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Expert opinion
on the Draft Law of Ukraine on the Judiciary

and

on the Draft Law of Ukraine on the Status of Judges

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1 GENERAL

The present opinion is made on the Draft law of Ukraine on the Judiciary and Draft law of Ukraine on the status of judges, which have been approved by the National Commission on Strengthening Democracy and the Rule of Law on 11 July 2006.

The paper at hand is aiming at the illustration of some aspects of international and supranational standards, governing the status of judges and the functioning of the judiciary against the background of the principles of separation of powers, the rule of law, and the independence of the judiciary.

The following thoughts have no intention to express an opinion on issues of the interpretation of the constitution, or other legal provisions of the national legal system of Ukraine concerning the status of judges and the role of the judiciary. The comments will only refer, to a certain extent, to common accepted rules for the application of the law, with which authorities of the Ukraine are more than familiar, and only in so far as these comments could potentially be helpful to guide a more comprehensive delineation of the deliberations of the lawmakers in Ukraine.

The opinion is based primarily on the following legal documents and sources:

- European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR, 1950);
- The International Convention on Civil and Political Rights (1966);
- The Charter of Fundamental Rights of the European Union, adopted in Nice, 2000;
- United Nations Basic Principles on the Independence of the Judiciary (1985);
- Recommendation No. R(94)12 of the Committee of Ministers of the Council of Europe to Member States on the Independence, Efficiency and Role of Judges;
- The European Charter on the Statute for Judges, approved by the Council of Europe in Strasbourg (1998);
- The European Parliament Resolution on the Annual Report on Respect for Human Rights in the European Union (1998 and 1999, adopted on 16th March 2000);
- The Universal Charter of the Judge, unanimously approved by the Central Council of the International Association of Judges, 1999, Taipei;
- The Statute of the Judge in Europe, approved by the European Association of Judges in 1993;
- Statements by delegates of high councils of judges or judges' associations, 1997, Warsaw;
- Bejiing Statements on Principles of the Independence of the Judiciary in the Lavasia region (August 1997);
- Opinions no. 1, 3, 4, 6 and 7 of the Consultative Council of European Judges, Strasbourg (2000 – 2005);

- Final conclusions of the First Study Commission of the International Association of Judges, concerning judicial councils, role of presidents of courts, judicial ethics and assessment of judges (2001-2006);
- Case law of the European Court for Human Rights, Strasbourg.

While each state presents a unique set of circumstances, a number of common features mark the European Union aspirant countries and should be kept in mind when developing standards designed to encompass all of efforts to achieve a real degree of separation of powers, rule of law and judicial independence.

The areas in which the candidate states generally have short-comings are:

1. Weak commitment to a culture based on the rule of law;
2. Insufficient institutional independence of, and material support for the judiciary and;
3. Undue executive interference with the administration of the judiciary.

Perceptions persist that judicial processes should or do hew to current political priorities and that judges implement state policy. These perceptions contribute to popular distrust of judges. This lack of public and political trust can have serious consequences for judicial independence as it undermines support for needed reforms and can encourage incursions on judicial prerogatives.

Meaningful judicial independence rests not only on sound principles and social attitudes, but on careful attention to the effects of administrative structures regulating the judiciary. Many EU candidate and member states have developed independent judicial councils to administer the judiciary on matters such as discipline, court management, appointments and promotions. Councils can be a useful solution to the problems of executive interference. When a state chooses not to create a truly independent judicial council, it must ensure that the alternatives are put in place that contain explicit and robust institutional guarantees for the neutrality of procedures applied to the judiciary, provide judges with meaningful input and ensure that independence is maintained in fact. Insufficient institutional independence and material support are in part symptoms of the larger problem of executive control: where another branch is responsible for the judiciary, it will always have incentives and opportunities to make the judiciary a lower priority, unless public expectations demand otherwise.

The problem of executive control is especially acute in countries where the judiciary's institutional independence is poorly established. Part of the solution is to clearly insulate the judiciary from undue executive (or legislative) involvement through unambiguous constitutional guarantees and the creation of institutions – within the judiciary or with substantial judicial representation – to administer the judiciary and judge's careers in a neutral manner. The continuing assumption, both in the other

branches and in the judiciary, that executive involvement in judicial administration is necessary because the judiciary is ill – prepared to administer itself, must be confronted and rejected[1].

2 DRAFT LAW OF UKRAINE ON THE JUDICIARY

2.1 COMMENTARY ON INDIVIDUAL ARTICLES

The very first paragraph should be amended by the heading "Scope of application". It is important that the law on the one hand delineates the scope of its application and, on the other hand, leaves enough broad and inclusive interpretation of the notions regulated herein, in order to overcome any difficulties that may arise as to whether certain issues should be regulated by this law.

Article 1

One essential precondition for the protection of human rights and fundamental freedoms is that the individual judges and the judiciary as a whole are enjoying independence. Every guarantee a given law is establishing for the protection of judicial independence is not aimed at favouring the judges, but is considered as a precaution to safeguard the fundamental right of the individual to an independent and impartial judge in each case that is brought before the courts. The importance of independence and impartiality of courts, established by law, should therefore be declared in the very first article of the Law on Judiciary, and should at the same time serve as an essential guarantee to honour the provisions of the European Convention of Human Rights (article 6) and Ukrainian constitutional principles [see, for example, Principle I., paragraph 2 of the Recommendation No. R(94)12].

The conference of the presidents of the associations of judges of Central and Eastern Europe (Council of Europe, May 13th – 15th 1998, Budapest), noted in its conclusions that the independence of the judiciary is a citizens' right, therefore each reform of legal institutions, carried out guided by the rules of democracy, needs to pursue the aim to protect the independence of courts, as well as the independence of every single judge.

When referring to Article 6 of the Constitution of Ukraine, the law may use the term "separation" instead of the term "division" of powers.

For the same reasons as stated above, the law should provide for judicial power to be executed (performed) by judges through appropriate judicial procedure, as prescribed by the law. By excluding

[1] See Monitoring the EU Accession Process: Judicial Independence; Country Reports 2001, Central European University Press, Budapest, New York.

the definition of civil, commercial, administrative, criminal or constitutional procedure contained in the current draft, the law would provide a possibility to perform justice in other procedures, such as court annexed alternative dispute resolution procedures, specialised, summary procedures, optional procedures, etc.

Proposed wording:

1. Judicial power in Ukraine shall be performed by independent and impartial courts, established by the law, and based on the principle of separation of powers, as provided for by article 6 of the Constitution of Ukraine.

2. Judicial power shall be performed by judges through the administration of justice in appropriate judicial procedures. Judicial procedures shall be administered by the Constitutional Court of Ukraine, and the courts of general jurisdictions.

Article 2

The proposed wording could cause serious controversies in the application of the law by judges. On the one hand, it deals only with rights and interests of individuals or legal entities, but not with their obligations, or criminal charges against them[2]. On the other hand, the law determines standards for application which could be incompatible with the recognised European standards of decision-making processes, because it requires the courts to secure the interests of the public and the interests of the state. The principle of separation of powers means that the legislative, the executive and the judicial branch of a democratic state, ruled by law, are separated from each other and sufficiently independent, and that a balance between them is established, which guarantees that each power alone is acting strictly within its own competence, and lastly, a judicial control of all public acts is instituted. This means that the judiciary ultimately decides whether an action or decision of one of the respective branches of the state is lawful. Therefore, the objective of the justice system can *not* be to secure the interests of the state. In short, the purpose of court proceedings can *not* be to please the state, but to apply and abide by the law.

Proposed wording:

While determining civil rights and obligations, or any criminal charges against any individual or legal entity, courts and judges shall ensure the right of everyone to a fair trial, and respect for other human rights and fundamental freedoms as guaranteed by the constitution and laws of Ukraine.

[2] See United Nations Universal Declaration of Human Rights of December 10th 1948, article 10, ECHR, article 6, paragraph 1.

In the decision-making process, judges have unfettered power to decide cases impartially in accordance with their conscience and their interpretation of facts, and in pursuance of the prevailing rules of the law.

Article 3

It is unclear whether the paragraph 4 prohibits military courts as well as specialised courts, like family courts, labour courts. When comparing the development in many European jurisdictions, it would be wise to leave broad enough wording which would allow for the establishment of specialised courts if and when needed.

Article 5

In order to strengthen the exclusive authority of courts for the administration of justice, it is suggested to insert a provision that no organ (body) other than courts themselves should decide on their own competence, as defined by the law[3] .

Proposed wording:

In paragraph 1, a new second sentence should be added as follows: 'No organ than the courts themselves should decide on their own competence, as defined by the law.'

Article 6

In paragraph 1, the term "dependence on any influence" should be further strengthened, by using standard wording from Recommendation R (94)12 or from the Universal Charter of a Judge of the International Association of Judges.

Proposed wording of the second sentence of the first paragraph:

In the decision-making process, judges should be independent and be able to act without any restriction, improper influence, inducements, pressures, threats or interferences, direct or indirect from any quarter or from any reason.

Paragraph 3 limits the exceptions to the regulatory framework of procedural law. One could imagine a situation when the substantial law (for example the Law on Legal Aid) would be a legitimate ground for such exceptions, too.

Proposed wording:

Delete the word "procedural".

[3] See principle II a, paragraph III of Recommendation R(94)12.

The text of paragraph 5 is too narrow, because judicial self-government should be applied only in order to solve such problems that pertain to the internal activity of courts, and not to other issues or challenges.

Proposed wording: The term “issues” shall be used instead of the word “problems”.

Article 7

Bias is just one aspect of individual partiality. Therefore, it is suggested to use the word “impartial” instead of the word “unbiased court”. “Impartial” court is a universally recognised and used term[4].

Proposed wording: Delete the word “unbiased” and replace it with the word “impartial”.

Article 9

It seems that this article regulates both legal representation and legal aid; yet these can be interrelated or separate issues. The provision is too narrow, because it provides legal assistance and aid just for the purposes of court hearings, and not for the whole judicial proceedings from the lodging of a written lawsuit or defence onwards.

Proposed wording of paragraph 1: Each person has the right to legal assistance in order to initiate court proceedings, and during such proceedings.

Article 10

Referring to the case law of the ECHR[5], not only do the parties to the dispute, but any third person does have a legitimate right to access to any court decision.

At least all Supreme Court and other important court decisions should be accessible through Internet sites at no expense, as well as in print upon reimbursement of the cost of reproduction only; however, appropriate measures should bee taken in disseminating court decisions to protect the privacy of interested persons, especially parties and witnesses[6].

[4] See, for example, article 6, paragraph 1 of the ECHR.
[5] See, for example, judgements Szucks v. Austria and Werner v. Austria from 24th November 1997.

[6] See CCJE, Opinion No. 7 on Justice in Society, 2005, paragraph D1-D4.

Proposed wording of paragraph 1:

Nobody shall be limited in the right to receive in a court the written or verbal information about the results of consideration of his or her case by court. Any non-party to the court proceedings has the right of free access to the court decision, unless otherwise prescribed by the law.

The second sentence of paragraph 2 somewhat contradicts the third sentence of the same paragraph, and could, as a result, cause serious problems in the daily practice.

Proposed wording of the second sentence of paragraph 2:

Participants in court proceedings and other persons, attending open judicial hearings, may not use portative audio technical means, unless allowed by written permission of the court, issued in advance.

Article 13

ECHR does not provide for the right of everyone to appeal in civil or administrative disputes. It is up to the respective state to decide whether such a right should be unlimited. The experience of various jurisdictions in Europe that have such a provision shows that unlimited right to appeal could cause serious problems in terms of length of proceedings and judicial backlogs. It is worthwhile considering whether such unlimited right to appeal in all kinds of judicial proceedings is necessary. A system of "leave to appeal" has been recommended by the CCJE[7].

New article 14 a

Besides the right to access to court established by law, statutory law should provide for the right to a legitimate or lawful judge. The allocation of cases should not be influenced by any person concerned with the results of the case. The right to a lawful and legitimate judge is one of the basic principles in continental Europe, and it is therefore strictly protected either in the constitutions of the states, or in the rulings of the European Constitutional Court. For example, the German (Bonn) Constitution determines in article 101, paragraph 1: 'Nobody can be denied the right to a legitimate judge.' The Italian Constitution ascertains in article 25, paragraph 1: 'Everybody has the right to be judged by a natural judge, defined by a legal provision.' The French Constitution has no special provision, but the Constitutional Council interpreted the general clause on equality as it derives from the constitution, so that the later includes the demand for a natural judge. The Slovenian Constitution does also provide in article 23 that an individual can be judged only by a judge, selected by the rules defined in advance by law and the court order.

[7] See Opinion No. 6 on Fair Trial within a reasonable time, 2004, paragraph 138.

The right to a lawful judge is an important systemic security device against corruption in the justice system. The rules for allocating cases to judges must be determined in advance, so as to avoid the selection of a judge who might have a potential or actual conflict of interest.

Proposed wording of a new article 14 a:

Every party to the court proceedings is entitled to a lawful judge selected by the court rules defined and published in advance, by automatic allocation of cases according to alphabetic order.

Article 17 (paragraph 3, points 3 and 4)

It is not clear who nominates judges for the post of chair of the court. If the nomination comes from a reserve designed by Council of Judges, the law should define objective criteria for the nomination and appointment, in order to exclude the risk of favouritism, conservatism and cronyism ("cloning"), which exists if appointments are made in an unstructured way, or on the basis of personal recommendations.

Objective criteria must seek to ensure that the selection and career of judges, nominated and appointed for administrative posts, are based on merit, having regard to qualification, integrity, ability and efficiency.

It is a recommended European standard[8] that the appointing authority should provide reasons (in writing) for its decision, to ensure insight into the criteria applied. The law should also ensure the right of a candidate to appeal against the decision of an appointment.

In order to provide transparency of the procedure for the post of the chief of the court, such a vacancy should be publicly announced, and candidates for the appointment should be invited to apply for such a post. Thus, the procedure for the reserve could be approved by the Congress of Judges of Ukraine, but the criteria which should be applied to design such a reserve must be laid down by the law. Due to importance of the appointment of a chair of a court, the law might require that such a decision is adopted only if a two-third majority of both, i.e. of the members of the Council of Judges on the one hand, or the Plenary meeting of the Supreme Court on the other hand, vote for such a candidate.

The CCJE also recommended mandatory training courses on management and court administration, to be completed by the candidates who apply for the post[9].

Article 21, paragraph 2

The law introduces the criteria of seniority for those who will act as deputy chairs. It is necessary to note here that CCJE considers that although adequate experience is a relevant precondition to

[8] See Consultative Council of European Judges – CCJE Opinion No. 1 for the attention of the Committee of Ministers of the Council of Europe on standards concerning the independence of the judiciary and the irremovability of judges.
[9] See Opinion No. 4, paragraph 31.

promotion, the seniority in the modern world is no longer generally accepted as a governing principle to determine promotion[10].

Lessons learnt from management and administration of medium-size or bigger first instance courts suggest that the president of the court (chair) should have a person to delegate certain tasks to. In many jurisdictions, vice-presidents are appointed not only to replace the absent president, but also to relieve him/her of the excessive burdens of administrative tasks from the presidents of courts (compare also article 22 paragraph 3 of this law).

Referring to the assignments of the presidents (chairs) of courts, it is obvious that the law overloads them with certain administrative tasks, which could be performed by a court administrator (compare, for example, article 37, paragraph 1, point 8).

Courts should employ trained managers who know how to plan court operations, perform budgeting tasks and manage court infrastructure and personnel. Transfer of clearly delineated powers and meaningful tasks to these professional officials is therefore recommended[11].

Courts could also improve efficiency by employing trained junior legal and administrative staff for specific quasi-judicial and non-judicial tasks, such as the non-contentious register and records or case management; junior staff positions with competences similar to those established in Poland or in Germany and France ("Greiffiers", "Rechtspfleger") could be considered and defined by this law.

Article 37

The proposed text under point 3 of paragraph 1 provides that the Chief Justice of the Supreme Court of Ukraine convenes the plenary meeting of the Supreme Court and submits the issues for consideration of that meeting. In case of an expired term of his office as the Chief Judge, the law should provide for a mandatory convention of a plenary meeting of the Supreme Court not later than 3 months before his term of office expires, in order to ensure timely (re-)election. It is extremely important that the highest judicial body has an elected president which represents the third state branch. Lessons learnt from countries in transition in Europe teach us that one of the regrettable ways how to weaken the judiciary is to keep the post of the president of the Supreme Court vacant for an unreasonably long time.

Article 38

See remarks to article 17 as regards lack of transparent, objective criteria for appointment.

[10] See Opinion no. 1.
[11] CCJE, Opinion No. 6; Monitoring the EU Accession Process Judicial Capacity, 2002, page 48.

Article 49

This article is one of the most important provisions of the Law on the Judiciary, because it defines the powers of the High Qualifications Commission of Judges of Ukraine. In paragraph 1, point 1 the law states that the High Qualification Commission makes decisions regarding the recommendation of a candidate for the position of a judge, or the election of a judge for an open-ended term. It is worth mentioning here that unsuitable systemic solutions are known to encourage corruption in the justice system. It is essential that judges are outside an illegitimate influence range over the legislative and executive powers, as well as of other social groups. In all those European states, where a political body elects or appoints judges, this has proven to be problematic, because in many cases the political body has rejected the recommendations or proposals of the independent/autonomous bodies on the grounds of the candidate's value system or philosophy of life, or simply due to previous judgements rendered. Interestingly enough, a survey of the World Bank has revealed that judges see the most important reason for a corrupt justice system in the procedure of selection and appointment of judges. The CCJE therefore considers that every decision relating to a judge's appointment or career should be based on objective criteria and be taken based on the intervention of an independent authority - in most countries named as the Judicial Council or High Council of Justice -; this intervention can be given in the form of an opinion, recommendation, proposal or appointment. The political or administrative authority which does not follow this body's intervention should, at the very least, be obliged to make known the reasons for its refusal to do so[12].

To summarise: any written recommendation of the High Qualification Commission to the selection authority requires a written decision of that authority, which could be appealed by any candidate. It is therefore suggested to insert the above mentioned safeguard into draft law.

Article 54

The law does not provide for the High Qualification Commission's – an independent state body - own budget (to cover material expenses, investments, day-to-day operations). This represents a serious weakness, undermining the independence of that body. The state has a duty to ensure that the High Qualification Commission has all means necessary to accomplish its tasks properly[13].

Proposed wording of a new paragraph 4:

[12] See European Charter on the statute for judges, explanatory memorandum, paragraph 1.3.

[13] See European Charter on the statues for judges, paragraph 1.6.

The High Qualification Commission is an independent state budget user. The budget of the High Qualification Commission shall be prepared and proposed by the High Qualification Commission to the Government of Ukraine (or alternatively, to the Verkhovna Rada of Ukraine).

Articles 56 and 57

The composition of the Disciplinary Commission of Judges of Ukraine follows the criteria set forth in the European Charter for statute of judges, paragraph 5.1., as well as in principle VI of recommendation R(94)12. However, the law does not contain any provision to the effect that non-judicial members of the Disciplinary Commission can not be members of the parliament, government or the administration[14].

Proposed amendment to paragraph 2 of article 57:

Members of the parliament, government or state administration can not be elected to the Disciplinary Commission of Judges of Ukraine (or to the High Qualification Commission).

Article 59

Paragraph 3 of this article is not compatible with the standard international requirement that substantial judicial representation of the disciplinary body is a pre-condition for such a body to be deemed as independent, guaranteeing full right of defence to an accused judge[15]. A majority of votes within the Disciplinary Commission is formed by 8 members attending a session; therefore a scenario is conceivable in which non-judicial members, attending such a session, have higher representation than judicial members.

Proposed wording of paragraph 3:

A meeting of the Disciplinary Commission of Judges of Ukraine shall be considered as duly competent if attended by all its members.

Article 62

The draft law does not provide for any assurances for a right to appeal the decision of the Disciplinary Commission to a body (court) which is responsible to hear the appeal, nor whether the judge has a fully guaranteed right to a fair trial, including the right to legal representation, nor the procedure to be followed.

[14] See CCJE opinion no. 3, paragraph 71.
[15] See CCJE, opinion no. 3, paragraph 71.

Article 63

As regards the initiation of disciplinary proceedings, the law should envisage a separate disciplining body responsible for receiving complaints against judges, and serving as a filter preventing that dissatisfied litigants would bring manifestly ill-grounded charges against judges. This body, which would be separate from the Disciplinary Commission, should consider whether or not there is a sufficient case against a judge to call for the initiation of proceedings[16].

The draft law does not stipulate who is the authority filing the disciplinary charges after the disciplinary inquiry is completed. It is suggested to take into consideration whether a disciplinary prosecutor could be established to perform the described tasks.

Article 64

See remarks on Article 54.

Article 68

The law should clearly define which are "pertinent decisions, binding for the judges of a given court", adopted by this meeting of judges (paragraph 3, I) in order to avoid any misunderstanding and/or contradiction to the recognized standard that "decisions of judges should not be the subject of any revision outside any appeals' procedures as provided for by the law"[17].

Article 73

One of the most important tasks of the Council of Judges will be the selection and proposal of candidates to fill in positions of chairs and deputy chairs of respective courts.

The law should therefore prescribe transparent and objective criteria for the nomination, the procedure, the duty to issue a written proposal with a motivation, the question whether such a proposal shall be made in a way that allows for the proposition of only one or an unlimited number of nominees.

Article 74, paragraph 2, point 5

The text of this paragraph contradicts Article 57, paragraph 1, according to which the Conference of Judges, and not the Congress of Judges, appoints the members of Disciplinary Commission.

[16] See CCJE opinion no. 3, paragraph 77, II.
[17] Principle 1, paragraph 2a, Recommendation R(94)12.

Article 76

Regarding the powers of the Congress of Judges of Ukraine, it would be contrary to the principle of the rule of law if the number of delegates, composing the congress, would not be fixed and determined by the law, as it is the case in the proposed text.

Article 77, paragraph 6

Voting by secret ballot is not envisaged for the election of the members of the Council of Judges of Ukraine.

Articles 78, paragraph 5, point 6 and point 7

There are no objective criteria laid down in a statute for appointments of chairs of the courts.

The law is inconsistent, since it provides for the possibility that either the Congress of Judges of Ukraine or the Council of Judges of Ukraine appoints members of the High Qualification Commission and the Discipline Commission of the Judges of Ukraine. The law should be clear about the authority in this respect.

Article 82

The main deficiency of this article is that it does not prescribe who prepares and submits the draft budget for the judiciary to the government or to the parliament. The State Judicial Administration, the Supreme Court, the Constitutional Court and Specialised Courts are responsible only for the allocation of funds within the already adopted state budget. The budget is, of course, ultimately subject to the decision by parliament. However, the judiciary should not be left without representation at a crucial stage, when the budget is discussed in the Cabinet (government) and in the parliament. Placing the authority for the preparation and submission of a budget proposal in the hand of an independent body – the Council of Judges of Ukraine or the High Council of Justice of Ukraine could limit the executive ability to curtail judicial independence. “The independence of the judiciary is also dependent on adequate budgetary allocations for the administration of justice and the proper use of those resources. This can be best achieved by an independent body which has responsibility for the allocation of those resources.”[18]

Nevertheless, if the Judicial Council, or a similar autonomous body, only allocates money, then it only waits what other powers of state will give to the judiciary. It could play a much more important role, if it

[18] Final conclusions of the First study Commission of the International Association of Judges, Vienna, 2003.

is authorised to negotiate the judicial budget with the government and the parliament. Therefore, an autonomous body with substantial judicial representation should play a significant role in presenting and defending the judicial budget before the parliament. The parliament will still allocate funding, but solutions such as mandatory funding levels, or multi-year funding, or block appropriations can reduce the scope of political interference.

In the new European Union member states, responsibility for formulating the budget for the judiciary and for allocating it to individual courts is, as a general rule, in the competences of the same body that controls the administrative operation of the court system. Where judicial councils exercise significant administrative control over courts (Bulgaria, Hungary, Slovenia), they are involved in the budget process to a significant degree. The judiciary's freedom to operate independently can be seriously underminded, if it is unduly beholden to other branches for its material well-being[19].

Provisions for clear and detailed protection should be made to ensure that funding is not used to punish judges or to chill their decision-making.

Article 87

Referring to the commentary on Article 82, it is suggested to modify the text in such a way that the operation of the State Judicial Administration of Ukraine would be supervised by and accountable to the Council of Judges of Ukraine or to the High Council of Justice of Ukraine.

The control over the environment in which judges perform their duty is not always the focus of consideration when discussing the independence of judges. However, when taking into account how the working environment is reflected in the judges ruling, the question who controls the context in which judges take their decisions in concrete cases is greatly linked to the independence of the judiciary. In the USA, where this aspect of independence of the judiciary is given far more emphasis compared to Europe, the independence in administrating federal courts is provided for in two ways. In 1938, the Congress turned a certain part of the authorisation over to the judiciary, so that the judiciary itself determines process rules for court trials. At the same time, institutions were set up which take autonomous decisions on judicial policy – the US Administrative Conference (set up in 1922), the Federal Courts Administration Office (set up in 1939) and the District Judicial Councils (set up in 1939). But even in European countries, particularly the budget- related aspect of administering the judiciary steadily gains momentum, sincer there is a constant increase in the discrepancy between the burdens that courts bear, and the limited budget possibilities in individual countries. The budget thus becomes increasingly a more effective method of control and influence within the established system of state power. Since the budget is generally allocated to the judiciary by the government, and adopted by the parliament, it is an important guarantee for independence in executing the judicial role.

[19] See: Monitoring the European Union Accession process, Judicial independence, 2001, Central European University Press, OSI and EU.

Issues of relative budget autonomy are dealt with by the United Nations basic principles on Judicial Independence, Recommendations of the Council of Europe R(94)12, European Charter on the Statute for judges, The Universal Charter of the IAJ and The Charter of the EAJ, which proves that at standardisation level, there are no perfect models of financing the judiciary. All given documents therefore do not go beyond written expectations that the state is obliged to provide adequate conditions for executing the judicial role.

Apart from the budgetary resources, the execution of the judicial role is strongly influenced by other administrative powers, which are often concentrated at the executive branch. This includes particularly the provision of premises, staff, technical and material conditions for the operation of courts. The strengthening of judicial self-management regarding all questions of judicial administration could realistically be provided on a legislative platform in the framework of the implementation of the provision about the powers of a special independent body. In the case of Ukraine, this could be the Council of Judges of Ukraine, or the High Council of Justice of Ukraine. Such a rule should be laid down by the statutory law.

Article 88

This article is one of the most critical provisions of the Law of Ukraine on the Judiciary in light of the rule of law, the separation of powers, and the independence of the judiciary as universal recognised international legal principles and standards because of the powers of the State Judicial Administration of Ukraine, and its position under the executive branch of government. Some powers described especially in paragraph 1, points 4, 6, 7, 12 and 19 regarding their nature and scope fall entirely and exclusively under the authority of the judiciary, and not under the executive.

Statistical and personal registration of information about judges, especially if it is aimed at making decisions, and concerning the status and career of judges, is a task which has to be performed on the basis of objective criteria, with all assurances of judicial independence. The authority, responsible for collection and monitoring of such data, should be an independent authority from paragraph 37 and 45 of the Opinion no. 1 of the CCJE or from paragraph 1.3. of the European Charter on the Statute for judges, with substantial judicial representation.

The responsibility for the organization of judicial training should not be entrusted to an authority answerable to the executive, but to the judiciary itself or to another independent body, which should not be already responsible for both, training and appointing or promotion of judges, neither for their disciplining[20].

The European Charter on the Statute for Judges states that any authority responsible for supervising the quality of training programs should be independent of the executive or legislator, and that at least half of its members should be judges.

[20] See CCJE opinion no. 4 Initial and in service training for judges, paragraph 15 – 17.

The National School of Judges of Ukraine should therefore not be established by the Cabinet of Ministers (Section VI, Final and Transitional Provisions, paragraph 16) but by an independent judicial body.

The power to determine the workload norms of judges can not be entrusted to the State Judicial Administration of Ukraine. Such a body could provide an independent judicial authority only with a non-binding opinion, but the ultimate decision lies with the independent body itself. Having in mind the region's legacy of executive domination over the judiciary, the proposed system seems to contradict the principle of judicial independence and should be abandoned[21].

The powers of the State Judicial Administration of Ukraine are not precisely circumscribed, because the term "together" does not necessarily mean "consent" (paragraph 1, point 19).

For the reasons stated above it is therefore necessary to consider either to delegate judicial powers of the State Judicial Administration of Ukraine to a self-governing body like the Council of Judges of Ukraine (or the High Council of Justice), or to make the State Judicial Administration of Ukraine part of the judicial branch by accepting the proposed amendment to article 87.

Article 89

The draft law is not clear enough, because it states that the head of the State Judicial Administration of Ukraine shall be appointed to this post by the Cabinet of Ministers of Ukraine on the basis of the proposals submitted by the prime-minister of Ukraine, in coordination with the Council of Judges of Ukraine. The law should use precise legal terms like "consent" or "binding opinion" instead of the term "coordination", which could lead to different interpretations.

In order to diminish executive interference with judicial affairs, it is also recommended that the law should require that only a judge could be appointed as the head of the State Judicial Administration.

Article 91

The National School of Judges shall not be located at the State Judicial Administration of Ukraine, for the reasons explained above (see comments on Article 88). Besides this, it is essential for the purposes of preventing any interference with the recruitment process of the candidates for judges who will attend initial training courses (paragraph 3, point 1), that the assessment of their performance is made by an independent authority not being answerable to the executive.

3 THE DRAFT LAW OF UKRAINE "ON THE STATUS OF JUDGES"

[21] See 'Monitoring the European Union Accession Process, Judicial Capacity, 2002, OSI and EU, Hungary, USA'.

3.1 GENERAL

The statutory guarantee of judicial independence in this law (and in the Law on the Judiciary) do not have a privileged status. Since important guarantees of judicial independence are provided for only in statutory law, it might be desirable to require a supermajority (e.g. two-thirds majority), or a more complex procedure for their alteration. Such a legal requirement protects the statutory law from being amended under a cursory procedure unsuited to the issues at stake, and prevents the enactment of legislation aimed at having the effect of changing it[22]

3.2 COMMENTARY ON INDIVIDUAL ARTICLES

Section I.

Chapter 1 - Fundamentals

Article 3 (safeguards for independence)

Paragraph 4 of this article enumerates the guarantees for the independence of judges. Point 8 of this paragraph should be amended in such a way as to reflect that an adequate re-numeration system contributes to judicial independence, too. This guarantee is linked with the general standard that prohibits any reduction of a judge's salary, except for the purposes of the implementation of the decision of the disciplinary body, if such a sanction exists in the law.

The law should provide another guarantee which is not inserted into the draft law yet, namely the right to file an appeal. The statutory law should give to every judge who considers that his or her rights under the statute or more generally his or her independence, or that of the legal process, are threatened or ignored in any way whatsoever, the possibility of referring to an independent authority with substantial judicial representation (judicial council), with effective means available to it of remedying, or of proposing a remedy[23]. The right to appeal is an indispensable tool for protecting and maintaining judicial independence. The right to appeal is a necessary safeguard, because it is mere wishful thinking to set out principles to protect the judiciary, unless they are consistently backed by mechanisms to guarantee their effective implementation. The European Charter on the Statute for Judges stipulates that the body thus applied to must have the power to remedy the situation affecting the judge's independence of its own accord, or to propose that the competent authority remedy it. It seems that the Council of Judges of Ukraine could perfectly carry this statutory authority.

[22] See European Charter on the Statute for Judges, paragraph 1.2. of Explanatory Memorandum, Council of Europe
[23] See European Charter on the Statute for Judges, paragraph 1.4.

Article 4 (liability and immunity)

The draft provision is not sufficient. As regards criminal liability of judges, the law should clearly define what Consultative Council of European Judges recommended in Opinion No. 3, paragraph 75. Judges should be criminally liable in ordinary law for offences committed outside their judicial office, but criminal liability should not be imposed on judges for unintentional failings in the exercise of their functions.

The imposition on judges personally of civil liability for the consequences of their wrong decisions or for other failings like excessive delay requires careful consideration. As a general principle, judges personally should enjoy absolute freedom from liability in respect of claims made directly against them relating to their exercise, in good faith, of their functions. Judicial errors, whether in respect of jurisdiction or procedure, in ascertaining or applying the law or in evaluating evidence, should be dealt with by an appeal. Any remedy for other failings in the administration of justice (including, for example, excessive delay) lies only with the state. It would not be appropriate for a judge to be exposed, in respect of the purported exercise of his/her judicial function, to any personal liability, even by way of reimbursement by the state, except in a case of wilful default[24]. Judges' immunity from civil liability should therefore be guaranteed by this provision.

Article 6 (security)

The proposed text of paragraph 2 is rather strange. One could not imagine a judge using weapons in a courtroom, for example. On the contrary, any weapon used in a courtroom or within the court building and premises should be strictly forbidden, unless it is used by authorized court police officers.

Article 8

An important systemic instrument against corruption in the justice system is the principle of a judge being untransferable, unless he or she gave his or her consent to such a transfer. All EU member states restrict the practise of permanently transferring judges without their consent, except in case of disciplinary reasons, or re-organisation of the court system. Paragraph 3 complies with such international standards.

Chapter 2 - Professional judge

Article 9 (incompatibility)

[24] See CCJE Opinion No. 3, paragraph 55 to 57 and 76.

Paragraph 2 of this article is of extreme importance, because it regulates permitted and prohibited extra-judicial activities of a judge. In this context, the CCJE endorsed the provision of the European Charter on the Statute for Judges, under which judges' freedom to carry out activities outside their judicial mandate may not be limited except in so far as such outside activities are incompatible with confidence in, or the impartiality or the independence of a judge, or his or her required availability to deal attentively and within a reasonable period with the matters put before him or her[25]. The precise line between what is permitted and not permitted has, however, proven difficult to be drawn. Therefore, it is recommended to establish, within the judiciary, a consultative body with an advisory role, which would be available to judges whenever they have some uncertainty as to whether a given activity in the private sphere is compatible with their status of judge. Such a body should in any event be separate from, and pursue different objectives to existing bodies, responsible for imposing disciplinary sanctions[26].

It is also suggested here to add a general provision, which would require from every judge to do everything to uphold judicial independence at both the institutional and the individual level and to behave with integrity in the office and in his or her private life, as well as that a judge should at all times adopt an approach which both is and appears impartial. It is important to note here that the decisive criteria in many cases is what may objectively compromise the impartiality or independence in the eyes of a reasonable observer.

Paragraph 3 does not comply with international legal standards as regards belonging to professional unions. The European Charter on the Statute for Judges recognizes the right of judges to join professional organizations and a right of expression (paragraph 1.7.) in order to avoid excessive rigidity which might set up barriers between society and the judges themselves (paragraph 4.3.). Recommendation R(94)12 in principle IV - associations - provides that judges should be free to form associations, which, either alone or with another body, have the task of safeguarding their independence and protect their interests. Judges should be therefore free to join judges associations or unions. "… Judges may exercise the right to join trade unions (freedom of associations), although restrictions may be placed on the right to strike"[27]. The proposed text therefore does not fully comply with European legal standards.

A further crucial systemic security device against corruption in the justice system should be the duty of judges to disclose their financial circumstances. It is one of the most important means to prevent financial conflict of interest, and it protects judges against the reproach that they had a certain financial stake in the matter. Financial disclosure means that judges have to disclose their entire possessions,

[25] See paragraph 4.2. of the European Charter of the Statute for Judges; paragraph 39 of the Opinion No. 3 of the CCJE.
[26] See CCJE, Opinion No. 3, paragraph 29.

[27] See CCJE, Opinion No. 3, paragraph 34.

financial circumstances, shares, presents, fees and other income as well as unindebtedness, that is loans they raised. (Council of Europe, GREECO recommendations)

Article 10 (rights and responsibilities)

Judges may not only establish unions, but also or even foremost judges associations with the task of safeguarding their independence and protecting their interests. The European Charter on the Statute for Judges recognises the role of professional associations, formed by judges, to which all judges are freely entitled to adhere, which precludes any form of legal discrimination vis-à-vis the right to join them. It also points out that such associations contribute in particular to the defence of judges' statutory rights before such authorities and bodies as may be involved in decisions affecting them. Judges should therefore be supported at forming or adhering to professional associations by statutory incentive.

The proposed wording of the paragraph 2 of this article should be therefore supplemented as it is indicated above.

Paragraph 3 of Article 10 requires special attention, because it introduces mandatory training for judges. CCJE recommends mandatory initial training by programs appropriate to appointee's professional experience[28]. However, the CCJE recommends that the in-service training should normally be based on the voluntary participation of judges. It is unrealistic to make in-service training mandatory in every case. The fear is that it would then become bureaucratic, and simply a formality. Training must be attractive enough to induce judges to take part in it, as participation on a voluntary basis is the best guarantee for the effectiveness of the training. This should be facilitated by ensuring that every judge is conscious that there is an ethical duty to maintain and update his or her knowledge and skills. Subparagraph 1 of paragraph 3, which introduces mandatory in-service training for judges who are elected to the post without term limitation, should be therefore re-considered again. The law could encourage voluntary trainings by providing the duty of the courts to encourage their members to attend in-service training.

Article 12 (judicial ethics)

This provision is problematic in its nature and in terms of its binding effect. Judges should be guided in their activities only by the principles of professional conduct. Such principles should offer judges guidelines on how to proceed, thereby enabling them to overcome the difficulties they are faced with as regards their independence and impartiality. Such principles should be drawn up by the judges themselves, and be totally separate from the judge's disciplinary system. It would therefore be desirable to establish a body within the judiciary to advise judges, confronted with a problem related to

[28] See Opinion No. 4 on initial and in-service training for judges at national and European level, 2003.

professional ethics or compatibility of non-judicial activities with their status. To require judges to comply with the Code of Judicial Ethics, approved by the Congress of Judges of Ukraine, therefore seems inappropriate. It should keep its self-regulatory effect.

Section II.

Procedure for assuming the position of professional judge of court of general jurisdiction

Articles 21 to 30 (recruitment and selection)

The European Charter on the Statute for Judges provides: “Judicial candidates must be selected and recruited by an independent body or panel. Examination or selection panels can be used, provided they are independent. It is important to specify the particular safeguards accompanying the selection procedure.”

Every candidate for a post of judge in Ukraine should first compete for the entrance to the National School of Judges of Ukraine. The competition shall be held by the State Examination Commission. The composition of State Examination Commission shall be approved by the High Qualifications Commission of Judges of Ukraine (Article 25, paragraph 2). It is not clear whether the entrance to the National School of Judges, based on competition, could be rejected by the State Examination Commission or the High Qualification Commission of Judges of Ukraine. The law should be precise about this, because of the importance of this provision. It would be recommendable that the composition of the State Examination Commission is defined by law, and that it is not left to undefined criteria, adopted by the High Qualifications Commission of Judges of Ukraine.

The law should also provide the right to file a complaint of any candidate who has been rejected to enter the National School of Judges of Ukraine training program. (compare article 29) Article 25 should therefore be supplemented as indicated here.

Paragraph 3 of Article 27 guarantees that each candidate is entitled to receive a justified decision regarding a rejection of admission to the competition, made by the High Qualification Commission of Judges of Ukraine. The law should additionally provide for every candidate with a right to appeal against such a decision before a court, authorised to deal with administrative cases.

Article 32 to 43 (appointment and election)

As regards the appointment for the post of judge, the proposed text cannot go beyond the limits of Article 131 of the Constitution of Ukraine, which stipulates the composition of the High Council of Justice of Ukraine. The general accepted and recognized legal standard which requires the intervention of an independent authority with substantial judicial representation chosen democratically

by other judges[29] cannot be fully respected. The main problem lies with the Ukrainian Constitution, and not with the proposed law.

The procedures for regulating the course of a judge's career - from appointment through various promotions to retirement - should properly be isolated from political considerations. However, unless proper safeguards are in place, the discretion, which is inevitably attached to the decisions affecting the judge's career, provides opportunities for other actors to punish or reward judges, based on the substance of their rulings. For the duration of the probationary period, judges may feel an incentive to consider the effects upon their careers of decisions that displease officials in charge of determining who receives permanent appointment. Since probation is retained, it should be understood that it is only a mechanism to weed out incompetent judges, and cannot have any political content. Therefore, it seems improper to vest any decision of authority in the political branch after the initial appointment has been made.

As regards the election of judges for the permanent term of office, it has to be pointed out that the Ukrainian Constitution does not allow for introducing a system which would exclude direct political input into the election of judges. It may be argued that election confers a more direct democratic legitimacy, but it involves a candidate in a campaign, in politics and in the temptation to buy or give favours. Such a system may facilitate the undue political influence over elections. Every decision relating to a judge's appointment, election or career should be based on objective criteria and be either taken by an independent authority or be subject to guarantees ensuring that it is not taken other than on the basis of such criteria.

Additional safeguards are therefore necessary in order to ensure intervention of an independent body with substantial judicial representation. It is suggested that not only the decision of the President of Ukraine shall be justified and reasoned, but also the proposal of the High Council of Justice shall be furnished with the reasons in case of rejection of such a candidate to be proposed for the appointment. The judge concerned should have the right to appeal against such a decision of the High Council of Justice before the Court of Law, at least in such a case when the High Qualification Commission recommends such a judge for appointment and the High Council of Justice decides differently.

The intervention of the High Qualification Commission of Judges of Ukraine in the election process is therefore crucial. In order to ensure an independent decision making process based exclusively on objective criteria, paragraph 2 of Article 37 seems problematic in the sense that members of parliament could influence the decision of the High Qualification Commission by attending its sessions during consideration of matters concerning the election of a candidate for the post of judge. This paragraph should therefore be deleted.

[29] See paragraph 1.3. of the European Charter on the Statute for Judges; CCJE Opinion No. 1, paragraph 44; recommendation No. R(94)12.

A right to appeal should be guaranteed to a judge concerned in case that the High Qualification Commission rejects a candidate and does not recommend him or her for the post of judge (paragraph 3, Article 37).

Additional safeguards in case of denial of electing of a candidate for the post of judge (paragraph 6 of Article 36) should be inserted into the draft law. In such a case, the High Qualification Commission of Judges of Ukraine should have the right to insist on the proposed candidate, and to submit its recommendation to the parliament, which has to ultimately decide in a way that the recommendation could be rejected only if such a decision is adopted by a 2/3 majority of the members of the parliament.

As regards the procedure for decision-making on the election of a candidate for the post of judge without term limitation (Article 43), it does not seem to be appropriate that only jobless candidates (former judges on probation) could apply for such a post (paragraph 1, point 2). Any judge should have the right to be elected for a permanent term of office within the procedure, which should guarantee his employment without any suspension period between probation and permanent term.

Section III.

Qualification Ranks and Qualification Attestation

On Articles 46 to 51

Systemic assessment of individual judges' performance in accordance with pre-established standards is a form of individual accountability. Because assessment also provides a form of regular feed-back about the quality and efficiency of a judge's work, it assists in further professional development and can also be a valuable tool in improving judges' overall capacity, especially when integrated with training programs. It is desirable that judicial bodies have an exclusive or nearly exclusive authority to evaluate judges' performance. However, they must endeavour to demonstrate to the broader society that they can undertake this task with professionalism.

As for the content of evaluation, meaningful criteria should include at least three elements: the quality of decision-making, the efficiency of case processing and professionalism in conduct; in addition, measurement criteria should be selected to avoid encroaching on judges' independence. The challenge in practice is how to define and balance these elements, and how to select sources of data and information to use, so that evaluation serves to increase the opportunities and incentives for judges to develop their professional capacity. Objective data, such as the number of cases received and disposed of, or length of proceedings, could be used as quantitative measurements. Nevertheless, such a numerical system must always be complemented by qualitative criteria.

This section regulates the assessment of judges and their performance during their career. It is important to ensure that the judge's independence and impartiality are not infringed in the area of promotion to higher qualification ranks. It must be specified that there are two potential issues here: a) judges illegitimately excluded from promotion and b) judges being unduly promoted. The criteria for promotion should be defined exclusively in terms of the qualities and merits observed in the performance of judicial duties by means of objective assessments, carried out by an independent body. An involvement of the other powers of the state in the assessment of judges should be forbidden, as it is in conflict with the principle of separation of powers and judicial independence. There could be a risk that assessments could be used as the basis for removing a judge from his office post. Therefore, the issue of removal from office (for lack of competence) must be kept independent from normal assessments[30].

In order to avoid the possibility of bias, and also to exclude internal or external influence, which might infringe the independence of any assessment, all assessments should be conducted by means of transparent procedure. That procedure should apply clear, previously defined criteria. The procedure should resolve in a decision together with reasons, and the result and reasons should be submitted to the judge concerned. Some evaluation systems rely too much on subjective elements, which give the evaluating body extended discretionary power. Again, this might lead some judges simply to please their evaluators in order to get good marks. The aim of the assessment process should be that only those who have demonstrated that they have the soundest knowledge of the law and the other skills that a judge must use, such as the ability to act decisively, to communicate, to organize his professional life, could be promoted to a higher post.

There is a risk that the proposed qualification test (Article 49, paragraph 4) could not meet the above mentioned standards and would turn into another formal exam during a judge's career, which doesn't seem to be necessary. The CCJE recommended that the authorities responsible for making and advising on promotion in member states of the Council of Europe should introduce and give effect to objective criteria, with the aim of ensuring that the selection and career of judges are based on merit, having regard to qualifications, integrity, ability and efficiency.

Another problematic point of the proposed assessment system is that the outcome of an assessment will influence the remuneration of the judge (see Article 77, paragraph 4 of the draft law). It is strictly forbidden that the outcome of an assessment could influence the remuneration system. If a judge has to be assessed, even by his/her peers, in order to receive a higher salary or a bonus, he/she might be induced to please the superior judge (or chief justice) even with regard to judicial decisions that are made[31]. A procedure for the assessment of a judge in the course of his/her work may be a valuable means to promote self-awareness amongst judges, and to indicate possible improvements in the performance of individual judges and might also be of assistance in asserting candidates for

[30] See IAJ, First Study Commission, Final Conclusions, 2006.
[31] See Final conclusions of the First Study Commission of the International Association of Judges, Siófok, Hungary 2006.

promotion. By these means, judicial assessment (within the bounds discussed above) may help to strengthen trust and confidence in the judiciary in a democratic society. It is suggested to elaborate further the objective criteria for assessment and the influence of the assessment on a judge's career. It is also important that the Qualification Commission will be obliged to act accordingly with defined objective criteria, and it is therefore possible and necessary to scrutinize the content of the criteria applied and their practical effect on a decision adopted by the Qualification Commission within a system which allows for a full appeal to the High Qualification Commission of Judges of Ukraine and not only regarding the violation of the procedure of consideration of the matter, as it is proposed in paragraph 6 of Article 51 of the draft law.

Section IV.

Disciplinary liability

Article 52

This article is trying to give an answer to the question about what conduct it is that should render a judge liable to disciplinary proceedings. It is obvious that an attempt has been made to specify in detail all conduct that might give grounds for disciplinary proceedings, leading to some form of sanction. The CCJE in its Opinion no. 3 stated that precise reasons must be given for any disciplinary action but it does not conceive to be necessary or even possible (either by virtue of the principle *nulla poena sine lege* or on any other basis) to seek to specify in precise or detailed terms the nature of all misconduct that could lead to disciplinary proceedings and sanctions. At present, the grounds for disciplinary action in Council of Europe member states are usually stated in terms of great generality, because the essence of disciplinary proceedings lies in conduct fundamentally contrary to that to be expected of a professional in this position. To illustrate this position, one could pose the question as to what should be the legal ground for initiating a disciplinary procedure against a judge who was, for example, staying away from work without excuse for a certain length of time.

It is therefore recommended to define only general grounds which could lead to the disciplinary procedure instead of trying to define a "catch – all" approach.

In addition to what has been mentioned above, some specified categories of disciplinary offence give raise to certain doubts as to whether such definitions are compatible with international legal standards. Systematic or severe violations of the rules of judicial ethics are incorrectly correlated with misconduct giving potentially rise to disciplinary sanctions. Rules of professional conduct represent only best practise which all judges should aim to develop and to which all judges should aspire. In order to justify disciplinary proceedings, misconduct must be serious and flagrant, in a way which can not be posited simply because there has been a failure to observe professional standards set out in

guidelines such as the Code of Judicial Ethics[32]. "It is essential not to confuse ethical principles with disciplinary matters."[33] The Code of Judicial Ethics, approved by the 5th Congress of Judges of Ukraine on 24 October 2002 stipulates: "These norms can not be applied as reason for disciplinary punishment of judges or to determine their guilt".

As regards the proposed disciplinary offence of an evidently unqualified solution of a case (paragraph 1, point 1) as well as a regards the systematic ignoring of the position of high-level courts regarding the application of legal norms for the consideration of cases (paragraph 1, point 11), it seems that judges will not have unfettered freedom to decide cases impartially, in accordance with their conscience and their interpretation of the facts, and in pursuance of the prevailing rules of law. Therefore, again, it would be worth considering whether just the general definition of a failure to carry out responsibilities of a judge could be defined as a legal ground for initiating a disciplinary procedure, of course, only if the misconduct is serious enough.

Article 55

The wording of this article poses a question as to why the same body which is responsible for determining the disciplinary offence is also responsible for initiating the disciplinary proceedings. Paragraph 5 of this article stipulates that the issue of initiating a disciplinary case shall be solved by the Disciplinary Commission of Judges of Ukraine, which is at the same time, according to Article 54, a body which decides about the disciplinary offence committed by a judge. Such a double role of the same body is not consistent with international legal standards, which require that the phase of initiating disciplinary proceedings must be separated from the decision-making process of the disciplinary body. It is therefore suggested that the law sets up a special disciplinary prosecutor who would play the role of a filter, which means that he will have the right to examine any complaint against a judge and make a decision as to whether or not to initiate a disciplinary action. The judicial inspector mentioned in paragraph 2 of Article 55 should accordingly execute his/her task upon the written assignment of the disciplinary prosecutor and not upon the board of three members of the Disciplinary Commission of Judges of Ukraine itself. A judicial inspector, based on the results of his examination, shall send findings and materials, along with his draft justified resolution, to the Disciplinary prosecutor and not to the Discipline Commission of Judges of Ukraine (paragraph 4). The disciplinary prosecutor should therefore have discretionary powers in terms of whether to initiate disciplinary proceedings or not. It is suggested that the disciplinary prosecutor must be a judge.

Article 56

[32] See Opinion of the CCJE no. 3, paragraph 60.
[33] See Final conclusion of the First Study Commission of the International Association of Judges concerning rules for ethical conduct of judges, their application and observance, paragraph 6, 2004

The requirement that a majority of members of the Disciplinary Commission of Judges of Ukraine shall be present at the session is not sufficient. The disciplinary proceedings against any judge should only be determined by an independent authority (or tribunal) operating based on procedures which guarantee full rights of defence[34]. The legal standards regarding the composition of such a body should not be effective unless all members of such a body have attended its sessions.

Article 57

This article deals with the question what sanctions should be available for misconduct established in disciplinary proceedings. The European Charter on the Statute for Judges (Article 5.1.) states that the scale of sanctions which may be imposed is set out in the statute and must be subject to the principle of proportionality. Some examples of possible sanctions appear in Recommendation no. R(94)12 (principle VI.1.) such as withdrawal of a case from the judge, moving the judge to other judicial tasks within the court, economic sanctions such as reduction of salary for a temporary period, and suspension. Informal warnings or reprimands proved to be very effective in certain jurisdictions. It is therefore worth to reconsider all possible disciplinary sanctions here.

Article 58

If the proposed provision is followed, a judge does not have the right to appeal against the decision of the High Council of Justice concerning the disciplinary responsibility of judges of high specialised courts and judges of the Supreme Court of Ukraine, which is a first instance body. It is therefore suggested to introduce such a possibility and to define an appellate body.

Neither the Disciplinary Commission nor the High Council of Justice is in itself a court. The arrangement regarding disciplinary proceedings in every Council of Europe member state should be such as to allow an appeal from the initial disciplinary body (whether it is itself an authority, tribunal or court) to a court[35]. The provision of Article 58, paragraph 4, which allows only an appeal filed at the court with regard to the violation of the procedure of examination of disciplinary proceedings, is not compatible with the above mentioned standard, which guarantees to every judge the right to full appeal, including on the merits of the disciplinary case and not only on the procedural issues. Paragraph 4 should therefore be amended.

Section V.

Dismissal, Termination, Supervision

[34] See CCJE Opinion no. 1, paragraph 60b.
[35] See Recommendation No. R(12)94 principle VI.3; CCJE Opinion no. 3, paragraph 77, point 5.

Article 65

Paragraph 2 of this article stipulates that High Council of Justice shall submit any proposal on the dismissal of a judge from his/her post in case of judgement of conviction regardless how serious an offence has been committed and regardless of the sentence imposed upon a judge It seems that such a provision is not proportionate to the seriousness of the crime committed by a judge. At least for misdemeanours or other minor offences, the High Council of Justice should have discretionary powers as to whether to submit a proposal on dismissal of a judge from the bench.

Article 68

In paragraph 3, the draft law in fact does not exclude a situation in which the decision on dismissal is not issued in a reasonable time therefore preventing the judge to exercise his/her right to free movement as a worker. It is suggested that a judge shall continue executing his/her powers until the decision on his/her dismissal is issued, but no longer than 6 months after notification of his/her request for resignation or voluntary withdrawal from the post.

Section VI.

Support of a professional judge

One of the most important prerequisites for averting corruption in the justice system is the judge's economic independence. However, the ultimate issue remains unsolved, namely: how much is too much? Underpaid judges are serious candidates for becoming a corrupt brigade. If a judge's salary is not enough to cover all of his personal and family needs, the judge will be caught in a dilemma of whether to give up his judicial function or to find an additional source of income. The problem here is that a judge's additional activity may easily be incompatible with his position as a judge. One should not ask whether the state can afford paying judges adequate salaries, but rather whether the state can afford not to do so.

The Council of Europe Recommendation No. R(94)12 provides that judges' remuneration should be guaranteed by law and be commensurate with the dignity of their profession and burden of responsibilities (principles I (2)a (II) and II (1)b). The European Charter contains a hard-headed recognition of the role of adequate remuneration in shielding off pressures aimed at influencing their decisions and, more generally, their behaviour, and of the importance of guaranteed sick pay and adequate retirement pensions (paragraph 6).

It is also important to note that threats like pay decreases are strictly prohibited in international documents and in the case law of European Constitutional Courts. It is suggested that the law provides a strict prohibition of any reduction of a judge's salary during his/her term of office, except in case of monetary disciplinary sanction imposed on a judge.

From the perspective of corruption, paying judges according to their performance (if considered an option) can be problematic. Performance oriented awarding of judges may cause an illegitimate acceleration of procedures and jeopardize the concept of a judge's impartiality. The parties to the dispute could be of the justified opinion that a judge's personal property interests will have precedence over the interests of justice. In this perspective, the parties could maintain that the judge has rejected the evidence they submitted, only because he is in a hurry to conclude the matter if he/she wants to get an award for it. When money talks, justice walks.

4 ANNEX 1 – DRAFT LAW OF UKRAINE ON THE JUDICIARY

5 ANNEX 2 – DRAFT LAW OF UKRAINE ON STATUS OF JUDGES