***Amicus Curiae* Brief**

for

the High Anti-Corruption Court of Ukraine

in the Case of Criminal Investigation and Charges against Yulia Tymoshenko

by

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Abbreviations

Art.	Article
CC	Criminal Code (Ukraine)
CPC	Criminal Procedure Code (Ukraine)
ECHR	European Convention on Human Rights
ECtHR (or the Court)	European Court of Human Rights
GC	Grand Chamber (ECtHR)
HACC	High Anti-Corruption Court (Ukraine)
KHPG	Kharkiv Human Rights Protection Group
NABU	National Anti-Corruption Bureau of Ukraine
SAPO	Specialized Anti-Corruption Prosecutor's Office

Executive Summary

1. The undersigned have been commissioned by the Kharkiv Human Rights Protection Group (the "KHPG") to undertake a strictly legal analysis of the investigation against Yulia Tymoshenko and her indictment on charges of an attempt to bribe a Member of the Ukrainian Parliament. The analysis is, in factual terms, based on a review of the available documentation of the investigation materials, presented by the KHPG (translated into English), and, in legal terms, on the ECHR, which is directly applicable to the proceedings at hand. The analysis is made for the purposes of the upcoming trial before the HACC. It has been carried out in full independence, without external interference of any kind.

The ECtHR has always taken the approach that an assessment of the fairness of criminal proceedings should be performed by analysing the proceedings as a whole, including all the appeals provided for by the domestic legal system. In line with this case-law, the present opinion cannot, at the current stage of the domestic proceedings, express a definitive view as to violations of the ECHR, since the issues identified may still be remedied in the course of the trial. It indicates issues of concern in light of the methods used and evidence collected by the investigation, which, if not remedied, will lead to a violation of the rights to a fair trial. These issues need to be addressed explicitly by the trial court and the trial court should provide the appropriate remedies, in accordance with its factual findings and the ECtHR caselaw.

The issues identified as potential violations of the right to a fair trial in the criminal investigation of Yulia Tymoshenko and the charges brought against her are 1) full access of the defence to all evidence; 2) the right to cross examine witnesses of the prosecution; 3) provocation to commit a crime; and 4) and ulterior motive for the criminal investigation and prosecution.

Additional issues that should be taken into consideration by the trial court are the surveillance warrant and the searches and seizures warrant. Whether Article 8 of the ECHR has been violated as a result of those warrants is not a necessarily matter for the trial court to resolve, as other domestic proceedings might be of relevance. The conditions under which these warrants have been obtained, however, and their legality, will be of relevance for the assessment of the provocation to commit a crime and the ulterior motive defences, which are issues that the trial court will have to address in order to guarantee the right to a fair trial.

I. Preliminary Remarks

The undersigned were commissioned by Mr. Yevgeniy Zakharov, Director of the KHPG, a Ukrainian human rights NGO, to undertake a strictly legal analysis of the criminal proceedings against Ms. Yulia Tymoshenko and her indictment on charges of an attempt to bribe a Member of the Ukrainian Parliament. The analysis is, in factual terms, based on a review of the available documentation of the proceedings, presented by the KHPG (translated into English), and, in legal terms, on the European Convention on Human Rights (ECHR), which is directly applicable to the proceedings at hand. The analysis is based on the evidence collected in the course of the investigation, which has been presented to the defence of Ms. Tymoshenko by the investigating authorities prior to the upcoming trial before the competent Ukrainian court, namely the High Anti-Corruption Court (the HACC). It has been carried out in full independence, without external interference of any kind. The analysis is based on a direct review by the undersigned of the available documents of the proceedings provided by the KHPG, with occasional assistance from Mr. Yevgeniy Zakharov as to the facts. For clarity and transparency, the facts on which the analysis is based have been described in a separate section. The KHPG has requested that the legal analysis be presented in the form of an *amicus curiae* brief as “this form would be of the greatest practical value” and that it addresses eight specific questions, which in its view raise specific concerns, and has requested a conclusion as to whether rights have been breached.

The ECtHR has consistently adopted a holistic approach when assessing compliance with the fair trial guarantees enshrined in Article 6 of the ECHR. Rather than evaluating individual procedural deficiencies in isolation, the Court examines the proceedings as a whole, considering whether the cumulative effect of the trial process ensured that the accused received a fair trial. This assessment is ordinarily undertaken retrospectively, once the domestic proceedings have been concluded and all relevant procedural safeguards, including available appeals, have been exhausted. Consequently, it would be premature at the present stage to conclude that a violation of Article 6 has occurred. Instead, this legal opinion identifies a number of deficiencies that give rise to concerns that require careful consideration by the trial court and specific remedies. Should these deficiencies remain unaddressed by the trial court, or should the available domestic remedies fail to rectify the impact

of those deficiencies on the fairness of the proceedings, they would ultimately give rise to a violation of Article 6 of the ECHR. The four issues identified by the present opinion as deficiencies of the investigation and potential violations of the ECHR if not remedied by the trial court are1) full access of the defence to all evidence, 2) theright to cross-examine prosecution witnesses, 3) provocation to commit a crime, and 4) an ulterior motive for the criminal investigation and prosecution. These issues have been included in the eight questions in the KHPG request for the present legal opinion.

The KHPG's request has identified two other issues in its eight questions, namely the legality of the surveillance warrant and the legality of the searches and seizures warrant. The legality of the surveillance warrant and the legality of the searches and seizures warrant raise issues under Article 8 of the Convention, the right to privacy. The remedies that need to be provided by the domestic legal system and exhausted with respect to those issues are not necessarily remedies that have to be provided by the trial court and whether Article 8 has been violated would not have a direct impact on the fairness of the upcoming trial. Still, the conditions under which those warrants have been obtained and their legality might be of relevance for the admissibility of evidence under Ukrainian law. The conditions under which those warrants have been obtained will also be of relevance for the assessment of the provocation to commit a crime and the ulterior motive defences, which are issues that the trial court will have to address in order to guarantee the right to a fair trial. For that reason, and in order to respond in an exhaustive manner to the questions raised by the KHPG, the present legal opinion will also provide a brief response to those questions.

II. Facts Established on the Basis of the Investigation Materials

The following is a description of the facts relevant for the upcoming trial, as established on the basis of the investigation materials provided to the defence of Ms. Yulia Tymoshenko, as well as some publicly known facts. The description of those facts serves two purposes. The first is to provide clarity and better understanding for the Convention compliance analysis that will follow. The second is to limit the findings of the present opinion to the known facts, as inevitably new facts will be established in the course of the upcoming trial, which will in turn affect the Convention compliance analysis.

a) General Background

Ms Yulia Tymoshenko (hereafter Ms Tymoshenko or the Defendant) is the head of the parliamentary faction of the All-Ukrainian Union 'Batkivshchyna', which is in opposition to Sluha Narodu, the current majority political party in the Ukrainian Parliament, the Verkhovna Rada.

On 22 July 2025, the Verkhovna Rada of Ukraine adopted draft law No. 12414, enacted as Law No. 4555-IX, which concerned the operating model of the National Anti-Corruption Bureau of Ukraine (NABU) and the Specialised Anti-Corruption Prosecutor's Office (SAPO). The new legislation concentrated control over NABU investigations and SAPO prosecutors in the office of the Prosecutor General, limiting their operational independence. Ms Tymoshenko has been strongly critical of NABU and SAPO, arguing that creating these anti-corruption institutions had increased rather than reduced corruption, and describing foreign influence over them as a system of “colonisation” and “outsourcing” the country’s sovereignty. The Defendant publicly supported that draft law limiting the operational independence of NABU and SAPO. The political party Batkivshchyna has also been active in exercising parliamentary control over those institutions, through the Temporary Commission of Inquiry of the Verkhovna Rada. The All-Ukrainian Union 'Batkivshchyna' faction, the Defendant and other persons associated with parliamentary oversight of NABU and SAPO have received critical coverage in pro-government media as a result of their policy positions.

b) Commencement of the Investigation Proceedings

Formal investigation proceedings appear to have commenced with Information ReportNo. 15/473цт-oi, dated 21 November 2025. Reportedly, it recorded information concerning an alleged scheme to bribe MPs of the Ukrainian Parliament in exchange for their votes. The report itself is not included in the materials made available for examination by the defence and the defence has no knowledge of its specific content. An internal memorandum dated 6 January 2026, describing information contained in that report, attributed the information about the alleged scheme for bribing MPs in exchange for their votes on legislation and other Parliamentary decisions to an unidentified 'source'. According to the information reproduced in this internal memorandum, two MPs, Pavlo Yakimenko and Bogdan Torokhtiy, were proposing that members of the majority party in Parliament Sluha Narodu switch their allegiance and

join their parliamentary group in exchange for monthly payments. Ms Tymoshenko was allegedly organizing the payments in exchange for specific voting in Parliament.

Another investigation document received by the defence, which appears to be dated 24 November 2025, is a report by Boris Indychenko, Head of a Special Detective Unit of NABU. The report states that "information was obtained indicating that members of an organized group had established a systematic mechanism for providing and receiving unlawful benefits by members of the Verkhovna Rada of Ukraine in exchange for decisions made during plenary sessions of the Verkhovna Rada of Ukraine". The report indicated five named MPs, the second one being the Defendant, indicating that there were also other unnamed MPs who allegedly participated in the scheme. This report expressly stated that the MPs were part of a criminal scheme for the systematic receipt by them of unlawful benefits in exchange for voting in accordance with instructions. It appears that the detectives producing those reports were never questioned during the pre-trial investigation about the sources and reliability of the information they reported.

On 27 November 2025, information concerning the alleged offence was entered in the Unified Register of Pre-Trial Investigations. The proceedings were entered as an investigation of a crime under part four of Article 369 of the CC, as the alleged offence involved an organised group. That classification of the investigated criminal offence as one involving an organised group was important, as it allowed the authorisation of audio surveillance, in accordance with Article 246 of the CPC. Article 246 of the CPC limits the use of audio surveillance to a number of serious offences, and without the organized group element, which was later entirely abandoned by the investigation, a surveillance warrant would have been illegal.

c) Authorisation and Conduct of the Covert Investigative Measure

The case file indicates that testimony provided by O.I. Oliinyk, a parliamentary assistant, was the key evidentiary basis for the audio surveillance authorisation. The file contains a record of his interview dated 5 January 2026 and a decision assigning him a special investigative task, also dated 5 January 2026. On the same day, 5 January 2026, Ms Natalia Kulitska, Deputy Head of a Detective Unit of NABU, the detective who conducted Oliinyk's interview, filed a request with the HACC for a covert operation and electronic surveillance warrant with respect to the Defendant. The decision assigning Oliinyk a special investigative task states that his true identity has

been concealed, in accordance with Article 272 of the CPC, with the task being assigned „to a person under the personal details ‘Oliinyk Oleksandr Ihorovych’.” No reason for concealing the identity of Mr. Oliinyk was given.

In his testimony of 5 January 2026, Oliinyk stated that, at Ms Tymoshenko’s request, a representative of a regional branch of the All-Ukrainian Union “Batkivshchyna” had arranged a meeting between her and an unidentified Member of Parliament from the Sluha Narodu party sometime in December 2025. The meeting took place at the Defendant’s party’s office at 13 Turivska Street in Kyiv. Oliinyk then described what Ms Tymoshenko had allegedly told that Member of Parliament. Namely, she proposed a scheme for voting in Parliament on her instructions, in exchange for regular payments. Oliinyk introduced this account with the phrase “it became known to me,” without identifying the Member of Parliament, the regional representative, or the source from which or the manner in which he had obtained the information.

During his later interview on 2 April 2026, after the covert investigative operation had taken place, Oliinyk expressly stated that the MP who was allegedly invited for a meeting by the Defendant in December was O.S. Mazur, and that the information he had about those events was second-hand information, coming from O.S. Mazur himself. Concerning the covert investigative operation, namely the meeting of 12 January 2026 between O.S. Mazur and the Defendant, Oliinyk stated that Mazur had informed him of the invitation the previous day; that he had accompanied Mazur to the meeting; that at Mazur’s instructions he had left the room where the Defendant and Mazur met and had not heard the conversation between them; that Mazur had subsequently recounted the substance of the conversation to him; and that he had not met Ms Tymoshenko before that day.

On 7 January 2026, an investigating judge of the HACC authorised the requested covert investigative measure in respect of the Defendant. The warrant indicated that a conclusion concerning the Defendant's possible involvement in the investigated criminal activities was based on the record of a witness examination of 5 January 2026, an internal memorandum and the record of an inspection of the website of the Verkhovna Rada of Ukraine.

On 9 January 2026, a person recorded in the materials as O. S. Mazur approached NABU and reported an alleged offer by the Defendant to provide unlawful benefits in

exchange for votes in the Verkhovna Rada. In his later testimony of 12 January 2026, witness Mazur indicated Oliinyk as his personal parliamentary assistant. The facts Mazur testified about were in line with the testimony of Oliinyk. The allegation that the Defendant initiated the communication and made the initial offer, however, is not supported in the case materials by other evidence, apart from this witness's account. Witness Mazur further stated, that during his initial contact with NABU he was informed that a criminal investigation of the Defendant for a scheme of bribing MPs in exchange for votes was already underway. Further, he informed NABU that a meeting between him and the Defendant was arranged for 12 January. No documents provided to the defence indicate that he was thereafter engaged by the investigation and that he participated in the covert investigative operation carried out during his meeting with the Defendant on 12 January 2026.

On 12 January 2026, the authorised covert investigative operation was conducted in the form of an audio recording of the Defendant. As it becomes clear from other evidence this audio recording allegedly captured a conversation between Mazur and the Defendant in an office on the premises of the Batkivshchyna political party on 12 January. The resulting audio recording was stored on the physical medium, MicroSD cardNo. 4794т. and parts of it were released by NABU on its official website on 14 January 2026. The parts of the audio recording released were selected by the investigation, with the voice of the person meeting Ms. Tymoshenko modified, as later indicated by NABU, in order to prevent voice recognition of that person.

On 12 January 2026 Mazur gave new testimony to NABU, confirming that the meeting with the Defendant on that same day, of which he had informed NABU earlier, had taken place. In his testimony, he did not expressly state that he was part of the covert operation and was aware of the surveillance or carried audio-recording equipment on him. However, the content of his conversation with Ms. Tymoshenko, which he reported in his testimony, coincides with the content of the conversation recorded on the audio record released on 14 January by NABU.

On both records of witness testimony, the one of 9 January and the one of 12 January, O.S. Mazur appears under an altered name and possibly altered personal data pursuant to an assumed-identity protective measure. The procedural documents presented to the defence, however, do not indicate this fact expressly and the defence has not received the decisions granting the assumed-identity protective measure.

In her statements at the bail hearing, and later, the Defendant has identified the person she met on 12 January 2026 as Ihor Kopytin, a serving Member of Parliament of Ukraine, belonging to the political party Sluha Narodu, the governing majority. The Defendant stated that there has been an attempt to provoke her to commit a crime, with Mr Kopytin having been used for that purpose by the investigating authorities. She further stated that Mr Kopytin was acting under pressure from NABU, who were using the fact that there were pending investigations against him as leverage.

The defence later requested that NABU provide, in light of the fact that Mazur has been identified, full access to the evidence, in particular the full audio recording and the original medium of the recording of the meeting of 12 January. NABU refused this request, implicitly admitting that an assumed-identity protective measure was applied with respect to the witness Mazur, relying at first on the discretionary powers of the investigation to provide access to evidence, and later on a risk to the safety of the witness Mazur, if his identity was revealed.

d) Searches, Notification, and Initial Public Communications

During the night of 13 to 14 January 2026, NABU detectives conducted searches, without a prior order by an investigating judge, at premises used by the Defendant for parliamentary and political activities and in a vehicle in her de facto possession. Investigative actions were also conducted in the office of Serhiy Vlasenko, a Member of Parliament, located in the same administrative building of the All-Ukrainian Union 'Batkivshchyna'. Mr Vlasenko had no procedural status in the proceedings at that time. At the time, Mr Vlasenko chaired a Temporary Investigative Commission whose remit included matters concerning NABU and SAPO. Electronic storage media, documents, and other materials were seized.

On 14 January, the Defendant was officially notified of the criminal charges against her. According to the official charge sheet, Ms Tymoshenko was suspected of “offering a public official holding a position of special responsibility an unlawful benefit in exchange for the public official performing their duties in the interest of the person making the offer”. The charges were based exclusively on the meeting of 12 January 2026 and did not involve any element of organised activity with other individuals apart from the Defendant and witness Mazur.

On 14 January 2026, NABU published an announcement on its official website entitled 'The head of a parliamentary faction of the Parliament has been notified of a suspicion“. On the same date, NABU published on its official YouTube channel a video containing part of the audio obtained during the covert investigative operation of 12January 2026. NABU's official resources also described the proceedings as concerning the 'Bribery of Members of Parliament by the head of a parliamentary faction'.

e) Defence Requests for Access and Judicial Review of the Searches

On 15 January 2026, the defence submitted application No. 15-01/26 seeking access to the audio recording of the covert investigative operation and application No. 16-01/26 seeking access to the criminal case file, including that audio recording of the covert operation. By decisions dated 16 January 2026, both applications were refused on the stated ground that access could prejudice the criminal proceedings.

On 19 January 2026, an investigating judge of the HACC considered the application for authorisation of the searches and seizures, which were already conducted. The application was heard in camera and without the participation of the defence. The court held the searches and seizures carried out on 13 and 14 January to be legal, with an appeal against this decision pending before the Supreme Court of Ukraine.

On 30 January 2026, defence counsel submitted a request to the Director of NABU, registered as No. 296/2367-01, stating that the defence had identified the witness Mazur as Member of Parliament I. V. Kopytin. The defence requested a copy of the NABU decision by which this witness had been engaged in confidential cooperation for the purpose of establishing the basis on which anonymity had been granted.

By letter No. 524-288/4057 of 3 February 2026, signed by Ye. O. Tenytskyi, NABU refused that request. The refusal relied on Article 222 § 1 of the CPC, under which information from a pre-trial investigation may be disclosed only with the written permission of the investigator or prosecutor and to the extent authorised by that official. On 10 February 2026 and on 26 February 2026, the defence again requested access to the full audio recording. By decisions dated 12 February 2026 and 2 March 2026, the requests were refused on the earlier stated ground that access could prejudice the proceedings.

f) Expert Examinations and Subsequent Restriction of Access

Expert opinion No. 2118, dated 9 March 2026, identified the recorded speech as belonging to Ms Tymoshenko. The analytical section of that opinion also stated, on several occasions, that particular portions of the recording were unsuitable or only partially suitable for examination.

On 11 March 2026, an investigating judge of the HACCissued an order granting the defence temporary access to MicroSD card No. 4794т, including the right to examine it and make copies. On 20 March 2026, Nataliia Kulitska, Deputy Head of the First Detective Unit of NABU's Second Main Specialised Detective Division, issued a decision restricting the defence's access to the audio files stored on MicroSD card No. 4794т and dated 12 January 2026. She held that all media containing audio files with recordings of the conversation of 12 January 2026 and the original voices of the two individuals with whom Ms. Tymoshenko had met, be kept separately from the criminal-proceeding materials. The decision stated that permitting the defence to copy the recording during its review of the pre-trial investigation materials, including under Article 290 of the CPC, could enable identification of relevant persons through voice recognition and comparison and could thereby create a threat to their safety.

The defence was ultimately provided with a partial derivative copy of the audio recording. It was not provided with the complete recording or the original physical medium. Consequently, the defence's technical examinations were conducted on the derivative copy disclosed by the prosecution. Independent examinations commissioned by the defence reported technical anomalies which, according to Computer Forensics Lab, were inconsistent with a continuous original recording. The PrismVote report stated that certain material phrases did not correspond to their temporal and substantive context and that reconstruction could indicate rearrangement or splicing of portions of the recording.

g) Witness Evidence and Identity-Protection Materials

The initial register entry referred to several persons whose alleged joint participation formed the basis for classification under part four of Article 369 of the Criminal Code. During the pre-trial investigation, two of those persons were questioned as witnesses, and defence counsel obtained explanations from three additional persons. All five persons were serving Members of Parliament. According to the materials submitted for examination, none provided information confirming interaction

with the Defendant in connection with the alleged scheme, and some stated that they were not personally acquainted with the Defendant.

According to the materials presented to the defence, the prosecution did not question, as a witness, the representative of the regional branch of the All-Ukrainian Union 'Batkivshchyna' who, according to Mazur, contacted him to arrange a meeting with Ms Tymoshenko.

On 26 May 2026, the Defendant was indicted. She faces charges of offering a bribe to a member of Ukraine's parliament in exchange for controlled voting. The indictment is under Part 4 of Article 369 of Ukraine's Criminal Code, namely "offering a public official holding a position of special responsibility an unlawful benefit in exchange for the public official performing their duties in the interest of the person making the offer". Charges are based exclusively on the meeting of 12 January 2026 and do not involve elements of organised activity with other MPs apart from the Defendant and witness Mazur, or sources of funding for the alleged bribe.

h) Media-Coverage Findings and Later Procedural Status

A media study reviewed 4,227 publications issued between 13 January and 1 May 2026 concerning the proceedings against Ms Tymoshenko. It established 774 publications, representing 18.3% of the reviewed material, as containing language that directly or indirectly indicated the Defendant's guilt before a judicial determination. Those publications accounted for approximately 5.6 million of the 11.3 million recorded views. The study reported that similar language appeared across successive procedural stages, from the searches and first official announcement through completion of the pre-trial investigation.

The study also recorded that an unofficial source disclosed the Defendant's name several minutes before the official announcement and that peaks in media activity occurred at times corresponding to procedural developments. It concluded that official procedural actions reinforced pre-existing media narratives. The study did not identify direct evidence of coordination between State authorities and civil-society organisations and stated that the available information was compatible both with coordination and with independent reactions to the same events.

Amendments to Article 80 of the Constitution of Ukraine were adopted in 2020, removing the existing constitutional immunity from criminal prosecution of members of

Parliament was removed. As a result, Parliament is no longer required to give its consent for the prosecution, detention or arrest of a members of Parliament. According to Ukrainian media, as of 7 April, 2026 more than 40 members of the Ukrainian Parliament, the Verkhovna Rada, were under investigation or facing charges in cases handled by NABU and SAPO.

The formal record of Mazur's testimony does not state that the witness's identity was concealed. Under Articles 15 and 22 of the Law of Ukraine 'On Ensuring the Security of Persons Participating in Criminal Proceedings', a protective measure involving altered identity particulars is formalised by a separate reasoned decision or court order. Article 15(a) provides that the decision changing those particulars is maintained separately and is not placed in the criminal case file. Article 20 provides that a protective measure may be applied where information indicates a real threat to the person's life, health, home, or property. The materials reviewed did not establish whether the nationality, date of birth, and address recorded for Mazur were authentic or altered particulars.

III. Applicable Article 6 ECHR Principles

The following is a summary of the most relevant principles under Article 6 of the ECHR drawn from the caselaw of the Court, for the case at hand. The selection of those principles has been made to reflect the general approach of the Court under Article 6, from the perspective of the specific legal issues raised by the investigation and criminal charges against Ms. Tymoshenko, which need to be addressed by the trial court.

The obligation of the prosecuting authorities to grant the defence access to all the evidential material in their possession is a well-established principle in the caselaw of the ECtHR under Article 6 of the Convention. The Court has explicitly stated that “Article 6 § 1 requires, … that the prosecution authorities disclose to the defence all material evidence in their possession for or against the accused” (*Rowe and Davis v. the United Kingdom* [GC], § 60). The Court has derived this obligation from the principles of adversarial proceedings and equality of arms between the prosecution and defence, where both prosecution and defence must be given the opportunity to have knowledge of and comment on the observations filed and the

evidence adduced by the other party. The Court has also held that an inherent element of these guarantees is the right to challenge the authenticity of the evidence and to oppose its use at trial (*Jalloh v. Germany*, § 96).

The right of access to evidence is not absolute in character. The Court has repeatedly acknowledged that the interests of criminal justice may require restrictions on access to certain material, in particular on grounds of national security, the protection of witnesses, or the preservation of the confidentiality of special investigative methods (*Paci v. Belgium*, § 85; *Rowe and Davis* [GC], § 61). However, such restrictions are compatible with the Convention only in so far as they are strictly necessary and do not impair the very essence of the rights of the defence (*Van Mechelen and Others*, § 58; *Regner v. the Czech Republic* [GC], § 148).

With respect to the issue of entrapment, the Court has accepted the use of undercover techniques by the investigation, as long as specific substantive and procedural requirements have been met. The basic principle is that the police may act undercover but not incite (*Khudobin v. Russia*, § 128), and the public interest cannot justify the use of evidence obtained as a result of police incitement, since this would expose the accused to the risk of being definitively deprived of a fair trial from the outset (*Ramanauskas v. Lithuania* [GC], § 54). These principles apply equally where the person acting covertly is not a state agent but a private individual acting on the instructions or under the control of the authorities.

In examining complaints of entrapment, the Court applies a two-stage methodology comprising a substantive and a procedural test of incitement (*Matanović v. Croatia*, § 122; *Ramanauskas v. Lithuania (no. 2)*, § 55). Under the substantive test, incitement, as opposed to a legitimate undercover investigation, arises where the authorities, or persons acting on their instructions, do not confine themselves to investigating criminal activity in an essentially passive manner, but exert such an influence on the subject as to incite the commission of an offence that would otherwise not have been committed (*Ramanauskas v. Lithuania* [GC], § 55). In assessing whether the investigation remained essentially passive, the Court examines the reasons underlying the covert operation and the conduct of the authorities carrying it out, in particular whether there were objective suspicions that the person had been involved in criminal activity or was predisposed to commit an offence (*Bannikova v. Russia*, § 38). Taking the initiative in contacting a person in the

absence of such objective suspicions has been regarded by the Court as an indication of conduct amounting to incitement (*Burak Hun v. Turkey*, § 44; *Sepil v. Turkey*, § 34).

As to the procedural requirements, the defendant must be effectively able to raise the issue of incitement during the trial, and it falls to the prosecution to prove that there was no incitement, provided that the defendant's allegations are not wholly improbable (*Ramanauskas v. Lithuania* [GC], §§ 69-70). The procedure by which the plea is examined must be adversarial, thorough, comprehensive and conclusive on the issue of entrapment (*Bannikova v. Russia*, § 57). Where there is non-disclosure of information by the investigative authorities for legitimate reasons, the Court attaches particular weight to compliance with the principles of adversarial proceedings and equality of arms (*Bannikova v. Russia*, § 58).

A third principle relevant for the present case is the right of an accused to examine witnesses against him or her, which the Court has ruled to be one of the fundamental elements of the right to a fair trial guaranteed by Article 6 § 1 and Article 6 § 3 (d) of the Convention. In assessing the compatibility with the Convention of restrictions on this right, the Court proceeds from the need to ensure the fairness of the proceedings as a whole and examines whether the restrictions on the rights of the defence were justified by sufficient grounds and whether they were accompanied by adequate counterbalancing safeguards (*Al-Khawaja and Tahery v. the United Kingdom* [GC], §§ 118-147; *Schatschaschwili v. Germany* [GC], §§ 100-131).

Whether such restrictions were justified by sufficient grounds would depend on the type of restrictions, keeping the identity of the witness concealed, limiting the type of questions that can be asked or not being able to cross-examine a witness altogether, the importance of this evidence for the conviction and the counterbalancing factors. The Court accepts that, in certain cases, the interests of witness safety may justify the application of measures aimed at non-disclosure of the witness's identity. At the same time, such restrictions are exceptional in character and require relevant and sufficient grounds to be advanced. A mere reference to an abstract risk to the witness is not sufficient: the national authorities must establish the existence of objective circumstances justifying the application of the security measures concerned, and the assessment of risk cannot be confined to general

assumptions but must be based on concrete evidence (*Al-Khawaja and Tahery* [GC], § 124; *Balta and Demir v. Turkey*, § 44).

Of particular importance is that according to the Court's case-law, the greater the evidential weight of the evidence of a witness whom the defence has not had the opportunity properly to examine, the more rigorous must be the procedural safeguards aimed at ensuring the fairness of the proceedings (*Schatschaschwili v. Germany* [GC], §§ 116, 123; *Snijders v. the Netherlands*, § 67). The national courts must evaluate if the witness statement, for which the rights of the defence to cross-examine the witness have been limited, is the only evidence ("sole evidence") or carries such massive weight that it is likely to determine the outcome of the case ("decisive evidence"). Particularly careful scrutiny is required where such evidence is sole or decisive evidence (*Al-Khawaja and Tahery* [GC], § 147) and where the witness concerned is directly connected with the formation of evidence which the prosecution regards as one of the central items in the case.

Finally, with respect to a possible ulterior motive for the criminal investigation and prosecution, Article 18 of the Convention prohibits the use of restrictions on rights and freedoms for purposes other than those for which such restrictions are permitted by the Convention. Article 18 is always applied in conjunction with another substantive right under the Convention, and the Court has held that Article 18 is applicable in conjunction with Article 6 as well, with respect to criminal prosecutions in general (see *Ukraine v Russia (Re Crimea)*, 25.06.2024, para 1338). A restriction of Convention rights cannot be compatible with the Convention if it was chiefly meant for another purpose that is not prescribed by the Convention, in other words, if that other purpose was predominant. Conversely, if the prescribed purpose was the main one, the restriction does not run counter to Article 18 even if it also pursues another purpose. In its case-law, the Court has repeatedly emphasised that an ulterior purpose is rarely confirmed by direct evidence and may therefore be established on the basis of a body of sufficiently strong, clear and concordant inferences, including the political and factual context of the case, the sequence of events and the conduct of the State authorities (*Merabishvili v. Georgia* [GC], §§ 301-317).

The Court emphasises that the assessment of a possible ulterior purpose and whether it was the predominant purpose is not reduced to an analysis of individual procedural decisions in isolation, but requires regard to be had to the overall

configuration of the prosecution and to the entirety of the measures applied; whether or not a violation of Article 18 is found depends on the assessment of the proceedings as a whole. In such an assessment, the Court attaches particular significance to the status of the applicant, the nature of the procedural measures, the manner of their implementation, the public communication of the authorities and the overall configuration of the events accompanying the prosecution (*Selahattin Demirtaş v. Türkiye (no. 2)* [GC], §§ 423-428; *Rashad Hasanov and Others v. Azerbaijan*, §§ 122-124).

IV. Issues of Concern that Must be Addressed by the Trial Court

a) Key Issues to be Addressed by the Trial Court

The present opinion will focus on four issues, which it has identified in light of the relevant facts, as laid out in the preceding section, as limiting the rights of the defence so far in a manner which would not be compatible with the right to a fair trial under the ECHR. These are 1) the anonymity granted to witnesses Oliinyk and Mazur and the resulting limitations on the right of the defence to cross examine them, 2) the refused access to the full original version of the audio recording of the covert operation, 3) the evidence of entrapment and 4) the evidence of ulterior motives for the initiation and continuation of criminal proceedings against the Defendant. Rather than reviewing them as separate questions, as they have been formulated in the request for an opinion by the KHPG, those issues will be reviewed by making cross-references between them. This approach is more appropriate, as these four issues overlap and the remedies which the trial court will have to provide in response to those issues, will quite often overlap too. For this reason, the present opinion will combine its analysis of those four issues, while referring to the legal principles established in the case law of the ECtHR on each issue separately.

All four key issues, identified earlier, centre on the role of witnesses Oliinyk and Mazur in the criminal investigation and the potential limitation of the right of the defence in their full cross-examination and access to all evidence as a result of the fact that they have been granted anonymity. At present, it is not clear to what extent the prosecution will rely on their testimony and call them as witnesses to testify at trial, and under what conditions. Given the central role of those two witnesses in the

covert operation, however, and in light of the position of the defence, which has indicated that it will request the lifting of anonymity and full cross examination, the examination and the modalities of the examination of those two witnesses are something the trial court will have to remedy.

Three lines of case law of the ECtHR will be of relevance in the decision of the trial court as to the modalities of the questioning of those two witnesses. The principles applicable with respect to anonymous witnesses of the prosecution, the applicable principles regarding the defence of entrapment, and the applicable principles regarding protection from ulterior motives in criminal prosecution.

With respect to the first, unless the prosecution lifts the measures of protection granted to those two witnesses, which in light of their prior refusals seems unlikely, the case law of the ECtHR on anonymous witnesses is directly applicable for the upcoming trial. With respect to the two other legal issues, the thresholds for applying the relevant principles of the ECtHR appear to have been satisfied, and, as a result, they will apply too. The entrapment defence has been raised by the Defendant at the bail hearing and in the course of the investigation and it is not manifestly unfounded. The investigation materials provided to the defence do not allow for an objective conclusion that the investigation authorities had at their disposal evidence of ongoing criminal activity by the Defendant, apart from the evidence obtained through the covert operation.

Similarly, the defence of a political motive for the criminal investigation and prosecution of the Defendant has already been raised, and appears to be part of the defence strategy. In its caselaw the ECtHR has declined suggestions that an applicant has to establish a *prima facie* case of ulterior motive, for the principles developed under Article 18 to apply (*Merabishvili v. Georgia* [GC], no. 72508/13, 28 November 2017, § 252 and § 310). The Court has held, however, that the complaint of an ulterior motive has to represent a “fundamental aspect of the case” and as any complaint of a violation of the ECHR, it should not be manifestly ill-founded, purely speculative or frivolous. Read in its entirety, the evidence put forward by the defence does not allow the ulterior motive defence to be qualified as manifestly ill-founded. It also appears, as it will be discussed in more detail later, to be a fundamental aspect of the case. As a result, the trial court will have to allow the ulterior motive defence both in the collection of evidence and address it in its own assessment of the

proceedings, applying the principles developed by the ECtHR under Article 18 in conjunction with Article 6 of the Convention.

b) Initiation of the Investigation and Entrapment

Both the issue of entrapment and that of ulterior motive depend on the motivation of witness Mazur for approaching NABU on his own initiative, and the motivations of witnesses Mazur and Oliynyk cooperating in the covert operation. Of particular relevance for the entrapment assessment will be the statements they have made to the Defendant in their meetings prior to the covert operation and in the course of the covert operation. Whether those two witnesses suggested the commission of the crime or acted as neutral observers, will be crucial for the trial court's answer as to whether there was entrapment under the substantive test of the ECtHR. Namely, whether those two witnesses confined themselves to investigating criminal activity in an essentially passive manner, or exerted such an influence as to incite the commission of the offence that would otherwise not have been committed (see Applicable Principles above).

The requirement for "passive investigation" would also apply to any meetings with the Defendant or individuals representing her, in which the two witnesses have participated prior to their contact with NABU and prior to their agreement to cooperate with NABU. The ECtHR has applied the substantive test on entrapment also to private individuals, when they did not act on the instructions of the investigating authorities (see *Ramanauskas v. Lithuania* [GC], §§ 63-65).Because of the centrality of witness Mazur in the investigation and the evidence supporting the charges, any limitation on his full cross examination and thus establishing the manner in which he behaved in his interactions with the Defendant and her representatives, as well as his motivation for cooperating with NABU must be subject to close scrutiny and if not allowed, it could lead to a violation of the right to a fair trial.

The allegations of entrapment rest on the lack within the investigation materials of evidence that the investigating authorities had independently verifiable information of ongoing criminal activity prior to the covert operation. The existing evidence is hearsay evidence and it comes from sources that have not been subject to examination and cross-examination on that issue. Detectives and other officials in the investigation have not testified, and witnesses Oliinyk and Mazur have not been cross-examined. Thus, the only direct evidence comes from the covert operation

itself. Due to the fact that the charges and the evidence in support of them are for a one-off event, and they come from a covert operation, the allegation of entrapment is not improbable. In line with the applicable principles of ECtHR caselaw, this shifts the burden of proof to the prosecution to establish that there was no entrapment (see Applicable Principles above).

The investigation materials contain references to NABU detectives reporting suspicions of a bribing scheme, implicating the Defendant. As one of those reports has not been presented to the defence, it is not clear whether it is one report or two different reports. Those detectives, or detective, have not been interviewed and the reliability of their sources is impossible to assess at this moment. For this reason, the prosecution cannot rely on this report or reports only, assuming a second one is presented, for its burden of proof that there was no entrapment. Testimony of detectives will also be limited by considerations of protecting methods of information gathering, which would limit the weight of the information they could provide in support of establishing that the investigating authorities had knowledge of ongoing criminal activity, independent of the covert operation. This would make the cross-examination of witnesses Mazur and Oliinyk, without anonymity protection, even more important.

In conclusion, the investigating materials do not contain at present sufficient evidence to establish that the prosecution has met its burden of proof that the investigation had prior information of an ongoing criminal activity and was acting in the course of the covert operation in a purely passive manner. The trial court will have to rule on this issue, taking into consideration the testimony of witnesses Oliinyk and Mazur and detectives who were involved in the investigation.

c) Anonymous Witnesses and the Right to Cross-Examination

The Article 6 ECHR principles that apply most directly to the questioning of witnesses Mazur and Oliinyk are those related to anonymous witnesses and the right to cross-examine witnesses. The ECtHR has restated its approach recently in a summarised form, noting that, before accepting restrictions associated with an anonymous witness, the domestic court must examine whether 1) there were good reasons for maintaining anonymity; 2) the anonymous testimony was the sole or decisive basis for conviction, or carried significant weight; and 3) sufficient counterbalancing measures protected the defence (*Snijders v. the Netherlands*, no.

56440/15, 6 February 2024; see also Applicable Principles above). This judgment also emphasised that the reason for anonymity must be examined concretely. A general reference to danger, confidentiality, or the witness's subjective fear is insufficient without an assessment of the actual circumstances. Thus, for the case at hand, the two main issues the trial court will have to decide are whether the testimony of those witnesses is key or decisive, and whether anonymity is justified in the specific circumstances of the case.

As to the first question, the testimony of those two witnesses allows the court to place the audio recording of the Defendant in a specific context and thus allows this recording to be understood. Without the testimony of those two witnesses, the fact that they are an MP from the governing majority and that MP's assistant, the place of the meeting, the preceding conversations and the overall context, it would be very difficult, if at all possible, to understand the audio recording from the covert operation. Apart from the audio recording and the testimony of those two witnesses, there is no other evidence in support of the charges against the Defendant. It thus appears that the testimony of those two witnesses will be decisive for the charges against the Defendant.

The examination of these witnesses has already taken place during the pre-trial investigation without the participation of the defence. Such a manner of obtaining evidence is not, in itself, incompatible with the Convention. At the same time, it acquires fundamental significance for the subsequent assessment of the fairness of the proceedings. According to the Court's settled case-law, the use of the evidence of a witness whom the defence has not had the opportunity to examine at the pre-trial stage requires that an adequate and proper opportunity be afforded to put questions to such a witness at another stage of the proceedings (*Al-Khawaja and Tahery* [GC], §§ 119, 127; *Schatschaschwili* [GC], §§ 105-131).

As to the second question, whether anonymity is justified, the justification for the special protection measures with respect to those two witnesses provided by NABU is their safety. No more details have been provided in that respect. In light of all the circumstances of the case, this justification does not seem convincing. There is no evidence or suggestion that the Defendant and her political party are involved in anything that is even remotely linked to violence. On the basis of the evidence in the investigation file and the publicly available information, if there is any risk for the two

witnesses, it is a reputational risk, not a safety risk. Even assuming, against all the evidence, that the Defendant and her associates might present a security risk for the two witnesses, the protection measure will still not be justified. The Defendant, without any doubt, knows the identity of the two individuals, which she met on 12 January 2026 and she has publicly identified witness Mazur as Ihor Kopytin. Once an anonymous witness's identity has become known to the accused or the defence, the original rationale for concealing that identity must be reassessed. The ECtHR has accepted that continued use of protective measures is not automatically incompatible with Article 6; however, the authorities must explain what concrete protective purpose those measures still serve, consider whether less restrictive measures are sufficient, and ensure that the remaining restrictions do not prevent the defence from investigating the witness's relationship with the accused, possible bias, credibility, or source of knowledge (see *Vasilyev and Others* no. 38891/08, 22 September 2020). The identity of the two witnesses being known to the Defendant, no specific security risk being identified and no need to protect the witnesses from public exposure or reprisals on the basis of the available case file materials, the protection measure appears to serve no legitimate purpose.

The lack of justification for keeping the anonymity of the two witnesses assumes even greater significance in light of the issues of entrapment and a possible ulterior motive of the prosecution. The importance of the testimony and full cross-examination of those witnesses for the decision as to whether there has been entrapment, has already been discussed. Their testimony and full cross-examination will also be important for deciding whether an ulterior motive existed for the investigation of the Defendant. The fact that the two witnesses belong to the majority political party in Parliament, to which the defendant is in opposition suggests that a political motive for cooperating with the investigation and actively inciting the commission of a crime are possible. Whether this was indeed the case, or whether there was no incitement and no political motive, could be assessed only on the basis of a full cross-examination of the two witnesses.

In light of the existing investigation materials, the grounds given for granting anonymity of witnesses Mazur and Oliinyk are general references to their safety, without an assessment of the actual circumstances that might justify such a conclusion, which is in violation of the principles established by the ECtHR in its case

law. The fact that witness Mazur has been identified and that his testimony is decisive for the criminal charges against the Defendant make the continued maintenance of his protection measure on the basis of the evidence contained in the investigation materials impossible to justify in line with the ECHR.

d) Access to All Evidence

Of considerable significance in the present case is also the fact that the prosecution relies on the need to protect the anonymity of witnesses Mazur and Oliinyk as a ground for restricting the access of the defence to the full audio recording from the covert operation, including the primary physical medium. The ECtHR has consistently held that the right to disclosure of evidence under Article 6 is not absolute and may be restricted where necessary to protect competing public interests, such as national security or confidential investigative methods. However, any limitation on the defence's access to evidence must be strictly necessary and accompanied by procedural safeguards sufficient to preserve the fairness of the proceedings (*Jasper v. the United Kingdom)*. The lack of a compelling public interest in protecting the identity of the two anonymous witnesses has already been discussed, and the same arguments apply equally with respect to the refusal of access to the full audio recording on that same ground. If maintained by the trial court, the restrictions on two key defence rights, the right to cross-examine witnesses and the restriction of access to key evidence will reinforce each other with a significant overall effect on the fairness of the proceedings. It is difficult to see what counterbalancing measures could be provided to compensate the lack of convincing justification for this significant restriction on the rights of the defence, which will impair the very essence of the right to a fair trial.

A particularly relevant judgment of the ECtHR with respect to the refusal to give access to the defence to the full original audio recording of the covert operation is *Yüksel Yalçınkaya v. Türkiye* [GC]. In that particular case the applicant has been convicted on the basis of reports on his use of a mobile application, ByLock, without being granted access to the primary electronic data. In finding a violation of Article 6, the ECtHRheld that access to analytical reports or derivative material cannot be regarded as a sufficient substitute for access to the primary data. The Grand Chamber expressly stated that the defence is entitled to seek access to the source material on the basis of which the reports in question were produced, since it is

precisely that material which may contain information capable of casting doubt on the admissibility, reliability or probative value of the evidence concerned (*Yüksel Yalçınkaya v. Türkiye* [GC], §§ 327-328). The Court accepted that there could be legitimate reasons, including national security concerns and the technical nature of large electronic datasets, for withholding the raw ByLock data. However, such a restriction on disclosure had to be accompanied by procedural safeguards affording a genuine opportunity to test the reliability, integrity and evidential value of the ByLock material, which was not done by the Turkish courts.

This principle will be particularly relevant in the present case, in which the audio recording appears to be the key evidence in support of the charges, with the support of the testimony of the two anonymous witnesses, who were not cross-examined so far by the defence. As there appear to be no legitimate reasons for that restriction, the procedural safeguards owed to the accused as regards the verification of the full audio recording take a particular significance. At present, the defence has not been provided the procedural opportunity to test the reliability, integrity and evidential value of the full audio recording, which might cast doubts on the admissibility, reliability and probative value of this evidence. If the trial court does not address and remedy this issue, in line with the principles established in *Yüksel Yalçınkaya v. Türkiye,* this would lead to a violation of the fairness of the trial.

e) Ulterior Motive for Prosecution

It has already been indicated that the issue of ulterior motive for the criminal investigation and prosecution of the Defendant does not appear to be manifestly unfounded and that it will have to be reviewed on the merits by the trial court. The main argument of the defence has been that both NABU and SAPO have been motivated by a desire to neutralise someone who has politically opposed those two institutions. It has also been indicated that a possible ulterior motive for witnesses Mazur and Oliinyk to cooperate with the covert operation and possibly entrap the Defendant cannot be excluded, and that these are issues for the trial court to address through collection of evidence and its own assessment.

In terms of the evidentiary burden for a finding that an ulterior motive was predominant in violation of Article 18, the ECtHR has applied its standard burden of proof, beyond reasonable doubt. It has further held that „applicants face specific evidentiary difficulties in proving that the authorities were driven by an ulterior motive

and for that reason the strict application of the principle *affirmanti incumbit probatio* … is not possible". It has further held that "there is therefore no reason for the Court to restrict itself to direct proof in relation to complaints under Article 18" and that "the possibility for the Court to draw inferences from the respondent Government's conduct … is likely to be of particular relevance in relation to allegations of ulterior purpose (*Merabishvili v. Georgia* [GC], §§ 311–313).

Thus, in addition to the direct evidence that might come from the questioning of witnesses Mazur, Oliinyk and employees of NABU,who have been involved in the criminal investigation of the Defendant, the following contextual elements will also be of relevance for the assessment of the claim of the Defendant that her criminal prosecution is politically motivated. The timing of the investigation, which took place shortly after the unsuccessful attempts of Parliament to limit the institutional autonomy of NABU and SAPO, as well as the exceptionally large number of criminal investigations against other members of Parliament. Taken together, the large-scale investigation of MPs, who exercise a control function over NABU and SAPO and the timing, shortly after legislative changes directed at those institutions are indicative of a political rather than a law-enforcement rationale.

Specific elements of the proceedings against the Defendant are also relevant. The investigation started in order to uncover an alleged network of MPs receiving bribes from outside sources, with some of those MPs redistributing those bribes to other MPs. It is precisely this organized criminal group element of the investigation, which served as the factual and legal ground for the surveillance and covert operation warrant. The timeframe within which the actual investigation developed, however, is in stark contradiction with this alleged goal. The surveillance and covert operation warrant was received on 9 January, and the covert operation was carried out on 12 January. The investigation was for all practical reasons immediately concluded, with the search of the Defendant's office and car on 13 January during the night. If the goal of the investigation was to uncover a network of corrupt influence in Parliament the sources of that influence and funding, a more systematic investigative approach would be applied. A normal law enforcement rationale of the investigation would have demanded a long-term surveillance, allowing for the collection of evidence on all the members of the network and the sources of the outside funding and influence of the alleged bribing scheme and the type of interests

being pursued. This would be the logic of a normal law enforcement operation, and this is precisely the logic that was reflected in the request for a surveillance warrant. The request contained many names of alleged members of the network, justified the surveillance precisely by the large scale of the alleged activity, and the warrant granted was for several months of surveillance.

Instead of an investigation of the whole alleged network over a long period of time, which would be the standard approach, the investigation took a completely different approach. It focused on the Defendant, the leader of an opposition political party, and has done that with the help of a political opponent from the governing majority. The covert surveillance ended within five days, and the whole investigation was concluded as soon as some evidence implicating the Defendant had been collected. Despite the fact that the investigation was deliberately terminated prematurely, the investigation authorities continued publicly to announce a broader investigation of bribery of MPs. This unusual development of the investigation suggests an ulterior motive behind the investigation.

A striking fact and an important element in the assessment of the ulterior motive of the investigation is the search of the office of Mr Serhiy Vlasenko, an MP and head of the Temporary Investigative Commission of Parliament, set up to investigate the circumstances connected with the activities of NABU and SAPO. The fact that his office was located in the office building of the political party "All-Ukrainian Union 'Batkivshchyna" is not sufficient to justify the search of his office, used by him independently. The conflicts of interest involving NABU and SAPO are apparent in this instance, and the likelihood of an ulterior motive for the searches and seizures is strong. Thus, the decision to search this office should be subject to close scrutiny by the trial court.

Another factor of relevance is the fact that the investigation sought maximum political effect by immediately making public excerpts of the audio recording of the covert operation by publishing them on the official website of NABU. It also leaked information about the investigation and identifying the Defendant prior to the official publication of information. This media strategy of NABU suggests a political rather than a law-enforcement rationale. NABU immediately published the audio recording and made public statements as to the alleged criminal activity as a network of corrupt activities in Parliament, for which the investigation had no evidence at that point and

has deliberately decided not to investigate it. Again, such behaviour cannot be explained by a standard law-enforcement rationale.

Taken in its entirety, the contextual evidence described above strongly suggests an ulterior motive, which makes it a fundamental aspect of the case and requires the trial court to explicitly address the issue. In line with the principle stated by the ECtHR, the strict application of the principle *affirmanti incumbit probatio* in Article 18 cases is not possible. In light of the contextual evidence described above, the prosecution bears part of the evidentiary burden, and should establish that the planning and conduct of the investigation was carried out in full compliance with the applicable national law and internal guidelines and without an ulterior motive. As already discussed, on the previous issues, such full assessment of the relevant evidence will have to include testimony by witnesses Mazur and Oliinyk, including cross-examination, as to their motivation in cooperating with the investigation. Similarly, testimony by detectives of NABU and other officials involved in the investigation as to the manner in which the investigation proceeded and how key decisions in its conduct were made, will be of crucial importance. A failure to allow such collection of evidence and a full assessment by the trial court as to whether an ulterior motive existed and played a predominant role could lead to a violation of Article 18 in conjunction with Article 6 of the Convention.

f) Other Relevant Issues

Three other issues have been raised by the KHPG in its questions, namely the legality of the electronic surveillance and the legality of the searches and seizures and a violation of the presumption of innocence. The KHPG has requested the present opinion to focus on the upcoming trial, from the perspective of the case law of the ECtHR. From the perspective of the upcoming trial, the first two issues are issues of admissibility of evidence and in accordance with the case-law of the ECtHR, admissibility of evidence is a matter of national law. For this reason, those issues will be touched upon only briefly. Statements implying guilt of an accused prior to the trial are a separate issue, with different effective remedies under national law, according to the case-law of the ECtHR. As this issue is of no direct significance for the fairness of the upcoming trial, the present legal opinion does not address it.

There are two concerns with respect to the surveillance warrant and the searches and seizures. With respect to the first, the warrant appears insufficiently reasoned,

both with respect to the evidentiary basis for the suspicion and the criminal activity and in terms of the proportionality of the specific measures. A lack of sufficient reasons for electronic surveillance warrants has been held by the ECtHR to be a ground for a violation of Article 8 of the Convention. The search and seizure warrant was also couched in general terms, something which has allowed the search of the office of a person who is not implicated in any way in the alleged criminal activity. The search of an office unrelated to the investigated crime is a violation of the right to privacy under Article 8 of the person using this office. As already indicated, the legality of this search and seizure and the motives to carry it out are also an important element in the assessment of the alleged ulterior motive of the investigation of the Defendant.

V. Conclusion

The evidence contained in the investigation materials indicates the following potential violations of the right to a fair trial in the criminal investigation and charges brought against Yulia Tymoshenko, which, if not remedied by the trial court, will lead to a violation of the right to a fair trial:

- the anonymity granted to witnesses Oliinyk and Mazur and the resulting limitations on the right of the defence to cross-examine them;
- the refusal of access to the full original version of the audio recording of the covert operation on grounds of the anonymity granted to those witnesses.

The grounds given for granting anonymity of these witnesses by the investigating authorities are general references to the safety of those witnesses. This is insufficient in light of the case-law of the ECtHR, while their testimony is decisive for the criminal charges and the audio recording is the key evidence in support of the charges. As of present, the defence has not been provided the procedural opportunity to fully cross-examine those witnesses, as well as to test the reliability, integrity and evidential value of the full audio recording. If not remedied by the trial court, these restrictions of defence rights would not be compatible with the right to a fair trial and would lead to a violation of Article 6 the ECHR.

Two other issues could lead to a violation of Article 6 of the Convention. At present, the investigation materials contain sufficiently strong evidence of:

- entrapment; and
- ulterior motives for the initiation and continuation of criminal proceedings against the Defendant.

The contextual evidence of entrapment is sufficiently strong to require the prosecution to meet the burden of proof and establish that the investigation was passive and did not incite a crime that would have otherwise not been committed. At present the investigation materials do not contain sufficient evidence to establish that the prosecution has met its burden of proof that the investigation had prior information of an ongoing criminal activity and was acting in the course of the covert operation in a purely passive manner.

The contextual evidence strongly suggests an ulterior motive of the investigating authorities and possible ulterior motive of witness Mazur. This requires the prosecution to present evidence as to the conduct of the investigation and the motives of the individuals making key decisions and the trial court to explicitly address the issue, and assess on the basis of both contextual and direct evidence whether an ulterior motive existed and whether it was predominant.

If the trial court does not address and remedy these two issues, this would lead in accordance with the case-law of the ECtHR to a violation of the fairness of the trial under Article 6 and under Article 18 in conjunction with Article 6 of the ECHR.



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