



LIFESTYLE MONITORING

**INTERNATIONAL PRACTICE REVIEW
AND POTENTIAL FOR APPLICATION
IN UKRAINE**



The “**Lifestyle Monitoring: International Practice Review and Potential for Application in Ukraine**” overview looks into international experience of applying such financial control instruments. Review of global praxis is ground for issuing recommendations that are in line with the Law of Ukraine “On Corruption Prevention”. Inter alia, as a result of the review, proposals are made regarding strengthened channels for taking in information from citizens and journalists, accession to international data exchange agreements, improvement of access to banking data, etc.

UNDP coordination team: Maksym Klyuchar, Robert Sivers, Halyna Kokhan, Ivan Presniakov, Yuliya Shcherbinina. Special credit is due to Dmytro Kotliar for peer-review of this analytical product.

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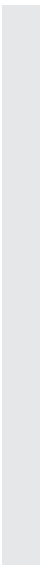
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CONTENTS

INTRODUCTION	7
LIFESTYLE MONITORING – INTERNATIONAL APPLICATION	9
GLOBAL PRACTICE OVERVIEW	10
LIFESTYLE MONITORING FOR UKRAINE: RECOMMENDATIONS.....	17
THE NATIONAL AGENCY ON CORRUPTION PREVENTION	17
LEGAL AND REGULATORY CONSIDERATIONS	18
ANNEX 1: SUGGESTED FLOWCHART FOR LIFESTYLE MONITORING APPLICATION IN LINE WITH UKRAINIAN LEGISLATION	22
ANNEX 2: EUROPEAN CONVENTION ON HUMAN RIGHTS, ARTICLE 8 — CAN LIFESTYLE MONITORING INCLUDE SECRET SURVEILLANCE INSTRUMENTS? ...	24



INTRODUCTION

The Ukrainian Law on Prevention of Corruption adopted on 14 October 2014 envisages a number of innovative instruments for countering corruption in the country. Amongst other things, the Law's Section VII, "Financial Control", envisages instruments that allow benchmarking the actual civil servant's lifestyle against his or her declared earnings. One of such instruments is the so-called "lifestyle monitoring" which is envisaged by the Law in Article 51. Keeping in mind that peculiarities of instrument application are largely left to the discretion of the National Agency on Corruption Prevention (NACP), the purpose of this analytical brief is to highlight the existing international practices of lifestyle monitoring and, based on examples available, suggest recommendations for Ukraine.

Article 8 of ECHR also covers surveillance by private entities, such as an NGO, while the threshold for legality is lower for monitoring by private entities than by the state entities

"Lifestyle monitoring" is a multi-faceted term that may denote a variety of approaches for anti-corruption oversight bodies: ranging from in-depth verification of asset declaration statements to actual field surveillance of officials suspected of illicit enrichment. Yet, if such monitoring is seen as visual observations or covert operations (field-surveillance), it has to be kept in mind that the right to respect for private and family life (Article 8 ECHR) sets certain limits to action by state bodies. Even in cases when in-office desk verifications are performed, state bodies may have certain limits imposed on their actions (while, of course, when verification is conducted merely based on documental evidence, the level of interference with private life is minimal). In such a case, each material and procedural aspect of lifestyle monitoring application will require a detailed legal basis. For each monitoring, one would have to document that the monitoring is suitable for producing compelling evidence, that no less intrusive measures are available, and that grounded suspicion is in place. If lifestyle monitoring is to mean covert surveillance operations, one

would also have to set up safeguards to protect privacy of “innocent bystanders” who happen to appear at the monitoring field.

The highlighted below case study of the Philippines shows how a broader, mixed interpretation of the lifestyle monitoring tool could be used to mobilize civil society as the front-line informant for unusual wealth of public officials. Since in the Philippines citizens and journalists had no broad-range access to state databases, they depended on starting off with on-site observations of displayed wealth of public officials. Later on, state bodies would consider the information about suspicious cases, and would follow-up with relevant action. In order to instruct citizens regarding due principles of lifestyle monitoring, a handbook was drafted for the civil society in 2007¹.

Keeping in mind the way that the relevant Article of the Ukrainian Law “On Prevention of Corruption” is structured, NACP may utilize lifestyle monitoring as a channel for taking in information from citizens, CSOs, media or any other source, conducting preliminary analytical work (screening), and initiating a full asset declaration verification or requesting additional investigation from other relevant institutions, including the entities and institutions specially authorized to combat corruption.

¹ Handbook “Declarations without decorations” designed by Transparency International Ukraine may be seen as a Ukrainian counterpart to the described manual. File available at: http://ti-ukraine.org/sites/default/files/images/library/metodologiya_stylu_zhyttya.pdf

LIFESTYLE MONITORING – INTERNATIONAL APPLICATION

“Lifestyle monitoring” (alternatively known as “lifestyle checks”² and “lifestyle audit”³) is a term used internationally with one or both of the following meanings: 1. desk review in order to verify information contained in asset declarations, as well as consideration of facts obtained from open sources that testify to discrepancies in the lifestyle observable and items declared⁴; 2. observations in the field conducted to determine whether a public official or his or her close person has assets and / or a lifestyle that are a mismatch with officially declared wealth⁵.

In any of these two cases or in combination thereof, there usually is a strong logical link between the asset declaration and verification regime (that establishes the baseline for benchmarking the standard of living) and the lifestyle monitoring. Moreover, both of the above-mentioned areas will sometimes overlap. Thus, the asset verification procedure may foresee use of publicly available digital mapping services to determine location of declared property, while lifestyle monitoring could cross-check with databases to see if any wealth found in the field is registered on the public official or his or her family. Similarly, an expert assessment of the value of real estate, as may be

² World Bank, *Public Office, Private Interests: Accountability Through Income and Asset Disclosure* (2012), p. 3, <https://star.worldbank.org/star/publication/public-office-private-interests>.

³ *The Star (Kenya)*, 1 April 2016, *EACC plans random integrity checks and lifestyle audits*, http://www.the-star.co.ke/news/2016/04/01/eacc-plans-random-integrity-checks-and-lifestyle-audits_c1323368.

⁴ *Greco Eval I Rep (2001) 13E Final (Romania)* at § 26: “Finally, in addition to the declaration of assets, the Romanian government introduced compulsory tax returns on 1 January 2001, another method of monitoring possible discrepancies between lifestyle and declared legal revenue.”

⁵ Niven R. Canlapan, *Investigative Practice in Immigration Corruption Cases in the Philippines*, p. 2, www.unafei.or.jp/english/pdf/PDF_GG7_Seminar/philippines.pdf: Lifestyle monitoring’s “objective is to discover the location and kinds of properties of the person who is the subject of investigation, including the places frequented and his hobbies in order to know whether or not he is living within the standards allowable by law. It may not be confined to the person himself/herself but also to the members of his family and his friends.”

foreseen by asset declaration laws, will normally also envisage an expert looking at the property on-site.

GLOBAL PRACTICE OVERVIEW

Judging by available studies, five countries use lifestyle monitoring as a tool (**Mongolia, Nigeria, the Philippines, Romania, and Rwanda**)⁶. It is the Philippines case that is deemed most relevant to building a lifestyle monitoring system for Ukraine.

Lifestyle checks in the Philippines were introduced in 2002⁷ as the President ordered them on all government officials including the police and military. In March 2003 a **“Lifestyle Check Coalition”**, bringing together government and civil society bodies, signed a memorandum of understanding. The coalition included six member agencies of the Inter-Agency Anti-Graft Coordinating Council: the Presidential **Anti-Graft Commission** (PAGC), the Ombudsman, the Department of Justice, the National Bureau of Investigation, the Commission on Audit, and the Civil Service Commission. The coalition also included the National Youth Commission, as well as several anti-corruption NGOs and the Catholic Bishops Conference of the Philippines.

The Coalition was described in 2005 as follows: It *“pools the expertise, resources and manpower of its members in identifying leads, gathering information and prosecuting accused public officials. The public provides the information, while the intelligence-gathering units of the Coalition (such as the NBI [National Bureau of Investigation] and the Intelligence Service of the AFP [Armed Forces] investigate suspected officials. The findings are forwarded to other member units for evaluation and confirmation.”*⁸

⁶ World Bank, *Public Office*, p. 61.

⁷ This paragraph is quoted by and large from: Transparency International, *Global Corruption Report 2004*, pages 237 and following.

⁸ Ombudsman, *Primer on Corruption*, p. 22, www.ombudsman.gov.ph/UNDP4/wp-content/uploads/2013/01/DGF-primer-Primer-on-Corruption.pdf.

The President mandated the PAGC to be the lead implementer of this program with the Ombudsman as the enforcer of findings and recommendations. After the abolishment of the PAGC in 2010, the Ombudsman has remained as the main stakeholder for promoting lifestyle checks. In 2006, the Ombudsman launched a *“lifestyle check hotline [...] as a dedicated channel for reporting incidents of corruption and leads on ill-gotten or unexplained wealth of public officials.”*⁹ The hotline exists until today displayed prominently on the homepage of the Ombudsman.¹⁰

The case of the Philippines may be treated as an umbrella one for a number of practices. One of them is an almost classic example of journalist investigations leading to a public outcry: “In 2003 a Philippine reporter used the publicly available forms filed under a newly enacted financial disclosure law to check the lifestyles of mid-level managers of the national tax agency. She compared what was reported about the value of homes, the number of cars owned, and so forth with what real estate and automobile registries showed and what neighbours said about how the managers lived. Many had significantly understated the value of their homes or lied about the number of cars they owned. On the day that her story appeared, two managers resigned and several more were placed on administrative leave.”

In a publication of 2005, the former head of the Anti-Graft Commission emphasised more the desk review nature of lifestyle checks: “What is a lifestyle check? It is an investigation into the character and ways of living or lifestyle of government officials and employees to determine consistency with their income. It presumes that government officials living extravagantly beyond their means may be involved in graft and corruption. It is anchored on freedom of information and access to important data, for example the Statement of Assets and Liabilities and Networth (SALN) and Income Tax Returns (ITR).”

From 2004 to the beginning of 2005, internal anti-graft units were formed in six agencies. They conducted 159 lifestyle checks on government officials and forwarded over 100 cases to the Office of the President and the Ombudsman¹¹.

As already noted, the lifestyle monitoring system in the Philippines is a hybrid of a complaints hotline on suspicious wealth, a regular system for financial

⁹ Annual Report 2006, p. 9, <http://www.ombudsman.gov.ph/index.php?home=1&navId=Ng==&subNavId=NDg=>.

¹⁰ www.ombudsman.gov.ph

¹¹ *Ibid*, page 89.

The government also foresaw in its government programme the introduction of “Random Lifestyle Checks”

verification of declarations based on desk review of data, a system that enables covert observations of public officials, and, finally, a mechanism for launching financial investigations in the criminal sphere. Thus, the *“lifestyle check consists of four areas: behavioural (such as leisure habits); asset value; relative checks (means checking relatives who could have gained employment through the official’s influence); and conflict of interest.”*¹² Broadly speaking, the aim of the tool application was to investigate *“the morality, lifestyle, and nightlife of government officials to gather evidence of graft and corruption.”*¹³

As far as the regulatory frameworks that enable lifestyle monitoring to take place are concerned, the possibility to conduct lifestyle checks for the Ombudsperson is envisaged by Section 15, Act No. 6770 on the Ombudsman¹⁴: *“The Office of the Ombudsman shall have the following powers, functions and duties: [...] 11. Investigate and initiate the proper action for the recovery of ill-gotten and/or unexplained wealth amassed after February 25, 1986 and the prosecution of the parties involved therein”. At the same time, the Ombudsman has only primary analysis and fact-finding powers, as it is “authorized to obtain and secure from all appropriate government agencies, including the Bureau of Internal Revenue such documents that may show the declarant’s assets, liabilities, net worth, business interests and financial connections.”*¹⁵

One of such agencies is the Revenue Integrity Protection Service¹⁶ – the anti-corruption arm of the Department of Finance¹⁷. It is specifically entrusted with

¹² Eiji Oyamada, *President Gloria Macapagal-Arroyo’s Anti-Corruption Strategy in the Philippines*, *Asian Journal of Political Science*, Volume 13, Number 1, June 2005, footnote 52, <http://www.tandfonline.com/doi/abs/10.1080/02185370508434251?journalCode=rasi20>.

¹³ *Medium-Term Philippine Development Plan 2004-2010, Chapter 21 Anti-Corruption*, p. 249, www.philconstruct.com/docs/downloads/NEDA%20DOCS/Medium%20Term%20Development%20Plan%202004-2010.pdf.

¹⁴ *An Act Providing for the Functional and Structural Organization of the Office of the Ombudsman, and for other Purposes*, 17 November 1989, <http://www.gov.ph/2003/12/17/executive-order-no-259-s-2003/>.

¹⁵ *Ombudsman, Frequently Asked Questions on the Statement of Assets, Liabilities and Networth (SALN)*, p. 6, <http://www.csc.gov.ph/2014-02-21-08-28-23/pdf-files/category/193-saln-forms?download=2587:frequently-asked-questions-faq-on-the-saln>.

¹⁶ <http://www.rips.gov.ph/>.

¹⁷ <http://www.gov.ph/2003/12/17/executive-order-no-259-s-2003/>.

For further, more in-depth measures, the Ombudsman depends on law enforcement agencies and the legal powers they can use

functions “to investigate [...] unusual or unjustified accumulation of wealth disproportionate to the earning capacity of government officials and employees under its jurisdiction and to initiate, and assist in, the prosecution of such cases for recovery or forfeiture of ill-gotten wealth [...]”

While the powers of the Revenue Integrity Protection Service were challenged in courts, including sufficient regulation of lifestyle monitoring, the Supreme Court in its 2009 verdict shot down the complaints noting that “the so-called lifestyle check pertains to the evidence-gathering process itself because it is through this method that the [Revenue Integrity Protection Service] would be able to collect sufficient evidence to indict a suspected [...] official or employee for graft and corruption. Considering this, the Court finds nothing illegal with the lifestyle check as long as the constitutional and statutory rights of the accused are recognized and respected.”¹⁸

As far as efficiency and effectiveness of the hybrid lifestyle monitoring model utilized in the Philippines is concerned, the annual reports by the Ombudsman continuously emphasise the impact of lifestyle checks¹⁹. They list the number of checks conducted and the amount of wealth forfeited to the state. The UNCAC Peer Review Report also contains data in this regard²⁰. At the same time, practical gains and successes are, usually, described in generic terms: “In 2003, the Lifestyle Check program of the government started to show results. High profile cases were then pursued. Top-ranking officials in the Bureau of Internal Revenue, Bureau of Customs, and Department of Public Works and Highways were targeted for lifestyle check. Some of them were suspended from public office while a few were dismissed [...]. This has helped raise public’s hope in the government’s effort in the fight against corruption and boost revenue collection [...]”²¹

¹⁸ Decision, G.R. Nos. 178000 and 178003, 4 December 2009, http://sc.judiciary.gov.ph/jurisprudence/2009/december2009/178000_178003.htm.

¹⁹ <http://www.ombudsman.gov.ph/index.php?home=1&navId=NQ==&subNavId=OTY=&cy=2015>.

²⁰ http://www.unodc.org/documents/treaties/UNCAC/CountryVisitFinalReports/2013_11_28_Philippines_Final_Country_Report.pdf.

²¹ Transparency and Accountability Network, *Lifestyle Checks – A Handbook for Civil Society*, p. 5, <http://gateway.transparency.org/tools/detail/432>.

The handbook defines “lifestyle” as combination of the following elements: real estate, movables, travels, school fees, extravagant parties, gambling in casinos, loan payments, tax payments, cost of living

Despite this, cost-effectiveness estimates done in 2005 underlines resource-intensity of lifestyle checks including the ensuing investigation. Thus, *“in the Philippines, it was estimated that the cost of investigation per case was around USD 2 000. In 2004, the average time-frame for investigation of a case was around three months plus ten months of Ombudsman proceedings (reduced from the previous average of two years).”*

Importantly, the lifestyle monitoring, as conducted in the Philippines on the side of state authorities, has no underlying unified methodology or inter-agency flowchart of action²². Instead, investigative strategies are drawn up for each case and adapted throughout implementation.

Unlike the state, civil society in the Philippines did come up with a guide that is called to make citizens more vigilant, partake in information search and verification, as well as gathering other field evidence. In 2007, the civil society organisation “Transparency and Accountability Network” (TAN)²³ drafted a 52-page publication “Lifestyle Checks – A Handbook for Civil Society”.²⁴

This handbook sets out by pointing to a crucial need of citizen support: In 2004, government agencies had 278 investigators, while there were about 1.5 million government employees with the ratio of potential verifications thus reaching 1 to almost 6 000. The objective of the publication is therefore to nudge the citizens to become whistle-blowers on lifestyle irregularities.

The suggested methods for citizen action are subdivided into two groups of tools: 1) gathering information from observation and 2) analysing documents. The handbook, amongst other things, contains a simple formula for calculating whether the wealth exceeds the income and highlights some practical tips for such calculations (for instance, not forgetting the 13th monthly salary many

²² Interview with representatives of the Philippines Ombudsman, August 2016.

²³ TAN appears to be not active anymore. Its former website (<http://www.tan.org.ph>) is deactivated and a Facebook page has its last entry from July 2013 (<https://www.facebook.com/TransparencyandAccountabilityNetwork>).

²⁴ <http://gateway.transparency.org/tools/detail/432>.

government employees are paid). In addition, the handbook provides a few hints on how to detect some assets (“seeing the children in school uniform” as a lead to expenditures for private schooling).

Finally, the reader finds a list of main documents needed for verification of declared data (car registration for vehicles, real estate deeds, as well as salary grade tables, declaration forms etc.) and showcases an example of piecing together all evidence to come up with a lifestyle estimate. Finally, the manual instructs readers on how to write a report providing a template in this regard, and lays down the suggested code of conduct for tipsters.

If summarized, this brief overview of the case from the Philippines may generate the following conclusions:

- ▶ *Lifestyle monitoring in the described case is mostly an activity aimed at mobilizing civil society in order to detect as many enriched public officials as possible. In other words, lifestyle monitoring spreads the normal verification work of one or several state oversight bodies into society at large.*
- ▶ *In the case of the Philippines, citizens do not have access to state databases such as vehicle registries, and the access and quality of registered data is rather weak. Therefore, citizens have to take “on-site observations” as a starting point for listing the actual wealth of a public official.*
- ▶ *State bodies would in most cases not need on-site observations in order to detect registered assets.*
- ▶ *The term “lifestyle checks” in the case of the Philippines is used mostly for normal desk review-style verification of declarations. On-site observations are not a stand-alone feature in this process which one can review separately. These largely depend on cooperation with law enforcement authorities and require a relevant suspicion.*
- ▶ *There is neither a specific legal basis for state-run lifestyle checks nor a dedicated methodology. The handbook for civil society contains tips for on-site observations and primary logical analysis. While it misses out on legal limits of such observations by citizens, the practical consequences of this gap are minimal.²⁵*

²⁵ As far as data collection by citizens on public officials is concerned, there has been no statutory provision until 2012, when the Philippines enacted the “Data Privacy Act” (<http://www.gov.ph/2012/08/15/republic-act-no-10173/>). The Act also covers data collection by private individuals, but exempts activities “for journalistic [...] or research purposes”. The exemption for journalists is in line with international standards – for more please refer to Article 9 Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data (<http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:31995L0046>).

LIFESTYLE MONITORING FOR UKRAINE: RECOMMENDATIONS

Keeping the national legislative context in mind, as well as the international practices highlighted above, and the considerations for protection of privacy (please refer to Annex 2 for more detail), it may be recommended to adhere to the following logic:

THE NATIONAL AGENCY ON CORRUPTION PREVENTION

A. For NACP, citizen- and journalist-generated insights, state databases and information from private entities will be the main source for verifying the “lifestyle” of a public official – as envisaged by the law. For instance, one of the avenues for utilizing such external information is verification of cases on undue declaration of real estate, since conclusions regarding real (market) value of the property may be drawn only as a result of visual observance. Such field observations are beyond the NACP mandate but may be conducted by citizens or journalists.

B. NACP should join international agreements on data exchange for the purpose of verifying asset declarations²⁶ and for the purpose of taxation²⁷, as taxation information from abroad could be used for verifying asset declarations.

C. A strong methodology for comprehensive declaration verification as per Law’s Article 50 would bolster NACP efforts in conducting its own verifications, and in following-up on citizens’ complaints.

D. Use of open source data for verifications should be coupled with honed analytical skills.

²⁶ <http://rai-see.org/regional-data-exchange-on-asset-disclosure-and-conflict-of-interest/>.

²⁷ See for example European Court of Human Rights / Information Note 191 – December 2015, page 19 (English summary of decision in French), www.echr.coe.int/Documents/CLIN_2015_12_191_ENG.pdf.

- ▶ E. NACP will clearly benefit from access to banking data. In this context the stubbornly persisting myth should be dissolved that, under human rights standards, access to banking data necessarily requires approval by prosecutors or a court. The ECtHR has found no violation of privacy in 2015 in a case where a country transmitted data on bank accounts to another country abroad for the mere administrative purpose of tax verification and without any individual suspicion or court order²⁸. In addition, the legislation of Ukraine already envisages access to information under bank secrecy for some of the agencies without court decision (albeit, only the information regarding registered individual entrepreneurs and legal entities).
- ▶ F. Lifestyle monitoring should also include a stage for summarizing cases and reviewing legal and regulatory loopholes and gaps in the legislation that continue having an impact on the asset declaration regime. For example, where a public official did not have to declare his/her cash reserves in the past, he or she could always justify any expense later on by alleging cash reserves brought to office (that in fact did not exist). Where such loopholes could be still remedied through new regulation, NACP should advocate such changes.
- ▶ G. NACP could review whether it should issue its own manual for citizens on how to conduct a lifestyle monitoring. For instance, this could be a simplified instruction (“one-pager”) written in comprehensible language to address a large circle of people. There could be in addition a more detailed resource tailored to the current Ukrainian declaration system and addressing above issues possibly not covered in the Transparency International Ukraine methodology.
- ▶ H. The aforementioned instruction could be complemented by public awareness measures such as an annual award for the most innovative lifestyle check, or the one leading to the financially most outrageous evidence. In any case, it will be of utmost importance for NACP to ensure transparency regarding action undertaken in follow-up on citizen complaints.

²⁸ ECtHR, *ibid.*

LEGAL AND REGULATORY CONSIDERATIONS



I. As for lifestyle monitoring in the field by citizens, no changes in the legal framework appear to be necessary. Ukraine has a law on protection of personal data (2297-VI, of 1 June 2010, as amended on 3 July 2013).²⁹ In addition, there are criminal provisions setting boundaries for citizens to interfere with other citizens' private life, such as trespassing (Article 162) or violation of secrecy of correspondence (Article 163 of the Criminal Code).³⁰ On-site observations by citizens will have to stay within the boundaries of these laws. If observations do not remain within the boundaries, and the violation is noticed, the citizen will face the respective legal consequences. However, the citizen can still submit the intelligence as a complaint to NACP. One can expect that evidence legally obtained by NACP during the ensuing verification / fact-checking can be used in court.

To conclude, the main line between administrative verification of asset declarations and criminal investigations runs between open inspections versus undercover operations. Thus, the following generic regulation is recommended based on Law's Article 51, Paragraph 3.

PROCEDURE FOR MONITORING LIFESTYLES OF DECLARANTS: SUGGESTIONS FOR DISCUSSION

Article 1. OBJECTIVE

This guidance (internal decree) is based on provisions of the Law "On Prevention of Corruption", Article 51, Paragraph 3, and regulates the procedure and boundaries for monitoring the lifestyle of declarants by authorized persons of NACP.

Article 2. DEFINITIONS

- *"Open source data"*: Data from overt, publicly available sources, such as the media, internet, web-based communities and user-generated content, public official data, publications, and public geospatial data.*

** This requires amending the law "On Corruption Prevention"*

²⁹ <http://www.lexology.com/library/detail.aspx?g=fc6dbbd9-60a5-4715-8466-0921d33787ec>.

³⁰ <http://www.legislationline.org/documents/action/popup/id/16257/preview>.

- *“Open on-site inspections”*: The visual sighting of a specific object of income, asset or expenditure as it could be seen by any citizen within the public sphere, as for example on public streets. This concerns in particular the visual inspection of real estate property or a vehicle as it is visible to the general public.

Article 3. OPEN SOURCE DATA

Monitoring of data from open sources, should a discrepancy be discovered between the actual lifestyle and assets, is used as grounds for full declaration verification and as supplementary source of information for it, as specified under Law's Article 50.

Article 4. PROCEDURE: OPEN ON-SITE INSPECTIONS*

- *On-site inspections conducted by NACP require written approval by the supervisor of the authorised person.*
- *The duration of the inspection shall not exceed the time necessary for sighting the appearance of the object in question.*
- *The authorised person may document the visual sighting of the on-site inspection through the necessary number of photos.*
- *After the inspection, a written report is submitted to the supervisor and is duly kept on file.*

Article 5. REFERRAL: SURVEILLANCE OPERATIONS

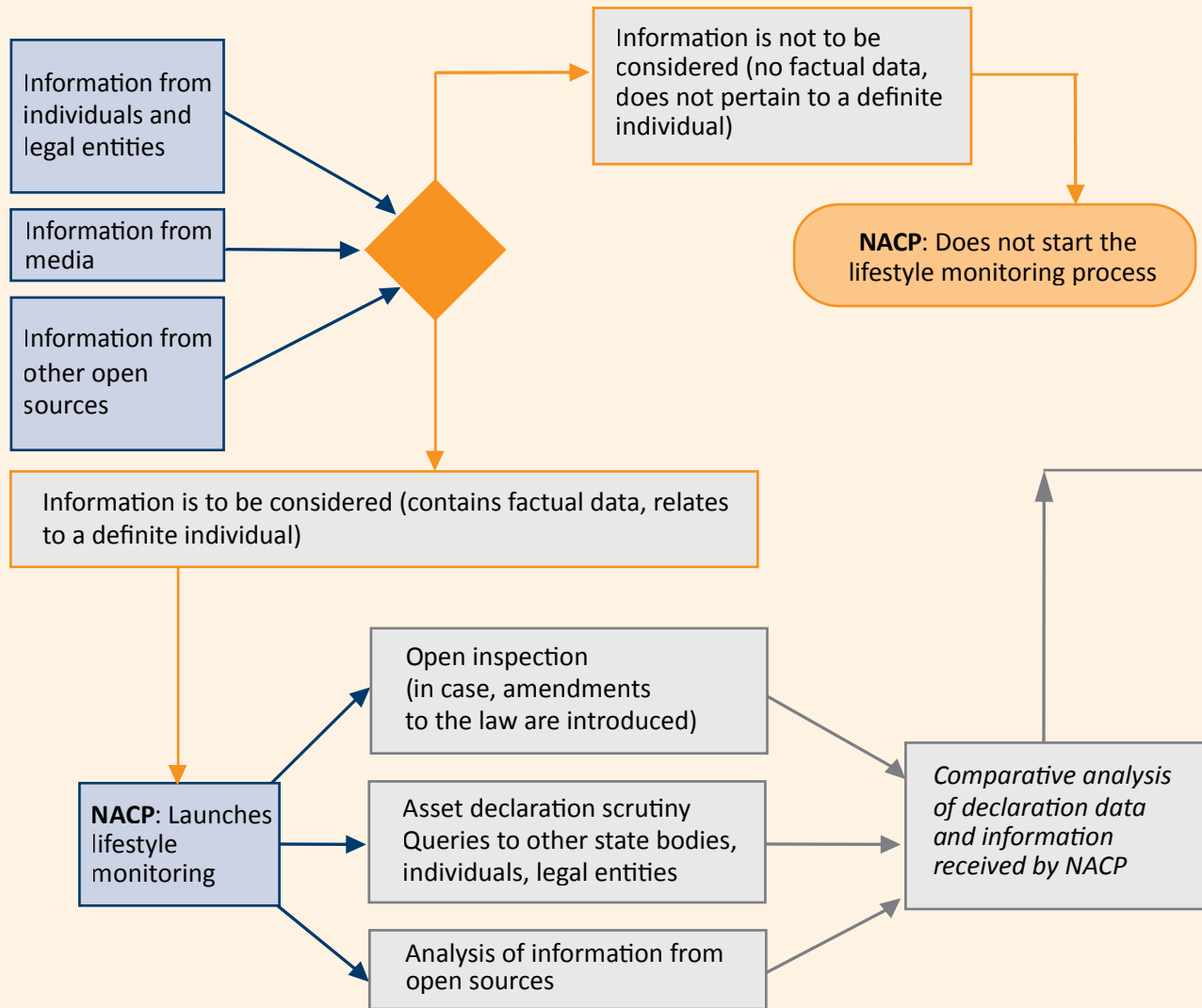
NACP does not conduct surveillance operations. In case it appears opportune to conduct a surveillance operation in order to obtain additional intelligence on the lifestyle of a declarant, NACP refers the case to the [specify the body – for instance NABU] and specifies the elements of suspicion and the possible criminal offence concerned as provided for in the Law's Article 51, Paragraph 4 part 2.

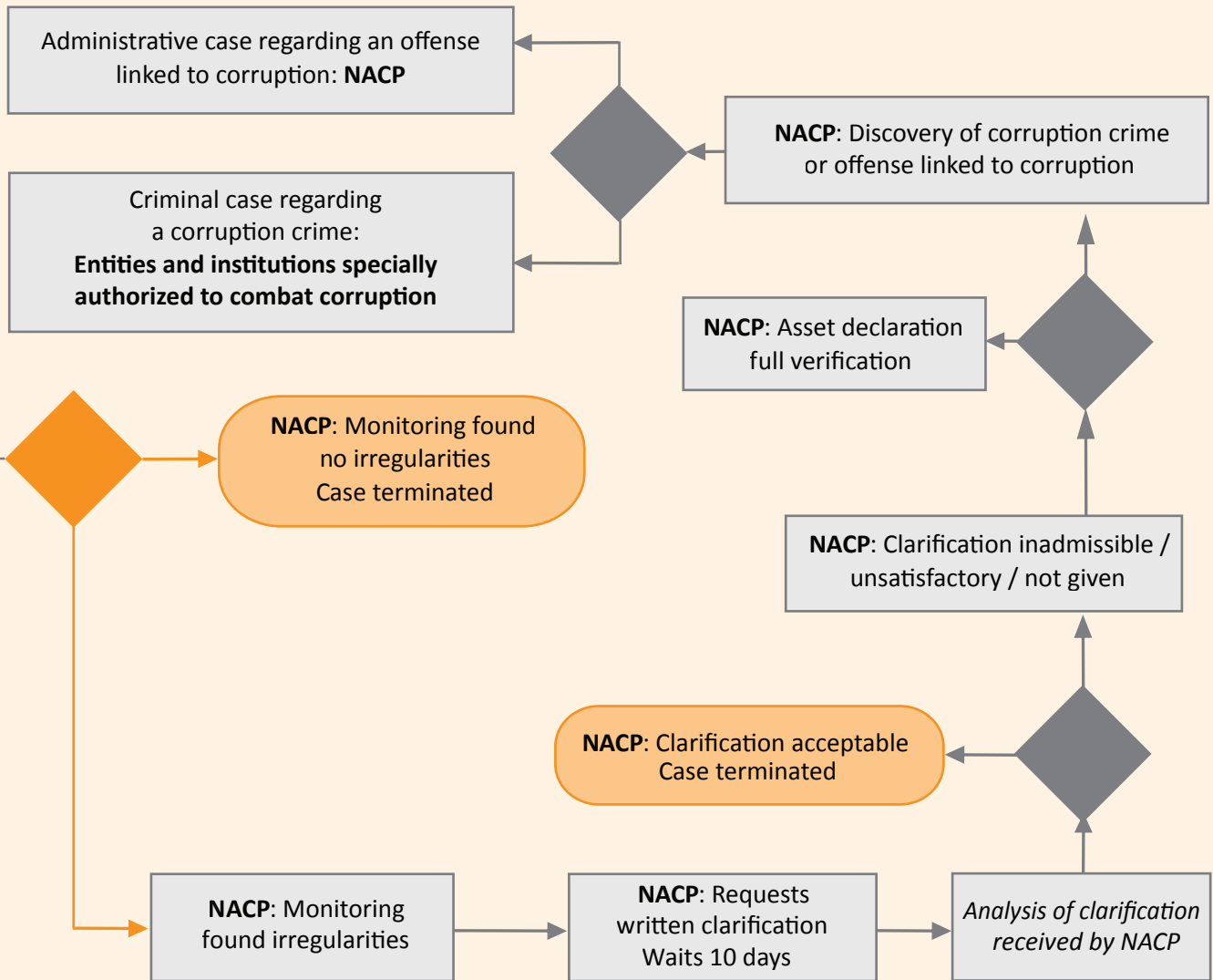
Article 6. ACTIONS THAT FOLLOW THE DISCOVERY OF A LIFESTYLE IRREGULARITY

As per Law's Article 51, Paragraph 4 part 1, NACP – having determined a discrepancy between the standard of living and property and income declared by the declarant, shall give opportunity to the declarant within ten working days to provide a written explanation regarding this finding. A written response of the declarant is attached to the case of the ongoing comprehensive declaration verification file. Should the declarant fail to provide an explanation in the required time-frame or refuse from providing one, NACP shall [define concrete action that shall be undertaken in such case].

* This requires amending the law “On Corruption Prevention”

ANNEX 1. SUGGESTED FLOWCHART FOR LIFESTYLE MONITORING APPLICATION IN LINE WITH UKRAINIAN LEGISLATION





ANNEX 2. EUROPEAN CONVENTION ON HUMAN RIGHTS, ARTICLE 8 — CAN LIFESTYLE MONITORING INCLUDE SECRET SURVEILLANCE INSTRUMENTS?

Lifestyle monitoring in this aspect may consist, in particular, of the following activities:

- observing the movements of a public official (or close person);
- observing the home or assets outside the home;
- observing assets worn by the public official (or close person);
- taking pictures;
- taking videos;
- taking minutes of the observations made,

and, at the same time, be compliant with Article 8 of the European Convention on Human Rights that reads:

1. Everyone has the right to respect for his private and family life, his home and his correspondence.
2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

a. GENERAL TEST

The European Court of Human Rights (ECtHR) tends to review cases by the following scheme:

- I. Is there “family life”, “private life», “home” or “correspondence” in the facts of the case?
- II. Has the right been interfered with?
- III. Was the interference permissible?
 - a. Was the interference made in accordance with the law?
 - b. Was the interference taken for one of the legitimate aims set out in Article 8.2?
 - c. Was the interference “necessary in a democratic society”, that is does it “correspond to a pressing social need and in particular, [is it] proportionate to the legitimate aim pursued”?

b. MONITORING BY STATE INSTITUTIONS

As for step I, the ECtHR has included the following activities interpreted as interference with private life:

- secret surveillance of a person (whether with recording or not);³¹
- taking a picture of a person;³²
- depending on the case at hand – activities of a professional or business nature and measures effected outside a person’s home or private premises, even in a public context;³³
- monitoring of the actions of an individual by the use of photographic equipment, if data is recorded and the recording is systematic or permanent³⁴ (whereas the monitoring of the actions of an individual in a public place by the use of photographic equipment which does not record the visual data, as such, does not give rise to an interference with the individual’s private life).³⁵

Interestingly, the ECtHR so far regards the mere use of an undercover agent without any use of recording devices as not “affecting private life”. The Court stated: “The use of an undercover agent had taken place within the context of a deal relating to 5 kg of cocaine and had been aimed at arresting the dealers. Mr Lüdi must have been aware that he was engaged in a criminal act under the Drugs Law and that consequently he ran the risk of encountering an undercover police officer whose task would in fact be to expose him.”³⁶

This decision appears to be the only decision by the ECtHR on the use of undercover agents without recording devices³⁷. Legal commentaries however remain cautious, to what extent this decision would

³¹ ECHR, *Ramanauskas v. Lithuania*, Application No. 74420/01, 5 February 2008, par. 50, 51.

³² *Peck v. the United Kingdom*, no. 44647/98, §§ 57-58, ECHR 2003 I; *Perry v. the United Kingdom*, no. 63737/00, §§ 36-37, ECHR 2003 IX (extracts); and *Benediktssdóttir v. Iceland (dec.)*, no. 38079/06, 16 June 2009.

³³ *Ibid.*

³⁴ *P.G. and J.H. v. the United Kingdom*, no. 44787/98, § 57, ECHR 2001-IX; *Peck*, cited above, §§ 58-59; and *Perry*, cited above, § 38.

³⁵ See, for example, *Herbecq and the association “Ligue des droits de l’homme” v. Belgium*, applications nos. 32200/96 and 32201/96, Commission decision of 14 January 1998, DR 92-B, p. 92.

³⁶ <http://hudoc.echr.coe.int/eng/?i=001-57784>.

³⁷ *Karen Reid, Practitioner’s Guide to the European Convention on Human Rights, 4th edition, 2011, page 142.*

apply to an undercover agent for example entering a suspect's house, even if not wearing a wire³⁸. One should also note that in the Lüdi-case the agent's task was only to make contact, but not to observe the specifics of his private movements. If agents are tasked to collect data on the public official, the risk of private life being at stake is probably high (see step II).

Furthermore, in the Lüdi-case it was clear that the targeted person was involved in criminal activity. The question remains, if the undercover activity would interfere with privacy if the targeted person was not a suspect. As far as can be seen, no decision by the ECtHR so far has dealt with this question. It is however probably fair to say that substantial doubts remain, whether the ECtHR would come to the same conclusion in a case targeting a non-suspect. At least in the context of interceptions of ordinary citizens, the ECtHR recently decided against Hungary and noted that the law was applied without "the basis of an individual suspicion regarding the target person"³⁹.

As for step II, the following factors weigh in:

- Was a particular individual targeted by the monitoring measure?⁴⁰
- Was personal data processed or used in a manner constituting an interference with respect for private life?⁴¹
- A person's reasonable expectations as to privacy is a significant though not necessarily conclusive factor.⁴²

It should be noted that the interference may already exist through "legislation permitting secret measures" without "such measures" being "in fact applied to" the complainant.⁴³

STEP III. a: Was the interference made in accordance with the law?

This step requires the presence of a national law, the clarity and precision of its wording and the

³⁸ *Ibid.*

³⁹ *Szabó and Vissy v. Hungary*, Application no. 37138/14, § 71, 12 January 2016.

⁴⁰ *Rotaru v. Romania [GC]*, no. 28341/95, §§ 43-44, ECHR 2000 V; *Peck*, cited above, § 59; and *Perry*, cited above, § 38.

⁴¹ See, in particular, *Perry*, cited above, §§ 40-41, and *I. v. Finland*, no. 20511/03, § 35, 17 July 2008.

⁴² See *Halford v. the United Kingdom*, 25 June 1997, § 45, *Reports of Judgments and Decisions 1997 III*, and *Perry*, cited above, § 37.

⁴³ *Klass v. Germany*, App. No. 5029/71, § 34 (1980).

aim it pursues⁴⁴. In the context of surveillance, this specifically means that the law “must specify the offences which may justify an interception order, subjective limitations to particular categories of people, chronological limits of the monitoring, the procedure to be followed for examining, using, sharing and storing the data obtained, the precautions to be taken when communicating these data to third parties, the circumstances in which the information can be erased or destroyed, and the provision of prior or ex post facto review by a judge or other genuinely (objectively and subjectively) impartial authority, factually and hierarchically independent from the body in charge of imposing such measures, empowered to certify that recordings were genuine and reliable. Should national legislation omit to refer to some of the above-mentioned elements, the Court will extend its assessment to domestic case-law which may be relevant to safeguarding individuals. In all circumstances, however, the approach of the Court is rather rigid [...]”⁴⁵

Domestic legal provisions do not only include statutory legislation but “also judge-made law typical of common law jurisdictions, international legal obligations applicable to the state in question, and a variety of ‘secondary’ sources, for example royal decrees, emergency decrees, and certain internal regulations based on law”⁴⁶.

STEP III. b: Was the interference taken for one of the legitimate aims set out in Article 8 §2?

This step is probably the easiest to take. Lifestyle monitoring has the aim of “prevention of [...] crime” in the sense of Article 8 § 2. It may detect cases of illicit enrichment, which is a criminal offence in Ukraine. It may also detect public officials who through other corrupt/criminal ways accumulate illicit wealth.

STEP III. c: Proportionality

The proportionality test consists by and large for the following three sub-questions:

- i. Is there a pressing social need for some restriction of the Convention?
- ii. If so, does the particular restriction correspond to this need?
- iii. If so, is it a proportionate response to that need?

⁴⁴ Council of Europe human rights handbooks (2012), *Protecting the right to respect for private and family life under the European Convention on Human Rights*, page 37.

⁴⁵ Council of Europe human rights handbooks, page 40 (emphasis by author).

⁴⁶ Human rights files No. 15 (1997), *The exceptions to Articles 8 to 11 of the European Convention on Human Rights*, p.10.

The first question by and large overlaps with Step III.B. The pressing social need is the fight against corruption, in particular the accumulation of illicit wealth by public officials.

More relevant in the context of lifestyle monitoring is question ii. In this context it is essential that the monitoring is suitable to produce a relevant result. Otherwise, the monitoring does not “correspond to the need”. For example, the National Agency might want to conduct a monitoring, because somebody observed the public official’s wife wearing a “5,000 €” fur coat. What could the monitoring possibly achieve? Probably it could neither establish the value of the coat (being above the declaration threshold) nor the actual ownership. The added value of the monitoring would depend on the larger framework (see above section 3a and 3b).

In the context of question iii, in particular the availability of less intrusive measures are of importance. Could the same information be obtained through open source information or from other witness testimony? For example, one could establish through lifestyle monitoring (secret surveillance) that a public official’s child is sent to an expensive private school. However, there seems to be a variety of less intrusive measures available: obtaining data from the agency registering children for school or from the private school in question; requesting information from the public official on which public school the child allegedly visits and verifying this information through the records of the public school.

Another aspect of proportionality is the trigger of the monitoring: Is there a concrete substantiated suspicion of hidden wealth, or is the monitoring conducted based on a random sample? As far as can be seen, there are no cases where individual citizens are targeted by surveillance measures without a suspicion of a serious crime justifying the intrusion. In this regard, Article 51 § 1 of the Ukrainian Law “On Prevention of Corruption” indicates that monitoring is only conducted upon a suspicion. It is recommended to specify the level and substance of the suspicion in the future regulation under Article 51 § 3 of the Law.

Another point for consideration can be the rights of innocent bystanders who through their contacts with the public official fall within the scope of the monitoring. Such collateral intrusion is the side-effect of most surveillance measures. However, one needs to make sure that one avoids interference with non-targeted persons as much as possible.

One needs to keep in mind that the ECtHR views secret surveillance as one of the most serious interferences. Article 8 paragraph 2, “since it provides for an exception to a right guaranteed by the

Convention, is to be narrowly interpreted. Powers of secret surveillance of citizens, characterizing as they do the police state, are tolerable under the Convention only in so far as strictly necessary for safeguarding the democratic institutions⁴⁷.

c. MONITORING BY CITIZENS

It should be noted that Article 8 § 2 ECHR concerns only an “interference by a public authority”. However, the ECtHR has also included cases where private employers monitored their employees. The Court found that the subsequent use of the monitoring results in “public proceedings before the labour courts” (over the dismissal of the employee) constituted interference⁴⁸. Article 8 ECHR is also concerned in other situations between private individuals, such as the taking of pictures by one citizen of another: “The Court reiterates that, although the object of Article 8 is essentially that of protecting the individual against arbitrary interference by the public authorities, it does not merely compel the State to abstain from such interference: in addition to this primarily negative undertaking, there may be positive obligations inherent in an effective respect for private or family life. These obligations may involve the adoption of measures designed to secure respect for private life even in the sphere of the relations of individuals between themselves [...]. The boundary between the State’s positive and negative obligations under this provision does not lend itself to precise definition. The applicable principles are, nonetheless, similar. In both contexts regard must be had to the fair balance that has to be struck between the competing interests of the individual and of the community as a whole; and in both contexts the State enjoys a certain margin of appreciation [...]”⁴⁹.

There appears to be no case law on the legality of undercover activities by private citizens or organisations (NGOs). However, the situation for private entities is obviously easier than for state agents. Journalists, private detectives, or private citizens do not need authorisation by a prosecutor or court if they want to observe another citizen or public official. However, an observation would require justification. This could be the wish to verify the truthfulness of an asset declaration or to follow-up on a prima facie irregularity such as the display of unusual wealth. The observation would need to be proportionate. This means in particular restraining to the necessary measures and data as

⁴⁷ *Klass v. Germany*, App. No. 5029/71, § 42 (1980).

⁴⁸ *Köpke v. Germany*, 420/07, 5 October 2010.

⁴⁹ *Von Hannover v. Germany*, Application no. 59320/00, § 57, [http://hudoc.echr.coe.int/tur?i=001-61853#{%22itemid%22:\[%22001-61853%22\]}](http://hudoc.echr.coe.int/tur?i=001-61853#{%22itemid%22:[%22001-61853%22]}).

well as avoiding any excess in observations (in particular duration of monitoring and intimate nature of the data). However, journalists or citizens are free in principle to take pictures (unless they concern rather intimate details). Privacy issues usually arise only in this context, if citizens or journalists want to publish the pictures,⁵⁰ something which is not relevant in the context of lifestyle monitoring.

It is interesting to note that there would probably be no practical consequence of a violation of Article 8 ECHR. The public official will most likely not notice the observation. If the citizen does not make any report to state agencies, nobody will follow-up on the violation. If the citizen reports only the concrete suspicions noted, but does not report his/her possibly excessive monitoring activities, nobody will follow-up on any possible violation.

If the National Agency (or any other law enforcement body) would open its own investigation on the suspicion and establish all evidence by itself without using any of the citizen's testimony in court, there is a high likelihood that any possible violation of privacy by the citizen will not affect the legality of the court procedure itself. There are two points in this regard:

- Do rules excluding evidence obtained illegally by the police apply to evidence obtained by private citizens?
- If so, do these rules exclude only the evidence obtained, or also evidence legally obtained through ensuing investigations?

As far as can be seen, there is no jurisprudence by the ECtHR on the first question. There are foreign decisions, such as by the German Constitutional Court, which exclude private citizens from rules on prohibiting evidence. The Court decided that private individuals acquiring evidence in an illegal manner does not suffice to ban its use when state authorities had not incited their actions.⁵¹

On the second question, the Grand Chamber of the ECtHR had to decide a case where evidence was obtained from the defendant in violation of Article 3 ECHR (prohibition of torture). As a result of the police threatening torture, the defendant led the police to the location of the kidnapped victim. At first instance, he also confessed to the crime. The Court found no violation since the evidence obtained

⁵⁰ *Von Hannover, ibid.*

⁵¹ *Decision of 9 November 2010, 2 BvR 2101/09, <http://www.bverfg.de/pressemitteilungen/bvg10-109.html> (German), English summary: http://www.winheller.com/files/german_business_law_news_summer_2011.pdf, page 3.*

through the threat was not used in court, but only other evidence such as the confession: “[T]he Court considers that it was the applicant’s second confession at the trial which – alone or corroborated by further untainted real evidence – formed the basis of his conviction for murder and kidnapping with extortion and his sentence. The impugned real evidence was not necessary, and was not used to prove him guilty or to determine his sentence. It can thus be said that there was a break in the causal chain leading from the prohibited methods of investigation to the applicant’s conviction and sentence in respect of the impugned real evidence.”⁵²

While the prohibition on torture is the most absolute human right, one can expect that the ECtHR would be even more “liberal” with much less serious violations of privacy. For example, a citizen might have conducted a video-recording of a public official depositing a huge amount of cash at a bank. The video-recording might be illegal, for example, because the citizen trespassed on the bank’s property. Consequently, the video might, or might not be admissible in a Ukrainian court, depending on its case law. However, even if the recording was illegal, this should not prevent the National Agency from requesting documents from that bank for a full examination of the public official’s asset declaration.

One should also keep in mind that observations and data collection by citizens on other citizens will probably be relevant in the context of Ukraine’s legislation on data protection.

d. CONCLUSIONS FOR LIFESTYLE MONITORING

From above jurisprudence, one can draw the following conclusions for lifestyle monitoring by state agents:

- **Private life:** Lifestyle monitoring will usually concern the private life of the public official concerned. This includes his/her movements outside home and his/her contacts with other persons. In exceptional situations, privacy will not apply:
 - In purely public situations, for example, where a public official has an appearance at a press conference and somebody takes a picture of the gold watch displayed on the wrist.
 - Where the observation targets only an asset as it is visible to the general public. This concerns mostly real estate or businesses. Taking a look at the size of a house or the entrance hall of a

⁵² *Gäfen v. Germany*, Decision of 1 June 2010, Application no. 22978/05, § 180, <http://hudoc.echr.coe.int/eng?i=001-99015>.

business as visible from a public street, should not concern the private life of the owner. For this reason, for example, a zoning agency does not need a surveillance order from criminal court, if it wants to take a simple look if the construction of a house ended up with more stories than foreseen in the building permit.

- **Interference:** The targeting of a particular person, the systematic approach, and the collecting of data all speak in favour of an interference with privacy – insofar the situation is private.
- **Permissible:** There are five aspects in this regard.
 - There is yet no sufficient legal basis for lifestyle monitoring. Article 51 of the Law “On Prevention of Corruption” empowers NACP to conduct the monitoring. § 3 explicitly leaves regulation of the procedure entirely up to the Agency. At the same time, if NACP wishes to interpret lifestyle monitoring in a wider sense, it should regulate substance questions, as to when the monitoring would apply, what forms it could take, etc. If a NACP employee at a press-conference or in the street noticed signs of possibly unjustified lifestyle (expensive watch, vehicle or else), this may be the trigger to lifestyle monitoring, as it will be the case of “open source” information.
 - For each monitoring, the National Agency would have to document that the monitoring is producing relevant results suitable for establishing a case. This can either be evidence that allows for compelling conclusions, or intelligence which enables the Agency to take another relevant step, such as consulting a foreign data base (in the case of a foreign license plate) or requesting a justification from the public official (on a big cash expenditure).
 - For each monitoring, the National Agency would have to document that there is no less intrusive measure available for achieving a similar impact.
 - For each monitoring, the National Agency would need to document the suspicion justifying the monitoring.
 - For each monitoring, the National Agency would need to make all efforts in advance to reduce interference with “innocent bystanders”.

For monitoring by citizens, the same need for justification exists in principle. However, there are no formal procedures and the practical consequences for violating the privacy of a public official are rather non-existent.



UNDP in Ukraine

1, Klovs'kiy uzviz

Tel.: +38 (044) 253-93-63

Fax: +38 (044) 253-26-07

www.ua.undp.org