ADDRESS
of the Plenum of the Supreme Court to the President of Ukraine regarding the Law of Ukraine "On Amending the Law of Ukraine "On the Judiciary and the Status of Judges" and Some Laws of Ukraine
regarding the Operation of Judicial Governance Bodies"
Adopted by the Verkhovna Rada of Ukraine

Having analyzed the provisions of the Law of Ukraine "On Amending the Law of Ukraine "On the Judiciary and the Status of Judges" and Some Laws of Ukraine regarding the Operation of Judicial Governance Bodies" adopted by the the Verkhovna Rada of Ukraine on 16 October 2019 (hereinafter – Law), the Plenum of the Supreme Court considers it necessary to address to the President of Ukraine with the following.

Pursuant to Article 94 of the Constitution of Ukraine, the Chairman of the Verkhovna Rada of Ukraine shall sign a law and forward it without delay to the President of Ukraine. The President of Ukraine shall sign such law within fifteen days of its receipt, accepting it for execution, and shall officially promulgate it or return to the Verkhovna Rada of Ukraine with substantiated and formulated proposals for reconsideration.

The Supreme Court addresses to the President of Ukraine with request to apply the right to veto the Law of Ukraine "On Amending the Law of Ukraine "On the Judiciary and the Status of Judges" and Some Laws of Ukraine regarding the Operation of Judicial Governance Bodies" adopted by the the Verkhovna Rada of Ukraine provided by the Constitution of Ukraine in the view of facts defined below.

Pursuant to Article 25 of the Constitution of Ukraine and Article 36 of the Law of Ukraine "On the Judiciary and the Status of Judges", the Supreme Court shall be the highest judicial body in the system of courts of Ukraine.

The Plenum of the Supreme Court, with its resolution No. 11 of 16 September 2019, approved the Conclusion on the Draft Law of Ukraine "On Amending Certain Laws of Ukraine regarding the Operation of Judicial Governance Bodies" (Registration No. 1008), where it had introduced several proposals and remarks to some provisions of the Draft Law, requested to postpone its consideration in order to discuss it by the Legal Reform Commission and to receive opinions of international organizations as for the compliance of its norms with European standards of the judicial power independence.

Pursuant to Articles 1 and 3 of the Law of Ukraine "On the High Council of Justice", the High Council of Justice shall be a collegial, independent constitutional public authority and judicial self-government body acting in Ukraine on an ongoing basis to ensure the independence of the judicial power, its functioning on the principles of liability, accountability to society, forming integral and highly professional judiciary, observance of norms of the Constitution and laws of Ukraine, as well as professional ethics in the activity of judges and prosecutors; it shall provide binding consultative opinions regarding draft laws on the establishment, reorganization or liquidation of courts, the

judiciary and the status of judges, generalize proposals of courts, bodies and institutions of justice system regarding laws on their status and functioning, the judiciary and the status of judges.

The High Council of Justice with its decision No. 2356/0/15-19 of 5 September 2019 approved binding consultative opinion regarding the Draft Law of Ukraine "On Amending Certain Laws of Ukraine regarding the Operation of Judicial Governance Bodies" (Registration No. 1008), and requested to take into account the provided cautions while considering this draft law.

Pursuant to Article 130-1 of the Constitution of Ukraine and Article 133 of the Law of Ukraine "On the Judiciary and the Status of Judges" the Council of Judges of Ukraine is the supreme body of judicial selfgovernance and shall function as the executive body of the Congress of Judges of Ukraine.

On 16 September 2019 the Council of Judges of Ukraine with its decision No. 69 approved the text of open address to members of Ukrainian Parliament regarding the Draft Law of Ukraine "On Amending Certain Laws of Ukraine regarding the Operation of Judicial Governance Bodies" (Registration No. 1008) and requested to discuss and to take into account provided remarks.

The noted bodies as representatives of the judicial branch of power did not support the abovementioned law in general and requested to take into account the provided remarks and proposals.

Unfortunately, the main cautions were not taken into account while considering and adopting the Law, the Draft Law has never been discussed by the Legal Reform Commission established by the President of Ukraine, international organizations' cautions regarding its compliance with European standards of judicial power independence were not taken into account.

The Supreme Court constantly and consistently maintains that it is necessary to continue the judicial reform in Ukraine. The fundamental objectives of the judicial reform are represented with the implementation of mechanisms, which would let ensure human rights and freedoms through the administration of effective, independent and impartial justice. Justice may be considered effective only in case of its accessibility for an ordinary citizen and the possibility for him/her to receive clear court service in the form of justified and motivated judgment.

While holding the reform, it is also important to ensure provisions provided by the Constitution of Ukraine regarding the separation of state power into legislative, executive and judicial branches with understanding that each branch of power shall perform its authority pursuant to Article 19 of the Constitution of Ukraine avoiding the interference into the activity of another one.

At the same time, the judicial reform shall be held with obligatory observance of constitutional provisions, primarily, the independence of the judicial power and the independence of each judge as a holder of judicial power in Ukraine, as well as with obligatory observance of the principle of uniformity and proportionality, similar approaches to the procedure of reforming bodies and institutions involved into the process of reforming.

In this regard, attention shall be paid to several provisions of the adopted Law. The Plenum of the Supreme Court put emphasis on the support of a norm regarding the exclusion of items 22 and 23 of Chapter XII "Final and Transitional Provisions" of the Law of Ukraine "On the Judiciary and

the Status of Judges", since their implementation will promote fair solution of the issue on judicial remuneration for all judges administering justice, but not only those, who have passed the procedure of qualification assessment. Present legislative approach to the regulation of relevant issues has created unreasonably unequal conditions for judges, who had passed the qualification assessment and judges, who had not passed it.

At the same time, regarding other provisions of the Law, judges of the Supreme Court have expressed following cautions:

1. Primarily, the assessment of the Law from the viewpoint of its compliance with international standards of ensuring the status of judges and their independence is important. It is known, that the status of a judge is not a personal privilege but an integral component of appropriate exercise of his/her powers and the guarantee of the independence of the judicial branch of power, in general.

In the Opinion of the Venice Commission of 26 October 2015 it is underlined that the assessment of professionalism, ethics and integrity of all judges might be only an exceptional measure requiring the utmost care…; the Venice Commission considered that the emergency measures should be limited in time and should be taken promptly and effectively.

We draw attention that such an exceptional measure, in fact, was applied while forming the current composition of the Supreme Court, held in terms of complete openness and transparency; it was positively assessed by generally recognized national and international institutions.

On 8 April 2019 the Council of Europe approved its Opinion "On Compliance of the Procedure of Selection and Appointment of Judges of the Supreme Court with the Council of Europe Standards". While providing the general assessment of the law regarding the selection and appointment of judges of the Supreme Court, international experts drew attention to the fact that the developed legislative basis for exercising this competition procedure included the implementation of norms of the Constitution and the Law of Ukraine "On the Judiciary and the Status of Judges", as well as a number of rules, procedures and methodologies founded on international and European recommendations.

The Council of Europe experts in this Opinion noted that while providing the general assessment of the process of selection and appointment of judges of the Supreme Court, it should be taken into account that this process covered a very complicated procedure applied in Ukraine for the first time in its history. The legislative basis for the selection and appointment of judges provided detailed and preliminarily determined rules. All documents and rules relating the process of selection of judges to the highest judicial institution were publicly available and known before its beginning. One of the most important aspects of the competition to the Supreme Court is represented by its holding in the atmosphere of extremely high publicity.

Simultaneously, the procedure of selection and appointment of judges may be considered as long-term and rather complicated, since it has several consecutive levels, with the participation of a number of bodies with different functions and authorities. Some of them execute technical functions, as well as functions regarding the adoption of decisions. The High Qualification Commission of Judges of Ukraine and the High Council of Justice are authorized to adopt decisions;

the Public Integrity Council performs only consultative functions; the President of Ukraine has ceremonial authority.

Thus, in the noted Opinion the international experts, who carefully watched the process of forming and staffing of Ukrainian Supreme Court, remarked that in Ukraine the process of selection and appointment was complicated and multi-level with the involvement of different institutions, which were liable for certain components of this procedure. Such approach includes relevant guarantees for the protection of independence of the judicial power and does not constitute a threat for the rule of law.

The successful termination of forming the composition of the Supreme Court requires close attention to ensuring the independence of judges.

It should be noted that pursuant to item 9 of the Opinion No. 10 (2007) of the Consultative Council of European Judges the independence of judges, in a globalised and interdependent society, should be regarded by every citizen as a guarantee of truth, freedom, respect for human rights, and impartial justice free from external influence. The independence of judges is not a prerogative or privilege granted in their own interest, but in the interest of the rule of law and of anyone seeking and expecting justice. Independence as a condition of judges' impartiality therefore offers a guarantee of citizens' equality before the courts.

It should be remarked that the statement of the interference into the independence of judges is not excluded, even if the factual dismissal takes place because of adoption of acts by the Parliament – the body of the legislative power. The reduction of the number of judges of the Supreme Court from 200 till 100 (herewith, in fact there are 192 active judges) is, actually, aimed at the dismissal of about a half of judges presently administering justice. Besides, such mass dismissal has the features of inacceptable deprival of judges' right to profession and, respectively, the violation of Article 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms.

In her comment of 3 September 2019 "The Independence of Judges and the Judiciary under Threat" the Council of Europe Commissioner for Human Rights drew attention that "instead of upholding and strengthening judicial independence, impartiality and efficiency, some governments and politicians interfere with the judiciary and even resort to threats against judges". The Commissioner emphasized that judges should be consulted and involved in the preparation of legislation concerning their statute and, the functioning of the judicial system. Judges should enjoy security of tenure and protection from undue early removal from office or involuntary transfers.

The proposed legislative initiative drew attention of representatives of international institutions and diplomatic establishments acting in Ukraine (particularly, the EU Delegation to Ukraine and the Embassy of Canada to Ukraine) and formed negative assessment of relevant legislative initiatives.

Annika Weidemann, Chargée d'affaires a.i. EU Delegation, noted: "The EU has repeatedly expressed its position on judicial reform. We have clearly and repeatedly communicated our concerns as regards the draft law #1008. In particular, provisions relating to the Supreme Court go against European standards and risk undermining the independence of the judiciary. We would strongly encourage Ukraine to seek an opinion of the Venice Commission prior to enacting this law".

The Secretary General of the Council of Europe Marija Pejčinović Burić in her letter to the Ministry of Foreign Affairs of Ukraine remarked: "Achieving an independent, efficient and professional judiciary which enjoys the trust of the public and responds to its needs is part of

commitments undertaken by Ukraine when entering the Council of Europe. Against this background, we have taken note with some concern of Draft Law No. 1008. This text puts forward wide-ranging changes which could have significant implications for the independence of the judicial system. In particular, it affects the status and competencies of judges, as well as relating procedures. We fully acknowledge the will of the Ukrainian Government to advance with the reforms. At the same time, it is of utmost importance that it builds on the achievements resulting from reforms carried out to meet Council of Europe and international requirements. Particular attention should be paid to the requirements of the European Convention on Human Rights. In this respect, clear indications were given on Wednesday, 25 September, by the Committee of Ministers. In its decisions on the execution of judgments from the European Court of Human Rights relating the independence and impartiality of the judiciary and the system of judicial discipline and career in Ukraine (*Oleksandr Volkov v. Ukraine* group of cases), the Committee noted that the adoption in the first reading of the Draft Law No. 1008 aimed notably at introducing changes to the system of judicial discipline and careers… The proposed legislative amendments should be compliant with the Convention and the case law of the Court, with the principles of independence of the judiciary as set out in the judgment of *Oleksandr Volkov* and with relevant Council of Europe recommendations".

Herewith, the Secretary General of the Council of Europe called upon the authorities to take full advantage of the expertise of the Council of Europe to this end.

In return, the Parliamentary Assembly of the Council of Europe addressed to the European Commission for Democracy through Law (Venice Commission) requesting to prepare its opinion regarding the Draft Law No. 1008. This opinion is expected to be ready at the beginning of December. The Council of Europe Office in Ukraine emphasized that "the Council of Europe would like to reiterate that it is ready to work with all competent authorities of Ukraine to ensure that the reforms initiated are in line with European standards on the independence of the judiciary and the international obligations of Ukraine under the ECtHR".

Besides, on 17 October 2019 the American Chamber of Commerce in Ukraine, the European Business Association and the Union of Ukrainian Entrepreneurs called upon the President of Ukraine Volodymyr Zelenskyy to veto the Law regarding the operation of judicial governance bodies in order to hold a thorough public discussion among the Verkhovna Rada of Ukraine Committee on Legal Policy, business, international community and civil society as for norms proposed to be implemented. Herewith, they noted: "Presently, it is very important to continue facilitating the judicial reform process to ensure effective access to justice that will result in timely, high-quality decisions, and to develop a really justified document, which would ensure strengthening principles of the rule of law and justice in the country, and, in return, strengthening trust of business society for further investing into Ukrainian economy".

Therefore, the Plenum of the Supreme Court remarks that the Law forms potential threats to the independence of all judges, and its adoption will lead to the real endeavor on their independence and will have negative impact on the rule of law as an integral part of legal state.

2. Regarding amendments introduced by the Law to Article 37 of the Law of Ukraine "On the Judiciary and the Status of Judges" as for the reduction of number of judges of the Supreme Court, the following should be remarked.

From the very beginning of its operation (15 December 2017) **77 227** cases were transferred to the Supreme Court, which were not considered by high specialized courts and the Supreme Court of Ukraine. Since then, on average, the Supreme Court receives **360 cases every day**. In total, during the period from 15 December 2017 till 24 October 2019 the Supreme Court adopted **169 777** judgments. As of 24 October 2019 the number of pending complaints and claims was **58 236**.

The existence of such rests including receiving of significant number of new cases leads to the situation, when the Supreme Court sometimes may not administer justice within reasonable terms, and in the view of the importance of each case for its participants, the delay of administering justice is equal to the denial to administer it. At the same time, the reduction of judges of the Supreme Court will result in situation, when quantitative indicator of cases consideration will be half of collection rate, and thus in everyday increasing of pending cases. In return, this will result in increasing the terms for consideration exponentially.

Herewith, the Supreme Court considers extremely important cases on bank system, disputes with participation of foreign investors, tax disputes, and in the near future the Court may receive criminal cases on so-called top-corruption, the solution of which, under such circumstances, will be significantly complicated.

Finally, the abovementioned will result in society's disappointment with the state's ability to ensure appropriate conditions of effective protection of their rights in judicial procedure, which will result in increasing the number of applications to the European Court of Human Rights because of the violation of reasonable terms of consideration of judicial cases, though presently Ukraine has the second position on this indicator.

Besides, the priority task of the Supreme Court is represented by ensuring the unity of case law. Legal positions formed by the Supreme Court shall be a landmark for judges of first and appeal instances, and their observance – the guarantee that most of judgments will be in accordance with the unified case law. At the same time, presently, courts of first and appeal instances are understaffed significantly. The abovementioned results in excessive workload for judges of these courts, which cannot help influencing on the quality of their work including in terms of observance of opinions of the Supreme Court.

It also should be reminded that the main element of the rule of law principle provided by Article 8 of the Constitution of Ukraine is represented by the principle of legal certainty, pursuant to which legal norms shall be clear and unambiguous, since the other may not ensure their unified application and does not exclude the indefiniteness of the interpretation in law-enforcement practice. The Constitutional Court of Ukraine drew attention to this fact in relevant judgments (of 22 September 2005 No. 5-рп/2005, of 29 June 2010 No. 17-рп/2010, of 22 December 2010 No. 23-рп/2010, of 11 October 2011 No. 10- рп/2011, etc).

The European Court of Human Rights also repeatedly underlined that laws should comply with the standard established with the Convention for the Protection of Human Rights and Fundamental Freedoms, which required rather clear forming of legal norms in the text of regulatory acts. Particularly, "… The law should be accessible to the persons concerned and formulated with sufficient precision to enable them – if need be, with appropriate advice – to foresee, to a degree

that is reasonable in the circumstances, the consequences which a given action may entail" (*Vyerentsov v. Ukraine*, 11 April 2013).

Pursuant to Article 126 of the Constitution of Ukraine a judge shall hold office for unlimited term. A judge shall be dismissed only on grounds provided by the Constitution of Ukraine. Comprehensive grounds for dismissal of a judge are provided in the noted article, and amending the law is not indicated in that list. A judge may be dismissed from office in the event of his refusal to be transferred to another court, if the court, where the judge is holding his/her position, is being liquidated or reorganized. Thus, the decrease is not provided.

The Supreme Court in not liquidated or reorganized in the context of the Law of Ukraine "On the Judiciary and the Status of Judges". Therefore, there are no legal grounds for the dismissal of judges, who will not pass the assessment for holding posts in the Supreme Court and do not want to be transferred to appeal instance. Thus, the state will be obliged to pay them judicial remuneration, though they will not administer justice.

Besides, attention should be paid to the fact that the issue of judges' career, as it has been regulated by the Law, is controversial to European standards. The Venice commission in its Opinion of 26 October 2015 CDL-AD (2015)027 noted: "All decisions on the judges' career (promotions, transfers, dismissals) must belong to the High Council of Justice and not to a political institution, if a truly independent judiciary is to be achieved".

Besides, the European Charter on the Statute for Judges also provides the prohibition to transfer a judge to another court without his/her consent. Thus, in item 3.4 it is provided that a judge holding office at a court may not in principle be appointed to another judicial office or assigned elsewhere, even by way of promotion, without having freely consented thereto.

Issue of judges' independence is also noted in item 11 of the Recommendation CM/Rec (2010) 12 of the Committee of Ministers of the Council of Europe to its member states: "The external independence of judges is not a prerogative or privilege granted in judges' own interest but in the interest of the rule of law and of persons seeking and expecting impartial justice. The independence of judges should be regarded as a guarantee of freedom, respect for human rights and impartial application of the law. Judges' impartiality and independence are essential to guarantee the equality of parties before the courts".

Therefore, the decrease of the number of judges of the Supreme Court may not be performed before appropriate staffing of courts of first and appeal instances, consistent ensuring the unity of case law and, consequently, increasing authority of these courts and the reduction of expectations of process participants regarding the possibility of successful appealing of judgments in the Supreme Court.

Only successful taking of such measures may become an objective precondition for gradual decrease of the number of judges of the Supreme Court on the grounds of effective implementation of so-called procedural filters and their appropriate social perception. Presently, even the application of procedural filters provided with procedural law is perceived by society and professional community as denial of access to justice.

3. The reduction of judicial remuneration for judges of the Supreme Court shall be revised, as well; it is directly controversial to international standards of guaranteeing judges' independence, particularly, by means of prohibition of worsening their welfare. In Montreal Universal Declaration

on the Independence of Justice of 1983 and the Opinion No. 1 (2001) of the Consultative Council of European Judges on standards concerning the independence of the judiciary and the irremovability of judges it is remarked that the period of office of judges, their independence, social guarantees, adequate payment and conditions of work shall be guaranteed by law and may not be changed downwards.

In item 73 of the Opinion No. 10 (2007) of the Committee of Ministers of the Council of Europe on the Council for the Judiciary at the service of society it is noted that although the funding of courts is part of the State budget, such funding should not be subject to political fluctuations. Decisions on the allocation of funds to the courts must be taken with the strictest respect for judicial independence.

Pursuant to the Universal Charter of the Judge adopted by the IAJ Central Council in Taiwan on 17 November 1999, the remuneration must not depend on the results of the judge's work, or on his/her performances, and must not be reduced during his or her judicial service

The reduction of judges' remuneration for judges of the Supreme Court does not take into consideration the requirements of Article 22 and 126 of the Constitution of Ukraine and provisions of Article 6 of the Law of Ukraine "On the Judiciary and the Status of Judges", since it may have impact on the independence of the court and represents narrowing of guarantees of such judges' independence.

The judicial remuneration is the guarantee of a judge's independence and an integral component of his/her status.

Narrowing of the basic amount of the official salary of a judge of the Supreme Court also does not take into consideration relevant judgments of the Constitutional Court of Ukraine (No. 4-рп/2007 of 18 June 2007), pursuant to which, the special procedure of financing courts and judges' activity shall be one of constitutional guarantees of their independence fixed in Article 126 of the Constitution of Ukraine and aimed at ensuring of independent conditions for the administration of independent justice.

In its Judgment No. 11-рп/2018 of 4 December 2018, the Constitutional Court of Ukraine noted that the reduction of a judge's remuneration forms threat to the independence of a judge and the judicial power in general, as well as the conditions for impact on the judge by means of the rate of his/her material support.

Besides, pursuant to Article 58 of the Constitution of Ukraine, laws and other regulatory legal acts shall have no retroactive force, unless they mitigate or nullify the responsibility of a person.

4. Separate attention should be paid to provisions of the Law (item 1 of Part 1 of Article 44 of the Law of Ukraine "On the High Council of Justice") regarding disciplinary proceedings as for a judge on the ground of an anonymous application. In our opinion, such norms implement instruments of pressure upon judges, which is not acceptable. The existence of personalized complaint is the guarantee of a judge's independence on unreasonable complaints concerning his/her activity and the guarantee that judges will not face unlawful obstacles while administering justice.

The mechanism of anonymous applications may become the instrument of unjustified prosecution, harassment and intimidation of a judge.

Therefore, this novel will also undermine judges' independence.

5. The Law (Part 4 of Article 48 of the Law of Ukraine "On the High Council of Justice") proposes to reduce the term of informing a judge about hearing in the Disciplinary Chamber from seven till three days. Herewith, the provision allowing a member of the High Council of Justice to hold preliminary examination is excluded (particularly, in Part 1 of Article 48 of the Law of Ukraine "On the High Council of Justice"). In other words, a judge will not be requested to provide explanations, and three days before hearing in the Disciplinary Chamber he/she will be informed about the consideration of case as for him/her. At the same time, it should be remarked that, for instance, pursuant to Article 128 of the Civil procedure Code of Ukraine even a court summon shall be handed in taking into account the condition, upon which the called persons shall have sufficient time to come to court and to prepare for the participation in judicial consideration of the case, but not later than five days before court hearing.

In other words, absence at hearing in the Disciplinary Chamber for any reasons, even valid ones (pursuant to Part 3 of Article 47 of the Law of Ukraine "On the High Council of Justice") will not impede the consideration of the disciplinary case as for judge, if he/she is informed three days before the hearing. On the other hand, if the judge decides to participate in the hearing in the Disciplinary Chamber, he/she will be obliged to cancel the consideration of previously appointed cases, and, in its turn, it may have impact on appropriate, timely and effective judicial protection of the process participants' rights and freedoms.

The impossibility to prepare appropriately and to participate in the consideration of his/her case in the hearing in the Disciplinary Chamber may have negative impact on the judge's ability to protect him/herself effectively from accusations and unjustified prosecution against him/her.

Therefore, this novel will also undermine judges' independence.

Taking into account the abovementioned, the Supreme Court request the President of Ukraine to apply the right to veto provided by Constitution of Ukraine regarding the Law of Ukraine "On Amending the Law of Ukraine "On the Judiciary and the Status of Judges" and Some Laws of Ukraine regarding the Operation of Judicial Governance Bodies" adopted by the Verkhovna Rada of Ukraine.