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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

(VENICE COMMISSION)

DRAFT OPINION ON THREE DRAFT LAWS PROPOSING AMENDMENTS TO THE CONSTITUTION OF UKRAINE

on the basis of comments by

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Introduction

1. In its letter dated 8 April 2003, the Monitoring Committee of the Parliamentary Assembly of the Council of Europe asked the Venice Commission to give an opinion on the Draft Law "On Amendments to the Constitution of Ukraine" (hereinafter referred to as the "Draft Law") (CDL (2003) 32).

2. On 6 March 2003, the President of Ukraine, Mr. L. Kuchma, submitted the Draft Law in question to the Verkhovna Rada (Parliament) and opened a nation-wide public debate, which was scheduled to be completed on 15 May 2003.

3. The Venice Commission invited Ms F. Flanagan, and Messrs S. Bartole, G. Batliner and K. Tuori to act as rapporteurs on this issue.

4. On 14 May, Mr. Zadorozhniy, the Permanent Representative of the President of Ukraine in the Verkhovna Rada informed the Venice Commission that the Draft Law was to be revised taking into account the proposals and opinions expressed during the nation-wide debate, and in particular the results of the meeting of the President of Ukraine, the leaders of the Verkhovna Rada and the Cabinet of Ministers, as well as the leaders of the main political parties, which was planned for the beginning of June 2003. An ad hoc commission headed by the Ukrainian Minister of Justice would then prepare a final draft text to be submitted to the Verkhovna Rada.

5. On the request by the Ukrainian authorities, (Mr Vasyliev, First Vice-Speaker of the Verkhovna Rada and Co-Chairman of the Ad-hoc commission of the Verkhovna Rada on amendment to the Constitution) to continue co-operation with the Venice Commission on the basis of the final proposal for amendments, the Commission decided not to adopt the opinion on the draft amendments of 6 March 2003, but to provide its opinion on the final draft proposal for amendments to be submitted to the Verkhovna Rada. The new proposal for constitutional amendments was submitted to the Verkhovna Rada and to the Constitutional Court of Ukraine in late June 2003. However, due to further developments in Ukraine, the President decided to withdraw the revised draft law.

6. Three other proposals have been submitted to the Verkhovna Rada : the first Draft Law on amendments to the Constitution of Ukraine, prepared by Parliamentary Deputies A. Matviyenko and others (no. 3027-1 of 1 July 2003 – CDL (2003) 79); the second Draft Law on amendments to the Constitution of Ukraine, prepared by Parliamentary Deputies S.B. Havrish and others (no. 4105, of 4 September 2003 – CDL (2003) 80); and the third Draft Law on amendments, prepared by Parliamentary Deputies S.B. Havrish and others (no. 4180 of 19 September 2003 – CDL (2003) 81). The three Draft Laws on amendments have also been submitted to the Constitutional Court of Ukraine for opinion.

7. The Venice Commission invited Mms Flanagan and Thorgeirsdottir, and Messrs Bartole and Tuori to act as rapporteurs on these draft laws. As the revised proposal submitted to the Verkhovna Rada by the President of Ukraine had been withdrawn, the present opinion, based on the comments by the rapporteurs (CDL (2003) 94, 96, 98 and 95 respectively) concerns the three Draft Laws prepared by the Parliamentary Deputies and submitted to the Verkhovna Rada in July and September 2003.

I. Background

8. The constitution that is currently in force in Ukraine was adopted on 28 June 1996. It has established a presidential-parliamentary type of institutional regime. The national system of governance is comprised of three main institutions: the Parliament (Verkhovna Rada), the highest legislative body, made up of 450 deputies elected for four years; the President, who is the Head of State and the Chief Executive, elected for five years; the Cabinet of Ministers led by the Prime Minister, who is appointed by the President and approved by the Verkhovna Rada. The President, on the proposal of the Prime Minister, appoints the members of the Cabinet.

9. Leonid Kuchma, the President of Ukraine, has been in power since 1994. Soon after being re-elected President in November 1999, L. Kuchma launched a first initiative to amend the 1996 Constitution. Besides the President, both parliamentary factions and individual deputies have repeatedly denounced the existing constitutional system, proposing radical amendments to the existing constitution.

10. In conformity with the Constitution (Articles 154 and 159), a draft law on amendments to the constitution may be submitted to the Verkhovna Rada by the President or by no fewer than one-third of the constitutional composition of the Verkhovna Rada. A draft law on amendments will be considered by the Verkhovna Rada upon an opinion of the Constitutional Court of Ukraine declaring compliance of the draft law with the requirements of Articles 157 and 158 of the Constitution. Room for the Court's discretion is however limited, given that the Constitution specifies the exact criteria on which the review should be based. Article 157 prohibits any amendment to the Constitution that can be detrimental to the country's independence or territorial integrity, or entails the abolition or restriction of human rights and freedoms guaranteed. As to the Article 158, it sets forth a number of technical restrictions.

11. At present, the Constitutional Court has delivered opinions on two of the three draft laws submitted for its consideration. In a decision of 30 October 2003, it declared two provisions of Draft Law no. 3027-1 to be contrary to Articles 157 and 158[1] of the Constitution. Draft Law no. 4180 was declared constitutional although the Court expressed some hesitation as to a number of other provisions proposed.

12. The Ukrainian authorities have expressed their determination to meet European standards and criteria that underpin true democracy[2]. The commitment undertaken by Ukraine when it ratified the European Convention on Human Rights (hereinafter: ECHR) was to do its utmost to ensure an effective political democracy for the further realisation of the guaranteed human rights and freedoms. The present opinion will examine whether the proposed amendments to the 1996 Constitution represent a clear commitment to these goals.

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[1] Article 85.3 giving to the Parliament the power to interpret legislation and the corresponding Article 150.2 suppressing the power of the Constitutional court to interpret legislation. See the Decision of the Constitutional Court of Ukraine on the constitutionality of the Draft Law on constitutional amendments no. 1-40 /2003 of 30 October 2003.

[2] *Cf.* for example, the address of Mr Olexander Lavrynovych, Minister of Justice of Ukraine to the Congress of Local and Regional Authorities of the Council of Europe (of 22 May 2003).

II. General remarks

13. The three draft laws submitted to the Verkhovna Rada propose numerous amendments to the text of the 1996 Constitution (CDL (2003) 86). Those amendments involve a redistribution of the powers of the President, the Verkhovna Rada and the Cabinet and are directed towards a more parliamentary form of government and a less presidential one.

14. The choice between a presidential and a parliamentary system is a political one to be freely made by each single state. However, the system chosen should be as clear as possible, and the provisions should not create room for unnecessary complications and political conflicts. If a presidential system is chosen, certain minimum requirements of parliamentary influence and control should be fulfilled. In a parliamentary system, in turn, basic requirements arising from the principle of the separation of powers should be respected.

15. The Commission will examine the main amendments proposed in the draft laws that give cause for concern. It should be noted at the outset, that the schemes of the draft constitutions are very difficult to follow and related provisions are often scattered throughout the text. This difficulty is exacerbated by the incomplete system of numbering which makes it difficult to refer to related provisions where necessary. Such difficulties are not conducive to a widespread general awareness of the terms of the Constitution.

1st Draft Law on amendments to the Constitution of Ukraine no. 3027-1 (CDL (2003) 79)

I. People's Deputies' mandate

16. The Draft Law on amendments to the Constitution of Ukraine no. 3027-1 (hereinafter: the Draft Law) provides in Article 78 that People's Deputies shall not have another representative mandate, whether it be a position in the civil service or another official position in bodies of state power or in institutions or agencies arising from such bodies. This type of prohibition appears regularly in the laws of other states and is acceptable as it reasonably excludes an occupation incompatible with that of being a member of parliament or dual representation.

17. The draft Article also prohibits People's Deputies from engaging "*in entrepreneurial activity or other activity on a remunerative basis (except teaching, scholarly and creative activity), and prohibits membership of a governing or steering body of an enterprise, association or organisation that aims to gain profit*". In the event of a Deputy being found to be engaged in incompatible activity, he or she must resign either from that activity or from being a Deputy. These latter categories of prohibited activity cover a wide range of activity in which the majority of people running for election would be engaged in one form or another. It is unclear whether the list of prohibited activities is intended to encompass holding shares in commercial companies, and the meaning of "entrepreneurial activity" is uncertain.

18. Such a broad prohibition might prove to be a significant disincentive to potential candidates. Whilst it is a matter of policy to be decided by individual states what category of activity is incompatible with being a member of parliament, nonetheless it would be important to ensure that activities deemed incompatible are not such as to dissuade a

significant section of the population from running for election. Other parliamentary democracies have rules requiring their members of parliament to declare interests that have the potential to compromise independence, with appropriate sanctions where rules are breached. Whilst these regimes are not foolproof in removing all conflicts of interest that arise or situations that compromise independence, neither would the rules in the proposed draft Article 78. Rules requiring declarations of interests would not have the possible disadvantages described above where almost all gainful or entrepreneurial activity is prohibited.

19. In accordance with the proposed amendments, a Deputy's mandate would be terminated on his or her leaving or a failure to join the parliamentary faction from which he or she was elected (Article 81.3). Whilst the idea of having this provision in the Draft Law is presumably to promote stability and the effectiveness of the governing party or bloc in circumstances where fragmentation of parliamentary blocs is a problem, it would also have the effect of weakening the Verkhovna Rada itself by interfering with the free and independent mandate of the deputies, who would no longer necessarily be in a position to follow their convictions and at the same time remain a member of the Parliament.

20. In this regard, the Commission recalls its opinion on the Ukraine constitutional reform project of 2001[3], in which it stressed that linking "the mandate of a national deputy to membership of a parliamentary faction or bloc *infringes the independence of the deputies and might also be unconstitutional*...bearing in mind that Members of Parliament are supposed to represent the *people* and not their parties." The oath to be taken by Deputies contained in Article 79 expresses this clearly. Furthermore, such a rule would "put the parliamentary bloc or group in some ways above the electorate which […] is unable to revoke individually a parliamentary mandate conferred through election"[4].

21. The requirement that the termination of the deputy's mandate be decided by a court judgement does not remove the problematic character of the provision. Judges should not be entrusted with the power of adopting decisions of a political nature that imply the use of political criteria of judgement.

22. The Commission therefore strongly recommends that this proposed provision be removed from the Draft Law.

23. According to new Article 81.1 (5), a deputy would lose his or her mandate on the basis of being absent from the Verkhovna Rada's meetings for four months without a valid reason. Such a sanction seems rather severe, particularly in the absence of any preceding lesser sanction.

24. The Draft law also proposes that the operational rules of procedure of the Verkhovna Rada are no longer established by law as stipulated in Article 82.5 of the present Constitution.

[3] Doc. CDL-INF (2001) 11, p.2.
[4] *Ibidem*, p. 3.

II. The Relations between the President, the Cabinet and the Verkhovna Rada

25. The Commission welcomes the proposed Article 113.2 stating that the Cabinet of Ministers of Ukraine would be responsible to the Verkhovna Rada and not to the President as is the case according to the current provision. This change would be in line with the proposed amendments concerning the appointment and dismissal of the Ministers.

a. Appointment of the Prime Minister

26. According to the present Constitution, the President appoints the Prime Minister with the approval of the Verkhovna Rada. Draft Article 85.1 (12) states that the Verkhovna Rada "*on a proposal of the Presiden*t" would appoint the Prime Minister (new Articles 106.9 and 114). The Commission welcomes these changes, as they would promote the move towards more of a parliamentary system.

27. New Article 114 requires the President to propose for the post of Prime Minister :

- the candidate nominated by the largest party (or electoral bloc of parties) or,

- if the largest party or electoral bloc refuses to nominate a candidate, the candidate nominated by the second largest party or electoral bloc.

If these candidates are rejected by the Verkhovna Rada,

- the candidate nominated by a parliamentary coalition representing the majority of the Verkhovna Rada.

28. The President would not appear to have any discretion to depart from the prescribed procedure. The provisions on the procedure of nomination would allow the appointment of a Prime Minister who is not the leader of the first (largest) political party. On the other hand, the support of a strong political party or coalition with a majority of seats in the Parliament might secure the Prime Minister's leadership of the executive.

29. Such a procedure seems indeed rather complicated. This may however be understandable, considering the difficulties Ukraine has experienced in the past in the formation of workable political coalitions.

30. The proposed procedure of appointment also raises the question of the possible consequences for the Prime Minister - and Cabinet - thus chosen and supported by a particular majority at the time of appointment, in case of loss of the support of that majority at a later stage or of being supported by a different majority of the Verkhovna Rada. In accordance with the proposed amendments, the power of dismissal of the Prime Minister is given to the Verkhovna Rada alone (Article 85.1(12) and Article 106.9)[5]. The issue of responsibility of the Cabinet may be considered by the Verkhovna Rada on the proposal of no fewer deputies than one-third of its constitutional composition and a resolution of no confidence may be adopted by the majority of the constitutional composition of the Rada

[5] According to the 1996 Constitution, the Verkhovna Rada and the President share the power of dismissal. In the past, the Verkhovna Rada was less able than the President to benefit from this power due mainly to a collective action problem in constructing a coalition for Cabinet dismissal. The majority of Cabinet dismissals were initiated by the president, reflecting the former's control of the initiative in Cabinet formation matters.

(Article 87.1 of the 1996 Constitution). These modifications seem in line with the aim of the Draft Law in moving towards a stronger parliamentary system. However, given the particular context of the Ukrainian political situation, it might be useful to provide for more precise rules on the resignation of the Prime Minister and the Cabinet's continuance in office.

b. Formation of the Cabinet

31. The Verkhovna Rada approves the composition of the Cabinet (with the exception of four ministers) appointed on the proposal of the Prime Minister, and has the power to dismiss individual members on the submission of the Prime Minister (Article 85.1 (12)). Whilst the aim of this provision is presumably to promote the parliamentary character of the system, it could have the effect of complicating the nomination procedure.

32. The proposed procedure of nomination differs for four key ministers, namely the Ministers of Internal Affairs, Emergency Situations including the consequences of Chernobyl, Foreign Affairs and Defence (Article 114.7). They would be appointed upon agreement by the President. Such a difference might threaten the cohesion of the government and the exercising of its policy, especially given the specific context of Ukrainian political system where the relations between the President and the Prime Minister regularly become highly competitive. Considering the powers of the President in the respective fields - although further complicating the procedure for forming the Cabinet - this difference may be justified only to a certain extent.

33. Regarding the work of the Cabinet, the Commission notes that the new Article 113.3 provides that the Cabinet would be guided in its activity not only by the Constitution, the laws and Presidential Acts, but also by "*the resolutions of the Verkhovna Rada*". It should be stressed that if the proposed addition means that the Verkhovna Rada would have a general power to pass resolutions binding the Cabinet, such a power could easily lead to confusion and to a contradiction of the principle of the separation of powers.

c. Appointment and dismissal of certain high officials

34. The appointment and dismissal of certain important heads of public bodies require the approval of the Verkhovna Rada. For example, according to draft Article 85.1(24), the Verkhovna Rada has to consent to appointment and dismissal by the President, of the Head of the Antimonopoly Committee, the Chair of the State Committee on Television and Radio Broadcasting and the Head of the Security Service. The Verkhovna Rada would also have the power to express non-confidence in the persons appointed to their offices with its approval (Article 85. 1(37)). Such a power would entail a kind of political parliamentary responsibility, which is alien to the functioning of a modern administrative system.

35. The Commission is of the opinion that if the proposal is to be adopted, the decision on appointment and dismissal of the aforementioned officials should be taken by a special, qualified majority. The offices concerned are characterised by the neutrality of their functions and require the independence and impartiality of their holders. Persons eligible for appointment to the offices concerned cannot be identified with the majority or with one or another political party. The requirement of the qualified, special majority would guarantee the fairness of their election and of the bodies they are supposed to chair.

36. Draft Article 90.2 (1) and (2) clearly defines the cases in which the President may dissolve the Verkhovna Rada. Such a provision is welcomed from the point of view of constitutional and political stability.

III. Right of the Verkhovna Rada to interpret laws

37. According to draft Article 85.1(3), the Verkhovna Rada would have the power not only to adopt laws, but also to interpret them. In practice, draft texts put before national assemblies contain not only the proposed legal text, but also the legislator's motives for the proposal. These motives, together with discussions in the parliament and its committees can be of significance in a subsequent interpretation of the legal acts when adopted by the Parliament. The proposed amendment risks invading on the sphere of the judiciary. Judges use statutory interpretation to protect rights, for example by interpreting 'value-laden' expressions in statutes or by the use of presumptions. The power of the Verkhovna Rada to interpret laws, whose practical scope remains unclear, would contradict the principle of the separation of powers.

38. In its decision of 30th October 2003, the Constitutional Court of Ukraine considered transfering of the power to interpret laws from the Constitutional Court to the Verkhovna Rada contrary to the Constitution in force. In line with the Constitutional Court's decision, the Commission strongly recommends the withdrawal of the proposed amendment from the Draft law.

IV. Election of judges

39. In accordance with the proposed amendments, all judges, except those of the Constitutional Court, would be elected by the Verkhovna Rada for a period of 10 years, with the right to re-election (Article 128). The Commission is highly concerned with such a proposal, and recalls that time-limited appointments as a general rule can be considered a threat to the independence and impartiality of judges. In its Opinion on standards concerning the independence of the judiciary and the irremovability of judges, the Consultative Council of European Judges (hereinafter: CCJE) has stated: "*European practice is generally to make full-time appointments until the legal retirement age*" [6].

40. The CCJE also stressed: "*when tenure is provisional or limited, the body responsible for the objectivity and the transparency of the method of appointment or re-appointment as a full-time judge are of especial importance*"[7]. The responsible body should decide exclusively on the basis of the professional skills of the concerned persons and, therefore, on the basis of technical criteria only. While designating the Parliament as a body entrusted with the task of electing and re-electing judges, the proposed amendments do not provide guarantees that the choices will not be politically biased. Such provision is therefore contrary to the principles of a free and democratic government and to the ECHR.

41. The Commission strongly recommends that the proposed amendment be withdrawn from the Draft law.

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[6] Opinion no. 1(2001) of the CCJE for the attention of the Committee of Ministers of the Council of Europe on Standards concerning the independence of the judiciary and the irremovability of judges (*Recommendation no. R (94) 12 on the independence, efficiency and role of judges and the relevance of its standards and any other international standards to current problems in these fields*), CCJE (2001) OP no. 1, para. 49.

[7] *Ibidem*, para. 53.

V. Procurator General

42. On the basis of draft Article 85.1(25), the power of appointment and dismissal of the Procurator General is given to the Verkhovna Rada on submission of the President. The establishment of a requirement of political responsibility in the relationship between the Procurator General and the Verkhovna Rada (Article 122.1) may endanger the independence that the exercise of the functions of the Procurator General presupposes.

43. The Procurator, by virtue of draft Article 121.5, is also given a significant additional role of "*supervision of the observance of human and citizens' rights and freedoms and the fulfilment of laws by bodies of executive power and by bodies of local self-government*". In this respect, the Commission recalls that in its Resolution 1244 (2001) on the Honouring of Ukraine's Obligations and Commitments, the Parliamentary Assembly of the Council of Europe invoked the commitment of the Ukrainian authorities to change the role and functions of the Prosecutor's Office (particularly with regard to the exercise of a general supervision of legality) with the aim to ensure its conformity with the European standards. Later on, in its Resolution 1346 (2003), the Parliamentary Assembly expressed its deep concern with the functioning of the Prosecutor's Office, and more particularly, with regard to its independence and interference with the legislative and executive power.

44. The Commission is highly concerned with the proposed amendment as the extension of the power of the Prosecutor can be considered a step backward not in line with the historical traditions of the procuracy in a state subject to the rule of law. In a state like Ukraine where the purported aim is to enhance an effective political democracy, it is of paramount importance that the institution that supervises compliance with the rule of law is non-political. A separate office of an Ombudsman would therefore be highly preferable.

45. Draft Article 106.1(16) also extends the role of the Procurator General where the Constitutional Court finds a law suspended by the President to be unconstitutional. In such a situation, the President may "*apply to the Procurator General*", but no elaboration of the function of the Procurator General is given.

46. Bearing in mind Article 156.1 of the Constitution in force[8], the proposed amendment on the extension of the role of the Procurator General might require the organisation of national referendum for its adoption.

VI. Media

47. Given the pre-eminent role of the media in a democratic society, any proposed amendment in the draft law that may have an impact on the freedom of the media merits to meticulous scrutiny.

48. Article 34 of the Constitution in force guarantees everyone the right to freedom of thought and speech, and the expression of his or her views and beliefs. Everyone has the right

[8] A draft law on introducing amendments to Chapter I (General principles), Chapter III (Elections. Referendum), and Chapter XIII (Introducing amendments to the Constitution) is submitted to the Verkhovna Rada by the President of Ukraine, or by no less than two-thirds of the constitutional composition of the Verkhovna Rada, and on the condition that it is adopted by no less than two-thirds of the constitutional composition of the Verkhovna Rada, and is approved by an All-Ukrainian referendum designated by the President.

to freely collect, store, use and disseminate information in written or any other means of his or her choice.

49. The treatment of the press by the member states of the Council of Europe must measure up to the principles of Article 10 of the ECHR and the relevant case-law. The free and unhindered exercise of journalism is enshrined in the right to freedom of expression and is a fundamental prerequisite to the right of the public to be informed on matters of public concern.

50. According to draft Article 85.1 (24), the Chairman of the State Committee on Television and Broadcasting and the Head of the National Security Council would be appointed and dismissed by the Verkhovna Rada, on the nomination by the President (see *supra* under 35). The Verkhovna Rada would also have the authority to issue a vote of no confidence to persons appointed to their position upon consent of the Rada, which would lead to their resignation from the position (Article 85.37). Furthermore, draft Article 85 (20) is changed so that the Verkhovna Rada has the authority to appoint and *dismiss* all 8 members of the National Council of Broadcasting.[9] Incompatibilities or conditions for dismissing members of national broadcasting councils are usually not specified in the law of the older member states of the Council of Europe.[10]

51. In this regard, the Commission recalls the Council of Europe Committee of Ministers' recommendation according to which: "*Member states should ensure the establishment and unimpeded functioning of regulatory authorities for the broadcasting sector by devising an appropriate legislative framework for this purpose. The rules and procedures governing or affecting the functioning of regulatory authorities should clearly affirm and protect their independence*"[11].

2nd Draft Law on amendments to the Constitution of Ukraine no. 4105 (CDL (2003) 80)[12]

I. Verkhovna Rada – term of authority

52. Article 76.5 of the Draft Law on amendments to the Constitution of Ukraine no. 4105 (hereinafter: the Draft Law) proposes to increase the parliamentary term of the Verkhovna Rada from the present four to five years. There is no established European rule as to the term of a national Parliament. In most Central and Eastern European states the parliamentary term is 4 years. In some other countries like France, Italy or Turkey, the parliamentary term is 5 years.

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[9] Draft law 4180 does not recommend changes with regard to these provisions.

[10] *Cf.,* Austria, Denmark, Finland, Iceland, Ireland, Luxembourg, Malta, Norway, Sweden, Switzerland. The members' terms are staggered in France but there they can only be dismissed by the Council itself, which is appointed by President, Senate and National Assembly.

[11] Council of Europe Committee of Ministers Rec (2000) 23.

[12] This Draft law on amendments to the Constitution contains a number of provisions that are identical to the 1st Draft law (no. 3027-1) previously examined. These concern more particularly, the provisions on procurator general, judiciary (except for jugdes of the Constitutional Court), media and to a certain extent, also the provisions on the People's deputies mandate and the formation of the Cabinet. For the purpose of the present opinion, the relevant comments concerning these provisions already made with respect to the 1st Draft law (no. 3027-1) are reproduced also with regard to the Draft law no. 4105.

II. National Deputies' mandate

53. Draft Article 78.2 provides that National Deputies shall not have another representative mandate, whether it be in the civil service or any other paid official position "*except for the offices of ministers and chief executives of central bodies of executive power* […]". The possibility for ministers to serve in Parliament appears also in the laws of some other states and is not in itself contrary to a parliamentary system of governing. Yet, making an exception for members of parliament to be chief executives of central bodies of executive power infringes the distinction between the executive and the legislative power.

54. The draft Article also prohibits National Deputies from engaging in "*any remunerative or business activities (except academic, research and artistic activities)"* and prohibits membership of a governing or steering body *"of an enterprise or any profit-making institution*". In the event of a Deputy being found to be engaged in any incompatible activity, he or she must resign either from that activity or from being a Deputy. These latter categories of prohibited activity cover a wide range of activity in which the majority of people running for election would be engaged in one form or another. It is unclear whether the list of prohibited activities is intended to encompass holding shares in commercial companies, and the meaning of "business activities" is uncertain.

55. Such a broad prohibition might prove to be a significant disincentive to potential candidates. Whilst it is a matter of policy to be decided by individual states what category of activity is incompatible with being a member of parliament, nonetheless it would be important to ensure that activities deemed incompatible are not such as to dissuade a significant section of the population from running for election. Other parliamentary democracies have rules requiring their members of parliament to declare interests that have the potential to compromise independence, with appropriate sanctions where rules are breached. Whilst these regimes are not foolproof in removing all conflicts of interest that arise or situations that compromise independence, neither would the Rules in the proposed draft Article 78. Rules requiring declarations of interests would not have the possible disadvantages described above where almost all gainful or entrepreneurial activity is prohibited.

56. In accordance with the proposed amendments, a deputy's mandate would be terminated on his or her leaving, not joining or being dismissed from the parliamentary faction from which he or she was elected (Article 81.2 (7)). The relevant decision would be taken by the highest steering body of the respective political party (election bloc of political party). Whilst the idea for having this provision in the Draft Law is presumably to promote stability and the effectiveness of the governing party or bloc in circumstances where fragmentation of parliamentary blocs is a problem, it would also have the effect of weakening the Verkhovna Rada itself by interfering with the free and independent mandate of the deputies, who would no longer necessarily be in a position to follow their convictions and at the same time remain a member of the Parliament.

57. The proposed procedure would also give the parties the power to annul electoral results. In this regard, the Commission recalls its opinion on the Ukraine constitutional reform project of 2001[13], in which it stressed that linking "the mandate of a national deputy to membership

[13] Doc. CDL-INF (2001) 11, p.2.

of a parliamentary faction or bloc *infringes the independence of the deputies and might also be unconstitutional*...bearing in mind that Members of Parliament are supposed to represent the *people* and not their parties." The oath to be taken by Deputies contained in Article 79 expresses this clearly. Furthermore, such a rule would "put the parliamentary bloc or group in some ways above the electorate which […] is unable to revoke individually a parliamentary mandate conferred through election"[14].

58. The Commission therefore strongly recommends to withdraw the proposed provision from the Draft Law.

59. The Draft law also proposes that the operational rules of the procedure of the Verkhovna Rada are no longer established by law as stipulated in Article 82.5 of the present Constitution (new Article 83.4).

III. The Relations between the President, the Cabinet and the Verkhovna Rada

a. Appointment of the Prime Minister

60. The Draft law provides for the appointment of the Prime Minister by the Verkhovna Rada on a proposal submitted by the President. The candidate for the Prime Minister is to be nominated by "*the coalition of deputies' factions and groups of deputies*" representing a parliamentary majority. Such a coalition is to be formed following "*the results of elections and on the basis of coordination and bringing together of political positions*". The formation of the coalition should take place within a month after the opening session of a newly elected Verkhovna Rada or the termination of the activities of a previous coalition. Complementary provisions on formation and organisation of the coalition, as well as of the termination of its activities would be included in the Rules of Procedure of the Verkhovna Rada.

61. According to Article 83.5, the coalition which nominates the candidate for the office of the Prime Minister is also supposed to "*form*" the Cabinet and to be "*responsible for its performance*". What these expressions mean remains unclear.

62. One can assume that the central idea behind these provisions is to oblige the Verkhovna Rada to form a majority and a government as a basis for stability. In this respect, the Commission recalls that the Constitution of Ukraine guarantees the political parties the freedom of choice and decision in conformity with European standards. In addition, whether such a formalised procedure for forming a parliamentary majority would contribute to enhancing political stability is very uncertain. At any rate, if the proposal is to be adopted, the role and functioning of the "coalition" should be more precisely regulated in the Constitution itself, and not be left to a statute of lower rank.

b. Formation of the Cabinet

63. Regarding most Cabinet ministers, the Verkhovna Rada approves the composition of the Cabinet nominated by the Prime Minister (85.1 (12)). The amended constitution would draw a distinction between the procedure in relation to the Ministers for Defence and Foreign Affairs and the remainder of the Cabinet. The Verkhovna Rada on the President's nomination

[14] *Ibidem*, p. 3.

would appoint the Ministers for Defence and Foreign Affairs. The Verkhovna Rada would also have the power to terminate the authority of these persons (Article 85.1 (12)).

64. The nomination procedure and differences in status for such an important political organ as the Cabinet of Ministers raise concerns with regard to the necessary cohesion of the Cabinet and risk reducing the authority of the Prime Minister (Article 114). The reasons behind the proposed amendments are more questionable than those behind the Draft Law no. 3027-1. Both the President and the Prime Minister would be elected by the Parliament. Any such provision needs to be clearly justified**.**

65. The Commission also notes that proposed amendments give the power of initiating the procedure of no confidence in the Cabinet also to the President (Article 87.1). Such a proposal does not seem coherent with the aim of diminishing powers of the president and strengthening the parliamentary traits of governing in Ukraine.

c. Appointment and dismissal of some high officials

66. The power of appointment and dismissal of some important heads of public bodies is altered. For example, under draft Article 85.1(12) the President's existing power of appointment of the Head of the Antimonopoly Committee, the Chair of the State Committee on Television and Radio Broadcasting and the Chair of the State Property Fund is given instead to the Verkhovna Rada on the nomination of the Prime Minister. The President would keep the authority to nominate the Head of the National Security Service.

67. The Commission is of the opinion that if the proposal is to be adopted, the decision on appointment and dismissal of the aforementioned officials should be taken by a special, qualified majority. The concerned offices are characterised by the neutrality of their functions and require the independence and impartiality of their holders. The persons eligible for the mentioned offices cannot be identified with the majority or with one or another political party. The requirement of a qualified, special majority could guarantee the fairness of their election and of the bodies they are supposed to chair.

IV. Election of the President

68. The most significant amendment in the Draft Law is contained in new Article 103 that would have the President elected by two-thirds of the Verkhovna Rada in a secret ballot. This would replace the current constitutional provision that the citizens of Ukraine directly elect the President. The President would continue to be elected for a five-year term.

69. A decision to alter the way of election of the President is a political one. Nevertheless, the Commission notes that whether elected directly by the citizens of Ukraine or indirectly by the Verkhovna Rada, the President would retain the same degree of independence, being removable from office only in accordance with the provisions of Articles 108, 109, 110 and 111. The powers of the President terminate prematurely only on resignation, inability to perform his or her role for reasons of health, removal by impeachment for state treason or another crime or on death. None of these provisions is amended by the Draft Law. The President would also retain certain powers that do not seem congruous with the position an indirectly elected president traditionally has in a parliamentary system of governing.

70. It is also noted that the Verkhovna Rada would elect the President by secret ballot. The current Constitution does not otherwise provide in any way on the issue whether ballots should be open or secret. The issue of whether election of the President should be by secret ballot or not is a significant matter of policy. There are precedents in other constitutional regimes for a secret ballot being used for election of individuals to positions in parliament and, more often, for occasional particularly sensitive votes.

V. Procurator General

71. By draft Article 85.1(25) the power of appointment and dismissal of the Procurator General is given to the Verkhovna Rada on submission of the President. The establishment of a requirement of political responsibility in the relationship between the Procurator General and the Verkhovna Rada (Art. 122 par 1) may endanger the independence that the exercise of the functions of the Procurator General presupposes. As in the case of the appointment and dismissal of certain other high officials, a special, qualified majority should take the decision on appointment and dismissal of the Procurator General.

72. The Procurator, by virtue of draft Article 121.5, is also given a significant additional role of the "*supervision of the observance of human and citizens' rights and freedoms and the fulfilment of laws by bodies of executive power and by bodies of local self-government*". In this respect, the Commission recalls that in its Resolution 1244 (2001) on the Honouring of Ukraine's Obligations and Commitments, the Parliamentary Assembly of the Council of Europe invoked the commitment of the Ukrainian authorities to change the role and functions of the Prosecutor's Office (particularly with regard to the exercise of a general supervision of legality) with the aim to ensure its conformity with the European standards. Later on, in its Resolution 1346 (2003), the Parliamentary Assembly expressed its deep concern with the functioning of the Prosecutor's Office, more particularly, with regard to its independence and interference with the legislative and executive power.

73. The Commission is highly concerned with the proposed amendment, as the extension of the power of the Prosecutor can be considered a step backward not in line with the historical traditions of the procuracy in a state of law. In a state like Ukraine where the purported aim is to enhance an effective political democracy, it is of paramount importance that the institution that supervises compliance with the rule of law is non-political. A separate office of an Ombudsman would therefore be highly preferable.

74. Having in mind Article 156.1 of the Constitution in force[15], the proposed amendment on the extension of the role of the Procurator General might require the organisation of the national referendum for its adoption.

[15] A draft law on introducing amendments to Chapter I (General principles), Chapter III (Elections. Referendum), and Chapter XIII (Introducing amendments to the Constitution), is submitted to the Verkhovna Rada by the President of Ukraine, or by no less than two-thirds of the constitutional composition of the Verkhovna Rada, and on the condition that it is adopted by no less than two-thirds of the constitutional composition of the Verkhovna Rada, and is approved by an All-Ukrainian referendum designated by the President.

VI. Election of judges

75. In accordance with the proposed amendments, all judges except the judges of the Constitutional Court, would be elected by the Verkhovna Rada for a period of 10 years, with the right to re-election (Article 128). The Commission is highly concerned with such a proposal, and recalls that the time-limited appointments as a general rule can be considered a threat to the independence and impartiality of judges. In its Opinion on standards concerning the independence of the judiciary and the irremovability of judges, the Consultative Council of European Judges (hereinafter: CCJE) has clearly stated: "European practice is generally to make full-time appointments until the legal retirement age" [16].

76. The CCJE also stressed: "*when tenure is provisional or limited, the body responsible for the objectivity and the transparency of the method of appointment or re-appointment as a full-time judge are of especial importance*"[17]. The responsible body should decide exclusively on the basis of the professional skills of the concerned persons and, therefore, on the basis of technical criteria only. While designating the Parliament as a body entrusted with the task of electing and re-electing judges, the proposed amendments do not provide guarantees that the choices will not be politically biased. Such provision is therefore contrary to the principles of a free and democratic government and to the ECHR.

77. The Commission strongly recommends the withdrawal of the proposed amendment from the Draft law.

78. Regarding the appointment of judges of the Constitutional court, one-half of the judges would be appointed by the President and one-half by the Verkhovna Rada (new Article 148. 2). In the Commission's view, the proposal to withdraw the right to nominate one-third of the constitutional judges from the High Council of Judges is highly criticisable as it entails the risk of the possible politicising of this important judicial body. If such a proposal is to be adopted, it should at least provide for the parliamentary election of the constitutional judges by a qualified, special majority. Such a provision would oblige the majority and the minority in the Parliament to find an agreement in the selection of the constitutional judges and would ensure a more balanced membership of the Court.

79. Having in mind Article 156.1 of the Constitution in force[18], the proposed amendment on the election of the judges of the Constitutional court might require the organisation of the national referendum for its adoption.

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[16] Opinion no. 1(2001) of the CCJE for the attention of the Committee of Ministers of the Council of Europe on Standards concerning the independence of the judiciary and the irremovability of judges (Recommendation no. R (94) 12 on the independence, efficiency and role of judges and the relevance of its standards and any other international standards to current problems in these fields), CCJE (2001) OP no. 1, para. 49.

[17] *Ibidem*, para. 53.

[18] A draft law on introducing amendments to Chapter I (General principles), Chapter III (Elections. Referendum), and Chapter XIII (Introducing amendments to the Constitution), is submitted to the Verkhovna Rada by the President of Ukraine, or by no less than two-thirds of the constitutional composition of the Verkhovna Rada, and on the condition that it is adopted by no less than two-thirds of the constitutional composition of the Verkhovna Rada, and is approved by an All-Ukrainian referendum designated by the President.

VII. Media

80. Given the pre-eminent role of the media in a democratic society, any proposed amendment in the draft law that may have an impact on the freedom of the media merits meticulous scrutiny.

81. Article 34 of the Constitution presently in force guarantees everyone the right to freedom of thought and speech, and the expression of his or her views and beliefs. Everyone has the right to freely collect, store, use and disseminate information in written or any other means of his or her choice.

82. The treatment of the press by the member states of the Council of Europe must measure up to the principles of Article 10 and the relevant case-law. The free and unhindered exercise of journalism is enshrined in the right to freedom of expression and is a fundamental prerequisite to the right of the public to be informed on matters of public concern.

83. According to draft Article 85.1 (12), the Chairman of the State Committee on Television and Broadcasting would be appointed by the Verkhovna Rada, on nomination by the Prime Minister. The Verkhovna Rada would also have the authority to terminate the authority of persons appointed to their position upon its consent.

84. In this regard, the Commission recalls the Council of Europe Committee of Ministers' recommendation according to which: "*Member states should ensure the establishment and unimpeded functioning of regulatory authorities for the broadcasting sector by devising an appropriate legislative framework for this purpose. The rules and procedures governing or affecting the functioning of regulatory authorities should clearly affirm and protect their independence*"[19].

VIII. Transitional arrangements regarding elections

85. The Draft Law also contains provisions on the entering into force of the constitutional reform. According to new Chapter XVI to be added to the Constitution, the presidential elections due in 2004 (in conformity with the 1996 Constitution) would be held in conformity with the existing provisions (by universal suffrage). However, the presidential term would be curtailed with the new President being elected by the new Verkhovna Rada in 2006. Thereafter, both the ordinary terms of the Verkhovna Rada and President would be for 5 years.

86. Furthermore, the proposed transitional provisions also establish that in 2006, the Verkhovna Rada shall be elected following the *"principles of proportional system, whereby National Deputies shall be elected in the multi-mandate national election district according to electoral list of candidates nominated by political parties, election blocs of political parties in line with the law"*. Such *ad hoc* constitutional provisions should be replaced by permanent provisions in Chapter IV of the Constitution.

[19] Council of Europe Committee of Ministers Rec (2000) 23.

87. Transitional arrangements of this kind can often present political difficulties. The constitutional reforms and their entering into force should not be subject to short-term political calculations.

3rd Draft Law on amendments no. 4180 (CDL (2003) 81)

88. The Draft Law on amendments no. 4180 is identical to the Draft Law on amendments no. 4105 except for transitional provisions regarding the scheduling of elections and entering into force of the constitutional reform. The preceding comments on the amendments proposed by the Draft Law no. 4105 therefore also apply to this Draft law.

Transitional provisions regarding elections

89. According to new Chapter XVI to be added to the Constitution, the presidential elections due in 2004 would take place under the new provisions and therefore the new President would be elected by the Verkhovna Rada. A further presidential election would take place in 2006, and the parliamentary elections, in 2007.

90. It should be born in mind that the present Verkhovna Rada was elected in 2002 for a four year term. The Commission have strong doubts as to whether the decision taken by the Verkhovna Rada itself to prolong its own term of authority may be considered to conform to European democratic standards.

91. Furthermore, the proposed transitional provisions also establish that in 2007, the Verkhovna Rada shall be elected following the "*principles of proportional system, whereby National Deputies shall be elected in the multi-mandate national election district according to electoral list of candidates nominated by political parties, election blocs of political parties in line with the law*". Such *ad hoc* constitutional provisions should be replaced by permanent provisions in Chapter IV of the Constitution.

92. Transitional arrangements of this kind can often present political difficulties. The constitutional reforms and their entering into force should not be subject to short-term political calculations.

CONCLUSION

93. Ever since the highly controversial All-Ukrainian referendum in 2000, Ukraine has been confronted with a power struggle between the different State organs. It is therefore understandable that constitutional reform remains very much on the agenda and the Commission can only welcome and support efforts aimed at strengthening the position of Parliament with respect to the President. All drafts examined try to achieve this aim. However, any reformed system of government chosen should be as clear as possible, and the provisions should not create room for unnecessary complications and political conflicts. The drafts examined do not really succeed in establishing such a clear and coherent system.

94. Draft Law no. 3027-1 proposes a number of amendments that go in the desired direction of providing for additional powers to the Verkhovna Rada. However, the provisions on the appointment of the members of Government may lead to conflicts between the organs of state

power. Other provisions, such as those on the status of the deputies, the election of judges and on extending the powers of the Prosecutor's Office are problematic from the point of view of European democratic standards.

95. Regarding Draft Laws no. 4180 and no. 4105, the proposal to adopt a system of indirect election of the Head of the State would in principle be conducive to establishing a parliamentary system of government. It is therefore surprising that these drafts maintain stronger powers for the President than provided for by Draft no. 3027-1. The logic behind a system of dividing executive power between two organs, the President and the Government, both deriving their legitimacy from Parliament is not apparent and seems not conducive to effective governance. Moreover, these drafts also contain similar problematic provisions on the judiciary, the public prosecutor's office and the status of deputies as draft no. 3027-1.

96. As regards particular aspects of the drafts, the Commission strongly recommends:
- ensuring that the provisions on the National Deputies do not link an individual Deputy to membership of a parliamentary faction or bloc in a way infringing his or her free and independent mandate;
- withdrawing the proposed amendment on the limited tenure of judges; and
- ensuring the conformity of the role and functions of the Prosecutor's Office with European standards.

97. The Commission recognises and welcomes the efforts in Ukraine to reform the system of government in a way bringing Ukraine closer to European democratic standards. The precise solutions chosen in the various drafts do not yet seem to have attained that aim and introduce other amendments to the Constitution that would appear to be a step backwards. Further work and discussion seem to be required, and the Venice Commission remains at the disposal of the Ukrainian authorities for further co-operation in the field of constitutional reform.