

Warsaw, May 2014



AUTHORS:

IRYNA **SUSHKO**

Civic Initiative „Europe without Barriers”, Kyiv, Ukraine

JAKUB **BENEDYCZAK**

the Friendly EU Border project,
the Stefan Batory Foundation,
Warsaw, Poland

CONTRIBUTOR:

KRZYSZTOF **MROZEK**

the Friendly EU Border project,
the Stefan Batory Foundation,
Warsaw, Poland

PROOFREADING:

ALAN **PARSONS**

Supported in part by a grant from
the Open Society Foundations.

A SECOND CHANCE FOR UKRAINE

After the victory of Ukrainian revolution, Brussels has declared its readiness to intensify and speed up visa dialogue with Kyiv. At the same time, despite the “Maidan moral capital”, EU leaders do not seem open to abolishing the visa regime with Ukraine until it fulfils all the technical criteria. The new Ukrainian authorities therefore have to resume work on the Visa Liberalisation Action Plan. Where is Ukraine at the moment in terms of the technical requirements which need to be met by its “post-revolutionary” elites?

Ukraine was the first Eastern Partnership country to start visa dialogue with the EU. Both sides signed the Visa Facilitation Agreement (VFA) back in September 2008, although it has been amended twice, in July 2012 and January 2013. Two years after signing the VFA, the EU and Ukraine started negotiating a plan for future visa liberalisation. Natalia Shapovalova, an associated fellow at Fride¹ writes: “Despite having introduced visa-free travel roadmaps for the Western Balkan countries, the EU hesitated to offer Ukraine a similar plan for full visa liberalisation. Instead, an Visa Liberalisation Action Plan (VLAP) was put in place in November 2010. The VLAP envisaged a more gradual, two-stage process in which the adoption of legislation would be followed by implementation. Unlike the Western Balkan roadmaps, the VLAPs with EaP countries do not envisage a visa-free regime upon completion of all reforms, but rather speak of the possibility of a visa-free regime”².

¹ Fride is a European think tank based in Madrid, Spain, see more: www.fride.org/page/5/about-fride.

² N. Shapovalova, *Visa-free Ravel for the EU's Eastern partners: time to act*, N° 165 – November 2013, p. 1.

Visa Liberalisation Action Plans were also received by Moldova and Georgia. The documents cover a wide range of reforms (up to 60), and are divided into 4 blocks:

1. Documents security (including biometrics)
2. Illegal migration (border and migration management, asylum policy)
3. Public security and order (fighting organised crime, terrorism and corruption, judicial & law enforcement co-operation, data protection)
4. External relations and fundamental rights (freedom of movement, citizens' rights including the protection of minorities).

The technical progress of these reforms is monitored by the European Commission, which periodically evaluates the progress made by Ukraine (and Georgia respectively) in its reports. Once Ukraine has adopted the required legislation, the Commission and the Council of the EU will decide whether Ukraine will be promoted to the second phase of the VLAP (i.e. implementation). After a recommendation from the European Commission indicating that the respective stage of implementation has been accomplished, the Council – as well as the European Parliament – will take a decision about the visa-free regime for Ukraine. In addition to the official assessment by the Commission, civil society experts also provide independent evaluations of the visa liberalisation process using the VLAP criteria, the Eastern Partnership Visa Liberalisation Index³.

While the common opinion is that Ukraine is “only” obliged to a limited number of reforms relating to anti-discrimination and anti-corruption legislation in order to fulfil all the requirements, in the 3rd report of the European Commission (November 2013) it was concluded that more legislative changes are required for promotion to the “second implementation” stage. However, this does not mean that it is beyond Kyiv capabilities and that the EU is absolved of responsibility to provide a wide range of support. What should be done and what are the most effective solutions in the current situation?

First of all, the work of the National Coordination Centre for Implementation of VLAP must be restarted. The National Centre, formed in April 2011, has not been working since the end of 2012. The National Centre was established to implement the Ukrainian VLAP, harmonize the activities of the central executive authorities within the framework of the VLAP and to coordinate the implementation of the main directions and tasks of the National Plan for the realization of the VLAP. Since starting its activities, it has accomplished approximately 80-85% of the legislative work necessary to abolish the EU visa regime for Ukrainian citizens thanks to its active work and efficiency. The success of the National Centre is down to the inclusion of independent experts and using experience from Moldova where the Head of the National Centre was obliged to provide weekly reports about the on-going progress to the government.

It is worth pointing out that on March 18, 2014, in response to the recommendations of independent experts regarding the necessity to restart the work of the Ukrainian National Centre for VLAP Performance, the new Government of Ukraine held the first post-revolutionary meeting for the members of the National Coordination

3 Visa-free Europe Coalition's „Eastern Partnership Visa Liberalisation Index”, www.monitoring-visa-free-europe.eu.

Centre for Implementation of VLAP. Independent experts took part in the meeting, but there was not enough willingness from the government to grant the representatives of the expert community membership to the National Centre, even though this had been suggested by independent experts. Therefore, the transparency and accountability of the National Centre remains under control of experts although they are currently observing the process from the outside.

Biometric documents

One of the fundamental requirements of the VLAP is the replacement of old-type passports (non-compliant with the International Civil Aviation Organization) with the new generation of biometric travel documents. Although the law “On Unified State Register of Demographics and Documents Confirming the Citizenship of Ukraine, Proving Identity or Special Status” (the USRD law) came into force in December 2012, Ukrainian civil society and experts raised concerns about possible violations with regards to human rights and international standards due to the procedures for processing personal data not being harmonised with international and European standards. From a practical view, the registry system has been transformed into a huge mechanism of corruption and has become inoperable due to the lack of funds to implement it.

Because of judicial weakness, independent Ukrainian experts recommend replacing the USRD law with a law “On identity documents”. The draft of this law, which included the recommendations presented by the International Organization for Migration, has been prepared and developed by highly-qualified and independent experts. The bill contains regulations about the issue of biometric documents for travelling purposes and for internal identification and is scheduled to be submitted for consideration by the Parliament of Ukraine as part of the “Reanimation reform package”. The project and the experts working on the package of reforms after the revolution, including those connected to VLAP, can be seen on the Facebook profile of the reform package⁴.

The replacement of old-type passports and the legislation process should follow the existing systems for the personalisation and distribution of documents which is compliant with European standards. Furthermore, before the Ukrainian revolution the production of passports was transferred to the state-owned “Ukraine” printing house where relevant equipment has been installed and tested, hence the acceleration of the process of replacing passports should be intensively promoted.

Irregular immigration

In general, the legal framework for border management already exists. The proper functioning of border management is strengthened by efficient and on-going inter-agency cooperation and the input of EU experts.

In 2010 the Integrated Border Management Strategy was approved, which is ready for implementation, as well as two documents providing a framework for transforming the State Border Guard Service (“Concept of Development of the State Border Guard Service of Ukraine until 2015” and “Development Programme of the State

4 www.facebook.com/platforma.reform?fref=ts.

Border Service of Ukraine until 2015”). The personnel of the State Border Service is now covered by a new Code of Ethics, while in 2011 the officials responsible for border management have also received new Code of Conduct. The Ukrainian border management has also regularly participated in anti-corruption trainings since 2010.

The infrastructure for border management is quite adequate. One of the key factors for this is the agreement with FRONTEX, which has been implemented effectively as well as participation in the EU Border Assistance Mission (EUBAM). As a consequence, the process of demarcation with Moldova has been 95% completed. The demarcation of the Ukraine-Moldova border was almost completed at the end of 2013 (1,209 kilometres out of a total of 1,222 kilometres have been demarcated), including 452 kilometres of the self-proclaimed Republic of Transnistria. The common borders with EU member states have also undergone a process of delimitation and demarcation. The demarcation process has been much less effective with Belarus and Russia. In spite of the fact that in June 2013 Belarus and Ukraine exchanged ratification protocols for the Agreement on common Borders (dated on May 12, 1997), frontier mark with number 0001 was established in November 2013 and during the third meeting of the Ukrainian-Belarusian Joint Demarcation Commission held in Minsk (January 2014) both sides agreed on the plan of demarcation of the state border, in practise the process has only started.

The demarcation of the land boundary with Russia started only in 2012. *De jure*, the Ukrainian-Russian maritime border, which is 321 km long (including the Sea of Azov by the Kerch Strait), still remains contested. However, due to annexation of Ukrainian peninsula of Crimea by Russia and tensions in eastern and southern Ukraine in 2014, it is currently impossible to continue the process of delimitation and demarcation of the Russian-Ukraine maritime and land border.

In the assessment of experts, migration management requires more efficient and appropriate implementation although the legal framework is largely in place. In 2011 the Concept of Migration Policy was issued, which has been adapted to meet international standards and is currently in the implementation phase. In the same year the Ukrainian government approved an action plan for the Integrated Border Management Strategy (ready for implementation in the VLAP’s 2nd phase), and also established the State Migration Service.

Although in 2013 the Ukrainian authorities have created a regularly-updated migration profile, the unified database is still at the conceptual stage and needs further development. Since the EU considers readmission to be the most effective tool for fighting irregular migration, it has obviously been a crucial point for Ukraine in its migration policy. In 2008 Ukraine signed a Readmission Agreement with the European Union and by 2014 had also signed agreements with more than 20 non-European countries. During the last few months readmission protocols have been negotiated for the implementation of the Agreement on the Readmission of People between Ukraine and Czech Republic (signed), Estonia (approved), Austria (draft approval), Cyprus (implementation is ongoing) and the Benelux countries (implementing protocols currently being processed). The appropriate protocols have been submitted for processing to the respective authorities in Poland and Portugal and have also been prepared for the Hungarian and Romanian authorities. The preparation stage for

implementing protocols has also been finalised and agreed with the Slovak Republic. Negotiations of bilateral agreements on readmission with Bosnia and Herzegovina, Macedonia, Switzerland, and Serbia are still on-going.

Active dialogue about the expansion of the readmission area with so-called “migration risk countries” is continuing successfully. The respective authorities of Afghanistan, Bangladesh, India, Iraq, Pakistan, China and Sri Lanka have received a draft of the readmission agreements and implementing protocols from Ukraine. Furthermore, the Ukrainian-Nigerian readmission dialogue has been activated and the readmission agreement with Lebanon, including the executive protocol, is being prepared.

Visa-free travel and, as a result, the possible increase in migration risks is the reason to demand the sustainable modernisation of control mechanisms, in particular in readmission and asylum policies which have to be aligned to international standards, i.e. mechanisms for the return of immigrants, the safety of individuals who have applied for international protection in Ukraine, the definitions of subsidiary and temporary protection and the provision of medical care for asylum seekers as well as access to travel documents for refugees. The infrastructure for asylum seekers, refugees, stateless persons and illegal immigrants also requires improvement.

This opinion is strengthened by the report of UN High Commissioner for Refugees (UNHCR) who argues that the asylum system still does not offer sufficient protection against expulsion and does not provide asylum and refugee status. Furthermore, the process of applying for asylum status is not based on effective and fair rules.

On March 18, 2014, during, mentioned before, working meeting of the National Coordination Centre for Implementation of VLAP it was decided to amend the national legislation on asylum. This included the definition of subsidiary and temporary protection, as well as providing free medical care to persons who have applied for international protection in Ukraine. On May 13, 2014 amendments to legislation on asylum (law № 4580) were adopted by the parliament, but no assessment has yet been available.

Public security and order

As far as the anti-corruption policy is concerned, the institutional independency between state agencies and authorities is a considerable area of doubt, in particular when it comes to establishing a specialist investigative body that dealing with the issues of high-level corruption. In 2010 the National Anti-Corruption Committee (NAC) was established. However, a presidential decree issued in 2012 which allocated additional provisions to the National Committee (e.g. increase in transparency of the members’ nomination process, sanctioning the presence of NGOs’ representatives) undermined its independence and abilities, and was also questioned by GRECO. NAC still remains under the control of the President’s Office and is linked to the National Security and Defence Council (they share the same Secretary and Secretariat). In 2013 the Office of Governmental Commissioner for Anti-Corruption Policy was restored. The coordination and exchange of information between NAC and the Governmental Commissioner has been established but practical cooperation and the linking of databases requires systematic improvement. Furthermore, in spite of the



adoption of the National Anti-Corruption Strategy in 2011 (amended in January 2014) based on the State Program on Prevention and Combating Corruption for 2011–2015 (updated January 15, 2014 as a result of a resolution by the Cabinet of Ministers of Ukraine), there is still no accompanying program and the strategy itself is too general.

All the measures of the anti-corruption policy are currently being promoted in parliament by the group of independent experts who developed the “Reanimation package”, at regular consultations which are also supported by the Committee for European Integration of the Ukrainian Parliament. As a consequence, the draft laws “On the National Anti-Corruption Investigation Bureau” (№ 4573-1) and “On the National Service for Combating Corruption” (№ 4573-1) have been registered by the Parliament of Ukraine. However, it has not been included on the parliament’s voting agenda so far. The project has also received support from the committees of the Verkhovna Rada of Ukraine and is being considered for approval by the Ministry of Justice of Ukraine. Additionally, a law for banks and banking activities was proposed to provide confirmation of the right to receive information from the databases specified in the declaration made during their inspection. The bill introduced administrative and disciplinary responsibility for inaccurate information in the declaration of assets, income and expenses.

The reality regarding the Investigation Bureau is, however, much more complicated. *De facto* it already exists, but *de jure* it still only consists of one person, i.e. the Governmental Commissioner for Anti-Corruption Policy (1200–1300 people are going to be employed. Their responsibilities will be: operational search activities, pre-trial investigation, inspections, etc.). Moreover, the Investigation Bureau has no officially-defined structure and personnel. So far all its members have the status of volunteers. In this situation, it works more like an NGO with no official status. On the other hand, it has to be said that the establishment of the independent body only concerns the second phase.

Another institution which shall soon be set up is the National Commission for the Prevention of Corruption, i.e. a preventive body that will take responsibility for coordinating policy regarding corruption, conflicts of interest, administrative investigations, etc.

The crucial point for completing the 1st phase of the VLAP, is ensuring the proper establishment of the institutional framework to combat corruption in Ukraine. Ukraine adopted a number of legal acts and ratified United Nations and Council of Europe conventions on corruption in order to fulfil GRECO recommendations and the provisions of the UN Convention against Corruption. Nevertheless, GRECO negatively assessed Ukrainian anti-corruption legislation as not in line with international standards. This is due to the fact that combating corruption in Ukraine requires a much more holistic and comprehensive approach in accordance with the Criminal Code, Criminal Procedural Code, Code of Administrative Offences, laws regarding the funding of political parties and electoral campaigns (conditions here should be specified in line with international standards to eliminate existing shortcomings). Anti-corruption legislation and implementation need to be adjusted in line with anti-money laundering activities, while the fighting of organised crime (including confis-

cation procedures and corporate liability) and transparency for public procurement should be improved.

On May 13, 2014 amendments to legislation on corruption (law № 4556) were adopted by the parliament, but no assessment has yet been available.

The legislative framework for the prevention and fighting of organised crime, financing terrorism, drug abuse and money laundering is already in place and is fully in line with international standards. All these fields were also assessed positively in the Third European Commission report on Ukrainian implementation of VLAP, as well as the action plans for the National Concept of the Policy in the Sphere of fighting Organised Crime (adopted in 2011). This was strengthened by the international documents ratified by Ukraine (including UN Conventions against transnational organised crime and financing terrorism, CoE Convention against trafficking in human beings and the Memorandum of Understanding between Ukraine and the European Monitoring Centre for Drugs and Drug Addiction) which are fundamental for preventing and fighting organised crime, financing terrorism, drug abuse and money laundering.

Due to the significant progress made by Ukraine in combating money laundering and financing terrorism, in 2011 the Parisian Financial Action Task Force (FATF) Plenary unanimously adopted the decision to exclude Ukraine from the list of countries with strategic deficiencies in combating money laundering and terrorist financing. However, an important factor for anti-money laundering is that its provisions should be extended to people involved in politics. Amendments are also needed to anti-human trafficking legislation in the form of interviewing procedures and the granting residence permits.

Despite the existence of the Virtual Contact and Analysis Centre, which intends to facilitate the exchange of information, there is still no database on organised crime and the exchange of information is limited to the departments of the Ministry of Interior and Security Service, the only ones which have direct access to this sensitive information. There is also a need to create the conditions for an appropriate level of cooperation between the Prosecutor's Office and the other law enforcement bodies, i.e. the Security Service of Ukraine, the State Border Guard Service, the Customs Service, the Military Justice services and the Prosecutor's Offices and other services of the Ministry of Interior.

In spite of the fact that the legislation on the protection of personal data still needs some correction, in general it is in line with European standards, which is essential for further cooperation with Eurojust and Europol regarding personal data protection. Moreover, the "Personal Data Protection law" (amended: April 15, 2014) includes the recommendation and amendments of the European Commission. Thanks to this revision the "post-revolutionary" authorities have speeded up the legislative actions. The responsibilities of the State Service of Ukraine on Personal Data Protection (SSUPPD) were transferred to the Ukrainian Parliament Commissioner for Human Rights at the end of March, 2014 and on April 15, 2014 (on May 13, 2014 with amendments to governmental draft, № 4551) the Parliament of Ukraine



adopted the draft law “On Amendments to Certain Legislative Acts of Ukraine on activities of the Ukrainian Parliament Commissioner for Human Rights in the sphere of Personal Data Protection”. The law extended the powers of the Ombudsman in data protection regarding the private sector and included all the recommendations in the third report of the European Commission. It will turned out soon if the demand for a complete transfer of power from the SSUPPD to the Ombudsman’s office and the broadening the latter’s responsibilities will occur.

External Relations and Fundamental Rights

If the anti-corruption policy remains the most significant weakness in the realisation of the VLAP by Ukraine, the anti-discrimination law is the most controversial and problematic.

On April 15, 2014 the Parliament of Ukraine adopted at the first reading of the draft law “On Amending the Legislative Acts of Ukraine for Preventing and Combating Discrimination in Ukraine”, and on May 13, 2014 approved the final version (№ 4581).

In order to avoid misunderstandings in interpreting the “other features” in the Constitution of Ukraine and the anti-discrimination law, the Ministry of Justice and Ministry of Foreign Affairs have addressed a joint appeal to the High Specialized Court of Ukraine for Civil and Criminal Cases to provide clarification for the lower level courts about the practical application of the concept of “other features”, as used by the law “On preventing and combating discrimination in Ukraine”. The Constitution of Ukraine and the law “On the Prevention and Combating of Discrimination in Ukraine” established a non-exhaustive list of grounds on which discrimination is prohibited and which may not be considered during court proceedings (health status, sexual orientation, appearance, etc.). Therefore, the approved law still needs to be improved by adding specific definitions of the forms of discrimination, as well as providing legal certainty of the prohibition on discrimination on the grounds of gender/sexual orientation.

Another law, “On the preventing and combating of domestic violence”, requires amendments to provide access to cultural and education services in the native language, the use of native languages for national minorities and the strengthening of legislation on social adaptation and the integration of foreign citizens. Also, the labour code should include guarantees to the private sector and provisions on reasonable accommodation for disabled persons. Furthermore, within the Strategy and an Action Plan on the Social Inclusion of the Roma minority in Ukraine in 2020, a problem of numbers (i.e. the registration of Roma people, and therefore determining of the number of Roma people in Ukraine) needs to be solved, while a strong coordination body and monitoring mechanism within the Strategy are also needed.

Ukraine has signed most international treaties and conventions regarding anti-discrimination (e.g. the Framework Convention for the Protection of National Minorities and the European Charter for Regional or Minority Languages) but its government and administration should more actively pursue the specific recommendations of the UN bodies, OSCE/ODIHR and CoE/ECRI.

Despite some legislative gaps, freedom of movement is generally guaranteed. Before the “Maidan revolution” there were some at-

tempts to improve the legislation by drafting laws, including the law “On amendments to certain laws of Ukraine regarding the registration of the place of stay and place of residence of natural persons in Ukraine”. Also, the law protecting refugees, stateless persons and foreigners has been in force since 2011, although it requires further improvements and amendments. At the same time the “Rules on processing and issuing temporary residence permits” approved by the Ministry of Interior issued in 2011 are fully in line with international standards and do not require any improvements.

At the moment the crucial points for development in the area of Fundamental Rights are: legislation regulating access to travel documents, information for foreigners about conditions of legalizing their residency in Ukraine and regulations for regular, periodic performance and anti-discrimination trainings for law enforcement officials, prosecutors and judges. It is necessary to provide financial and logistical support from the EU, both from institutions and the non-governmental sector.

A second chance for Ukraine

For the fourth year, Ukraine has remained at the first phase of implementing the Visa Liberalisation Action Plan⁵. The pace of reforms speeded up in summer of 2013, ahead to the Eastern Partnership Summit in Vilnius where Ukraine was expected to sign an Association Agreement with the EU. After it resigned from European integration, implementation of the VLAP nearly stopped.

Ukraine has suffered almost 7 months of stagnation and lack of progress. The time that has already been wasted doubles the government’s efforts in lifting visa regime as soon as possible. The active implementation of public policies which comprise the 2nd phase of VLAP should run in parallel with the finalisation of the 1st phase, regardless of the formal date for the EU’s evaluation of the 2nd phase. In such circumstances, Ukraine could expect swift visa suspension from the EU for Ukrainian citizens by 2015.

It is certain that the EU will not review any of the criteria in the VLAP because of the influence of Maidan. Europe’s fascination with revolutionary change may warrant a better perception of Ukrainian citizens, but won’t be enough to resolve the visa issues in a solely political manner. Therefore if the new Ukrainian authorities, in particular those elected in May 2014, intensify their efforts to implement the Visa Liberalisation Action Plans, the visa liberalisation process between Ukraine and the EU will get a second wind and a visa-free regime could be achieved in 1–1.5 years.

Reviewing the actions of the “post Maidan” elites it seems that, despite the turbulent geopolitical situation and uncertain internal political relations, the government and president are determined to follow the EU’s technical requirements. If the authorities elected in May continue this course of action, the EU will be obliged to provide appropriate financial, technical and logistical support for Ukraine.

5 The last part is a compilation of excerpts (including small changes) from Iryna Sushko article “Visa liberalization: a path out of deadlock” in Dzerkalo Tyzhnia, www.novisa.org.ua/en/vizova-liberalizatsiya-yak-zijti-z-mertvoyi-tochki/.

Recommendations

- The creation of a political vacuum shall be prevented where the necessary legislation has been implemented.
- Ukraine's government should take action on the implementation of the second phase tasks, particularly in areas where the first VLAP phase has been finalised. There is therefore a high probability that the assessment of the first mission about the progress of the second phase will determine tangible progress in all the areas of the VLAP. This will move Ukraine closer to its ultimate goal – the abolishment of visa requirements for short-term trips to Schengen countries.
- Strengthening the institutional capacity of all concerned central executive authorities as well as the development of staff competency through expert consultations aimed at using experience and exchanging best practices in the areas associated with the VLAP.
- Strengthening the competency of the authors of draft laws by providing them with independent expertise. Due to the lack of consultation with independent experts, adopted laws have been redrafted several times, including the laws relating to anti-discrimination, personal data protection and combating corruption.
- Amending and eliminating anti-democratic and corruption-related components of the law “On Unified State Register of Demographics and Documents Confirming the Citizenship of Ukraine, Proving Identity or Special Status”, which was adopted in December, 2012
- Amending and eliminating anti-democratic and corruption-related components of the law “On Unified State Register of Demographics and Documents Confirming the Citizenship of Ukraine, Proving Identity or Special Status”, which was adopted in December, 2012.
- Amending the Criminal Code, conducting reforms of prosecutors' offices, improving preventive mechanisms regarding declaration of assets, income and expenses by officials, and the funding of political parties.
- Ensuring that the proper institutional framework for combating corruption in Ukraine exists, in particular, the establishment of a specialist investigative body that will deal with issues of high-level corruption.
- Immediate adoption of the law on the establishment of a National Anti-Corruption Investigation Bureau and a National Commission for the Prevention of Corruption, a preventive body that will coordinate policy in this area and deal with conflicts of interest, administrative investigations, etc.