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Or. Engl.

EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW
(VENICE COMMISSION)

SECRETARIAT MEMORANDUM

**ON THE COMPATIBILITY OF THE DRAFT LAW
OF UKRAINE**

**ON AMENDING THE CONSTITUTION
OF UKRAINE
AS TO JUSTICE**

**as submitted by the President to the Verkhovna Rada
on 25 November 2015
(CDL-REF(2015)047)**

**WITH THE VENICE COMMISSION'S OPINION
ON THE PROPOSED AMENDMENTS
TO THE CONSTITUTION OF UKRAINE
REGARDING THE JUDICIARY
as approved by the Constitutional Commission
on 4 September 2015
(CDL-AD(2015)027)**

**Taken note of by the Venice Commission
at its 105th Plenary Session
(Venice, 18-19 December 2015)**

I. Introduction

1. Following a request on 21 July 2015 by the Speaker of the Verkhovna Rada of Ukraine and Chair of the Constitutional Commission, Mr Volodymyr Groysman, a preliminary opinion on the constitutional amendments regarding the judiciary proposed by the constitutional commission was issued on 24 July and subsequently endorsed by the Venice Commission (CDL-AD(2015)026) at its 104th Plenary Session (Venice, 23-24 October 2015).
2. On the basis of the preliminary opinion, the proposed amendments were revised by the Constitutional Commission and submitted again to the Venice Commission for assessment on 10 September 2015. The Venice Commission adopted an opinion (CDL-AD(2015)027) on the revised constitutional amendments adopted by the Constitutional Commission at its 104th Plenary Session (Venice, 23-24 October 2015).
3. On the basis of the Venice Commission's opinion, the constitutional amendments were further revised by the Constitutional Commission.
4. On 25 November 2015, the President of Ukraine submitted the finalized draft constitutional amendments to the Verkhovna Rada (CDL-REF(2015)047).
5. The present memorandum examines whether and to what extent the text submitted to the Verkhovna Rada follows the recommendations contained in the Venice Commission's opinion of 23-24 October 2015 (CDL-AD(2015)027). The Venice Commission took note of it at its 105th Plenary Session (Venice, 18-19 December 2015).

II. Preliminary remarks

6. The Preliminary Opinion of 24 July 2015 welcomed several very positive features of the draft amendments, notably: the removal of the powers of the Verkhovna Rada to appoint the judges, the abolition of probationary periods for junior judges, the abolition of "breach of oath" as a ground for dismissal of the judges; the reform of the Public Prosecutor's Office and in particular the removal of the power of the Verkhovna Rada to express no confidence in the Prosecutor General and the removal of the general supervisory power of prosecutors; the balanced composition of the Constitutional Court and the introduction of a constitutional complaint. The Venice Commission nevertheless formulated some recommendations in order to bring the amendments fully in line with European standards.
7. The opinion adopted in October 2015 welcomed that several important recommendations contained in the preliminary opinion had been followed in the revised amendments, notably: the President's powers to dismiss the judges was removed; the Verkhovna Rada was given a say in the composition of the High Council of Justice and at least 45 deputies were given the possibility to seek an opinion of the Constitutional Court on the constitutionality of questions to be put to an all-Ukrainian referendum.
8. The Venice Commission formulated two more key recommendations and certain further recommendations which will be examined in detail in the following paragraphs.

III. Analysis of the follow up to the recommendations

Article 125 paragraph 1 – Establishment and dissolution of Courts

9. As regards the establishment and dissolution of courts, the Venice Commission welcomed the limitation of the President's powers (removal of his power "to establish courts by the procedure determined by law", Article 106) and considered as acceptable in principle the system chosen by the constitutional commission that the system and structure of the judiciary

will fall within the competence of the Verkhovna Rada under the ordinary procedure, while the decisions on the establishment or dissolution of specific courts will be taken by the Verkhovna Rada upon the initiative of the President “upon the proposal of the High Council of Justice”. For the sake of efficiency, however, the Commission had expressed the view that the President should act only “in consultation with” the HCJ. This recommendation has been followed.

10. The Commission reiterated its strong recommendation to abolish the high specialized courts with the administrative courts remaining an autonomous system. The compromise formula “higher specialized courts may function in accordance with the law” enables the abolition of these courts. The implementation of this recommendation, however, may only be assessed in the light of future legislation.

Article 126 – Independence of the judges

11. The Venice Commission recommended that failure by a judge to produce an asset declaration justifying the legal origin of the judge’s property, even if it is already a requirement under the law on the status of judges”, should be explicitly mentioned in the Constitution as a ground for the judge’s dismissal. This recommendation has been followed (Article 126 paragraph 6.6).

12. This ground for dismissal has not been added in Article 149.1. However, it should be clear that it applies also to the judges of the Constitutional Court.

Article 128 – Appointment of judges; Article 131 – the High Council of Justice

13. The Venice Commission strongly recommended, in order to solve any possible doubts, to add among the competences of the High Council of Justice that of “deciding on transfers and promotions of judges”. This key recommendation has been followed (Article 131 paragraph 1.8).

14. The Venice Commission further recommended as regards the election of two members of the HJC by the Verkhovna Rada that it should be done by qualified majority, despite the difficulty of obtaining such a majority in the current political context in Ukraine. This recommendation has not been followed.

Article 131-1 – the Prosecutor General

15. Under the amendments, the Prosecutor General of Ukraine is to be elected and dismissed by the President with the consent of the Verkhovna Rada. The Venice Commission recommended that the Rada express its consent by qualified majority, despite the difficulty of obtaining such a majority in the current political context in Ukraine. This recommendation has not been followed.

Article 131-2 – the Bar

16. The Venice Commission had welcomed the independence of the Bar, but had expressed the opinion that the obligation to be represented only by a practicing lawyer member of the Bar was too far-reaching and recommended to provide for some exceptions, for example for labour disputes or disputes of minor importance. The revised Article 131-2 paragraph 5 now provides for “Exceptions for representation before the court in labour disputes, social rights protection disputes, disputes related to elections and referendums or in disputes of minor importance”. This recommendation has thus been followed.

Article 148 – the Composition of the Constitutional Court

17. The Venice Commission, while expressing once again its acknowledgment of the difficulty to achieve a qualified majority today in Ukraine recommended the Ukrainian authorities to take into consideration the possibility to provide that the Verkhovna Rada appoint 6 judges of the Constitutional Court “with a qualified majority”. This recommendation has not been followed.

18. The Venice Commission had further expressed doubts as to the desirability of the 20-year residence requirement for Constitutional Court judges. In the revised version of Article 148, the residence requirement has been totally removed. The Venice Commission’s recommendation has therefore been followed.

Article 149-1 - Grounds for termination of the powers of the constitutional Court judges

19. The Venice Commission had strongly recommended that only “serious” disciplinary offenses should be grounds for dismissal of constitutional court judges. This key recommendation has been followed in the revised Article 149-1.

Chapter XV – Transitional provisions

20. The Venice Commission accepted that the judges appointed for the first time before the entry into force of the constitutional amendments should not be automatically appointed for an indefinite period of time but should pass the assessment procedure. However, it recommended that the experience acquired by them during their probationary period be duly taken into account after such professional examination. The revised Article 16-1 paragraph 2 provides that “Such judges may be appointed to the office of judge according to the procedure prescribed by law”. This formula will enable the legislator to provide for an appropriate simplified training procedure for these judges. This recommendation has therefore been followed.

21. Finally, the Venice Commission expressed the strong view that while exceptional measures such as the qualification assessment of the judges could be taken, provided that they were limited in time and carried out swiftly and effectively, mass dismissal of all judges is not an acceptable option in a state governed by the rule of law. The Venice Commission also expressed the view that in case of reorganization of particular courts, the judges concerned could be given the option to retire or apply for a new position. The revised Article 16-1 paragraph 5 textually provides that “in cases of reorganization or dissolution of particular courts, established before the Law of Ukraine “on amending the Constitution of Ukraine (as to justice)” taking effect, judges concerned shall have the right to retire or apply for a new position through a competition according to the procedure prescribed by law. Specifics of the transfer of a judge to another court may be prescribed by law”. No provision has been inserted to the effect of a mass dismissal of all judges. The Venice Commission’s recommendation has therefore been followed.

IV. Conclusions

22. With the exception of the recommendation that a qualified majority should be required for the election by the Verkhovna Rada of the 2 members of the High Council for the Judiciary and the 6 judges of the Constitutional Court and for the consent by the Verkhovna Rada to the nomination and dismissal by the President of the Prosecutor General, all the recommendations formulated by the Venice Commission in its opinion CDL-AD(2015)027 were followed.