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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW
(VENICE COMMISSION)

UKRAINE

URGENT FOLLOW-UP OPINION

**TO THE OPINIONS ON THE LAW “ON AMENDMENTS TO CERTAIN
LEGISLATIVE ACTS OF UKRAINE TO CLARIFY THE PROVISIONS ON
THE COMPETITIVE SELECTION OF CANDIDATES FOR THE POSITION
OF JUDGE OF THE CONSTITUTIONAL COURT OF UKRAINE”**

**Issued on 25 September 2023 pursuant to Article 14a
of the Venice Commission’s Rules of Procedure**

**Endorsed by the Venice Commission
at its 136th Plenary Session
(Venice, 6-7 October 2023)**

on the basis of comments by

**Mr Paolo CAROZZA (Member, United States)
Ms Marta CARTABIA (Member, Italy)
Mr Srdjan DARMANOVIC (Member, Montenegro)
Mr Christoph GRABENWARTER (Member, Austria)**

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I. Introduction

1. By letter dated 5 September 2023, Mr Ruslan Stefanchuk, Chairman of the Verkhovna Rada of Ukraine (hereafter "the Parliament"), requested an urgent follow-up opinion from the Venice Commission on the Law "On Amendments to certain legislative acts of Ukraine to clarify the provisions on the competitive selection of candidates for the position of judge of the Constitutional Court of Ukraine" ([CDL-REF\(2023\)037](#)) (hereafter "the Law").

2. On 11 September 2023, the Bureau of the Venice Commission,
- conscious of the importance and urgency of the matter and the exceptional nature of the Venice Commission's involvement in the next stages of the process as regards the composition of the AGE and the competitive selection of the candidate judges of the Constitutional Court of Ukraine;
 - having considered the importance of finalising the process of the assessment of the legislative process in a comprehensive and transparent manner;
 - given the previous - including follow-up - opinions adopted by the Venice Commission on the matter;

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.

3. Having served previously as the rapporteurs for the Venice Commission opinions adopted on this specific matter, Mr Paolo Carozza, Ms Marta Cartabia, Mr Srdjan Darmanović and Mr Christoph Grabenwarter continued to act as rapporteurs for this urgent follow-up opinion.

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

5. This urgent follow-up opinion was drafted on the basis of comments by the rapporteurs. It was issued in accordance with the Venice Commission's protocol on the preparation of urgent opinions (CDL-AD(2018)019) on 25 September 2023 and was endorsed by the Venice Commission at its 136th Plenary Session (Venice, 6-7 October 2023).

II. Background

6. On 10 June 2023, the Venice Commission adopted its follow-up opinion ([CDL-AD\(2023\)022](#)) to the opinion on draft law no. 9322 of 25 May 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" (Draft Law No. 9322 of 25 May 2023) (the "follow-up opinion").

7. Reiterating 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 welcomed 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, and the provision that substitute members of the AGE will be appointed to ensure continuity of work in case of recusal or self-recusal.

8. Nonetheless, the Venice Commission recommended *removing* from Article 10¹¹ of the draft law the provision on the order of voting for the election by the Congress of Judges; *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 (para. 40 of the follow-up opinion). The Venice Commission concluded that with the change and the clarifications recommended above, the key recommendations which it had formulated in its opinion of December 2022 ([CDL-AD\(2022\)054](#)) and in the follow up to such opinion ([CDL-PI\(2023\)002](#)) could be considered as having been followed in Draft law 9322 of 25 May 2023; the Commission stated that, after the adoption of the recommended amendments, it would therefore proceed with the submission of proposed candidates for the position of one member and one substitute member of the AGE (para. 42 of the follow-up opinion).

9. On 27 July 2023, the Verkhovna Rada adopted Law No. 3277-IX "On amendments to certain legislative acts of Ukraine to clarify provisions on the competitive selection of candidates for the position of judge of the Constitutional Court of Ukraine" (CDL-REF(2023)37). On 17 August 2023, the President of Ukraine signed¹ the Law, which was published in the Official Gazette on 19 August 2023 and entered into force on 20 August 2023².

10. By letter dated 29 August 2023, the Ukrainian authorities requested the Venice Commission to nominate candidates for the position of member and substitute member of the AGE "in as expedient manner as possible".

III. Analysis

- *Removing from Article 10¹¹ of the draft law the provision on the order of voting for the election by the Congress of Judges*

11. Article 10¹¹-1 of the Law on the Constitutional Court of Ukraine introduces two consecutive stages of voting by the Congress of Judges. The first stage provides that the Congress of Judges, after receiving from the AGE the list of the suitable candidates ranked according to the preference roll call vote of the AGE members, makes its own ranking of the "suitable" candidates. Subsequently, the Congress of Judges elects the CCU judge based on such a ranking.

12. The Venice Commission notes that the Congress of Judges is not bound by the ranking of "suitable" candidates made by the AGE; it makes its own ranking (the procedure has been aligned with the ranking voting conducted by the Verkhovna Rada (Article 208-4(16) of the Rules of Procedure of the Verkhovna Rada). Therefore, the ranked order made by the AGE and transmitted to the Congress of Judges does not have any direct mandatory consequence on the order of voting of candidates by the Congress of Judges, which is in line with the Venice Commission's recommendation (follow-up opinion, para. 26).

- *Clarifying that the names of the AGE members who voted in favour of each candidate in the ranking phase be also published*

13. Article 10⁸-7 of the Law on the Constitutional Court of Ukraine *clarifies* that the results of the ranking vote of each AGE member are public, recorded by name and published on the official website of the Constitutional Court. The Venice Commission concludes that the recommendation has been followed.

- *Specifying that the decisions of the AGE may only be challenged on formal grounds and not on the merits*

¹ See <https://www.president.gov.ua/en/news/buduyemo-arsenal-vilnogo-svitu-razom-zvernennya-prezidenta-u-84933>

² See <https://zakon-rada.gov.ua.translate.google/laws/card/3277-20? x tr sl=uk& x tr tl=en& x tr hl=fr& x tr pto=wapp>

14. The new Part 32 of Article 10² of the Law on the Constitutional Court of Ukraine *specifies* three grounds on which the decisions of the AGE may be appealed: 1. The composition of the AGE that made the relevant decision did not have the authority to make it; 2. The decision was not signed by any of the members of the AGE who participated in its adoption, and 3. The decision does not contain the reasons for which the AGE reached the relevant conclusions.

15. The Venice Commission notes that a similar approach is used for challenging the decision of the High Council of Justice of Ukraine.³ The Commission finds that the above-mentioned grounds refer to the procedures of the AGE's functioning (the AGE will adopt its Rules of Procedures – Art. 10²-25(1) of the Law on the Constitutional Court of Ukraine) and do not concern substantive aspects of the AGE decisions, and therefore are of a formal (procedural) nature. It concludes that the recommendation has been followed.

IV. Conclusion

16. The Venice Commission:

- concludes with satisfaction that the key recommendations it had formulated in the 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) ([CDL-AD\(2023\)022](#)) have been followed in the Law adopted on 27 July 2023;
- considers that it may proceed with the selection of one member and one substitute member of the AGE.
- instructs its Bureau to proceed accordingly and to convey to the Ukrainian authorities without delay the names of such a candidate member and a candidate substitute member of the AGE in accordance with the Transitional provisions of the Law.

³ Article 52(1) of the Law on the High Council of Justice:

"1. A decision of the High Council of Justice adopted upon consideration of an appeal against a decision of the Disciplinary Chamber may be appealed and cancelled solely on the following grounds: 1) the composition of the High Council of Justice that made the relevant decision did not have the authority to make it; 2) the decision was not signed by any of the members of the High Council of Justice who participated in its adoption; 3) the judge was not duly notified of the meeting of the High Council of Justice - if any of the decisions specified in paragraphs 2-5 of part ten of Article 51 of this Law were made; 4) the decision does not contain references to the grounds for disciplinary liability of the judge as defined by law and the reasons for which the High Council of Justice reached the relevant conclusions."