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CONSULTATIVE COUNCIL OF EUROPEAN JUDGES (CCJE)

Opinion of the CCJE Bureau

following a request of the Association of Judges of Ukraine

concerning the issues related to the transfer of judges

in the context of re-organisation of the court system

INTRODUCTION

1. The CCJE was requested, on 10 August 2023, by the President of the Association of Judges of Ukraine, acting on behalf of a group of judges, to provide an opinion concerning the draft Law (Bill # 5456-Д) reviewed by the Verkhovna Rada (Parliament) of Ukraine on 20 March 2023. This draft reportedly regulates issues of the judicial system in Ukraine and in particular touches upon the transfer of judges in the context of re-organisation of the court system.
2. When addressing the CCJE, the President of the Association of Judges of Ukraine recalls that the judicial system of Ukraine was reformed several times, and, as a result of the constitutional reform of 2016, a three-branch judicial system (local courts, courts of appeal, Supreme Court) was introduced. However, there was no legal mechanism governing the termination of the old courts, in particular of the Higher Specialised Court for Civil and Criminal Cases, the Higher Economic Court and the Higher Administrative Court (the HSCU, the HECU, the HACU) as the legal entities in line with the principle of legal certainty established by the Constitution of Ukraine. This situation reportedly resulted in judges of the HSCU, the HECU and the HACU *de facto* being prevented from carrying out their professional activities although they still have the status of judges and have not been officially dismissed.
3. The above-mentioned draft Law (Bill # 5456-Д) reportedly does not guarantee that these judges will retain their status, and it includes the provisions that they may be transferred to lower courts (courts of appeal or local courts) without their consent, and that they may not be transferred to the higher specialised court without a competition.
4. Furthermore, according to this draft Law (Bill # 5456-Д), the judges transferred to other courts and those intending to resign shall reportedly benefit from the same status and social welfare services as the judges of the higher specialised courts. However, following several legislative changes, what is meant by such specialised courts now is not what it was meant before, with the consequence that the status and conditions of service of some of the judges concerned may in some cases be downgraded.
5. The President of the Association of Judges of Ukraine consequently concludes that the adoption of the above-mentioned draft Law (Bill # 5456-Д) may undermine the stability of the judicial system and the principle of independence of judges, and accordingly asks the CCJE to provide an opinion on the subject.
6. Having examined the letter of the President of the Association of Judges of Ukraine in the light of European standards, including the Council of Europe Committee of Ministers' Recommendations, the CCJE and the Venice Commission Opinions as well as other relevant standards, the CCJE Bureau issues the following Opinion:

OPINION

7. In general terms, the security of tenure of judges and their permanent appointment until the statutory age of retirement are a corollary of independence of judges.¹
8. As the CCJE Bureau already underlined in its Opinion following a request by the CCJE member in respect of the Slovak Republic as regards the reform of the judiciary in the Slovak Republic, in considering the issue of transfer of a judge to another court, this matter is envisaged in Recommendation CM/Rec(2010)12 of the Committee of Ministers to member States on judges: independence, efficiency and responsibilities (Recommendation CM/Rec(2010)12) as follows: “A judge should not receive a new appointment or be moved to another judicial office without consenting to it, except in cases of disciplinary sanctions or reform of the organisation of the judicial system”.²
9. It is important to reiterate in this context that, in the CCJE Bureau’s opinion, the above-mentioned paragraph regarding a possibility of transferring a judge without his/her consent cannot be viewed and understood separately from other principles aimed at establishing standards of irremovability and consequently independence of judges. For that reason, such transfers may comply with European standards only provided that the principles of security of tenure and irremovability, as key elements of the independence of judges, are observed.³
10. Accordingly, judges should have guaranteed tenure until a mandatory retirement age, where such exists,⁴ the term of office of judges should be established by law,⁵ and a right to remedy should be guaranteed.⁶ Furthermore, “where judges consider that their independence is threatened, they should be able to have recourse to a council for the judiciary or another independent authority, or they should have effective means of remedy”.⁷
11. Although the CCJE’s Magna Carta of Judges does not expressly address the issue of transfer of judges, it points out that judicial independence should be guaranteed in respect of judicial activities and in particular in respect of recruitment, nomination until

¹ See CCJE Opinion No. 1 (2001) on standards concerning the independence of the judiciary and the irremovability of judges, paras 52 and 57.

² Recommendation CM/Rec(2010)12, para 52. See also the CCJE Bureau’s Opinion following a request by the CCJE member in respect of the Slovak Republic as regards the reform of the judiciary in the Slovak Republic (CCJE-BU(2020)3, 9 December 2020), page 3, Section B.

³ CCJE Bureau’s Opinion following a request by the CCJE member in respect of the Slovak Republic as regards the reform of the judiciary in the Slovak Republic (CCJE-BU(2020)3, 9 December 2020), page 3, Section B.

⁴ Recommendation CM/Rec(2010)12, para 49.

⁵ Recommendation CM/Rec(2010)12, para 50.

⁶ Recommendation CM/Rec(2010)12, para 8.

⁷ Recommendation CM/Rec(2010)12, para 8.

the age of retirement, promotions, irremovability, training, judicial immunity, discipline, remuneration and financing of the judiciary.⁸

12. The Venice Commission underlined in particular that the irremovability of judges is recognised in the case law of the European Court of Human Rights and in a number of international reference documents as an important safeguard for the independence of judges. While the principle of irremovability is not absolute, as a general rule, the transfer of judges without their consent is only permissible in exceptional cases, such as general reforms of the judicial system and as a result of disciplinary sanctions.⁹
13. In a similar way, the European Charter on the statute for judges (1998) stipulates in dealing with matters of appointments and irremovability 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. An exception to this principle is permitted only in the case where transfer is provided for and has been pronounced by way of a disciplinary sanction, in the case of a lawful alteration of the court system, and in the case of a temporary assignment to reinforce a neighbouring court, the maximum duration of such assignment being strictly limited by the statute.¹⁰ In the case of decisions affecting selection, recruitment, appointment, career progress or termination of office of a judge, the Charter envisages the intervention of an authority independent of the executive and legislative powers within which at least one half of those who sit are judges elected by their peers following methods guaranteeing the widest representation of the judiciary.¹¹
14. As regards the claim that the transfer of judges to the lower courts without their consent may have some consequences for their conditions of service, including salaries and pensions, the CCJE Bureau recalls that the Committee of Ministers of the Council of Europe underlined in the above-mentioned Recommendation CM/Rec(2010)12 on judges: independence, efficiency and responsibilities (Recommendation CM/Rec(2010)12) that “judges’ remuneration should be commensurate with their profession and responsibilities, and be sufficient to shield them from inducements aimed at influencing their decisions. Guarantees should exist for maintaining a reasonable remuneration in case of illness, maternity or paternity leave, as well as for the payment of a retirement pension, which should be in a reasonable relationship to their level of remuneration when working. Specific legal provisions should be introduced as a safeguard against a reduction in remuneration aimed specifically at judges”.¹²
15. The CCJE also stressed that it should be ensured that all judges of the same seniority receive the same remuneration, with the exception of any specific additional remuneration for special duties.¹³

⁸ CCJE Magna Carta of Judges (2010), para 4.

⁹ Venice Commission Opinion on the December 2021 Amendments to the Organic Law on Common Courts in Georgia (Venice, 17-18 June 2022), see also Venice Commission Report on the Independence of the Judicial System. Part I: The Independence of Judges (Venice, 12-13 March 2010), para 43.

¹⁰ European Charter on the statute for judges (1998), para 3.4.

¹¹ European Charter on the statute for judges (1998), para 1.3.

¹² Recommendation CM/Rec(2010)12, para 54.

¹³ CCJE Opinion No. 15 (2012) on the specialisation of judges, para 56.

16. The CCJE also mentioned sufficient remuneration of judges among basic safeguards of judicial independence.¹⁴ Moreover, adequate salaries, retirement pensions and other social benefits, a manageable workload, a proper working infrastructure and job security for both judges and court staff are vital for the legitimacy and good reputation of a judicial system. These are also important safeguards against corruption in the judiciary.¹⁵
17. The Venice Commission also emphasised that the remuneration of judges has to correspond to the dignity of the profession and that adequate remuneration is indispensable to protect judges from undue outside interference. The level of remuneration should be determined in the light of the social conditions in the country and compared to the level of remuneration of higher civil servants. The remuneration should be based on a general standard and rely on objective and transparent criteria.¹⁶

C O N C L U S I O N S

18. The CCJE Bureau considered the disputed draft Law (Bill # 5456-Д), particularly as regards its reported provisions on the transfer of judges to the lower courts without their consent which may also have some consequences on their conditions of service, including salaries and pensions, from the point of view of the above-mentioned international advisory instruments.
19. The CCJE Bureau concludes, as it did previously in a similar case,¹⁷ that the adoption of these provisions providing for a transfer of judges to a lower court without their consent when changing the system of courts will comply with European standards only provided that principles of security of tenure and irremovability as key elements of the independence of judges are observed. In this respect, precise and clear provisions should be established at the legislative level.
20. As regards in particular maintaining the same level of salaries and pensions after such transfers, the CCJE Bureau notes that the international advisory instruments do not provide exact quantitative indicators as regards the specific amounts or percentages for remuneration to be allocated to judges.
21. In the opinion of the CCJE Bureau, and in line with international advisory instruments, the importance of judges' mission and the dignity of their office should be taken into account when considering the levels of their remuneration. Therefore, although member States have a margin of appreciation, in the particular situation occurring now in Ukraine

¹⁴ CCJE Opinion No. 18 (2015) on the position of the judiciary and its relation with the other powers of state in a modern democracy, para 35.

¹⁵ CCJE Opinion No. 21 (2018) on preventing corruption among judges, Chapter V. Conclusions and recommendations, clause (g).

¹⁶ Venice Commission Report on the Independence of the Judicial System. Part I: The Independence of Judges (Venice, 12-13 March 2010), para 46.

¹⁷ This is in fact the same conclusion as the one reached by the CCJE Bureau in a similar case in the Slovak Republic (CCJE Bureau's Opinion following a request by the CCJE member in respect of the Slovak Republic as regards the reform of the judiciary in the Slovak Republic (CCJE-BU(2020)3, 9 December 2020, page 7).

where a group of judges has already reached certain level of seniority, based on their professional experience and qualifications, even if they are transferred to lower courts, it would be advisable to ensure that their remuneration is maintained at the same level. In this way, these judges would not have to bear the brunt of the changes in the judicial system and would continue being remunerated according to their level of seniority based on their professional experience and qualifications.