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Cases examined by the Committee of Ministers concerning the reform of the system of disciplinary liability in Ukraine (*Oleksandr Volkov v. Ukraine*¹) and the careers of judges (*Salov v. Ukraine*)

With regard to the amendments introduced to the Constitution of Ukraine, the relevant secondary legislation and practice on the functioning of the reformed system of disciplinary liability and careers of judges

Memorandum prepared by the Department for the Execution of Judgments of the ECHR (Directorate General of Human Rights and the Rule of Law)

The opinions expressed in this document are binding on neither the Committee of Ministers nor the European Court.

Executive summary

*The present cases concern deficiencies in the system of judicial discipline of judges, as identified by the judgments of the European Court of Human Rights in the judgments of *Oleksandr Volkov v. Ukraine* and *Salov v. Ukraine*.*

This memorandum, prepared at the request of the Ministers Deputies during their 1273rd meeting (December 2016) (DH), describes the measures already taken by the authorities, in the context of a larger reform of the judicial institutions in Ukraine, with regard to the reform of the system of discipline and careers of judges. It is based on information submitted by the domestic authorities in writing and in the course of the in-depth consultations held on 20 December 2016 between the Department of Execution of Judgments of the European Court, the Government Agent's Office and the relevant authorities involved in the system of judicial discipline and careers of judges.

The Ukrainian authorities have undertaken substantial legislative and institutional reforms in order to respond to the violations and avoid similar violations in the future. These include changes to the Constitution of Ukraine and the adoption of two major laws dealing with the functioning of the judiciary. These reforms are welcome and substantive advances in execution of these judgments. Overall, these changes are encouraging as they establish a strong foundation for the functioning of an independent and impartial judiciary.

However, certain issues, largely related to fine-tuning of the implementation of the new system of judicial discipline and careers of judges, still remain outstanding.

¹ *Oleksandr Volkov v. Ukraine* (application no. 21722/11, judgment final on 27 May 2013) et *Salov v. Ukraine* (application no. 65518/01, judgment final on 6 December 2015).



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I. SUMMARY OF THE ASSESSMENT: PROGRESS AND OUTSTANDING ISSUES

A. Reform of the system of judicial discipline and judicial careers

1. Judicial reforms in Ukraine undertaken in the period of 2014 – 2017 led to extensive institutional and legislative changes concerning the judiciary, including the adoption of Constitutional amendments in June 2016. The enacting legislation for these amendments consisted of the new laws on the Judiciary and the Higher Council of Justice (hereafter - HCJ). The reform led to structural simplification of the courts' system, introducing a three-tier judicial system, with a reformed Supreme Court as the highest level of jurisdiction. It provided for strengthening of the powers and the institutional capacity of the HCJ to deal with issues of judicial discipline and careers of judges. Such a change was aimed at assuring transparent, lawful and proportionate examination of issues of judicial discipline and careers, without undue influence of politicians.
2. These changes were substantively supported by the indications given in the judgments of Oleksandr Volkov and Salov as to the general measures which have been supervised by the Committee. This judicial reform, undertaken with the assistance of the Council of Europe and its technical advice², aims at building a foundation for a more accountable, transparent and efficient functioning of the judiciary. It introduced safeguards to assure the independent and impartial functioning of the judiciary, ensuring that no internal and external pressure would be exerted on judges and that the good reputation of the judiciary is restored. The judicial reform was welcomed as a serious achievement by recent decisions of Council of Europe bodies³ and international institutions.⁴

B. Content of the execution obligations arising from the general measures required by the *Oleksandr Volkov and Salov* judgments

3. The supervision of execution of general measures in the Oleksandr Volkov case focused on the following shortcomings identified by the European Court:
 - dismissal proceedings for a judge of the Supreme Court were held before a body that was not independent or impartial;
 - there was no effective judicial control over the decision to dismiss, due to irregularities in the setting-up and composition of the Higher Administrative Court that dealt with the applicant's appeal;
 - Parliament acted unlawfully and the MPs abused procedure in deciding to dismiss the applicant from his judicial position;
 - domestic legislation envisaged no limitation period for the dismissal proceedings;

² Notably through the work of the Venice Commission and the Council of Europe Project "Support to the Implementation of the Judicial Reform in Ukraine".

³ The PACE already welcomed the "considerable progress achieved" with Constitutional amendments of June 2016 in its Resolution 2145 (2017) "On the functioning of the democratic institutions in Ukraine" (see paragraph 5 and the Explanatory memorandum thereto, paragraph 34).

⁴ See report on the Human Rights Situation in Ukraine by UNHCHR (16 August to 26 November 2016). http://www.ohchr.org/Documents/Countries/UA/UAReport16th_EN.pdf



- the decision to dismiss the applicant was based on a notion of a “breach of oath”, which did not meet the requirements of foreseeability and did not provide appropriate protection against arbitrariness.
4. As to the supervision of the Salov case, the European Court focused on the excessively wide powers of the presidiums of the regional courts, referring in particular to the “lack of clear criteria and procedures in domestic law concerning the promotion, disciplinary liability, appraisal and career development of judges or limits to the discretionary powers vested in the presidents of the higher courts” (§ 83), as well as “the binding nature of the instructions given by the presidium of regional courts...” (§ 86). Thus, the main issues in this case were the influence of the Presidents and the Presidiums of the higher courts on the careers of judges and the substantive elements for assessment of judicial careers (judicial statistics for a particular judges, formation of a judicial dossier, etc.).

C. Status of execution of *Oleksandr Volkov* case

5. As to individual measures in the present case, the Court’s award of just satisfaction in respect of non-pecuniary damage has been paid to the applicant. As regards compensation for pecuniary damage, the Court held that it was not ready for decision and accordingly reserved that question, pending outcome of the negotiations between the parties. The authorities were invited to inform the Committee of the outcome of these negotiations. This information is still awaited. As regards the applicant’s reinstatement in his previous post, it is recalled that, in February 2015, the Supreme Court reinstated the applicant in his post.⁵
6. As regards general measures, at its examination of the case in June 2015, the Committee noted that certain measures to improve the legal framework for judicial discipline in Ukraine had been undertaken by the authorities. It also noted that only constitutional amendments could solve the problems at issue in the present case, notably with regard to the restructuring of the institutional basis of the system of judicial discipline. Therefore, the Committee encouraged the Ukrainian authorities to ensure that rapid advances were made in the constitutional reform. Further to this, in their most recent communication of 19 October 2016 (see [DH-DD\(2016\)1162](#)), the Ukrainian authorities indicated that the long-awaited constitutional reform on the judiciary had been adopted, with the assistance and in technical cooperation with the Council of Europe.⁶
7. The authorities also provided detailed information on the current legal framework relating to judicial discipline, as amended by the most recent constitutional changes and the respective secondary implementing legislation.⁷ However, considering the complexity and scope of the measures taken, and in order to give the Committee a comprehensive analysis, the Committee instructed the Secretariat to prepare a detailed assessment of the information provided as well as of the scope of measures taken and envisaged to execute the present judgment before its 1280th meeting (March 2017) (DH) with a view to enabling a full examination.
8. It appears from the measures taken by the authorities that:

⁵ See the notes of the 1230th meeting (June 2015) (DH) for full details.

⁶ Amendments of 2 June 2016 (which entered into force on 30 September 2016).

⁷ Additional information provided by the authorities on 20 January 2017, with extensive background information and legal analysis provided by the authorities that participated in the consultations of 20 December 2016.



- (a) as regards the structural issue related to the composition of the Higher Council of Justice, which was found to be lacking independence and impartiality, these issues were remedied by the respective legislative amendments.⁸ Currently the Higher Council of Justice is operating on a full-time basis, with a majority of judges in its plenary composition as well as in composition of its disciplinary chambers;
- (b) as regards the deficiencies in the appeal proceedings related to the setting up and the composition of the special chamber of the Higher Administrative Court, this issue has been remedied by the changes introduced to the domestic law. The complaints arriving to the HAC are now examined on a random basis and are shared among all chambers, on the basis of an automatic distribution of cases.⁹
- (c) as to Parliament's involvement in the dismissal of the judges, under the new Constitutional changes the Parliament has no influence on the issues of judicial discipline and careers of judges.¹⁰
- (d) as to the absence of time limitations for disciplinary liability of judges, the legislation has been amended and the newly adopted amendments introduce a 3-year limitation period for such liability.
- (e) as regards the notion of "breach of oath" as a ground for dismissal, such a ground has been abolished. The new legislation provides for a comprehensive range of grounds for disciplinary liability of judges, with a sanction of dismissal for "a grave disciplinary misconduct" of a judge.

D. Status of execution of *Salov* case

9. In their communication to the Committee of 23 January 2017, the authorities indicated that the Presidiums of the courts no longer exist and that the Presidents of the courts no longer have powers in matters of discipline and careers of judges. They further stated that some elements criticised in the judgment in the case of *Salov* have been addressed through the reforms of the system of discipline and careers of judges undertaken in the case of *Oleksandr Volkov v. Ukraine*. Furthermore, the authorities indicated that issues related to careers of judges are now within the authority of the reformed Higher Council of Justice, which is operating on a full-time basis and is composed of a majority of judges. It remains to ascertain nevertheless which criteria shall be taken into account for judicial careers and promotions.

E. Summary of the current situation

⁸ The HCJ acts on a full-time basis. It has 21 member, with 11 judges. The Disciplinary Chambers are also composed of 4 members of the HCJ who are judges.

⁹ As regards the failure of the HAC to address important arguments advanced by the applicant, it is noted that this was partly due to incorrect practice of the HAC. Such a lack of correct judicial practice can be remedied through specific training measures on enhancing the courts' handling of a party's arguments during proceedings.

¹⁰ It is also noted that a consequence of the new proposed procedure is that there will no longer be any "probationary periods" for judges who will instead be appointed to indefinite terms. Also, the President's role in final appointment of judges, on the basis of proposals of the HCJ, is of purely ceremonial nature.



10. It is to be noted that the authorities achieved substantial progress with the measures undertaken in the *Oleksandr Volkov* and *Salov* cases in the following areas:

- Reform of the institutional basis for the functioning and the composition of the HCJ, ensuring its independence and impartiality, with the ability to resist internal and external pressure;
- Introduction of the new system of appeals against the decisions related to judicial discipline and careers of judges;
- Exclusion of the Parliament from the decision-making process in the dismissal of judges and limitation of the role of the President and the executive in that process;
- Introduction of a comprehensive system of regulations and sanctions for disciplinary misconduct, which are sufficiently foreseeable and accessible, ensuring the principles of legal certainty and proportionality of sanctions;
- Judicial careers are no longer based on recommendations submitted by the Presidents of the courts or their Presidiums, with higher courts and the presidents having no influence on the promotions of judges.

11. However, certain issues remain outstanding and the authorities should provide more information on the following:

- Confirmation that the necessary regulations are in place for the election of the members of the HCJ (by the Congress of Judges, Parliament, President, Congress of the Bar and legal academia) to ensure democratic election of their representatives and their professional qualifications to assume the roles of the members of the HCJ;
- A timeframe for the completion of the procedure for filling judicial posts at the Supreme Court and the revision of legislation relating to the procedure for review of the decisions taken by the HCJ by the newly formed Supreme Court;
- An assessment of how Council of Europe standards as to the role and powers of the prosecutors in the area of discipline and careers of judges are reflected in the legislation and the Rules of Procedure for the HCJ;
- The scope of review of the case by the judicial instance following the decisions by the HCJ and whether this review would include such issues as failure to hear an important argument by the complainant, failure to apply time-limitation for a disciplinary sanction and failure to ensure independent and impartial examination of the case;
- Confirmation that the practice of application of the three-year limitation period is consistent and firmly upheld in the judicial practice;
- The development of clear guidelines on the application of disciplinary sanctions and consistent judicial practice on that subject, with an appropriate scale of sanctions for individual disciplinary offences and respect of the principle of proportionality;
- Alignment of the disciplinary sanctions with other types of judicial liability, including criminal liability of a judge;
- Importance and scope of evaluation of the judicial dossier in career of a judge;
- Procedures for appeals against the decisions as to the careers or promotions of judges.



II. DETAILED REVIEW OF THE GENERAL MEASURES TAKEN BY THE AUTHORITIES IN THE CASE OF VOLKOV V. UKRAINE

A. The scope of issues covered in the judgment of *Oleksandr Volkov v. Ukraine*

12. Considering the special circumstances identified in the judgment¹¹, the Court made specific indications under Article 46 in order to execute this judgment. As regards, *individual measures*, the Court held “that the respondent State shall secure the applicant’s reinstatement in the post of judge of the Supreme Court at the earliest possible date” (§§ 207-208).
13. As regards *general measures*, the Court noted that “the present case discloses serious systemic problems as regards the functioning of the Ukrainian judiciary” (§199). The Court indicated that Ukraine should urgently put in place general reforms in its legal system, notably by taking “a number of general measures aimed at reforming the system of judicial discipline. These measures should include legislative reform involving the restructuring of the institutional basis of the system. Furthermore, these measures should entail the development of appropriate forms and principles of coherent application of domestic law in this field” (§§ 200 + 202). The general measures were to ensure the sufficient separation of the judiciary from the other branches of State power and ensure appropriate guarantees against abuse and misuse of disciplinary measures to the detriment of the judicial independence.

B. The Constitutional amendments of June 2016 and the secondary legislation introduced in 2016 – 2017 (overview of the system of disciplinary liability as in force now)

14. The constitutional amendments with regard to the justice system were drafted in close consultation with the Venice Commission, which welcomed the fact that many of its recommendations had been taken up by the authorities. According to the new amendments, the High Council of Justice is the sole body in Ukraine competent to deal with discipline and careers of judges. The Council of Europe, jointly with the Judicial Reform Council, had provided an expertise on the draft law on the Higher Council of Justice and reportedly most of the recommendations were incorporated in the draft that was submitted to the parliament. According to the law, the High Council of Justice (HCJ) will be composed of 21 members. Ten will be elected by the Congress of Judges, two will be appointed by the President and two by the Verkhovna Rada. In addition, two members will be elected by the Congress of Lawyers of Ukraine, two by the Ukrainian Congress of Prosecutors and two by academic institutions. The Chairman of the Supreme Court of Ukraine is *ex officio* a member of the HJC. The new law gives effect to the new powers of the HCJ, with its new composition becoming effective by 30 April 2019.
15. The HCJ started its operation under the newly adopted law on the HCJ as from 4 January 2017. It adopted its Rules of Procedure on 24 January 2017 and formed its disciplinary

¹¹ The decision as to the applicant’s dismissal for alleged professional misconduct had been taken by the Higher Council of Justice, approved by the Parliament and upheld on judicial appeal by the Higher Administrative Court.



chambers on 2 February 2017. It further approved the disciplinary complaints form.¹² It has already adopted its first decisions on dismissal of judges, under the provisions of the new law, on 14 February 2017, when four judges were dismissed for “grave misconduct” of a judge.¹³ More disciplinary proceedings, with a possible sanction of dismissal, are pending before the HCJ, for judicial misconduct. These are to be examined under the provisions and according to the rules of the newly reformed HCJ.

16. Elections of the new members of the HCJ on part of the judiciary were planned to occur on 14-15 March 2017, during the Congress of Judges, with 44 candidates indicating their interest to take part in the elections to the HCJ.
17. Additionally, the competition for the judicial posts in the reformed Supreme Court is still on-going before the Higher Qualifications Commission of Judges. It is provisionally envisaged that the reformed Supreme Court would start functioning after 30 March 2017.
18. Furthermore, the Higher Administrative Court and the Supreme Court (as a second cassation appeal instance) still maintain competence over examination of complaints against the decisions taken by the HCJ, under Article 171-1 of the Code of Administrative Justice. No legislative amendments to empower the reformed and newly set-up Supreme Court to deal with such appeals have been introduced to Parliament.

C. General measures undertaken by the authorities on the basis of the findings of the European Court of Human Rights

1. As regards the proceedings before the HCJ: composition of the HCJ and personal bias of certain of the HCJ members¹⁴

19. The Court held that the proceedings concerning the applicant before the High Council of Justice (HCJ) were incompatible with the independence and impartiality principles under Article 6 § 1 in that there were structural deficiencies in them. It further noted appearance of personal bias on the part of certain members of the HCJ determining the applicant's case.¹⁵
20. As regards the objective criteria (structural deficiency of the composition of the HCJ): The Court referred *inter alia* to the European Charter on the statute for judges¹⁶ which recognises the need for a majority or substantial representation of judges on disciplinary bodies during disciplinary proceedings against judges.¹⁷ The Court noted that only four members of the HCJ worked there on a full-time basis,¹⁸ the other members receiving a

¹² Approved a decision of the Higher Council of Justice on 14 February 2017.

¹³ The formulation used in Article 126, paragraph 5, subparagraph 3 is as follows: “3) committal of a grave disciplinary misconduct, gross or systematic neglect of duty, which is incompatible with the status of a judge or which disclosed his/her incompatibility with the occupied post.”

¹⁴ Findings of the Court in §§ 109 – 117 of the judgment.

¹⁵ § 117 of the judgment.

¹⁶ See § 78 of the judgment.

¹⁷ § 109 of the judgment.

¹⁸ According to section 19 of the HCJ Act of 1998



salary outside the HCJ¹⁹ or having some affiliation with the bodies of executive power or prosecutor's office.²⁰

21. As regards the subjective criteria (personal bias of certain members of the HCJ): The Court observed that two members of the HCJ who carried out preliminary inquiries in the applicant's case and submitted requests for his dismissal subsequently also took part in the decision to remove him from office, with one of them appointed President of the HCJ and presiding over the hearing,²¹ another one being a chairman of the parliamentary committee on the judiciary, as a member of the HCJ and involved in the applicant's case.²²

22. In response to the European Court's judgments the following measures have been taken by the authorities, which can be welcomed:

- as regards the issue of objective criteria - the reformed HCJ is operating on a full-time basis and is composed of a majority of judges, in line with the European standards.²³ The same applies to the Disciplinary Chambers, formed by the HCJ, each of the chambers being formed respecting the principles above. Furthermore, the majority of the HCJ members are judges (out of 20 members, 10 will be elected by the Congress of Judges, with the President of the Supreme Court as *ex officio* member of the HCJ). Independence of the members of the HCJ is strengthened by the tenure in office of not more than two consecutive tenures of four years each, strong financial support, maintenance of a status of a judge for judges, conflict of interest rules, etc.

- as regards the issues of personal bias and the subjective criteria, - these issues have been remedied by the legislative measures. First the Law on the HCJ and the Rules of Procedure, provide that the rapporteur in the disciplinary proceedings case shall not take part in the examination of the case by the Disciplinary Chamber. Furthermore, in case of appeal, the members of the Disciplinary Chamber shall not take in hearing the appeal lodged with the full composition of the Higher Council of Justice. Furthermore, stricter rules of conflict of interest, an obligation to declare potential conflict of interest and an obligation to withdraw from the case in the event of conflict of interest are now in force. Additionally, the participation of the member of the HCJ in political or other governmental activities is forbidden. Members of HCJ act in an individual capacity and cannot exercise any other functions, being full-time members of the HCJ.

23. Nevertheless, **there are certain outstanding issues, where further information and clarifications are required from the authorities as to the following elements:**

- as to the presence of the two prosecutors in the composition the HCJ, how would any risk of pressure on judges be avoided in situations where the General Prosecutor's Office lodges submissions on particular cases concerning disciplinary or criminal proceedings against the judges²⁴;

¹⁹ § 113 of the judgment.

²⁰ § 114 of the judgment.

²¹ § 115 of the judgment.

²² § 116 of the judgment.

²³ See the European Charter on the status of judges cited by the Court in its judgment, as well as point 27 of the CM Recommendation CM/Rec(2010)12 on judges: independence, efficiency and responsibilities, adopted on 17 November 2010.

²⁴ One of the possibilities would be to exclude prosecutors from examining cases concerning judicial discipline, careers and criminal proceedings against the judges. This might be possible through the amendments to the Rules of Procedure of the HCJ.



- in order to guarantee the independence of the HCJ, what safeguards are in place to ensure the democratic election of all of the representatives to the HCJ (including by the Congress of Judges, Parliament, President, Congress of the Bar and legal academia)?

2. As regards the proceedings before the Parliament (procedure to appoint and to dismiss the judges)²⁵

24. At the outset, the Court remarked that the subsequent determination of the applicant's case by Parliament did not remove the structural defects but rather only served to contribute to the politicisation of the procedure and to aggravate the inconsistency of the procedure with the principle of the separation of powers.²⁶ It further ruled that the chairman of the parliamentary committee, as well as one of its members, were also members of the HCJ and participated in deciding the applicant's case at both levels. The Court underlined this as a structural deficiency, together with *inter alia* the issue of personal bias by the chairman of the parliamentary committee and objective structural shortcoming in that the HCJ's members could not withdraw in a given case before Parliament, as no withdrawal procedure was envisaged by the relevant legislation in force at the time²⁷. The Court further criticised the procedure before the plenary meeting of Parliament²⁸ as an inappropriate forum for examining issues of fact and law, assessing evidence and making a legal characterisation of the facts. It also ruled that the role of politicians sitting in Parliament was not compatible with the requirements of independence and impartiality of a tribunal under Article 6 § 1.²⁹ It also held that the decision on the applicant's dismissal was voted on in the absence of the majority of the members of Parliament, in breach of the principle of legal certainty.³⁰

25. **Since the Constitutional amendments and the Law on Judiciary and Status of Judges entered into force, the Parliament is no longer involved in the appointment and the dismissal of judges.** Instead, the role of the Parliament is concerned only with the selection of its two representatives on the HCJ, on the basis of an open call for candidatures and then "rating vote" for the candidatures for the position in the HCJ. A safeguard has also been introduced against Parliament's potential abuse of the possibility to recalling the candidate it appointed, through the procedure of incompatibility. This procedure can be only launched at the request of the HCJ itself. Ultimately, the decision on the final incompatibility can be then approved by the Parliament itself.

3. As regards the proceedings before the Higher Administrative Court (HAC): judicial control over the dismissal of judges³¹

26. The Court held that the judicial control exercised by the High Administrative Court (HAC) over the applicant's dismissal was insufficient, both from a structural point of view as well as

²⁵ Findings of the Court in §§ 118-122 and 143-147 and 171 of the judgment.

²⁶ § 118 of the judgment.

²⁷ Judges (Election and Dismissal) Act of 2004.

²⁸ § 121 of the judgment.

²⁹ § 122 of the judgment.

³⁰ § 145 of the judgment.

³¹ Findings of the European Court in this respect at §§ 123-130 and 150-156 of the judgment.



due to a deficient practice in his specific case. In addition, the Court held that the setting up and composition of the special chamber of the HAC hearing the applicant's case did not comply with Article 6 § 1. In particular, the Court questioned the powers of HAC to effectively review the decisions of the HCJ and Parliament, given that the HAC could declare these decisions unlawful without being able to quash them and take any further adequate steps if deemed necessary.³² Also, there was no automatic reinstatement in the post of judge exclusively on the basis of the HAC's declaratory decision.³³

27. Additionally, the Court noted that the applicant's case could be heard exclusively by a special chamber of the HAC, to be set up by a decision of the HAC's president (who is also to define the personal composition). In the instant case, however, by the time this was undertaken, the president's term of office had expired³⁴ and the chamber formed according to his directions did not satisfy the requirements of a "tribunal established by law".³⁵
28. The Court further addressed the issue of handing of the applicant's case by HAC and noted that important arguments advanced by the applicant³⁶ were not properly addressed by the HAC, in particular his allegations of a lack of impartiality on the part of certain members of the HCJ and of the parliamentary committee.³⁷ The HAC also failed to deal with the arguments as to unlawfulness of the voting procedure in a proper manner.³⁸
29. As regards the measures taken by the authorities, it is to be noted that the Higher Administrative Court still has jurisdiction over decisions taken by the HCJ.³⁹ In particular, several cases were most recently pending, which concerned issues of judicial careers and judicial discipline. The Supreme Court also has powers to review the decisions of the Higher Administrative Court in certain cases.⁴⁰ However, the newly adopted law suggests a different approach to the previous system of appeals against disciplinary decisions concerning judges. In particular, it introduces a process by which the rapporteur of the disciplinary chamber to which a case has been allocated by means of automated distribution of cases, submits a disciplinary case for review to the composition of the Disciplinary Chamber. The decision taken by the Disciplinary Chamber can then be appealed to the full composition of the HCJ. Thus, the full composition of the HCJ acts as "a second-tier tribunal". It has full jurisdiction over the facts of the case and the law applied by the respective Disciplinary Chamber.
30. The individuals concerned (both the judge participating in the procedure and the complainants) can then appeal against these decisions to the judicial body. In principle, this

³² § 125 of the judgment.

³³ § 126 of the judgment.

³⁴ § 152 of the judgment.

³⁵ §§ 155-156 of the judgment.

³⁶ Further, the HAC made no genuine attempt to examine his contentions that the parliamentary decision on his dismissal had been incompatible with domestic law, despite having competence to do so. Instead of assessing the evidence submitted by the applicant, the HAC reinterpreted his allegations as a claim about the unconstitutionality of the relevant parliamentary resolution and thereby avoided dealing directly with the issue in favour of the Constitutional Court to which the applicant had no direct access.

³⁷ § 127 of the judgment.

³⁸ § 146 of the judgment.

³⁹ See for instance a ruling of the HAC of 27 January 2017 on initiation of the proceedings before it.

⁴⁰ See Article 171-1 of the Code of Administrative Justice of Ukraine.



judicial body should be the Supreme Court but as set out below, this is yet to be defined in the procedural legislation.

31. The judicial body concerned has limited scope of review of the decisions taken by the HCJ as regards both disciplinary matters and the matters of dismissal of a judge based on “grave judicial misconduct”.⁴¹ Such an approach for a procedural framework of review of the disciplinary complaints is in principle compatible with the criteria of “full jurisdiction” and “sufficiency of review”, issues which were identified as contrary to the requirements of “fairness of the proceedings” in the judgment at issue. In particular, the full composition of the HCJ, acting as “a tribunal established by law”, can deal with allegations of lack of independence and impartiality, the manner in which the decision was arrived at and important arguments raised in the course of appeal, such as “apparent unlawfulness of the decision taken” and failure to comply with the requirement of legal certainty.
32. However, **more information is necessary from the authorities on whether the scope of review of the case by the judicial instance would include important arguments raised by the applicant**, including *inter alia* allegations of lack of independence and impartiality on the part of the members of the HCJ or failure to comply with the principles of legal certainty, including as to the time-limits for instituting disciplinary proceedings against a judge.

4. As regards absence of limitation for dismissal proceedings against judges for “breach of oath” (principle of legal certainty) ⁴²

33. The Court noted that domestic law did not provide for any time bars on proceedings for dismissal of judges for “breach of oath”. Without indicating any appropriate timeframe for such a limitation period, the Court considered that this open-ended approach to disciplinary cases involving the judiciary poses a serious threat to the principle of legal certainty.⁴³
34. The Law on the HCJ now contains a three-year limitation period. It is to be noted that the three-year time limit is to be calculated from the moment of alleged disciplinary act, with the periods of temporary inability to work or vacation periods of a judge excluded from calculation⁴⁴. This is a welcome development. However, this might also create ambiguity and difficulty in applying the limitation period, which might comprise periods of temporary inability to work or vacation periods. **Further information and clarifications are therefore required with regard to the application of the limitation period of three years.** It would be useful if the authorities could confirm whether or not the stable judicial practice in this area before the entry of the Constitutional amendments into force will be maintained.⁴⁵

⁴¹ In particular, it can only review the submission on the basis of the following criteria: the composition of the HCJ has no powers to decide on the case, the decision of the HCJ was not signed, the judge was not properly informed about the hearing and the decisions of the HCJ contains no grounds and reasons for disciplinary liability. This approach is envisaged in Article 52 of the Law on the HCJ. It is also repeated in Article 57 of the Law on the HCJ with respect to proceedings on dismissal of a judge.

⁴² Findings of the Court in §§ 135-140 of the judgments.

⁴³ § 139 of the judgment.

⁴⁴ See Article 109-11 of the Law on Judiciary and the Status of Judges.

⁴⁵ See Resolution of the chamber in administrative cases of the Supreme Court of 12 April 2016, which upheld the three-year limitation period as a period relevant for disciplinary proceedings against a judge.



5. As regards the notion of “breach of oath” as a ground for dismissal of judges (not sufficiently foreseeable and no appropriate protection against arbitrariness)⁴⁶

35. The Court noted that until 15 May 2010, the substantive law did not contain any description of the offence of “breach of oath”. The basis for construing the scope of that offence was inferred from the text of the judicial oath.⁴⁷ The latter however offered a wide discretion in interpreting the offence. The legislation in force since 2010 did specifically deal with the external elements of that offence.⁴⁸ The Court observed that that legislation still provided the disciplinary authority with wide discretion.⁴⁹ Additionally, the Court ruled that, as regard the procedural safeguards, that at the time of the determination of the applicant’s case, there were no guidelines or practice establishing a consistent and restrictive interpretation of the notion of “breach of oath”,⁵⁰ nor had any procedural safeguards been put in place to prevent arbitrary application of the relevant substantive law (no time-limits for initiating and conducting proceedings against judges for “breach of oath”; see also above).⁵¹ Moreover, domestic law did not set out an appropriate scale of sanctions for disciplinary offences and did not develop rules ensuring their application in accordance with the principle of proportionality.⁵² At the relevant time, only 3 sanctions for disciplinary wrongdoing existed (reprimand, downgrading of qualification class, and dismissal), leaving little room for disciplining judges on a proportionate basis.⁵³ In these circumstances, the Court concluded that nearly any misbehaviour by a judge occurring at any time during his or her career could be interpreted, if desired by a disciplinary body, as a sufficient factual basis for a disciplinary charge of “breach of oath” and lead to his or her removal from office.⁵⁴
36. In view of the Court’s findings, measures were required with a view to ensuring the foreseeability of the substantive law (definition of the notion of “breach of office”), as well as the existence of sufficient procedural safeguards to prevent arbitrary application of the law (guidelines; consistent practice; appropriate scale of sanctions for disciplinary offences; respect of the principle of proportionality).⁵⁵ In its opinion, the Venice Commission stressed the need to replace the notion of “breach of office” with clearly defined offences on the legislative level.⁵⁶

⁴⁶ The findings of the Court at §§ 173-187 of the judgment.

⁴⁷ Contained in section 10 of the Status of Judges Act of 1992: “I solemnly declare that I will honestly and rigorously perform the duties of judge, abide only by the law when administering justice, and be objective and fair”; see § 173 of the judgment.

⁴⁸ See section 32 of the HCJ Act of 1998, as amended.

⁴⁹ § 174 of the judgment.

⁵⁰ § 180 of the judgment.

⁵¹ § 181 of the judgment.

⁵² The European Charter on the statute for judges also provides for the principle of proportionate application of disciplinary sanctions on judges; see § 78 of the judgment. Certain States have set up a more detailed hierarchy of sanctions to meet this principle; see § 82 of the judgment.

⁵³ § 182 of the judgment.

⁵⁴ § 185 of the judgment.

⁵⁵ See also point 69 of the CM Recommendation CM/Rec(2010)12 on judges: independence, efficiency and responsibilities, adopted on 17 November 2010, which stipulates a number of procedural safeguards.

⁵⁶ See § 24 of the aforementioned Venice Commission opinion, referring precisely to the findings of the European Court in the present case.



37. The Constitutional amendments and the Law on the Judiciary and the Status of Judges have developed a comprehensive and detailed system of disciplinary liability of judges. In addition to the ethical norms regulating judicial conduct, developed by the Council of Judges of Ukraine, in a Code of Judicial Ethics,⁵⁷ the Constitution provides for the grounds of dismissal of a judge for *inter alia* committing “a grave disciplinary misconduct, gross or systematic neglect of duty, which is incompatible with the status of a judge or which disclosed his/her incompatibility with the occupied post.”⁵⁸ The Law on the Judiciary and the Status of Judges envisages 19 main grounds for disciplinary liability of judges with 6 types of sanctions, based on their severity. Additionally, it provides for dismissal of a judge for a “grave disciplinary misconduct” that might be based on 7 constituent elements.⁵⁹
38. **It appears therefore that the amendments introduced to the domestic legislation have clearly resolved the issue of lack of foreseeability and clarity of the notion of “breach of the judicial oath”,** the elements of determination of which could be applied in an arbitrary manner. However, the legislative amendments have also introduced a complex and comprehensive system of sanctions for judicial misconduct, which may prove difficult to streamline through judicial practice.
39. **The outstanding issues are therefore: development of clear guidelines on application of disciplinary sanctions, development of consistent judicial practice of the Higher Council of Justice, with appropriate scale of sanctions for individual disciplinary offences and respect of the principle of proportionality.** Furthermore, these sanctions should be aligned with other possible areas of judicial liability – criminal⁶⁰ or administrative sanctions, civil liability of a judge, sanctions for involvement in corrupt practices or sanctions for failure to comply with the rules of judicial ethics. More specifically, they should reflect the approach of no liability for interpretation of the law, evaluation of facts or evidence that judges normally perform in the exercise of their functions. Relevant measures therefore are necessary to assure that the sanctions are applied in line with these recommendations.⁶¹ These developments should be aligned with the case-law of the Court and the relevant Council of Europe recommendations on liability of judges.⁶²

⁵⁷ Code of Judicial Ethics had been adopted on 22 February 2013, with the Explanatory memorandum to it adopted on 4 February 2016.

⁵⁸ See Article 126 of the Constitution.

⁵⁹ See Articles 106 and 109 of the Law on Judiciary and the Status of Judges.

⁶⁰ A separate recommendation to review the criminal liability of a judge for “deliberately unlawful judicial decision” under Article 375 of the Criminal Code. See, the Council of Europe Opinion of the Directorate General of Human Rights and the Rule of Law “On the Draft law of Ukraine No. 2897 On Amendments to the Legislative Acts of Ukraine Introducing the Provisions on Criminal Misdemeanor Offences” (DGI(2016)16, Strasbourg, 6 December 2016.

⁶¹ See also point 66 of the CM Recommendation CM/Rec(2010)12 on judges: independence, efficiency and responsibilities, adopted on 17 November 2010, which stipulates a number of procedural safeguards.

⁶² Opinion no. 10 (2007) of the Consultative Council of European Judges (CCJE) to the attention of the Committee of Ministers of the Council of Europe on the Council for the Judiciary at the service of society (adopted at 8th meeting in Strasbourg on 21-23 November 2007.



III. ASSESSMENT OF GENERAL MEASURES UNDER THE JUDGMENT OF SALOV V. UKRAINE

A. Scope of the findings of the European Court

40. The European Court focused on the excessively wide powers of the presidiums of the regional courts, referring in particular to the “lack of clear criteria and procedures in domestic law concerning the promotion, disciplinary liability, appraisal and career development of judges or limits to the discretionary powers vested in the presidents of the higher courts”⁶³, as well as “the binding nature of the instructions given by the presidium of regional courts...”⁶⁴. Thus, the main issues in this case were the influence of the Presidents and the Presidiums of the higher courts on the careers of judges and the substantive elements for assessment of the judicial careers (judicial statistics for a particular judges, formation of a judicial dossier, etc.).

B. Outstanding issues related to the reform of the system of judicial careers

41. In their communication to the Committee of 23 January 2017, the authorities indicated that the Presidiums of the courts no longer exist and that the Presidents of the courts no longer have powers in the matters of discipline and careers of judges. They further stated that some elements criticised in the judgment in the case of *Salov* have been addressed through the reforms of the system of discipline and careers of judges undertaken in the case of *Oleksandr Volkov v. Ukraine*. **Furthermore, the authorities underlined that issues related to careers of judges are now within the authority of the reformed Higher Council of Justice, which is operating on a full-time basis and is composed of a majority of judges.**

42. While the issues of disciplinary liability of judges have been comprehensively and extensively dealt with in the new amendments to the Constitution and the Law on Judiciary and the Status of Judges, the elements and factual grounds for the judicial career or promotion of judges remain unclear.

43. Indeed, one of the objective elements of assessment of work of the judge is the “judicial dossier”⁶⁵ and the information contained in it. It appears that the “judicial dossier” contains *inter alia* information as to efficiency and delays in the administration of justice, as well as information as to the number of decisions quashed or amended by the higher judicial instances. **More information should be received from the authorities as to the practical implications related to existence of the “judicial dossier”**, collection of information to it, as well as influence of the “negative” statistical data on administration of justice by a particular judge on his judicial career. It is the quality, not the quantity that should be the

⁶³ See § 83 of the *Salov* judgment.

⁶⁴ See § 86 of the *Salov* judgment.

⁶⁵ Regulations on the procedure for maintenance of a judicial dossier, approved by the Council of Judges of Ukraine on 5 June 2015 (Decision No. 57 of the Council of Judges of Ukraine).



focus of judges' evaluation.⁶⁶ Furthermore, according to the recommendations contained in the European Charter on the statute for judges⁶⁷, decisions relating to promotions and careers of judges taken by the HCJ should be susceptible to appeal and review. The authorities are invited to provide more information in this respect and the measures they intend to take to regularise the situation.

⁶⁶ This view is further supported by the Joint opinion by the Venice Commission and the Directorate of Human Rights of the Directorate General of Human Rights and the Rule of Law on the Law on the Judiciary and the Status of Judges and amendments to the Law on the High Council of Justice of Ukraine, adopted by the Venice Commission at its 102nd Plenary Session (Venice, 20-21 March 2015) (CDL-AD(2015)007-e).

⁶⁷ See the European Charter on the status of judges cited by the Court in its judgment, as well as point 27 of the CM Recommendation CM/Rec(2010)12 on judges: independence, efficiency and responsibilities, adopted on 17 November 2010.