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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW
(VENICE COMMISSION)

UKRAINE

JOINT AMICUS CURIAE BRIEF

**OF THE VENICE COMMISSION
AND THE DIRECTORATE GENERAL OF HUMAN RIGHTS
AND RULE OF LAW (DGI) OF THE COUNCIL OF EUROPE**

**ON CERTAIN QUESTIONS RELATED
TO THE ELECTION AND DISCIPLINE
OF THE MEMBERS OF THE HIGH COUNCIL OF JUSTICE**

On the basis of comments by

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I. Introduction

1. By letter of 1 July 2022, the Acting Chair of the Constitutional Court of Ukraine, Mr Serhyi Holovaty requested an *amicus curiae* brief of the Venice Commission on certain questions related to the election and discipline of the members of the High Council of Justice of Ukraine.
2. Mr Nicolae Esanu, Mr Martin Kuijer, Mr Gerhard Reissner and Ms Hanna Suchocka acted as rapporteurs for this *amicus curiae* brief.
3. This *amicus curiae* brief was prepared in reliance on the English translation of the questions and the pertinent legislation. The translation may not accurately reflect the original version on all points.
4. This *amicus curiae* brief was drafted on the basis of the comments by the rapporteurs. It was adopted by the Venice Commission at its 132nd Plenary Session (Venice, 21-22 October 2022).

II. The request

5. The request of the Constitutional Court of Ukraine for an *amicus curiae* brief refers to the Law No. 1635-IX of 14 July 2021 “*On Amendments to Some Legislative Acts of Ukraine on the Procedure for Election (Appointment) to the Positions of Members of the High Council of Justice and the Activities of Disciplinary Inspectors of the High Council of Justice*”. This Law is available in document [CDL-REF\(2021\)081](#). This Law amends *inter alia* the Law on the High Council of Justice (available at [CDL-REF\(2020\)067](#)).

6. The request for an *amicus curiae* brief is formulated as follows:

“The Constitutional Court of Ukraine is currently considering a case upon the constitutional petition of the Supreme Court concerning the conformity of subparagraph thirteen of paragraph 23’ of Section III “Final and Transitional Provisions” of the Law of Ukraine “On the High Council of Justice” of December 21, 2016 No.1798-VIII, subparagraphs one, six, eleven of paragraph 4 of Section II “Final and Transitional Provisions” of the Law of Ukraine “On Amendments to Some Legislative Acts of Ukraine on the Procedure for Election (Appointment) to the Positions of Members of the High Council of Justice and the Activities of Disciplinary Inspectors of the High Council of Justice” of July 14, 2021 No.1635-IX (hereinafter referred to as the Law No. 1635) with the Constitution of Ukraine (constitutionality).

The subject of the right to constitutional petition [the Supreme Court] argues that the disputed provisions of these laws:

- 1) *allow instant termination of the activity of the High Council of Justice, which poses real significant threats to the principle of uninterrupted functioning of public authority;*
- 2) *establish a re-evaluation of the Members of the High Council of Justice who are judges and have already passed the evaluation for compliance with the criteria of professional ethics and integrity;*
- 3) *establish the procedure for dismissal of Members of the High Council of Justice, which does not comply with the principle of the rule of law;*
- 4) *level the established procedure for the formation of the High Council of Justice, violating the principle of independence of judges, set up by Article 126 of the Constitution of Ukraine.*

*The Constitutional Court of Ukraine appeals to the esteemed European Commission for Democracy through Law (Venice Commission) to provide an *amicus curiae* brief on the following issues:*

1. *Subparagraph six of paragraph 4 of Section II “Final and Transitional Provisions” of the Law No. 1635 establishes the procedure for removal from office or termination of powers of a Member of the High Council of Justice.*

Could the implementation of this procedure lead to the termination of the activity of the High Council of Justice, resulting in non-compliance with the principle of the rule of law and the principle of independence of judges, and limiting the principle of uninterrupted functioning of the High Council of Justice established by Article 131 of the Constitution?

2. Subparagraph one of paragraph 4 of Section II "Final and Transitional Provisions" of the Law No. 1635 establishes a one-time evaluation by the Ethics Council of the compliance of a Member of the High Council of Justice (except the Chairman of the Supreme Court), elected (appointed) to the position of Member of the High Council of Ukraine before the entry into force of this law, with the criteria of professional ethics and integrity for the position of Member of the High Council of Justice of those members of the High Council of Justice who as judges have already passed the examination during the qualification evaluation or while participating in the competition for the position of judge.

Could one-time evaluation of these persons, which was established by the law, be considered as a re-evaluation, and could such an evaluation be regarded as an interference of the parliament in the independence of the judiciary?

3. Subparagraphs five to eleven of paragraph 4 of Section II "Final and Transitional Provisions" of the Law No. 1635 establish the procedure for dismissal of Members of the High Council of Justice.

Does the procedure for dismissal of Members of the High Council of Justice established by the Law No. 1635 comply with the principle of independence of the judiciary as one of the components of the principle of the rule of law enshrined in Article 8 of the Constitution of Ukraine and the provisions of Article 19.2 of the Constitution?

4. Subparagraphs eleven to thirteen of paragraph 23-1 of Section III "Final and Transitional Provisions" of the Law No. 1798 regulate the procedure for decision-making by the first composition of the Ethics Council, according to which, in particular, in the case of an equal number of votes "for" and "against" during the repeat ballot, the votes of the members of the Ethics Council, of whom at least two have been proposed by international and foreign organisations, are decisive.

Could the application of these provisions of the Law No. 1798 lead to a violation of the principle of independence of judges enshrined in Article 126 of the Constitution of Ukraine?

5. Paragraph 23-1 of Section III "Final and Transitional Provisions" of the Law No. 1798 establishes the procedure for forming the first composition of the Ethics Council and making decisions by it.

Could the procedure for forming and making decisions by the High Council of Justice established under this provision of the Law No. 1798 pose a threat to the sovereignty of the Ukrainian state or even lead to its violation?"

III. Background

7. On 5 May 2021, the Venice Commission issued, pursuant to Article 14a of its Rules of Procedure, the Urgent Joint Opinion of the Venice Commission and the Directorate General of Human Rights and the Rule of Law (DGI) on the draft law on amendments to certain legislative acts concerning the procedure for electing (appointing) members of the High Council of Justice (HCJ) and the activities of disciplinary inspectors of the HCJ (Draft law no. 5068). That opinion was endorsed by the Venice Commission at its 127th Plenary Session on 2-3 July 2021 (hereinafter, "the 2021 Opinion").¹ The further amended draft law no. 5068 was enacted as Law No. 1635-IX on 14 July 2021.

¹ Venice Commission, CDL-AD(2021)018, Ukraine - Urgent joint opinion of the Venice Commission and the Directorate General of Human Rights and the Rule of Law (DGI) of the Council of Europe on the draft law on amendments to certain legislative acts concerning the procedure for electing (appointing)

8. One of the main elements of Law No. 1635-IX is that a mixed national / international Ethics Council was established to evaluate candidates for membership of the HCJ and to perform a one-off evaluation of the sitting members of the HCJ.

9. The Ethics Council, which has three national and three international members, was established on 9 November 2021.² Its Rules of Procedure and its "Methodology for assessing compliance of a candidate to the position of the member of the High Council of Justice and members of the High Council of Justice with the criterion of professional ethics and integrity" are available on its site.³ All decisions of the Ethics Council are available on that site as well.⁴

10. Following the establishment of the Ethics Council two members of the HCJ resigned and their resignation was accepted by the HCJ on 20 January 2022 (according to Article 24 part 1, 2 of the Law of Ukraine "On the High Council of Justice"). On 22 February 2022, ten more members of the HCJ resigned. Their resignation was accepted by the HCJ in its composition then still including those ten members. The HCJ terminated their mandate with effect of 23 February 2022.

11. These resignations created a problem for the functioning of the HCJ, notably its quorum: while the Law on the High Council of Justice requires a specific quorum of 14 members in some specific cases, it requires the presence of half or two thirds of its members respectively in other cases (see Articles 30 (2) and 37 (2) of the Law on the HCJ). However, Article 18 provides that the HCJ is "fully legitimate" when "at least fifteen of its members are elected (appointed), out of whom the majority are judges, including retired judges, and who took the oath of the office."

12. After the dismissal of the members of the HCJ at their own will in January and February 2022, only 5 members remained in the HCJ, including the Chairman of the Supreme Court, who is member of the HCJ *ex officio*. It is not clear whether the HCJ took any decisions since 23 February 2022, because since the start of the war against Ukraine the HCJ restricted access to its decisions on its official website.⁵

13. The remaining four non-*ex officio* members of the HCJ were evaluated by the Ethics Council. Three HCJ members were found "compliant with the criteria of professional ethics and integrity for the position of the member of the High Council of Justice".⁶

members of the High Council of Justice (HCJ) and the activities of disciplinary inspectors of the HCJ (Draft law no. 5068).

² Web-site of the Ethics Council: https://court.gov.ua/eng/ec/about_ec/about/.

³ https://court.gov.ua/eng/ec/about_ec/14/ (the Rules of Procedure were amended due to the introduction of martial law).

⁴ https://court.gov.ua/eng/ec/pres-centr/rishenna_er/.

⁵ News on the website of the High Council of Justice about the restriction of access to information. (March 4): *"In order to prevent the use of information contained on the website of the High Council of Justice for criminal purposes during the period of martial law in Ukraine, access to the register of acts of the High Council of Justice, the register of judges' notifications about interference in activities, information about bringing judges to disciplinary responsibility, about removing judges from the administration of justice, the list of judges dismissed by the Supreme Council of Justice for committing a significant disciplinary offense, the register of automated distribution of materials among members of the Supreme Council of Justice, information on draft agendas and summoning of persons to meetings of the Supreme Council of Justice, information on candidates for the positions of members of the Supreme Council of Justice and members of the High Qualification Commission of Judges of Ukraine were temporarily suspended."*

<https://hcj.gov.ua/news/shchodo-dostupu-do-informaciyi-oficynogo-vebsaytu-vyshchoyi-rady-pravosuddya>.

⁶ https://court.gov.ua/eng/ec/pres-centr/rishenna_er/rishennj_7_07_05_2022_er,

https://court.gov.ua/eng/ec/pres-centr/rishenna_er/rishennj_8_07_05_22,

https://court.gov.ua/eng/ec/pres-centr/rishenna_er/rishennj_09_07_05_22.

14. Only one HCJ member was found by the Ethics Council, on 7 May 2022, to be non compliant with those criteria.⁷ According to part II. Final and Transitional Provisions, paragraph 4 of Law No. 1635-IX, that decision of the Ethics Council resulted in the suspension of the membership in the HCJ of that member.

15. On 23 June 2022, the member concerned appealed to the Administrative Court of Cassation of the Supreme Court against the decision of the Ethics Council proposing his dismissal. That case is still pending before the Administrative Court of Cassation, which however did not grant the requested suspension of the decision of the Ethics Council, i.e. the Administrative Court of Cassation did not suspend the automatic suspension of the member from the HCJ. That member therefore has remained suspended from the HCJ.

16. According to part II. Final and Transitional Provisions, paragraph 4, of Law No. 1635-IX, the body having elected or appointed a member of the HCJ who was found by the Ethics Council not to be in compliance has three months to endorse or reject the decision of the Ethics Council. If that entity does not decide within the three months period, “such member of the High Council of Justice shall be deemed dismissed pursuant to law.”⁸

17. The suspended member had been elected to the HCJ by the Congress of Representatives of Legal Higher Educational Institutions and Scientific Institutions, which therefore had to decide by 7 August 2022 whether to endorse or reject the decision of the Ethics Council.

18. However, the Congress of Representatives of Legal Higher Educational Institutions and Scientific Institutions held its session only on 19 August 2022. Even though the deadline had expired, and the member concerned was already to be considered dismissed, the Congress considered the case but failed to reach the required majority to decide either to reject or to endorse the decision of the Ethics Council.

19. On 22 August 2022 the Ukrainian Parliament elected as members of the HCJ two candidates who had been found to be compliant with the criteria of professional ethics and integrity by the Ethics Council.

IV. Replies to the questions from the Constitutional Court

20. Before replying to the five specific questions from the Constitutional Court, the Venice Commission and DGI would like to underline that the HCJ is established by Article 131 (7) of the Ukrainian Constitution “*to take measures to ensure independence of judges*”. By exercising its powers, the HCJ has a direct impact on the status of judges. The HCJ participates in the process of nomination and admission to the profession, promotion of judges and their transfer to a higher court, or early retirement. In order to fulfil this task, the HCJ must remain independent of the other branches of government and must be composed of persons of impeccable ethic integrity. The participation of judges and lay members in the HCJ is based on the assumption that they bring integrity, independence and competence to it. The activities of the HCJ and its ability to fulfil its tasks depend on the personal qualities of its members.

⁷ https://court.gov.ua/eng/ec/pres-centr/rishenna_er/risennj_6_07_05-2022_er/.

⁸ This provision was not yet included in the draft law no. 5068 (CDL-REF(2021)030) that was submitted to the Venice Commission for its urgent joint opinion CDL-AD(2021)018 on the draft law on amendments to certain legislative acts concerning the procedure for electing (appointing) members of the High Council of Justice (HCJ) and the activities of disciplinary inspectors of the HCJ.

A. Question 1 - Could the implementation of the procedure for removal from office or termination of powers of a Member of the High Council of Justice lead to the termination of the activity of the High Council of Justice, resulting in non-compliance with the principle of the rule of law and the principle of independence of judges, and limiting the principle of uninterrupted functioning of the High Council of Justice established by Article 131 of the Constitution?

21. In a number of opinions,⁹ the Venice Commission referred to the need to ensure the uninterrupted functioning of the Constitutional Court. For example, the interruption for more than a year of the work of the Constitutional Court of Ukraine was at the origin of the Opinion on possible constitutional and legislative improvements to ensure the uninterrupted functioning of the Constitutional Court of Ukraine in 2006.¹⁰

22. The question arises whether Article 131 of the Constitution establishes a specific “principle of uninterrupted functioning of the High Council of Justice”. Under the principles of the Rule of Law and separation of powers, legislative and executive powers must act diligently to ensure that the state bodies, including the High Council of Justice, may function without unjustified interruptions. However, it is open to discussion whether it is necessary or useful to establish a separate principle of “uninterrupted functioning of the High Council of Justice”.

23. It is for the Constitutional Court of Ukraine to decide whether Article 131 of the Constitution can be interpreted in the sense that it would establish such a principle. Article 131 does not determine the mandate of the HCJ. The clause that the “[t]erm of the office for elected (appointed) members of the High Council of Justice shall be four years” refers to individual members, not to the mandate of the HCJ itself. It is true that the termination of the mandate of the HCJ can influence the mandate of its members and the termination of the mandate of one (or several) individual member(s) can affect the functioning of the HCJ. Nonetheless these are two separate legal issues.

24. Even it were admitted that the Constitution did establish the “principle of uninterrupted functioning of the High Council of Justice” and this principle were to be interpreted in the sense that it could be infringed by the termination of the mandate of individual members, this can hardly be interpreted in the sense that the uninterrupted functioning of the High Council of Justice must be ensured even in cases, when it is clearly established, that a member of the HCJ does not fulfil the conditions for membership, including integrity, in which case this membership would undermine the credibility of the Judiciary. Such an interpretation would not be compatible with the Rule of Law.¹¹

25. There are numerous possibilities - and one of them has already materialised - that an interruption of the functioning of the HCJ could happen, e.g. illness or death of several members, refusal of appointing / electing bodies to elect or nominate new members; or - mass resignation of members with the effect of stopping the activities due to a lack of quorum. The possibility that

⁹ Venice Commission, CDL-AD(2006)017 Opinion on amendments to the law on the Constitutional Court of Armenia, paragraphs 22, 31(2); CDL-AD(2007)036 Opinion on Draft Amendments to the Law on the Constitutional Court, the Civil Procedural Code and the Criminal Procedural Code of Azerbaijan, § 16; CDL-AD(2011)050cor, Opinion on draft amendments and additions to the law on the Constitutional Court of Serbia, § 17; CDL-AD(2015)024, Opinion on the draft institutional law on the Constitutional Court of Tunisia, § 27; CDL-AD(2016)017, Georgia - Opinion on the Amendments to the Organic Law on the Constitutional Court and to the Law on Constitutional Legal Proceedings, § 53; CDL-AD(2017)001, Slovak Republic - Opinion on questions relating to the appointment of Judges of the Constitutional Court, § 43.

¹⁰ Venice Commission, Opinion on possible Constitutional and Legislative Improvements to ensure the uninterrupted functioning of the Constitutional Court of Ukraine, CDL-AD(2006)016.

¹¹ Venice Commission, CDL-AD(2016)007, Rule of Law Checklist, II.F.1., § 82; Consultative Council of European Judges, CCJE Opinion No. 24 (2021), §§ 12-18.

provisions on dismissals of individual members might result in a loss of quorum cannot be a sufficient argument that those provisions themselves are an infringement of the rule of law and the independence of judges.

26. All state organs have to fulfil their tasks according to the Constitution and to contribute to the well-functioning of the state powers. The mere possibility that numerous members of the HCJ could be found non-compliant with the criteria of integrity and that as a result the number of remaining members would fall under the quorum, should not result in an unconstitutionality of the underlying legal provision. To the contrary, judicial independence is violated *de facto* if the highest organ of judicial administration is composed by persons who lack integrity.¹²

B. Question 2 - Could a one-time evaluation of the persons who as judges have already passed the examination during the qualification evaluation or while participating in the competition for the position of judge, be considered as a re-evaluation, and could such an evaluation be regarded as an interference of the parliament in the independence of the judiciary?

27. The principle of the irremovability of judges is a key element for the maintenance of judicial independence, which is a cornerstone of the rule of law. "At the same time, it must be stressed that the authority of a judiciary can only be maintained if (a) the legal system puts in place adequate mechanisms to ensure that candidates are not appointed as a judge if they do not have the required competences or do not meet the highest standards of integrity; and (b) the judiciary is cleansed of those who are found to be incompetent, corrupt or linked to organised crime. This is not only essential in view of the role a judiciary plays in a state governed by the rule of law, but also because a judge – once appointed for life – will in principle be irremovable except for limited grounds for dismissal".¹³

28. Removing a judge from an administrative position within the judiciary, such as a member of the High Judicial Council, does not have the same impact on judicial independence of the judge concerned as the dismissal of a judge from judicial adjudication. Nonetheless, the evaluation of a judge as a member of the HCJ will eventually also impact his or her work as a judge. Even if a possible dismissal of a judge as a member of the Judicial Council due to a negative outcome of the extraordinary evaluation will not directly affect his/her position as a judge, it might compromise his/her credibility and thus the credibility of the judiciary. It would only seem coherent if a finding of non-compatibility by the Ethics Council would result in a disciplinary investigation and the judge concerned might eventually be removed also from his or her position as a judge.

29. Already in the 2021 Opinion, the Commission insisted that the vetting of sitting members of a Council for the Judiciary can only be an extraordinary one-time measure: "*A vetting of the current members of the HCJ [High Council of Justice] by the Ethics Council according to the criteria of professional ethics and integrity can be considered acceptable only as a one-time, exceptional measure. The participation of an international component in the Ethics Council is a necessary guarantee for such an exceptional measure in Ukraine, which establishes a balance between the independence of the members of the HCJ and the necessity to ensure their integrity.*"

¹² Venice Commission, CDL-AD(2021)018, Ukraine - Urgent joint opinion of the Venice Commission and the Directorate General of Human Rights and the Rule of Law (DGI) of the Council of Europe on the draft law on amendments to certain legislative acts concerning the procedure for electing (appointing) members of the High Council of Justice (HCJ) and the activities of disciplinary inspectors of the HCJ (Draft law no. 5068), § 16.

¹³ Venice Commission, CDL-AD(2022)005, Croatia - Opinion on the introduction of the procedure of renewal of security vetting through amendments to the Courts Act, §14.

*In line with the principle of proportionality, current members should not be excluded from the HCJ for minor infringements.*¹⁴

30. While the evaluation of candidates is in principle not a problem, vetting of sitting members of a judicial council can be introduced only in narrow special circumstances, as a measure of last resort and only if ordinary means like disciplinary measures and general anti-corruption instruments have no sufficient effect.¹⁵

31. This extraordinary mechanism can be established if systemic problems cannot be solved through ordinary disciplinary mechanisms. A re-evaluation of judges already vetted is hardly compatible with the principle of irremovability of judges and the rule of law.¹⁶ As an extraordinary means, it should be applied only once. Judges who have already undergone such integrity testing should not be tested again as part of a general evaluation. This does of course not exclude individual measures under disciplinary or even criminal law when there are indications of wrongdoing after a general evaluation.

32. The Venice Commission is not in a position to assess which forms of evaluation or vetting were undergone by the sitting members of the HCJ and in what manner these previous assessments differed with the current one (i.e. the applicable criteria and/or the applicable methods, notably the available sources of information). In individual cases, new information discovered (*nova reperta*), could legitimise disciplinary or criminal procedures and may lead to a procedure for dismissal according to Article 24 of the Law on the HCJ.

33. In any case, it would seem that any finding of unconstitutionality of the legal basis would affect only the cases of persons who were found not to be in compliance with the criteria and not persons who resigned even before they were evaluated.

34. Another issue is the distinction between the President of the Supreme Court (who is not evaluated by the Ethics Council) and other (Supreme Court) judges who are members of the HCJ (who are evaluated by the Ethics Council). This distinction needs to be explained.

35. The different treatment of the President of the Supreme Court can be explained by the fact that that the President of the Supreme Court is an *ex officio* member of the High Council of Justice. The mechanism of evaluation and possible dismissal of the President of the Supreme Court is a totally different mechanism, which cannot be mixed with the mechanism of evaluation and eventual dismissal of the members of High Council of Justice. Therefore, the exception for the President of the Supreme Court seems justified.

¹⁴ Venice Commission, CDL-AD(2021)004, Ukraine: Urgent Joint Opinion of the Venice Commission and the Directorate General of Human Rights and Rule of Law (DGI) of the Council of Europe on the Draft Law on Amendments to Certain Legislative Acts Concerning the Procedure for Electing (Appointing) Members of the High Council of Justice (HCJ) and the Activities of Disciplinary Inspectors of the HCJ (Draft Law No. 5068), § 59.

¹⁵ Office of the UNHCHR, Rule of law tools for post-conflict states, Vetting: an operational framework, UN, New York and Geneva 2006; Venice Commission, CDL-AD(2022)005, Croatia - Opinion on the introduction of the procedure of renewal of security vetting through amendments to the Courts Act, § 12.

¹⁶ Paragraph 58 of the Joint Urgent Opinion CDL-AD(2021)018 assumed that the current members (with the exception of the President of the Supreme Court) had not been vetted. In the light of the *amicus curiae* request, this does not seem to be the case.

C. Question 3 - Does the procedure for dismissal of the Members of the High Council of Justice established by Law No.1635 comply with the principle of independence of the judiciary as one of the components of the principle of the rule of law enshrined in Article 8 of the Constitution¹⁷ of Ukraine and the provisions of Article 19.2 of the Constitution?¹⁸

36. The purpose of the establishment of the Ethics Council is to create a truly independent judiciary, including the members of the HCJ, by removing members who do not fulfil the criteria of integrity. The evaluation is therefore a mechanism to regain judicial independence. Thus, the evaluation does not contradict independence, but it is a guarantee for it.

37. As the Ethics Council is only making recommendations, *a priori* no issue of compatibility with the rule of law would appear to exist. Carrying out the 'one-time vetting' therefore would not in itself lead to a situation interfering with the functioning of the HCJ. Avoiding that such a situation arises is a shared responsibility of all stakeholders:

- a. the Ethics Council should be careful in finding a sitting member 'non-compliant' and do so only if there are "*reasonable doubts about compliance*" (see 3.3 Rules of its Procedure);
- b. the Ethics Council is to be mindful of the principle of proportionality as reflected in 1.4 of its Methodology;
- c. the appointing body – when deciding on the recommendation made by the Ethics Council – should ensure that following dismissals of members the procedure for new appointments is immediately started.

38. In practice, the number of members of the HJC has already fallen below the quorum, not because of the activity of the Ethics Council but because of numerous resignations of members of the HCJ. It is the joint responsibility of all stakeholders, notably the appointing bodies, to overcome this situation as soon as possible through loyal cooperation.

39. If this loyal cooperation by one of the appointing bodies is missing, there should be a mechanism to unblock the situation. However, the automatic dismissal if the appointing body does not adopt a decision within three months from the moment of submission by the Ethics Council of the recommendation to dismiss a member of the High Council of Justice may be seen as problematic. This loss of office *ex lege* affects judicial independence.¹⁹ In some cases it changes the nature of recommendation to a definite decision.

40. It may be necessary to consider the different reasons which may cause a delay. This problem can be addressed at least partially if it is at least ensured that a decision of the Supreme Court rejecting the recommendation of the Ethics Council has the effect of reinstating the member to

¹⁷ "Article 8

In Ukraine, the principle of the rule of law is recognised and effective.

The Constitution of Ukraine has the highest legal force. Laws and other normative legal acts are adopted on the basis of the Constitution of Ukraine and shall conform to it.

The norms of the Constitution of Ukraine are norms of direct effect. Appeals to the court in defence of the constitutional rights and freedoms of the individual and citizen directly on the grounds of the Constitution of Ukraine are guaranteed."

¹⁸ "Article 19

...

Bodies of state power and bodies of local self-government and their officials are obliged to act only on the grounds, within the limits of authority, and in the manner envisaged by the Constitution and the laws of Ukraine."

¹⁹ This provision was not yet included in the draft law No. 5068 ([CDL-REF\(2021\)030](#)) that was submitted to the Venice Commission for its urgent joint opinion [CDL-AD\(2021\)018](#) on the draft law on amendments to certain legislative acts concerning the procedure for electing (appointing) members of the High Council of Justice (HCJ) and the activities of disciplinary inspectors of the HCJ.

the HCJ. In order to find that remedy 'effective' it has to be ensured until that decision no new member can be appointed replacing the member who was dismissed by default, in order to avoid double appointments. This may well be the case but part 5 of the Transitional and Final Provisions on that appeal is not explicit on this matter.

41. There are also practical issues to take into account concerning the automatic dismissal if the appointing body cannot take a decision in time. Some of them are large collegiate bodies. It may not be possible to organise meetings of such large bodies within the three months deadline, for example for the Congress of Judges,²⁰ the Congress of Lawyers,²¹ the All-Ukrainian Conference of Prosecutors²² and the Congress of Representatives of Legal Higher Education Institutions or Scientific Institutions²³ with the necessary quorum.

D. Question 4 - Could the application of provisions of the Law No. 1798 according to which, in particular, in the case of an equal number of votes ,”for” and ,”against” during the repeat ballot, the votes of the members of the Ethics Council, of whom at least two have been proposed by international and foreign organisations, are decisive, lead to a violation of the principle of independence of judges enshrined in Article 126 of the Constitution of Ukraine?

42. On the individual level, the principle of judicial independence means the independence of each judge in the exercise of adjudicating functions and his or her ability to act without any restriction, improper influence, pressure, threat or interference, direct or indirect, exercised by legislative and executive powers (external independence) or by any person or authority within judiciary (internal independence).

²⁰ Meets every two years but can convene an extraordinary congress (Article 130 (1) of the Law of Ukraine "On the Judiciary and the Status of Judges"). According to Article 130 (6) of the Law of Ukraine "On the Judiciary and the Status of Judges", the announcement of the convening of the Congress of Judges of Ukraine and the issues to be considered must be published in the "Voice of Ukraine" and "Government Courier" newspapers not later than thirty days before the start of the work of the congress, and in the case of convening an extraordinary congress at the request of the meeting of judges - fifteen days before the start of the work of the congress.

²¹ In accordance with Article 54 (4) of the Law "On Advocacy and Lawyer's Activity", the Congress of Lawyers is convened by the Council of Lawyers at least once every three years. The Congress of Lawyers is convened within a sixty-day period at the initiative of the Council of Lawyers or at the request of at least one-tenth of the total number of lawyers included in the Unified Register of Lawyers, or at least one-third of the bar councils of the regions. Article 54 (5) stipulates that lawyers are informed about the day, time and place of the start of work of the congress of lawyers of Ukraine and the issues brought to its discussion no later than twenty days before the day of the start of work of the congress.

²² According to Article 68 (1) of the Law "On the Prosecutor's Office", the regular all-Ukrainian conference of prosecutors is convened by the Council of Prosecutors of Ukraine once every two years. An extraordinary conference may be convened by decision of the Council of Prosecutors of Ukraine. Article 68 (2) stipulates that the delegates of the All-Ukrainian conference of prosecutors and the persons invited to it shall be notified of the day of the conference and the issues to be considered no later than thirty days before the start of the conference.

²³ The Congress of Representatives of Legal Higher Educational Institutions and Scientific Institutions is not held on a regular basis. According to Article 13 (8) of the Law "On the High Council of Justice", the time and place of the congress of representatives of legal higher educational institutions and scientific institutions are determined by the HCJ, and in case of impossibility of making a decision by the HCJ due to the lack of a sufficient number of elected (appointed) of its members - the central body of executive power in the field of education and science. Article 13 (9) specifies that the notice of the time and place of the congress is published no later than forty-five calendar days before its holding in the newspaper "Voice of Ukraine" and is made public on the website of the High Council of Justice or the central body of executive power in the field of education and science, if it determines the time and place of the congress, and is also sent immediately to educational institutions and scientific institutions that delegate their representatives to the congress.

43. In the light of these criteria, the independence of judges would not be affected by the fact that some members of the Ethics Council are designated by international and foreign organisations or by the fact that votes of two of these members are decisive in the case of the tied vote.

44. Taking also into consideration that the Ethics Council normally makes recommendations which can be appealed directly with the Supreme Court, international participation can be considered as an additional guarantee of independence of the judges concerned, because the persons designed by international and foreign organizations will *a priori* be more independent from legislative and executive power or persons and any authorities within the Ukrainian judiciary. The inclusion of international members can provide guarantees for the independence of judges because they add an additional element of objectivity, not being involved in interests, strategies and politics of national stakeholders.

45. In their document entitled Rule-of-Law Tools for Post-Conflict States - Vetting: an Operational Framework, the Office of the United Nations High Commissioner for Human Rights states that: *“A transitional personnel reform should, therefore, generally be administered by a specially created mechanism in the form of a commission. This special commission should be independent to ensure a fair, impartial and legitimate implementation of the process. Establishing an independent commission and ensuring the impartiality of its members may not be easy(...) Its members should be distinguished citizens of integrity who are not associated with a political party or former warring faction. The inclusion of non-national members may increase the independence and legitimacy of the commission.”*²⁴

46. Paragraph 59 of the 2021 Opinion already insisted that *“[t]he participation of an international component in the Ethics Council is a necessary guarantee for such an exceptional measure in Ukraine, which establishes a balance between the independence of the members of the HCJ and the necessity to ensure their integrity.”*

47. Already in its Opinion on the Draft Law on Anticorruption Courts, the Venice Commission had stated that *“[i]n international comparison, it is not unusual that anti-corruption institutions are established with considerable support and input from international donors, and it is not unheard of that foreign nationals play some part in the judiciary; for example, in certain very small countries, even judges may be foreign nationals. The international involvement seems to be justified in the specific situation in Ukraine, with due regard to the principle of Ukraine’s sovereignty.”*²⁵

48. The basis for the work of the Ethics Council is a Ukrainian law, which was adopted in the framework of Article 131 of the Constitution. The Ethics Council is not competing with the HCJ or replacing it. The Ethics Council is provided to be established only for a limited period of time of 6 years. It is doing preparatory work to assist the bodies that elect (appoint) members of the High Council of Justice in determining whether an applicant for the position of a member of the High Council of Justice meets the criteria of professional ethics and integrity.

49. Moreover, the international element affects only the composition of the HCJ, while, as a national institution, the HCJ itself works completely without any international involvement. Finally, all decisions of the Ethics Council, both concerning candidates and current members of the HCJ, can be appealed to the Supreme Court. Therefore, the final decision remains with a national body in all cases.

²⁴ <https://www.ohchr.org/en/publications/policy-and-methodological-publications/rule-law-tools-post-conflict-states-vetting>, p. 24.

²⁵ Venice Commission, CDL-AD(2017)020, Ukraine - Opinion on the Draft Law on Anticorruption Courts and on the Draft Law on Amendments to the Law on the Judicial System and the Status of Judges (concerning the introduction of mandatory specialisation of judges on the consideration of corruption and corruption-related offences), § 49.

50. As concerns the preponderant vote of two international members, this comes into play only in case after a repeat vote, which is a tied vote. In order to find a solution for tied votes, the Ukrainian legislator has chosen one of several possible solutions as an anti-blocking mechanism. International experts were included in the first composition of the Ethics Council in order to increase the trust in this body. The voting provision for tied votes follows in a coherent manner the same logic. The rule on the preponderant vote therefore would not seem to violate the principle of the independence of judges.

E. Question 5 - Could the procedure for forming and making decisions by the High Council of Justice established under this provision of the Law No. 1798 pose a threat to the sovereignty of the Ukrainian state or even lead to its violation?

51. It is up to the Constitutional Court of Ukraine to interpret the Constitution and to determine the exact meaning of the concept of sovereignty in Ukraine, but the provision entrusting the appointment of three members of the Ethics Council to international and foreign organisations and to provide that the votes of two of those members have priority in case of tie would not seem to the Venice Commission and DGI to be a threat to the sovereignty of Ukrainian State.²⁶

52. These provisions should not be seen as posing a threat to the sovereignty of Ukraine because this was a sovereign choice of Ukraine and the chosen mechanism is an extraordinary and temporary²⁷ solution; furthermore:

- a. the decisions of the Ethics Council are recommendations;
- b. the decisions of the Ethic Council can be appealed before the Ukrainian Supreme Court;
- c. there are several examples of including foreign expertise in the judiciary of a country. For example, the Constitutional Court of Liechtenstein has always a judge from Austria and a judge from Switzerland among its five members.²⁸ The Constitutional Court of Andorra has always judges from Spain and from France among its four members.²⁹ The Constitutional Court of Bosnia and Herzegovina³⁰ includes international judges and this was the case until recently in Kosovo. Within the common law system, it is even frequent that judges from one country act as judges and even as Chief Justices in another country;³¹ such participation in adjudication goes even further than international participation in the selection of HCJ members;
- d. the international and foreign organisations designate members of the Ethics Council not on the basis of their sovereign right but only due to the fact that they are empowered to do so by the Ukraine, exercising Ukraine's sovereign choice;

²⁶ See already Venice Commission, CDL-AD(2021)018, Ukraine - Urgent joint opinion of the Venice Commission and the Directorate General of Human Rights and the Rule of Law (DGI) of the Council of Europe on the draft law on amendments to certain legislative acts concerning the procedure for electing (appointing) members of the High Council of Justice (HCJ) and the activities of disciplinary inspectors of the HCJ (Draft law no. 5068), § 51: "this is acceptable from the viewpoint of national sovereignty".

²⁷ Venice Commission, CDL-AD(2021)018, Ukraine - Urgent joint opinion of the Venice Commission and the Directorate General of Human Rights and the Rule of Law (DGI) of the Council of Europe on the draft law on amendments to certain legislative acts concerning the procedure for electing (appointing) members of the High Council of Justice (HCJ) and the activities of disciplinary inspectors of the HCJ (Draft law no. 5068), § 42: "*The Venice Commission reiterates that they should be established only for a transitional period until the envisaged results are achieved. A permanent system might raise issues of constitutional sovereignty.*"

²⁸ Article 104 of the Constitution.

²⁹ Article 96 of the Constitution and Article 11 of the Qualified Law on the Constitutional Court, which provides for "status of ex officio nationality" for non-Andorran the members during the exercise of their mandate.

³⁰ Article VI.1 of the Constitution.

³¹ Past examples are Lesotho, Seychelles, Uganda, Hong Kong (<https://www.info.gov.hk/gja/general/201912/18/P2019121800396.htm>).

- e. even if half of the members of the Ethics Council are designated by international and foreign organisations, the Ethics Council remains a Ukrainian body, governed by national, Ukrainian law. The international and foreign organisations must act within the limits and under the conditions established by Ukraine;
- f. the members of the Ethics Council act in their individual capacity and not as representatives of the international and foreign organisations which nominated them;
- g. The preponderant vote of two international members was a sovereign choice of the Ukrainian authorities in order to increase the trust in, and the legitimacy of the process. This is a supplementary guarantee of independence of the Ukrainian judiciary.

53. In the opinion of the Venice Commission and DGI, for a successful and trusted exceptional evaluation or vetting of judges, the participation of international experts, free of national interests and not involved in national conflicts, is highly desirable.

V. Conclusion

54. This *amicus curiae* brief follows a line of opinions on judicial reforms including on an earlier draft version of the law that is being examined by the Constitutional Court of Ukraine. The lack of a holistic approach by the Ukrainian authorities, which was pointed out in these opinions, resulted in various, sometimes contradictory pieces of legislation. The implementation of some amendments was still unfinished when the new amendments were introduced.³² The Venice Commission and DGI are however aware of the grave challenges facing Ukraine at the moment. In view of the Russian attack against Ukraine it is understandable that instead of the holistic reforms the Commission has been advocating for years, only partial reforms are being pursued.

55. A recurrent theme in those opinions has been the concern as regards the functioning of the bodies of judicial governance, i.e. the HCJ (and its interrelationship with the High Qualification Council of Judges) including doubts as to the integrity of its members. The Commission and DGI have therefore emphasised the importance of “sequencing”: a judicial reform which does not tackle the functioning of the HCJ and the integrity of its members is doomed to fail.³³ Against that backdrop, the establishment of an Ethics Council was considered “very welcome”.³⁴

56. The establishment of a procedure which could lead to the dismissal of a sitting HCJ member who is found to be unethical is not by itself contrary to the principle of independence.

57. When answering this request for an *amicus curiae* brief, the Commission and DGI draw on their previous opinions, most notably the Urgent joint opinion of the Venice Commission and DGI on the draft law on amendments to certain legislative acts concerning the procedure for electing (appointing) members of the High Council of Justice (HCJ) and the activities of disciplinary inspectors of the HCJ (Draft law no. 5068) (CDL-AD(2021)018). The main arguments from this

³² For instance, Venice Commission, CDL-AD(2017)020, Ukraine - Opinion on the Draft Law on Anticorruption Courts and on the Draft Law on Amendments to the Law on the Judicial System and the Status of Judges (concerning the introduction of mandatory specialisation of judges on the consideration of corruption and corruption-related offences); CDL-AD(2019)027, Ukraine - Opinion on the Legal framework in Ukraine governing the Supreme Court and judicial self-governing bodies; CDL-AD(2020)022, Joint Opinion of the Venice Commission and the Directorate General of Human Rights and Rule of Law (DGI) of the Council of Europe on the draft amendments to the Law 'on the Judiciary and the Status of Judges' and certain Laws on the activities of the Supreme Court and Judicial Authorities (draft Law no. 3711).

³³ Venice Commission, CDL-AD(2021)018, Ukraine - Urgent joint opinion of the Venice Commission and the Directorate General of Human Rights and the Rule of Law (DGI) of the Council of Europe on the draft law on amendments to certain legislative acts concerning the procedure for electing (appointing) members of the High Council of Justice (HCJ) and the activities of disciplinary inspectors of the HCJ (Draft law no. 5068)” §§ 14 and 16.

³⁴ Ibid § 20.

opinion remain valid. In the light of the answers given above to the five questions from the Constitutional Court, the Venice Commission and DGI would however like to point out that the adopted Law No. 1635-IX, was further amended as compared to the draft law No. 5068, notably as concerns the introduction of a rule that results in the automatic dismissal of a current member of the HCJ if the appointing body does not either confirm or reject the decision of the Ethics Council finding that member non-compliant with the criteria of professional ethics and integrity.

58. The inclusion of international experts in the Ethics Council may be difficult for the judges and members of the HCJ to accept but it is important to combat the scourge of corruption without generating instability and more corruption. It is foremost corruption that weakens the sovereignty of the state.

59. In giving a global evaluation, it is also necessary to take into account all procedural guarantees as stipulated (*inter alia*) in the Rules of Procedure and Methodology of the Ethics Council (see for example item 3.14), and the fact that judicial review is available. A priori, the decisions of the Ethics Council seem to follow these rules and guarantees.

60. As such, the Ethics Council therefore does not seem to endanger judicial independence or the sovereignty of Ukraine. However, the limit of three months for the electing or appointing bodies and the automatic dismissal of sitting members if these bodies do not act upon the recommendation of the Ethics Council within this deadline appears problematic.

61. As concerns the current situation in the HCJ, it would seem that the loss of quorum within the HCJ did not result from decisions of the Ethics Council but from the mass resignation of the members of the HCJ. Even if the Constitutional Court were to establish the unconstitutionality of some provisions, this should not affect the position of those members who resigned voluntarily and whose integrity the Ethics Council could not even assess.³⁵

62. The Venice Commission remains at the disposal of the Constitutional Court and the Ukrainian authorities for further assistance in this matter.

³⁵ See Article 152 of the Constitution.