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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 LEGISLATIVE SITUATION REGARDING ANTI-CORRUPTION MECHANISMS FOLLOWING DECISION No. 13-R/2020 OF THE CONSTITUTIONAL COURT OF UKRAINE

Issued pursuant to Article 14a of the Venice Commission's Rules of Procedure

on the basis of comments by

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I. Introduction

1. On 25 November 2020, following exchanges with the President of the Venice Commission, the President of Ukraine, Mr Volodymyr Zelenskyy, requested an urgent opinion of the Venice Commission on the constitutional situation created by decision no. 13-r/2020 of 27 October 2020 of the Constitutional Court of Ukraine. In his request, Mr Zelenskyy formulated three questions to the Venice Commission: he asked the Venice Commission to issue an opinion "on the state of anti-corruption legislation after this judgment; the judges of the Constitutional Court of Ukraine issuing a judgment while possibly being in a conflict of interest situation; the Constitutional Court of Ukraine's compliance with the due process of law in hearing the case and resolving the matter, including with regard to its reasonableness and respect for the limits of the constitutional petition."

2. In his letter Mr Zelenskyy argued that the decision of the Constitutional Court of Ukraine "irreparably compromised" the proper functioning of the State's anti-corruption infrastructure and "created a major constitutional crisis". Against this background, on 25 November 2020, the Bureau of the Venice Commission accepted the request for an urgent opinion and decided to divide the subject-matter of the request in two separate urgent opinions.

3. This urgent opinion deals with the first question, namely with the state of anti-corruption legislation after decision no. 13-r/2020 of 27 October 2020. The two other questions formulated in the President's request are dealt with in a separate urgent opinion (CDL-PI(2020)019).

4. This urgent opinion has been prepared jointly with the Directorate General of Human Rights and Rule of Law ("DG I") of the Council of Europe. Ms Hanna Suchocka (Honorary President, former member, Poland), Mr Nicolae Esanu (substitute member, the Republic of Moldova) and Mr Martin Kuijer (substitute member, the Netherlands) acted as rapporteurs for this opinion on behalf of the Venice Commission, Mr Đuro Sessa acted as an expert for the Action against Crime Department of the DG I, and Mr Gerhard Reissner acted as an expert for the Justice and Legal Cooperation Department of the DG I.

5. Due to the Covid-19 pandemic, no visit to Kyiv was possible, but video conferences were held on 2 December 2020 with the Office of the President of Ukraine, the President's Commission on Legal Reform, the Committee on Legal Policy of the Verkhovna Rada, the National Agency for the Corruption Prevention, the National Anti-Corruption Bureau, the High Council of Justice, as well as with representatives of the civil society and of international organisations and diplomatic missions active in Ukraine. The Venice Commission is grateful to the Council of Europe Office in Ukraine for the excellent organisation of the videoconferences.

6. This opinion was prepared in reliance on the English translation of the relevant legislation and the decision of the Constitutional Court of Ukraine. The translation may not accurately reflect the original version on all points.

7. This urgent opinion 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 125th online Plenary Session on 11-12 December 2020.

II. Background

A. Outline of decision no. 13-r/2020 of the Constitutional Court of Ukraine (the CCU) and reactions to it

8. In 2020 the Constitutional Court of Ukraine (the CCU) adopted several decisions which affected the operation of the anti-corruption bodies, namely the National Anti-Corruption Bureau

(the NABU), which is in charge of criminal investigations in the sphere of anti-corruption,[1] and the National Agency for the Corruption Prevention (the NACP), which deals, among other functions, with the verification (audit) of financial declarations of public officials.[2] The focus of this urgent opinion will be the last of those decisions, namely decision no. 13-r/2020 of 27 October 2020.[3] By this decision the CCU invalidated as unconstitutional certain provisions of the Law of Ukraine "On the Prevention of Corruption"[4] concerning the powers of the NACP to verify the accuracy of the financial declarations submitted by public officials, and Article 366-1 of the Criminal Code of Ukraine, which provides for criminal liability for submitting false declarations/failure to submit a declaration.

9. Following decision no. 13-r/2020, the NACP announced its inability to perform inspections of certain State-owned enterprises and institutions. The NABU declared that cases regarding inaccurate declaration of assets had to be closed, and public officials convicted of abuse would thus evade liability. Reportedly, over a hundred criminal cases investigated by the NABU have been dropped.

10. Decision no. 13-4/2020 was met with stark disapproval from a part of the population and of the political class. President Zelenskyy publicly criticised the CCU and proposed draft legislation (Draft Law no. 4288) which would overturn the contested decisions, reinstate the provisions of the legislation invalidated by the CCU and dismiss judges of the CCU. Other legislative proposals were made aimed at reforming the rules on the operation of the CCU. The Venice Commission emphasises that in the present urgent Opinion it will not examine legislative proposals made by various political actors in response to decision no. 13-r/2000, or draft laws which are now in the process of adoption.

B. Status and powers of the NACP before decision no. 13-r/2020 of the CCU

11. The NACP was established by the Law on Prevention of Corruption of 2014 (hereinafter – the 2014 Law; in 2019 the 2014 Law has been amended in order to reinvigorate the anti-corruption effort).[5] The Chairperson of the NACP is appointed by the government following a competition, organised by the Competition Commission, which includes representatives of the government and members appointed by international partners of Ukraine. The mandate of the Chairperson may be terminated in the case of his/her "inefficiency" (Article 5 (5) (9)) by a Commission on the independent assessment of effectiveness of the NACP, also established with participation of international partners (Article 14 (4)).

12. The 2014 Law, besides establishing the NACP, regulates a broad range of substantive and procedural questions. First of all, it defines the rules of professional conduct[6] for public officials, for example, as regards acceptance of gifts (Article 23 et seq.) or rules to follow in a situation of conflict of interests (Article 28 et seq.). Most importantly for the purposes of the present urgent opinion, the 2014 Law establishes the duty of all public officials to publish annual financial declarations (Article 45) and to notify the NACP about important acquisitions or expenditures (Article 52). The 2014 Law describes in great detail what sort of information should be entered into the financial declaration, how it should be published, corrected, etc. These declarations are

[1] The NABU is a "state law enforcement agency" which counteracts criminal corruption offenses, through conducting pre-trial investigation in criminal proceedings, public and covert operative search activities, etc. The status and powers of NABU are regulated by a special law, partly invalidated by the CCU in decision no. 11-r/2020 2020 of 16 October 2020 with a deadline to 16 December to align the legislation to the judgment.
[2] For more information about the composition, functions and powers of this body see Section B below
[3] See Venice Commission, CDL-REF(2020)078, Ukraine - Decision No. 13-r/2020 of the Constitution Court of Ukraine of 27 October 2020, with dissenting opinions
[4] See Venice Commission, CDL-REF(2020)79, Ukraine - Law on Prevention of Corruption of 2014, as amended. The provisions which have been declared unconstitutional are marked with a strikethrough.
[5] Also partly invalidated by the CCU in 2020, by decision no. 13-r/2020.
[6] They are called "ethical" rules in the English translation of the Law of 2014; however, the Venice Commission prefers to call them "rules of conduct" to stress their mandatory character.

to be filled in and submitted electronically and are accessible via a digital system accessible for the public and permitting quick and automated comparison with data contained in other electronic registers: they are often referred to as e-declarations.

13. Under the 2014 Law, the main function of the NACP is to ensure that public officials comply with those rules. The NACP "monitors and controls over implementation of legislation on ethical behaviour, the prevention and settlement of conflicts of interest" (Article 11 (1) (6)), verifies financial declarations of public officials (Article 48), checks whether declarations have been submitted in a timely manner (Article 49), and whether they accurately reflect the financial situation of the official concerned, whether all assets, benefits and interests are properly reflected therein (Article 50). The process of verification may concern family members of the declarants (Article 50 (1) part 4) and is based on various sources of information: it is primarily conducted by comparing the e-declarations with known data in other government databanks (Tax Office, Chamber of Commerce, etc), but the verification can also be based on press reports, information obtained from private persons and legal entities, etc. Article 51 of the 2014 Law empowers the NACP to monitor the "lifestyle" of the public officials, in order to check whether it corresponds to the officially declared financial situation. In case such verification or monitoring of the lifestyle results in detecting some "unjustified assets", the NACP must notify the NABU and the Special Anti-corruption Prosecution Office accordingly.

14. To verify financial declarations and to enable the NACP to monitor the "lifestyle" of public officials, the NACP may, under Article 12, "obtain information" from government bodies and private persons, "including restricted information, as may be necessary to fulfil its objectives", have "direct access to information and telecommunication and reference systems, registers, databases, including those containing restricted information" administered by public authorities; can "receive statements" from private individuals or obtain their "written explanations", "inspect work organisation" of public entities in the area of the fight against corruption, initiate proceedings before other anti-corruption bodies or (see Article 12 (2)) seek bringing those responsible to "statutory liability". Article 12 (2) proclaims that "a precept issued by the NACP shall be binding".[7]

15. Following the verification, the NACP may issue a "protocol" which identifies irregularities in the declaration of a public official. Depending on the character of those irregularities, this protocol is communicated, together with the supporting materials, to the competent authority for decision. The NACP itself cannot impose a sanction on the official who failed to submit a declaration or declare assets; however, the protocol may trigger appropriate proceedings: administrative, in the case of minor transgressions, or criminal, if the irregularities are serious enough as to fall under Article 366-1 of the Criminal Code on the submission of a knowingly false declaration (invalidated by the CCU – see below), or if there is evidence of another crime (bribery, for example). In both cases the final decision belongs to a court, administrative or criminal, and not to the NACP. As to the disciplinary liability, the protocol of verification of the declaration may also be used in disciplinary proceedings against the public official concerned.

[7] Article 13 (2) describes in further detail the powers of the agents of the NACP: to have access to the premises of public bodies and have access to documents or other materials "as may be necessary to conduct inspections"; to "demand any necessary documents or other information in connection with the exercise of their powers, subject to the restrictions established by law", to "carry out inspections" etc.

C. Powers of the NACP vis-à-vis judges before decision no. 13-r/2020 of the CCU

16. The powers of the NACP extend to judges of ordinary courts and judges of the CCU (both categories are mentioned in Article 3 (1) (e) of the 2014 Law).[8] The 2014 Law specifies in several places that judges may be governed by special rules – for example, as regards the conflict of interests (Article 35), or as regards inspections of the financial situation of candidates to judicial positions (Article 56 (2)). However, otherwise the 2014 Law does not make a distinction between judges and other public officials.

17. Judges are granted additional guarantees under the Law on the Organisation of Courts and the Status of Judges,[9] the Law on the High Council of Justice[10] and the Constitution itself (see Article 131 of the Constitution, or Article 149-1 as regards judges of the CCU). Most importantly, a judge may be suspended, dismissed or taken into custody only following a decision by the High Council of Justice (the HCJ). A judge of the CCU may be detained only following a decision of the CCU, and is dismissed only by a decision of the CCU taken by 2/3 of the judges (Article 149-1 of the Constitution).Thus, in theory, protocols drawn up by the NACP in respect of judges of ordinary courts may be transmitted for decision to the HCJ, which is entitled to take disciplinary measures including the dismissal of a judge (as regards judges of the CCU this power belongs to the CCU itself), but in practice such protocols have not resulted in any actual dismissal of a judge to date.

D. Article 366-1 of the Criminal Code (submitting false financial declaration) before decision no. 13-r/2020 of the CCU

18. Article 366-1 of the Criminal Code, declared unconstitutional by decision no. 13, reads as follows:

> *"Submission by the subject of declaration of knowingly false information in the declaration of a person authorized to perform functions of the state or local self-government as provided for by the Law of Ukraine "On Prevention of Corruption", or intentional failure by the subject of declaration to submit the aforementioned declaration –*
>
> *shall be punishable by a fine of 2,500 to 3,000 non-taxable minimum incomes of citizens, or community service for a term of 150 to 240 hours, or imprisonment for a term of up to two years, with deprivation of the right to occupy certain positions or engage in certain activities for a term of up to three years.*
>
> *Note. Subjects of declaration shall mean persons, who under paragraphs 1 and 2 of Article 45 of the Law of Ukraine "On Prevention of Corruption", are obliged to submit a declaration of the person authorized to perform functions of the state or local self-government. The responsibility under this Article for submission by the subject of declaration of knowingly false information in the declaration in respect of property or other declaration object of value shall occur if such information differs from reliable information by the amount that exceeds 250 subsistence wages for able-bodied persons."*[11]

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[8] Although in the Ukrainian legal order judges of the CCU are not considered as a part of the country's judiciary, for most purposes the 2014 Law treats them the same; therefore, unless indicated specifically, the term "judge" in this urgent Opinion refers to judges of ordinary courts and judges of the CCU.

[9] See Venice Commission, CDL-REF(2020)068, Ukraine - Law on the Organisation of Courts and the Status of Judges.

[10] See Venice Commission, CDL-REF(2020)067, Ukraine - Law on the High Council of Justice

[11] Which is an approximate equivalent of EUR 37,500 at the moment.

III. Analysis

A. Approach of the Venice Commission to the situation following decision no. 13-r/2020

19. On 31 October 2020 the President of the Venice Commission and the President of GRECO wrote a joint letter to the Speaker of the Verkhovna Rada.[12] In that letter they stressed the importance of fighting corruption, in particular within the judiciary, but at the same time emphasised the role of a Constitutional Court as gatekeeper of the Constitution. This letter fully embodies the position of the Venice Commission. "Disregarding a judgment of a Constitutional Court is equivalent to disregarding the Constitution and the Constituent Power, which attributed the competence to ensure this supremacy to the Constitutional Court".[13]

20. That does not mean that constitutional courts are beyond reproach and can never make a mistake.[14] The Venice Commission notes, in this specific context, that there are serious allegations (examined further below and in the second urgent opinion dealing with other questions put by the President of Ukraine in his request) that the CCU did not respect its own procedures and that some of the judges of the CCU performed judicial functions while a possible conflict of interests may have resulted in objectively justified fears as to their impartiality. The Venice Commission's own analysis (see below) reveals that the CCU's reasoning is flawed in many respects. That decision may produce critical adverse effects for the functioning of anti-corruption bodies, which is extremely worrying.

21. Parliament and the executive, however, must respect the role of the Constitutional Court as the "gatekeeper of the Constitution". The fight against corruption is an essential element in a state governed by the Rule of law, but so is respect for the Constitution and for constitutional justice. They go hand in hand. Parliament and the Executive must "take into account the arguments used by the Constitutional Court" and "fill legislative/regulatory gaps identified by the Constitutional Court […] within a reasonable time".[15]

22. While the Ukrainian legislature should execute the decision of the CCU, it should also take into account the principle set out in Article 9 of the Constitution of Ukraine that "international treaties that are in force, agreed to be binding by the Verkhovna Rada of Ukraine, are part of the national legislation of Ukraine".[16] Positive obligations of the State in this area may stem indirectly from human rights treaties,[17] but stem more directly from international treaties in the sphere of the fight against corruption – like the Criminal Law Convention on Corruption (1999),[18] signed and ratified by Ukraine. The international standards of judicial independence and governance of

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[12] See here: https://www.venice.coe.int/files/2020_10_31_UKR_JointGRECOVeniceCommissionLetterSpeakerVerkhovnaRada.pdf

[13] See Venice Commission, CDL-AD(2017)003, Spain - Opinion on the law of 16 October 2015 amending the Organic Law No. 2/1979 on the Constitutional Court, para. 69

[14] See CDL-AD(2019)012, Republic of Moldova - Opinion on the constitutional situation with particular reference to the possibility of dissolving parliament, paras, 34, 43 and 50.

[15] See Venice Commission, Rule of Law Checklist, E.3.iii and iv

[16] See also Article 92-2 of the Law on the Constitutional Court of Ukraine: "The Constitutional Court may develop and elaborate a legal position of the Court in its subsequent acts, change its legal position in the event of substantial change to normative regulations that the Court was guided by when expressing such position, or in the presence of objective grounds for the need to improve the protection of constitutional rights and freedoms, *taking into account Ukraine's international obligations*, subject to substantiation of such change in the Court's act" (emphasis added).

[17] As stressed in the 2018 Opinion on Romania, "a State is under a positive obligation to ensure that its criminal system is effective in the fight against serious forms of crime, that criminal law constitutes a strong deterrent to commit such offences, and that perpetrators of such offences do not enjoy impunity" – see the Venice Commission, CDL-AD(2018)021, Romania - Opinion on draft amendments to the Criminal Code and the Criminal Procedure Code, para. 31.

[18] ETS No. 173.

the judiciary – both hard and soft law standards – should also be taken into account by the Verkhovna Rada when interpreting the decision of the CCU.

23. In sum, the purpose of the present urgent Opinion is to help identify possible legislative amendments which would implement decision no. 13-r/2020 of the CCU in line with the Constitution and international standards, while, at the same time, preserving the anti-corruption mechanisms and not impeding the fight against corruption in Ukraine.

B. Procedure before the CCU

24. On 27 October 2020 the CCU (sitting as a Grand Chamber, composed of 15 judges) on a motion filed by 47 MPs, adopted the decision which is at the focus of the present opinion. This decision nullified Article 366-1 of the Criminal Code, which provides for the criminal liability for inaccurate asset declaration by public officials/failure to submit a declaration, and also invalidated some important powers of the NACP, as defined by the 2014 Law. Four dissenting opinions were written by Justices Holovaty, Lemak, Pervomaiskyi and Kolisnyk.

25. Many of the interlocutors met by the rapporteurs complained about various procedural irregularities which accompanied the adoption of decision no. 13-r/2020. For example, it was adopted with unusual speed: it took the CCU only a few weeks to examine the constitutional complaint introduced by a group of MPs. This is a very short time in comparison to the usual duration of such proceedings before the CCU, especially in light of the large amount of supporting material the CCU had to assess, and the magnitude of the underlying questions. A public hearing was scheduled, but later cancelled and replaced with a written procedure.[19] The CCU went far beyond the petition it was considering, thus expanding its scope of review: the CCU declared unconstitutional several articles of the 2014 Law which were not mentioned in the petition.

26. Most importantly, several judges of the CCU (including the judge-rapporteur) were in possible conflict of interest. The NACP had detected irregularities in their financial declarations, and cases had been transmitted to the NABU for further criminal investigation. The invalidation of Article 366-1 and of the provisions in the 2014 Law on financial declarations put an end to those further investigations into the financial declarations of the said judges and thus directly benefited them. The question of the possible conflict of interest was raised by the President's Office in the proceedings before the CCU but there is no mention of it in the judgment, let alone of an explanation of why the CCU disregarded it. The CCU did adopt six procedural rulings (not published on the web-site of the CCU nor apparently made accessible to the general public otherwise) concerning four judges, including the judge rapporteur and the President of the CCU, whereby it dismissed the recusal requests in a standardised summary manner. The only reasoning given by the CCU in its rulings – in respect of all judges concerned – was that "the motives [for recusal] indicated in the request [by the President's Office] do not disclose the presence of grounds which would cast doubt as to the objectiveness and impartiality" of the respective judge. According to the Constitutional Court , these rulings will be made public at some point, when proceedings in the case are finished.

27. In the Commission's view, it is striking that the matter of conflict of interest was not addressed in any meaningful manner by the Court, that no serious in-depth reasons for refusing the request for recusal were given, and that the Court's rulings were not made available to the general public when the main decision was published, or at least shortly thereafter. Serious and very specific allegations of a possible conflict of interest should never be discarded in a summary manner. The Venice Commission reiterates that the legitimacy of a Constitutional Court does not stem solely from the constitutional and legal provisions which define the Court's powers. It also depends on the persuasive force of the court's reasons for its decisions, and on the painstaking respect for procedural rules by the court. The fact that the decision was adopted so quickly, without a public

[19] The CCU justified this decision by the need to meet Covid-19-related measures applicable in Ukraine at the time.

hearing, that the CCU extended the scope of the original petition, and that it did so without engaging with a very serious allegation of a possible conflict of interest, seriously calls into question the manner in which the CCU operated in this case and will affect the public perception of the institution.

28. The Venice Commission will now turn to the examination of the reasoning of decision no. 13 and its effects on the anti-corruption legislation. Decision no. 13 can be divided into two parts: one concerning the investigative powers of the NACP in relation to the verification of financial declaration (by judges), and another concerning Article 366-1 of the Criminal Code establishing the liability for false declarations/failure to declare. The Venice Commission will examine these two questions separately, and will start with Article 366-1.

C. Article 366-1 of the Criminal Code

29. Decision no. 13-r/2020 in this part (see section 17 et seq. of the decision) contends in the first place that the offence of "submitting a false declaration" should not be punished by means of criminal legislation. The CCU based its conclusion on the fundamental principle of proportionality. The most relevant parts of the decision read as follows: "Criminalization of a specific human act is possible provided that it meets, in particular, a set of such criteria: significant social threat of the act; the spread of similar acts in society; ineffectiveness of other sectoral legal means of influencing these actions; the impossibility of successfully combating the act with less repressive methods." The criminal offence contained in Article 366-1 was introduced "in the absence of grounds for this, and as a result, the crime is an act that is not objectively so". The acts defined in Article 366-1 "are not capable of causing significant harm to a natural or legal person, society or the state" to be criminalised. The CCU considers "that the declaration of knowingly unreliable information in the declaration, as well as the intentional failure of the subject of the declaration to declare should be grounds for other types of legal liability".

30. This first argument of the CCU deserves a detailed examination. It is open for a constitutional court to find that a criminal sanction applied in a specific case limits in a disproportionate manner the exercise of a constitutionally protected fundamental right – for example, the freedom of speech, the right to privacy, etc. – or, where the review is *in abstracto*, goes against a fundamental principle of law or international standard. However, in Ukraine the duty to submit an accurate financial declaration is an ordinary duty which is attached to the status of a public official. The CCU did not explain in its decision what sort of constitutionally protected public or private interest is disproportionately affected by the sanctions provided by Article 366-1, it simply concluded that this provision is disproportionate as such.

31. The Venice Commission observes that it is a requirement of the separation of powers that a constitutional court should not usurp the role of the legislature. Even when, formally, a constitutional court has the power to declare unconstitutional a provision of the criminal code, this power should be exercised with due regard to the role played by Parliament in a system of checks and balances. According to Article 92 of the Constitution of Ukraine, only laws define acts that are crimes and responsibility for them. In the case at hand the CCU did not invoke any evidence nor develop any specific argument justifying its blanket assertion that submitting a false declaration is "not capable of causing significant harm to a natural or legal person, society or the state".

32. The CCU argues in the second place that Article 366-1 of the Criminal Code does not correspond to the "requirements of clarity and unambiguity". According to the CCU, "[…] the use of legal constructions lacking a clear list of laws makes it impossible to unambiguously define the range of subjects of crime, and reference norms make it impossible to establish the range of their addressees. As a result, persons who cannot be parties to the declaration and therefore knowingly failed to do so may be held liable for intentional failure to file a declaration".

33. The Venice Commission notes at the outset with regret that decision no. 13-r/2020 of the CCU also lacks clarity: the CCU failed to identify which specific parts of Article 366-1 it found to be insufficiently clear. Should it refer to the definition of the class of persons who may be held liable for submitting a false declaration, it follows from the note to Article 366-1 that potential subjects of this crime are those public officials who are under an obligation to submit declarations pursuant to paragraphs 1 and 2 of Article 45 of the 2014 Law. Article 45 is not declared unconstitutional by the CCU for lack of clarity or for any other reason – and, from the Venice Commission's own perspective, this provision is sufficiently clear: it does not appear that public officials in Ukraine do not know whether or not they are required to submit declarations. Such terms as "knowingly false information" or "intentional failure to submit a declaration" do not appear to the Venice Commission as ambiguous either. In any event, as the CCU reasoning is extremely unspecific, the legislature has a significant margin of manoeuvre in responding to this criticism. The Venice Commission thus recommends the legislature to interpret the CCU's decision in accordance with the overall constitutional framework of the country and relevant international obligations.

34. Since the central argument of the CCU is the alleged "lack of proportionality" of Article 366-1, more tailor-made sanctions may be provided in the revised provision: for example, the sanction of imprisonment may be reserved only for cases above a certain threshold and for perpetrators acting with deliberate intent. That being said, in the Commission's view, the level of monetary fines and other sanctions should be sufficiently high as to act as deterrent and as to ensure a punishment which is proportionate to the importance which the fight against corruption has in Ukraine. The sanction of imprisonment should be maintained for the most serious violations. To address the main concern of the CCU in this respect, this differentiation might be codified in the text of the article rather than entrusting the observance of the principle of proportionality entirely to the full discretion of the judge, and the elements permitting to differentiate between crimes of different degrees of gravity should be enumerated there.

35. Decision no. 13-r/2020 in this part represents a serious challenge for the Ukrainian legal order. The unconstitutionality of Article 366-1, declared by the CCU, entails that criminal proceedings instituted under this provision but not completed to date will have to be discontinued. There is a risk that certain people, who would otherwise be convicted for false declarations, will go unpunished. The legislature must reflect how to "fill in" this gap created by the decision of the CCU, and how to ensure the continuity of the system of financial declarations. It can be achieved by strengthening other measures, of a non-criminal character. Alternatively, the facts might be qualified under other, already existing but less specific criminal provisions like forgery of official documents, bribery, embezzlement of public funds, etc.

D. Investigative powers of the NACP

36. Most of the decision under examination is focused on the provisions of the 2014 Law which give the NACP the power to verify financial declarations of public officials, including judges.

37. Decision no. 13-r/2020 restates the principles of the separation of powers, checks and balances, independence of the judiciary, etc. The CCU notes, in particular, that the special position of the judiciary is demonstrated by the rules related to the appointment and accountability of judges. According to the CCU, independence of judges is best ensured through the establishment of a special institution shielding judges from influences and pressures. Influencing a judge in relation to a specific case he/she deals with is impermissible. The CCU argues that the fight against corruption should not affect the independence of the judiciary. Integrity checks should be carried out by competent, independent and impartial bodies and cannot be used as a tool to eliminate politically "undesirable" judges. The decision of the CCU contains numerous references to the provisions of the Constitution of Ukraine, as well as to relevant international law standards, the case-law of the European Court of Human Rights (the ECtHR), etc.

38. Not all of the references to the international instruments made by the CCU are relevant or accurate (on this see more below). However, generally speaking the Venice Commission agrees that judicial independence is a fundamental principle of any legal order governed by the rule of law. The main question is how to organise the system of judicial governance in order to reduce or even remove completely the risk of external interference with independent decision-making by the judges.

39. When answering this question, the CCU sees a problem when the legislature "empowers bodies and officials outside the judiciary with a significant amount of powers to organise and operate courts, determine the judiciary and status of judges". "Any forms and methods of control in the form of inspections, monitoring, etc. of the functioning and activity of courts and judges should be implemented only by the judiciary and exclude the establishment of such bodies in both the executive and legislative branches." The CCU is worried by "the effect of the norms that institutionalise the control powers of the NACP". The NACP, for the CCU, is an "executive body" and exercises control functions *vis-à-vis* the judges and the CCU judges. That, for the CCU, threatens the judges' independence. The CCU does not contest the duty of public officials to declare their assets, but special rules should exist in respect of judges. This is the main thrust of decision no. 13-r/2020.

40. In the operative provisions the CCU declares unconstitutional a number of provisions of the 2014 Law, which describe the investigative powers which allowed the NACP to verify declarations and monitor the lifestyle of officials, including judges, get access to state registers, collect information and initiate proceedings in respect of the corruption-related offences (these powers are described in paragraph 13 and 14 above). In essence, the NACP was stripped of most of its investigative powers related to the verification of financial declarations, breaches of rules of conduct and monitoring of the "lifestyle".

41. Before going further, the Venice Commission notes that in this case the CCU did not use the opportunity provided by Article 91 of the Law on the Constitutional Court,[20] which allows for establishing in a decision a time-limit for its implementation by the legislature. In the previous decisions which concerned the status of NABU (see footnote 1 above), the CCU gave the legislature the time – albeit very short – to fix the problems it identified. It is unclear why in decision no. 13-r/2020 the CCU did not do the same. Indeed, there is no general obligation for a constitutional court to postpone the coming into effect of its decision, in order to give the legislature time to fill in the gap created by the invalidation of a statutory rule. In certain circumstances an immediate entry into force of a decision of the constitutional court is not only possible but even desirable. However, delaying the effect of declarations of unconstitutionality may be seen as good practice in the situations when the proper functioning of state institutions or legal mechanisms, otherwise compatible with the Constitution, may be jeopardized by the invalidation of certain isolated provisions of the law. In an opinion on Tunisia the Venice Commission recommended that "the Court should be able to defer the effect of its findings of unconstitutionality, so as to avoid a legal gap following the repeal of a law or of provisions within a law."[21] In an opinion on Luxembourg the Venice Commission observed that the possibility of deferring the effect of a judgment is "welcome, not to say essential".[22] While certain isolated statutory provisions can be easily "erased" from the legal order, decision no. 13-r/2020 is much more complex: it requires revisiting the whole mechanism of financial reporting by judges. Therefore, the legislature ought to have been given sufficient time to revisit the system and develop new legal solutions.

[20] See here: http://www.ccu.gov.ua/sites/default/files/law_on_ccu_amended_2017_eng.pdf
[21] See Venice Commission, CDL-AD(2015)024, Opinion on the Draft Institutional Law on the Constitutional Court of Tunisia, para. 11.
[22] See Venice Commission, CDL-AD(2019)003, Opinion on the proposed revision of the Constitution of Luxembourg, para 116.

1. Material scope of the CCU's decision no. 13-r/2020

42. For the Venice Commission, the operative part of decision no. 13-r/2020 should be interpreted in the light of its reasoning. Any other approach would make the very idea of a "reasoned judgment" superfluous.[23] In addition, Article 89 of the Law on the CCU stipulates that the decisions of the CCU should be reasoned. Where the reasoning is lacking or insufficient, the legislature should rely on general constitutional principles and international standards. Where the conclusion is contradictory, it should apply logic.

43. Decision no. 13-r/2020 clearly distinguishes between the situation of judges and other public officials. The CCU discusses at length the special role of judges and the special guarantees for their independence. P. 15 gives support to the existing mechanism of financial declarations by stating that "declaring the income of persons exercising public power is an indisputable requirement in any modern democratic state. There is no doubt that public figures in the state must file a declaration of income".

44. However, the operative provisions of the decision seem to invalidate the NACP powers in bulk, even though these provisions of the 2014 Law are applicable not only to judges but to other public officials as well. Thus, the operative provisions do not follow logically from the preceding reasons for judgment. The CCU has informed the Commission that it has severed the proceedings, and that another judgment will be issued in time in respect of some other aspects of this issue. Irrespective of what these additional aspects may be, the conclusion of the CCU is supported by some reasoning only in respect of ordinary and constitutional judges. It follows that only the provisions regarding judges need to be amended.in order to comply with decision no. 13-r/2020. The powers of the NACP in relation to other public officials should be reinstated.

2. The power of the NACP to verify judges' declarations

45. It may appear that decision no. 13-r/2020 requires a complete removal of the NACP from the process of verification of declarations of judges. However, looking more closely at the reasoning of the decision, this is not necessarily what is required. The CCU's decision contains numerous references to international and European standards, in particular to the case-law of the ECtHR and to the recommendations of the Consultative Council of European Judges (the CCJE). Thus, the CCU decision should be construed in the light of those and other international standards.

a. From the perspective of international standards and from a comparative perspective

46. The United Nations Convention against Corruption (ratified by Ukraine in 2009) encourages States to introduce a duty of public officials to submit asset declarations, which implies an efficient system of verification (audit) of such declarations.[24] At the European level, the Council of Europe Committee of Ministers Recommendation No. R(2000)10 on codes of conducts for public

[23] As the Venice Commission stressed in CDL-AD(2008)030, Opinion on the Draft Law on the Constitutional Court of Montenegro, para. 71, "Article 69 obliging other state authorities to take into account the legal reasons of the decision of the Constitutional Court when they adopt a new individual act is also a positive element. Often, the problems with other courts result from the fact that they follow the operative part but not the reasoning of the Constitutional Court."

[24] In para. 5 of Article 8 it calls on State parties to "endeavour, where appropriate and in accordance with the fundamental principles of its domestic law, to establish measures and systems requiring public officials to make declarations to appropriate authorities regarding, inter alia, their outside activities, employment, investments, assets and substantial gifts or benefits from which a conflict of interest may result with respect to their functions as public officials." The Convention further requires that "each State Party shall consider establishing, in accordance with its domestic law, effective financial disclosure systems for appropriate public officials and shall provide for appropriate sanctions for non-compliance. Each State Party shall also consider taking such measures as may be necessary to permit its competent authorities to share that information with the competent authorities in other States Parties when necessary to investigate, claim and recover proceeds of offences established in accordance with this Convention" (para. 5 of Article 52).

officials, recommends Member States introducing an obligation of public officials to declare, at regular intervals, personal or private interests which are likely to be affected by their official duties (p. 14). The Group of States against Corruption (GRECO) calls for introducing a duty of public officials to declare assets,[25] and, more specifically in respect of Ukraine, expressed support to the obligation for *judges and members of their families* to submit such declarations.[26]

47. If the duty of public officials to declare their assets and financial interests is uncontroversial, the question of who should verify these financial declarations is a more complex question: there is no single model as to how the verification is to be organised, whether it should be a unique system for all public officials, or separate systems for different categories of them.[27] What is clear, however, is that there is no requirement under international standards that judges should be submitted to any special regime in this respect.

48. This plurality of models is acknowledged by the CCJE: in its Opinion no. 21 (2018) on the prevention of corruption amongst judges the CCJE insisted that *disciplinary proceedings* (italics added) should be conducted by a properly composed judicial council or a similar body having a strong judicial component (p. 30). This does not mean, however, that the process of verification of financial declarations of judges should also be in the hands of such bodies. As regards investigative authorities, in para. 50 the CCJE proposes that "it might be necessary to establish specialised investigative bodies and specialised prosecutors to fight corruption among judges", but it does not express any position about the organisation of bodies which verify the financial declarations.

49. The Venice Commission examined this question in an opinion of 2019 on Armenia,[28] where it held as follows:

> *27. Two solutions are possible in this respect: either to create a special body within the judiciary responsible for checking financial declarations of judges or to entrust this task to an external body which deals with the declarations of all public officials. The first solution is better for judicial independence but lacks transparency, which may give rise to a corporatist behaviour. […]*
>
> *28. It is difficult to find a common European standard in these matters. Some documents suggest that only a judicial body should have the power to bring disciplinary cases against judges. Other authorities accept that the verification of the financial statements by the judges may be performed by a body external to the judiciary. […] In the opinion of the Venice Commission, whether to entrust the task of verifying declarations to an external body (dealing with all public officials, including judges), or to a specialised body within the judiciary, depends on the local realities. […]"*

50. In the Armenian context, the Venice Commission readily accepted the choice made by the legislature, namely that it is an external body – the Commission for the Prevention of Corruption created by Parliament – which verifies financial declarations of judges and, in the case of irregularities, initiates disciplinary proceedings before the Supreme Judicial Council.[29]

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[25] See GRECO, Code of conduct for public officials: GRECO findings & recommendations, pp. 13-16.
[26] See GRECO, Fourth Evaluation Round: Corruption prevention in respect of members of parliament, judges and prosecutors, Evaluation Report Ukraine, 2017, p. 180.
[27] See the OECD study "Asset Declarations for Public Officials: A Tool to Prevent Corruption", p. 15.
[28] See Venice Commission, CDL-AD(2019)024, Armenia - Joint opinion of the Venice Commission and the Directorate of Human Rights (DHR) of the Directorate General of Human Rights, and rule of law (DGI) of the Council of Europe, on the amendments to the Judicial Code and some other laws.
[29] Ibid., para. 29.

51. Finally, from a comparative perspective, the model where asset declarations of judges are verified by bodies outside of the judiciary may be regarded as dominant in the region.[30] Therefore, whether or not to create a special legal mechanism of verification of declaration of judges is not dictated by international standards, and the previous model – where declarations of judges and other public officials are verified by the same body – is more widespread in the region. That means that the choice of the most appropriate model belongs to the national legislature.

b. From the national constitutional perspective

52. The Constitution of Ukraine is silent on the question of financial declarations of public officials and who should verify them. The CCU based its reasoning on the constitutional principle of judicial independence, claiming that the mechanism of verification of financial declarations by the NACP may be abused to put pressure on the judges. This argument, however, does not lead to the necessity of terminating the currently existing mechanism of verification of declarations, rather to the necessity of ensuring that there are appropriate guarantees against abuse.

53. It is normal and necessary that judges should be governed by special rules as regards the manner in which they are appointed, promoted or dismissed from their positions. The Constitution of Ukraine provides for a special mechanism in this regard, with the High Council of Justice (the HCJ) at its center. However, in their capacity as citizens, judges are subjected to ordinary laws and regulations (on property, town planning, tax, civil status, traffic rules and so on). In their capacity as public officials, they have the obligation to submit a financial declaration. This duty is unrelated to the exercise of *the judicial function* but follows from the judge's status as a public official and is indeed an essential guarantee in the eyes of the public that the judicial function – as all other state functions – is exercised by individuals who meet the requirements of integrity. It is therefore an important precondition for ensuring public trust in the judiciary. The Venice Commission has always been wary of rules which exempt judges from the general legal regime and repeatedly warned about the risk of judicial corporatism, cronyism and self-protection amongst judges.[31] It stressed that judges should only enjoy *functional* immunity, i.e. directly related to the performance of judicial functions.[32] In the Commission's opinion, there is no compelling justification for setting up a special legal regime for checking the financial declarations of judges. However, when subjecting judges to an obligation to submit financial declarations, the legislature should provide for guarantees against the risk that such an obligation is abused in an attempt to unduly exercise pressure and influence pending cases. But whether or not a risk of such abuses exists largely depends on the powers of this body conducting verifications. As shown above, in the Ukrainian system the NACP has only fact-finding competences; the final decision on the substance of its findings belongs to a court in the framework of administrative or criminal proceedings, or, in the context of disciplinary proceedings, to a body of judicial governance (the HCJ for ordinary judges and the CCU for judges of this court).

54. In this respect, the Venice Commission has noted that some judges of the CCU have alleged to have been subjected to abusive conduct by NACP officers in excess of their powers. However,

[30] For example, this is the case in Albania, Armenia, Azerbaijan, Bulgaria, Czech Republic, Estonia, Georgia, Latvia, Lithuania, Montenegro, North Macedonia, Serbia, Slovakia, Slovenia, the Republic of Moldova, and Romania.

[31] See, for example, Venice Commission, CDL-AD(2016)007, Rule of Law Checklist, para. 82; see also CDL-AD(2002)012, Opinion on the Draft Revision of the Romanian Constitution, para. 66, CDL-AD(2014)006, Joint opinion of the Venice Commission and the Directorate of Human Rights (DHR) of the Directorate General of Human Rights and Rule of Law of the Council of Europe, and of the OSCE Office for Democratic Institutions and Human Rights (OSCE/ODIHR) on the draft law on disciplinary liability of judges of the Republic of Moldova, paras. 46 and 48, CDL-AD(2014)007, Joint opinion on the draft law amending and supplementing the judicial code (evaluation system for judges) of Armenia, para. 70.

[32] See Venice Commission, CDL-AD(2010)004, Report on the Independence of the Judicial System Part I: The Independence of Judges, para. 61. The Committee of Ministers Resolution (97) 24 on the twenty Guiding Principles for the fight against corruption calls Member states to limit immunities regarding investigation of corruption-related offences "to the degree necessary in a democratic society" (principle 6).

these allegations refer to abuses which, if proven, would engage the individual responsibility of the relevant NACP officers. These allegations do not justify that the NACP powers as provided by the 2014 Law as such should be removed. Instead, judges should be able to complain about such abuses, and if the existing avenues are insufficient appropriate mechanisms may be designed to tackle this problem – see the following section which proposes several options for such mechanisms.

c. How to reform the mechanism of control of financial declarations of judges? Possible role for the HQCJ

55. As demonstrated in the previous paragraphs, the reasoning of the CCU far from clear. As a result, the legislature enjoys a large margin of appreciation as to how to implement this decision. The main concern of the CCU is that the powers of the NACP – defined in the decision as an "executive body" – may represent a danger for the judges' independence when used for ulterior purposes. Thus, the Verkhovna Rada should reform the mechanism of verification of declarations by judges in order to reduce (if not exclude completely) this risk.

56. There are several ways how to proceed. The legislature may consider:

- increasing the independence of the NACP and improving public control over this body exercised by the Public Council (for more details on this see paragraph 58 below);
- reviewing some of the broadly formulated investigative powers of the NACP;
- giving a supervisory role over the NACP to a judicial body; or
- a combination of the above.

57. First of all, the independence of the NACP from the executive and legislative branches should be enhanced as recommended by GRECO, which prompted to develop "appropriate measures, including of a regulatory nature to enhance the independence and impartiality of the National Agency on Corruption Prevention (NACP) decision-making structures; and (ii) lay down detailed, clear and objective rules governing NACP's work, in particular, its investigative tasks, in order to fully secure transparency and accountability in practice of NACP action".[33] This recommendation is still relevant – see the Compliance Report of 2020 by GRECO.[34]

58. The Venice Commission notes that the 2014 Law, as amended, already contains provisions prohibiting any interference with the activities of the NACP by state officials, political parties, etc. The NACP is supervised by a Public Council composed of representatives of various anti-corruption NGOs. The Public Council gives opinions on the annual reports of the NACP. An external evaluation of the activities of the NACP is conducted every two years by an Independent Performance Review Commission, the members of which are also in part proposed by international donors. The law contains provisions ensuring the transparency of the work of the NACP for the general public. There are further ways of making the instruments of public control over the activities of the NACP more efficient or increasing the independence and impartiality of the NACP in practice, as stressed in the Compliance Report of 2020 by GRECO

59. An additional avenue would be to identify powers of the NACP which are particularly prone to abuse. The NACP is not a law-enforcement agency and therefore cannot conduct searches, seizures, wiretapping, cannot compel individuals to testify, etc. However, the catalogue of its fact-finding powers is quite extensive (see Articles 11 and 12 of the 2014 Law). Some of these powers could be formulated more precisely and narrowly – or special exceptions and procedural safeguards in respect of the use of certain powers vis-à-vis judges can be envisaged. That being said, this recommendation should not be interpreted as inviting the Ukrainian authorities to

[33] See GRECO, Fourth Evaluation Round (Corruption prevention in respect of members of parliament, judges and prosecutors, Evaluation Report Ukraine, 2017, p. 31.
[34] See GRECO, Compliance Report on the Fourth Evaluation Round, GrecoRC4(2019)28, p. 14 – 16.

reduce investigative powers of the NACP: these powers should be sufficient to enable the NACP to collect information and verify declarations of public officials.

60. Finally, decision no. 13-r/2020 may be construed as requiring to give judicial bodies a role in the process of verification of declarations of their peers. The Venice Commission does not consider that every procedural step of the NACP in the process of verification of declarations of judges should be authorised by a court or another judicial body. That does not follow from any applicable (international) standard as outlined above and it would paralyse the work of the NACP which is clearly unwarranted.

61. By contrast, some elements of *ex post* supervision of the activities of the NACP in respect of judges could be introduced into the law. The Venice Commission emphasises that supervision of the fact-finding activities of the NACP in respect of judges is not required by international standards, and there are strong doubts as to whether it is required by the Ukrainian Constitution. However, the legislature could consider introducing elements of external supervision of the activities of the NACP in an attempt to accommodate decision no. 13-r/2020.

62. Such *ex post* supervision can take different forms. First of all, a "complaints mechanism" can be created, enabling judges to complain about abusive actions of the NCAP before a judicial authority. The power to examine complaints could be assigned to a designated court. But it is necessary to ensure that the integrity of those judges who examine such complaints is beyond reproach. The Venice Commission understands that entrusting this function to a court which has not been reformed and which does not therefore enjoy public trust as regards the integrity and independence of its judges may be politically problematic, so the legislature enjoys a considerable leeway in deciding which court should be allocated these functions.

63. Another option would be to require the NCAP to submit periodic reports to a judicial body. Such reports will not involve approving each individual procedure against a judge but rather contain a more generalised information about measures taken by the NACP during a given period in connection with the verification of declarations of judges.

64. The power to review such reports may be allocated to an appropriate body of judicial governance. The central body of judicial governance in Ukraine is the High Council of Justice (HCJ), regulated by the Constitution and the Law on the HCJ.[35] The HCJ has been reorganized in 2016.[36] It appears that the process of reform of this body is not completed and there are still serious concerns about the integrity of some members of the HCJ.[37] In addition, the HCJ is a body which takes final decisions on dismissing a judge and may therefore not be the most suitable institution to examine actions of the NACP in the process of gathering of evidence.

65. Another body of judicial governance is the High Qualification Commission of Judges – the HQCJ. As is known, the Ukrainian authorities made several attempts to reform the HQCJ. In 2019 the Verkhovna Rada adopted Law No. 193-IX, which entered into force on 7 November

[35] See Venice Commission, CDL-REF(2020)067, Ukraine - Law on the High Council of Justice.

[36] Since 2016 the HJC has 21 member (see the current version of Article 131 of the Constitution): 10 are judges/retired judges elected by their peers, plus the President of the Supreme Court who is a member ex officio but who is elected to his post by judges (i.e. can also be a part of the quota of "judges elected by their peers"). The Prosecutor General and the Minister of Justice are not anymore members of the HJC. Non-judicial members represent other legal professions (prosecutors, barristers, law professors) and institutional actors (President, Rada). Overall, the composition of the HJC corresponds to the European standards in this field. For more details see https://www.coe.int/en/web/human-rights-rule-of-law/-/assessment-of-the-2014-2018-judicial-reform-in-ukraine

[37] See 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), para. 23.

2019.[38] On the same date the "old" HQCJ has been dissolved. By decision no. 4-p/2020 of 11 March 2020 the CCU invalidated Law no. 193-IX,[39] and the HQCJ has not been recomposed since then. Without a "new" HQCJ, all judicial appointments were put on hold and some 2000 judicial posts remain vacant. In its opinion CDL-AD(2020)022 the Venice Commission urged the rapid re-establishment of the HQCJ.

66. On 22 June 2020 the President of Ukraine introduced Draft Law no. 3711 aimed at resolving the crisis around the HQCJ.[40] The thrust of Draft Law no. 3711 was to re-establish the HQCJ in order to relaunch the selection procedure of first and second instances judges.[41] This bill was analysed by the VC in the most recent opinion on Ukraine (hereinafter the October 2020 Opinion).[42]

67. In principle, *if* the HQCJ is re-established, and *if* it is composed of professional and independent members, in line with the recommendations of the October 2020 Opinion, this body could assume the function of reviewing the NACP reports in relation to judges. The Venice Commission recalls that the HQCJ has already been given a very similar function: under Article 62 of the law on the Organisation of Courts and the Status of Judges,[43] the HQCJ is supposed to deal with the judges' "declarations of integrity". The HQCJ has inspectors (see Article 103) who may verify whether the assets and spending of judges corresponds to the levels of his or her declared income.[44] So, giving the HQCJ a supervisory function vis-à-vis the NACP is coherent with the system of accountability in the judiciary.

68. Finally, the Venice Commission observes that the HQCJ has no competency to deal with the judges of the CCU. Therefore, the legislature may provide for a different mechanism of supervision of activities of the NACP, insofar as they aim at the verification of the financial declaration of judges of the CCU. That being said, in the light of the unresolved question of conflict of interest in the context of decision no. 13-r/2020, the Venice Commission recommends not to give the CCU the power to hear the reports of the NACP, but to consider other appropriate solutions.

69. In sum, the most appropriate solution would be to entrust the supervision function in respect of ordinary judges to the HQCJ. This recommendation implies that it is a matter of urgency that

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[38] The Law no. 193-IX was analysed by the Venice Commission in CDL-AD(2019)027, Ukraine - Opinion on the Legal framework in Ukraine governing the Supreme Court and judicial self-governing bodies. Law No. 193-IX changed the composition of the HQCJ: it would consist of 12 members appointed by the HCJ. Law no. 193 also intended to establish two new commissions – the Selection Board (the SB) for the appointment of the members of the new HQCJ and the Integrity and the Ethics Board (the IEB, created to supervise the behaviour of the members of both HCJ and the HQCJ. The SB and the IEB were conceived to have a mixed international (three members)/national (three members) composition; three national members are to be elected by the General Assembly of Judges, and three are appointed by international partners of Ukraine. The SB was supposed to serve as a filter for appointing new members of the HQCJ and of candidates to the judicial positions. The IEB (similarly composed) would assess the ethical behavior of the members of the HQCJ and of the HCJ (before appointment and during the mandate) – while the last word in disciplinary matters would belong to the HCJ.

[39] See Venice Commission, CDL-AD(2019)027, Ukraine - Opinion on the Legal framework in Ukraine governing the Supreme Court and judicial self-governing bodies.

[40] See Venice Commission, CDL-REF(2020)061, Ukraine - 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

[41] Draft law no. 3711 establishes a Competition Committee (somewhat similar to the Selection Board under Law No. 193-IX) for the appointment of the members of the HQCJ. Unlike Law No. 193-IX, draft law No. 3711 does not establish an Integrity and the Ethics Commission to examine the integrity of the members of the HCJ. The draft law no. 3711 also subordinates the HQCJ to the HCJ.

[42] See 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).

[43] See CDL-REF(2020)068, Ukraine - Law on the Organisation of Courts and the Status of Judges

[44] The most recent provisions on the status and powers of the HQCJ can be found in the Law on the Organisation of Courts and the Status of Judges (see CDL-REF(2020)068).

the HQCJ be re-composed under the new rules, which ensure the appointment of sufficiently independent, honest and professional members to the HQCJ. Before such law on the HQCJ is enacted, a transitional solution may be provided in the 2014 Law.

70. The Venice Commission stresses that the development of appropriate responses to decision no. 13-r/2020 is primarily the prerogative of the Ukrainian legislature, which should decide which mechanism (a complaints mechanism or a reporting mechanism, or a combination of both) is the most appropriate in the current situation.

IV. Conclusions

71. President Zelenskyy requested an urgent opinion of the Venice Commission on the constitutional situation created by decision no. 13-r/2020 of 27 October 2020 of the Constitutional Court of Ukraine. This urgent Opinion addresses the first question raised by President Zelenskyy, namely the effects of decision no. 13-r/2020 on the anti-corruption legislation. The other questions put by President Zelenskyy are addressed in the urgent Opinion on the reform of the Constitutional Court of Ukraine (CDL-PI(2020)019).

72. The Venice Commission stresses that the fight against corruption is an essential element in a state governed by the Rule of law, but so is respect for the Constitution and for constitutional justice. They go hand in hand. Parliament and the Executive must respect the role of the Constitutional Court as gatekeeper of the Constitution and need to implement its decisions. In turn, a Constitutional Court, like any other state institution and court, on the one hand deserves institutional respect but, on the other hand, must respect its own procedures and for the sake of constitutional stability and legal certainty, must issue decisions that are generally consistent with its own case-law. Even more importantly, a constitutional court must decide within the parameters of its legal authority and jurisdiction.

73. The Venice Commission acknowledges that decision no. 13-r/2020 of the Constitutional Court of Ukraine lacks clear reasoning, has no firm basis in international law, and was possibly tainted with a major procedural flaw – an unresolved question of a conflict of interest of some judges. This is regrettable, not only because of the immediate negative effect of this decision on the fight against corruption in Ukraine, but also because such decisions undermine public trust in constitutional justice in general.

74. Nonetheless, the constitutional role of the Constitutional Court must be respected, and the Verkhovna Rada should implement the decision by interpreting it in light of the constitutional foundations of the country and applicable international standards, preserving public interests such as the fight against corruption, including in the judiciary. In particular, it is important to keep the duty of public officials (including judges of ordinary courts and of the Constitutional Court) to submit financial declarations, to have an efficient mechanism of verifying such declarations, and to provide in the law for appropriate sanctions for those public officials – including judges and prosecutors – who knowingly submit false declarations/fail to submit declarations.

75. Against this background, the Venice Commission invites the Verkhovna Rada to consider the following solutions:

- As regards Article 366-1 of the Criminal Code, invalidated by the Constitutional Court, criminal liability for the submission of knowingly false declaration/failure to submit declaration should be restored, but the law may specify in greater detail the different sanctions corresponding to the degree of criminal responsibility, reserving, for example, the sanction of imprisonment for cases above a certain threshold and for perpetrators acting with deliberate intent;

- As regards the powers of the National Agency for Corruption Prevention (the NACP) to verify declarations, all of its powers in respect of public officials other than judges, may be restored as they are unaffected by the reasoning used by the Constitutional Court in its judgment;
- As regards the powers of the NACP vis-à-vis judges, additional safeguards may be introduced in the law to protect them from potential abuses:
  - the independence of the NACP in practice and the public control over its activities should be improved as per GRECO recommendations;
  - some of the investigative powers of the NACP may be formulated more precisely and narrowly, or special exceptions and procedural safeguards in respect of judges may be envisaged;
  - in order to shield judges from potential abuses by the NACP, the law may provide for the supervision of the activities of the NACP in respect of judges either in in the form of a complaints mechanism, or in the form of regular reporting by the NACP to an appropriate judicial body.

76. On the last point the question remains which judicial body should exercise the supervision function vis-à-vis the NACP (insofar as the financial declarations of judges are concerned). In so far as the Ukrainian legislature would contemplate the establishment of a complaint mechanism, this role could be assigned to a designated court. In so far as the Ukrainian legislature would contemplate the introduction of an obligation for the NACP to periodically submit a report of its activities vis-à-vis judges, the High Qualification Commission of Judges (the HQCJ) would appear to be the most appropriate body to play this role in the Ukrainian context, because of its existing powers to verify declarations of integrity of judges. However, this solution is possible only once the HQCJ is re-established and only if it is composed of professional, honest and independent members, as per recommendations of the Opinion of the Venice Commission of October 2020 (CDL-AD(2020)022). The re-establishment of the HQCJ is therefore a priority. As regards judges of the Constitutional Court, the law may provide for another mechanism of supervision of the activities of the NACP in their regard.

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

Strasbourg, 10 December 2020 **CDL-PI(2020)019**

Opinion No. 1012/2020 **Or. Engl.**

EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

(VENICE COMMISSION)

UKRAINE

URGENT OPINION

ON THE REFORM OF THE CONSTITUTIONAL COURT

Issued 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 (Substitute Member, Italy)
Mr Srdjan DARMANOVIC (Member, Montenegro)
Mr Christoph GRABENWARTER (Member, Austria)

Contents

I. Introduction

1. On 25 November 2020, the President of Ukraine, Mr Volodymyr Zelenskyy, requested an urgent opinion of the Venice Commission on the constitutional situation created by Decision 13-r/2020 of 27 October 2020 of the Constitutional Court. In his request, The President requested the Commission *"to assess the constitutional situation created by the Constitutional Court of Ukraine Judgment No. 13-r/2020 of 27 October 2020 and issue an opinion on the state of anti-corruption legislation after this judgment; the judges of the Constitutional Court of Ukraine issuing a judgment while possibly being in a conflict of interest situation; the Constitutional Court of Ukraine's compliance with the due process of law in hearing the case and resolving the matter, including with regard to its reasonableness and respect for the limits of the constitutional petition".*

2. On 25 November 2020, the Bureau of the Venice Commission accepted dealing with this request in an urgent manner. The Commission decided to prepare two urgent opinions, one on the situation if the anti-corruption mechanism following Decision 13-r/2020 (addressing the first question raised by the President, CDL-PI(2020)018) and the present urgent opinion on the reform of the Constitutional Court (addressing the second and third questions.

3. Mr Carozza, Ms Cartabia, Mr Darmanović and Mr Grabenwarter acted as rapporteurs for this urgent opinion.

4. On 3 December 2020, the rapporteurs, assisted by Ms Granata-Menghini, Mr Dürr and Mr Dikov had virtual meetings with (in chronological order) the Deputy Head of the President's Office of Ukraine and Chairperson of the Working Group on Judiciary Reform under the President's Commission on Legal Reform, some Judges of the Constitutional Court, the *Verkhovna Rada's* (Parliament) Committee on Legal Policy, the President's Commission on Legal Reform 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 meetings.

5. This opinion was prepared in reliance on English translations of the Ukrainian Constitution[1], the Law on the Constitutional Court[2], its Rules of Procedure[3] and other documents. The translations may not accurately reflect the original versions on all points. The Venice Commission emphasises that in the present urgent Opinion it will not examine legislative proposals made by various political actors in response to decision no. 13-r/2000, or draft laws which are now in the process of adoption.

6. This urgent opinion 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 125th online Plenary Session on 11-12 December 2020.

II. Background

7. On 27 October 2020, on a motion filed by 47 MPs, the Constitutional Court of Ukraine (sitting as a Grand Chamber, composed of 15 judges – 3 positions are vacant) adopted Decision 13-r/2020 (CDL-REF(2020)078 and CDL-REF(2020)078add) that invalidated large parts of the anti-corruption legislation in force (CDL-REF(2020)079).

[1] http://www.ccu.gov.ua/sites/default/files/constitution_2019_eng.pdf.
[2] http://www.ccu.gov.ua/sites/default/files/law_on_ccu_amended_2017_eng.pdf.
[3] http://www.ccu.gov.ua/sites/default/files/rules_2018_0.pdf

8. Four of the judges of the Constitutional Court, including the judge-rapporteur, were challenged by the President of Ukraine in his capacity as a party to the proceedings on the ground of conflict of interest, having been found by the National Agency for Corruption Prevention (NACP) to have failed to make due declarations of their financial situations, with referral to the National Anti-Corruption Bureau (NABU) for possible criminal investigations in two cases. They were therefore potentially directly concerned by the legislation at issue.

9. Following a first open hearing during which these allegations of conflicts of interest and the request of recusal were made, the Court withdrew and changed the type of proceedings thereafter from open hearings to a written procedure, stating that the change was due to the coronavirus crisis. The judges concerned did not withdraw from the case and participated in the judgment.

10. Decision 13-r/2020 of 27 October 2020, which was handed down in a hasty way,[4] is somewhat hard to understand (see the section on reasoning below). The decision annulled Article 366-1 of the Criminal Code, which provides for criminal liability for a knowingly false asset declaration by government officials. Moreover, it declared some important powers of the NACP void. In this context, it declared unconstitutional the provisions of law on the verification of officials' e-declarations and deprived the NACP of the authority to check asset declarations and identify conflicts of interest (on issues of the anti-corruption mechanism, see parallel urgent opinion CDL-PI(2020)018).

11. In reaction to Decision 13-r/2020 President Zelenskyy presented draft law No. 4288 in Parliament. Draft law No. 4288 would:

1. declare null and void Decision 13-r/2020, as it had been adopted in the private interests of judges of the Constitutional Court and was arbitrary and ungrounded, contradicting the principle of rule of law and denying the European and Euro-Atlantic choice of the Ukrainian people;
2. ensure the continuity of the annulled provisions of the Criminal Code and the Law on the Prevention of Corruption;
3. terminate the powers of the judges of the Constitutional Court; and
4. ensure the selection and appointment of new judges of the Court.

12. Several other bills have been introduced, or proposals to introduce such legislation were made, aimed at resolving the constitutional crisis/breaking the resistance of the Constitutional Court. These aim, among other things, at:

- adopting not identical but similar provisions to the invalidated provisions;
- depriving the Constitutional Court of funding;
- increasing the quorum for decisions of the Court, thus probably blocking its work; and
- re-appointing new judges based on new criteria/procedures.

13. On 31 October 2020, the President of the Venice Commission and the President of the Group of States against Corruption (GRECO) sent a joint letter to the Speaker of the Parliament insisting that “[t]erminating the mandate of the judges is in blatant breach of the Constitution and of the fundamental principle of separation of powers. Violating the Constitution, even if for an arguably good cause, cannot lead to a culture of constitutionalism and respect for the rule of law, which the fight against corruption pursues.”[5]

14. On 16 November 2020 the Speaker of Parliament, Mr Razumkov established a working group in the Parliament to prepare legislative amendments to overcome the crisis. In addition, on 16 November 2020, the Parliament launched the procedure for the selection of candidates

[4] On this point see the accounts in the dissenting opinions.
[5] https://www.venice.coe.int/webforms/events/?id=3023.

for a vacant position at the Constitutional Court (two more vacancies are to be filled by the Congress of Judges).

15. By letter of 25 November 2020, following exchanges with the President of the Venice Commission[6], President Zelenskyy requested an urgent opinion of the Venice Commission on the constitutional situation created by Decision No. 13-r/2020 of 27 October 2020 of the Constitutional Court.

III. Decision 13-r/2020 of the Constitutional Court of Ukraine

16. Decision 13-r/2020 contains a number of peculiarities, as concerns its reasoning, possible conflicts of interest, the extension of the scope of the legal provisions that were found unconstitutional, and the absence of a period of time for the parliamentary implementation of the decision.

A. Reasoning of the decision

17. The reasoning of Decision 13-r/2020 is incomplete and not persuasive.[7] This opinion will not enter into a detailed discussion of Ukrainian national law but it should be pointed out that an important part of the decision refers to international standards which are not presented in a coherent manner:

- the analysis of international standards seems one-sided, omitting important references on judicial accountability; for instance when it refers CCJE Opinion N° 21 (2018) on preventing corruption among judges, it fails to mention paragraph 37 of that Opinion which points out that GRECO recommends having a specific body inside *or outside the judiciary (emphasis added)* charged with the scrutiny of the timeliness and accuracy of such declarations;
- references to international standards are immediately followed by conclusions of the Court itself without developing specific arguments leading to these conclusions;
- Decision 13-r/2020 states that any form of control by a non-judicial organ of the financial disclosures and reporting by judges is *per se* contrary to general principles of judicial independence. This is not the case, as evidenced also by the practices in a variety of other countries.[8] Judges are properly subject to various other forms of supervision and control by the other branches of government, such as basic criminal laws, taxation, etc. The Court's language is so categorical and unreasoned that it would appear to apply even to these.

18. Following a general presentation of the principle of judicial independence, the main part of the reasoning seems to be missing. Decision 13-r/2020 does not examine the very provisions that it invalidates. The Court only "concludes that certain provisions of the Law No.1700 concerning the powers of the National Agency for the Prevention of Corruption in terms of control functions of the executive over the judiciary" are unconstitutional but it does not analyse specific articles of that to come to this conclusion. This is particularly regrettable because the Court extended the scope of the challenged request by 47 Members of Parliament (see below) and invalidated also Articles 11, 13, 35, 48, 65, 131 of Law no. 1700 "On Preventing Corruption", without explaining why there is an intricate link between the challenged provisions and other provisions that were invalidated (see below). Furthermore, there is a reference to a "functional analysis" of the National Agency for the Prevention of Corruption but this very

[6] https://twitter.com/giannibuquicch1/status/1323664463501905922; https://twitter.com/giannibuquicch1/status/1329804991067017218.
[7] See also dissenting opinion by Judge Lemak, referring on this point to Justice Scalia (CDL-REF(2020)078).
[8] Asset declarations of judges are verified by bodies outside of the judiciary for instance in Albania, Armenia, Azerbaijan, Bulgaria, Czech Republic, Estonia, Georgia, Latvia, Lithuania, Moldova, Montenegro, North Macedonia, Romania, Serbia, Slovakia and Slovenia (see the Fourth Evaluation Round of GRECO) https://www.coe.int/en/web/greco/evaluations/round-4.

analysis is not set out in Decision 13-r/2020, not even by reference to external studies or similar sources.

19. It is true that by Ruling no. 9-up/2020 of 27 October 2020[9], the Constitutional Court split the request by 47 MPs - case no. 1-24/2020(393/20) – into two separate proceedings. More reasoning could be forthcoming in a second decision that is still to be rendered. However, each decision of the Constitutional Court should have its own reasoning and should be understandable on its own.

20. Finally, the decision does not explain why it annuls legal provisions that apply to all civil servants while its reasons refer to judges only. During the meetings with the rapporteurs, the Court mentioned that Decision 13-r/2020 related to judges only and would not cover the application of the invalidated provisions in respect of civil servants and a decision on civil servants would still need to be handed down but this could not yet be spelled out in Decision 13-r/2020. Such an explanation leaves the Commission somewhat perplexed. This would mean that the Court would have knowingly adopted a decision that leaves it unclear whether legal provisions remain applicable or not. Such a judicial drafting technique is a matter of concern: the scope and the effects of a Constitutional Court's decisions have to be clear and understandable, especially when the decision invalidates legal provisions.

21. To sum up, Decision 13-r/2020 demonstrates that the style of reasoning and decision drafting of the Constitutional Court has serious shortcomings, falls short of standards of a clear reasoning in constitutional court proceedings, and requires improvement.

B. Conflicts of interest – recusals / withdrawals

22. It is the object of criticism that some judges of the Constitutional Court were allowed to sit on the case leading to Decision 13-r/2020. Three of the judges had indeed been notified by the National Agency for Corruption Prevention that their asset declarations are incomplete.

23. Article 60 of the Law on the Constitutional Court provides strict rules on withdrawal of the judges of the Constitutional Court when they have a conflict of interest in a specific case. Article 60 (1) item 1, provides that recusal (withdrawal) shall be applied when the judge *"is interested in the outcome of the case either directly or indirectly". A priori,* this would seem to be the case when a judge is under investigation on the basis of a legal provision that is the subject of the review by the Constitutional Court. This issue will be discussed below also from a comparative perspective.

24. Although recusal was formally requested by one of the parties, the Court and the individual judges in question have made no effort to justify their implicit denial of the recusal request – thus lacking transparency and explanation.

C. Scope of the decision – limitation to provisions challenged in the request

25. While in some jurisdictions, the constitutional court or equivalent body is strictly limited to the examination of the provisions specifically challenged in the petition to the court, other courts are also empowered to invalidate provisions that are directly linked to those found unconstitutional, if the continuing operation of those additional provisions would result in an incoherence in the legal system.

26. In Decision 13-r/2020 the Constitutional Court of Ukraine indeed went beyond the request of the 47 Members of Parliament. In addition to the challenged provisions, the Court also (partly) invalidated Articles 11, 13, 35, 48, 65, 131 of Law no. 1700 "On Preventing Corruption".

[9] Rulings are procedural decisions of the Constitutional Court.

In paragraph 10 of Decision 13-r/2020 the Court states that these provisions are linked to Article 11.1.8 of Law No.1700 but it does so summarily and does not examine in which way specific provisions would violate judicial independence. In the light of the principle of presumption of constitutionality and the principle *ne eat iudex extra petita*, such an examination is required, notably when the scope of the request is extended.

27. Among the provisions invalidated by extension of the scope of the request, Article 35[10] is particularly relevant because it provides that in the event of a real or potential conflict of interest of a member of a number of public bodies, including the Constitutional Court, that person must not participate in the decision making. Other members of that public body who know about such a conflict of interest may raise that issue and a reference to such a conflict shall become part of the decision taken. However, even after the annulment of that article, Article 60 of the Law on the Constitutional Court remains in force (see below).

28. The situation in Ukraine concerning the extension of the scope of the request is specific because it was among the countries that in the past explicitly provided for such an extension of the scope of the request. The previous version of the Law of Ukraine "On the Constitutional Court of Ukraine"[11] provided in its Article 61, para 3 that *"If in the course of consideration of a case on a constitutional petition or constitutional appeal non-compliance with the Constitution of Ukraine of other legal acts (their separate provisions) is revealed, except for those in respect of which proceedings have been opened and which influence the decision or opinion in the case, the Constitutional Court Ukraine recognizes such legal acts (their separate provisions) as unconstitutional".*

29. However, this provision no longer exists in the current Law in force.[12] There is a presumption that a removal of a provision indicates that the legislature made a deliberate choice and that this was not an "oversight". If that is the case, then the Court's judgment apparently exceeded its proper scope in Decision 13-r/2020. In order to overcome any uncertainty in future proceedings, Parliament should clarify this in the Law on the Constitutional Court.

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[10] *Article 35. Peculiarities of resolving a conflict of interest arising in the activity of certain categories of persons authorized to perform the functions of government or local self-government*
1. Rules for resolving a conflict of interest in the activities of the President of Ukraine, People's Deputies of Ukraine, members of the Cabinet of Ministers of Ukraine, heads of central executive bodies, which are not part of the Cabinet of Ministers of Ukraine, judges, judges of the Constitutional Court of Ukraine, the chairmen, vice-chairmen of regional and district councils, city, village, settlement heads, secretaries of city, village and settlement councils and deputies of local councils are determined by laws governing the status of the respective persons and the basis of the organization of the respective bodies.
{Part 1, Article 35 as amended according to the Law No. 1798-VIII of December 21, 2016}
2. In the event of a real or potential conflict of interest of a person authorized to perform the functions of government or local self-governments, or other similar person, who is part of a collective body (committee, commission, board, etc.), this person has no right to participate in the decision-making process of this body.
Any relevant member of the collegial body or participant of the meeting who is directly related to the question under consideration may state the conflict of interest of such person. A statement about a conflict of interest of a member of a collegial body shall be included in the minutes of the meeting of the collegial body.
If the non-participation in the decision-making process of an agency of a person authorized to perform the functions of government or local self-governments, or other similar person, who is a part of that collective body, results in loss of competence by this agency, the person's participation in decision-making should be subject to external controls. The respective collective agency makes the decision on exercising external control.

[11] https://zakon.rada.gov.ua/laws/show/422/96-вр#Text

[12] https://zakon.rada.gov.ua/laws/show/2136-19#Text.

D. Absence of postponement of the entry into force of the annulment of provisions found unconstitutional.

30. The Venice Commission notes that in this case the Constitutional Court did not make use of its competence provided by Article 91 of the Law on the Constitutional Court,[13] which gives the Court the power to establish in a decision a time-limit for its implementation by the legislature. The Constitutional Court imposed this three-month time-limit for instance in its Decision 11-r/2020 of 16 September 2020 declaring several provisions of the law establishing NABU unconstitutional, stating that it was doing so "given the necessity to ensure the proper functioning of the National Anti-Corruption Bureau of Ukraine". Notwithstanding the fact that NAPC is also a body working on anti-corruption, in Decision 13-r/2020 the Court did not do the same, with the effect that the decision entered into force with its publication and numerous anti-corruption cases were therefore immediately closed and criminal judgments based on Article 366-1 of the Criminal Code of Ukraine were overturned.

31. Not all systems of constitutional adjudication allow for such a delayed implementation of a judgment of unconstitutionality. Where the power to suspend temporarily a declaration of unconstitutionality does exist, however,[14] the Venice Commission is generally in favour of such delays of the entry into force of decisions of the constitutional courts to avoid legal gaps and legal uncertainty following the repeal of legal provisions[15] In its 2016 Opinion on the draft Law on the Constitutional Court of Ukraine, the Venice Commission had strongly supported that possibility.[16] Such delays are particularly important when they concern the annulment of criminal provisions which can lead to the immediate acquittal of persons who may have committed deeds that could be punishable even under other criminal provisions. The practice of any Constitutional Court in imposing delays of this kind should be consistent given the fact that they lead to a continued application of a law found unconstitutional.

IV. Method of reform

32. In light of issues identified in Decision 13-r/2020, it is appropriate and even necessary to go beyond the analysis of the decision itself to discuss possible ways of addressing structural problems that are revealed by the Commission's analysis of the decision in question.

33. The difficulties presented by the problematic Decision 13-r/2020, on the one hand, and the corresponding proposal of the President in Draft Law 4288, on the other, concern an underlying issue that in different ways arises in all constitutional democracies: "who has the final say? the Constitutional Court or Parliament?" The answer depends in part on the temporal scope of the conflict: in relation to a specific case being litigated, the final say is for the Constitutional Court. The Constitutional Court's decisions are final and binding. Its decisions are not infallible, but they are final nonetheless, even when they might be considered wrong. This principle is clearly stated in many constitutions, including the Constitution of Ukraine.[17]

34. On the other hand, Parliament can enact legislation that replaces annulled provisions as long as they do not repeat the same provisions that have been invalidated and take into

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[13] Article 91: "Determination by the Court of the Date of Loss of Effect of an Act (Specific Provisions Thereof)
1. Where laws of Ukraine or other acts or specific provisions thereof are found by the Court to be non-conforming to the Constitution of Ukraine, they shall lose their effect from the day of the adoption by the Court of a decision declaring their unconstitutionality, unless otherwise provided by the same decision, but not earlier than the date of its adoption."

[14] Venice Commission, CDL-AD(2010)039rev, Study on individual access to constitutional justice, paras 197-198.

[15] *Ibid.*, para. 195; CDL-AD(2015)024, Opinion on the Draft Institutional Law on the Constitutional Court of Tunisia, para. 11.

[16] Venice Commission, CDL-AD(2016)034, Ukraine - Opinion on the draft Law on the Constitutional Court, para. 63.

[17] Article 151 of the Ukrainian Constitution reads: "Decisions and opinions adopted by the Constitutional Court of Ukraine shall be binding, final and cannot be challenged."

account the Court's arguments.[18] Only the constituent power, often Parliament with a qualified majority or other reinforced procedure, can establish a new framework that will be binding also on the Constitutional Court, through the constitutionally-established procedures for enacting constitutional amendments.

35. Political bodies must not be allowed to terminate the powers of individual judges of the Constitutional Court (except through processes of impeachment where this is established by the constitution), or of the whole body of the Court collectively. Nor should Parliament block the activity of the Constitutional Court through financial pressure or procedural obstacles or similar efforts.[19] This would amount to a major, severe, breach of the rule of law,[20] and the constitutional principles of the separation of powers and the independence of the judiciary.

36. In a democratic state, governed by the rule of law, criticism of constitutional court decisions is permissible but the holders of public office must show restraint in their criticism. In particular threatening statements against judges aimed at influencing the Court's decisions are inadmissible.

37. Notwithstanding the circumstances set out in Section III above, the rule of law therefore requires that Decision 13-r/2020 be implemented. As pointed out in the joint letter by the Presidents of the Venice Commission and GRECO the annulment of a decision of the Constitutional Court and the dismissal of all its judges would be unconstitutional and would contradict the rule of law.

38. The Constitutional Court cannot be "punished" for its decisions, but its working can be improved. Therefore, while the parallel opinion CDL-PI(2020)018 examines ways to implement Decision 13-r/2020 in order to enable the effective continuation of the work of the anti-corruption bodies within the framework of the Ukrainian Constitution, this opinion examines ways in which the Constitutional Court could be reformed in ways consistent with the Constitution of Ukraine and with sound principles of constitutionalism. Decision 13-r/2020 is therefore only an indication that a reform of the Constitutional Court is warranted and a starting point for a reform. In this context, the Commission will also refer to its 2016 Opinion on the then draft law on the Constitutional Court for reference.[21]

39. During the video-meetings, the parliamentary working group informed the rapporteurs about a proposal of regulating the procedure of the Constitutional Court entirely in the Law on the Constitutional Court, and not to leave part of it to be defined by the Constitutional Court itself. The proponents of this idea refer to Article 153 of the Constitution, which provides that the *"organisation and operation of the Constitutional Court of Ukraine, status of judges of the Court, grounds to apply to the Court and application procedure, case consideration procedure and enforcement of decisions of the Court shall be defined by the Constitution of Ukraine and by law."* (emphasis added)

40. There is no doubt that important parts of the procedure before the Constitutional Court should be regulated in the Law on the Constitutional Court, notably aspects that create rights or obligations for individuals. This is important in order to be in conformity with Article 6 ECHR.

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[18] Venice Commission, CDL-AD(2016)007, Rule of Law Checklist, II.3.iii and iv., iii. "Are Parliament and the executive obliged, when adopting new legislative or regulatory provisions, to take into account the arguments used by the Constitutional Court or equivalent body? Do they take them into account in practice? iv. Do Parliament or the executive fill legislative/regulatory gaps identified by the Constitutional Court or equivalent body within a reasonable time?)"

[19] Venice Commission, CDL-AD(2016)001, Opinion on amendments to the Act of 25 June 2015 on the Constitutional Tribunal of Poland; CDL-AD(2016)026, Poland - Opinion on the Act on the Constitutional Tribunal.

[20] Venice Commission, CDL-AD(2016)007, Rule of Law Checklist, para. 107, II.3.iii.

[21] Venice Commission, CDL-AD(2016)034, Ukraine - Opinion on the draft Law on the Constitutional Court.

41. Completely removing the autonomy of the Constitutional Court to adopt its own rules of procedure is not warranted, however. In respect of Azerbaijan, the Commission observed that *"[t]he legal basis of the activity of each constitutional court is usually formed by three kinds of legal regulations having different positions in the hierarchy of norms of the domestic legal order of the state. They play different roles in the process of the complete and coherent legal regulation of the constitutional body. On the 'top' of this triad is usually the constitution establishing the jurisdiction of the court, the parties entitled to appeal as well as the constitutional principles on which the activity of the constitutional court is to be based. Laws on constitutional courts usually transform these constitutional principles into more concrete norms. Finally, the rules of procedure constitute the next and last level of this triad. They fill in practical details of the everyday judicial activity. The Rules of Procedure should be drafted by the constitutional court itself."*[22]

42. In respect of Armenia, the Venice Commission criticised the level of detail of the Law on the Constitutional Court: *"One pervasive issue in this draft Law is the very detailed nature of some of its provisions. A number of them could be considered to be too detailed for a constitutional law such as this draft Law and might find their place in the Rules of Procedure, which are easier to amend. In light of the above, the Venice Commission strongly suggests that the Armenian authorities reconsider the demarcation between what should appear in this draft Law and what should appear in the Rules of Procedure".*[23]

43. In the light of the principle of loyal co-operation between State bodies (see below), the Constitutional Court should be available to provide its expertise for the improvement of the Law on the Constitutional Court. In the light of the specific situation in Ukraine, if amended provisions of the Law were to be challenged before the Court itself, the Court should show some restraint. The Venice Commission would be available for assistance in distinguishing provisions which can improve the work of the Court from others that might block its work..

V. Possible avenues for a reform of the Constitutional Court

A. Quality of the reasoning

44. The Venice Commission regularly insists on the importance of a coherent reasoning by constitutional courts: *"It is important to stress the relevance of the Constitutional Court's reasoning, which should guide ordinary courts. Respect shown by the ordinary courts for the Constitutional Court's reasoning is the key to providing an interpretation that is in conformity with the Constitution".*[24] The decision has to be sufficiently clear to allow the public and notably the legislature to react appropriately and to implement the decision. The Commission has also pointed out that "for the sake of constitutional stability and legal certainty, a Constitutional Court should be consistent with its own case-law".[25]

45. The type of reasoning applied in constitutional court decisions can be somewhat different from that of civil or criminal courts, where typically facts are established, and these facts are then evaluated against applicable legal provisions. Because of the very nature of constitutions, constitutional courts often interpret the provisions of the Constitution in light of general constitutional principles, such as judicial independence or separation of powers. It is then their task to judge the conformity of legal provisions with the constitution.

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[22] Venice Commission, CDL-AD(2004)023 Opinion on the Rules of Procedure of the Constitutional Court of Azerbaijan, paragraphs 5-6

[23] Venice Commission, CDL-AD(2017)011 Opinion on the Draft Constitutional Law on the Constitutional Court of Armenia, paragraphs 100-101.

[24] Venice Commission, CDL-AD(2007)036 Opinion on Draft Amendments to the Law on the Constitutional Court, the Civil Procedural Code and the Criminal Procedural Code of Azerbaijan, paragraphs 22.

[25] Venice Commission, CDL-AD(2019)012, Opinion on the constitutional situation with particular reference to the possibility of dissolving parliament in the Republic of Moldova, para. 53.

46. For a constitutional court decision to be well reasoned, it is therefore necessary to examine specific legal provisions that are being assessed, and to explain for each provision why it is either compatible with or contradicts the constitution. In Ukraine, the legislature could prescribe in the Law on the Constitutional Court that each legal provision found unconstitutional has to be examined individually in the decision of the Court.

47. As constitutional interpretation sometimes differs from the interpretive techniques applied by courts to ordinary laws, it might be useful that newly appointed judges (and the staff of the Court) benefit from special training on methods of constitutional interpretation. This can apply even to highly qualified persons who are legal experts in their field of law (see below as concerns the qualifications for judges). Together with other stakeholders, the Venice Commission might be in a position to assist in such an effort.

B. Conflicts of interest

48. Before referring to the specific situation in Ukraine, a comparative overview of how conflicts of interest are handled in other constitutional courts and equivalent bodies may be useful.

1. Comparative perspective

49. From a comparative perspective, laws on the organisation and the procedure of constitutional courts regularly provide for cases and situations in which a justice has a conflict of interest and as a consequence is excluded from participating in a decision. There is a great diversity of the applicable systems, ranging from the express exclusion of withdrawal of constitutional courts judges to strict rules excluding judges.

50. The extreme case is the Constitutional Court of Romania, where the legislation provides that parties cannot demand recusal of the judges and that judges are obliged to sit and vote in all cases without exception.

51. Given that nearly all legislation (tax, social security, electoral matters) can concern the judges also as an individual, there are not such general recusals, as they always would lead to a *non liquet*. The reason for such a position may be that in abstract proceedings constitutional courts do not resolve concrete controversies that involve definite persons with whom a specific situation of incompatibility may arise, but reviews parliamentary legislation, applicable to the general public, including the judges of the constitutional court. This may of course be different for complaints to the Constitutional Court involving a specific case or controversy. This position also does not address the situation that may arise where a judge has given reason to believe that he or she has prejudged a case or otherwise enters into a dispute with an improper bias.

52. In the United States, there is no formal obligation for the Supreme Court justices to withdraw, although in practice justices will occasionally do so when a party requests recusal. This is also generally the case with respect to the Supreme Court of Canada. In Italy Article 29 of the Rules of Procedure explicitly states that the general principles on recusal and withdrawal of judges do not apply to judges of the Constitutional Court. Austria is a country where the application of rules for the judge's recusals is very strict. There the Court also benefits from the system of substitute judges who can sit when a titular member has to withdraw.

53. While the judges of the Constitutional Court of Romania have to participate in all cases and a quorum is ensured, the Constitutional Court of South Africa does not decide when there is no quorum because of withdrawals. However, the Constitutional Court of South Africa is on top of the pyramid of ordinary courts and the last judgement of the Court of Appeals will then stand in such a case.

54. Although there is a wide variation in constitutional practice, the Venice Commission regards it as preferable that there be clear rules requiring withdrawal of judges in cases of personal conflicts of interest or any other circumstances that could create a perception of possible bias.

2. Situation in Ukraine

55. As pointed out above, Article 60 of the Law on the Constitutional Court of Ukraine recognises situations of conflict of interest of the Constitutional Court judges and provides for withdrawal/recusal from the case for judges who might find themselves in a conflict of interest.

56. Article 60 (5) refers to the Rules of Procedure as concerns the manner of statements of recusal or withdrawal of the judge. Indeed, Section 44 of the Rules of Procedure of the Constitutional Court[26] establishes the rules of the recusal of a judge upon request by a party and self-recusal by the judge him-/herself. The Grand Chamber or the Senate concerned decide on the validity of the (self-)recusal without the judge concerned. According to Section 44 (8) of the Rules of Procedure, a*"[f]ailure to notify the Court by the Judge of the existence of an actual conflict of interests entails execution of actions or making decisions by him/her provided there is an actual conflict of interests entails liability in accordance with the legislation."*

57. In principle, disregard of the legal provisions on recusal is a grave threat to the institutional integrity of the Court and to the rule of law. There may however be specific reasons why this is not the case for a given decision to be made.

58. During the discussions with the rapporteurs, the judges of the Constitutional Court argued that in the procedure resulting in Decision 13-r/2020, potentially all judges were affected by the challenged provisions and would be obliged to withdraw, with the effect of a *non liquet* – the impossibility to adopt a decision - that had to be avoided.

59. First, a distinction has to be made between legal provisions that potentially affect in a generic way the court and its judges and those where there is a direct application of challenged provisions to the judge concerned. While all judges were indeed potentially concerned, as is the case for virtually all legislation, it seems that in this case some judges had much more direct, personal, and serious interests in the outcome of the case that would fall under the obligation specified in Article 60. Even if the withdrawal of some judges might not have affected the quorum of the Court, the valid point raised that a *non-liquet* has to be avoided merits discussion.

60. When the quorum of the Court is potentially affected, the Venice Commission agrees that " […] it must be ensured that the Constitutional Court as guarantor of the Constitution remains functioning as a democratic institution. The possibility of excluding judges must not result in the inability of the Court to take a decision. […]"[27] Such a situation can even arise in a case that concerns the integrity of the judges of the Court itself, as the Commission found in an *amicus curiae* brief relating to Albania: *"However, if there are grounds to believe that a judge considering the constitutionality of the Vetting Law would fail the requirements established by this very law and thus appears to be unfit for the office, not only the judge has a right but, in certain circumstances, may be under the obligation to resign, for instance, if the judge concerned foresees his/her failure to satisfy the background assessment due to inappropriate contacts with the members of the organized crime. However, since there is a presumption that*

[26] http://www.ccu.gov.ua/sites/default/files/rules_2018_0.pdf.
[27] Venice Commission, 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, paragraph 7.

judges of the court are acting in good faith, the judge should be allowed to evaluate constitutionality of the requirements established by law"[28]

61. For all judges, including those of constitutional courts, it is important not only to act in an impartial way but also to convey the perception of impartiality to the public. What is essential in such a difficult situation is therefore that this issue be presented transparently in the decision of the Court itself or – where the legal tradition is open for alternative ways – also in a separate public decision or procedural ruling to avoid any speculation why a judge participated in a decision. This seems not to be the case in Decision 13-r/2020, which lacks discussion of this issue and does not explain why some judges, including even the reporting judge, did not withdraw when this a priori would have been warranted. The procedure under Article 60 of the Law and Section 44 of the Rules of Procedure is not set out in the decision.

62. An amendment to the Law on the Constitutional Court could ensure that decisions on (self-) recusals and their reasoning be set out clearly in the main decision adopted by the Constitutional Court or in a separate public procedural ruling or decision. The principle that conflict of interest (notably financial) should lead to recusal unless there is a problem of *non liquet* could be explicitly set out.

63. An amendment to the Law could also change the quorum requirements in those cases where a quorum is lost due to the recusal of judges, thereby avoiding the risk of non liquet.

64. It would also be helpful if the Law on the Constitutional Court gave a better, more detailed, definition of "conflict of interest", for example singling out financial conflicts of interest, specifically when this results resulting from protocols established by NAPC or the opening of investigations by NABU, as a most serious kind of conflict.

C. Disciplinary sanctions

65. In Ukraine, judges of the Constitutional Court can be dismissed only by the Court itself[29] and it is only the Court which is empowered to take disciplinary any disciplinary measures against one of its judges. The adoption of disciplinary sanctions against the judges of the Court seems to be within the competence of the Standing Commission on the Rules of Procedure and Ethics of the Court but this is not spelled out. The disciplinary procedure should be regulated in the Law on the Constitutional Court, with further details set out in the Rules of Procedure.

66. The question arises whether the absence of a withdrawal in a pending case can lead to disciplinary sanctions when such withdrawal was warranted under Article 60 of the Law on the Constitutional Court. Section 44 (8) of the Rules of Procedure provide for "liability in accordance with the legislation" when the judge did not make a statement of withdrawal in a situation of a conflict of interest. As shown above, the reference to liability in accordance with the legislation seems to be moot if there is a lack in the legislation.

67. In extreme cases, that might even lead to the dismissal of the judge concerned. Article 149 of the Constitution provides that only the Constitutional Court itself, acting with a qualified majority, can dismiss a judge of the Constitutional Court for, among other reasons:
"[…] 3. commission by him or her of a serious disciplinary offence, flagrant or permanent disregard of his or her duties to be incompatible with the status of judge of the Court or reveals non-conformity with being in the office".

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[28] Venice Commission, CDL-AD(2016)036 *Amicus Curiae* Brief for the Albanian Constitutional Court on the Law on the Transitional Re-Evaluation of Judges and Prosecutors, para. 25.
[29] Article 149 of the Constitution.; Article 21 of the Law on the Constitutional Court; Section 13 of the Rules of Procedure of the Constitutional Court.

In these cases, "dismissal of a judge of the Constitutional Court of Ukraine from his or her office shall be decided by not less than two third votes of full Court".

68. The question is however what happens when the judge made such a statement for self-recusal or when a party requested the recusal of a judge and the Grand Chamber of senate respectively decide that the (self-)recusal is not warranted. It would seem that in such a situation the judge concerned would not incur disciplinary liability.
69. In the absence of a discussion of this topic in Decision 13-r/2020 it remains unclear whether there was a decision of the Grand Chamber under Section 44 of the Rules of Procedure in this case.

70. In view of the special need for integrity of the judges of the Constitutional Court, an amendment to the Law on the Constitutional Court could ensure that disciplinary proceedings and decision regarding a judge of the Constitutional Court are transparent and always made public not only during the hearing (as provided for by Section 44 of the Rules of Procedure but systematically together with the adopted decision. The rulings on recusal should be reasoned in substance).

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.[30]

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.[31]

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.[32]

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[30] 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, para. 24; see also 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), para. 6.
[31] 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, para. 25; see also 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), para. 17.
[32] Venice Commission, CDL-AD(2016)034, Ukraine - Opinion on the draft Law on the Constitutional Court, adopted by the Venice Commission at its 109th Plenary Session (Venice, 9-10 December 2016), para; 13 seq.

75. Following a recommendation by the Venice Commission, in 2017 the President of Ukraine established a commission with international participation[33] (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.[34]

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".*[35]

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.[36] 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.[37] These bodies would have a mixed national and international composition.

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.[38]

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[39] and the Advisory Panel of Experts on Candidates for Election as Judge to the European Court of Human Rights.[40]

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[33] For an earlier case of an international contribution to the work of a Constitutional Court, see Venice Commisison, CDL(1999)079, Secretariat memorandum on progress in co-operation with Croatia.
[34] http://en.dejure.foundation/library/new-model-for-selecting-constitutional-court-judges.
[35] Article 148 of the Constitution.
[36] 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), paras. 19 seq.
[37] Ibid., CDL-AD(2020)022, para. 40 seq.
[38] In the USA, the American Bar Association undertakes a very rigorous investigation of the character and competence of every nominee to the federal judiciary, and makes public evaluations ("highly qualified," "qualified," or "not qualified") that are taken into account by the Senate in its confirmation process.
[39] Cf. M. Bobal, Selecting Europe´s judges, 2015.
[40] Cf. C. Grabenwarter/M. Pellonpää, "High judicial Office" and "Jurisconsult of Recognised Competence": Reflections on the Qualifications for Becoming a Judge at the Strasbourg Court, ZaöRV 2020, pp. 1-22.

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.

E. Improving the procedural legitimacy of the decision of the Constitutional Court

82. With the introduction of constitutional complaints against legal provisions (normative constitutional complaint)[41] under Article 151 of the Constitution and the revised Law on the Constitutional Court, senates of six judges were introduced at the Court to decide on these complaints together with boards of three judges to examine the admissibility of complaints.[42]

83. Already in its 2016 Opinion on the draft Law on the Constitutional Court, the Venice Commission raised the problem of possibly diverging case-law of the senates: *"The annulment of a law on the basis of an individual complaint can be as important as that on the basis of a request from an institution (petition / appeal). The problem with deciding in parallel senates (there seems to be no distribution by substance matter as in Germany) may be the coherence between their case-law."*[43] At the time, the Venice Commission recommended to solve this issue by obliging senates to relinquish jurisdiction to the Grand Chamber when they wanted to deviate from previous case-law.

84. In the light of current discussions, it might be useful to amend the Law on the Constitutional Court to provide that when a senate comes to the conclusion that a legal provision should be annulled, before the entry into force of that decision, the President of Ukraine or the Verkhovna Rada can request that the final decision be taken by the Grand Chamber. A full procedure by the Grand Chamber would significantly slow down the work of the Constitutional Court. However, this risk could be limited if the Grand Chamber would not start its own proceedings but simply vote on the decision already prepared by the senate and only either confirm it or invalidate it. This would lead to enhanced coherence between the case-law of the senates. In parallel to such a procedure for individual complaint proceedings, the transparency of abstract proceedings upon request by state authorities ("petitions") should be improved by providing that written proceedings in the Grand Chamber are exceptional only.

F. Possibility for re-opening of cases

85. The Law on the Constitutional Court does not allow for the re-opening of the proceedings of the Constitutional Court. Its decisions are final and binding.[44] The Court can provide clarifications of its decisions[45] but it cannot change the substance of its decisions when there is a fundamental change of circumstances.

86. Such a possibility could be provided for in the Law on the Constitutional Court in cases where the Constitutional Court has failed to abide by the laws and procedures applicable to itself – in particular, where judges have participated who should have been excluded because of conflicts of interest. The problem with such a provision would be that due to the final and binding nature of the decision of the Constitutional Court, it would be for the Court itself to come to the conclusion that it failed to abide by the law.

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[41] Venice Commission, CDL-AD(2016)034, Ukraine - Opinion on the draft Law on the Constitutional Court, para. 34 seq; general: CDL-AD(2010)039rev, Study on individual access to constitutional justice, para. 77 seq.
[42] Article 61 of the Law on the Constitutional Court.
[43] Venice Commission, CDL-AD(2016)034, Ukraine - Opinion on the draft Law on the Constitutional Court, para. 59.
[44] Article 150 of the Constitution.
[45] Article 95 (2) of the Law on the Constitutional Court.

87. The Venice Commission was rather hesitant as to the possibility for a constitutional court to re-open its proceedings: *"Re-opening the case upon the discovery of new circumstances is highly unusual for constitutional courts. Article 96 runs also counter to Article 135.3 of the Amendment of the Constitution, according to which 'The Constitutional Court shall perform its activity at the initiative of subjects provided by the Law on the Constitutional Court.' Among these subjects, there cannot be the Court itself. If the Court is given the power to review its own judgements whenever new circumstances appear or there is a changing of the provisions upon which the Court has founded a previous judgement, this can endanger the Court's role in the constitutional system. In addition, several questions need to be clarified: what are the terms of this possibility, what is the relationship of the 'new' judgment of the Constitutional Court with earlier decision, what about res judicata objections etc."*[46]

88. In a more recent opinion, referring to criminal activity of judges of a constitutional court, the Venice Commission was more nuanced: *"Since the decision of a Constitutional Court is regarded as final and respecting its decision is in conformity with the constitutional order and in the interest of legal certainty, reviewing a judgment by a Constitutional Court must be an exception. This is where a separation needs to be drawn between the judge's criminal activity (e.g. there could be a video recording of the judge accepting a bribe and promising to take a decision in a given way) from the adopted court decision itself. The judge should be punished for the crime s/he has committed. Functional immunity does not cover ordinary crimes and hence the judge should face criminal responsibility. …*
In general, a judgment enters into legal force and becomes binding on the court itself, which cannot start a new procedure. In some situations, a provision for the reopening of a judgment may be required. This requirement often exists, for instance, for member States of the Council of Europe in response to a judgment by the European Court of Human Rights, which finds that the member State has breached its obligations under the European Convention on Human Rights (ECHR) and the Constitutional Court has rendered a decision contributing to this breach. There are, generally, no legal provisions that allow for the reopening or reviewing of a judgment specifically on the basis of offences (e.g. bribery) committed by a Constitutional Court judge in his or her function leading to a tainted judgment. However, proof that a bribe has been accepted by a Constitutional Court judge (criminal conviction) could provide a new element to reopen a judgment under the applicable general procedural rules. Constitutional court laws often refer to general (mostly civil) procedural codes to be applicable in constitutional proceedings - subsidiarily.
In summary, it is important that only the Constitutional Court itself be able to revise its judgments if there is proof of a criminal act in adopting it (criminal conviction of a judge). No other public authority can be authorised to do so. …
However, such a procedure would only be possible if it has a legal basis in the country concerned, i.e. if there is legislation that clearly provides for this possibility. For this reason, an internal reexamination procedure of the Constitutional Court would be needed rather than a review procedure by other public authorities such as Parliament or the Supreme Court (which already deals with minor and administrative offences by Constitutional Court judges (Article 16(2) of Law No. 317-XIII)). When there is no such possibility, and if this is warranted in substance, a constitutional amendment may be necessary to overcome a Constitutional Court judgment that was adopted involving a criminal act of one of the court's judges."[47]

89. The Venice Commission, therefore, does not recommend instituting a possibility for a Constitutional Court to re-open its proceedings, in general. That could easily be abused for exerting pressure on the Court to re-open its proceedings for political reasons. Such a possibility could however be opened when the criminal liability of a judge relating to that case

[46] Venice Commission, CDL-AD(2002)016, Opinion on the Draft Law on the Constitutional Court and Corresponding Amendments of the Constitution of the Republic of Moldova, paragraph 66.
[47] Venice Commission, CDL-AD(2019)028 Republic of Moldova – *Amicus Curiae* Brief on the criminal liability of the Constitutional court judges, paras. 45-50.

(e.g. bribe-taking) has been established. [In any case, a re-opening of the decision cannot lead to the reinstatement of a law that has already been annulled. That would change the nature of the Court from a negative to a positive legislator.]

G. Recourse to international assistance

90. Constitutional courts or the European Court of Human Rights can make requests for *"amicus curiae briefs"* to the Venice Commission relating to cases pending before them, in which the Commission provides information on comparative constitutional and international law issues. In briefs, the Venice Commission does not address the question constitutionality of a specific legal provision, but it leaves that decision to the requesting constitutional court. For this reason, against the background of the pending case, the requesting Courts formulate specific questions they would like the Venice Commission to answer.

91. When the Venice Commission prepared its Opinion on the draft Law on the Constitutional Court of Ukraine in 2016, the Court had then showed a rather restrictive attitude towards international assistance.[48] However, since then, the Constitutional Court of Ukraine has already twice requested the assistance of the Venice Commission on two difficult pending cases relating to international standards in the form of requests for *amicus curiae* briefs.[49] In its 2016 Opinion on the draft Law on the Constitutional Court, the Venice Commission had even recommended that the law provide that Court should actively request *amicus curiae* briefs.[50]

92. In the discussion with the rapporteurs, the judges of the Constitutional Court accept the usefulness of *amicus curiae* requests to the Venice Commission. However, they pointed out that it may be necessary to adapt the Law on the Constitutional Court to allow for longer deadlines in constitutional complaint cases when the Court requests an *amicus curiae* brief from the Venice Commission.[51]

93. The Venice Commission is available to provide more such *amicus curiae* briefs, when the deadlines required by the Constitutional Court allow the Commission to adopt these briefs at its plenary sessions.

VI. Constitutional culture - loyal co-operation between State Powers as a precondition for effective constitutional justice

94. With regard to defamatory declarations reportedly directed against members of the Constitutional Tribunal, the Commission – in the opinion on Romania – held that a *"public authority, in its official capacity does not enjoy the same freedom of expression as does an individual who is not entrusted with public functions. State bodies may of course also publicly disagree with a judgment of the Constitutional Court but in doing so they have to make clear that they will implement the judgment and they have to limit criticism to the judgment itself. Personal attacks on all judges or individual judges are clearly inadmissible and jeopardize the position of the judiciary and the public trust (…)"*.

95. The Commission emphasised that *"independence and neutrality of the Constitutional Court is at risk when other state institutions or their members attack it publicly. Such attacks are in*

[48] Venice Commission, CDL-AD(2016)034, Ukraine - Opinion on the draft Law on the Constitutional Court, para. 66.
[49] Venice Commission, CDL-AD(2019)001, Ukraine - *Amicus Curiae* Brief on separate appeals against rulings on preventive measures (deprivation of liberty) of first instance cases; CDL-AD(2019)029, Ukraine - *Amicus Curiae* Brief for the Constitutional Court of Ukraine on draft law 10257 on the early termination of a Deputy's mandate.
[50] Venice Commission, CDL-AD(2016)034, Ukraine - Opinion on the draft Law on the Constitutional Court, para. 61.
[51] Venice Commission, CDL-AD(2016)034, Ukraine - Opinion on the draft Law on the Constitutional Court, para. 48.

contradiction with the Court's position as the guarantor of the supremacy of the Constitution (…) and they are also problematic from the point of view of the constitutionally guaranteed independence and irremovability of the judges of the Court (…)."[52]

96. In its 2016 Opinion on Poland, the Venice Commission highlighted that institutional legislation needs thorough scrutiny and the consideration of the opinions of all relevant stakeholders. *"Even if Parliament is not obliged to follow their views, this input can avoid technical errors, which can defeat the purpose of the legislation."* The Commission concluded authorities should be guided by the principle of loyal co-operation between State organs.[53]

97. These observations were made at a time when the Constitutional Court was in a very difficult situation as Government introduced reforms in order to remove certain rules safeguarding the proper functioning of the Court. Unfortunately, if we look at the current situation in Ukraine, we can see that these observations are highly relevant here, too.

98. This also means that the Constitutional Court, as an institution, should be consulted as concerns reforms of its working methods. Parliament is not obliged to follow the advice given and not doing so will not result in the unconstitutionality of the reform but the views of any institution that will have to apply revised working methods can only be beneficial for the legislative process.

99. Conversely, the principle of loyal cooperation also applies to the Constitutional Court, not only to the political branches. It has an obligation, within the limits of the Constitution, of course, to seek a harmoniously functional constitutional system. For example, the Court should facilitate the implementation of its decisions, by giving Parliament sufficient time to address the situation following a decision of unconstitutionality of a legal provision.

100. Also in respect of Ukraine, "[t] he Venice Commission reiterates that in a state governed by the rule of law, it is essential that constitutional bodies decide within the parameters of their legal authority and responsibility, lest the robustness of State Institutions in the country in line with the Constitution be seriously undermined and the democratic functioning of state institutions be irreparably compromised.'[54]

VII. Conclusion

101. The Venice Commission takes Decision 13-r/2020 of 27 October 2020 of the Constitutional Court as an indication that a reform of the Constitutional Court is warranted and as starting point for reform. In this context, the Commission will notably refer to its 2016 Opinion on the then draft law on the Constitutional Court.[55]

102. Therefore, the Venice Commission makes the following recommendations as concerns amendments to the Law on the Constitutional Court:

1. Parliament should consider making more explicit its presumed intention to limit the scope of Constitutional Court decisions to the specific questions raised by the parties before it.
2. The Court should be obliged to provide specific reasons for each legal provision which it finds unconstitutional.
3. The disciplinary procedure should be regulated in the Law on the Constitutional Court, with further details set out in the Rules of Procedure.

[52] Venice Commission, CDL-AD(2012)026, paras. 63 seq.
[53] Venice Commission, CDL-AD(2016)001, paras. 132 seq.
[54] CDL-AD(2019)012, Republic of Moldova - Opinion on the constitutional situation with particular reference to the possibility of dissolving parliament.
[55] Venice Commission, CDL-AD(2016)034, Ukraine - Opinion on the draft Law on the Constitutional Court.

4. The possibility for the re-opening of cases of the Constitutional Court should be established only when the criminal liability of a judges in relation to that decision has been established (e.g. bribe taking).
5. A better, more detailed, definition of "conflict of interest" should be provided, for example singling out financial conflicts of interest, specifically when this results from protocols established by NAPC or the opening of investigations by NABU;
6. Decisions on (self-) recusals and their reasoning should be set out clearly in the main decision adopted by the Court or in a separate public procedural decision or ruling.
7. The quorum requirements should be reduced in those cases where a quorum is lost due to the recusal of judges, thereby avoiding the risk of *non liquet*.
8. Parliament should consider adopting legislation detailing the consequences of judges of the Constitutional Court failing to abide by the legal provisions regarding withdrawal, including making public disciplinary proceedings and decisions against judges of the Court.
9. A screening body for candidates for the office of judge of the Constitutional Court should be established, 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.
10. When a senate comes to the conclusion that a legal provision is unconstitutional and should be annulled, it should seek confirmation from the Grand Chamber upon request by the President of Ukraine or the Parliament. Grand Chamber proceedings should be held in public hearings as a rule.

103. While the procedure before the Constitutional Court and notably aspects relating to the rights and obligations of parties should be regulated in the Law on the Constitutional Court, the Court should be able to define further details of its procedure in its own Rules of Procedure.

104. The Venice Commission recommends filling the current vacancies at the Constitutional Court by the Parliament and the Congress of Judges only after an improvement of the system of appointments as set out above (screening body). The establishment of such a system is therefore urgent to fill these vacancies.

105. In order to depoliticise the composition of the Constitutional Court, the judges on the parliamentary quota should be elected with a qualified majority. For this, a constitutional amendment would be required at a later stage.

106. A useful practical measure would be that newly appointed judges of the Constitutional Court should benefit from special, including international, training on constitutional interpretation.

107. In the process of reform of the Constitutional Court the latter should be properly consulted on all aspects of the reform. In the light of the specific situation in Ukraine, the Constitutional Court should show some restraint if amended provisions were challenged before the Court. The Venice Commission is available to assist in this matter.

108. The Venice Commission remains at the disposal of the Ukrainian authorities for further assistance in this matter, including a more profound examination of the Law on the Constitutional Court.