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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW
(VENICE COMMISSION)

UKRAINE

OPINION

ON THE DRAFT LAW

**"ON AMENDING SOME LEGISLATIVE ACTS OF UKRAINE
REGARDING IMPROVING PROCEDURE FOR SELECTING
CANDIDATE JUDGES OF THE CONSTITUTIONAL COURT OF
UKRAINE ON A COMPETITIVE BASIS"**

**Adopted by the Venice Commission
at its 133rd Plenary Session
(Venice, 16-17 December 2022)**

**Based on the urgent opinion issued on 23 November 2022 pursuant
to Article 14a of the Venice Commission's Rules of Procedure**

On the basis of comments by

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

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I. Introduction

1. By letter of 10 October 2022, Mr Ruslan Stefanchuk, Chairman of the Verkhovna Rada of Ukraine (hereafter "the Parliament"), requested an urgent opinion from the Venice Commission on the draft Law "On Amending Some Legislative Acts of Ukraine Regarding Improving Procedure for Selecting Candidate Judges of the Constitutional Court of Ukraine on a Competitive Basis" ([CDL-REF\(2022\)059](#)) (hereafter "the draft amendments"), *"on the subject of its compliance with democratic standards that are generally recognised in Europe"*.
2. Mr Carozza, Ms Cartabia, Mr Darmanović and Mr Grabenwarter acted as rapporteurs for this opinion.
3. On 8-10 November 2022, the rapporteurs, along with Ms Simona Granata-Menghini and Mr Mamuka Longurashvili from the Secretariat, had online meetings with the representative of the Office of the President of Ukraine, some Judges of the Constitutional Court, the Parliamentary Committee on Legal Policy, as well as with representatives of the international community and civil society. The Commission is grateful to the Council of Europe Office in Kyiv for the excellent organisation of these online meetings.
4. The urgent opinion was prepared in reliance on the English translation of the draft amendments. The translation may not accurately reflect the original version on all points.
5. The urgent opinion was drafted on the basis of comments by the rapporteurs and the results of the online meetings. It has been issued ([CDL-PI\(2022\)046](#)) in accordance with the Venice Commission's protocol on the preparation of urgent opinions ([CDL-AD\(2018\)019](#)) on 23 November 2022.
6. On 6 December 2022, the President of the Venice Commission sent to the Chairman of the Verkhovna Rada a letter clarifying certain aspects of the urgent opinion.
7. The Commission noted that the Ukrainian Parliament adopted the Law on 13 December 2022. The text of the Law was made available to the Venice Commission's Secretariat on 16 December 2022, in Ukrainian.¹ The Commission did not have the opportunity to examine the text of the Law as adopted; the silence of the opinion on the final text should not be interpreted as an implicit approval thereof.
8. The urgent opinion was submitted to the Venice Commission and, in view of the circumstances, was adopted as an ordinary opinion at its 133rd Plenary Session (Venice 16-17 December 2022).

II. Background

9. According to Article 148 of the Constitution of Ukraine, *"The Constitutional Court of Ukraine shall be composed of eighteen judges of the Constitutional Court of Ukraine. The President of Ukraine, the Verkhovna Rada of Ukraine and the Congress of Judges of Ukraine² each shall appoint six judges to the Constitutional Court of Ukraine. Selection of candidates for the post of judge of the Constitutional Court of Ukraine shall be conducted on a competitive basis under*

¹ <https://itd.rada.gov.ua/billInfo/Bills/pubFile/1582306>

² According to the [Law "On the Judiciary and the Status of Judges"](#), the Congress of Judges of Ukraine is the highest judicial self-government body. The ordinary Congress of Judges is convened by the Council of Judges of Ukraine (which acts as the executive body of the Congress) once every two years. The extraordinary Congress of Judges of Ukraine may be convened by the Council of Judges of Ukraine at its own discretion (Articles 129-130 and 133).

the procedure prescribed by the law. A citizen of Ukraine who has command in the state language, attained the age of forty on the day of appointment, has a higher legal education and professional experience in the sphere of law not less than fifteen years, has high moral character and is a jurist of recognised competence can be a judge of the Constitutional Court of Ukraine. A judge of the Constitutional Court of Ukraine shall not belong to political parties, trade unions, take part in any political activity, hold a representative mandate, occupy any other paid office, perform other remunerated work, except scholarly, teaching or creative activities. A judge of the Constitutional Court of Ukraine shall be appointed for nine years without the right of reappointment. A judge of the Constitutional Court of Ukraine shall step in his or her office as of the date of taking the oath at the special plenary sitting of the Court. The Constitutional Court of Ukraine shall elect the Chairman among the judges of the Court at a special plenary sitting of the Court by secret ballot only for one three-year term”.

10. Currently, there are 16 judges at the CCU. The presidential and parliamentary quotas (six judges appointed by each body, respectively) have been filled. Two posts of the CCU judges to be appointed by the Congress of Judges are vacant. According to the information available on the CCU website,³ the sitting judges were appointed as follows:

- Six Judges appointed by the President of Ukraine: Mr Serhiy HOLOVATY, appointed on 27 February 2018 (Mr Holovaty was Deputy Chairman of the CCU between 17 September 2019 and 18 September 2022, and has been acting Chief Justice since 29 December 2020); Ms Oksana HRYSCHUK, appointed on 26 November 2021; Mr Viktor KOLISNYK, appointed in January 2016; Mr Vasyl LEMAK, appointed on 27 January 2018; Mr Volodymyr MOISYK, appointed in January 2016; and Mr Oleksandr PETRYSHYN, appointed on 26 November 2021.
- Six Judges appointed by the Parliament of Ukraine: Mr Serhii SAS and Mr Ihor SLIDENKO, both appointed in March 2014; Ms Iryna ZAVHORODNIA and Mr Oleh PERVOMAISKYI, both appointed on 20 September 2018; Mr Viktor KYCHUN, appointed on 18 February 2021; and Ms Olha SOVHYRIA, appointed on 27 July 2022.
- Four Judges appointed by the Congress of Judges of Ukraine: Mr Viktor KRYVENKO, appointed in November 2015; Mr Viktor HORODOVENKO, appointed on 13 November 2017; Ms Galyna YUROVSKA, appointed on 29 October 2019; and Mr Petro FILIUK, appointed on 30 October 2019.

³ <https://ccu.gov.ua/en/category/31>

A. Previous recommendations of the Venice Commission⁴

11. In its 2020 Urgent Opinion on the Reform of the Constitutional Court,⁵ the Venice Commission noted the following:

“D. Procedure for appointment of judges to the Constitutional Court

71. *In order to ensure a high quality of the decisions of the Constitutional Court, the procedure for appointment of the judges is essential. The constitutional amendments of 2016 introduced the principle of competitive selection of the judges, which was welcomed by the Venice Commission.*

72. *In its Opinion on the draft constitution in 2015, the Venice Commission had also recommended to introduce an election of the judges on the parliamentary quota with a qualified majority. That recommendation has not been taken up. The Commission repeats it, hoping that it can be considered in the framework of a future constitutional amendment.*

73. *The judges of the Constitutional Court are appointed by the President, the Parliament and the Congress of Judges (Article 148 of the Constitution and Article 9 of the Law on the Constitutional Court – each appointing body appoints six judges respectively).*

74. *While the general principle of competitive selection by screening committees applies to all three appointing bodies, the appointment procedures applied by the three appointing bodies do not ensure the highest level of moral and professional qualification of the candidates. Each of the appointing bodies can determine its own procedures. In its Opinion on the draft Law on the Constitutional Court, the Venice Commission had deplored the absence of clear regulations on the composition and work of the screening committees.*

75. *Following a recommendation by the Venice Commission, in 2017 the President of Ukraine established a commission with international participation (Ms Hanna Suchocka, Honorary President of the Venice Commission), which screened the candidates. This experience has been assessed very positively by all interlocutors. Conversely, Parliament conducts the screening in a political procedure, without expert input. For the Judiciary, the Council of Judges is responsible for conducting the first stage of the competition and the preselecting of candidates for a final vote by the Congress of Judges. There is a widespread perception that appointments are too often politically motivated.*

76. *A reform of the appointment system might be the occasion to remedy to that problem. The judges of the Constitutional Court need to have high moral values and be lawyers of recognised competence. Certain rules of incompatibility apply: “A citizen of Ukraine who has command in the state language, attained the age of forty on the day of appointment, has a higher legal education and professional experience in the sphere of law not less than fifteen years, has high moral character and is a jurist of recognised competence can be a judge of the Constitutional Court of Ukraine”.*

77. *Among these qualities, the requirement of a “high moral character” merits particular attention, alongside professional qualities. To ensure that only persons with these qualities can become judges of the Constitutional Court, a screening body with an international component could be established.*

78. *For comparison, in co-operation with the international donor community, the Ukrainian authorities are currently preparing urgent legislation to establish an “Ethics Commission” for the ordinary judiciary. In parallel, draft Law no. 3711 currently being examined in Parliament, provides for a Competition Committee, which would be in charge of ensuring the integrity of the members of the High Council of Justice and of re-establishing the High Qualification Commission of Judges (HQCJ) that is in charge of the selection of candidates for judicial office. These bodies would have a mixed national and international composition”.*

⁴ [CDL-AD\(2015\)027](#), Opinion on the Proposed Amendments to the Constitution of Ukraine regarding the Judiciary as approved by the Constitutional Commission on 4 September 2015; [CDL-AD\(2015\)043](#), Secretariat Memorandum on the compatibility of the Draft Law of Ukraine on amending the Constitution of Ukraine as to Justice as submitted by the President to the Verkhovna Rada on 25 November 2015 ([CDL-REF\(2015\)047](#)); [CDL-AD\(2016\)034](#), Opinion on the draft Law on the Constitutional Court, adopted at its 109th Plenary Session (Venice, 9-10 December 2016); [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), adopted at its 124th online Plenary Session (8-9 October 2020) and [CDL-AD\(2020\)039](#), Urgent Opinion on the Reform of the Constitutional Court, issued pursuant to Article 14a of the Venice Commission's Rules of Procedure on 9 December 2020, endorsed by the Venice Commission on 11 December 2020 at its 125th online Plenary Session (11-12 December 2020).

⁵ [CDL-AD\(2020\)039](#).

79. A body with a similar – or even the same – international component could be entrusted with the screening of candidates for office as judge of the Constitutional Court. Such a screening body could also include representatives of civil society, possibly drawn from the existing Public Integrity Council, which advises on the qualities of judges candidates for the ordinary courts.

80. In addition, the expertise of highly reputed international experts (e.g. former presidents or judges of the European Court of Human Rights) could be sought as concerns an evaluation of the qualities of the candidates in the field of comparative constitutionalism or the protection of human rights. Examples for such expertise on the European level are the Article 255 TFEU panel for the Court of Justice of the European Union and the Advisory Panel of Experts on Candidates for Election as Judge to the European Court of Human Rights.

81. The screening body could be a strict filter, admitting for appointment by the three appointing authorities only candidates who were positively evaluated. Alternatively, the pre-filtering body would make public recommendations only”.

12. Based on the above references to the CJEU and ECtHR panels, the Venice Commission finds it useful to recall that the CJEU Panel (called “Comité 255”) began its work on 1 March 2010. The Panel gives an opinion on candidates’ suitability to perform the duties of Judge and Advocate-General of the Court of Justice and the General Court before the Governments of the Member States make the appointments. The Panel is composed of seven members.⁶

13. The ECtHR Advisory Panel was established by the Resolution of the Council of Europe Committee of Ministers adopted on 10 November 2010.⁷ It advises the High Contracting Parties whether candidates for election as a judge to the ECtHR meet the criteria stipulated in Article 21(1) of the European Convention on Human Rights: “The judges shall be of high moral character and must either possess the qualifications required for appointment to high judicial office or be jurisconsults of recognised competence”. The Advisory Panel is composed of seven members.⁸

14. In March 2021, the Venice Commission adopted its Opinion on the Draft Law On Constitutional Procedure (Draft Law No.4533) and the Alternative Draft Law On The Procedure For Consideration of Cases and Execution of Judgments of the Constitutional Court (Draft Law No. 4533-1). The Commission made a substantially positive assessment of draft law no. 4533, while making several recommendations to improve it.⁹ The delegation of the Venice Commission understood from the online meetings that draft law no. 4533 is still pending adoption by the Parliament. Consequently, the Venice Commission recommends adopting the revised version of draft law no. 4533, preferably at the same time as the draft amendments under consideration.

B. Subsequent developments

15. In its Opinion¹⁰ of 17 June 2022 on Ukraine's application for membership of the EU, the European Commission underscored the urgent need for the reform of the CCU in line with the Venice Commission’s recommendations: “Central to such reform is the introduction of a credible and transparent selection procedure for appointments of judges to the CCU, including an integrity check”. Therefore, the European Commission recommended that granting the candidate status

⁶ <https://comite255.europa.eu/en/>

⁷ Resolution [CM/Res\(2010\)26](#) on the establishment of an Advisory Panel of Experts on Candidates for Election as Judge to the European Court of Human Rights.

⁸ <https://www.coe.int/en/web/dlapil/advisory-panel>

⁹ [CDL-AD\(2021\)006](#), §84: “... draft law no. 4533 also has some shortcomings. Most importantly, the draft law does not contain provisions on a new system of competitive selection of judges involving an international component as recommended in the Urgent Opinion. While this appointment system does not need to be included in draft law no. 4533, the amendment to Article 11 of the Law on the Constitutional Court should be removed and current vacancies at the Constitutional Court should be filled only after an improvement of the system of appointments”.

¹⁰ https://neighbourhood-enlargement.ec.europa.eu/opinion-ukraines-application-membership-european-union_en

to Ukraine is subject to, *inter alia*, enactment and implementation of the legislation on a selection procedure for judges of the [CCU], "*including a pre-selection process based on evaluation of their integrity and professional skills, in line with Venice Commission recommendations; ...*".

16. On 12 August 2022, the draft amendments were registered in Parliament and on 6 September 2022, they were adopted in the first reading.

III. Analysis of the draft amendments

A. Aim of the amendments and powers of the Advisory Group of Experts

17. The aim of the amendments is to set up an independent body called the Advisory Group of Experts (hereafter "the AGE") with the task of assisting the three appointing bodies in "*assessing the moral qualities and legal competence of candidate judges of the [CCU]*".

18. The nature of this assistance and the extent of the powers of this AGE needs to be addressed; in particular, it is necessary to clarify whether the tasks of the AGE are limited to a screening of the candidatures or amount to a selection on the basis of the assessment of the fitness to sit as a constitutional court judge.

19. In this respect, the Venice Commission considers that it is necessary, at the outset, to recall and explain in detail the importance of a balanced composition of constitutional courts. The Commission, in this respect, has previously explained that "*Society is necessarily pluralist - a field for the expression of various trends, be they philosophical, ethical, social, political, religious or legal. Constitutional justice must, by its composition, guarantee independence with regard to different interest groups and contribute towards the establishment of a body of jurisprudence which is mindful of this pluralism. The legitimacy of a constitutional jurisdiction and society's acceptance of its decisions may depend very heavily on the extent of the court's consideration of the different social values at stake, even though such values are generally superseded in favour of common values. To this end, a balance which ensures respect for different sensibilities must be entrenched in the rules of composition of these jurisdictions. Constitutional jurisdictions may, by some of their decisions, appear to curb the actions of a particular authority within a State. The Constitution will often confer to the constitutional court the power to deliver its Opinion on issues concerning the separation of powers or the relationships between the organs of the State. Even though constitutional courts largely ensure the regulation of these relationships, it may well be appropriate to ensure in their composition a balanced consideration of each of these authorities or organs. The pursuit of these balances is limited by the indispensable maintenance of the independence and impartiality of constitutional court judges. Collegiality, i.e. the fact that the members adjudicate as a group, whether or not they deliver separate opinions, constitutes a fundamental safeguard in this respect. Even though the rules on the composition of constitutional courts may reflect the coexistence of different currents within a given nation, the guarantees of independence and the high sense of responsibility attaching to the important function of constitutional judge effectively ensure that constitutional judges will act in such a way as to dismiss all grounds of suspicion that they may in fact represent particular interests or not act impartially*".¹¹

20. The need for a balanced composition of a constitutional court has a bearing on the powers of the appointing bodies to select the judges. Like ordinary judges, constitutional court judges need to have absolute integrity, to be highly competent and to be fully independent; in the latter respect, it should be reiterated that "*Constitutional judges have a "duty of ingratitude" towards the authority that elected or appointed them. They may well be nominated by a party and elected by*

¹¹ [CDL-STD\(1997\)020](#) The composition of constitutional courts - Science and Technique of Democracy, no. 20 (1997), p. 21.

the MPs of that same party, but they can never represent that party. As judges, they are independent, their loyalty is to the Constitution, not to those who have elected them".¹²

21. The choice of a given candidate for the position of a constitutional judge does not only depend on an objective assessment of a candidate's professional knowledge but also on his/her moral qualification and integrity. This choice is given to different appointing bodies because it should reflect the diversity of ideas and positions in society. The appointing bodies should therefore have some discretion, provided, of course, that the integrity test is passed and the formal requirements as to the minimum qualifications are met.

22. For these reasons, the Venice Commission considers that the previous experience in the matter of selection committees for ordinary judges is relevant but cannot necessarily be regarded as exclusively and completely decisive/determining. Some differences may well be justified.

23. Under the draft amendments (Article 10⁶-1 of the draft law "On the Constitutional Court"), "*All candidates admitted to the competition shall undergo a special background check in accordance with the procedure provided for by the Law of Ukraine "On Prevention of Corruption". A "background check" pursuant to the Law "On Prevention of Corruption" is carried out with the written consent of the candidate (Article 10¹-5 of the draft law "On the Constitutional Court").*

24. The integrity requirements (verified through the background check) and the basic constitutional requirements (command in the state language, age of forty on the day of appointment, higher legal education and professional experience in the sphere of law of no less than fifteen years) are objective criteria, the lack of which may legitimately lead to the rejection of a judicial candidate.

25. The draft amendments further provide that the AGE sends to the appointing body "*no less than three candidates*" per position to be filled. This suggests that the AGE selects among the candidates who have passed the formal screening. Its powers are, therefore, not only formal but also substantive.

26. It is not for the Venice Commission to decide whether the AGE should have only screening powers; however, the extent of its powers will have a bearing on the evaluation of its composition and operation.

B. Composition of the AGE

1. International component

27. Pursuant to Article 10³ of the draft law "On the Constitutional Court", the AGE consists of six experts: one member proposed by each of the three appointing bodies (the President, the Parliament, and the Congress of Judges), one member - by the Venice Commission and two members by the "*international organisations which, in accordance with international or interstate agreements, have provided Ukraine, in the past five years, with international technical assistance in the field of constitutional reform and/or rule of law, and/or protection of human rights, and/or prevention and counteraction to corruption*". According to Article 2-4 of Final and Transitional Provisions, the list of such organisations is prepared by the Ministry of Foreign Affairs of Ukraine within five days from the date of entry into force of the amendments to the draft law "On the Constitutional Court".

¹² [CDL-AD\(2016\)001](#), Opinion on Amendments to the Act of 25 June 2015 on the Constitutional Tribunal of Poland, §119.

28. The AGE is thus composed of three national and three “international” members. In its 2020 Urgent Opinion, the Venice Commission recommended: “*establishing a screening body for candidates for the office of judge of the CCU, with an international component, which could include international human rights experts and participation from civil society, to ensure the moral and professional qualities of the candidates*”.¹³ The Venice Commission is pleased to see that the Ukrainian authorities are following up on this recommendation to include an international element, as stated in the explanatory report to the draft amendments.

29. As regards other similar organs existing at the national level, the Venice Commission recalls that following a series of legislative amendments in 2021,¹⁴ a mixed national/international Ethics Council was established to evaluate candidates for membership of the High Council of Justice (HCoJ) and to perform a one-off evaluation of the sitting members of the HCoJ. The Ethics Council, which has three national and three international members, was established on 9 November 2021.¹⁵ The Ethics Council consists of three active or retired judges appointed by the Council of Judges and three members “*proposed by the international organisations with which Ukraine has been cooperating for at least the last three years in preventing and combating corruption and/or in terms of a judicial reform under the international treaties of Ukraine*”.¹⁶

30. There seems to be a broad expectation that the “international” members of the AGE will be foreigners. However, the draft amendments do not specify that the members chosen by the international actors should not be Ukrainian citizens. As the aim of the international participation is to reassure public opinion not only of the independence of the members of the AGE and their impartiality in respect of domestic matters but also of the non-susceptibility of these members to pressure, the choice of a non-Ukrainian seems to make it easier and more suitable to meet these targets, but it is possible that a suitable Ukrainian candidate could be found. In any case, a deep knowledge of Ukraine would be necessary, and at least some knowledge of the Ukrainian language would certainly be an asset. At a minimum, in the Venice Commission’s opinion, the amendments should make clear that the members chosen by international actors could also be Ukrainian citizens.

31. As concerns the participation of the Venice Commission, the Commission has previously appointed a member of the selection committee for candidates to the position of constitutional justice set up in 2017 by President Poroshenko, and this experience has been positively evaluated by all interlocutors. The Commission is, therefore, ready to participate in the current process also in this respect.

32. As concerns the role of the “international organisations”, during the online meetings, the delegation was informed about the successful experience of appointing members by the international organisations fulfilling specific criteria comparable to those mentioned in para. 29 above. For example, the Ethics Council, the Competition Commission for the selection of

¹³ [CDL-AD\(2020\)039](#), op.cit. §102-9.

¹⁴ [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), issued pursuant to Article 14a of the Venice Commission’s Rules of Procedure on 5 May 2021, endorsed by the Venice Commission at its 127th Plenary Session (Venice and online, 2-3 July 2021).

¹⁵ Website of the Ethics Council: https://court.gov.ua/eng/ec/about_ec/about/. The Rules of Procedure of the Ethics Council 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. All decisions of the Ethics Council are available on that site as well https://court.gov.ua/eng/ec/pres-centr/rishenna_er/

¹⁶ [CDL-AD\(2022\)023](#), Ukraine - Joint amicus curiae brief on certain questions related to the election and discipline of the members of the High Council of Justice, adopted by the Venice Commission at its 132nd Plenary Session (Venice, 21-22 October 2022), §19.

members of the High Qualification Commission, the Competition Commission for the selection of the Director of the National Anti-Corruption Bureau, the Competition Commission for the selection of the Head of the Specialized Anti-Corruption Prosecutor's Office. Therefore, given previous successful experience, specific criteria listed in the draft law circumscribing the number of international organisations to those fulfilling the requirements, and the particularly difficult context faced by Ukrainian people and institutions, the Venice Commission considers the draft amendments sufficiently clear in this respect. It recommends, nonetheless, that the procedure which will be followed by such (potentially quite numerous) international organisations to select a member of the AGE should be fixed and made known before the selection takes place.

2. Role of the Civil Society

33. Another question concerns the role of civil society, which could be realised in different ways:

- One option would be to add to the proposed composition of the AGE one member chosen by "civil society". Identifying which representatives of civil society could legitimately be entrusted with this task presents a notable difficulty. The panorama of associations in Ukraine is very diverse and, at times, polarised, and it is difficult to imagine that any selection amongst them could be accepted by and inspire the trust of all the others. Several interlocutors have expressed the same concern.
- A second option could be that of entrusting the role of providing information and feedback on the judicial candidates and monitoring the process (which should be transparent). A similar role is being carried out in the context of the work of the Ethics Council, whose composition does not include representatives of civil society. The Venice Commission has received very positive assessments of its effectiveness. Finally, the Venice Commission considers that such an option should be accompanied with due guarantees of protection of the reputation of the candidates with a view to preserving the authority and reputation of the Constitutional Court.

34. At the level of international expert groups, civil society may provide the bodies with unsolicited information. The respective bodies take notice of the information and may use it in the course of the examination of the qualification of candidates, in particular during the hearings. However, there is no discussion between members of expert bodies and representatives of NGOs, nor are they present in one of the bodies.

35. Alongside this international practice and in view of the difficulties and concerns raised in the discussions in the meetings, the Venice Commission has a preference for the second option referred to in para. 33 above. Although this option still presents some difficulty with regard to the identification and selection of appropriate civil society organisations, the problem is less pronounced than in the first option.

3. Role of the three appointing bodies

36. As concerns the role of the three appointing bodies, the following considerations are called for. The three appointing bodies have the constitutional power to select six judges of the Constitutional Court each. As explained above, there is a discretionary element in this power: the choice is not merely linked to the degree of professional competence. The creation of a mechanism for the selection of candidates should not remove this discretion but should ensure that this discretion is exercised after the necessary screening of integrity and possession of the constitutional and legal requirements to become a constitutional judge. It is also designed to add transparency and accountability to the process.

37. The involvement of the appointing bodies in the setting up of the AGE may be questioned. If the role of the AGE is to counterbalance the risk of political motivation in the selection of the judges for the CCU, then it appears contradictory to give the power to appoint the “independent experts” of the AGE to the same bodies – President, Parliament and Congress of Judges – that have the power to select the judges. In fact, in order to ensure the neutrality/independence of the selection of the AGE member by Parliament, a long and convoluted procedure is established - see Article 208⁵ of the draft law “On the Rules of Procedure of the Parliament”. This procedure replicates the procedure for appointing the judges of the CCU. The risk in this system is that the AGE could be captured by political dynamics, with the paradoxical result of increasing rather than neutralising the political elements in the selection of judges.

38. Moreover, Articles 208⁴ and 208⁵ of the draft law “On the Rules of Procedure of the Parliament” provide very detailed and similar procedures for the election of the CCU judges and the AGE member, both by open voting by a majority of MPs from the constitutional composition of Parliament. Furthermore, if a candidate does not get a majority of votes, then s/he is struck out. If no one on the list gets a majority, then the selection process starts anew. The Venice Commission finds these procedures unnecessarily cumbersome.

39. According to Article 10³-21(5) of the draft law “On the Constitutional Court”, the AGE interviews candidate judges of the CCU. According to Article 10⁷-5 of the same draft law, the candidates who have undergone a special background check and are included on the list of candidates recommended by the AGE shall also be interviewed by the selection commission (President), the Committee (Parliament), and the Council of Judges of Ukraine.

40. The Venice Commission considers that such long, complex and convoluted procedures risk paralysing the institution. Based on the good experiences of the ECtHR and EU, the Commission would favour that AGE members should preferably be appointed/selected by a body other than those entitled to appoint the judges of the CCU. However, given the present circumstances, the Venice Commission is aware of the difficulty of identifying an appropriate body in Ukraine. Having regard to the successful experience of the Ethics Council, the Commission accepts that the presence of the “international” component, including the Venice Commission’s appointee, may be a sufficiently counterweighing element to reduce the risks of politicisation of the AGE to a minimum. The Commission accordingly accepts that the appointment of the national members of the AGE should be left with the three appointing bodies but recommends simplifying the relevant procedures.

C. Official appointment of the AGE members

41. Article 10³ of the draft law “On the Constitutional Court” provides that the official start of the function of a member of the AGE is the date of issuing of the relevant Presidential decree, the date of the issuing of the decision of the Parliament and the date of issuing of the decision by the Congress of Judges; for the international members, the start is the date on which the Ministry of Foreign Affairs of Ukraine receives the decision of the Venice Commission or the international and foreign organisations. In the Commission’s opinion, the international members should be formally appointed through an official act of a Ukrainian authority, ratifying the appointment decisions.

D. Applicability of this selection mechanism to the three appointing bodies

42. Article 148 of the Constitution imposes “*the general principle of competitive selection by screening committees to all three appointing bodies*”. The selection of candidates by the AGE is, appropriately, designed to apply to the three appointing bodies without the necessity of separate or specific additional norms.

E. Eligibility criteria

43. The Venice Commission finds similarities between the requirements for candidate judges of the CCU (Article 10¹-1 of the draft law “On the Constitutional Court”) and the candidates to the AGE (Article 10³-4 of the draft law “On the Constitutional Court”). In the Commission’s view, it would be appropriate to introduce stricter requirements (higher age, longer experience) for the members of the AGE, in order to give the latter greater legitimacy.

44. As regards the political neutrality requirement, the Commission notes that concerning both the candidate judges and candidate AGE members, the draft amendments using similar terms, like the Constitution, exclude membership of a political party and even any participation in any political activity. Additionally, the political neutrality requirement concerning the candidate AGE member covers a period of two years before the appointment (Article 10³ – 5(1) of the draft law “On the Constitutional Court”). At any rate, the draft amendments (and the Constitution) are stricter than the law in other European states, which to some extent may be justified by the particular situation and background in Ukraine. The Venice Commission recalls that in the case of constitutional court judges, *“in order to prevent direct influence of political parties, it is not necessary to ask for complete political abstention. It should be sufficient that the members give up any party membership upon appointment or presentation of their candidature. Once the members are appointed, they act independently and in their individual capacity”*.¹⁷

45. A check on the prevention of corruption (Article 10¹-5 of the draft law “On the Constitutional Court”) seems justified against the particular background of Ukraine.

F. Duration of the mandate of the AGE and of international involvement

46. The AGE is established as a permanent body. In the Commission’s view, this is positive, as it eliminates the necessity of setting it up each time that there is a vacancy to be filled, thus removing the links between the AGE and the appointing bodies of the day.

47. The draft amendments do not foresee a limitation on the duration of the direct involvement of international bodies in the membership of the AGE. While this is understandable under the present circumstances, a provision establishing a fixed ending date for international participation (a “sunset clause”) could be envisaged. Indeed, the Venice Commission has previously supported international involvement in bodies such as the Ethics Council in order to increase public trust, expressing the view that such involvement does not violate Ukrainian sovereignty, notably in light of the advisory nature of the bodies’ determinations, of the sovereign Ukrainian choice to decide such involvement and of the subjection of the international members to the Constitution and the legislation of Ukraine. At the same time, the Commission has expressed the view that international involvement should be established only for an exceptional solution, for a transitional period.¹⁸

¹⁷ [CDL-AD\(2006\)006](#) - Opinion on the Two Draft Laws amending Law No. 47/1992 on the organisation and functioning of the Constitutional Court of Romania adopted by the Commission at its 66th plenary session (Venice, 17-18 March 2006), §15.

¹⁸ [CDL-AD\(2021\)018](#), 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), issued pursuant to Article 14a of the Venice Commission’s Rules of Procedure on 5 May 2021, endorsed by the Venice Commission at its 127th Plenary Session (Venice and online, 2-3 July 2021), §§ 51 and 52.

48. Therefore, Venice Commission recommends introducing a sunset clause in the draft amendments, providing for a time limit to international participation in the process of selection of the judges of the Constitutional Court of Ukraine.

G. Term of office

49. According to Article 10³ of the draft law “On the Constitutional Court”, the AGE members are elected for an indefinite period of time (and participate in its work *pro bono*). They may be dismissed, may resign and are replaced when necessary. If a member systematically fails to fulfil his/her duties or obstructs the work, the AGE shall consider the issue of expressing no confidence and terminating his/her mandate at the request of at least three other members of the AGE.

50. Given the extraordinary and temporary nature of such mechanisms, the Venice Commission considers that for international members, a limited duration would appear preferable. For example, members of the CJEU and ECtHR panels are appointed for a term of four and three years, respectively, renewable once.

51. The Venice Commission finds that the rules on the termination of membership reflect a lot of mistrust among political forces. It is highly unusual that three AGE members may terminate the membership of another member. In the practice of the CJEU and ECtHR panels, where a member does not complete his/her term, a successor is appointed for a full term. The Venice Commission finds it important to provide for the appointment of substitutes, at least for international members, to avoid delays due to non-availability. Therefore, the Commission recommends the drafters review that provision accordingly.

H. Assessment of moral qualities and legal competence of the candidates

52. The draft amendments state that the AGE is to assess the “moral qualities” and “legal competence” of candidates but define neither of these concepts. In addition, the draft amendments do not lay out any substantive limits or guidelines on how the AGE has to conduct such an assessment. Most of the details regarding its powers and operations are fairly technical.

53. According to Article 10³-21(2) of the draft law “On the Constitutional Court”, the AGE develops and approves the methodology for assessing the moral qualities and legal competence of candidate justices of the CCU. The Venice Commission wishes to stress the importance of developing the methodology to assess moral qualities and legal competence based on best international practices.

54. In this context, concerning “*moral qualities*”, the Venice Commission refers to the ECtHR Advisory Panel (“*qualities such as integrity, a high sense of responsibility, courage, dignity, diligence, honesty, discretion, respect for others and the absence of conviction for crimes have been mentioned as key components of this [moral character] requirement, as well as (obviously) independence and impartiality*”).¹⁹ As regards the term “*lawyer of a recognised competence*”, the Commission refers to the regularly updated Compilation of its Opinions on Constitutional Justice: “*It would be better to specify who are the “reputable lawyers” ..., for instance, law professors, high*

¹⁹ [See The Advisory Panel of Experts on Candidates for Election as Judge to the European Court of Human Rights - A short guide on the Panel’s role and the minimum qualifications required of a candidate \(2020\)](#), p.7. See also [OHCHR principles](#) (“10. In the selection of judges, there shall be no discrimination against a person on the grounds of race, colour, sex, religion, political or other opinion, national or social origin, property, birth or status, except that a requirement, that a candidate for judicial office must be a national of the country concerned, shall not be considered discriminatory”).

ordinary and administrative magistrates, lawyers with a minimum of 15 years of profession".²⁰ Finally, the Venice Commission refers to the Ethics Council's "*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*".²¹

I. Auditions and meetings

55. Article 10³-18 of the draft law "On the Constitutional Court" provides that the meetings of the AGE shall be held openly. While the interviews with candidates may be public, the Venice Commission is of the view that the meetings devoted to the discussion of candidates' suitability should rather be held in camera. Legitimacy and trust are created more by the authority of the members of the AGE than by public discussion of the quality of candidates for the CCU.

56. In addition to the provisions on the duty of a member of the AGE to withdraw in case of conflict of interest, the possibility for a judicial candidate to request the recusal of an AGE member for reasons of bias should be provided in Article 10³-24 of the draft law "On the Constitutional Court" (and an alternative quorum should be devised, should two members recuse themselves).

J. Voting procedures

57. A quorum of four members is established.

58. Considering the mandate of the AGE, the general rule for decision should be "by consensus". The draft law "On the Constitutional Court" provides that decisions are taken by four votes. It does not envisage a solution in cases where the AGE cannot reach a decision. If the AGE fails to identify at least three candidates to submit to the appointing bodies, the whole procedure is to be repeated (Article 10⁷- 4 of the draft law "On the Constitutional Court").

59. In the Commission's view, given the importance of filling the CCU vacancies in a timely manner, the draft amendments should contain an anti-deadlock mechanism. The Venice Commission is aware of the difficulty of designing appropriate and effective anti-deadlock mechanisms for which there is no single model. Each state has to devise its own formula.²² However, it is essential to provide for one.

60. For as long as the AGE will be operating with international members, the number of AGE members should be increased to seven in order to prevent a stalemate in the decisions. The seventh member should be on the international quota.

61. At the very least, the draft amendments should set out a timeframe for carrying out the procedure and submitting the judicial candidates to the appointing bodies. When it expires with no decision, the procedure should be repeated, and this might of itself be sufficient to encourage an agreement among the members of the AGE.

²⁰ [CDL-PI\(2020\)004](#), Compilation of Venice Commission Opinions, Reports and Studies on Constitutional Justice (updated), p. 18.

²¹ https://court.gov.ua/eng/ec/about_ec/14/ (the Rules of Procedure were amended due to the introduction of martial law).

²² See [CDL-PI\(2018\)003rev](#), Compilation of Venice Commission Opinions and Reports Relating to Qualified Majorities and Anti-Deadlock Mechanisms.

K. Decisions

62. Pursuant to Article 10⁷-2 of the draft law “On the Constitutional Court” (and Article 208⁴-7 of the draft Law “On the Rules of Procedure of the Parliament”), the number of candidates compiled by the AGE must be at least three times more than the number of vacant positions. These candidates are those who, in the opinion of the AGE, “best meet the criteria”. This suggests that the AGE is empowered to select which candidates to submit to the appointing bodies. This selection seems to be based on a ranking of the candidates following the examination, the interviews and the collection of information.

63. In the Commission’s view, the AGE should not choose the candidates it prefers. The AGE should receive the list of candidates who have passed the background checks and therefore meet the formal integrity requirements and the strictly formal requirements for becoming CCU judges. The screening decisions should be open to an appeal. The AGE will then proceed with its assessment of the moral qualities of the candidates, including their integrity. The AGE should subsequently express an opinion on the candidates’ suitability for the position in light of their moral qualities and professional competence. It should provide the names of the screened candidates to the relevant appointing body, accompanied by its assessment of the qualities of each candidate (ranging from not suitable, to suitable, to very suitable²³). These assessments should be made available to the public. Candidates who are judged by the AGE to be “not suitable” are to be excluded from further consideration and must not be chosen by the appointing bodies.

64. The responsibility for the choice of the future judge rests with the appointing body. The draft amendments foresee that Parliament and the Council of Judges will make their own ranking of the candidates before proceeding to the vote. The transparency of the assessments of the AGE and the reasons accompanying the appointment decisions should ensure accountability and create public trust.

65. The Venice Commission would like to stress in this context the need for the election and appointment criteria to take into account gender equality standards. As an example, the Commission refers to the Guidelines of the Committee of Ministers on the selection of candidates for the post of judge at the ECtHR: *“Lists of candidates should, as a general rule, contain at least one candidate of each sex, unless the sex of the candidates on the list is under-represented on the Court (under 40% of judges) or if exceptional circumstances exist to derogate from this rule”*.²⁴ During the online discussions, the Commission was informed about the Ukrainian Law “On Ensuring Equal Rights and Opportunities for Women and Men”, which will apply to the appointment of the CCU judges. While this is welcome, the Commission recommends that the drafters make reference to the relevant Article(s) of the above-mentioned Law.

66. In light of the possible lack of suitable candidates, some interlocutors suggested that the number of candidates per vacancy should be reduced to two. The Venice Commission has expressed the view that all the candidates who have overcome the background checks and meet the minimum formal requirements to become judges should be put on the list to be transmitted by the AGE to the appointing bodies. As long as the number of candidates on the list does not depend on the discretion of the AGE, the Venice Commission is favorable to providing that two

²³ For example, the Standing Committee on the Federal Judiciary of the American Bar Association utilizes three rating categories in reporting the result of its evaluation of a nominee to the Supreme Court: “Well Qualified,” “Qualified” and “Not Qualified”, see more details here: https://www.americanbar.org/groups/committees/federal_judiciary/ratings/supreme-court-evaluation-process/

²⁴ [Guidelines of the Committee of Ministers on the selection of candidates for the post of judge at the European Court of Human Rights](#) and [Explanatory Memorandum](#) (Adopted by the Committee of Ministers at the 1138th meeting of the Ministers’ Deputies, 28-29 March 2012).

candidates would be sufficient in order not to provoke the repeat of the procedure in the absence of compelling reasons.

L. Importance of a qualified majority

67. The Venice Commission recalls that a qualified majority aims to ensure that a broad agreement is found in Parliament, as it requires the majority to seek a compromise with the minority. For this reason, a qualified majority is normally required in the most sensitive areas, notably in the elections of office holders in state institutions. In its 2015 Opinion on the Proposed Amendments to the Constitution of Ukraine,²⁵ the Venice Commission also recommended introducing a qualified majority for the election of the CCU judges by Parliament. That recommendation, however, was not taken up. The Commission wishes to underline and reiterate the importance of such a constitutional amendment, even though it is aware of the difficulties that achieving such a majority could raise in the current exceptional situation.

M. Failure to choose

68. In case the procedure does not result in the identification of at least three candidates per vacant position, or if the appointing body refuses or fails to appoint or elect a candidate, the procedure begins anew. The Venice Commission reiterates in this connection the importance of providing that the decisions to appoint or elect and to refuse to appoint or elect must be subject to public scrutiny and, therefore, presented to the public.

N. Publication of vacancies

69. According to the draft amendments, vacancies and openings of applications for judges will be announced on the websites of the three appointing bodies. Referring to the CoE Guidelines, the Venice Commission recalls that the need for an effective public call for applications reflects the principles of transparency and fairness. In particular, according to the CM Guidelines, "*The call for applications should be widely publicly available, in such a manner that it could reasonably be expected to come to the attention of all or most potentially suitable candidates*".²⁶ Based on the best international practice, this might entail, for example, publication in the official journal/ other official publications; publication in national and, where appropriate, regional newspapers; publication in the specialised legal press; dissemination via judicial bodies (e.g. presidents of the highest courts, judicial councils, associations of judges); dissemination via lawyers' professional associations, Ombudsmen/ national human rights institutions, universities and NGOs, etc.

IV. Final remarks on the legislative technique

70. The Venice Commission finds that some draft provisions are extremely long and too detailed. During the online meetings, the delegation was informed about Ukraine's long-standing "legislative tradition" consisting of very detailed and formalised texts. The level of such detailed content is all the more important when it comes to procedural rules, and in this particular case, the Rules of Procedure of Parliament. Aware of the complexity of the issue going beyond a specific opinion, the Venice Commission would like to draw the attention of the Ukrainian legislators to its regularly updated Compilation of opinions and reports concerning the law-making procedures and the quality of the law. Among many useful findings based on the variety of legislation of the member States, the Commission recalls the "golden

²⁵ [CDL-AD\(2015\)027](#), op.cit §25.

²⁶ Guidelines of the Committee of Ministers, op.cit. §62.

rule” for structuring and drafting legislative acts, namely that an article should not contain more than three paragraphs (or subparagraphs), a paragraph should not contain more than three sentences, and a sentence should not contain more than one idea.²⁷

V. Conclusion

71. The Venice Commission welcomes the intention and efforts of the Ukrainian authorities to improve the competitive selection of candidate justices to the CCU. Overall, the Venice Commission finds that the draft amendments go a long way toward implementing the recommendations of the Venice Commission’s previous opinions. At the same time, there is still room for improvement.

72. The Venice Commission invites the Ukrainian authorities to make full use of its previous and present opinions while the draft amendments are under consideration by the Parliament in order to provide all the necessary guarantees for independence, impartiality and efficiency of the AGE – in line with international standards. In particular, the Venice Commission makes the following key recommendations:

- to introduce a sunset clause in the draft amendments, providing for a time limit to international participation in the process of selection of judges of the Constitutional Court of Ukraine;
- to provide for a definite term of office for the international members of the AGE and for their appointment through an official act of a Ukrainian authority, ratifying the appointment decisions;
- to simplify the procedure of selection of the AGE member by Parliament to avoid paralysing the institution;
- to provide for the election or appointment of substitute members (at least for international members);
- to provide that the criteria for electing or appointing Constitutional Court judges should take into account gender equality standards, possibly by referring to the relevant applicable legislation;
- to provide that the AGE provides the relevant appointing body with the names of the screened candidates accompanied by its assessment of the moral qualities, including integrity and professional competence of each candidate (ranging from not suitable, to suitable, to very suitable). These assessments should be made available to the public; Candidates who are judged by the AGE to be “not suitable” are to be excluded from further consideration and must not be chosen by the appointing bodies;
- the AGE methodology to assess the moral qualities and legal competence should be based on best international practice;
- to provide in the law for a solution in cases where the AGE cannot reach a decision. For as long as the AGE will be operating with international members, the number of AGE members should be increased to seven. The seventh member should be on the international quota;
- to set out a timeframe for carrying out the selection procedure and for submitting the judicial candidates to the appointing bodies;
- to ensure that the decisions by the appointing bodies to appoint or elect or to refuse to appoint or elect are subject to public scrutiny and, therefore, presented to the public;
- to include civil society in the process of selection of the CCU candidate judges with the task of providing information and feedback on the judicial candidates and monitoring the process.

²⁷ [CDL-PI\(2021\)003](#), Compilation of Venice Commission opinions and reports concerning the Law making procedures and the quality of the law, endorsed by the Venice Commission at its 126th Plenary Session (online, 19-20 March 2021).

73. Further detailed recommendations are to be found in the text of this opinion.

74. The Venice Commission remains at the disposal of the Ukrainian authorities for further assistance in this matter.