegal annexation of Crimea by the Russian Federation.

5. According to opinion polls, the People's Front currently has minimal support among the population and would not return in the parliament if elections were held today. This provides them with a strong incentive to continue supporting the Bloc of Petro Poroshenko in the ruling majority. The opposition itself is clearly divided between the parties that were part of, or emerged from, the Euromaidan movement and the Opposition Bloc which mainly consists of former members of the now defunct Party of Regions of former President Yanukovich. Marked differences also exist among the opposition parties that supported the Euromaidan protests. In addition, especially the larger parties in Ukraine are very heterogeneous and different unofficial factions and groupings exist within and among them. These differences have not led to a political realignment in the Verkhovna Rada and the formal emergence of new factions as the Ukrainian Constitution stipulates that any member of parliament that fails to join, or leaves, the official faction of the party on which list he or she was elected, will lose his or her mandate. The Assembly, as well as the Venice Commission, have on several occasions expressed their concern about the existence of this de facto imperative mandate which runs against European standards of a representative mandate.

6. The fragmented political environment is both the result of the existence of a strong system of oligarchic interests as well as providing an environment in which an oligarchic system can thrive. The dominance of the political system by oligarchic interests, combined by the pervasive corruption in the country, is alienating the citizens— who perceive the political class as primarily serving its own interests.

7. This was also a factor in the rise in popularity of Mikael Saakashvili in the end of 2017. While it is unlikely that the Ukrainian voters would massively support a relative outsider like Mr Saakashvili as President or Prime Minister of Ukraine, especially in the current "patriotic" environment, the hard handed treatment of him following his repeated allegations of widespread corruption in government circles, have led to a surge in popularity. His initial arrest led to several demonstrations against the government. Even if his arrest was more a catalyst than the main cause for these protests, it underlines the political risks for the authorities of failing to effectively address corruption and ineffective governance.

8. Parliamentary and Presidential elections will take place in 2019. During our visit it was clear that the parties are already gearing up to the elections and that the election campaign has de facto started. Recent polls indicate a re-emergence of Ms Yulia Tymoshenko in the limelight of Ukrainian politics. Although she remains a controversial person for some, she would in fact be the most serious challenger to Mr Poroshenko if presidential elections were held today.

9. In Resolution 2145(2017), the Assembly expressed its concerns about the hardening of political discourse and environment. Although most prevalent against them, this is not only limited towards parties and persons that are perceived as supportive of Russia and its interests. A clear example of this was the very public break between President Poroshenko and his erstwhile ally businessman and Governor of Dnipropetrovs'k, Ihor Kolomoiskiy. A close associate of Mr Kolomoiskiy, the former Deputy Governor of Dnipropetrovs'k, Mr Korban, was arrested on questionable charges and only released after breaking away from Mr Kolomoiskiy and leaving politics. Supporters of Mr Korban have denounced his arrest and prosecution as politically motivated. In this context, the Ombudsperson of Ukraine at that time expressed her view that some of the procedures followed by the authorities in that case had clearly raised questions from a legal point of view. Mr Korban was later absolved of all charges by the Prosecutor General. Without wishing to comment on the merits of the case of the authorities against Mr Saakashvili, it should be noted that the decision to withdraw his Ukrainian nationality following his very public fall out with President Poroshenko and the ruling majority, and his subsequent deportation from Ukraine, have been decried as politically motivated by his supporters as well as several of our interlocutors.

² Doc 14227(2017).

10. On 7 December 2017, Yehor Sobolev was dismissed as Chairman of the Parliamentary Committee on Prevention and Combating Corruption on questionable grounds. Mr Sobolev is widely credited for his efforts in fighting corruption in Ukraine and has strong support in the international community. His dismissal was widely seen as a result of his opposition to attempts by the authorities to bring the institutions set up to fight corruption in the country under their political control. While his dismissal was probably “all in the game” from a political point of view, it raises questions with regard to political retaliation against persons who seem to be encroaching on financial interests of the ruling elites. The authorities should ensure strict political impartiality of all government structures and any hard handed approach in politically sensitive issues.

11. Some opposition parties have alleged that they are not given the proper political space for an opposition country to function. In particular the Opposition Bloc has complained that it has not been given any chairmanship of Verkhovna Rada Committees or position of Vice President in the Verkhovna Rada. This is strongly contested by other parties, both from the ruling majority opposition, who allege that in fact the Opposition Bloc was offered a committee chairmanship, although not a post of vice speaker of the Verkhovna Rada. All parties agree that the rights of the opposition were much better regulated in the previous Rules of Procedure of the Verkhovna Rada. However these rules were abolished in 2010 when the Party of Regions had the ruling majority. Consequently the current version of the rules of procedure does not provide for any special rights for the opposition. Given that the Verkhovna Rada is in the process of changing its Rules of Procedure in order to bring it in line with the new constitutional provisions; we recommend that the Verkhovna Rada will use this opportunity to re-introduce a clear set of rights for the opposition.

12. A key incentive and catalyst for the reforms implemented by the authorities in recent years has been the visa liberation process with the EU. At last, on 11 June 2017, Ukrainians were allowed visa free short stay travel to the European Union.

III. Civil Society

13. After the Revolution of Dignity, civil society organisations, which had played a key role in the Euromaidan movement, were considered to be privileged partners in the implementation of the reforms. Regrettably this symbiotic relationship seemed to have changed and in recent times, the political space for civil society to operate has deteriorated, especially for organisations and persons that are active in the field of fighting corruption. Many representatives of NGOs we met during our visit asserted that the authorities sought to control civil society, which it no longer considered a partner. Moreover, a number of them complained about what they considered to be smear campaigns against some NGOs and their activists, especially those working on anti-corruption issues or sensitive subjects such as LGBTI rights. Harassment and attacks on civil society activists by extreme rights groups are allegedly not investigated, or at least not promptly enough. Given the historically strong civil society in Ukraine and the important role it has played in the reforms and democratic consolidation of the country this trend is of concern and should be turned around.

14. On 3 March 2017, the Verkhovna Rada adopted a number of amendments to the laws governing the system of electronic asset declarations for public officials (the so-called e-declaration system). These amendments aimed to relieve security and military personnel actively serving in the conflict in eastern Ukraine from the need to file an e-declaration, both for practical as well as security reasons. However, the proposal of the President was substantially modified in its first reading in the Rada. As a result the adopted amendments now require that anti-corruption activists file the same e-declaration as public officials. This new provision was decried by civil society and the international community who was concerned that these new provisions would have a chilling effect on anti-corruption organisations and activists. Given the concerns expressed regarding these amendments, the Monitoring Committee, on 7 September 2017, decided to request an opinion from the Venice Commission on these amendments.

15. It is important to note that the 3 March amendments were also criticised by the National Anti-Corruption Council (NACP)³ which expressed its concern that the new legal provisions did not precisely define the range of persons covered, which would exponentially increase the declarations filed and thus the verification work of the NACP. In response to national and international criticism, President Poroshenko announced that the contentious provisions would be abrogated by a new law under preparation by the Presidential administration on enhanced financial reporting obligations for civil society organisations. However, this draft law itself turned out to be extremely problematic.⁴ In particular a number of provisions in

³ The NACP is the institution responsible for the implementation of the e-declaration system and the verification of the information submitted by those obliged to file a declaration.

⁴ It has some resemblance to financial reporting legislation for civil society organisations that were adopted in Russia and Hungary and which were criticised by the international community, including the Assembly.

the draft law raised concerns about its compatibility with the European Convention of Human Rights on freedom of association and prohibition of discrimination. Therefore, the Monitoring Committee, on 13 December 2017, decided to ask for an opinion from the Venice Commission on draft laws no. 6674 and no. 6675, “On Introducing Changes to the Tax Code of Ukraine to Ensure Public Transparency of the Financing of Public Associations and the Use of International Technical Assistance” and “On Introducing Changes to Some Legislative Acts to Ensure Public Transparency of Information on Finance Activity of Public Associations and on the Use of International Technical Assistance” which together form the new regime of financial reporting and disclosure of financial information for NGOs.

16. Since the draft laws 6674 and 6675 were intended to abrogate law 6172, adopted on 3 March 2017, it was agreed with the Venice Commission that the request for an opinion on draft laws 6674 and 6675 would replace the request for an opinion for law 6172, and that an assessment of the principle aspects of law 6172 would be included in the said opinion. Subsequently, the Venice Commission adopted its Opinion⁵ on the draft laws #6674 and #6675 at its plenary meeting on 16 and 17 March.

17. In its opinion, the Venice Commission expressed its concern that the new financial disclosure regime, which it considers burdensome, would be in conflict with several human rights and fundamental freedoms, in particular, freedom of association. Concerned that these requirements could have a chilling effect on civil society and endanger the continued existence of a number of NGOs, the Venice Commission recommended that these two laws be reconsidered in their entirety. If the authorities insist on introducing a new reporting regime for NGOs, then the laws should – as a minimum – be substantially changed and narrowed down to “to ensure that they fully respect international standards pertaining to the freedom of association, the right to privacy and the prohibition of discrimination and are based on compelling evidence that they are necessary in a democratic society and proportionate to a legitimate aim”.⁶ Moreover the sanctions for failing to comply with the provisions of the law should be changed so as to be proportional to the transgressions made. Moreover, it should be possible to correct unintended errors or omissions without incurring a penalty.⁷

18. With regard to the e-declaration requirements for anti-corruption activists that were introduced by law 6172 of 3 March 2017, the Venice Commission noted in particular the absence of a clear definition of what would constitute “activities that are linked to preventing and countering corruption”. This could potentially cover an extremely wide range of persons and organisations as well as activities, in contradiction with the requirements under article 11 of the ECHR on freedom of association. Moreover, it was felt that the authorities failed to justify the extension of the e-declaration regime to anti-corruption activists and organisations, and the fact that they were singled out from other activities and organisations violates the prohibition of discrimination as outlined in the Convention. In addition to these concerns about the principles of the law, the Venice Commission raised questions with regard to the practical implementation of this law which could generate a considerable number of additional declarations for the NACP, whose capacity seems already overextended,⁸ to verify.

19. Regrettably, the authorities indicated to the Venice Commission that they would not withdraw all together the draft laws 6674 and 6675, as recommended in the opinion, subsequently, the draft laws no. 6674 and no. 6675 were adopted by the Verkhovna Rada in first reading. The authorities indicated that the recommendations of the Venice Commission would be addressed in amendments on draft laws when the draft laws were discussed in second reading. However, we were not able to get a clear agenda for the adoption process for these two draft laws. It should be noted that, until these laws are amended and adopted, law 6172 is not abrogated and remains valid. In line with its provisions, on 1 April 2018, anti-corruption activists had to file their e-declaration. Regrettably, the authorities made it clear that they did not wish to cancel the provisions requiring anti-corruption activists to file an e-declaration pending the adoption of the revised laws 6674 and 6675. As it was clear that the latter would not be adopted before the 1 April deadline, Verkhovna Rada Speaker Parubiy tabled an amendment that would have delayed the coming into force of the e-declaration provisions for anti-corruption activists. However, this was rejected by the ruling majority in the Verkhovna Rada. This development raised questions about the willingness of the ruling majority to foster a political climate in which civil society organisations can fulfil their democratic functions, let alone flourish, and should therefore be strongly condemned.

⁵ CDL-AD(2018)006: [http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2018\)006-e](http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2018)006-e).

⁶ CDL-AS(2018)006 § 13 B.

⁷ CDL-AD(2018)006 § 13 A-D.

⁸ It is estimated that under the original law the NACP already has to process well over 1 million declarations.

IV. Fight against corruption

20. The fight against the pervasive corruption in Ukraine is a stated priority of the authorities. In Resolution 2145(2017) the Assembly underscored the importance of the fight against corruption for the overall democratic consolidation in the country. In this respect, it welcomed that most structures to fight corruption had been put in place but expressed concern about the limited concrete results and slow pace of these reforms. It stressed that the newly established structures should now lead to concrete and tangible results on the ground.

21. A three-tier set of institutions has been set up to implement the anti-corruption strategy: the National Anti-Corruption Bureau (NABU), the Specialised Anti-Corruption Prosecutors Office (SAPO) and the National Agency for the Prevention of Corruption (NAPC). These institutions are now technically fully operational. However, many interlocutors noted that the vast majority of the cases started by the NABU and SAPO were delayed in the Courts for unclear reasons. In the context of a weak, politicised judicial system which lacks genuine independence, combined with widespread allegations of endemic corruption in the judiciary, there have therefore been repeated calls from several segments of the Ukrainian society for the establishment of a specialised anti-corruption court that would have the required means and independence to efficiently consider high level corruption cases. The establishment of such a specialised anti-corruption court has been supported by the international community, including by our Assembly.⁹

22. On 1 February 2017, Draft Law 6011 on Anti-Corruption Courts, providing for the setting up of a specialised High Anti-Corruption Court (HACC), was submitted to the Verkhovna Rada on the initiative of several individual MPs. On 30 June 2017, this draft law, jointly with the related draft law 6529 “On amendments to the Law on the Judicial System and the Status of Judges” (which provides for the introduction of mandatory specialisation of judges considering corruption cases), were sent to the Venice Commission for opinion by the Speaker of the Verkhovna Rada. The Venice Commission adopted its opinion¹⁰ during its plenary on 6 and 7 October 2017.

23. In its opinion the Venice Commission agreed, *inter alia*, that the HACC, as proposed in the draft law, should be considered a specialised court and not a special court, the latter being prohibited by the Ukrainian Constitution.¹¹ However, it noted that under the Constitution, courts are established by laws which must be submitted to the Verkhovna Rada by the President. In order to avoid constitutional challenges to the law, the Venice Commission therefore recommended that the law as drafted would be withdrawn and reintroduced, in the same format, but with the Venice Commission recommendations addressed, by the President of Ukraine. This advice was partly followed when, on 22 December 2017, President Poroshenko submitted a new law on the creation of an anti-corruption court to the Parliament. However, this draft differs on crucial points from the draft law that was assessed by the Venice Commission and did not include the latter’s recommendations on several key issues. This draft law was adopted in first reading on 1 March 2018.

24. During our visit, the Speaker of the Verkhovna Rada, as well as the Presidential Administration and Ministry of Justice, informed us that they expected that most of the Venice Commission recommendations would be entered into the draft law during its second reading in the Verkhovna Rada. However, we were informed that on two crucial issues, namely the manner in which judges on the HACC were appointed, and the exact jurisdiction of the HACC, the authorities and ruling majority are hesitant¹² or unwilling to follow the Venice Commission’s recommendations. The international community as well as your rapporteur during the visit, have urged the authorities to include all the Venice Commission recommendations, including those regarding the appointment of the judges on the HACC and the exact jurisdiction of that Court. Despite the divergence of opinion between many political forces with regard to different aspects of the HACC, the Speaker of the Verkhovna Rada expected the law to be adopted before the summer of 2018.

25. In its opinion on draft law 6011, the Venice Commission strongly recommended that the jurisdiction of the HACC would mirror that of the NABU and SAPO. It therefore recommended that the competences and jurisdiction of the specialised HACC would be clearly defined in the law. While the Jurisdiction of the HACC is defined in the Presidential draft, this definition does not at all correspond to the jurisdiction of NABU or SAPO and includes a wide range of offences that are not related to the fight against high level corruption.

⁹ Res 2145(2017) § 10.3.

¹⁰ CDL-AD(2017)020.

¹¹ Although not necessarily against European principles if clearly established in law, see *Frunui vs Slovakia*, quoted in CDL-AD(2017)020 § 18.

¹² In the view of one high level interlocutor, the international community was asking the authorities and Verkhovna Rada to establish an institution before which many of them would risk to be summoned. While this was clearly an exaggeration for the sake of argument, it underscores the difficulties and complexity of the process surrounding the establishment of the HACC.

Moreover, the court would not be competent in certain areas that are related to the fight against corruption such as illegal acquisition of property; money laundering and laundering of criminally obtained property, misuse of state budget funds and making regulations contrary to the procedures described by law. If this jurisdiction were to be adopted, there is a very severe risk that the HACC would be flooded with minor cases. This would severely impact its effectiveness.¹³ For their part, the authorities have argued that a monetary minimum value of 30.000 Euros before a corruption case would fall within the HACC jurisdiction to prevent the inundation of the Court. However this is strongly disputed by many experts and it indeed seems questionable that a monetary minimum value alone would be an effective safeguard against the flowing of the HACC.

26. According to draft law 6011, a special Competition Commission would be established that would be actively involved in the recruitment procedure for HACC judges and whose appointment proposals would be binding on the High Qualification Commission (HQC) and High Council of Justice (HCJ) and thus President of Ukraine. This Competition Council would consist of 9 members, 3 appointed by the Minister of Justice on the proposal of the International Community, 3 by the Verkhovna Rada and 3 by the President of Ukraine. Any decision should be taken with a qualified majority of at least 7 persons, so always including at least one person appointed on recommendation of the International Community. This was welcomed by the Venice Commission who recommended a crucial role of the International Community in the appointment process in order to ensure that the HACC would have the required public trust. However, in the version of the law provided by the President, this Council can be overruled by the HQC with a two thirds majority. It should be noted that the HQC also can and often did overrule, with the same qualified majority, recommendations of the Public Integrity Council in the appointment of regular judges. Therefore the proposal for the appointment of judges to the HACC contained in the Presidential draft for the establishment of the HACC runs counter to the Venice Commission recommendation that the international community should have a crucial role in the appointment process. This is a key issue for the functioning of the court, as many interlocutors noted that without such a crucial involvement of the international community the court would lack the required trust in the Ukrainian society as an effective tool in the fight against pervasive corruption.

27. The President has stated that he opposes the crucial role of the Public Council of International Experts in the appointment of judges to the HACC as recommended by the Venice Commission, as this would infringe on the sovereignty of Ukraine. Moreover the authorities argued that, if an appointment procedure for HACC judges were different from that of general judges, this could open the possibility for the Constitutional Court to consider the HACC a special court, which is prohibited by the Ukrainian Constitution. However it should be emphasised that, in effect, the main difference between the procedure proposed in draft law 6011, which was welcomed by the Venice Commission, and the one contained in the Presidential draft is that, in the former, at least one of the international members would need to agree on an appointment for the appointments board to have the required majority. It is difficult to see how this could change the nature of the HACC itself.

28. We call upon the authorities to fully implement the Venice Commission recommendations with regard to the jurisdiction of the HACC and the appointment of its judges to ensure the establishment of a genuinely effective anti-corruption court that will have the trust of the Ukrainian people.

29. Key institutions in the fight against corruption are the National Anti-Corruption Bureau (NABU), which is responsible for investigating corruption among high level public officials and the corresponding Specialised Anti-Corruption Prosecutors Office (SAPO). In general, these institutions are considered¹⁴ to be functioning efficiently and independently. Regrettably this seemed to have a counter reaction among certain segments of the country's administration and political class who seem to actively undermine and try to curtail the NABU and SAPO. The SAPO and NABU have been engaged in a turf war with the office of Prosecutor General Lutsenko – a close ally of President Poroshenko – over the ultimate responsibility over corruption investigations. When NABU started an investigation into corruption within the prosecution service, the Prosecutor General ordered the arrest of several of NABU investigators. More recently, several investigations by NABU and SAPO into corruption in the State Migration Service had to be stopped after the Prosecutor General's Office and the SBU made the identities of several of NABU's undercover agents public, which was strongly condemned by the international community. For its side, on 17 November 2017, NABU announced that it had started a criminal investigation of Prosecutor Lutsenko for alleged unlawful enrichment. Recently, following a meeting between the Prosecutor General and the Head of NABU, the relations seem to have improved and closer and more efficient co-operation has reportedly been established.

¹³ This would be similar to the developments around the NACP which already has great difficulties dealing with the high number of e-declarations. A number of interlocutors noted that the addition flood of declarations coming from anti-corruption activist would also risk rendering this institution inoperable.

¹⁴ GRECO, Fourth Evaluation Round, Evaluation report on Ukraine.

30. In what was widely perceived as another attempt to curtail the independence of the country's anti-corruption agencies, a draft law was tabled in the Verkhovna Rada that would have put the NACP, NABU and SAPO fully under the control of the Verkhovna Rada by giving the latter the power to dismiss the heads of these bodies at will. On 6 December 2017, after a public outcry, including from Ukraine's international partners, the Verkhovna Rada decided to withdraw this draft from its agenda. Currently, according to legal provisions, the heads of the NACP, the SAPO and the NABU can only be dismissed on clearly defined grounds following an official independent audit. Many interlocutors have indicated that Yegor Sobolev's opposition to appointing an auditor loyal to President Poroshenko, which could have paved the way for the dismissal of NABU head Artem Sytnyc, was one of the unofficial reasons behind his dismissal as Chairperson of the Rada's anti-corruption committee in December 2017.

31. Reportedly the relations between the NABU and the SAPO have become increasingly tense. The NABU has accused the SAPO of deliberately hindering its investigations by not providing it with the required legal warrant and authorisations. Recently, it came to light that the office of the SAPO had been wiretapped by NABU as part of an investigation into possible corruption of the SAPO, authorised by General Prosecutor Lutsenko. During our stay, rumours were circulating widely that the SAPO was going to resign, although this did not materialise in the end. We will continue to closely follow these cases and the developments in the relation between NABU and SAPO.

32. During our stay we became increasingly concerned about the developments within and around the third institution in the fight against corruption: the National Agency for the Prevention of Corruption (NAPC). The NAPC is responsible for the implementation of the law on Prevention of Corruption (LPC) that established, inter alia, an electronic asset declaration system for public officials, the so-called e-declaration system. The system, developed with the assistance of the UNDP, became functional on 15 August 2016. In a first wave, top level public officials, including the President, government ministers, and members of the Verkhovna Rada, had to declare their assets using this system as from August 2016. The second wave started in January 2017 and included all other persons covered by the LPC. The first wave resulted in more than 105.000 declarations, and by mid-2017, over 1 million declarations had been received.¹⁵ The NAPC is widely criticised for its inaction with regard to the verification of the assets declarations. By mid-2017, only around 3.000 declarations had been verified of which 10 were sent to the NABU for investigation, which seems rather low given the number of revelations of considerable wealth of public officials when the declarations were filed. An automatic declaration verification system has not been introduced as a result of the NAPC's decision to develop such a system from the ground up instead of adapting readily available software.

33. The small number of verifications and requests for further investigations by NABU seems not to be the result of lack of staffing and resources, or of limitations in its legal powers, but mostly the result of a lack of proactivity and political will.¹⁶ Reportedly there is a frequent blockage of the decision-making structures.¹⁷ The Head of the NAPC's financial Monitoring Department has stated that the agency is de facto supervised by the Presidential Administration.¹⁸ This is compounded by a lack of transparency regarding the grounds for NAPC decisions and actions. This also raises concerns with regard to the task of "lifestyle monitoring" that the NAPC is required to conduct by law, which could be abused for political purposes. The lack of tangible results and the perceived dependence on the presidential administration have undermined public trust in this institution. The shortcomings and weaknesses of the NAPC and the provisions that govern it need to be addressed as a priority.

34. During our visit we regrettably could not note much progress with regard to the introduction of the electronic verification system and were alarmed by the clearly apparent lack of political will to address this issue promptly and efficiently, or for that matter to ensure an effective and efficient functioning of this important institution.

35. Reportedly the co-operation between the NAPC and NABU has been problematic. The NAPC initially refused to give NABU full access to its registry of asset declarations, which is hindering investigations. It is clear that these on-going turf wars and attempts to curtail the independence of the anti-corruption agencies hinder the fight against the endemic corruption in the country and raise serious questions with regard to the existence of the required political will among the authorities in this respect. Continuation of these negative

¹⁵ GRECO, Fourth Evaluation Round, Evaluation report Ukraine paragraph 35.

¹⁶ GRECO, Fourth Evaluation Round, Evaluation report Ukraine paragraphs 23-41.

¹⁷ See GRECO, Fourth Evaluation Round, Evaluation report Ukraine paragraphs 24 and 25 for a quick outline of the decision making and control structures of the NAPC.

¹⁸ Ukrainian Week: "Frustrated and Optimistic", 28 February 2018.

developments and absence of tangible and marked results in the fight against corruption could stall the overall reform programme in the country and even undo progress made.¹⁹

36. The NABU informed us that they currently depend on the State Security Services for the technical means to conduct wiretaps and eavesdropping. They felt that this was undermining their independence and would prefer to be provided with the means to do so autonomously. The SBU also favoured this but noted that this would require several changes to the law which at this moment are not on the agenda of the Verkhovna Rada.

37. In follow up to the motion “Ukraine is urged to fight corruption and bring criminals to justice”,²⁰ which was tabled on 28 April 2017, I met with the owner of the Ukrainian company that was the victim of a criminal takeover of its investments in the Zagota (Odessa Oblast) municipality by organised crime organisations with links to the local authorities. Unfortunately little or no progress has been made with the investigation in this case, which included an attempt to murder the Head of the main Ukrainian investor, despite previous attention being drawn to this by Assembly members and promises from the Prosecutor General's office. This case highlights the obstacles in fighting organised crime and corruption in the Odessa region.

V. Law on Education

38. To recall, on 5 September 2017, the Verkhovna Rada adopted a new Law on Education. Article 7 of this law, which regulates the use of the state language and minority languages in the education system, was strongly criticised by Ukraine's neighbouring countries that have minorities living within Ukraine's borders on the grounds that it would reduce the education in minority languages. On 12 October 2017, in a debate under urgent procedure, the Assembly adopted Resolution 2189(2017)²¹ on “The new Ukrainian Law on education: a major impediment to the teaching of national minorities' mother tongues”.

39. In face of the sustained international criticism, the Ministry of Foreign Affairs of Ukraine requested, on 29 September 2017, an opinion of the Venice Commission on article 7 of the new Law on Education. The Venice Commission adopted its opinion²² at its plenary on 8 and 9 December 2017.

40. According to the Venice Commission opinion, use of the state and minority languages is protected and regulated in the Constitution of Ukraine as well as in the Law on languages. As noted by the Venice Commission in its opinion on the Law on Languages of Ukraine: “*the use and protection of languages has been and remains, in Ukraine, a complex and highly sensitive issue [...] the balance between regional and minority language protection and the protection of Ukrainian as the state language, including the specific situation of the Russian language, continues to be a serious challenge for the authorities of Ukraine.*”²³ It is clear that this situation has become even more complex, especially with regard to the Russian language, as a result of Russia's aggression in Eastern Ukraine and its illegal annexation of Crimea. In general, the overall legal framework is seen as in principle being adequate for the protection of minority languages.²⁴

41. The Law on Education is a framework law and depends on its implementation on a series of still to be adopted or amended implementation laws such as the Law on Secondary Education. A number of concerns could therefore be addressed in these laws, although, as clear from the Venice Commission, this is not the case for all concerns and/or all languages.

42. It is important to know that the Venice Commission has reaffirmed that the protection of the state language and its promotion among all citizens, especially to ensure their integration and participation in the country, is a valid objective for state authorities. The insistence of the Hungarian Government that minorities should have the rights to be educated in the minority language only at state schools is not supported by the findings in the Venice Commission opinion. At the same time, it is clear that article 7 reduces the guarantees for education in minority languages, which is of concern, especially if not properly managed.

43. Ukraine has signed and ratified the Framework Convention for Minorities and the Charter for Regional or Minority Languages; it is therefore bound by the provisions of these conventions. According to the

¹⁹ The European Union has indicated that continuation of attempts to undermine the anti-corruption agencies and absence of concrete results in the fight against corruption could lead to the end of visa free travel in the EU for Ukrainian citizens.

²⁰ Doc 14309(20117).

²¹ <http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=24218&lang=en>.

²² CDL-AD(2017)030.

²³ CDL-AD(2011) § 27 and 28.

²⁴ This may change as a result of the Constitutional Court Decision with regard to the Law on Languages.

Framework Convention, legislation and policies dealing with minority issues should be adopted in close consultation with the minorities concerned. While the minorities concerned were consulted during the drafting of the Law on Education, article 7 changed radically during the first and second reading in the Verkhovna Rada. Article 7 was therefore adopted without the required consultations with the national minorities concerned, contrary to the country's commitments under the framework convention.

44. Article 7 introduces education in the Ukrainian language on all levels of education, either as a specific subject or as language of instruction. The law provides for primary education in the mother tongue, both as subject and as language of instruction, at the primary school level. For secondary education it provides different regulations for official languages spoken in the European Union and those which are not. At secondary education level, EU languages may be taught as a subject as well as be used as a language of instruction. It will therefore depend on the provisions of the law on secondary education, and its implementation, if those minority languages are to be taught in an adequate manner and in line with the country's international obligations. However for non-EU languages, the law foresees at secondary level only the education of this language as a subject. This includes the education of Russian, which is spoken by a very large part, if not the majority, of the population. This cannot be addressed in implementation legislation and this is of concern.

45. We were informed that national and international consultations had been initiated by the Ukrainian authorities with several of the ethnic minorities, on issues of relevance to their kin states. Reportedly these consultations are taking place in a constructive manner and are expected resolve most, if not all, concerns. The exception has been Hungary which reportedly has refused all invitations for meetings extended by the Ukrainian authorities. Most interlocutors linked these refusals from the Hungarian side to the election campaign in Hungary. It is therefore hoped that the co-operation will start soon now that the Hungarian elections have taken place.

46. Clearly the most sensitive issue is that of the Russian language. As noted above, under the provisions of the new language law, while Russian can and will be taught as a subject on secondary level, it will not be possible to use Russian – or any other non-EU or non-indigenous language – as a language of instruction at secondary level.²⁵ This cannot be remedied via secondary legislation. For the Ukrainian side this issue is closely linked to the Russian military aggression in Eastern Ukraine and the illegal annexation of Crimea. The provisions that limit the use of Russian as a language of instruction at secondary schools is seen as part of a defence against what is perceived as on-going attempts at the Russification and destabilisation of the country. No quick solutions are to be expected with regard to this issue, especially in the context of any progress with regard to the implementation of the Minsk agreements. Nevertheless, we emphasised to our counterparts that introducing provisions that limit the acquired rights of education in the mother tongue of such a large part of the population also could have a negative impact on the stability and social unity of the country, and make the country even more vulnerable to Russian propaganda and meddling.

47. The Venice Commission notes that the provisions of article 7 are valid for both private and public schools. It suggests exempting private schools from the limitation of the teaching in minority languages at the secondary level. We were informed by the Deputy Minister of Education that his Ministry agreed to withdraw these provisions and he therefore expected that the Verkhovna Rada would soon adopt the necessary amendments to the Law on Education to do so.

48. Immediately after the change of power following the Euromaidan protests, the Verkhovna Rada voted to withdraw the Law on Languages. This was used by Russia as a justification for its annexation of Crimea. It should be noted, however, that that decision was never enacted and the law on languages remained valid. One of the arguments used by President Turchynov not to abolish the law at that time was that the Constitutionality of that law was challenged before the Constitutional Court. On 28 February 2018, the Constitutional Court declared the Law on Languages unconstitutional.

VI. Parliamentary and Presidential Elections in 2019

49. Both Presidential and Parliamentary elections will take place in Ukraine in 2019. As mentioned earlier, it was clear during our meetings with the different political factions that the election campaign had already been started.

50. Ukraine has no unified legal framework for the conduct of different types of elections. As a result, a different legal framework exists for Presidential, Parliamentary and Local elections as well as for referenda. These legal frameworks are so vastly different that it is de facto impossible to organise Presidential and

²⁵ There are no restrictions on primary and nursery levels.

Parliamentary elections on the same day.²⁶ For that reason the Assembly and the Venice Commission have recommended, for a considerable time already, that the Verkhovna Rada adopts a Unified Election Code (UEC). Over the last years, several drafts for such an UEC have been prepared both within and outside the Verkhovna Rada,²⁷ and many have received opinions of the Venice Commission. Until now, none of them made it beyond the committee stage but, in December 2017, the Verkhovna Rada adopted in first reading a draft Unified Election Code. Given the fact that the elections are close, many interlocutors doubted that the Unified Election Code law would be adopted in final reading in time for the 2019 elections. This view was strengthened by the fact that more than 4400 amendments have been tabled to the law, which will take considerable time to deal with. However, the Speaker of the Parliament, as well as the leadership of the ruling majority, told us that they expected that the Unified Election Code could be adopted in May 2018. It should be stressed that the adoption of a Unified Election Code would be an enormous feat and mark an important step forwards for the democratic consolidation of the country.

51. On 23 January 2018, in line with legal requirements, President Poroshenko dismissed all the members of the sitting CEC as their term had ended. At the same time he announced the names of persons that he wanted to propose to the Verkhovna Rada for the same number of vacancies in the CEC. This caused uproar among the opposition according to whom no members of the opposition were among the candidates suggested by Mr Poroshenko. In Resolution 2201(2018) on the Progress of the Assembly's monitoring procedure (January-December 2018) the Assembly expressed its concern about "... the lack of balanced composition of the Central Election Committee according to the recommendations of the Council of Europe, by proportional representation of all parliamentary political factions."²⁸

52. When President Poroshenko presented his list to the Verkhovna Rada, it contained 15 candidates, including representatives from Samopomich and Batkivshyna. The majority of the candidates on the list are reportedly technical experts.²⁹ The Opposition Bloc has been offered to add a nominee from among its rank but had, at the time of our visit, not yet done so. Several interlocutors pointed out that this does not guarantee that all parties will automatically be represented on the CEC as there are currently 15 nominees for 13 places. We have urged all political forces to resolve the issue of the composition of the CEC as soon as possible in an inclusive manner.

²⁶ Reportedly the polling stations are not established with the same boundaries and it would probably need different election commissions.

²⁷ A number of them have been assessed by the Venice Commission.

²⁸ Resolution 2203 (2018) §6.9.

²⁹ http://i.tyzhden.ua/content/photoalbum/2018/02_2018/26/uv/book120.pdf.

APPENDIX I

**Programme of the fact-finding visit to Kyiv
(19-21 March 2018)**

Co-rapporteurs: Mr Eerik-Niiles Kross, Estonia, Alliance for Liberals and Democrats for Europe and ...

Secretariat: Mr Bas Klein, Deputy Head of Secretariat, Monitoring Committee

Main focus of the visit:

- Recent political developments and state of the reform programme
- Relations between ruling majority and opposition, 2019 Parliamentary and Presidential Elections
- Civil society and changes to legal Framework for NGOs
- Law on Education, education in Minority Languages
- Fight Against Corruption

Monday, 19 March 2018

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|-------------|---|
| 09:00 | Briefing by the Head of the Council of Europe Office in Ukraine (*) |
| 09:30 | <p>Briefing on the state of the reform process by the “Reanimation Package of Reforms” (focus Judiciary, fight against corruption, public administration and electoral reforms) (*)</p> <ul style="list-style-type: none"> • Arem Myrgorodskyy, RPR, Head of Secretariat • Anatoliy Tkachuk, RPR, Member of Board • Mykhailo Zhernakov, RPR, work group on reform of judiciary • Roman Kuibida, RPR, work group on reform of judiciary • Viktor Tymoshchuk, RPR, Member of Board • Yevhen Radchenko, RPR work group on electoral reform |
| 11:30 | <p>NGO Round table on legal framework for NGOs and space for civil society (*)</p> <ul style="list-style-type: none"> • Viktor Taran, Centre of Political Studies and Analytics “Eidos”, Director • Serhiy Loboyko, Head of Innovations department at NAUKMA, Head of “E- democracy” work group, RPR • Anastasia Krasnosilska, ANTAC • Maksym Latsyba, Ukrainian Centre of Independent Political Studies, Director, member of RPR • Tetiana Pechonchuk, HR Information centre, Head of Board • Maryna Linchenko, Centre for Civil Liberties |
| 13:00 | Lunch |
| 14:00 | Meeting with a representative of the Jehovah’s Witnesses in Ukraine, Mr Illia Kobel (*) |
| 14:30 | <p>Roundtable on the fight against corruption (*)</p> <ul style="list-style-type: none"> • Dmytro Kotliar, AC expert, CentreUA • Yaroslav Yurchyshyn, TI Ukraine • Daria Kalenyuk, ANTAC • Sasha Drik, Civil Lustration Committee NGO, Head of Board |
| 16:00-16:45 | Meeting with the Deputy Minister for Foreign Affairs, Sergiy Kyslytsya |
| 17:15-18:00 | Meeting with the Head of Central Election Commission, Mykhaylo Okhendovsky |
| 20:00 | Dinner with the Diplomatic Community hosted by the Estonian Ambassador in Kyiv (*) |

Tuesday, 20 March 2018

- 09:30-10:30 Meeting with the members of the Parliamentary Delegation of the Verkhovna Rada of Ukraine to the PACE
- 11:00-11:45 Meeting with the Deputy Chairperson of the Ukrainian Security Service (SBU)
- 12:00-12:45 Meeting with Deputy Minister of Education and Science, Pavlo Hobzey
- 13:00 Lunch
- 14:15-15:00 Meeting with the Chairperson of the Verkhovna Rada of Ukraine, Mr Andriy Parubiy
- 15:15-16:00 Meeting with the Heads of parliamentary factions and groups of the Verkhovna Rada
- 16:15-17:00 Meeting with the Deputy Minister of Justice
- 17:30-18:30 Meeting with Ms Lyudmila Denisova, Ukrainian Parliament Commissioner for Human Rights (Ombudsperson)

Wednesday, 21 March 2018

- 09:00-10:00 Meeting with the Deputy Director of the National Anti-corruption Bureau, Gizo Uglava
- 10:30-11:45 Meeting with the Prosecutor General of Ukraine, Yuriy Lutsenko
- 12:15-13:00 Meeting with the Deputy Head of the National Agency for Prevention of Corruption
- 13:00 Lunch with the First Deputy Head of the Specialized Anti-Corruption Prosecutor's Office, Maksym Hryshchuk
- 14:30-15:15 Meeting with the members of the Parliamentary Delegation of the Verkhovna Rada of Ukraine to the PACE
- 15:30-16:15 Meeting with the members of Committee on Science and Education of the Verkhovna Rada of Ukraine
- 16:30-17:15 Meeting with Mr Oleksiy Filatov, Deputy Head of the Presidential Administration
- 17:30 18:30 Meeting with the members of the Committee on Corruption Prevention and Counteraction of the Verkhovna Rada of Ukraine

(*) organised by the Council of Europe office in Kyiv

APPENDIX II

STATEMENT

Co-rapporteur urges Ukrainian authorities maintain momentum in fight against corruption

- **23/03/2018**

Following his visit to Kyiv in the framework of the ongoing monitoring procedure in respect of Ukraine, PACE co-rapporteur Eerik-Niiles Kross (Estonia, ALDE) welcomed the many reforms that have been implemented by the Ukrainian authorities, since the adoption of Assembly [Resolution 2145](#) on the functioning of democratic institutions in Ukraine, despite the continuing military aggression and the context of the hybrid war waged against the country by the Russian Federation. This clearly underscores Ukraine's commitment to the Council of Europe's values and norms. At the same time, Mr Kross urged the Ukrainian authorities to maintain their commitment to the fight against the widespread corruption in the country, where regrettably tangible results are far less than hoped for.

In this context, Mr Kross stressed the importance of the establishment of the special anti-corruption court. He therefore urged the Verkhovna Rada to adopt the law to create this anti-corruption court without further delay and to ensure that the recommendations of the Venice Commission are fully taken into account, especially with regard to the jurisdiction of the Court, as well as with regard to ensuring that the international partners of Ukraine have a crucial role in the appointment of the judges of this court.

"As recommended by the Venice Commission the jurisdiction of the anti-corruption court should correspond to the one of the National Anti-Corruption Bureau lest the court would be overwhelmed by cases, which in turn would undermine its required effectiveness as a key instrument in the fight against high level corruption" stressed Mr Kross. "Moreover, it is clear from the many talks with our interlocutors that, in order to ensure that this court has the full trust of the Ukrainian citizens, the international community needs to have a crucial and binding role in the appointment of its judges", he added.

Following his meeting with the National Agency for the Prevention of Corruption, Mr Kross expressed his serious concern about the lack of any tangible results with regard to the verification of the asset declarations filed under the e-declaration regime. "The Ukrainian society, as well as the international community, had rightfully very high expectations with regard to the e-declaration system. The lack of any concrete results with regard to the verification of these declarations by the NACP, as well as the failure of the NACP to have an automated verification system in place more than a year after the e-declaration system went live, is unacceptable and raised questions about its commitment and required political will" said Mr Kross. "Given that the 1st of April is the deadline for the next round of e-declarations, I urge authorities and all political forces, to work together to promptly resolve these problems in the functioning of this important institution" he added. In this context, Mr Kross expressed his concern about the tensions between the National Anti-Corruption Bureau and other law enforcement agencies as well as reports that the Special Anti Corruption Prosecutor is contemplating giving his resignation. All these inter agency tensions undermine the efforts to fight the widespread corruption in the country, and should be resolved promptly.

Mr Kross welcomed the fact that the Unified Election Code, a long standing recommendation of the Assembly, had been adopted in first reading. However he expressed some concern with regard to the timeframe for its adoption in final reading, given the more than 4000 amendments to this code and the fact that the political parties are already gearing up for the elections. He called upon all political forces to ensure that a proper legal and administrative framework for elections is in place that could have the trust of all political stakeholders and most importantly the Ukrainian citizens themselves.

With regard to civil society, Mr Kross expressed his dismay about the fact that the amendments that would postpone the coming into force of the controversial requirement for anti-corruption activists to file an e-declaration were not placed on the agenda of the Verkhovna Rada. This requirement, which has a chilling effect on anti-corruption activists and NGOs, violates European standards and should now be abrogated without further delay. Moreover, the Rapporteur called upon the authorities to recall, or at a minimum substantially amend, the draft legislation that would introduce a burdensome financial reporting regime for NGOs that, in its current format, runs counter to European standards and norms with regard to freedom of association.

In the context of his visit, Mr Kross had a meeting with the lawyers in the so-called Zatoka organised Crime case. He expressed his concern about the lack of progress in the prosecution of this case which highlights the obstacles in fighting organised crime and corruption in the Odessa region despite previous attention drawn to this by Assembly members and promises from the Prosecutor General's office. Lastly, with regard to the law on education, Mr Kross welcomed the national and international consultations on the issue of education in minority languages and hoped that this issue would soon be resolved in full compliance with international norms. In this context, Mr Kross reiterated the Assembly's full support for Ukraine's territorial integrity and condemned the fact that Russian presidential elections took place on the territory of illegally annexed Crimea