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The functioning of democratic institutions in Ukraine

Addendum to the report

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

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1. Introduction

1. Following the adoption by the committee, on 9 September 2010, of our report on the functioning of democratic institutions in Ukraine we decided to carry out a fact-finding mission to Ukraine to have an exchange of views with the authorities and the different political forces in Ukraine, as well civil society, on the findings presented in the report, as well as to update ourselves on the latest developments in the country before the debate in the Parliamentary Assembly on the report.

2. The visit took place from 28 to 30 September 2010. Due to other important commitments in her national parliament, Mrs Renate Wohlwend had to cancel her participation in this visit. During the visit, Ms Repts met the president, the prime minister, the speaker of the parliament, the Chairman of the Legal Affairs Committee of the Verkhovna Rada, the chairperson and members of the Ukrainian delegation to the Assembly, members of the opposition, including former Prime Minister Yulia Tymoshenko, the Chairperson of the Investigative Committee of the Verkhovna Rada for the issuing of broadcasting licences, representatives of the media and civil society in Ukraine, as well as members of the diplomatic community in Kyiv. We wish to express our gratitude to the Verkhovna Rada and Representative of the Secretary General of the Council of Europe in Kyiv, and his staff, for the programme and hospitality.

3. As mentioned in our report, the political atmosphere in Ukraine remains tense and polarised. This polarisation has not decreased since our last visit and has possibly increased. It is important that the monitoring procedure, and our findings and recommendations, are not used as an instrument in the current stand-off between the ruling coalition and opposition parties, and Ms Repts therefore stressed in all meetings with our interlocutors the neutrality and the impartiality of both our approach and the findings in the report. To our great satisfaction, most interlocutors, from both the opposition and ruling coalition – including President Yanukovich and other high representatives of the authorities – acknowledged that the report was balanced, impartial and constructive, even if they disagreed with some of the findings or recommendations.



4. President Yanukovich, as well as members of the government, repeatedly stressed the importance they attached to co-operation with the Council of Europe, as well as their commitment to honouring the obligations and remaining accession commitments of Ukraine to our Organisation. In this respect, they underscored that if, as a result of the need for urgent implementation of reforms, laws were adopted before receiving opinions of the Council of Europe, and most notably those of the European Commission for Democracy through Law (Venice Commission), this would not preclude the adoption of new amendments later on to address the recommendations in such opinions. These clearly expressed commitments should be welcomed.

5. Regrettably, the concerns we noted in our report, especially with regard to democratic rights and freedoms, not only remain but actually seem to have augmented since the previous visit. We referred to isolated incidents, which we could not at that moment discern as a systemic trend. Now clearer patterns seem to emerge. These patterns could be worrisome if not immediately addressed and reversed. A number of findings and observations fall outside the scope of the report or need to be analysed in more detail. Their analysis will be part of our full report on the "honouring of obligations and commitments by Ukraine" that we intend to finalise during the coming year. In this addendum, we will limit ourselves to outlining briefly the main issues that are of direct relevance to our current report and proposing amendments to our draft resolution in line with our findings. In addition, we will propose a small number of amendments to clarify and strengthen our original text or to adjust some facts.

2. Developments since the adoption of the draft report

2.1. Constitutional reform

6. On 1 October 2010, the Constitutional Court of Ukraine, following an appeal by 252 parliamentarians 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 and ordered the parliament to bring the current legislation back into line with the previous Constitution of 1996. At the moment of writing, a few hours after the Constitutional Court decision, it is impossible to gauge all the legal implications of this decision, which has considerably strengthened the power of President Yanukovich. While this decision will possibly remove some of the constitutional constraints surrounding reforms that are mentioned in the report, others remain and new ones may have been introduced. We will analyse the impact of the new constitutional environment in our next report. However, at this moment it is important to underscore that this decision must not be used as a pretext to avoid the constitutional reform called for by, *inter alia*, the Assembly. Instead, this decision should be used in order to initiate a genuine constitutional reform process in the Verkhovna Rada with the aim of bringing Ukraine's Constitution fully into line with European norms and standards.

7. Recently, in a rare event, four judges of the Constitutional Court resigned simultaneously and were replaced by judges generally considered as being sympathetic to Mr Yanukovich. One of the judges that resigned cited that he was put under pressure to do so. The fact that these four newly appointed judges reportedly tipped the decision in favour of Mr Yanukovich will only add to the controversy surrounding this decision and allegations that the current authorities intend at all cost to monopolise the power in the country.

8. During the visit, the president, as well as other members of the government, agreed with our observation that, for a number of announced reforms, constitutional changes are necessary to ensure that these reforms are fully in line with European standards and norms. Therefore, we welcome that the president announced that, irrespective of the decision of the Constitutional Court, he would initiate a number of constitutional reforms that would address some of the concerns we mention in the report.

2.2. Reform of the judiciary

9. With regard to the reform of the judiciary, all sides acknowledged that the reform of the judiciary is essential and that many aspects of the recently adopted Law on the Judiciary and Status of Judges are to be welcomed. As mentioned above, the authorities assert that, as a result of the need to implement these reforms quickly, the Law on the Judiciary and Status of Judges was adopted and enacted without waiting for the final opinion of the Venice Commission on this law. However, they stressed that previous opinions of the Venice Commission on earlier versions of the draft law were fully taken into account when adopting this law. In addition, the authorities expressed their willingness to further amend the law should the opinion of the Venice Commission so require.

10. The opposition and several other interlocutors expressed their concern about the enlarged powers of the High Council of Justice. They emphasised this especially as, under current constitutional constraints, it is not a genuine body of judicial self-administration in which judges – elected by their peers – have the majority. This concern about the functioning of the High Council of Justice is confirmed in the preliminary comments by the Venice Commission on the Law on Amending Certain Legislative Acts of Ukraine in Relation to the Prevention of Abuse of the Right to Appeal, which acknowledges that there “exists an evident danger of politically motivated nominations to the High Council of Justice which can lead even to the domination of members of the High Council of Justice guided by political considerations”.¹ The Venice Commission expects to adopt its opinion on this law during its next session, but we would like to highlight that, according to the preliminary comments, the law gives rise to serious reservations. As already stated in the draft resolution, these concerns must be addressed. As suggested by the committee, we have drafted an amendment with the aim of highlighting the need for the training of judges to be in line with Venice Commission recommendations.

2.3. Freedom of the media

11. The developments with regard to the freedom of the media give rise to serious concern. There is an increasing number of allegations and, in a number of cases, credible reports of pressure on journalists or of interference of state organs, especially law enforcement agencies, with the work of journalists and media organisations. A special investigative committee set up by the Verkhovna Rada to investigate violations of the freedom of the media – which is composed of members of both the opposition and the ruling coalition – has established unanimously in a number of cases, that acts of censorship and or interference had taken place. This deterioration in the situation of media freedoms is of serious concern and needs to be reversed immediately, especially taking into account the upcoming local elections on 31 October 2010.

12. A case having given rise to political controversy is the recent revoking by the Court of Appeal of a decision by the National Council responsible for the attribution of broadcasting frequencies. The decision in question attributed a number of additional broadcasting frequencies to two broadcasting stations, TVi and Channel 5. Many media experts informed us that procedural violations had indeed occurred when the council awarded these frequencies. It should be noted that the decision of the court did not revoke the general broadcasting licences for these stations, or take them off the air, as erroneously reported in some media. However, the same experts also noted that, in most previous decisions, the broadcasting authority seems to have violated procedural requirements. However, in the past this has never led to the withdrawal of broadcasting frequencies. Therefore, unless all other decisions of that council are reviewed, selective justice may have been applied in the case of TVi and Channel 5. The possibility of selective justice being applied is also suggested by the fact that, at the same meeting where the frequencies to TVi and Channel 5 were granted, 20 other decisions to grant frequencies were reportedly taken with the same procedural violations. However, in none of these cases has the decision been revoked. This case is all the more controversial due to the involvement of the Head of the Security Services of Ukraine, as outlined in our report.

2.4. Role of the security services

13. The role of the Security Services of Ukraine and its apparent involvement in the domestic political environment has become increasingly problematic and a matter of concern. We have received numerous, often substantiated and credible, reports of pressure by the Security Services of Ukraine on journalists, politicians and civil society activists, or on people or businesses close to them. This is not acceptable in a democratic society and the Law on Security Services, and especially the provisions that give them the authority to conduct normal criminal investigations, should be thoroughly reviewed with the aim of bringing them fully into line with European standards. This alleged activity of the Security Services of Ukraine is all the more controversial in view of the potential conflict of interest of its head, Mr Khoroshkovsky, who is at the same time a member of the High Council of Justice and a leading and influential businessman in Ukraine, whose financial holdings have a considerable impact on the public sphere.

2.5. Local elections

14. Local elections will take place in Ukraine on 31 October 2010. The holding of democratic elections that are overall conducted in line with international standards is one of the main achievements since 2004. We are therefore concerned by the fact that allegations that the forthcoming elections will be fraudulent have surfaced in recent weeks. These allegations may be in part due to political strategy, but they also indicate a lack of trust

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in the fairness of the election administration resulting from shortcomings in the electoral framework and the long-standing tradition of political forces manipulating the legal election framework with a view to short-term party gains.

15. A primordial objective of election legislation and the election administration is that it should instil trust in the electoral process of all stakeholders, parties and voters alike. Judging from the statistics of the Central Election Commission, it would seem that there is a considerable imbalance between members representing the ruling coalition (5 906) and those representing opposition parties (3 088) on the territorial elections commissions. Given the fact that the territorial elections commissions appoint the precinct election commission, this imbalance is most likely to be replicated on the level of the individual polling stations. This imbalance is even more evident in terms of the distribution of the leadership posts (chairpersons, deputy chairperson and committee secretary). The ruling party received 1 028 such positions against 476 for the opposition parties. In addition, the quorum for several important decisions by the election commissions has been reduced to three persons, which makes a balanced distribution of leadership functions all the more important.

16. We received several reports that, in a number of regions, bogus party branches of Ms Tymoshenko's Fatherland Party are being set up and are fraudulently registered. The authorities appear to be siding with the fake party branches when the party headquarters challenges the legitimacy of these branches. This in effect allows a hostile takeover of the Fatherland Party structure to occur, if not with the complicity of the authorities, at least with their full knowledge. If not remedied in a timely fashion, this could affect the democratic nature of the forthcoming local elections.

17. High-level government leaders, and especially the President of Ukraine, have repeatedly stressed that no one has more to benefit from genuinely democratic elections than the current authorities. They stated that they have therefore taken several measures to ensure that these elections will be organised according to international standards. To that effect, the authorities have invited a number of international organisations, including the Council of Europe and the Office for Democratic Institutions and Human Rights of the Organization for Security and Co-operation in Europe (OSCE/ODIHR), to observe these elections, and have stressed that they would welcome large numbers of international observers. However, the relatively late issue of these invitations could prevent a number of invited organisations from making the necessary preparations for observing these elections.

3. Proposed amendments to the draft resolution

18. On the basis of the points mentioned above, we have prepared a number of amendments to the original draft resolution for consideration by the committee. Explanations are only given where their aim is not clear from the text itself or from the explanations given above.

Amendment A

In paragraph 3, first sentence, add the words, “, when achieved according to democratic principles,” between “newly established administration” and “is understandable”.

Amendment B

Replace paragraph 7.1.5 with:

"urges the authorities to adopt provisions on party financing in the Law on Political Parties that are fully in line with European standards, especially with regard to transparency of party financing, and to consider additional measures that would reduce the dependence of political parties on economic and commercial interests."

Amendment C

Add a new sub-paragraph between sub-paragraphs 7.3.2 and 7.3.3:

"asks the authorities to bring the system of training of judges and the training institutes in compliance with European standards. For this purpose, judicial training must be part of the judicial branch and should be controlled and supervised by an independent body of judicial self-administration, as was recommended by the Venice Commission."

Amendment D

In sub-paragraph 7.3.6, change “an opinion of the Venice Commission” into “Council of Europe expertise”.

Amendment E

Add a new sub-paragraph after 7.4.2:

“calls upon the Verkhovna Rada to adopt the laws that are pending in parliament on conflict of interest and ethics in public service; on asset declarations of public officials; and on access to public information, after having obtained a Venice Commission opinion on these drafts.”

Amendment F

In paragraph 7.5.2, replace the words “Law on Order of Organising and Conducting of Peaceful Events” with “Law on Peaceful Assemblies”.

Amendment G

Add a new paragraph before paragraph 8:

“The Assembly expresses its concern about the increasing number of credible reports of undue involvement by the Security Service of Ukraine (SBU) in domestic political affairs, including pressure put on journalists and party and civil society activists and their relatives. It considers such activities unacceptable in a democratic society and therefore calls upon the authorities to reform the security services and its functions in line with European standards.”

Amendment H

Add a new paragraph between paragraphs 8 and 9:

“The Assembly takes note of the decision of the Constitutional Court of Ukraine of 1 October 2010 that declares as unconstitutional the law number 2222 amending the constitution in 2004. The Assembly considers that this decision should now prompt the Verkhovna Rada to initiate a comprehensive constitutional reform process with the view of bringing Ukraine’s Constitution fully into line with European standards.”

Amendment I

Replace paragraph 10 with the following text:

“The Assembly expresses its concern about the increasing number of allegations, and credible reports, that democratic freedoms and rights, such as freedom of assembly, freedom of expression and freedom of the media, have come under pressure in recent months. It considers that the interference of state organs, such as the law enforcement and security services, in the work of journalists and media organisations is incompatible with a democratic society. The Assembly calls upon the authorities to fully investigate all reports of infringements of rights and freedoms and to remedy any violations found. In addition, it calls upon the authorities to ensure that legal proceedings do not result in the selective revocation of broadcasting frequencies and to review any decision or appointment that could lead to a conflict of interest, especially in the field of law enforcement and the judiciary.”

Amendment J

Add a new paragraph between paragraph 11 and 12:

“The Assembly is concerned that allegations of possible electoral fraud could indicate a lack of trust of electoral stakeholders in the fairness of the conduct and administration of the forthcoming elections. Considering that trust in the administration of the elections is essential for their democratic nature, it calls upon the authorities to ensure a balanced composition of the election administration at all levels, including leadership positions. It recommends the authorities to consider adopting additional measures to foster the trust of electoral contestants and voters in the electoral process.”