



The President

Mr Ruslan Stefanchuk,
Chairman of the Verkhovna Rada,
Ukraine

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Paris, 25 January 2023

Dear Mr Stefanchuk,

I wish to thank you at the outset for your constructive co-operation with the Venice Commission, notably as concerns the setting up of a mechanism of selection of candidate judges for the Constitutional Court of Ukraine, with international participation.

As you know, the Venice Commission attaches the greatest importance to providing the Constitutional Court of Ukraine with strong guarantees of independence, as this Court will play a crucial role in the democratic and rule of law compliant development and functioning of the Ukrainian institutions and in the protection of the fundamental rights and freedoms of the Ukrainian people. You have yourself expressed your strong support for achieving this aim. The high importance of this matter explains why the Venice Commission has accepted not only to provide its expert opinion on this mechanism, but also its exceptional direct involvement in the composition of the Advisory Group of Experts (the AGE).

Such direct involvement, in turn, explains why the Venice Commission needs to be convinced that the features of this mechanism may enable it to achieve its aim of providing the most independent and best candidate judges, while respecting the institutional balance as well as Ukrainian sovereignty under its Constitution. The participation of the Venice Commission in the AGE is therefore conditional upon the compliance of the composition and functioning of the AGE with the Venice Commission's recommendations.

As previously announced, the rapporteurs have analysed the compliance of the Law adopted on 13 December 2022 with the Commission's opinion adopted on 16-17 December 2022. I wish to reiterate that the opinion adopted in December 2022 differed from the urgent opinion issued on 23 November 2022 only in that it contained certain clarifications, which I had announced to you in my letter of 6 December 2022. It had indeed appeared that the urgent opinion was not sufficiently explicit on some points. The Commission, therefore, added these clarifications to the text adopted in December 2022, without altering the substance of its recommendations.

In the process of preparation of this analysis, the rapporteurs had the opportunity to receive written comments from Mr Denys Maslov, Chairperson of the Verkhovna Rada Committee on Legal Policy, and to exchange views with you, Mr Maslov and Ms Olha Stefanishyna, Deputy Prime Minister of Ukraine for European and Euro-Atlantic integration, in an online meeting held on 23 January 2023. I wish to thank you for the opportunity to discuss these matters constructively once again.

The rapporteurs have completed their analysis, which is attached to this letter; they conclude that while most key recommendations contained in the opinion of December 2022 have been followed, two core recommendations – concerning the powers of the AGE and its composition - have not been met in the adopted law.

Today, the Bureau of the Venice Commission has decided that, in light of this conclusion, the preconditions for the nomination of candidate members of the AGE by the Venice Commission are not fulfilled. As a consequence, at this stage I cannot follow up to the relevant request, which I received on 29 December 2022.

I trust that it is possible to align the Law to these two outstanding recommendations and wish to assure you that the Venice Commission is ready to assist in the preparation of the relevant legislative amendments, should you so wish, within a short timeframe, as we are aware of the urgency of the matter.

As the matter is of great interest to the other international partners of Ukraine, which have been asked to provide candidates for two positions in the AGE, I will shortly make public this letter and the analysis by the rapporteurs.

I thank you for your understanding and count on our continued excellent co-operation.

Yours sincerely,



Claire Bazy Malaurie

Encl. Analysis of the compliance of the "On Amendments to Certain Legislative Acts of Ukraine on improving the procedure for the selection of candidates for the position of judge of the Constitutional Court of Ukraine on a Competitive Basis" with the core recommendations made by the Venice Commission in its opinion of 16-17 December 2022 (CDL-AD(2022)054)

Analysis of the compliance of the "On Amendments to Certain Legislative Acts of Ukraine on improving the procedure for the selection of candidates for the position of judge of the Constitutional Court of Ukraine on a Competitive Basis" with the core recommendations made by the Venice Commission in its opinion of 16-17 December 2022 (CDL-AD(2022)054)

The rapporteurs have analysed whether the key recommendations of the Venice Commission's Opinion on the draft law "On Amendments to Certain Legislative Acts of Ukraine on improving the procedure for the selection of candidates for the position of judge of the Constitutional Court of Ukraine on a Competitive Basis", adopted at its 133rd Plenary session (Venice, 16-17 December 2022), have been met in the Law as adopted on 13 December 2022.

Such an analysis is necessary for the Venice Commission to decide whether to submit candidates for the first composition of the Advisory Group of Experts (hereafter "the AGE"), an independent body which will assist the President of Ukraine, the Parliament of Ukraine and the Council of Judges of Ukraine (hereafter "the appointing bodies") in assessing the moral qualities and legal competence of candidate judges of the Constitutional Court of Ukraine (hereafter "the CCU").

A. Previous recommendations of the Venice Commission

It is necessary to stress at the outset the extraordinary and temporary nature of the AGE's international component. In this context, it is recalled that in its recent Joint Amicus Curiae Brief on certain questions related to the election and discipline of the members of the High Council of Justice of Ukraine, the Venice Commission provided clarification on whether the composition and decision-making of the Ethics Council, composed of three national and three international members, pose a threat to the sovereignty of Ukraine.

Bearing in mind the particularities of the composition of constitutional courts (see para. 19 of the December 2022 opinion), some elements of the Amicus Curiae Brief are relevant as regards the AGE, in particular:

- the Venice Commission and international and foreign organisations designate members of the AGE not on the basis of their sovereign right but only due to the fact that they are empowered to do so by Ukraine, exercising Ukraine's sovereign choice;
- the international members of the AGE are chosen and appointed by a decree of the Cabinet of Ministers of Ukraine;
- the AGE is a Ukrainian body governed by Ukrainian law;
- the members of the AGE act in their individual capacity and not as representatives of the Venice Commission and international and foreign organisations which proposed them;
- all cases related to challenging decisions, actions, or inaction of entities responsible for the appointment of the CCU judges in the process of competitive selection of candidates as well as the evaluation of candidates by the AGE can be appealed before the Ukrainian Supreme Court;
- there are several examples of including foreign expertise in the judiciary of a country. For example, the Constitutional Court of Liechtenstein always has a judge from Austria and a judge from Switzerland among its five members. The Constitutional

Court of Andorra always has judges from Spain and France among its four members. The Constitutional Court of Bosnia and Herzegovina includes international judges, and this was the case until recently in Kosovo. Within the common law system, it is even frequent that judges from one country act as judges and even as Chief Justices in another country. Such participation in adjudication goes even further than international participation in the selection of CCU members by the AGE.

In its opinion of December 2022, the Venice Commission made the following key recommendations:

- to introduce a sunset clause, 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’s 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.

Other recommendations in the text of the opinion concerned holding the AGE meetings devoted to the discussion of candidates’ suitability in camera (para. 55); the possibility for a judicial candidate to request the recusal of an AGE member for reasons of bias (and an alternative quorum, should two members recuse themselves) (para. 56); the possibility to appeal screening decisions (para. 63); introducing a qualified majority for the election of the CCU judges by Parliament (para. 67); wider dissemination of the information about the vacancies (para. 69).

B. Analysis of compliance

Overall, the analysis of the Law shows that most recommendations were followed, in particular, as regards the sunset clause, a definite term of office for the international members of the AGE and for their appointment through an official act of a Ukrainian authority, substitute members, gender equality standards, publicity of the AGE decisions, the inclusion of the civil society, holding the AGE meetings concerning candidates' suitability in camera, the possibility of appealing screening decisions and the possibility for a judicial candidate to request the recusal of an AGE member for reasons of bias. This is to be welcomed. At the same time, the recommendations on simplifying the selection procedure of the AGE members by Parliament, on introducing a qualified majority for the election of the CCU judges by Parliament and on wider dissemination of the information about vacancies have not been followed.

Two key recommendations, however, are to be considered essential for the mechanism to achieve its main objective of ensuring that the future Constitutional Court of Ukraine is equipped with very strong guarantees of independence and may attain the highest level of public trust:

- To ensure 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.
- To provide in the law for a solution in cases where the AGE cannot reach a decision. The Venice Commission has recommended that 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.

C. Powers of the AGE

The Law, as adopted, stipulates that the task of the AGE is the “adoption of a justified decision on evaluation of compliance of moral qualities and level of competence in the sphere of law of candidates for the position of the judge of the Constitutional Court regarding each candidate, compiling of a list of evaluated candidates and submission to nominating entities” (Article 10²⁵§7) however, the Law then separates the assessment of the candidates by the AGE into two distinct, successive phases: the first relates only to the “moral qualities”, which include integrity; the second, concerning only those candidates who have succeeded in the first phase, relates to the level of competence in the sphere of law. According to Article 10⁸ of the Law, a finding of the AGE that a candidate is non-compliant on the grounds of moral qualities, including integrity, excludes the candidate from further consideration. This only partly corresponds to the Venice Commission’s recommendation, that is, only in its part relating to the assessment of moral qualities, including integrity. Instead, according to the Law, the finding by the AGE of non-compliance of a candidate with regard to professional legal competence does not lead to her/his exclusion from further proceedings: based on the results of the assessment of professional competence, the AGE rates each the candidates as either “very suitable”, or “suitable” or “not suitable”. The list containing all the candidates,

classified into the three categories on the basis of a reasoned decision, is then transmitted by the AGE to the appointing bodies, who may choose the future judge(s) of the CCU from any of the three categories, including a “not suitable” one(s).

In its opinion of December 2022, the Venice Commission recalled the need to preserve the discretion of the appointing bodies; indeed, it stated that it is not for the AGE to “choose the candidates”. However, the role of the AGE is to make sure that only suitable candidates, possessing both high moral qualities and professional competence, may become constitutional judges by excluding from the appointment procedure those candidates who do not possess such qualities and competences. Indeed, the opinion clearly states that the discretion of the appointing bodies should only be exercised “after the necessary screening of integrity and possession of the constitutional and legal requirements to become a constitutional judge” (para. 36). It seems, therefore, only logical (and indeed in the urgent opinion it had not been stated explicitly and was subsequently clarified in the adopted opinion) that “not suitable” candidates - not only those who are assessed by the AGE not to possess high moral qualities, hence integrity, but also candidates who are “not suitable” on the basis of the assessment of professional competence - should be, as a consequence, automatically and definitely excluded from the selection procedure.

Giving the appointing bodies the possibility to select “not suitable” candidates as judges of the Constitutional Court has the potential to render the role of AGE meaningless. The appointment of candidates judged “not suitable” could also irreparably undermine the authority of the Constitutional Court, thus going against the very purpose of the setting up of the AGE.

It is to be recalled that the exclusion of “not suitable” candidates would not disproportionately restrict the margin of appreciation of the appointing bodies, who are free to choose any other candidate among those ranked “very suitable” and “suitable”. In order not to restrict the power of choice of the appointing bodies, it is also important to encourage a wide number of candidates by means of appropriate dissemination of vacancy notices and allow a due term for applying.

Accordingly, the recommendation of the Venice Commission that the Law itself must ensure that candidates who are deemed “not suitable” by the AGE on grounds of either moral integrity or professional competence are to be excluded from further consideration and must not be chosen by the appointing bodies has not been followed.

D. AGE composition and decision-making

In its opinion, the Venice Commission, noting that the AGE had an even number of members and votes were to be taken by a qualified majority of two-thirds, recommended to include in the law a solution in case the AGE cannot reach a decision; such solution, evidently, should make it possible for the AGE to take a decision. The Commission gave a two-fold recommendation in this respect for the transitional period: the AGE 1. should have a seventh member, and 2. That the latter be appointed on the international quota. The Law as adopted maintains a 6-member composition and requires that decisions be taken by the AGE with four votes. According to Article 10⁸ of the Law, in case of a tie vote (i.e. three votes “for” and three – “against”) on the assessment of both a candidate's moral qualities and of her/his

professional competence, a second interview shall be held. In case of yet another tie vote, the candidate concerned either ends the participation in the competition on the ground of the impossibility to reach a decision on his/her moral qualities or is rated “not suitable” on the ground of the impossibility to reach a decision on his/her professional competences. According to the Ukrainian authorities, even if the AGE cannot reach an agreement on a candidate, this option provides for an anti-deadlock mechanism.

While the solution envisaged in the Law technically allows to bring the procedure to an end, its results are not satisfactory in that, instead of enabling the AGE to take a decision, it institutionalises and may even encourage non-decisions. Indeed, it enables each group of three members to block the decision of the other, potentially leading to the exclusion of all candidates, including the good ones. Moreover, this situation may lead to the result that no candidate is selected, and the position of constitutional judge remains vacant for an indefinite term.

The recommendation of the Venice Commission to appoint a seventh member on the international quota has two aims: 1. It serves as an antideadlock mechanism, as with an odd number of members, decisions are more likely to be taken and 2. It gives the international members a quantitative prevalence in the AGE. This prevalence is necessary in order to avoid the risk that the appointing bodies interfere in the work of the AGE, which is meant to be an independent body.

The Ukrainian authorities argue that the Venice Commission has recognised that there are numerous and diverse kinds of anti-deadlock mechanisms and that each state should choose its own. This is true, but the mechanism should be appropriate: as during the transitional period the AGE has an international component designed to guarantee the choice of the most independent and best candidates, it is logical and essential that the presence of such component should be meaningful. While a composition of seven members, with four being appointed on the international quota, appears to be the optimum solution, the solution chosen for the Ethics Council (in case of a tie vote, the vote of the group with two members appointed on the international quota prevails) could be acceptable if a six-member composition is maintained for the AGE.

Accordingly, the recommendations of the Venice Commission to increase the number of the AGE members to seven, with the seventh member on the international quota, has not been followed.

E. Conclusion

In conclusion, two of the core recommendations contained in the opinion adopted by the Venice Commission in December 2022, which are:

- to ensure 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 and

- 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

have not been followed in the Law adopted on 13 December 2022.

Therefore, the preconditions for the nomination of candidate members of the AGE by the Venice Commission are not fulfilled.