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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

(VENICE COMMISSION)

DRAFT OPINION

ON POSSIBLE CONSTITUTIONAL AND LEGISLATIVE IMPROVEMENTS TO ENSURE THE UNINTERRUPTED FUNCTIONING OF THE CONSITUTIONAL COURT OF UKRAINE

on the basis of comments by

Mr A. ENDZINS (Member, Latvia)
Mr J. MAZAK (Member, Slovakia)
Mr P. PACZOLAY (Member, Hungary)

1. By letter dated 20 March 2006, the Minister of Justice of Ukraine and member of the Venice Commission, Mr Holovaty, requested the Venice Commission to give an opinion on how the relevant Ukrainian legislation should be improved to ensure the uninterrupted functioning of the Constitutional Court of Ukraine.

2. The Commission appointed Messrs Endzins, Mazak (CDL(2006)044) and Paczolay as rapporteurs on this issue. This [draft] opinion has been adopted by the Venice Commission at its ... Plenary Session (Venice, ...).

A. Background

3. Chapter XII of the Constitution of Ukraine defines the framework for establishment, structure and activity of the Constitutional Court. According to Article 148 of the Constitution, the Constitutional Court is composed of eighteen judges. The President, the *Verkhovna Rada* and the Congress of Judges each appoint (or elect) six judges to the Constitutional Court. The judges are appointed for a nine year non-renewable term.

4. The general principles contained in Chapter XII of the Constitution are further developed in the law "On the Constitutional Court of Ukraine", adopted on 16 October 1996. The law deals in particular with "the procedure for the organisation and operation of the Constitutional Court of Ukraine, and the procedure for its review of cases" (Article 153 of the Constitution). Under the above law a judge of the Constitutional Court enters office from the date of swearing the judge's oath, which he or she takes at a session of the *Verkhovna Rada* with the participation of the President, the Prime Minister and the Chairman of the Supreme Court no later than one month from the date of appointment (Article 17 of the Law).

5. On 18 October 2005, the term of office of ten justices of the Constitutional Court of Ukraine, including its Chairman, came to an end the first nine year appointment of judges of the Constitutional Court was made in 1996). Another three judges' posts had been vacant for some time already (. Given the number of judges remaining in office (five judges), the Constitutional Court became inoperative, since a quorum of twelve judges is required for plenary sessions by Article 51 of the Law.

6. In its Resolution 1466 (2005), adopted already on 5 October 2005, the Parliamentary Assembly of the Council of Europe (PACE) called upon the Ukrainian authorities to "ensure that the composition of the Constitutional Court of Ukraine is renewed without undue delay after the expiry of the term of office of its justices."

7. On 3 November 2005 the Congress of Judges of Ukraine appointed six judges and on 14 November 2005 the President of Ukraine appointed three judges respectively to the Constitutional Court. However, the *Verkhovna Rada* seemed to be reluctant both to appoint the four judges under its own quota and to allow for the procedure of swearing in to take place. On 15 December 2005 the PACE Monitoring Committee urged the *Verkhovna Rada* "to carry out its constitutional duty and renew the composition of the Constitutional Court of Ukraine without any further delay."

8. In its declaration of 16 December 2005, the Venice Commission expressed its concern (shared by the Constitutional Court of Lithuania, holding the Presidency of the Conference of European Constitutional Courts) over the stalled process of appointment of new judges to the Constitutional Court of Ukraine and called on "the Ukrainian authorities and especially the Ukrainian Parliament

to quickly take the necessary steps for renewing the membership of the Constitutional Court of Ukraine."

9. The declaration pointed out that "in countries where it has been established, the constitutional court is an institution of crucial importance in ensuring the functioning of the various state bodies within constitutional limits. They have the key function of guaranteeing the respect for fundamental principles of democracy, the protection of human rights and the rule of law, which are also the basic standards of the Council of Europe, of which Ukraine is a member."

10. Given its jurisdiction, the effective and continuous functioning of the 'Guardian of the Constitution' has paramount importance for the country. According to the Ukrainian Constitution, the Constitutional Court decides on issues of the conformity of laws and other legal acts with the Constitution. The Court's mandate entails providing an official interpretation of the Constitution and laws, giving opinions on the constitutionality of international treaties both already force and submitted to the *Verkhovna Rada* for ratification. The Court's mandate also includes an opinion on impeachment of the President.

11. The constitutional duty to ensure continuance and stability of the Court's work lies upon the state authorities involved in the Court's procedure of composition. Consequently, respective measures should be taken by them to restore functioning of "the sole body of constitutional jurisdiction in Ukraine" (Article 147 of the Constitution).

B. Possible solutions aimed at improving the legislation

1. Appointment mechanism

12. In order to avoid the paralysis in the Constitutional Court's activity in case of the constitutionally empowered authority's failure to appoint a judge, it seems advisable to introduce default mechanisms. Several options could be considered in this respect. When taking into consideration the different options we have to be aware of the fact that the appointment of the judges of a Constitutional Court is the only case when politics directly interferes with constitutional justice. While the work of constitutional courts must be independent and free from political influence, one cannot deny that political factors have a clear say in determining the appointment of constitutional judges. Even though the deadlock should be resolved as far as possible on the basis of constitutional tools generally used in other countries, at the same time some specific, probably temporary, circumstances of the deadlock concerned have to be taken into account.

13. A safeguard may be established through a provision allowing a judge to continue to sit at the Court after his/her term of office has expired until the judge's successor is appointed. Such a mechanism is currently in place for example in Portugal, Germany, Spain and Bulgaria. Such a system prevents that a stalemate during the appointment process blocks the activity of the Court. This will however not be sufficient in case of retirement for health reasons or death of a judge.

14. It might also be advisable to provide for a safety measure, ensuring that the activities for filling the vacancy start well in advance so that the selection of a candidate is finalised by the time the vacancy occurs. In Romania, for example, a new judge must be appointed at least a month before the end of the mandate of the preceding judge. Again, such a provision alone cannot overcome the refusal of an appointing authority to fulfil its constitutional duty. In Hungary, where the vacancies on the Constitutional Court has created serious problems several times, according the Act on the

Constitutional Court a new judge must be elected at least three months before the end of the mandate of the preceding judge (Article 8.4). Nevertheless, this has happened very rarely.

15. Therefore, a more powerful default mechanism would be a devolution of the powers of appointment to other state authorities in case of a continued inaction or failure to appoint judges by an appointing authority. In the case of Ukraine, if one of the three appointing authorities (President or the *Verkhovna Rada* or the Council of Judges) did not appoint judges after a certain deadline the powers to appoint these judges would devolve to the remaining two authorities at equal parts. For example, if the *Verkhovna Rada* does not appoint judges under its quota within a month after the expiry of the term of the predecessors, the two other authorities entitled to make appointments (the President and the Congress of Judges) intervene and each fill half of the vacant positions, if the number of judges to be appointed is even. In the case of a uneven number of vacant positions, the authority to appoint one more judge would devolve on the body for which the last appointment dates back longer. For instance, if three vacancies need to be filled and the last appointment was made by the President, then the President and the Congress of Judges of Ukraine would appoint one judge each, and the third judge would be appointed by the Congress of Judges.

16. In addition, to ensure that the body or the bodies obtaining right to appoint additional judges will comply with their newly obtained competence, the transfer of appointment powers from one constitutional body to another might even be followed certain means of pressure. For example, if that or those of originally authorised bodies that have complied with its or their duty also fail to appoint the rest of the judges required, the power of the President of Ukraine to dissolve the *Verkhovna Rada* or the Council of Judges could be introduced. However, giving the President that power could at the same time be regarded as unbalanced, since the other two authorities could not be given similar means of pressure on the President in case of the latter's failure to comply with his or her constitutional obligation. On the other hand, the Head of State remains accountable for his or her actions and is bound by the presidential oath. Here, the principle of *presumptio boni viri* comes into play. Therefore, it seems possible to rely on this principle without the necessity to provide for additional constraints on the President during the process of appointment of constitutional judges.

Administration of the oath

17. An effective appointment procedure does not constitute the only safeguard to avoid the deadlock in the functioning of the Constitutional Court of Ukraine. Drawbacks related to the mechanism of entry into office could and did hinder the work of the Court. Therefore, the issue of the administration of the oath needs to be addressed. The main objective should be ensuring that the oath is taken in a timely manner and the procedure for swearing in does not result in formalities possibly jeopardising a judge's entry into office.

18. One of the solutions in this respect could be taking the oath in a written form and submitting it to the President of Ukraine or the Speaker of the *Verkhovna Rada* of Ukraine.

19. Another solution could be providing for an internal mechanism to be established for swearing in. The option would consist in enabling the newly appointed judges to be sworn in by the Chairman of the Constitutional Court. In the case that the Chairman's authority has ended, the possibility to be sworn by the Chairman *ad interim* or oldest judge in office could be envisaged.

C. Conclusions

20. Although the rule of appointment, under which the relevant power is split between the three branches of power in Ukraine, ensures a balanced representation of the Constitutional Court, a risk to the stability and uninterrupted functioning of the Court remains and has already materialised. The appointment system should therefore provide certain mechanisms to avoid the probability of stalling (caused by political or technical reasons) the new appointment after a judge's term of office expires. However the establishment of safeguards preventing deadlocks in the appointment procedure alone cannot lead to the full solution of the problem as long as obstacles for the judge's assumption of duties persists.

21. In order to ensure and safeguard the stable functioning of the constitutional judiciary the Venice Commission recommends the adoption of relevant constitutional and legislative amendments aimed at improvement of the Ukrainian legislation in this respect. In particular:

- Providing that a judge remains in office until his or her predecessor has been appointed;
- Creation of a safeguard in the case of the failure of a constitutionally empowered authority to appoint (or elect) new judges of the Constitutional Court by devolving the power of appointment from the original constitutional body to the remaining ones;
- The simplification of the taking of an oath by providing for a written form of taking the oath or the introduction of an internal mechanism for swearing in.