



Strasbourg, 5 July 2021

**CDL-AD(2021)018**  
Or. Engl.

**Opinion No. 1029 / 2021**

**EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW**  
**(VENICE COMMISSION)**

**UKRAINE**

**URGENT JOINT OPINION**

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

**ON THE DRAFT LAW ON AMENDMENTS TO CERTAIN  
LEGISLATIVE ACTS CONCERNING THE PROCEDURE FOR  
ELECTING (APPOINTING) MEMBERS OF THE HIGH COUNCIL OF  
JUSTICE (HCJ) AND THE ACTIVITIES OF DISCIPLINARY  
INSPECTORS OF THE HCJ (DRAFT LAW NO. 5068)**

**Endorsed by the Venice Commission  
at its 127th Plenary Session  
(Venice and online, 2-3 July 2021)**

**on the basis of comments by**

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## I. Introduction

1. By letter of 15 February 2021, Mr Dmytro Razumkov, Speaker of the Verkhovna Rada, the Ukrainian Parliament, requested an urgent opinion of the Venice Commission on the draft law on amendments to certain legislative acts concerning the procedure for electing (appointing) members of the High Council of Justice (HCJ) and the activities of disciplinary inspectors of the HCJ (draft law no. 5068) ([CDL-REF\(2021\)030](#)).

2. At its 126<sup>th</sup> Plenary Session (online, 19-20 March 2021), the Venice Commission authorised the preparation of an urgent opinion on this matter.

3. Mr Nicolae Eșanu, Mr Martin Kuijer and Ms Hanna Suchocka acted as rapporteurs for this opinion on behalf of the Venice Commission. Mr Gerhard Reissner, Former President of the CCJE, analysed the draft law on behalf of the Directorate of Human Rights (“the Directorate”) of the Directorate General of Human Rights and Rule of Law (DGI).

4. Due to the COVID-19 crisis, the rapporteurs could not travel to Kyiv. Instead, assisted by Mr Dürr from the Secretariat, they held a series of video meetings on 1 April 2021 with (in chronological order), the Chairperson of the Parliamentary Committee on Legal Policy, Mr Andrii Kostin, and members of the Committee on Legal Policy, the Deputy Head of the President’s Office of Ukraine and Chairperson of the Working Group on the Judiciary Reform under the President’s Commission on Legal Reform, Mr Andriy Smyrnov, the acting Chairperson of the High Council of Justice, Mr Oleksiy Malovatsky, and members of the HCJ, as well as representatives of the international community and civil society. The Venice Commission and the Directorate are grateful to the Council of Europe Office in Kyiv for the excellent organisation of these virtual meetings. Following the meeting, the Venice Commission received written analyses of draft law no. 5068 from the HCJ, the Odessa I.I. Mechnykov National University, the National University “Odesa Law Academy”, the Taras Shevchenko National University of Kyiv, the National School of Judges and the Ukraine Bar Association as well as from civil society. Upon request by the Ukrainian authorities a meeting took place on 20 April 2021 between Mr Smyrnov, Mr Kostin, the Minister of Justice, Mr Maliuska and the rapporteurs. On 30 April 2021, the Ukrainian authorities submitted written comments on the draft urgent joint opinion (hereinafter, “the Comments”).

5. This opinion was prepared in reliance on the English unofficial translation of the draft law, as well as on unofficial translations of the Rules of Procedure of the Verkhovna Rada of Ukraine ([CDL-REF\(2017\)037](#))<sup>1</sup> and the consolidated version of the Law on the High Council of Justice ([CDL-REF\(2020\)067](#)). The translations may not always accurately reflect the original version on all points, therefore certain issues raised may be due to problems of translation.

6. This urgent joint opinion was drafted on the basis of comments by the rapporteurs and the results of the online meetings held. It was issued pursuant to the Venice Commission’s Protocol on the preparation of urgent opinions ([CDL-AD\(2018\)019](#)) and will be presented to the Venice Commission for endorsement at its 127<sup>th</sup> Plenary Session (Venice and online, 2-3 July 2021).

## II. Background

### A. Wider context - structural reforms

7. The Venice Commission was involved in the process of reforming the judiciary in Ukraine and prepared many opinions on this issue since 1997. The judicial system of Ukraine has been subject to numerous changes in recent years. In the absence of a holistic approach, various pieces of legislation were adopted that did not have the character of a comprehensive reform.

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<sup>1</sup> For a summary see on the site of the Rada: <https://zakon.rada.gov.ua/laws/anot/en/1861-17/print>.

8. Draft Law 5068 has to be seen as part of wider changes in the Judiciary of Ukraine which took place after 2016. Following constitutional amendments in 2016,<sup>2</sup> the members of the Supreme Court were vetted by the High Qualifications Commission of Judges (HQCJ) with the assistance of the Public Integrity Council, in which civil society is represented. The HQCJ then started the vetting of candidates for some 2000 vacancies in first and second instance courts.

9. However, in November 2019, Law No. 193-IX provided for a complete renewal of the High Qualification Commission. In its Opinion of December 2019 on that law,<sup>3</sup> the Venice Commission criticised its hasty adoption and a reduction in size of the Supreme Court from 200 to 100 judges, as well as submitting the newly appointed Supreme Court judges to a second vetting. On the other hand, the Venice Commission welcomed the model of a mixed composition (national / international) for the appointment of the members of the HQCJ as well as an Integrity and Ethics Commission.<sup>4</sup>

10. The Constitutional Court annulled large parts of Law no. 193-IX, including the changes affecting the Supreme Court. However, the HQCJ that had been dissolved with immediate effect was not re-established and some 2000 vacancies could not be filled.

11. Draft Law no. 3711, which is still pending before Parliament (as the revised draft law no. 3711-d), tried to remedy this problem. In its Joint Opinion of October 2020,<sup>5</sup> the Venice Commission and the Directorate again welcomed that the HQCJ would be composed with the assistance of a mixed national/international body, the Selection Committee. The Joint Opinion insisted that the integrity and ethics of the High Council of Justice (HCJ) are an urgent issue and that the new HQCJ should not be subjected to the HCJ until these issues were resolved. An integration of the HCJ (a constitutional body) and the HQCJ (based on the law) could be a long-term goal only.<sup>6</sup>

12. In parallel to draft law no. 3711-d and draft law no. 5068, which is the subject of this opinion, draft law no. 5067 "On amendments to the Code of Administrative Justice of Ukraine regarding the first-instance case jurisdiction of the Supreme Court" envisages transferring appeals against executive acts by the Government, ministries, the National Bank of Ukraine, etc. from the jurisdiction of the Kyiv City Administrative Court to the Supreme Court. Finally, draft law no. 5069 "On Amendments to Article 188-32 of the Code on Administrative Offenses of Ukraine regarding liability for failure to comply with lawful demands of the disciplinary inspector of the High Council of Justice" would establish administrative liability for non-compliance with demands of the HCJ disciplinary inspector.

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<sup>2</sup> See Venice Commission, [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](#)) with the Venice Commission's 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\(2015\)027](#)).

<sup>3</sup> Venice Commission, [CDL-AD\(2019\)027](#), Ukraine - Opinion on the Legal framework in Ukraine governing the Supreme Court and judicial self-governing bodies.

<sup>4</sup> Venice Commission, [CDL-AD\(2019\)027](#), para. 22.

<sup>5</sup> Venice Commission, [CDL-AD\(2020\)022](#), Ukraine – 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).

<sup>6</sup> Venice Commission, [CDL-AD\(2020\)022](#), para 80.

## **B. Holistic approach vs. urgency of reforms**

13. As in previous cases, the Venice Commission and the Directorate deplore that there is no holistic approach to the reform of the judiciary in Ukraine.<sup>7</sup> In addition to draft law no. 5068, which is the subject of this joint urgent opinion, three other draft laws are pending in Parliament, nos. 3711-d, 5067 and 5069, which all deal with specific aspects, often in a rushed manner. This results in a fragmented approach and there seems to be no proper impact assessments before further changes are proposed. Institutional reforms are intended to remedy a lack of application of existing disciplinary procedures and a general vetting replaces the dismissal of persons who are deemed to be corrupt.

14. Nonetheless, as in the past, the Venice Commission and the Directorate are mindful of the urgency of the situation<sup>8</sup> and acknowledge that the reforms should be undertaken to remedy these urgent problems. Their proper sequencing is essential in order to avoid transferring additional powers to yet unreformed parts of the judiciary.<sup>9</sup>

15. The Venice Commission has consistently stated that the establishment of judicial councils, in charge of judicial appointment, promotions and discipline, is an important element for the independence of the judicial system. The Commission favours a mixed composition of judicial councils that also includes non-judges to reduce the danger of corporatism in the work of the council.<sup>10</sup> A judicial council cannot fulfil its functions if the integrity of its members is not ensured. A lack of integrity of the council's members diminishes and even defeats the objective for which it was established, i.e. guaranteeing the independence of the judiciary.

16. In general, the Venice Commission and the Directorate welcome the rationale behind draft law no. 5068 as it intends to implement one of the key recommendations of the previous joint opinion: *"the issue of integrity and ethics of the HCJ should be addressed as a matter of urgency as well"*.<sup>11</sup> A judicial reform which does not tackle the functioning of the HCJ and the integrity of its members is doomed to fail.

## **III. Analysis of draft law no. 5068**

17. The constitutional position of the HCJ is regulated in Article 131 of the Constitution, which establishes the general requirements which a HCJ member must fulfil.<sup>12</sup> But there is also a general provision saying that *"[a]dditional requirements to be a member of the High Council of Justice may be provided for in the law"*. This means that a specific additional requirement regarding ethical conduct and integrity of a member of the HCJ can be introduced by an ordinary law. Draft law no. 5068 introduces such a requirement and demands that members of the HCJ fulfil "criteria of professional ethics and integrity".<sup>13</sup>

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<sup>7</sup> Venice Commission, [CDL-AD\(2020\)022](#), see paras. 6-8, 19, 69-71.

<sup>8</sup> Not only the international community highlighted how crucial this part of the reform is, but also the HCJ stressed the urgency of the situation albeit from a slightly different angle: some 4000 judges have to deal with more than four million pending court cases and they deplored a lack of proper funding.

<sup>9</sup> Venice Commission, [CDL-AD\(2020\)022](#), para. 80.

<sup>10</sup> Venice Commission, [CDL-AD\(2007\)028](#), Report on Judicial Appointments, [CDL-AD\(2010\)004](#), Report on the Independence of the Judicial System Part I: The Independence of Judges.

<sup>11</sup> Venice Commission, [CDL-AD\(2020\)022](#), para. 77.

<sup>12</sup> "... A member of the High Council of Justice shall not belong to political parties, trade unions, take part in any political activity, hold a representative mandate, occupy any other paid office (except for the office of the Chairman of the Supreme Court), perform other remunerated work except scholarly, teaching or creative activity. Member of the High Council of Justice shall be legal professional and meet the requirement of political neutrality. ...."

<sup>13</sup> Draft amended Article 6 (2) of the Law "On the High Council of Justice".

18. Draft law no. 5068 amends the Rules of Procedure of Parliament and the Law “On the High Council of Justice”. These amendments introduce: a) changes of the rules of the election (appointment) of the members of the HCJ; b) establishment and functioning of the Ethics Council; c) establishment and functioning of the Disciplinary Inspectorate Service of the HCJ and disciplinary inspectors, and d) rather limited amendments to the rules of disciplinary responsibility of judges.

### A. Ethics Council

19. Draft law no. 5068 establishes an Ethics Council for a period of six years to assist the bodies that elect (appoint) the members of the HCJ<sup>14</sup> in determining whether an applicant for the position of member of the HCJ meets the criteria of professional ethics and integrity (new Article 9-1).

20. The establishment of such an Ethics Council is very welcome in light of the memorandum of understanding which the Ukrainian Government and the European Union concluded on 23 July 2020<sup>15</sup> and a separate memorandum with the International Monetary Fund, as well as in view of previous recommendations of the Venice Commission to deal as a matter of urgency with the issue of integrity and ethics of the HCJ.<sup>16</sup> Given this urgency, it is welcome that the proposed solution does not require amendment of the Constitution.

#### 1. Composition

21. 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”.

22. The Venice Commission and the Directorate welcome that the composition of this Ethics Council reflects the Commission’s earlier recommendations, especially as concerns the participation of international experts in the re-establishment of the HCCJ<sup>17</sup> and the opinion on the anti-corruption court.<sup>18</sup> The Commission previously recommended to give a crucial role to international organisations and donors active in providing support for anticorruption programmes and judicial reform in Ukraine as a temporary measure to foster the trust of the public and help in overcoming any problems of corporatism.

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<sup>14</sup> Article 131 of the Constitution “... *The High Council of Justice shall consist of twenty one members: ten of them shall be elected by the Congress of Judges of Ukraine among judges or retired judges; two of them shall be appointed by the President of Ukraine; two of them shall be elected by the Verkhovna Rada of Ukraine; two of them shall be elected by the Congress of Advocates of Ukraine; two of them shall be elected by the All-Ukrainian Conference of Public Prosecutors; two of them shall be elected by the Congress of Representatives of Law Schools and Law Academic Institutions...*”.

<sup>15</sup> “... 3. The authorities will strengthen the independence, integrity and effective functioning of the judiciary, the authorities will adopt amendments to the law on judicial reform taking into account the opinions from the Venice Commission, including through legislative amendments, to ensure:

(...)

b) the creation of an Ethics Commission with international participation, which would have the mandate to 1) carry out a one-time assessment of the integrity and ethics of members of the High Council of Justice and recommend their dismissal to the electing (appointing) authorities in those cases where the members of the High Council have been found non-complying with the standards, and 2) establish a pool of pre-selected candidates from which the electing (appointing) authorities for members of the High Council of Justice will draw their nominations...”.

<sup>16</sup> Venice Commission, [CDL-AD\(2020\)022](#), para. 77.

<sup>17</sup> Venice Commission, [CDL-AD\(2020\)022](#), para. 41.

<sup>18</sup> Venice Commission, [CDL-AD\(2017\)020](#), para. 73.

23. As to the criteria for membership in the Ethics Council, Article 9-1 (2) provides that its members should have an *“impeccable business reputation, high professional and moral qualities and public standing, [who] meet the criteria of professional ethics and integrity, have at least 10 years of work experience, including in other countries, in the implementation of procedural guidance, supporting public prosecution in court or conducting legal proceedings in corruption-related cases.”*

24. These conditions seem to be inspired by the acts regulating the establishment and functioning of the anticorruption bodies. The criteria should allow members of the Ethics Council to check professional ethics and integrity of current members and HCJ candidates. Practical experience in fighting corruption is most relevant. The meaning of the requirement for experience in *“implementation of procedural guidance”* remains unclear, however.

25. Draft Article 9-1 (6) and Final and Transitional provision no. 2 provide that the Chairman of the HCJ should approve the list of the Ethics Council’s members. This means that the Chairman (chairperson) who him-/herself will be subjected to the one-time assessment by the Ethics Council could block the establishment of the Council. Instead, another body of the judiciary, e.g. the President of the Supreme Court or the President of the High Anti-Corruption Court could be empowered to declare the members of the Ethics Council appointed. The President of the Supreme Court could be empowered to approve that list as the representative of the highest court of the judiciary. Alternatively, the President of the High Anti-Corruption Court could be empowered to do so because that Court has a specific jurisdiction that is relevant to the issue of ethics and integrity. There should also be a default mechanism if the Council of Judges were not to appoint its members. The President of the High Anti-Corruption Court could be empowered to appoint qualified judges or retired judges.

26. In their Comments, the Ukrainian authorities point out that the implementation of such a proposal would create a conflict of interest since the Presidents of the Supreme Court and the High Anti-Corruption Court are subject to disciplinary procedures administered by the High Council of Justice.

27. However, the Presidents of these Courts would not themselves decide on the ethics and integrity of candidates and current members of the HCJ; they only would appoint judges or retired judges to perform this task and this would be done only in the event of the inaction of the Council of Judges.

28. The Ukrainian legislator could reconsider the wording in draft law no. 5068 as concerns the reference made to ‘international organisations’ which seems to preclude the participation of individual countries that are important donors working with Ukraine in the field of judicial reform and the fight against corruption.

29. During the virtual meetings the delegation was reassured that the fact that the draft law stipulates that the international actors have to agree on a “joint list of candidates” would be unproblematic given previous experiences with regard to the anti-corruption court. The Commission sees no reason to reach a different conclusion.

30. As concerns the three “national members” (it was pointed out that in practice the international organisations might even propose some Ukrainian candidates), they should be judges or retired judges (draft Article 9-1 (3) (1)). They should already have undergone the evaluation and of course they should have no disciplinary or criminal record, have correctly delivered their asset and interest declarations etc. This should be spelled out in an amendment to Article 9-1 (2)).

31. As an additional procedural safeguard, the Council of Judges should announce on its website the candidacy of national members at least two weeks before their appointment with all relevant documents to allow for transparent debates on the candidates.

32. Draft law no. 5068 stipulates that the powers of a member of the Ethics Council shall be terminated before the end of his or her mandate if, *inter alia*, a judgment of guilt against him or her has entered into force. The reference to a 'judgment of guilt' is understood by the Commission as meaning a guilty verdict *by a criminal court*. Likewise, the words 'entry into force' are understood by the Commission as meaning that no ordinary appeal lies anymore against such a verdict.

33. Two issues should be clarified. The first is whether *all* convictions for a misdemeanour suffice for the purposes of the draft law (hence also all convictions for petty offences, including violation of minor traffic regulations). The second is whether the judgment should be issued by a Ukrainian criminal court or whether (in light of the participation of international experts) also criminal convictions by foreign criminal courts are relevant for the purposes of the draft law. This should be the case.

## 2. Temporary nature

34. Draft Article 9-1 (1) provides that "*The Ethics Council shall be established for a period of 6 years*". The rapporteurs were informed that this must be interpreted in the sense that the Ethics Council will be established for a single 6-years term.

35. The Venice Commission and the Directorate welcome the temporary nature of the international participation in the Ethics Council and consider the duration of six years to be reasonable given the fact that national law provides for a gradual change in the composition of the HCJ by the various appointing bodies.

36. While the Ethics Council as such could, in principle, even become a permanent institution, the law should expressly specify that the international participation in the Ethics Council is valid for a single mandate of six years. This would contribute significantly to the constitutionality of the proposed Ethics Council.

## 3. Criteria of professional ethics and integrity

37. A major concern is that the draft law remains silent on the "*criteria of professional ethics and integrity*" which are the very foundation of the work of the Council. The Commission insists that in order to meet the criteria of predictability and foreseeability, the law itself should elaborate on those core characteristics.<sup>19</sup> During the virtual meeting with representatives of the HCJ, the latter stressed that they do not object as such to integrity checks as long as it is made clear from the outset what is exactly meant by 'integrity'.

38. It is not for the Venice Commission and the Directorate to draft such criteria but the national legislator may find various sources of inspiration useful when developing these criteria or by referring to them in the law. On the domestic level other legislative texts exist which deal with the issue of integrity.

39. Inspiration could also be drawn from draft law no. 3711-d, which is to re-establish the HQCJ. Its Article 95 (10) (2) provides for "*a list of candidates who most closely meet the integrity criterion (morality, honesty, incorruptibility, in particular concerning the legitimacy of the sources of property, consistency between the standard of living of the candidate or his family members and the declared income, conformity of the candidate's lifestyle to his status)*".

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<sup>19</sup> Venice Commission, [CDL-AD\(2016\)007](#), Rule of Law Checklist, paras. 58.



40. Alternatively, or in combination, international sources could be referred to for such criteria, notably the UN Bangalore Principles of Judicial Conduct.<sup>20</sup>

#### **4. Scope of the mandate / ranking of candidates**

41. Draft Article 9 (8) of the Law on the High Council of Justice stipulates that the Ethics Council will draw up a list of recommended candidates that is “*at least twice the number of vacant positions of members of the High Council of Justice*” and transmit it to the appointing body. Thus, the Ethics Council can decide not to include in the list of candidates all applicants which fulfil the criteria of professional ethics and integrity, but only some of them. This means that necessarily the Ethics Council does not only *filter* candidates who meet the integrity criteria but also somehow *ranks* them, by separating the “best” candidates who are included in the list from others who are not included.

42. Candidates either meet the criteria of integrity or they do not. Candidates cannot be more or less partially sound and thus cannot be ranked on integrity. To invest such a discretionary power with the Ethics Council creates a risk of arbitrariness as such a ranking could not be based on objective criteria and competition between candidates. It would call into question the reputation and functioning of such an Ethics Council from the outset.

43. This is also problematic because it is not in conformity with the mandate of the Ethics Council. The Ethics Council is established in order to assist the bodies that elect (appoint) members of the HCJ in determining whether applicants meet the criteria of professional ethics and integrity. The Ethics Council has no attributions to decide which of the candidates who meet the criteria of professional ethics and integrity deserve to be elected (appointed) or not. Its attributions are limited to the assessment of professional ethics and integrity. Therefore, the Ethics Council should submit to the bodies that elect (appoint) members of the HCJ a list which includes all candidates who meet the criteria of professional ethics and integrity.

44. This issue is also of great relevance with regard to the question whether draft law no. 5068 is compatible with the Constitution of Ukraine. Under Article 131 of the Constitution it is for the appointing bodies to make the choice of candidates. It is not for the Venice Commission and the Directorate to determine whether the draft law is in conformity with the Constitution; however, in its view it would not be incompatible with the constitutional competence of the appointing/electing bodies of the members of the HCJ if an advisory body were established with the limited task to *filter* the candidates on the basis of integrity criteria.

45. Finally, this provision does not envisage a situation when there are not enough candidates. The provision on including in the list twice the number of vacant positions should be removed also for this reason. Rather than vetting candidates proposed by the appointing bodies, the Ethics Council should establish a general pool of candidates from which the appointing bodies can select candidates. That list should include all candidates who meet the criteria of professional ethics and integrity. The Venice Commission and the Directorate therefore recommend amending the draft law in this respect and limiting the role of the Ethics Council to filtering out candidates who do not meet the relevant criteria of integrity. Such an approach would also be in line with the 2020 memorandum of understanding between the Ukrainian Government and the European Union.

#### **5. Decision-making / voting requirements**

46. Draft article 91-1 (11) stipulates that a decision of the Ethics Council is adopted if at least four members of the Ethics Council voted for it, provided that the three international experts are

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<sup>20</sup> [https://www.unodc.org/pdf/crime/corruption/judicial\\_group/Bangalore\\_principles.pdf](https://www.unodc.org/pdf/crime/corruption/judicial_group/Bangalore_principles.pdf).

among the majority. During the virtual visit, some interlocutors advocated an alternative system on the basis of which the international expert(s) would have a decisive vote in case of a tie (3-3).

47. The Venice Commission and the Directorate observe that both the draft law and the alternative system seem to operate on the assumption that the international experts function *en bloc*, that the same is true for the three members appointed by the Council of Judges, and that these two blocs would in practice take opposing positions *en bloc*. Given the fact that the members of the Ethics Council would sit in a personal capacity in the Council, this assumption seems speculative.

48. The rule requiring the vote of all three international members in favour of decisions of the Ethics Council would *de facto* give each of them a right of veto. This could easily lead to a complete blocking of the work of the Ethics Council and should be avoided. The rules could stipulate that decisions of the Ethics Council are ordinarily adopted in case four members vote in favour of it and that at least two international experts should be among those four members.

49. In addition, it seems prudent to regulate the situation of a split vote (3:3 or 2:2), which could equally block the work of the Council over a longer period of time. One solution would be to provide that in such a case, the vote would be repeated within a certain timeframe indicated in the law, to allow the members of the Ethics Council to discuss the case and to find an agreement. The repeat vote could potentially overcome the tie vote, but if it does not, then the vote of the group with at least two votes by international experts should prevail.

50. The Comments contend that the rule that, in case of a tie vote, the vote of the group with at least two votes by international experts should prevail would lead to the full control of decision-making in the Ethics Council by the international experts. Their three representatives would be able to make any decisions, without taking into account the views of the national members. The constitutionality of this rule was doubtful as it contradicted the principle of sovereignty. The Council of Judges might refuse nominating its representatives if this rule were adopted and the selection process would lack legitimacy. There were no international precedents for such a procedure.

51. However, the Venice Commission and DGI consider it necessary that, following a repeat vote, the vote of the group with at least two votes by international experts should prevail. This is not only important to establish trust in the Ukrainian Judiciary, but it is also acceptable from the viewpoint of national sovereignty. Indeed, as concerns the current members of the HCJ, they would only be suspended and the decision on dismissal would remain with the appointing body. Finally, all decisions of the Ethics Council, both concerning candidates and current members of the HCJ, can be appealed to the Supreme Court. Therefore, the final decision remains with a national body in all cases.

52. There exist other possible alternatives to the anti-deadlock mechanism proposed above, including, for example, the addition to the Ethics Council of a 7th member to overcome tie votes. The Commission is ready to assess the compatibility of such possible alternatives with international standards, if so requested by the Ukrainian authorities.

## **6. Rules of Procedure**

53. Draft Article 9-1 (12) provides that the Ethics Council shall define and publish its Rules of Procedure and define and publish the procedure for determining whether an applicant for the position of member of the High Council of Justice meets the criteria of professional ethics and integrity. At the same time, the Final and Transitional Provision no. 3 obliges the Ethics Council to assess compliance of the current members of the HCJ with such criteria within three months.

54. The one-time compliance assessment should of course be undertaken on the basis of the adopted Rules of Procedure. In such a setting, the deadline of three months seems unrealistic and should be extended (see also below, section 8). In order to facilitate the adoption of the Rules of Procedure, notably in case of a tie vote, the law could enable the Ethics Council to apply the rules for the HCCJ in analogy. The two sets of rules of procedure of the Ethics Council and the HCCJ may be quite similar or even the same. Some of the procedural rules of the HCCJ are included in the Law on the Organisation of Courts and the Status of Judges. At least these rules could be used also for the procedure of the Ethics Council.

## **7. Candidates to the HJC - consequences of non-compliance**

55. Draft Article 208-1 (4) of the Rules of Procedure of the Verkhovna Rada provides that in cases when the committee in charge of justice issues adopts a decision of non-compliance of an applicant with the requirements established by the Law on the High Council of Justice such applicant shall terminate participation in the competition. In parallel, Draft Article 208-1 (7) provides that in cases when an applicant to be appointed by the Rada does not meet the requirements for holding this position defined by law, and/or if he or she is not listed among the candidates recommended by the Ethics Council for election to the position of a member of the HCJ, such an applicant shall cease to participate in the competition for the position of a member of the HCJ.

56. Draft Article 208-1 (6) provides that the Secretariat of the Verkhovna Rada shall draft and submit a report to the committee in charge of justice issues on the findings of the special check. This means that both the Rada committee in charge of justice issues and the Ethics Council decide on the criteria of ethics and integrity. The existence of these parallel regulations is problematic. Only the Ethics Council should decide on ethics and integrity.

57. This problem should be solved by introducing a general pool of candidates who are vetted by the Ethics Council from which the appointing bodies, including the Verkhovna Rada, can choose (see above).

## **8. Current members of the HCJ – one-time vetting**

58. Final and Transitional provision No. 3 of draft law no. 5068 provides for an exceptional, one-time vetting of the current members of the HCJ, with the exception of the President of the Supreme Court (who – contrary to the other members of the HCJ – has already been vetted by the HCCJ). A current member who is found not to be in compliance with the criteria of ethics and integrity is suspended until the appointing body makes the final decision on dismissal.

59. A vetting of the current members of the HCJ by the Ethics Council according to the criteria of professional ethics and integrity can be considered acceptable only as a one-time, exceptional measure.<sup>21</sup> The participation of an international component in the Ethics Council is a necessary guarantee for such an exceptional measure in Ukraine, which establishes a balance between the independence of the members of the HCJ and the necessity to ensure their integrity. In line with the principle of proportionality, current members should not be excluded from the HCJ for minor infringements.

60. Final and Transitional provision no. 3 foresees that an involvement of the HCJ itself is not necessary when the Ethics Council proposes the dismissal of one of its members. This is positive and avoids the blocking of the one-time vetting. The suspension of a current member following a proposal by the Ethics Council ensures that the member concerned, whose integrity was found

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<sup>21</sup> In its recent judgment *Xhoxhaj v Albania*, App. No. 15227/19, of 9 February 2021, the European Court of Human Rights held that system of vetting of judges and prosecutors in Albania did not violate the Convention (<https://hudoc.echr.coe.int/fre#%7B%22itemid%22%3A%22001-208053%22%7D>).

to be tainted, cannot participate in the activity of the HCJ until the appointing body makes a final decision. Such a suspension is intended to 'freeze' the situation; it does not encroach on the competence of the appointing bodies to dismiss (or not) the member concerned.

61. As the draft law stands currently, the provision that the Ethics Council needs to complete its assessment of the current members of the HCJ within 3 months from the date of the approval of its composition seems entirely unrealistic, as the Council would first – on the basis of Article 9-1 (12) – need to establish its understanding of the criteria it will apply and approve its rules of procedure before applying those criteria and procedure in respect of the 17 persons currently acting as a member of the HCJ. This deadline should therefore be extended.

## **9. Appeals against decisions of the Ethics Council**

62. The draft law should clarify that judicial protection is available to a candidate who is deemed *not* to meet the criteria of professional ethics and integrity by the Ethics Council. As it stands, the draft law does not refer to the procedure for appeals against decisions of the Ethics Council. During the online meetings, the Ukrainian authorities pointed out that that in conformity with other legislation, any individual public act can be appealed against. This means that a decision that terminates a candidacy for a position at the HCJ or that establishes the non-compliance of a current member of the HCJ with ethics and integrity criteria can be appealed against in court.

63. Draft Law no. 5068 should explicitly provide for appeals against the decisions of the Ethics Council to the Supreme Court, even if the parallel draft law no. 5067 already envisages reducing the jurisdiction of the unreformed Kyiv City Administrative Court.

## **10. Further consequences**

64. A decision of the Ethics Council that a current member of the HCJ does not live up to the necessary standards of ethics and integrity or that a candidate does not qualify should not remain without further consequences. The Ethics Council should be obliged to transmit its findings to the National Agency for Prevention of Corruption and the National Anti-Corruption Bureau for further action to determine whether criminal law measures are required.<sup>22</sup>

## **11. Other procedural issues**

65. The Commission welcomes various elements in the draft law that concern the proposed working methods of the Ethics Council, such as the possibility to participate in the sessions and decision-making of the Council remotely via videoconferences using electronic means of communication. However, the Ethics Council will need sufficient investigative powers to perform its tasks. This should be set out in the law.

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<sup>22</sup> In its 2018 Opinion for Malta, the Venice Commission identified a structural problem with regard to the Permanent Commission against Corruption (PCAC): the PCAC reported its findings on corruption to the Minister of Justice who had no powers of investigation. That problem would be addressed by ensuring that the PCAC were to be able to transmit a finding of corrupt conduct directly to the public prosecutor ([CDL-AD\(2018\)028](#), para. 72). The Commission recommended that even reports that express doubts as to corruption or are indicative of corruption, not only a finding of corruption should be transmitted to the prosecution. In its following Opinion [CDL-AD\(2020\)019](#), para. 57 the Venice Commission welcomed that the Maltese authorities amended Article 11 of the Permanent Commission Against Corruption Act to the effect that the PCAC is obliged to transmit the report of the results of an investigation directly to the Attorney General if “the conduct investigated is corrupt or connected with or conducive to corrupt practices”. In the Ukrainian context, the duty to transmit a suspicion of corruption to the National Anti-Corruption Bureau (the NABU) in charge of criminal investigations in the sphere of anti-corruption would appear logical. See for more background information: [CDL-AD\(2020\)038](#).

66. Draft Article 9 (3) Law on the High Council of Justice provides that an applicant for the position of member of the HCJ shall personally submit documents. It should be possible to submit documents by other means, at least when there are good reasons that personal submission is not possible.

### **B. Disciplinary procedure / Disciplinary Inspectorate Service**

67. The draft law provides for the establishment and functioning of the Disciplinary Inspectorate Service of the HCJ and disciplinary inspectors and amends the rules on disciplinary responsibility of judges.

68. These amendments are rather limited to the improvement of the mechanism of disciplinary responsibility of judges. However, the Venice Commission and the Directorate have already expressed their opinion that additional attributions should not be assigned to the yet unreformed HCJ. The sequencing of these changes is therefore important. The proposed amendments on the establishment of the Disciplinary Inspectorate Service should enter into force only after the one-time vetting of the current members of the HCJ.

69. The draft law should be reconsidered in respect of some of the time limits it introduces. The draft amendments to Article 43 (5)<sup>23</sup> provide for example for a strict 30-day deadline from the date of the receipt of the complaint, for the preparation of documents by a disciplinary inspector. This is positive from the viewpoint of the celerity of the procedure but there may be a need to extend that deadline in justified cases.

70. Furthermore, draft Article 48 (5) provides that a judge will be notified of the date of the Disciplinary Chamber's session no later than 7 days before such a session. The proposals extend this time-limit from the previous three days (that deadline had been declared unconstitutional by the Constitutional Court) to seven days, but this still seems too short for the judge to properly prepare his/her defence against the allegations.

71. The amendments delete Article 47 (3) that stipulates that if the judge is absent, even for justified reasons, the Disciplinary Chamber reviews the disciplinary case without him or her, with the exception of cases when the judge was not notified or was notified in violation of the law. This provision was understandably declared unconstitutional by the Constitutional Court, as it infringes the right to defence of the judge. Accordingly, it is necessary to provide that a proven absence for a justified reason should give a right to a re-opening of the proceedings.

### **IV. Conclusion**

72. The main thrust of draft law no. 5068 is the establishment of an Ethics Council for a period of six years to assist the bodies that elect (appoint) the members of the High Council of Justice (HCJ) in determining whether the applicants for the position of member of the HCJ and the current members of the HCJ meet the criteria of professional ethics and integrity.

73. In general, the Venice Commission and the Directorate welcome the rationale behind draft law no. 5068 as it intends to implement one of the key recommendations of the previous joint opinion: *"the issue of integrity and ethics of the HCJ should be addressed as a matter of urgency as well"*. A judicial reform which does not tackle the functioning of the HCJ and the integrity of its members is doomed to fail. The Venice Commission and the Directorate welcome that the composition of this Ethics Council builds on the Commission's earlier opinions, especially as concerns the participation of international experts.

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<sup>23</sup> There may be a translation or numbering problem, as the current Article 43 does not seem to have a paragraph 5.

74. The Venice Commission and the Directorate deplore that draft law no. 5068 is a partial measure and does not provide for a holistic reform of the judiciary. Nonetheless, the Venice Commission and the Directorate are mindful of the urgency of the situation and acknowledge that reforms should be undertaken to remedy to these urgent problems.

75. The Venice Commission and the Directorate make the following main recommendations:

1. the law should set out the “criteria of professional ethics and integrity”; this can be done in the text or by reference to national and/or international sources, such as the UN Bangalore Principles of Judicial Conduct;
2. the President of the Supreme Court or the President of the High-Anti-corruption Court could declare the Ethics Council as established and a default mechanism should be introduced for the case when the Council of Judges has failed to appoint its members;
3. the candidacies for the position of national members of the Ethics Council should be announced on the web-site of the Council of Judges and only judges already evaluated (vetted) should be eligible for appointment;
4. the international participation in the Ethics Council should expressly be limited to a single mandate of six years;
5. the law should provide sufficient investigative powers to the Ethics Council for its work;
6. in order to facilitate the adoption of Rules of Procedure, the law could enable the Ethics Council to apply the rules for the HCJ by analogy; at least the applicable rules in the Law on the Organisation of Courts and the Status of Judges could be used also for the procedure of the Ethics Council;
7. the provision that the Ethics Council needs to complete its assessment of the current members of the HCJ within 3 months is unrealistic; this deadline should be extended;
8. the Ethics Council should establish a pool of candidates from which the appointing bodies can choose (i.e. filtering of candidates) and the Ethics Council should not be (*de facto*) empowered to *rank* candidates; only the Ethics Council and not the Rada Committee in charge of justice issues should decide on ethics and integrity of candidates.
9. the decisions of the Ethics Council should be deemed as adopted if four members vote in favour and if at least two international experts are among those four members; in case of a split vote, the vote should be repeated, but if the tie vote is not overcome within a fixed timeframe indicated in the law, the vote of the group of members that includes at least two international experts should prevail;
10. an appeal against the decisions of the Ethics Council should lie with the Supreme Court;
11. the Ethics Council should be obliged to transmit its findings of non-compliance to the NACP and the NABU for further action.

76. As in previous opinions, the Venice Commission and the Directorate stress that the sequencing of the reforms is very important. In this respect, the Disciplinary Inspectorate Service should be established only after the one-time vetting of the members of the HCJ has been carried out.

77. The Venice Commission and the Directorate remain at the disposal of the Ukrainian authorities for further assistance, notably as concerns the wider reform that could also consolidate the various judicial advisory bodies.