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Ukraine: Preparation for the EU Accession Process

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Executive Summary

The European Commission's Opinion recommendation to grant candidate status to Ukraine was combined with seven conditions, progress on which was required before Ukraine could advance further on the path to EU accession. These conditions concern fundamental political issues, such as judicial reform, the fight against corruption, "de-oligarchisation", improved media market regulation and greater protection for minorities. Between June 2022 and March 2023, Ukraine has demonstrated noticeable progress in all seven areas. Leaders of two crucial anti-corruption institutions, the Specialised Anti-Corruption Prosecution Office and the National Anti-Corruption Bureau, have been appointed. The integrity of the vetting of members of the High Council of Justice (HCJ) is largely ensured and the Council has become operational. The Verkhovna Rada has passed laws on the procedure for selecting Constitutional Court judges, Financial Action Task Force standards, media regulation and national minorities. Nonetheless, there is still work to be done and some decisions have caused acute criticism. Further progress largely depends on the European Commission's assessment of the substance of the changes. The EU has agreed to provide an interim evaluation and results are expected in May 2023, giving Ukraine time to finalise reforms before the regular October review of candidate countries' progress. This increases the chance that Ukraine will fulfil the criteria the European Commission set for the move to EU accession talks. However, EU political consensus on opening accession talks, is not guaranteed.

Introduction

On 23 June 2022, the European Council took the historic decision to grant candidate status to Ukraine. This decision was based on a European Commission Opinion,¹ which set seven conditions on continuing reform of political fundamentals alongside the key recommendation on the provision of candidate status. Successful implementation of these conditions is a necessary but probably not sufficient criterion for Ukraine to progress further on its path to EU accession talks. The seven conditions concern fundamental reform of the judiciary, the fight against corruption, de-oligarchisation, media regulation and protecting the rights of minorities.

Ukraine has already made significant progress on implementing all seven conditions, and this has been recognised by the European Council.² This report briefly reviews why each condition is essential and what had been achieved as of mid-March 2023.³

1 European Commission (2022). Opinion on the EU membership application by Ukraine. 17 June. https://ec.europa.eu/commission/presscorner/detail/en/qanda_22_3802

2 Council of the European Union (2022). Outcome of proceedings. 13 December. <https://www.consilium.europa.eu/media/60797/st15935-en22.pdf>

3 The analysis heavily relies on Emerson et al. (2023) "EU accession prospects of Ukraine, Moldova and Georgia — first responses to the conditions set by the European Commission" [HTTPS://3DCFTAS.EU/PUBLICATIONS/EU-ACCESSION-PROSPECTS-OF-UKRAINE-MOLDOVA-AND-GEORGIA-%E2%80%94-FIRST-RESPONSES-TO-THE-CONDITIONS-SET-BY-THE-EUROPEAN-COMMISSION](https://3dcftas.eu/publications/eu-accession-prospects-of-ukraine-moldova-and-georgia-%E2%80%94-first-responses-to-the-conditions-set-by-the-european-commission)

Condition 1: Constitutional Court reform

To enact and implement legislation on a selection procedure for judges of the Constitutional Court of Ukraine, including a pre-selection process based on the evaluation of their integrity and professional skills, in line with Venice Commission recommendations.

In 2020, the Constitutional Court of Ukraine (CCU) provoked a series of political crises, undermining the reform efforts in the judicial and anti-corruption spheres. The CCU declared unconstitutional planned changes to the Supreme Court of Ukraine and the model for High Council of Justice integrity checks, as well as the Criminal Code article establishing criminal liability for judges who knowingly pass unjust sentences or make bad rulings, and criminal liability for false information in asset declarations made in the public register of e-declarations. It also removed the authority of the National Agency for the Prevention of Corruption to gather, store and publish e-declarations by officials and monitor their lifestyles.⁴ The need for CCU reform, in particular of the vetting of CCU judges, has become increasingly apparent.

The Parliament passed a new law on selecting the CCU judges on 13 December 2022,⁵ having sought the opinion of the Venice Commission on the draft law. The law foresees the formation of an Advisory Group of Experts (AGE) on the vetting of CCU candidates, the recommendations of which would be binding. According to the law, the AGE will have six members: one delegated by parliament, one appointed by the president, one appointed by the Congress of Judges, one appointed by the Venice Commission and two from among the international organisations that have assisted Ukraine with its rule of law reforms.

However, civil society fiercely criticised the new law⁶ for not envisaging a seventh member (and fourth international member) to avoid a potential deadlock and make it less prone to political influence. Following the criticism, the Venice Commission issued another opinion with an explicit recommendation to add a seventh AGE member from the international experts' quota.⁷ The European Commission expects Ukraine to align its legislation with Venice Commission's recommendations,⁸ so further amendments to the law on CCU judge selection are expected.

4 Emerson M. et al (2021). Deepening EU-Ukrainian relations: updating and upgrading in the shadow of Covid-19. Third edition. <https://3dcftas.eu/publications/deepening-eu-ukrainian-relations-updating-and-upgrading-in-the-shadow-of-covid-19-third-edition>

5 The Law of Ukraine No. 2846-IX "On amendments to certain legislative acts of Ukraine on improving the procedure for selecting candidates for the position of judge of the Constitutional Court of Ukraine on a competitive basis" dated 13 December 2022. <https://zakon.rada.gov.ua/laws/show/2846-IX#Text> (in Ukrainian)

6 DeJure (2022) What is wrong with the Venice Commission's urgent opinion CDL-PI(2022)046 on the draft law No. 7662 on the competitive selection procedure for the candidates to the Constitutional Court of Ukraine.

7 December. <http://en.dejure.foundation/tpost/nfhzui2711-what-is-wrong-with-the-venice-commission>

7 Council of Europe (2022) Ukraine – Opinion on the draft law "On Amendments to Certain Legislative Acts of Ukraine on improving the procedure for the selection of candidates for the position of judge of the Constitutional Court of Ukraine on a Competitive Basis", adopted by the Venice Commission at its 133rd Plenary session. CDL-AD(2022)054-e. Venice, 16-17 December. [https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD\(2022\)054-e](https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2022)054-e)

8 EEAS (2023) Ukraine: Statement by the Spokesperson on the appointments of High Council of Justice members and the reform of the Constitutional Court. 13 January. https://www.eeas.europa.eu/eeas/ukraine-statement-spokesperson-appointments-high-council-justice-members-and-reform_en?fbclid=IwAR3qWVWkWRW8RhACBbt1EaVbsNFVQ0kMxAKfKeazZefhkC25JtXCd3Ndws

Condition 2: Judicial reform

To finalise the integrity vetting of the candidates for the High Council of Justice members by the Ethics Council and the selection of candidates to establish the High Qualification Commission of Judges of Ukraine.

Successful completion of judicial reform is fundamental to Ukraine's future and its EU accession process. The first major round of judicial reform in Ukraine, which aimed to increase the system's independence and integrity, was launched in 2016. As part of the reform process, the High Council of Justice (HCJ) was created as a collegiate, independent constitutional body to govern the judicial branch. Despite this partial success, reform had stalled by 2019 and questions were mounting about the integrity of the HCJ and the High Qualification Commission of Judges (HQCJ), a special body responsible for forming the corps of judges and ensuring their level of qualifications.

The newly elected president launched a second major round of judicial reform in 2019. Parliament passed a law disbanding the current HQCJ and setting new rules on competitive selection of new members. These included integrity checks on the HCJ and envisaged the involvement of international experts in the selection and evaluation of the HQCJ and the HCJ.⁹ These changes were mainly blocked, however, until additional legislative changes revitalised reform in 2021. At the same time, by the end of 2021 the HCJ had become non-functioning as most of the positions were vacant, not least in anticipation of integrity checks.

The 2021 law provides for an Ethics Council,¹⁰ which comprises three representatives of the judicial sphere and three international experts, to conduct compulsory integrity checks on current members of and future candidates for the HCJ. The Ethics Council was formed in December 2021 but its operation was delayed by the war and recommenced only in May 2022. The HCJ became operational again in January 2023 after parliament and the Congress of Judges appointed their HCJ members from a list of pre-selected candidates who had passed the Ethics Council integrity vetting. By March 2023, the Congress of Prosecutors had appointed their HCJ members, bringing the number of HCJ members appointed to 17 of the required 21.

HCJ selection was criticised by civil society experts because the Ethics Council interviews with HCJ candidates were not broadcast for security reasons. This reduced the transparency of the process and left many concerns about candidates' integrity unanswered, at least in public. Nonetheless, restoration of a functioning HCJ was very welcome.

Selection of HQCJ members is the responsibility of a special Competition Commission, comprising three members representing the judicial branch (the HCJ) and three international members with a decisive vote. The Commission began work in January 2022 and initiated an application process for candidates in February, but this was halted by the full-scale Russian invasion. The application process resumed in July 2022.

9 The law of Ukraine No. 193-IX "On amendments to the Law of Ukraine "On the Judiciary and the Status of Judges" and some laws of Ukraine regarding the activities of judicial governance bodies" dated 16 October 2019. <https://zakon.rada.gov.ua/laws/show/193-20/ed20191016#Text>

10 The law of Ukraine No.1635-IX "On making changes to some legislative acts of Ukraine regarding the procedure for election (appointment) of members of the High Council of Justice and activities of disciplinary inspectors of the High Council of Justice" dated 14 July 2021. <https://zakon.rada.gov.ua/laws/show/1635-IX#Text>

The Commission's work was completed in March 2023 when 32 candidates – from over 300 applications – were recommended to the HCJ for the final stage of the selection process.¹¹ From them, the HCJ will have to select 16 members. The list of pre-selected candidates received a positive response from civil society experts monitoring the reform, raising hopes of an integral and professional HQCJ. This will be important as the HQCJ will be responsible for filling over 2500 vacant judge's positions – about one-third of the entire corps of judges in the country.

Condition 3: Fight against Corruption

To further strengthen the fight against corruption, in particular at the highest levels, through proactive and efficient investigation, and a credible track record of prosecutions and convictions, complete the appointment of a new head of the Specialised Anti-Corruption Prosecutor's Office by certifying the identified winner of the competition, and launch and complete the selection process for and appointment of a new Director of the National Anti-Corruption Bureau of Ukraine.

The fight against corruption has become a crucial element of the reform process since 2014, following Euromaidan and the Revolution of Dignity. Efforts have been undertaken to reduce the opportunities for corruption through greater transparency, online public service and more efficient market mechanisms, and by penalising corrupt acts. The latter was addressed by establishing a comprehensive institutional framework that includes the National Anti-Corruption Bureau, the Specialised Anti-Corruption Prosecution Office, the National Agency for the Prevention of Corruption and the High Anti-Corruption Court.

In 2020–2021, however, progress stalled on anti-corruption institutional reform. Several decisions of the Constitutional Courts undermined critical elements of anti-corruption reform and reinstalling the anti-corruption institutional framework required time to adopt new legislation. Moreover, two vital anti-corruption institutions – the Specialised Anti-Corruption Prosecution Office and the National Anti-Corruption Bureau – had been functioning without leadership for some time as political problems interfered with the selection and appointment process after the tenure of previous heads expired.

The European Commission's conditions have reinvigorated the change process. A new head of the Specialised Anti-Corruption Prosecution Office was appointed in July 2022, ending a more than six-month delay as his successful candidature was already known in December 2021. The selection process for a National Anti-Corruption Bureau director was also revived, and a new director was appointed in March 2023 after an open and competitive selection process involving the international experts' integrity check.

Notably, cooperation between the Specialised Anti-Corruption Prosecution Office and the National Anti-Corruption Bureau has intensified, and several high-profile cases against senior officials in the previous administration have recently been sent to the court.

¹¹ Competition Commission for the Selection of HQCJ Members (2022 Facebook post on 15 March 2023. <https://www.facebook.com/scomHQCJ/posts/pfbid0ATa2MH94qzwjjiNEp4wxRwen4roTkEPXU5tdnMrBgYRdWAcLJs7Nj3hTkE5P9RSdeI>

Condition 4: Anti-money Laundering and Law Enforcement Sector Reforms

To ensure that anti-money laundering legislation is in compliance with the standards of the Financial Action Task Force (FATF), adopt an overarching strategic plan for reform of the entire law enforcement sector as part of Ukraine's security environment.

Ukraine has been an active participant in the FATF, demonstrating a good level of compliance with its standards. According to the most recent FATF report, as of 2020 Ukraine was compliant with 11 recommendations, largely compliant with 22 recommendations and partly compliant with six.¹² These results are on a par, for instance, with Poland. Among the issues that still require attention are: targeted financial sanctions related to terrorism; terrorist financing and proliferation; transparency and beneficial ownership; the regulation and supervision of designated non-financial businesses and professions; and new technologies and statistics. In the second half of 2022, Ukraine adopted several laws implementing the relevant FATF standards, particularly on ownership structures,¹³ the prevention of terrorism,¹⁴ the prevention of proliferation and money laundering.¹⁵

Ukraine has also made progress with developing an overarching strategic plan on reforming the law enforcement sector, which is crucial to the rule of law reform nexus. The Interdepartmental Working Group responsible for plan preparation completed drafting after several months and in January 2023 the draft was passed to the Presidential Office. It is expected to be adopted by Presidential Decree in the near future.¹⁶

Condition 5: Anti-oligarch Legislation

To implement the Anti-Oligarch law to limit the excessive influence of oligarchs in economic, political, and public life; this should be done in a legally sound manner, taking into account the forthcoming opinion of the Venice Commission on the relevant legislation.

Strong oligarchic influences in Ukraine have traditionally been considered a central obstacle to its economic prosperity and democratic development. Before Euromaidan, oligarchs

12 FATF (2020) Anti-money laundering and counter-terrorist financing measures Ukraine 2nd Enhanced Follow-up Report & Technical Compliance Re-Rating. Follow-up report. June. <https://www.fatf-gafi.org/content/dam/fatf/documents/reports/fur/Moneyval-2nd-Follow-Up-Report-Ukraine-2020.pdf.coredownload.pdf>

13 The law of Ukraine No. 2571-IX "On amendments to some laws of Ukraine on improving the regulation of ultimate beneficial ownership and the ownership structure of legal entities," dated 6 September 2022. <https://zakon.rada.gov.ua/laws/show/2571-IX#Text>

14 The law of Ukraine No.2589-IX "On the ratification of the Additional Protocol to the Council of Europe Convention on the Prevention of Terrorism" dated 20 September 2022, <https://zakon.rada.gov.ua/laws/show/2589-20#Text>

15 The law of Ukraine No. 2736-IX "On amendments to some laws of Ukraine regarding the protection of the financial system of Ukraine from the actions of a state that carries out armed aggression against Ukraine, and the adaptation of Ukrainian legislation to certain standards of the Group for the Development of Financial Measures to Combat Money Laundering (FATF) and the requirements of EU Directive 2018/843" dated 4 November 2022, <https://zakon.rada.gov.ua/laws/show/2736-IX#Text>

16 Krapivin E. (2023) Ministry of Internal Affairs of Ukraine: How did the system survive, does it need to be transformed in war conditions? Reanimation Package of Reforms Column. <https://rpr.org.ua/en/news/ministry-of-internal-affairs-of-ukraine-how-did-the-system-survive-does-it-need-to-be-transformed-in-war-conditions/>

owned about 15% of the country's assets. Since then, the financial might of the oligarchs has been significantly reduced, and Russia's full-scale war of aggression in Ukraine has further encouraged this process.¹⁷

In 2021, the Ukrainian Parliament adopted the so-called anti-oligarch law,¹⁸ a unique legislative act that envisages the establishment of an oligarchs' register and constraining the participation of oligarchs in the political life of the country, the media and privatisations. The law sets criteria for defining oligarchs, but these are seen as vague and thus prone to manipulation.¹⁹

The critical issue is who makes the decision to include a person on the oligarchs' register. The law gives this responsibility to the National Security and Defence Council (NSDC), which is directly chaired by the president. Moreover, there is no transparency in NSDC decisions on inclusion on the oligarchs' register and no mechanism to contest the decision in the courts.

The law entered into force in November 2021. In June 2022, the NSDC adopted a regulation on the register of oligarchs, and the procedure for its formation and maintenance.²⁰ It also announced that it had commenced inquiries into 86 persons.²¹ In February 2023, however, the government postponed completing the register, awaiting the decision of the Venice Commission.²²

The Venice Commission's decision required to implement action on this condition is still pending. According to the most recent information, it will be published in June 2023. The Venice Commission is expected to recommend revising the law to reduce the associated political risks and ensure that it does not violate human rights.²³

Condition 6: Media market

To tackle the influence of vested interests by adopting a media law that aligns Ukraine's legislation with the EU audio-visual media services directive and empowers the independent media regulator.

The media market in Ukraine is multi-faceted. Several large media outlets are affiliated with high-profile persons who tend to use them to enhance their political influence, but many

17 CES (2022) Oligarchic Ukrainian capital. Research. <https://ces.org.ua/oligarchic-ukrainian-capital-research/> (in Ukrainian)

18 The law of Ukraine No.1780-IX "On the prevention of threats to national security associated with the excessive influence of persons who have significant economic and political weight in public life (oligarchs)" dated 23 September 2021. <https://zakon.rada.gov.ua/laws/show/1780-20#Text>

19 Dzamukashvili S. (2021) Why Ukraine's anti-oligarch bill is so problematic. Emerging Europe. 18 November. <https://emerging-europe.com/news/why-ukraines-anti-oligarch-bill-is-so-problematic/>

20 Decree of the President of Ukraine No. 459/2022 "On the decision of the National Security and Defense Council of Ukraine dated June 29, 2022 "On the approval of the Regulation on the Register of persons who have significant economic and political weight in public life (oligarchs), the procedure for its formation and maintenance" dated 29 June. <https://zakon.rada.gov.ua/laws/show/459/2022#n5>

21 Pavlysh O. (2022) The NSDC has counted 86 Ukrainians who may enter the register of oligarchs. Ekonomychna Pravda. 20 July. <https://www.epravda.com.ua/news/2022/07/20/689398/>

22 Decision of the Cabinet Of Ministers Of Ukraine No. 177-p "On making changes to the plan of measures to prevent the abuse of excessive influence by persons who have significant economic and political weight in public life (oligarchs)" dated 24 February 2023, <https://zakon.rada.gov.ua/laws/show/177-2023-%D1%80#Text>

23 Sydorenko S. (2023) The end of the law on oligarchs? What claims did "Venetian" prepare for him. European Pravda. 10 March 2023. <https://www.eurointegration.com.ua/articles/2023/03/10/7157764/>

smaller media outlets adhere to high-quality standards and counterbalance the giants.²⁴ A public broadcaster, Suspilne, began operating in 2017, replacing state-run broadcasting, and many smaller state-run media organisations were privatised.

The anti-oligarch law has fostered further changes in the market. In 2021 Petro Poroshenko gave his two large television channels to their employees, while Rinat Akhmetov, the wealthiest person in the country, closed his media empire in mid-2022. Since March 2022, all nationwide channels' broadcasting has been merged into a single government-run "marathon", #UApazom, as a part of information policy under martial law.²⁵

In December 2022, the Verkhovna Rada adopted a new media law,²⁶ which aligns Ukrainian legislation with the EU audio-visual directive. The law increases the powers of the independent market regulator, makes changes to the licensing system, introduces co-regulation and expands regulatory capabilities over new types of media not previously covered.

However, the new law does not cover media advertisements, an aspect of the EU directive regulated in Ukraine by another act. Advertising legislation is expected to be amended in line with the EU *acquis* in the spring of 2023.

Condition 7: Legislation on National Minorities

To finalise the reform of the legal framework for national minorities currently under preparation as recommended by the Venice Commission and adopt immediate and effective implementation mechanisms.

The adoption of a new law on national minorities is highly significant for both Ukraine and its partner states. The current law on national minorities was adopted in 1992, and the most recent amendments in 2012.²⁷ The law is not compliant with Ukraine's international commitments and does not meet modern domestic needs. The Council of Europe has recommended that Ukraine pass new legislation on national minorities.²⁸

Ukraine's parliament adopted framework legislation on national minorities in December 2022 and the law will enter into force in July 2023.²⁹ The new law strengthens the powers and responsibilities of the authorities on implementing public policy on protecting the rights and freedoms of national minorities. It envisages the establishment of consultative and advisory

24 Korbit A. (2021) Strengthening public interest in Ukraine's media sector. Chatham House Research paper. <https://www.chathamhouse.org/2021/04/strengthening-public-interest-ukraines-media-sector/summary>

25 Decree of the President of Ukraine No.152/2022 "On the decision of the National Security and Defense Council of Ukraine dated March 18, 2022 regarding the implementation of a unified information policy under martial law" dated 19 March 2022. <https://www.president.gov.ua/documents/1522022-41761>

26 The law of Ukraine No.2849-IX "On media" dated 13 December 2022. <https://zakon.rada.gov.ua/laws/show/2849-IX#Text>

27 The law of Ukraine No.2494-XII "On national minorities in Ukraine" dated 25 June 1992. <https://zakon.rada.gov.ua/laws/show/2494-12#Text>

28 Council of Europe (2020). On implementing the Framework Convention for the Protection of National Minorities by Ukraine. Resolution CM/ResCMN(2020)13. 8 December. https://search.coe.int/cm/pages/result_details.aspx?ObjectId=0900001680a07742

29 The law of Ukraine No.2827-IX "On national minorities (communities) of Ukraine" dated 13 December 2022. <https://zakon.rada.gov.ua/laws/show/2827-20#Text>

bodies and centres of nationalities to improve the protection of national minority rights.

It remains unclear whether the scope of the law and its implementation mechanisms will be effective or sufficient to meet the Commission's conditions. Hungary and Romania have already expressed their concerns about the newly adopted legislation.

Conclusions

In sum, Ukraine has made much progress in implementing all seven of the Commission's conditions but has not yet completed the process. Moreover, some decisions have faced acute criticism. Table 1 summarises the status quo as of mid-March 2023.

Table 1: Ukraine's Progress in Implementing the Commission's Conditions as of Mid-March 2023

<i>No progress</i>	<i>Action taken but serious issues remain to be addressed</i>	<i>Progress is ongoing</i>	<i>Condition mostly implemented</i>
—	Condition 1: Constitutional Court reform	Condition 4: Anti-money laundering and law enforcement sector reforms Condition 5: Anti-oligarch legislation	Condition 2: Judicial reform Condition 3: Fight against corruption Condition 6: Media market Condition 7: Legislation on national minorities

Feedback is essential in order to make further advances so the Commission's agreement to provide an interim evaluation of Ukraine's progress is highly appreciated. This will allow verification of the achievements and further fine-tuning of legal and institutional changes. The Commission's assessment is expected in May 2023, giving some time for Ukraine to finalise reforms before the regular October review of candidate countries' progress. This increases the chances that Ukraine will fulfil the necessary criteria set by the Commission for advancing to EU accession talks. However, the sufficiency criterion, or EU political consensus on opening accession talks, is not guaranteed.



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