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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

OPINION

**AGREEMENT
BETWEEN THE SUPREME RADA AND THE PRESIDENT
UKRAINE**

by

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Comments on the Constitutional Agreement between the Supreme
Rada of Ukraine and the President of Ukraine
CDL (95)29

General comments:

The text bears traces of the period of transition. As a result of lack of access to full and comprehensive documentation, it was not possible to compare the new constitution with the socialist one. At the first glimpse however it appears that Section VI: Prosecutor's Office has not been changed in principle. This particular so-called independent authority under the totalitarian regime exercised an almost omnipotent power to intervene in the rights of all individuals and legal entities. Neither the period of the transition nor public interest can justify such a contentious authority in a new democratic constitution.

Specific comments:

Article 5

The issue is how to guarantee equal protection of all forms of ownership in the climate of a socially oriented market economy. It is only possible in the climate of free market economy. Therefore it would be preferable to say that all forms of ownership have the same legal content and protection and to delete any mention of the socially oriented market economy.

Article 6

It is not clear whether the elections shall be conducted under one mixed majoritarian-proportional system. The essence is that in fact every electoral system is majoritarian-proportional or proportional-majoritarian. Generally, each system bears some elements of the other one, but one prevails over the other. This

paragraph must clarify which of the two systems will be adopted or whether in fact both elements will be adopted e.g. by introducing a second chamber/senate.

Article 12

This article and the others refer to the balance between legislative, executive and judicial power, however the preamble only defines the purpose of the law as being "desirous to reform State power on the principles of strict delimitation of functions between its legislative and executive branches as a necessary prerequisite for overcoming of economy, social and constitutional crisis". The preamble is silent in relation to the judicial power. Nonetheless it is clear that judicial reform is the fundamental prerequisite of the economic, political and social transition. This anomaly must be rectified in the preamble because the Constitutional Agreement contains numerous sections dealing with judicial power, including section V.

Article 17

The Supreme Rada is empowered to provide official interpretation of the Constitution, laws, codes and other codified acts. On the other hand the courts are independent (article 37 par. 2) and they obey only the law (article 37 par. 3). The question is whether courts are bound to follow the official interpretation of the Supreme Rada and where is the beginning and end of the judicial independence. A similar problem is in article 25. The President of Ukraine is empowered to interpret its decrees and orders, which are binding on the whole territory of Ukraine. This could be acceptable if the interpretation only bound the executive. The right to bind the private sector (namely the subjects of Ukraine) properly belongs only to the judiciary.

Article 22

There is a conflict. On the one hand, after the Program of its Activity of the Government of Ukraine has been approved by the Supreme Rada of Ukraine, the latter may express the distrust to the Government of Ukraine not earlier than after one year of governmental activities, but on the other hand, article 33 determines that whenever the draft State Budget of Ukraine has not been submitted in good time, the Supreme Rada of Ukraine may take a vote of non-confidence in all or particular members of the Cabinet of Ministers of Ukraine. Accordingly, the Supreme Rada of Ukraine, could take a vote of no-confidence (i.e. distrust) within the one year "safe period" of governmental activities. It must be clarified as to whether article 33 is an exception to article 22 or whether it should be amended to be subject to article 22.

Article 24

The President of Ukraine is empowered to repeal acts by central and local public executive authorities of Ukraine as well as acts issued by executive authorities of the Autonomous Republic of Crimea whenever they are incompatible with the Constitution and laws of Ukraine, decrees and orders of the President of Ukraine. This means that the President is therefore exercising a similar role to a court of the highest instance that deals only with questions of law and not fact. The problem is that there is no judicial control over the President of Ukraine (i.e. executive). Traditional democratic constitutions grant this power to the judiciary, i.e. constitutional or general courts.

Article 42

The article determines the appointment of judges. One clear

constitutional principle of judicial independence is the term for which judges are appointed. The term should be of sufficient length so as to promote and protect the independence of judges. This Constitutional Agreement does not provide such protection.

Article 43

Within the norms of democracy, the Prosecutor General's Office is only empowered to act on behalf of the state.

The Office does not play any legal role in private law. Accordingly, article 43 (7) is inconsistent with this principle. The prosecutor's powers should be confined to protecting material and other interests of the State. Usually only the courts are empowered to protect rights of citizens and legal persons (including the State).

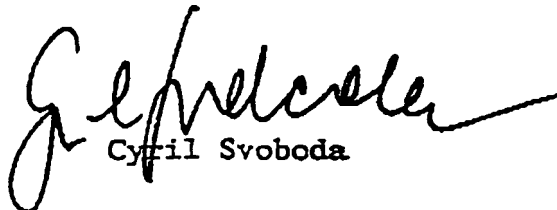
Article 43 (2) is unclear as to the extent of the Prosecutor General's power i.e. is his power confined to breaches of the legislation before the courts or does it extend to control of the court's decisions.

Article 43 is proof that the legal position and power of the Prosecutor General's Office is substantially the same as it was under the totalitarian regime.

Article 45

The article is inconsistent with article 43 in relation to the independence of the prosecutors. They could not be independent on the one hand and be subordinated to the Prosecutor General's Office on the other.

Prague August, 1st.



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