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### JUDICIAL REFORM IN UKRAINE MEETING EUROPEAN STANDARDS

#### INTRODUCTION

In the era of ever increasing importance of the diplomacy of energy resources and its management, Ukraine assumes a central role in the region, and a prominent position in the geopolitical strategic goals of the EU<sup>1</sup>.

Following the last enlargement of the EU in 2004, the Union and Ukraine now –and for the first time– share a common border. As direct neighbours, they face common challenges<sup>2</sup>. This is an additional impetus for enhancing cooperation, most notably through the approximation of institutional and legislative frameworks.

The present contribution reviews the framework of cooperation between EU-Ukraine, and assesses the extent to which the judicial system of Ukraine is being reformed in line with European standards.

#### I. FRAMEWORK OF COOPERATION

The depth and breadth of EU-Ukrainian cooperation is indeed enormous. One quick browse on the main chapters of the EU-Ukraine Action Plan gives an impressive overview of the scope of areas of cooperation between EU and Ukraine, spanning from political institution-building and reforming with a view to consolidating democratic values, to legal reform (including reform of the judiciary), with a view to approximating the EU standards, and economic reform (incorporating trade, competition, anti-fraud and anti-corruption mechanisms, taxation and public procurement etc), with a view to establishing an open market system and a free trade agreement.

Since 2007, the EU and Ukraine are in negotiations on a new agreement<sup>3</sup> that replaces the former Partnership Cooperation Agreement (PCA)<sup>4</sup>. While there may be specific areas and chapters of negotiation not yet completely closed and agreed on in every detail, there is a common accord that this new agreement will have the format of an Association Agreement<sup>5</sup>, involving reciprocal rights and obligations, and the adoption of binding decisions, i.e. quasi-legislative international instruments. The depth of such an agreement is highlighted by the negotiations on a comprehensive free trade area that form part of the overall association agreement. Such a free trade agreement has become a significantly more reachable goal since Ukraine joined the WTO in 2008.

Cooperation between the EU and Ukraine in the field of Justice and Home Affairs (JHA) is already considerably advanced. It forms integral part of the overall partnership framework set by the EU, as further elaborated in the EU-Ukraine Action Plan<sup>6</sup>. Ever since 2001, the EU Action Plan on JHA in Ukraine covered a wide range of areas, among which border management and visa control, asylum and migration, terrorism, judiciary reform, rule of law and good governance, democratic reforms and human rights' protection. Among the main challenges and strategic objectives for this cooperation, the following are directly linked to the overall reform of the judicial system:

- cooperation in the field of freedom, security and justice;
- support efforts to consolidate democratic values and institutions, comprehensive protection of human rights and fundamental freedoms, efficient and democratically accountable state institutions and policy-making instruments;

– judicial reforms, especially with a view to strengthening individual and institutional independence and impartiality of the judiciary, updating provisions on access to the judicial system, modernizing the administration of the judiciary.

Cooperation in the field of freedom and security has direct implications and impact on the reforms introduced in the judiciary. Migration flow management, asylum standards and processing procedures, as well as a concerted approach and confrontation of drugs, human trafficking, corruption, money laundering etc provoke an approximation of institutional design and procedures not only of the administration or law enforcement, but also of legislation and the judiciary. E.g., the imposition of appropriate judicial control over all decisions of detention longer than 3 days (72 hours) is one of the priorities of the cooperation in the field of illegal migration control, directly relating to the protection of the rule of law, and the reform of the Ukrainian judicial system; similarly, the approximation of the Ukrainian legislation and judicial proceedings in the field refugees and asylum seekers is at the center of the EU objectives in the field of asylum; even the establishment of common programmes for the training of judges and prosecutors in financial motoring and in investigating money laundering activities present challenges to the Ukrainian judicial system.

The basic objectives of the EU action plan in the area of justice involve reforms of the judiciary, and the strengthening of the judicial cooperation in civil and criminal matters, including the penitentiary system.

On the reform of the judiciary, the following objectives take center stage:

- encouraging Ukraine’s efforts to ensure impartiality, independence and competence of judges; to this end, the EU has put forward and monitors the implementation of the strategy on judicial reform entitled “Concept for the improvement of the judiciary in order to ensure fair trial in Ukraine in line with European standards”,
- reviewing the appointment system for the Constitutional Court in line with the recommendations of the Council of Europe’s Venice Commission<sup>7</sup>,
- supporting Ukraine’s efforts to establish a branch of administrative courts,
- reviewing and introducing the reforms needed in the civil, criminal, and administrative codes and codes of procedure, to meet European standards,
- increasing the capacity of the court system to deal with its workload and strengthen its administrative capacity,
- improving access to justice and establishing a proper legal aid system,
- introducing special training for judges and candidate judges; improving the recruitment system and career of judges, based on European standards with a view to strengthening their independence, impartiality and efficiency; offering support for the drafting and application of a Judicial Code of Ethics; establishing independent bodies to handle disciplinary proceedings for judges,
- reviewing and reforming the prosecution system in accordance with the relevant Council of Europe Action Plan,
- supporting transparency and access to justice through the creation and operation of electronic databases of all court decisions,
- supporting in the establishment of a single and independent professional bar association,
- enhancing and systematizing the training of judges and prosecutors on the protection of human rights in accordance with the European Convention on Human Rights, and most recently, the EU Charter,
- reducing the number of court cases going to appeal, and ultimately being annulled by higher courts<sup>8</sup>,
- developing out-of-court systems to speed up and cut costs of small civil cases (alternative dispute resolution instruments and procedures)<sup>9</sup>.

In the field of judicial cooperation on criminal matters, the following objectives are high on the agenda:

- adopting the amended Penal Procedural Code of Ukraine, and developing the necessary legislative and institutional measures to promote judicial cooperation with other countries,
- ratifying important international instruments on judicial cooperation in criminal matters<sup>10</sup>,

- establishing a network of contact points for a rapid exchange of information on mutual legal assistance and judicial cooperation related to cross-border offences,
- concluding the cooperation between Eurojust and Ukraine's General Prosecutor's Office.,

- fully implementing juvenile justice standards in line with relevant European standards.

Lastly, in the field of judicial cooperation on civil matters, the following are among the top priorities of the EU-Ukraine concerted action plan on judicial reform:

- fully implementing the Hague Convention on the taking of evidence of 1970 and on service of documents of 1965, with a view to promoting the practical functioning of legal assistance in civil matters,

- enhancing the framework of children rights protection, by adhering to international conventions on parental responsibility, adoptions, enforcement of alimonies, last wills and testaments, inheritances, abductions.

## II. ASSESSING PROGRESS

In assessing the progress made in the last few years, one has to always take into consideration the general political climate of the country, in which reforms must go through. It is a fact that Ukraine has undergone through a prolonged period of -relative to extreme- political instability. It would not be inaccurate to place the origins of this instability in 2004 and the 'orange revolution'. Since then, Ukraine has undergone a critical period of political and social unrest before and after the 2006 and 2007 elections, that was further exacerbated more recently, during the energy crisis and the events in Georgia, that placed the Ukrainian government directly in conflict with Russia.

In such a political environment, it is no surprise that no significant progress was made in the field of judicial reform. Key reforms did not meet with the necessary political support to be further promoted. A prime example is the failure to make any substantial progress on the reform of the Constitution. Further, the independence of the judiciary was compromised in autumn 2008 when judges were drawn into a dispute between the President and the Prime Minister regarding the President's decision to call pre-term elections, causing a halt to reforms of the judiciary.

More progress has been achieved in the reform of the criminal justice system. The Cabinet issued an instruction in 2008 "On Approval of the Action Plan for the Implementation of the Concept of Criminal Justice Reform". The instruction aims at improving pre-trial investigation procedures, strengthening the protection of victims' rights, improving the conditions and procedures for punishment and addressing corruption in the judicial process.

In addition, in 2008 a "Concept on the Reform of the Office of Prosecutor" was introduced, to bring the role of the General Prosecutor in line with the recommendations of the Council of Europe Venice Commission. Significant development in this respect in 2008 was the adoption of a law by Ukrainian Parliament "on amendments to the law of Ukraine on the Procuracy"<sup>11</sup>, which brought the existing law into line with the Constitution by requiring the consent of Parliament to the dismissal of the General Prosecutor. However, the opinion of the Venice Commission at its 79<sup>th</sup> Plenary Session on 12 to 13 June 2009 on the draft piece of legislation has not been overwhelmingly positive<sup>12</sup>. On the contrary, the Commission notes that

*"the present draft, which is not supported either by the Minister of Justice or the President, does not intend to reform the present functioning of the prosecution service in Ukraine which was inherited from the Soviet 'prokuratura' system. It is rather an attempt to preserve the status quo and to put an end to reform efforts undertaken on the basis of the 1996 Constitution of Ukraine...[t]he prosecutor's office would remain a very powerful and excessively centralised institution whose functions considerably exceed the scope of functions performed by a prosecutor in a democratic country. The draft does not bring Ukraine any closer to complying with the commitment towards the Council of Europe"*

The Commission concluded that *"a comprehensive reform in line with the country's commitment to the Council of Europe would require, first of all, constitutional amendments"*.

Contrary to its severe criticism on the proposed draft law on the prosecutor's office, the Commission found that the amendments of the Constitution, as proposed by the Ukrainian President, concerning the judicial system on the whole, and the Constitutional Court of Ukraine in particular, mark "a clear improvement with respect to the present Constitution". The Venice Commission had expressed its opinion on the judicial system of Ukraine several times in the past<sup>13</sup>. The Commission in particular does not find that having judges elected by the public serves to strengthen their independence. In addition, the Commission has expressed the opinion that it is not appropriate that Parliament should have any role in lifting a judge's immunity<sup>14</sup>, nor in appointing them, whether at high or lower courts. Further, the Commission favours the establishment one category of judges, appointed for permanent terms, to better protect their independence<sup>15</sup>, and stands critical before provisions that allow for the dismissal of a judge for breach of his/her oath, as "[t]his provision might be (mis)used to get rid of judges as the provisions used in the oath will necessarily be very vague".

With respect to the administration of justice, the Commission welcomes the new, revised composition of the High Council of Justice, proposed by the draft Constitution<sup>16</sup>, as well as its revised role and competences<sup>17</sup>.

On the composition of the Constitutional Court, the Commission reiterates its previous recommendations, noting that little progress is made in the draft Constitution presented by the President of Ukraine:

*"Under the Constitution in force constitutional judges are recruited through three different channels: the President of Ukraine, the Verkhovna Rada of Ukraine and the Congress of Judges of Ukraine each appoint six judges to the Constitutional Court of Ukraine. According to the draft the judges of the Constitutional Court would be appointed on the submission of the President of Ukraine by a two-thirds majority of the total membership of the Verkhovna Rada...the Venice Commission welcomed the shift from the system of exclusive direct appointment of constitutional judges by the President to the mixed system providing for the election or appointment by the three main branches of power because this system has more democratic legitimacy. A contrario, abandoning this system and moving to a combination of nomination of candidates by the President and their election by parliament is not welcome, although the proposed solution as such is acceptable and known in other countries. Moreover, in the present situation in Ukraine the proposed system could easily lead to deadlocks and the monopoly of presenting proposals gives an extremely strong role to the President."*

#### CONCLUSIONS

Ukraine commands strategic geopolitical importance for the EU. It is situated at the crossroads of energy supply for Europe, bordering the Federation of Russia.

The prospect of an EU-Ukraine free trade area, that became more realistic and feasible after Ukraine's accession to the WTO, requires major changes in the institutional structure of the judiciary. The Venice Commission of the Council of Europe has been largely charged with monitoring progress on the subject matter.

The reforms, however, that are placed on the agenda of the Commission could only be advanced within a stable domestic political environment, that has been missing from the country in the past few years. Resolving its internal tensions and divisions will allow Ukraine to concentrate on introducing, vigorously and emphatically, reforms of the judiciary, in line with European standards, that would enhance the independence and impartiality of judges on the one hand, and the efficiency of the system of administering justice on the other.

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<sup>1</sup> Ukraine is a key energy partner of the European Union, notably in the gas sector where some 80% of EU imports of Russian gas transit through Ukraine's gas pipeline system. Relations with Ukraine in the energy field were tested in January 2009 following a commercial dispute between the Russian Federation and Ukraine concerning gas. As a result of this dispute there was a temporary cut of Russian transit supplies to Europe via Ukraine resulting in emergency situations in several EU Member States and some neighbouring states. The European Commission facilitated the resolution of the gas crisis, inter alia, by the dispatch of a team to Russia and Ukraine to monitor gas transit flows.

<sup>2</sup> Especially in the fields of the fight against organised crime, terrorism, illegal migration etc.

<sup>3</sup> The "New Practical Instrument".

<sup>4</sup> Partnership Cooperation Agreement (PCA) between EU-Ukraine of June 1994, in force since 1 March 1998. EC Decision 149/98, Council and Commission Decision of 26 January 1998 on the conclusion of the Partnership and Cooperation Agreement between the European Communities and their Member States, of the one part, and Ukraine, of the other part, OJ L 049/19.02.98.

<sup>5</sup> A title finally adopted at the September 2008 Paris EU-Ukraine Summit.

<sup>6</sup> Initially elaborated and put forth in December 2001, and substantially amended and extended to endorse a wider scope of cooperation areas by the EU-Ukraine Cooperation Council on 21 February 2005.

<sup>7</sup> [www.venice.coe.int](http://www.venice.coe.int).

<sup>8</sup> As stipulated in the National Indicative Programme 2007-2010 for Ukraine of the European Neighbourhood & Partnership Instrument.

<sup>9</sup> Ibid.

<sup>10</sup> Like the 2<sup>nd</sup> Protocol to the European Convention on Mutual Assistance in Criminal Matters, the Rome Statute of the International Criminal Court, the Agreement on Privileges and Immunities of the International Criminal Court.

<sup>11</sup> CDL (2009) 085.

<sup>12</sup> [http://www.venice.coe.int/docs/2009/CDL-AD\(2009\)048-e.asp](http://www.venice.coe.int/docs/2009/CDL-AD(2009)048-e.asp).

<sup>13</sup> Most notably on the draft "Law on the Judiciary" and the draft "Law on the Status of Judges in Ukraine", CDL-AD (2007) 003.

<sup>14</sup> In art. 139 of the draft Constitution, the requirement of the consent of the Verkhovna Rada (Parliament) is replaced by the consent of the newly established Senate. This does not remove the concerns previously expressed by the Commission.

<sup>15</sup> The current Constitution provides two categories of judges, those appointed for a period of time (nominated for the first time) and judges appointed for an unlimited period of time. The new draft, in art. 141, replaces the provision of Art. 126 and provides for only one category of judges appointed for permanent terms.

<sup>16</sup> The Council would consist of sixteen members, with the Congress of Judges appointing eight members and the President and the Senate appointing four members each.

<sup>17</sup> The HCJ: 1. forwarding submission on the appointment of judges to the office; 2. forwarding submission on the dismissal of judges from the office in cases stipulated by the part one of Art. 143 of the Constitution; 3. terminate the authority of judges in the cases stipulated by the part two of art. 143 of the Constitution (age 65, and death); 4. takes a decision on suspension of the judges in the cases stipulated by part three of art. 143 (in the case of the prosecution of a crime or to correct violations of the requirements for incompatibility); 5. decides to bring the judges to disciplinary liability.

### Резюме

У статті розглядається структура співпраці між ЄС і Україною та оцінюється ступінь реформованості судової системи України відповідно до європейських стандартів, відображених експертними висновками Венеціанської комісії. Автор робить висновок про те, що реформи, зокрема судова реформа, уповільнюються через нестабільність місцевого політичного середовища впродовж останніх років. Автор також вважає зняття внутрішньої напруги та суперечностей передумовою запровадження та ефективного впровадження реформи судочинства відповідно до європейських стандартів, яке б підвищило незалежність і неупередженість суддів з одного боку, й ефективність системи відправлення правосуддя, – з іншого.

**Ключові слова:** судова реформа в Україні, співпраця між ЄС та Україною, політична стабільність.

### Summary

The article reviews the framework of cooperation between the EU and Ukraine and assesses the extent to which the judicial system of Ukraine is being reformed in line with European standards based on opinions of the Venice Commission. The author concludes that the reforms, in particular judicial reform, have been halted by the instability of the domestic political environment over past few years. The author views resolving the internal tensions and divisions as the precondition for introducing, vigorously and emphatically, reforms of the judiciary, in line with European standards, that would enhance the independence and impartiality of judges on the one hand, and the efficiency of the system of administering justice on the other.

**Key words:** judicial reform in Ukraine, EU-Ukraine cooperation, political stability.