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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW
(VENICE COMMISSION)

**DRAFT OPINION
ON THE TEMPORAL VALIDITY
OF DRAFT TRANSITIONAL PROVISION 18
OF THE CONSTITUTION
OF UKRAINE**

On the basis of comments by

**Ms Hanna Suchocka (Member, Poland)
Mr Kaarlo Tuori (Member, Finland)
Mr Alain Delcamp (Expert, Congress of Local and Regional
Authorities of the Council of Europe)**

**This document has been classified restricted on the date of issue. Unless the Venice Commission decides otherwise, it will be declassified a year after its issue according to the rules set up in Resolution CM/Res(2001)6 on access to Council of Europe documents.*

I. Introduction

1. By decree 119/2015 of 3 March 2015, the President of Ukraine, Mr Petro Poroshenko, established the Constitutional Commission of Ukraine with the task of preparing amendments to the current Constitution. Ms Hanna Suchocka, member of the Venice Commission, was appointed by the President as an international observer on the Constitutional Commission, as was Mr Alain Delcamp on behalf of the Congress of Local and Regional Authorities of the Council of Europe. Three working groups were established, one of which dealt with the decentralisation of power.

2. At the Venice Commission's 103rd Plenary Session (19-20 June 2015), the Speaker of the Verkhovna Rada of Ukraine and Chair of the Constitutional Commission, Mr Volodymyr Groysman, requested the Commission to prepare an urgent opinion on the draft amendments to the Constitution of Ukraine prepared by this working group.

3. A preliminary opinion (CDL-PI(2015)008) on these amendments was sent to the Ukrainian authorities on 24 June. On the basis of this preliminary opinion, the Constitutional Commission revised the text of the draft amendments, approved the text and submitted it to the President of Ukraine. The President of Ukraine submitted the draft amendments to the Verkhovna Rada, initiating the procedure for amending the Constitution in accordance with Article 154 of the Constitution.

4. On 16 July 2015 the Verkhovna Rada of Ukraine submitted the draft amendments (CDL-REF(2015)035) to the Constitutional Court. On 30 July 2015 the Constitutional Court decided that the draft amendments comply with the requirements of Articles 157 and 158 of the Constitution which establish limits for the revision of the Constitution. On 31 August 2015 the Verkhovna Rada adopted the draft amendments in the first reading. The second reading has not yet taken place.

5. On 24 August 2015, the Permanent Representative of Ukraine to the Council of Europe asked the Venice Commission to provide an opinion on the temporal validity of one of the provisions of the draft amendments, Section 18 of the Transitional Provisions: *"Specific arrangements for self-government in some parts of Donetsk and Luhansk oblasts shall be set forth in a separate law"*.

6. Ms Suchocka and Mr Tuori as well as Mr Alain Delcamp, adviser to the Congress of Local and Regional Authorities of the Council of Europe on constitutional matters, who had acted as rapporteurs on the draft amendments, were appointed as rapporteurs.

7. *The present opinion was prepared on the basis of the contributions by the rapporteurs and adopted by the Venice Commission at its ... Plenary Session (Venice, ...).*

II. Background

8. The provision examined in this Opinion can be seen as being in line with the overall thrust of the constitutional amendments which provide, with respect to administrative and territorial units, for *"taking into consideration their historical, economic, ecological, geographic, and demographic characteristics as well as ethnic and cultural traditions"* (draft Article 132 of the amendments). Nevertheless, it is a very specific provision that is clearly linked to the current conflict in Eastern Ukraine and the attempts to settle the conflict, in particular the Minsk Agreements. This makes it particularly important and sensitive.

9. The aim of the provision is to implement a clause contained in Section 11 of the Minsk II Agreement of 12 February 2015 *“carrying out constitutional reform in Ukraine with a new constitution entering into force by the end of 2015 providing for decentralization as a key element (including a reference to the specificities of certain areas in the Donetsk and Luhansk regions, agreed with the representatives of these areas),”*.

10. The provision can also be seen as a response to the recommendation in the preliminary opinion to leave space in the Constitution for special arrangements for certain administrative territorial units (CDL-PI(2015)008, para. 27), which would also enable future legal developments in line with the Minsk Agreements.

11. As explained in the letter requesting the opinion, at the meeting of legal experts of the States part of the Normandy format in Berlin on 20 August, the issue was raised whether the fact that the provision examined is part of the Transitional Provision would affect its validity in time.

III. Temporal validity of the provision

12. It has to be underlined from the outset that the issue of the temporal validity of the provision is a question of Ukrainian constitutional law and that it is up to the Constitutional Court of Ukraine to authoritatively decide on this question. The Commission can only look at this issue from the point of view of a foreign lawyer, based on elements of comparative law and its knowledge of and familiarity with Ukrainian constitutional law. This being said, based on the arguments set forth below, in the Commission’s view there can be little doubt that the Constitutional Court of Ukraine will arrive at the same conclusions.

13. Formal and procedural arguments are of decisive importance in this respect. As set forth above, draft Transitional Provision 18 is part of a package of constitutional amendments. It was

- prepared as part of a package of constitutional amendments;
- submitted by the President to the Verkhovna Rada together with the amendments to the other chapters of the Constitution;
- sent by the Verkhovna Rada together with the other amendments to the Constitutional Court;
- examined by the Constitutional Court together with the other amendments;
- voted by the Verkhovna Rada in the first reading together with the other amendments.

14. There is also no doubt that the draft Transitional Provision, if it will be finally adopted in the second reading, will be voted in the same manner and by the same majority as the other amendments. This creates a very strong presumption that the Provision will have the same legal value as all other provisions of the Constitution.

15. There is nothing in the text of the Provision which would indicate that its validity is limited in time.

16. If one looks at the Transitional Provisions of the Constitution of Ukraine, one can conclude that, as regards their effects in time, there are various types of provisions:

- There are some provisions which refer to a specific date, e.g. *“3.Regular elections of the President of Ukraine shall be held on the last Sunday of October 1999.”* While this Provision no longer has legal effect, it remains formally part of the Constitution.
- There are other provisions linked to a specific event or to specific events. An example is Transitional Provision 9, which is well known to the Commission: *“The procuracy continues to exercise, in accordance with the laws in force, the function of supervision over the observance and application of laws and the function of preliminary investigation, until the laws regulating the activity of state bodies in regard to the control*

over the observance of laws are put into force, and until the system of pre-trial investigation is formed and the laws regulating its operation are put into effect". Similarly to Transitional Provision 18, this type of provision contains a mandate for the legislature to adopt legislation but, contrary to Transitional Provision 18, its text indicates that it will lose legal effect once this mandate is completed.

- There are other provisions which are not limited in time in any way. Transitional Provision 1 states: "*Laws and other normative acts, adopted prior to this Constitution entering into force, are in force in the part that does not contradict the Constitution of Ukraine.*" It is obvious that this provision is of a permanent character.

17. One can thus conclude that the transitional provisions of the Ukrainian Constitution are by no means all of temporary character, but that the temporary character has to result from the drafting of the specific provision.

18. Comparative law shows that the Ukrainian Constitution is not unique in this respect and that many constitutions contain transitional provisions, which remain in force until amended or repealed through constitutional amendments or the adoption of a new constitution. A few examples will suffice:

- Article XII of the Transitional and Final Provisions of the Constitution of Italy of 1947 prohibiting the reorganisation of the fascist party remains in force.
- In Spain, most of the transitional provisions of the 1978 Constitution refer to the special status and powers of the regions or to decentralisation of power with respect to certain territories. As an example, Transitional Provision II was the legal basis for the autonomous status of Catalonia, the Basque country and Galicia.
- The Provisional Articles of the 1982 Constitution of Turkey remain or remained in force until abrogated. As an example, Provisional Article 15 on impunity for the leaders of the 1980 military coup had to be abrogated by the constitutional referendum of 2010 to make it possible to prosecute them.

19. This shows that both internationally and in Ukraine there is no coherent approach as to what provisions should be part of the main text of the Constitution and what provisions should be part of the transitional provisions, which can be quite heterogeneous, and that transitional provisions with a permanent character can be found in many constitutions. The decisive criterion for the temporal validity is not where the provision is located, but how it is worded. In the absence of an indication to the contrary, a transitional provision remains valid until it is abrogated by the constituent power.

IV. Conclusions

20. The Commission notes that Transitional Provision 18 is being adopted according to the same procedure as the other constitutional amendments. If adopted, it will thereby become an integral part of the Constitution and have the same effects as any other article of the Constitution. Both the Ukrainian Constitution and constitutions of other countries contain transitional provisions which are of a permanent character. Unless the temporary character of a transitional provision results from the drafting of this very provision, it remains valid until abrogated according to the procedure for amending the Constitution. The drafting of Transitional Provision 18 does not contain any indication that it would be of temporary character. If adopted, Transitional Provision 18 will therefore remain valid until its abrogation by the Verkhovna Rada of Ukraine in accordance with Chapter XIII of the Constitution of Ukraine on the revision of the Constitution.