



## ЕТИЧНА РАДА

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## ETHICS COUNCIL

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**Kyiv**

### DISSENTING OPINION

of the Ethics Council's Chair Lev Kyshakevych  
and members of the Council Volodymyr Siverin and Yurii Triasun  
regarding Decision No. 71 as of 1 November 2022  
on compliance of candidate for the position of the member  
of the High Council of Justice Liubomyr Viktorovych Vynar  
with the professional ethics and integrity criteria for filling in the position  
of the member of the High Council of Justice

Candidate for the position of the member of the High Council of Justice Liubomyr Viktorovych Vynar was recognized as compliant with the professional ethics and integrity criteria for filling in the position of the member of the High Council of Justice with the Ethics Council's Decision No. 71 of 1 November 2022.

Using the right granted by cl. 2.3.6 of the Ethics Council's Rules of Procedure adopted by the Ethics Council's Decisions No. 1 of 01 December 2021 and No. 4 of 09 December 2021, as amended by the Ethics Council's Decision No. 4 of 26 April 2022 ("Rules of Procedure"), we consider it as necessary to give a dissenting opinion regarding the decision adopted taking into account decisive votes of the Council's members nominated by international and foreign organizations (cl. 2.3.3 of the Rules of Procedure).

1. With respect to disciplinary proceedings and conflict situation in the court where the candidate worked

In its decision the Ethics Council has pointed out that during 2017 – 2019 the High Council of Justice (“HCJ”) received 19 disciplinary complaints with respect to Liubomyr Viktorovych Vynar and that the HCJ did not find grounds to bring the candidate to disciplinary responsibility in any of these instances. However, in its decision the Ethics Council has mentioned only those complaints which were submitted to the HCJ by the Head of the court, judges of these court, and head of the court apparatus. However, the Council ignored eight complaints submitted by parties to the proceedings in which Liubomyr Viktorovych Vynar was the presiding judge on unjustified delay or failure of the judge to take measures to consider an application, complaint, or case within the term established by the law, as well as the complaint of head of the Main Police Division in Zhytomyr region Yu. Oliynyk on improper fulfillment of duties by judge Liubomyr Viktorovych Vynar as an investigative judge.

As seen from the Council’s decision, the reason for submission of the majority of disciplinary complaints regarding Liubomyr Viktorovych Vynar was his conflict with the Head of Olevsk District Court of Zhytomyr region V. M. Kovalchuk. At the same time, conclusions in this section are worded in such a way that one may understand that this conflict happened because of biased attitude of the Head of this local court towards the candidate. This position in the decision is justified with information about results of the check by the Territorial Division of the State Judicial Administration in Zhytomyr region, pursuant to which there was established the fact of the conflict among the staff, application of Liubomyr Viktorovych Vynar to the High Council of Justice with a notification on interference with his activities as the judge, and his explanations during the interview.

At the same time, provisions of Articles 152, 154 of the Law of Ukraine “On the Judiciary and Status of Judges”, which stipulate authorities of the State Judicial Administration and its territorial bodies, do not grant them a competence to carry out checks in courts in terms of existence of conflicts between judges and take any response measures regarding that, and the candidate was notified about that with letter No. 06-585/18-ВНХ of 22 February 2018 of the head of this division.

We are hereby drawing attention to the fact that according to Article 151(1) of the same Law these public authorities only have duties relating to organizational and financial support of judiciary bodies. Therefore, in our opinion, references to this information in the decision are inappropriate.

As evident from the text of the decision, the Ethics Council has basically reached a conclusion that conflict in Olevsk District Court of Zhytomyr region emerged due to the biased attitude of the Head of the court. However, during the evaluation the Ethics Council did not establish who was to blame for the conflict as documents at disposal of the Council show that both the Head of the court submitted complaints to the HCJ regarding actions of judge Liubomyr Viktorovych Vynar, and the candidate submitted complaints and notifications about interferences with his activities by the Head of the court.

In particular, as evident from the text of the Head of the court’s complaints, even though judge Liubomyr Viktorovych Vynar did not have authorities relating to justice administration, still he as the judge of this court avoided fulfillment of labor duties and compliance with the labor discipline, did not attend meetings of judges for consideration of issues relating to administrative functions, and was absent from the workplace and did not inform about reasons of his absence.

At the same time, on 24 January, 2 and 13 March, 20 April, and 8 May 2018 Liubomyr Viktorovych Vynar also submitted to the High Council of Justice notifications on interferences with his activities by the Head of the court V. M. Kovalchuk. However, with respect to none of these notifications the High Council

of Justice adopted a decision to take response measures set out by Article 73(1) of the Law of Ukraine “On the High Council of Justice”, which confirms unjustified nature of these notifications.

Under such circumstances we believe that explanations of Liubomyr Viktorovych Vynar provided to the Council, in particular, during the interview regarding pressure and biased attitude of the Head of the court of Olevsk District Court of Zhytomyr region V. M. Kovalchuk have not been objectively confirmed with any other information.

In our opinion, it is impossible to agree with the Council’s conclusion given in the decision about active activity of Liubomyr Viktorovych Vynar as a judge during the period from November of 2018 to September of 2019.

While studying this issue, the fact that during the following periods:

- from 26 December 2018 to 18 January 2019;
- from 21 January to 25 January 2019;
- from 8 February to 7 March 2019;
- from 18 March to 28 March 2019;
- from 29 March to 6 May 2019;
- from 8 May to 2 June 2019;
- from 4 June to 21 June 2019;
- from 24 June to 9 July 2019;
- from 10 July to 3 August 2019;
- from 13 August to 16 August 2019;
- from 17 August to 23 August 2019;
- from 12 September to 27 September 2019 Liubomyr Viktorovych Vynar was undergoing treatment according to the provided sick leaves.

During this period of time when he was not on a sick leave (except for five days when he was at a workplace), he was either on different annual leaves, or in business trips. It should be pointed out that the candidate was delegated to participate in the Congress of Judges of Ukraine, to teach at the National School

of Judges of Ukraine for fifteen days only, which is a very small number of days during the period from November of 2018 to September of 2019.

Regardless of the fact that the workplace of judge Liubomyr Viktorovych Vynar was in Olevsk of Zhytomyr region during this period of time where, according to his explanations, he used to live in different hotel rooms, sick leaves were issued to him by different health care facilities of Lviv and Lviv region.

We believe that the fact of prolonged absence of the candidate at the workplace during this period of time, regardless of available documents on validity of its reasons, should have been evaluated by the Council more thoroughly in totality with all other information collected during the evaluation. In particular, it should have been taken into consideration that sick leaves were issued by different health care facilities, that frequent sick leaves of Liubomyr Viktorovych Vynar took place specifically during the period of his conflict with the Head of the court V. M. Kovalchuk, and that prolonged poor health condition of the candidate ended only once the Head of the court died on 8 March 2020. Besides, the Council ignored information provided by the National Anti-Corruption Bureau of Ukraine, in particular, broadcast of one of the Ukrainian channels dedicated to judge Liubomyr Viktorovych Vynar being at the workplace during 5 workings days within a year only. In particular, the broadcast contains a noteworthy interview of the assistant of judge Liubomyr Viktorovych Vynar who is selected by the judge independently according to Article 157 of the Law of Ukraine “On the Judiciary and Status of Judges”. The assistant stated that he had not seen the judge at the workplace for a long period of time, communicated with him by phone only, and did not know where the judge was.

Besides, it is necessary to point out that the Ethics Council should have evaluated actions of the candidate in the conflict context as in the future, in case he is selected as the HCJ member, he will have to evaluate actions of judges in a similar situation.

In such case violation of Liubomyr Viktorovych Vynar of the obligations set out by para. 2 of Article 56(7) of the Law of Ukraine “On the Judiciary and Status of Judges” regarding compliance with the judicial ethics rules would seem to be obvious, which means that there is a reasonable doubt about the candidate’s compliance with such indicator of the professional ethics and integrity criterion as diligence (cl. 1.3.4 of the Methodology).

2. With respect to information about the candidate’s financial situation specified in his declarations of the person authorized to fulfill functions of the state or local self-governance

According to cl. 1.3.7.6 of the Methodology, the candidate shall comply with financial control requirements stipulated by the anti-corruption legislation, in particular, with respect to timely submission of declarations, notifications about significant changes in the financial situation, notifications about open accounts with banking and financial institutions (including abroad), and provision of complete and accurate information in asset declarations.

During evaluation of the candidate it has been established that Liubomyr Viktorovych Vynar is a judge of Olevsk District Court of Zhytomyr region, which means that he is obliged to submit declarations according to requirements of the anti-corruption legislation.

As evident from the candidate’s annual declarations for the period of 2013 – 2019, he did not specify any real estate objects belonging to him under the right of ownership, rent, or use in Olevsk.

In his written explanations the candidate specified that during this period he used to live both in Lviv and Olevsk, renting hotel rooms in the latter town. Referring to Explanation No. 3 of the National Agency on Corruption Prevention (“NACP”) of 11 August 2016, Liubomyr Viktorovych Vynar specified that he did not have grounds to declare the right to use a hotel room as the obligation to

declare all real estate objects emerges only when such objects are rented or are under other right of use as of the last day of the reporting period.

However, according to para. 2 of Article 46(1) of the Law of Ukraine “On Prevention of Corruption” (in the version of Law of Ukraine No. 992-VIII of 1 August 2016), the declaration shall contain information about real estate objects belonging to the person submitting the declaration and his/her family members under the right of private ownership, including joint ownership, or under the right of rent or under any other right of use regardless of the form of a transaction conclusion which has resulted in emergence of such right.

At the same time, we believe that existence or absence of explanations of the authorized public authority like the NACP regarding application of specific provisions of the anti-corruption legislation does not release the person submitting the declaration from the duty to strictly follow requirements of such legislation while filling in and submitting declarations. Based on para. 15 of Article 11(1) of the Law of Ukraine “On Prevention of Corruption”, these explanations have the methodological and advisory nature and may not substitute or supplement the law (in the version of Law of Ukraine No. 992-VIII of 1 August 2016).

Under such circumstances the candidate should have specified information about real estate objects belonging to him under the right of use in respective declarations during the period of 2013 – 2019. Thus, we believe that the Ethics Council should have reached a conclusion about existence of a reasonable doubt about the candidate’s compliance with financial control requirements set out by the anti-corruption legislation, in particular, with respect to timely submission of the declaration, notifications about significant changes in the financial situation, notifications about accounts open with banking and financial institutions (including abroad), and submission of complete and accurate information in asset declarations (cl. 1.3.7.6 of the Methodology).

We are hereby drawing attention to the fact that similar factual circumstances regarding failure to declare the right to use a real estate object became one of the grounds for the Council recognizing candidates M. M. Voinarivskyi, R. Z. Holobutovskyi, and M I. Kobal as non-compliant with the professional ethics and integrity criteria for filling in the position of the member of the High Council of Justice, which is reflected in the Council's Decisions No. 12 of 23 June 2022, No. 14 of 23 June 2022, and No. 59 of 01 November 2022.

Different evaluation of similar actions of the candidates shows the unjustified nature of the Ethics Council's conclusions in its decision concerning Liubomyr Viktorovych Vynar and violates the formation of the Council's practice based on the principle of consistency.

Thus, being governed by Rules 2.3, 2.3.6, 3.1, 3.15.1, 3.2 of the Ethics Council's Rules of Procedure, Methodology for assessing compliance of the candidate for the position of a member of the High Council of Justice and sitting members of the High Council of Justice with the criterion of professional ethics and integrity, Article 9<sup>1</sup> of the Law of Ukraine "On the High Council of Justice", Final and Transitional Provisions of the Law of Ukraine "On Introducing Amendments into Some Legislative Bills of Ukraine Regarding the Procedure of Election (Appointment) to Positions of Members of the High Council of Justice and Activities of Disciplinary Inspectors of the High Council of Justice", we consider candidate for the position of the member of the High Council of Justice Liubomyr Viktorovych Vynar to be non-compliant with the professional ethics and integrity criteria for filling in the position of the member of the High Council of Justice.

**Lev Kyshakevych**

**Volodymyr Siverin**

**Yurii Triasun**