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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW
(VENICE COMMISSION)

UKRAINE

FOLLOW-UP OPINION

TO THE OPINION
“ON THE DRAFT LAW “ON AMENDMENTS TO CERTAIN
LEGISLATIVE ACTS OF UKRAINE ON IMPROVING THE PROCEDURE
FOR THE SELECTION OF CANDIDATES FOR THE POSITION OF
JUDGE OF THE CONSTITUTIONAL COURT OF UKRAINE ON A
COMPETITIVE BASIS”
(DRAFT LAW No. 9322 of 25 May 2023)

Adopted by the Venice Commission
at its 135th Plenary Session
(Venice, 9-10 June 2023)

on the basis of comments by

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I. Introduction

1. On 23 November 2022, the Venice Commission issued an urgent opinion ([CDL-PI\(2022\)046](#)) on the draft law “On Amendments to Certain Legislative Acts of Ukraine on improving the procedure for the selection of candidates for the position of judge of the Constitutional Court of Ukraine on a Competitive Basis” (the “Law”). On 6 December 2022, the President of the Venice Commission sent to the Chairman of the Verkhovna Rada a letter clarifying certain aspects of the urgent opinion.
2. The Ukrainian Parliament adopted the Law on 13 December 2022. The text of the Law was made available to the Venice Commission Secretariat on 16 December 2022 in Ukrainian. The Commission, therefore, did not have the opportunity to examine the text of the Law as adopted prior to its 133rd Plenary Session (Venice, 16-17 December 2022). In view of these circumstances, at that session, the urgent opinion was adopted as an ordinary one (the “December 2022 Opinion”).¹
3. On 29 December 2022, the Venice Commission was requested by the Speaker of the Verkhovna Rada to nominate candidate members for the first composition of the Advisory Group of Experts (“the AGE”), as provided by the Law.
4. On 25 January 2023, the President of the Venice Commission sent to the Speaker a letter, together with an analysis carried out by the rapporteurs and endorsed by the Venice Commission’s Bureau, of the compliance of the Law² with the core recommendations of the December 2022 Opinion.³ The Venice Commission’s President explained that in light of the conclusion that two core recommendations of the December 2022 Opinion remained to be implemented, the Venice Commission’s Bureau had decided not to nominate any candidates pending the amendment of the Law.
5. On 4 April 2023, tripartite online meetings took place with the participation of the Venice Commission rapporteurs, the Chairman of the Verkhovna Rada Committee on Legal Policy, the Deputy Prime Minister of Ukraine for European and Euro-Atlantic Integration, and representatives of the European Commission.
6. On 10 April 2023, the Ukrainian authorities submitted draft amendments to the Law (“the draft amendments”), requesting a swift assessment of the Venice Commission in order to allow the Parliament to finalise the legislation. The draft amendments were registered in the Verkhovna Rada on 19 April 2023 (Draft law No. 9225 dated 19 April 2023, [CDL-REF\(2023\)018](#)).
7. On 12 April 2023, the Bureau of the Venice Commission, given that the Commission had already adopted the December 2022 opinion concerning the Law, decided to use the follow-up format for the preparation of this opinion. The Bureau further authorised the preparation of the follow-up opinion through the urgent procedure, pursuant to Article 14a of the Commission’s revised rules of procedure.
8. On 7 and 21 April 2023, the Commission received input from Ukrainian civil society organisations (CSOs) on Draft law 9255.
9. On 4-5 May 2023, a delegation of the Venice Commission led by its President travelled to Kyiv to meet with the President of Ukraine, the Speaker of the Verkhovna Rada, the Minister of Foreign Affairs, the Deputy Prime Minister for European and Euro-Atlantic Integration, the Minister of Justice and the Vice-Minister of Education, as well as the acting President of the Constitutional

¹ [CDL-AD\(2022\)054](#) – Opinion on the draft law “On Amendments to Certain Legislative Acts of Ukraine on improving the procedure for the selection of candidates for the position of judge of the Constitutional Court of Ukraine on a Competitive Basis”, adopted by the Venice Commission at its 133rd Plenary session (Venice, 16-17 December 2022).

² *Ibid.*

³ [CDL-PI\(2023\)002](#) - Ukraine - Follow-up to the Opinion [CDL-AD\(2022\)054](#).

Court, representatives of civil society and several members of the diplomatic community. Draft law No. 9225 dated 19 April 2023 “On Amendments to Certain Legislative Acts of Ukraine on improving the procedure for the selection of candidates for the position of judge of the Constitutional Court of Ukraine on a Competitive Basis” was one of the topics discussed. The authorities announced that they would amend Draft law No. 9255. The Commission’s Bureau therefore decided, on 10 May, to await the revised Draft law and to assess it in its opinion, thus reverting to the ordinary procedure.

10. On 23 May 2023, a tripartite online meeting took place with the participation of the Venice Commission rapporteurs, the Chairman of the Verkhovna Rada Committee on Legal Policy, the Deputy Prime Minister of Ukraine for European and Euro-Atlantic Integration, and representatives of the European Commission. On 25 May 2023, Draft law No. 9225 dated 19 April 2023 was withdrawn, and Draft Law No. 9322 dated 25 May 2023 “On Amending Some Legislative Acts of Ukraine Regarding Improving the Procedure for Selecting Candidate Judges of the Constitutional Court of Ukraine on a Competitive Basis” (see [CDL-REF\(2023\)025](#)) was registered in Parliament. By a letter of the same day, the Chairman of the Verkhovna Rada requested the opinion of the Venice Commission on Draft law No. 9322.

11. Having served previously as the rapporteurs for the December 2022 Opinion, Mr Paolo Carozza, Ms Marta Cartabia, Mr Srdjan Darmanović and Mr Christoph Grabenwarter continued to act as rapporteurs for this follow-up opinion.

12. On 27 May 2023, comments on Draft law No. 9322 were received from the CSO Anti Corruption Center “Antac” and on 29 May and 6 June 2023, comments on Draft law No. 9322 were received from the CSO De Jure.

13. This follow-up opinion was prepared in reliance on the English translation of the draft amendments. The translation may not accurately reflect the original version on all points.

14. This follow-up opinion was drafted on the basis of comments by the rapporteurs and the results of the exchanges with the Ukrainian authorities and the European Commission. It was adopted by the Venice Commission at its 135th Plenary Session (Venice, 9-10 June 2023).

II. Background

15. In their analysis of 25 January 2023, the Venice Commission rapporteurs found that two of the core recommendations formulated in the December 2022 opinion had not been followed. These recommendations are:

- to ensure that the AGE provides the relevant appointing body with the names of the screened candidates accompanied by its assessment of the moral qualities, including integrity, and also the professional competence of each candidate (ranging from not suitable, to suitable, to very suitable). These assessments should be made available to the public; candidates who are judged by the AGE to be “not suitable” are to be excluded from further consideration and must not be chosen by the appointing bodies; and
- to provide in the law for a solution that would avoid deadlock in cases where the AGE cannot reach a decision. For as long as the AGE will be operating with international members, the number of AGE members should be increased to seven. The seventh member should be on the international quota.

16. In the latter context, recalling the extraordinary and temporary nature of the AGE's international component, the Venice Commission rapporteurs stressed that the role of the international members during the six-year transitional period is to guarantee the choice of the most independent and best candidates and that the presence of such a component should be meaningful. The Commission also noted that while a composition of seven members, with four members being appointed on the international quota, appears to be the optimum solution, the solution chosen for

the Ethics Council (with a casting vote of the international quota) could also be acceptable should the Ukrainian authorities insist on it.

III. Analysis

17. The Venice Commission will assess the proposed new amendments against the background of its previous recommendations, including the two not having been followed so far.

A. The AGE composition and decision-making models for assessment of integrity and professional competence

18. It appears from the draft amendments that the six-member composition of the AGE has been maintained, despite the Commission's recommendation to add a seventh member on the international quota. In their inputs to the Venice Commission, recalling the current composition of the CCU (13 judges out of 18) and the crucial role the Court has to play as regards post-war elections, reintegration of occupied territories and Euro-Atlantic integration, the CSOs stressed the risks of politicisation of the Constitutional Court should the following features be accepted for the AGE: six-member composition; no casting vote for the international members of the AGE, as well as a very high threshold (at least five votes) for grading a candidate as "suitable".

19. The Commission regrets it, as in its view the seven-member model would be easier to operate and would make the international presence in the AGE more meaningful. In their submissions the CSOs expressed the view that it was the best guarantee against the politicization of the Constitutional Court. However, the Venice Commission is of the view that a six-member composition could only be considered acceptable provided that the solution chosen for the Ethics Council – i.e. the prevailing vote of international members – were adopted. The Venice Commission, in addition, finds that, if the Ukrainian authorities insist on the six-member composition the casting vote of the international quota should be provided in the context of the assessment of both integrity and professional competence of the CCU candidate judges.

20. The Venice Commission notes that the draft amendments propose two phases of selection (which may be conducted simultaneously if the AGE so decides): an assessment of moral qualities, including integrity ("the integrity assessment"); and a professional competence assessment. Following both the integrity and the professional competence assessments, candidates are rated into two categories ("suitable" and "not suitable"); the candidates graded "not suitable" are excluded from further consideration (Article 10⁸, paragraphs 4 and 6, respectively, of the Law on the Constitutional Court).

21. Pursuant to Item 20 of Transitional Provisions, "During the transitional period of selection, the Advisory Group of Experts takes decisions by at least four votes of its members, of which at least two are nominated by international organisations or the European Commission 'For Democracy through Law'. If due to the same number of votes 'for' and 'against' the Advisory Group of Experts cannot make a decision, a second vote is held. In the event of an equal number of votes 'for' and 'against' in such a second vote, the votes of three members of the Advisory Group of Experts, of whom at least two are nominated by international organisations or the European Commission 'For Democracy through Law', shall be decisive."

22. The Venice Commission welcomes that in response to its recommendation, the draft amendments explicitly provide that "not suitable" candidates are excluded from further consideration following both integrity and professional competence assessments.

23. The Commission also notes that the decision-making model follows Item 50 of the Final and Transitional Provisions of the Law "On the Judiciary and the Status of Judges",⁴ which is the decision-making rule of the first composition of the Selection Commission for vetting candidates for membership in the High Qualifications Commission of Judges. This provision is similar to the voting rules applied in the case of the Ethics Council.⁵ One difference between the two rules concerns the first vote. As opposed to the six-member Selection Commission, where decisions are approved if they are voted by four members, the Ethics Council can take a vote also with a simple majority of the members present, provided that at least two international members vote in favour of the decision. However, this is relevant only in cases when not all members of the Ethics Council participate. For the AGE, this would normally not be relevant because the appointment of substitute members (see below) should ensure that the AGE always meets in full composition. The voting model proposed is therefore acceptable because it provides for the casting vote of the international members in case of a tie vote in line with the principles chosen for the Ethics Council. .

24. The Commission welcomes that the draft amendments provide that both the decision on the moral qualities and the decision on the professional competence of the candidates are taken, either separately or jointly, through a voting model which gives the members on the international quota a decisive say and that these decisions will result in the final exclusion of such candidate. This model recognises that the participation of international members in this procedure should be meaningful, and is therefore in line with the Commission's recommendation.

25. The draft amendments add a final phase to the selection procedure: after the AGE has selected the "suitable" candidates (in respect of both integrity and professionalism), it expresses a preference vote by roll call, which results in a ranking of all the suitable candidates depending on the number of votes received from the members of the Advisory Group, from the highest (6 votes in favour) to the lowest (0 votes in favour) (Article 10⁸.7). The ranking is not binding; the list in the ranking order of all the suitable candidates is transmitted to the parliament and to the Council of judges; the vote on the candidates is thereafter made in the order of the ranking (Article 208⁴.16 of the Rules of procedure of the Verkhovna Rada; Article 10¹¹). The Venice Commission had not recommended any ranking of the candidates, although it had suggested that three categories of candidates could be created: "very suitable", "suitable" and "not suitable". As long as this additional phase does not exclude any candidate who has been considered as "suitable" with the casting vote of the international members of the AGE, it does not affect the Commission's conclusion above that the draft amendments abide by the recommendation that the assessment of both the moral and the professional qualities of the candidates should be decided by the AGE with a decisive vote of the international quota. Two CSOs have argued that such additional ranking vote is redundant and enables the national members of the AGE to control its decisions, thereby affecting the fairness of the selection by the appointing bodies. The Commission underlines, however, that the preference vote is expressed on candidates who have all been considered as "suitable"; in this phase, the votes of national and international members have the same weight, but the order of election depends on the vote of the international members as much as on the vote of the national members.

26. The Commission considers nonetheless that the ranked order should not have any mandatory consequence on the order of voting of candidates by the Congress of Judges; it therefore recommends removing the relevant provision from Article 10¹¹ of the draft law.

⁴ "The decision of the first composition of the Selection Commission is approved if it is voted by the four members of the Selection Commission, two of which are appointed by international and foreign organizations. In case of an equal number of votes "for" and "against", the votes of the three members of the Selection Commission, two of whom are proposed by international and foreign organizations, shall be deemed decisive".

⁵ "2.3.3. A decision of the Council shall be adopted by a majority of votes of the members present, provided that it is supported by two votes of the Council members proposed by international and foreign organizations. In case of an equal number of «for» and «against» votes, one more voting shall be held. In case of an equal number of «for» and «against» votes cast at the re-voting, the votes of the members of the Council, of whom at least two are proposed by international and foreign organizations, shall be decisive".

27. Finally, as concerns the three members appointed on the international quota, the Venice Commission recalls, in response to a concern expressed by the CSOs, that the “international” members of the AGE may well be Ukrainian citizens (see [CDL-AD\(2022\)054](#), § 30), including reputable representatives of civil society organisations.

B. The recusal/self-recusal procedure

28. In order to ensure continuity and efficiency of the AGE’s functioning, the draft amendments introduce the following novelties:

Article 10¹². Deputy member of the Advisory Group:

“1. At the same time as the appointment of a member of the Advisory Group, the subject of appointment chooses one deputy for such member for the term of his authority.

A person who meets the requirements for a member of the Advisory Group can be elected as a deputy.

2. The appointing authority shall make a separate decision on the election of a deputy for a member of the Advisory Group in accordance with the rules established by Article 10² of this Law.

3. The person elected as an alternate member of the Advisory Group shall have the right to attend all meetings of the Advisory Group and any matters considered by it as an observer. Such persons shall be subject to the restrictions on the use of information provided for by this Law for members of the Advisory Group.

4. If a member of the Advisory Panel is self-recused or recused and has a deputy, such deputy, with his/her consent and without a separate decision of the appointing authority, shall temporarily perform the powers of the relevant member of the Advisory Panel in terms of consideration of issues and decision-making in respect of which such member is self-recused or recused.

5. If the powers of a member of the Advisory Group are terminated early and if he/she has a deputy, such deputy, with his/her consent and without a separate decision of the appointing authority, shall be deemed to be appointed to such vacant position of a member of the Advisory Group for the term of office of such member”.

29. The Venice Commission welcomes the provision for recusal and self-recusal of AGE members. It agrees that it is indeed very important to ensure the continuity of work of the AGE, which could be disrupted as a consequence of such recusals. Recourse to substitute members – which was already included in the Law upon a previous recommendation of the Venice Commission in respect of the event of early termination of the mandate of a member of the AGE - is also welcome, including in particular that substitute members will follow the meetings to be able, in case of recusal/self-recusal or early termination of the mandate of a member, to take over the work and ensure smooth processing of the files/procedures concerned.

30. The Venice Commission welcomes that provision that substitute members shall be elected so that they follow the procedure as observers in order to step in and replace possibly recused full members. The modalities of the obligatory participation of the international and national substitute members as observers should be established in the Regulations of the AGE.

C. The obligation of the AGE to publish "reasoned" decisions

31. The AGE shall publish not-suitability decisions following both integrity and professional competence assessment - according to Article 10⁸-4 of the Law and Article 10⁸-6 of the draft amendments, "not suitable" candidates are deemed to have failed the corresponding stage of the competitive selection as soon as the respective AGE decision is published. The decision should specify that the candidate concerned failed to meet the integrity or professional competence criterion.

32. According to Article 10²-24 of the Law, the decisions of the AGE shall be drawn up in a protocol and shall be published, "indicating the results of the roll-call vote". According to the Article 10⁸-7 of the Law, the AGE shall publish the general list of all "suitable" candidates in the ranked order and the justified decisions concerning each candidate and shall hand them over to the appointing bodies. The Commission recommends clarifying that the names of the AGE members who voted in favour of each candidate in the ranking phase be published too.

33. Article 10⁸7 further provides that "The Advisory Group shall publish its decisions regarding candidates who have received a "not-suitable" rating on the criteria of high moral character or recognised level of legal competence without giving the reasons that served as the basis for such a decision. The Advisory Group shall publish such decisions with reasons only at the request of the candidate who received an "unsuitable" grade." The Venice Commission welcomes this provision, which strikes the appropriate balance between the need for transparency and the respect for privacy (also to avoid a chilling effect).

IV. Other proposed improvements

34. The draft amendments propose some additional improvements such as, for example, extending the period for potential candidates to apply for the CCU judge position from 10 to 30 days (Article 208⁴, paragraph 4, of Rules of Procedure of the Verkhovna Rada); granting an additional period of up to 10 days to the candidates to submit and correct documents (Article 208⁴, paragraph 5, of Rules of Procedure of the Verkhovna Rada); clarifying that all commenced CCU selection procedures are to be ceased and re-started by the CCU appointing bodies within 20 days from the entry into force of the Law (Item 21 of the Transitional Provisions); enabling CCU candidate judges to undergo background checks during the term of the Martial Law (Article 28, paragraph 23, of the Law "On Legal Regime of Martial Law"); extending the deadline for the President of Ukraine, the Council of Judges of Ukraine, the Venice Commission and international organisations for nominating the candidate and substitute members for the AGE's first composition from 30 to 190 days (Items 8, 10 and 12 of Transitional Provisions, respectively).

35. The Venice Commission considers the above-mentioned improvements as a positive development.

36. As concerns the appeals against the decisions by the AGE, Article 22.4 of the Code of Administrative Procedure provides that the Supreme Court has jurisdiction at first instance in respect of disputes relating to the selection of CCU judges.

37. Article 108.9 of the law on the Constitutional Court provides that "All the cases associated with challenging decisions, actions or omissions or the entities responsible for designating judges of the Constitutional Court during the competitive selection of candidates for the position of a Judge as well as assessment of candidates for the position of a judge of the Constitutional Court by the Advisory Group shall be within the jurisdiction of the Supreme Court as a court of first instance and to the Grand Chamber of the Supreme Court as a court of appeal based on the administrative judicial proceedings." As concerns the nature of such appeal the Venice Commission is of the view

that AGE decisions should only be challenged on formal (procedural) grounds. This should be specified in Article 10⁸.9.

V. Conclusion

38. The Venice Commission reiterates the importance of introducing a mechanism of selection of the judges of the Constitutional Court of Ukraine which ensures the highest level of independence and impartiality of the Court. The Venice Commission also underlines that it is important to ensure that the positions of constitutional court judges do not remain vacant for a prolonged period.

39. Despite the war of aggression of the Russian Federation against Ukraine, the Ukrainian authorities, as well as civil society, have shown an exemplary willingness to move forward with the reforms and to implement the Venice Commission recommendations.

40. The Venice Commission regrets that its recommendation to add a seventh member to the AGE has not been followed. It welcomes however the significant improvements proposed in response to its key recommendations, such as the exclusion of "not suitable" candidates from further consideration following both the integrity and the professional competence assessments, ensuring the casting vote for the international members in regular and in tie vote situations for the evaluation of both integrity and professional competence, the provision that substitute members of the AGE will be appointed to ensure continuity of work in case of recusal or self-recusal; it also welcomes the other improvements described in paragraph 34 above. It recommends nonetheless removing from Article 10¹¹ of the draft law the provision on the order of voting for the election by the Congress of Judges. It further recommends clarifying that the names of the AGE members who voted in favour of each candidate in the ranking phase be also published and specifying that the decisions of the AGE may only be challenged on formal grounds and not on the merits.

41. The Commission wishes to express its satisfaction for the constructive attitude of the Ukrainian authorities.

42. The Venice Commission is of the view that the key recommendations which it formulated in its opinion of December 2022 ([CDL-AD\(2022\)054](#)) and in the follow up to such opinion ([CDL-PI\(2023\)002](#)) have been followed in Draft law 9322 of 25 May 2023 with the change and the clarifications recommended above; the Commission, once the amendments are adopted, will therefore proceed with the submission of proposed candidates for the position of one member and one substitute member of the AGE.