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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW
(VENICE COMMISSION)

DRAFT OPINION

**ON THE POSSIBLE INTRODUCTION
OF THE ENTITLEMENT FOR FORMER MPs
TO RESUME THEIR PARLIAMENTARY SEAT
UPON CEASING THEIR GOVERNMENTAL FUNCTIONS**

IN UKRAINE

On the basis of comments by

Mr Jean-Claude SCHOLSEM (Substitute member, Belgium)
Mr Kaarlo TUORI (Member, Finland)

I. Introduction

1. By a letter of 18 April 2006, the Minister of Justice of Ukraine sought the Venice Commission's opinion on the possible introduction in Ukraine of the entitlement for ministers to resume their parliamentary seat when they leave the Government.
2. Mr Scholsem and Mr Tuori were appointed as rapporteurs. Their respective comments (CDL(2006)036 and CDL(2006)037), complemented by the information provided by Mr Vogel on the incompatibility of the mandate of member of parliament and the office of cabinet minister according to the Swedish Constitution (CDL(2006)038) were presented to the Commission at the Plenary Session of 9-10 June 2006.
3. The present opinion, which was drafted on the basis of the rapporteurs' comments, the information on various legal systems provided by the Commission members as well as the results of the discussion held by the Commission in June, was adopted by the Commission at its .. Plenary Session (Venice, ...).

II. The incompatibility between the status of MP and the office of minister under the applicable provisions

4. The Constitution of Ukraine, prior to its amendment in 2004, did not set out explicitly the incompatibility between the mandate of an MP and the office of a member of government.
5. Indeed, former Article 78 of the Constitution of Ukraine (CDL(2003)086) read as follows:

“National Deputies of Ukraine exercise their authority on a permanent basis. National Deputies of Ukraine shall not have another representative mandate or be in the civil service. Requirements concerning the incompatibility of the mandate of the deputy with other types of activity are established by law.”

6. Former Article 81 § 2 and 3 provided:

“2. The authority of a National Deputy of Ukraine terminates prior to the expiration of the term in the event of:

- 1. his or her resignation through a personal statement;*
- 2. a guilty verdict against him or her entering into legal force;*
- 3. a court declaring him or her incompetent or missing;*
- 4. termination of his or her citizenship or his or her departure from Ukraine for permanent residence abroad;*
- 5. his or her death.*

3. The decision about the pre-term termination of authority of a National Deputy of Ukraine is adopted by the majority of the constitutional composition of the Verkhovna Rada of Ukraine.”

7. In 2001, the Law on the Status of People's Deputies was passed, setting out explicitly the incompatibility between parliamentary and governmental functions. Its Art. 3 § 1 provides in fact that:

“Members of parliament shall have no right to be members of the Cabinet of Ministers or heads of central executive authorities.”

8. According to Art. 4 § 6 of the same law:

“the powers of National Deputies shall be prematurely terminated in cases of infringement of the requirements laid down in Art. 3 § 1.”

9. The constitutionality of these provisions was challenged before the Constitutional Court. In a judgment of 4 July 2002, the Constitutional Court of Ukraine ruled that they were in compliance with the Constitution. According to the summary of the decision, the Court argued as follows: Article 78 § 1 of the Constitution provides that people’s deputies of Ukraine exercise their authority on a permanent basis, which means that throughout the deputy's time in office, his or her activities in the parliament shall be deemed professional work on a permanent basis. Article 120.1 of the Constitution states that members of the Cabinet of Ministers do not have the right to combine their official activity with other work, except teaching, scholarly and creative activity outside of working hours. The legal opinion of the Constitutional Court is ... that any work which is to be performed “on a permanent basis” cannot be combined with the holding of an individual office with a state or local self-government authority that is also to be carried out on a permanent basis, in particular a position as the head of an executive authority. The combination of the office of deputy with activity as a local council member holding no managing office in the relevant council, where these competences are not exercised on a permanent basis, does not contradict the Constitution. In addition, Article 81 § 4 of the Constitution provided that :

“In the event a requirement concerning incompatibility of the mandate of the deputy with other types of activity is not fulfilled, the authority of the National Deputy of Ukraine terminates prior to the expiration of the term on the basis of the law pursuant to a court decision.”

10. The amendments to the Constitution brought about in 2004 (CDL(2004)036) strengthened the provision of the incompatibility between the two functions.

11. New Art. 78 of the Constitution of Ukraine, insofar as relevant, reads as follows:

“National Deputies of Ukraine exercise their powers on a permanent basis.

A National Deputy of Ukraine shall not have any other representative mandate, be in the civil service, hold any other paid offices, carry out gainful or business activity (with the exception of teaching, scientific, and creative activities), or to be a member of the administration/governing body of a profit-seeking enterprise or organization.

The requirements concerning the incompatibility of the deputy’s mandate with other types of activity are established by law.”

12. It therefore adds as ground for incompatibility the fact of holding “any other paid office”, under which the office of ministers may be considered to fall.

13. Paragraph 4 of new Article 78 provides that:

“Where there emerge circumstances preventing the National Deputy of Ukraine from fulfilling a requirement concerning incompatibility of the deputy’s mandate with other types of activity, the National Deputy of Ukraine shall within twenty days from the date of the emergence of such circumstances shall withdraw from the business concerned or apply personally for divesting himself or herself of National Deputy powers.”

14. According to Art. 81 § 2.5 of the Constitution,

“The powers of a National Deputy of Ukraine shall terminate prior to expiration of his or her term in office in the event of ... his or her failure, within twenty days from the date of the emergence of circumstances preventing him or her from fulfilling a requirement concerning incompatibility of the deputy’s mandate with other types of activity, to remove such circumstances”.

15. In addition, Art. 120 § 1 of the Constitution states that:

“Members of the Cabinet of Ministers do not have the right to combine their official activity with other work, except teaching, scholarly and creative activity outside of working hours.”

16. It follows that there exists an incompatibility between the status of MP and the office of cabinet minister under the applicable Ukrainian constitutional and legal provisions.

17. In the Commission’s view, it would be appropriate, if the solution adopted in the Law on the Status of People’s Deputies is considered politically feasible, that the incompatibility should, in the future, be included in the Constitution as an explicit provision.

18. This incompatibility exists in other European countries, such as Belgium, France, Latvia, the Netherlands, Norway, Portugal and Sweden.

19. In Belgium, Article 50 of the Constitution provides that

Any member of one of the two Houses, appointed by the King as a minister and who accepts this appointment, ceases to sit in the House and takes up his mandate again when the King has put an end to his functions as a minister. The law provides for the terms of his replacement in the House concerned.

20. The Belgian system is known as “*siege ejectable*” given that the alternate member of the parliament who replaces the one who is called to be a member of government has to leave whenever the latter ceases his governmental office.

21. Article 23 of the French Constitution provides that :

“The duties of member of the Government shall be incompatible with the exercise of any parliamentary office, any position of occupational representation at national level, any public employment or any occupational activity.”

22. The MP who has resigned in order to take up a position of minister is replaced by an alternate and is not entitled to resuming his seat once his governmental functions are over. In practice, the alternate resigns, and partial elections are held to fill in the post (and the former MP is likely to be elected).

23. In Latvia, the 1994 Rules of Procedure of Parliament provide :

“a Saeima Member shall have the right to give up his/her mandate during his/her term of office as Prime Minister, Deputy Prime Minister, Minister or State Minister. Upon receiving notice about the giving up of a mandate, the Presidium of the Saeima (hereinafter — the Presidium) shall invite the next candidate to become a Saeima Member and shall notify the Mandate and Submissions Committee thereof. The Mandate and Submissions Committee shall verify the election documents and shall notify the Saeima of

the results of this verification, and the Saeima, by its decision, shall approve the mandate of the said candidate.

Prime Minister, Deputy Prime Minister, Minister or State Minister who, in accordance with the provisions of this Article, has given up his/her mandate as a Saeima Member may renew this mandate if he/she resigns from the office of Prime Minister, Deputy Prime Minister, Minister or State Minister or if the Government resigns. The Prime Minister's, Deputy Prime Minister's, Minister's or State Minister's application for the renewal of the mandate of a Member may be submitted to the Presidium within one week from the date when he/she has resigned from the office of Prime Minister, Deputy Prime Minister, Minister or State Minister.

24. In the Netherlands, Article 57 of the Constitution provides that :

“A member of the States General may not be a Minister, State Secretary, member of the Council of State, member of the Court of Audit (Algemene Rekenkamer), member of the Supreme Court (Hoge Raad) or Procurator General or Advocate General at the Supreme Court.

Notwithstanding the above, a Minister or State Secretary who has offered to tender his resignation may combine the said office with membership of the States General until such time as a decision is taken on such resignation.

25. The former MP who has become a minister does not have the right to resume his or her parliamentary seat upon cessation of his or her governmental office. He or she is however given priority for replacing other possible MPs.

26. In Norway, Art. 62 § 2 of the Constitution reads as follows:

“Members of the Council of State may not attend meetings of the Storting as representatives while holding a seat in the Council of State. Nor may the State Secretaries attend as representatives while holding their appointments.”

27. This means that a member of Government may be a candidate during elections for Parliament. If elected, the alternate will participate in the sittings. When she or he leaves the Government, she/he will participate in the sittings of the Storting.

28. In Portugal, Article 154 of the Constitution provides that

“Deputies who are appointed members of the Government shall not perform the functions of a Deputy while the appointment is in force; their seat shall be filled temporarily as provided for in Article 153.

29. In Sweden¹, Chapter 4 Article 9 paragraph 1 of the Constitution provides that:

“During such time as a member is acting as Speaker or is a member of the Government, his mandate as a member shall be exercised by an alternate. The Riksdag may stipulate in the Riksdag Act that an alternate member shall replace a member while the latter is on leave of absence.”

¹ See CDL(2006)038.

30. Swedish members of parliament, therefore only leave their mandates for the time during which they are members of the government, i.e. only temporarily, and while in government, each of them is replaced by an alternate who temporarily become member of the Riksdag and as such has full member rights. When the prime minister or any other minister leaves his office as member of the Government, he automatically resumes his mandate as member of the Riksdag, while the alternate member at the same time leaves the Riksdag.

31. The Commission notes that, with the exception of France and the Netherlands, all these countries have established the incompatibility in question only on a temporary basis, that is to say for as long as governmental functions are exercised. In the Commission's view, given that this incompatibility emphasizes the separation of the Parliament and the Government, the principle of parliamentarianism justifies its temporary character.

32. The present Constitution of Ukraine does not allow a former minister to resume his or her mandate as a National Deputy once he or she ceases his governmental functions. Art. 81 § 2 of the Constitution refers to the "termination" and not to the "interruption" of the Deputy's mandate. Because of the explicit wording of Art. 81(2), a change of the legal situation is possible only through amending the Constitution.

33. If the incompatibility between the mandate of a National Deputy and the office of a member of the Cabinet of ministers is in general retained, the parliamentary features of the system should be enhanced by allowing former ministers to resume their mandates as deputies after the termination of their offices as ministers.

III. The possibility of a vote of non-confidence in a single minister

34. The question of the incompatibility between parliamentary and governmental functions in Ukraine raises another issue, that of the possibility of a vote of non-confidence in a single minister as opposed to a vote of non-confidence in the whole government.

35. Art. 85 § 1.12 of the Constitution of Ukraine reads:

Powers of the Verhovna Rada of Ukraine shall include (...) "appointing to office - upon the submission by the President of Ukraine - the Prime Minister of Ukraine, the Minister of Defence, the Minister of Foreign Affairs of Ukraine; appointing to office - upon the submission by the Prime Minister of Ukraine - other members of the Cabinet of Ministers of Ukraine, the Chairperson of the Antimonopoly Committee of Ukraine, the Chairperson of the State Committee on Television and Radio Broadcasting of Ukraine, and the Chairperson of the State Property Fund of Ukraine; dismissing from office the officials mentioned above; deciding on the resignation of the Prime Minister of Ukraine and of members of the Cabinet of Ministers of Ukraine".

36. This provision has been interpreted as allowing for the dismissal of an individual minister by the National Assembly. Such an interpretation could be contested by arguing that the term "officials" employed in the provision on the power of dismissal does not refer to Cabinet Ministers at all and that the dismissal of Cabinet Ministers is exhaustively regulated by Art. 87 of the Constitution, which only allows a vote of no-confidence in the whole Cabinet of Ministers.

37. The possibility of a vote of no-confidence in an individual minister is in contradiction with the principle of collective responsibility of the government, according to which the Prime Minister is responsible for forming the government and is accountable for the work of the whole government.

38. However, this possibility does not in itself contradict any democratic standards. Thus, provisions on such a possibility can be found in the constitutions of many established parliamentary democracies.

39. The possibility of dismissing individual ministers may add to the general political instability, especially in a so-called new democracy.

IV. Conclusions

40. Under the present constitutional and legal provisions of Ukraine, there exists an incompatibility between the functions of member of parliament and those of member of government.

41. This incompatibility can only be removed through an amendment to the Constitution.

42. It would be more compatible with the principle of parliamentarianism if the possibility were introduced for the former MP, once his or her governmental functions concluded, to resume his or her parliamentary seat.

43. The Ukraine Constitution is currently interpreted as providing the possibility of a vote of non-confidence in a single minister. This possibility may add to the general political instability of Ukraine.