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## EXPERT OPINION ON THE RECOMMENDATIONS MADE IN THE FINAL REPORT OF THE VENICE COMMISSION CONCERNING THE AMENDMENT TO THE LAW OF UKRAINE ON THE PURIFICATION OF GOVERNMENT

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## BACKGROUND

Lustration Law of Ukraine (Law on the Purification of Government) was adopted on September 16, 2014 by the Verkhovna Rada, subsequently signed by the Ukrainian President, and entered into force on October 16, 2014. In the law, the legislator sought to dismiss some members of the state apparatus who were considered as lacking loyalty and integrity, in particular due to corruption or due to their specified associations with the regime of President Yanukovich and/or the communist regime.

The law has been a subject of an inquiry by a panel of experts appointed by the Venice Commission. The commission delivered reports, which have provided the Ukrainian legislators with guidance on improving the law according to the European standards. The Commission delivered its Final Opinion on June 19, 2015.

The Venice Commission is formally a body established by the Council of Europe. The reports of the Venice Commission are cited by the European Court on Human Rights, which is the highest authority for human rights disputes between individuals and member states of the Council of Europe. It is important for the Ukrainian legislators to consider the recommendations of the Venice Commission. In doing so, they have an opportunity to demonstrate their willingness to adhere to European human rights standards.

## THE IMPLEMENTATION OF THE VENICE COMMISSION'S RECOMMENDATIONS

The Comparative Table to the Draft Law of Ukraine “On Amending the Law of Ukraine ‘On the purification of government’ ” seeks to compare the existing provisions of the lustration law with the proposed version of the amended legislation. Most amended provisions seem an improvement of the legislation and take into account some suggestions by the Venice Commission.

Nonetheless, rather than a positivist approach to the legislation, refining wording and fixing legal nuances, the Ukrainian legislators need to engage with the entire report by the Venice Commission. There are two critical sets of recommendations stipulated by the Venice Commission, which have not been addressed and which bear implications for the amended law, its expected constitutional review by the Ukrainian Constitutional Court and its probable review by the European Court on Human Rights.

1. **Lustration and other domestic legislation:** The Final Report of the Venice Commission stipulated the need to put the lustration legislation in accord with other domestic laws. In addition to the Constitution, the amendment to the lustration law needs to be reconciled and/or clarified, especially vis-à-vis the Law

on the Restoration Trust in the Judiciary of Ukraine (see paras. 15 and 59 of the Final Report) and with criminal code and anti-corruption initiatives (see paras. 26, 29, 54-60). Covering the same issues (lustration of judges and corruption) with two different legislations may result in circumvention of the laws. It may ultimately undermine the legislator's objectives, which the Venice Commission considered legitimate (see para. 24). The legislators need to address the problem in a systematic way, not *ad hoc*.

- 2. Historical Research and An Impact Study:** The Venice Commission on several occasions noted certain discretions for the Ukrainian parliament in the pursuit of lustration legislation. However, the Commission attached the discretion in legislating lustration to the obligation of establishing certain historical facts (see paras. 50, 71, and 74). This requirement stems from the application of the concept of "the democracy capable of defending itself" (see para. 30). The concept allows member states of the Council of Europe to encroach individual rights in cases of necessity in democratic society, for instance, in cases of the protection of the rights of others and the territorial integrity. But according to the European Court on Human Rights, the state must ***carefully evaluate the scope and consequences of the measures*** (*Ždanoka v. Latvia*, 2006, cited in para. 30 of the Venice Commission Report). It means the burden of proof is on the state to demonstrate both the necessity of the measure and its consequences. The legislators may consider commissioning a research report that would examine the historical role of different state departments during the communist era and during the Yanukovich's era; and an impact study on the effects of the lustration law on the state apparatus and in society in general.

## CONCLUSION

In sum, the wording of the amended law has improved. This nevertheless does not mean that the legislator has been able to satisfy the recommendations of the Venice Commission. Two major outstanding issues are the consistency of the law with other domestic legal norms; and a historical study of the conditions that concern categories of excluded personnel specified in the backward-looking provisions of the law, and an impact study on the effects of the law in Ukrainian society.