Analysis of the legal framework of Ukraine in view of the optimisation of the selection procedures of judges to the first and second instance courts and procedures of the disciplinary proceedings

July 2022, Kyiv
The analysis is provided in the framework of the Council of Europe project
“Support for judicial institutions and processes to strengthen access to justice in Ukraine”

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Abbreviations and acronyms

LOCSJ	Law on Judiciary and Status of Judges
LHCJ	Law on High Council of Judges
HCJ	High Council of Justice
HQCJ	High Qualification Commission
Venice Commission	European Commission for Democracy Through Law
CCJE	Consultative Council of European Judges
CoE	Council of Europe
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
GRECO	Group of States against Corruption
OSCE	Organization for Security and Co-operation in Europe
ODIHR	OSCE Office for Democratic Institutions and Human Rights

I. Introduction and scope

In the framework of the Council of Europe project "Support for judicial institutions and processes to strengthen access to justice in Ukraine" the international consultants Nina Betetto[1] and Gerhard Reissner[2] (hereinafter -"the consultants") were requested to provide an analysis of the national legislation and regulations regarding the selection and appointment of judges (apart from the respective procedures of the Supreme Court judges) and disciplinary proceedings against judges with a view of optimisation and simplification of such procedures in line with Council of Europe standards and best practices in a number of the member States. Thus limited in scope, the analysis does not constitute a full and comprehensive review of the entire legal and institutional framework as laid down by the relevant legislation. The main objective of the present analysis is to assist in providing guidance to support decision-makers in potentially reforming the institutional dimension, substantive criteria and procedural set-up regarding the selection and appointment of first and second instance judges.

The analysis is drawn up on the basis on the English translation of respective provisions of the Constitution of Ukraine, the Law on Judiciary and Status of Judges (hereinafter - "the LOCSJ"),[3] and the Law on High Council of Judges (hereinafter - "the LHCJ"),[4] submitted to the consultants. Additionally, with the aim of exchanging views on possible ways of simplification and optimisation of existing modalities and procedures, in particular in relation to selection and appointment of judges and disciplinary proceedings, the consultants participated in online meetings with the representatives of the relevant national authorities, held on 23 June and 12 July.

The analysis takes into account soft-law standards and numerous reports that have been developed to provide guidance on the implementation of judicial independence, in particular:

- Recommendation No. R (2010)12 of the Committee of Ministers of the Council of Europe Judges: independence, efficiency and responsibilities (hereinafter - "the CM/Rec (2010)12");
- Magna Carta of Judges (Fundamental principles) (hereinafter - "the Magna Carta"), adopted by the Consultative Council of European Judges (hereinafter "CCJE");
- CCJE Opinion No. 1(2001) on Standards concerning the independence of the judiciary and the irremovability of judges (hereinafter - "the Opinion No. 1");
- CCJE Opinion N. 24(2021) on the evolution of the councils for the judiciary and their role in independent and impartial judicial systems;
- CCJE Opinion No. 4(2003) on appropriate initial and in-service training (hereinafter - "the Opinion No. 4");
- CCJE Opinion No. 15(2012) on specialisation of judges (hereinafter - "the Opinion No. 15");
- Venice Commission, Rule of Law Checklist (CDL-AD(2016)007) (hereinafter - "the Rule of Law Checklist");
- Venice Commission Report on the independence of the judicial system, Part I: the independence of judges (CDL-AD(2010)004) (hereinafter - "the Venice Commission Report on the independence");
- CDL-AD(2007)028, Venice Commission, Report on Judicial Appointments (hereinafter - "the Venice Commission Report on judicial appointments");
- the Venice Commission, Compilation of Venice Commission opinions and reports concerning courts and judges (CDL-PI(2019)008) (hereinafter – "the Venice Commission Compilation");
- Venice Commission Opinion on the amendments to the legal framework governing the Supreme Court and judicial governance bodies, December 2019, (CDL-AD(2019)027) (hereinafter - "the Opinion CDL-AD(2019)027");
- Venice Commission and Directorate General on Human Rights and Rule of Law (DGI) of the Council of Europe Joint Opinion on draft amendments to the 'Law on the Judiciary and the Status of Judges' and certain activities of the Supreme Court and judicial authorities (draft Law No. 3711) (hereinafter - "the Opinion CDL-AD(2020)022");
- GRECO (GrecoEval4Rep(2016)9), Fourth Evaluation Round, Corruption prevention in respect of members of parliament, judges and prosecutors, Ukraine, (hereinafter - "the GRECO Report");
- CCJE-BU(2017)11, Bureau of the Consultative Council of European Judges (CCJE), Report on judicial independence and impartiality in the Council of Europe member States in 2017 (hereinafter - "the Report on judicial independence and impartiality 2017");
- OSCE/ODIHR Opinion on the Law of Ukraine on the Judiciary and Status of Judges, JUD-UKR/298/2017 [RJU/AT], June 2017 (hereinafter - "the ODIHR Opinion").

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[3] As amended by the following laws: № 1774-VIII dated 06.12.2016; № 1798-VIII dated 21.12.2016; № 2147-VIII dated 03.10.2017; № 2509-VIII dated 12.07.2018; № 193-IX dated 16.10.2019; № 263-IX dated 31.10.2019.

[4] As amended by laws: № 2147-VIII dated 03 March 2017; № 2447-VIII dated 07.06.2018; № 2646-VIII dated 06.12.2018; № 193-IX dated 16.10.2019; № 263-IX dated 31.10.2019.

II. Background

In recent years, Ukraine has engaged in a number of reforms with respect to its judiciary. (Draft) legislation on the administration of justice, the judicial system and the status of judges in Ukraine, as well as implementing regulations, have been reviewed and evaluated several times by international expert organisations, for which many Venice Commission opinions and Council of Europe reports provide evidence.[5]

Many of the recommendations made were implemented by the competent authorities, in particular in amendments to the Constitution adopted in 2016. This includes, among others, Article 131§2 on the HCJ, which stipulates that ten members of the HCJ shall be judges appointed by their peers.[6] Also, the previously existing probationary period for judges, as well as the Parliament's powers to appoint judges for life, have been abandoned. Instead, the Constitution proclaims that a judge is appointed to office by the President following the submission of the HCJ (Article 128§1) and that a judge shall "hold an office for an unlimited term" (Article 126§5). These changes are welcome as they help to ensure the independence and impartiality of the judiciary, and of individual judges. The LOCSJ and the LHCJ reflect and further specify the constitutional changes, and thus form a further step towards the overall reform of the Ukrainian judiciary. They contain, among others, significant changes relating to the manner in which judges are selected and appointed.

However, due to the numerous unfinished and incoherent attempts to reform the judiciary, the Ukrainian judiciary rests in a stage of transition. Needless to say that the situation has been aggravated as a consequence of the military aggression of the Russian Federation.

III. Relevant European standards and best practices

1. International standards on judicial appointments

Choosing the appropriate system for judicial appointments is one of the primary challenges faced by newly established democracies where often concerns related to the independence and political impartiality of the judiciary persist. Political involvement in the appointment procedure is endangering the neutrality of the judiciary in these states, while in others in particular those with democratically proved judicial systems, such methods of appointment are regarded as traditional and effective. International standards in this respect are clearly more in favour of the extensive depolitisation of the process. CM/Rec (2010)12 (para. 44) – to name an example - points out that "decisions concerning the selection and career of judges should be based on objective criteria pre-established by law or by the competent authorities. Such decisions should be based on merit, having regard to the qualifications, skills and capacity required to adjudicate cases by applying the law while respecting human dignity."

However, no single non-political "model" of appointment system exists, which could ideally comply with the principle of the separation of powers and secure full independence of the judiciary. As the Venice Commission noted, in Europe, methods of appointment vary greatly according to different countries and their legal systems; furthermore they can differ within the same legal system according to the types of judges to be appointed.[7] Notwithstanding their particularities, appointment rules can be grouped under two main categories:

- The elective system, where judges are directly elected by the people[8] or by the parliament.
- The direct appointment system, where the appointing body, upon the proposal of the judicial council, can be the head of state or the government. What matters most in the event that judges are appointed by the head of state is the extent to which the head of state is free in deciding on the appointment. It should be ensured that the main role in the process is given to an independent body – the judicial council. The proposals from this council may be rejected only exceptionally, and the head of state should not be allowed to appoint a candidate not included in the list submitted by it.[9] Another option is direct appointment (not only a proposal) made by a judicial council.

Particularly in new democracies, where the powers of the executive are not restrained by legal culture and traditions, an appropriate method for guaranteeing judicial independence is the establishment of a judicial council. It should be endowed with constitutional guarantees for its composition, powers and autonomy.[10] The Venice

[5] CDL-AD(2015)027, Opinion on the Proposed Amendments to the Constitution of Ukraine regarding the Judiciary as approved by the Constitutional Commission on 4 September 2015; CDL-AD(2015)043, Secretariat Memorandum on the compatibility of the Draft Law of Ukraine on amending the Constitution of Ukraine as to Justice as submitted by the President to the Verkhovna Rada on 25 November 2015 (CDL-REF(2015)047) with the Venice Commission's Opinion on the proposed amendments to the Constitution of Ukraine regarding the Judiciary as approved by the Constitutional Commission on 4 September 2015 (CDL-AD(2015)027); CDL-AD(2017)020, Ukraine - Opinion on the Draft Law on Anticorruption Courts and on the Draft Law on Amendments to the Law on the Judicial System and the Status of Judges (concerning the introduction of mandatory specialisation of judges on the consideration of corruption and corruption-related offences); CDL-AD(2019)027, Opinion on the amendments to the legal framework governing the Supreme Court and judicial governance bodies.

[6] In addition, pursuant to Article 131§4 the President of the Supreme Court shall be an *ex officio* member of the HCJ.

[7] Venice Commission Report on judicial appointments, para. 7.

[8] Extremely rare, in Europe, it only occurs at the Swiss cantonal level.

[9] Venice Commission Report on judicial appointments, para. 14.

[10] See e. g. Venice Commission Report on judicial appointments, para. 48.

Commission holds that “such a council should have a decisive influence on the appointment and promotion of judges and disciplinary measures against them.”[11]

Due consideration should also be given to the basis of judicial appointments and promotions. In a number of countries judges are appointed based on the results of a competitive examination, while in others they are selected from the experienced practitioners. As observed by the Venice Commission, both categories of selection can raise questions. It could be argued whether the examination should be the sole grounds for appointment or regard should be given to the candidate’s personal qualities and experience as well. As for the selection of judges from a pool of experienced practitioners, it could raise concerns as regards to the objectivity of the selection procedure.[12]

In this context, the CCJE in its Opinion No. 1 (para. 18) draws attention to two problems: (a) of giving content to general aspirations towards “merits-based” appointments and “objectivity” and (b) of aligning theory and reality. It cautions that “any ‘objective criteria’, seeking to ensure that the selection and career of judges are ‘based on merit, having regard to qualifications, integrity, ability and efficiency’, are bound to be in general terms. Nonetheless, it is their actual content and effect in any particular state that is ultimately critical.” As a consequence, the CCJE recommends that “the authorities responsible in member states for making and advising on appointments and promotions should now introduce, publish 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’. Once this is done, those bodies or authorities responsible for any appointment or promotion will be obliged to act accordingly, and it will then at least be possible to scrutinize the content of the criteria adopted and their practical effect.”

2. International standards and best practices on initial judicial training

There are great differences among European countries with respect to the initial and in-service training of judges. Some countries offer lengthy formal training in specialised establishments, followed by intensive further training. Others provide a sort of apprenticeship under the supervision of an experienced judge, who imparts knowledge and professional advice on the basis of concrete examples, showing what approach to take and avoiding any kind of didacticism. Common law countries rely heavily on a lengthy professional experience, commonly as advocates. Between these possibilities, there is a whole range of countries where training is to varying degrees organised and compulsory. These differences can in part be related to particular features of the different judicial systems, but in some respects do not seem to be inevitable or necessary.

However, what is common to all jurisdictions is that there is a tight relationship between the judicial appointment methods and the characteristics of the initial judicial training offered. This is because the selection conditions correspond to implicit assumptions about the level of practical experience of the appointee, and the learning needs that the appointee has in order to fulfil his judicial role. All jurisdictions require a law degree for their professional judges, although some countries[13] (e. g. Denmark, Finland, Italy) seem to have further increased their requirement in the past decade, now requiring appointees to hold a postgraduate law degree While it is obvious that judges who are recruited at the start of their professional career need to be trained, the question arises whether this is necessary where judges are selected from among the best lawyers, who are experienced, as for instance in common law countries. In the CCJE’s opinion,[14] both groups should receive initial training: the performance of judicial duties is a new profession for both, and involves a particular approach in many areas, notably with respect to the professional ethics of judges, procedure, and relations with all persons involved in court proceedings. On the other hand, it is important to take the specific features of recruitment methods into account so as to target and adapt the training programmes appropriately: experienced lawyers need to be trained only in what is required for their new profession.

Two major trends in initial training can be observed.

- The first trend is that most European countries (whether civil or common law) now make some initial (or induction) training mandatory for all judges, irrespective of their prior experience or mode of appointment. This reflects the increasing awareness and acknowledgement of the importance of judicial training.
- The second trend is that the appointment and initial training practices in European democracies have become more hybridised throughout the decades. This means that the gap between civil and common law systems has shrunk, as each system adopted elements from the opposite model: (a) Latin judiciaries do not only recruit young, inexperienced judges, but also recruit, through alternative routes, judges with comparable levels of practical experience of common law Germanic or Nordic appointees; (b) common law

[11] Venice Commission Report on judicial appointments, para. 49.
[12] Venice Commission Report on judicial appointments, para. 36.
[13] E. g. Denmark, Finland and Italy. See D. Richards, Current models of judicial training: an updated review of initial and continuous training models across Western democratic jurisdictions , Journal of the International Organisation for Judicial Training, 5/2016, p. 43.
[14] Opinion No. 4, para. 24.

countries have lowered their requirements regarding the needed level of practical experience of candidates.

There has been a shift from continuous training as an optional entitlement to a mandatory requirement for all judges. In 2006, almost all countries reviewed had a voluntary entitlement for continuous training, but 10 years later half of the countries included in the review have at least some mandatory requirement for judicial continuous training.[15]

Apart from these general patterns, two major clusters can be observed.[16] The first cluster is comprised of civil law countries with a strong Napoleonic/Roman influence.[17] Each of these countries has two main judicial appointment routes. The first appointment route recruits judges from law graduates who are not required to have any practical legal experience. For these graduates, the initial training period is very significant (ranging from 1.5 years to 2.5 years) and typically includes at least six months of theoretical training, followed by or intermingled with at least nine months court practice. The second appointment route recruits judges from among experienced professionals. The legal requirement varies across civil law countries.[18] For second route judges, the induction training remains quite significant (between 4 and 8.5 months), although appreciably shorter than for judges from the first route.

The second cluster includes Nordic countries, countries of Germanic influence and England and Wales. What seems to be common to all these countries is a "learning by doing" philosophy, which has two major repercussions in the way judicial training is organised. First, in these countries there is considerably less emphasis on theoretical training, with most courses lasting only a few days. Second, most of the judicial training actually consists of court practice, in most cases supervised (with the exception of England and Wales). Where the training is evaluated, it consists in an evaluation of the court practice by the supervising judge. At one end of the continuum, some countries in this group[19] are closely similar to civil law systems of Roman influence because the required training period an amount to four years (but that training is mostly court practice). At the other end of the spectrum, in England and Wales, new appointees are required to attend induction training, but their activity in court is not supervised and the training does not contain any appraisal.

The CCJE acknowledges that the initial training will differ greatly according to the chosen method of recruiting judges. In view of the diversity of the systems for training judges in Europe, it recommends that: "all appointees to judicial posts should have or acquire, before they take up their duties, extensive knowledge of substantive national and international law and procedure."[20] While it does not seem possible to impose such a model everywhere, the CCJE appears to have a preference for the adoption of a system combining various types of recruitment as it may have the advantage of diversifying judges' backgrounds. In countries that train judges at the start of their professional career, the CCJE considers evaluation of the results of initial training to be necessary in order to ensure the best appointments to the judiciary. In contrast, in countries that choose judges from the ranks of experienced lawyers, objective evaluation methods are applied before appointment, with training occurring only after candidates have been selected, so that in those countries evaluation during initial training is not appropriate.[21]

IV. Procedure for taking on the position of judge at first instance court

1. Current state of play

Formal criteria for holding the office of judge (Article 65 of the LOCSJ) include a minimum age of 30 years, a university education in law and at least five years of professional activity in the field of law, competency and honesty, command of the official language of the country. Certain persons are exempt from the selection procedure, e.g. those who have been convicted or are serving a sentence. Moreover, a person may not be a candidate for the position of judge if s/he was previously dismissed from a judicial position as a result of the qualifications evaluation or for committing a substantial disciplinary offence, gross or systematic neglect of duties which is incompatible with the status of judge or which has revealed his/her incompatibility with the office, violation of incompatibility requirements, violation of a duty to certify the legality of the source of property or in connection with entry into force of a conviction regarding such persons.

Under the LOCSJ (Article 70-80) the recruitment of judges at a local court may be schematically summarized as:

- *Getting on the radar (Article 71-76 of the LOCSJ)*: Public announcement of selection of candidates to the position of a judge is made by the HQCJ. On the basis of the documents submitted, the HQCJ verifies the

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[15] D. Richards, o. c., p. 49.
[16] See more in detail, D. Richards, o. c., p. 46.
[17] E. g. France, Italy, Romania and Spain.
[18] With France and Italy requiring at least 15 years of experience, Spain requiring at least 10 and Romania requiring at least five years. See, D. Richards, o. c., p. 46.
[19] E. g. Austria and Netherlands.
[20] Opinion No. 4, para. 28 i.
[21] Opinion No. 4, para. 40.

applicants' compliance with legal requirements for candidates, and conducts an admission assessment – in the form of anonymous exam to check the general theoretical knowledge of the applicants, their command of the official language of the country, personal moral and psychological qualities of the candidate – the results of which are published on the HQCJ website. In the subsequent special background check, the HQCJ requests the competent authorities to verify the respective information about the candidates and prepares a report on the results; private individuals and legal entities may also submit information on candidates to the HQCJ. Any information received indicating that a candidate does not meet the legal requirements for holding the position of judge is examined by the HQCJ in the presence of the candidate who also has the right to access the relevant information, provide appropriate explanations, refute and deny it. The HQCJ then takes a motivated decision on whether to terminate further participation of the candidate in the selection procedure. In addition to the background check, judicial candidates have to submit their asset declarations – which are subject to a complete check by the competent authority (i.e. the National Agency on Corruption Prevention) – as well as the declarations of family relations, which are published on the HQCJ website. The qualification assessment results in a decision by the HQCJ on the candidates' aptitude to work as a judge. The decision must be motivated and can be challenged by unsuccessful candidates before the court in accordance with the provisions of the Administrative Offences Code on certain procedural grounds (Article 88 of the LOCSJ). Successful candidates are enrolled on a rating list which is published on the HQCJ website.

- *Shortlisting (Articles 77-78 of the LOCSJ):* Candidates who have successfully completed the above procedure undergo 12 months' special training at the National School of Judges followed by a qualification assessment by the HQCJ which evaluates the candidates' competency, professional ethics and integrity. In the evaluation of the latter two criteria, the HQCJ is assisted by the Public Council of Integrity (hereinafter "PIC"; Article 85 of the LOCSJ).
- *Final call (Articles 79-80 of the LOCSJ):* According to the number of vacant judges' positions in local courts, the HQCJ then conducts a contest on the basis of the rating of candidates and submits its recommendations to the HCJ. The HCJ reviews the recommendations made and decides on whether to make corresponding proposals on judicial appointments to the President of Ukraine. The HCJ may refuse the HQCJ's recommendations only if the statutory procedure has been violated or if there are reasonable doubts as to the compliance of a candidate with the criterion of integrity or professional ethics or other circumstances which may have a negative impact on public trust in the judiciary. The HCJ decision to refuse an appointment proposal must be motivated and can be appealed before the Supreme Court of Ukraine, but only on certain procedural grounds (Article 79 of the LOCSJ). The final appointment decision takes the form of a presidential decree. According to Article 80 of the LOCSJ the President cannot refuse to appoint the candidates proposed by the HCJ.

The HQCJ is a state body of judicial self-government, whose tasks under Article 93 of the LOCSJ involve, next to qualifications evaluations, organizing competitions for judicial vacancies, including the selection of judges and submitting recommendations on judicial appointments and transfers to the HCJ. According to Article 92 of the Law on Judiciary, the HQCJ consists of 16 members, half of whom are judges or former judges. The competition for the position of a member of the HQCJ is conducted by the Selection Commission (Article 95-95^1 of the LOCSJ). The Selection Commission following the procedures set out in Article 95 § § 1-23 selects candidates for the position of a member of the HQCJ who meet the criteria of integrity and professional competence, taking into account that there are at least two candidates for one vacant position. Based on the results of the competition, the Selection Commission compiles a list of candidates who meet the criteria and submits it to the HCJ. Subsequently, the HCJ openly conducts an interview with the candidates recommended by the Selection Commission and based on its results makes a reasoned and motivated decision on the appointment or refusal to appoint selected candidates to vacant positions of members of the HQCJ.

As shown above, a central task of this commission, which is an auxiliary body of the HCJ, is to re-compose the HQCJ. According to Article 95§1^1 of the LOCSJ "it is set up for the purposes of conducting a competitive selection of members of the HQCJ". Given the existing regulatory framework, the role of the HCJ in composing the HQCJ seems rather limited given the fact that Article 95^{1}provides that the competition procedure of the HQCJ members will be carried out by the Selection Commission.

As mentioned, in the process of examining the ethics and professional integrity of a judge or judicial candidate, the HQCJ is assisted by the PIC (Article 87). This council shall help the HQCJ determine the eligibility of a judge or judicial candidate following the criteria of professional ethics and integrity (Article 87§1). To do so, the Council shall collect, check and analyze information about a judge/judicial candidate, provide the HQCJ with this information, and shall then, "with justifiable reasons, provide the HQCJ with the conclusion on the non-eligibility of a judge (a judicial candidate) in terms of professional ethics and integrity, which shall be included in the record of a judicial candidate or the record of a judge" (Article 87§6). According to Article 87§2, the PIC shall consist of 20 members, who shall be representatives of human rights civic groups, law scholars, attorneys, and journalists. The

members of this council shall be "recognized specialists in the sphere of their professional activity", with a high professional reputation; they shall also meet the criterion of political neutrality and integrity.

The National School of Judges of Ukraine (Article 104-105 of the LOCSJ), among other things, administers a special training program for judicial candidates. It enjoys a special status within the justice system under the umbrella of the HQCJ.

2. Analysis

The Ukrainian model of judicial recruitment can be considered as a hybrid between the model of judicial recruitment through judicial schools and the model where the crucial role is played by the HCJ. The completion of mandatory training at the school, on the one side, and the division of competences between the HQCJ and the HCJ, which proposes a candidate to a position of a judge, on the other side, are the main features of this model.

Judged against the European standards and good practices for judicial appointments, the Ukrainian legislation foresees a merit-based selection process and provides that decisions on judicial appointments throughout the process are to be based on main criteria of competence and integrity. The introduction of the so-called direct appointment system where judges are appointed by the President of Ukraine upon the proposal of the HCJ, is a valid model and a clear step forward. A mixed composition of the HCJ with a substantial majority of judges elected by their peers, and only one *ex officio* HCJ member, namely the President of the Supreme Court, is in line with international standards. The procedure for taking on the position of judge at first instance court as outlined in Section IV of the LOCSJ is quite detailed, and appears to take great pains to ensure that the appointment of judges will be undertaken in a balanced, objective and fair manner, by an independent body, namely the HQCJ.

The current judicial appointment system, overall, meets the standards required by the international hard and soft law on judicial independence and judicial governance. It is positive that the selection process involves various aspects of the candidate's previous and current work and career. Qualification exam in a form of a written anonymous test and anonymous written practical assignment, which are intended to identify the level of knowledge and practical skills of candidates in application of law and the conduct of a court session, also deserve praise. Moreover, it is welcome that the judge candidate being evaluated has full access to all compiled material, and will have the opportunity to provide explanations and contest or refute information. Finally, it is commendable that the law drafters have sought to make the appointment process of candidate judges as transparent as possible, by allowing interested persons to be present at any stage of the examination and in the course of evaluation of the results, and by ensuring the publication of candidates' dossiers.[22] It should be noted, however, that the institutional set-up and required procedures to appoint a judge appear quite complicated involving a number of authorities:

- the selection procedure is the responsibility of the HQCJ, in whose composing an important role is played by the Selection Commission;
- a special training programme for judicial candidates is administered by the National School of Judges of Ukraine;
- in the qualification assessment of judicial candidates, the HQCJ is assisted by the PIC;
- the HQCJ recommendations are then decided upon by the HCJ;
- the final appointment, including the oath ceremony, is effected by the President of the Ukraine.

Before making more concrete proposals on how to improve the existing system of judicial appointments in Ukraine, a few preliminary remarks need to be made. First, key principles need to be recalled. The principle of stability and consistency of law, as a core element of the rule of law, requires stability in the judicial system. As the Venice Commission stated: "Clarity, predictability, consistency and coherency of the legislative framework, as well as the stability of the legislation, are major concerns for any legal order based on the principles of the rule of law."[23] There is a clear connection between the stability of the judicial system and its independence. Trust in the judiciary can grow only in the framework of a stable system. It should be stressed at the outset that genuine judicial reform and transformation is a lengthy and tiresome process. Often there are no visible and quick solutions, and positive elements may show only with time once the people in it have matured as well. Therefore, hasty changes should be avoided.

In the light of the above, in its Opinion CDL-AD(2019)027 on Ukraine (para. 13), the Venice Commission stated that: "Trust in the judiciary can grow only in the framework of a stable system. While judicial reforms in Ukraine have been considered necessary in order to increase public confidence in the judicial system, persistent institutional instability where reforms follow changes in political power may also be harmful for the public trust in the judiciary as an independent and impartial institution." The Venice Commission reiterated the same principles in its Opinion CDL-AD(2020)022 on Ukraine (para.33). Similarly, in its Report on judicial independence and impartiality 2017, the CCJE

[22] "(…) the process whereby judge candidates are selected should be open and transparent. This category of persons needs to be treated differently from that of already appointed judges, as the purpose of the procedure is to assess their aptitude for becoming a judge, and not their past work. Moreover, transparency is more justified here, given that the candidates have accepted to take part in a highly competitive selection process, the elements of which they are, or should be, aware of before submitting their application." See ODIHR Opinion, para. 62.

[23] Venice Commission, Rule of Law Checklist, II.B.4.i.

Bureau recalled that: "Public trust in judges may be undermined not only in cases of real, existing and convincingly established infringements, but also where there are sufficient reasons to cast doubt on judicial independence and impartiality". Frequent changes in the rules concerning judicial institutions and appointments can lead to various interpretations, including even alleging *mala fide* intentions for these changes.[24]

Second, another problem in Ukraine seems the poor implementation of the laws once they are adopted, possibly due to a continued problem of corruption and a lack of integrity in some parts of the judiciary.[25] However, institutional reforms cannot be the answer to solve problems that have arisen on account of the personal conduct of some of the members of these institutions.

This does not mean that flawed institutional design, once having been adopted, should not be improved in order to increase public confidence in the judicial system. In so doing, the specifics of each judicial system, its vices and virtues, the legal culture the relevant judiciary is embedded in and its historical legacies should be taken into account. Namely, "[…] judicial independence is not only a matter of law, but also a matter of tradition and political culture. Such a "culture of judicial independence" may very well be the most important factor for maintaining judiciaries free from political interference. The term "culture" should not be misunderstood as a judgment on the superiority or inferiority of certain countries. […] Rather, the term aims at describing the informal rules on acceptable behaviour and respect of other powers of state towards the judiciary. Such a "culture of independence" can reinforce formal legal safeguards".[26]

Finally, the question of trust in this highest body of the judiciary has been a recurrent topic in evaluation and reviews conducted by international fora. A prerequisite for any optimisation of judicial appointment procedures is to ensure the integrity of members of the HCJ.

3. Optimisation of procedures for taking on the position of judge at first instance

A serious problem facing the Ukrainian judiciary at the moment, which has its roots in the dissolution of the HQCJ in 2019 and its subsequent non-functioning, is the enormous amount of vacancies for judicial posts, particularly at first instance courts where the estimated number of vacancies exceeds 2500. The situation has been aggravated by the fact that, according to Article 131§9 of the Constitution, the HCJ is competent if not less than fifteen its members, the majority of whom being judges, are elected (appointed). Due to resignations and delays in the election/appointment of new members, since at least February 2022 the HCJ has not been able to exercise its tasks.

Judicial vacancies, which lead to large backlogs in criminal, civil, and administrative cases, have wide ramifications that affect a broad range of human rights, including the ability of people to access justice in a timely, fair, and effective manner. A key concern is that the shortage of judges will put many groups in society further behind.

3.1 Addressing the gap between law and practice

In its Opinion No. 1 (para. 6) the CCJE emphasised that: "what is critical is not the perfection of principles and, still less, the harmonisation of institutions; it is the putting into full effect of principles already developed." As mentioned earlier, the poor implementation of the laws once they are adopted, has been a chronic Ukrainian problem. Therefore, more needs to be done to try to ensure intentions of the legislature are turned into results – in short, that policy failure is avoided. To know how well regulation and regulatory policy actually work in practice, the authorities involved in judicial appointments need to devote greater attention to selecting reliable indicators and appropriate research designs needed to conduct more *ex post* evaluation of the judicial appointments system. Institutionalizing practices of rigorous *ex post* evaluation will help ensure more informed decision making in the future. HCJ should play a pivotal role here.

Equally importantly, given the number of stakeholders involved in the judicial appointments procedure, the consultants encourage the relevant authorities to strengthen further the co-ordination of their activities, and stress the importance of the further development and use of ICT at all stages of the procedure. As to the relationship between the HCJ and HQCJ, see below (point 3.2).

3.2 Optimising the institutional set-up

The consultants recognise the urgency of the need to fill the high number of judicial vacancies. The existing institutional set-up of bodies of judicial self-governance should serve as a basis to fill these urgent nominations. While the consultants do not suggest a substantial structural change of this institutional framework and still less an establishment of new bodies or agencies, they wish to stress the importance of speedy appointments of new members of the HCJ and HQCJ who passed the re-evaluation procedure. As mentioned, a prerequisite for any optimisation of judicial appointment procedures is to ensure the integrity of members of the HCJ.

[24] Venice Commission, Opinion CDL-AD(2019)027, para. 17.
[25] See e. g. Venice Commission, Opinion CDL-AD(2020)022, para. 8.
[26] A. Sanders, A Stress Test for Europe's Judiciaries, https://verfassungsblog.de/a-stress-test-for-europes-judiciaries/.

The relationship between the HCJ and HQCJ is a complex topic. The consultants agree with the Venice Commission that this issue should be addressed at a later stage and in the framework of a wider reform. A merger of the HCJ and HQCJ as the long-term goal should be the final point of such reform only once issues of integrity in the judiciary, including the HCJ, are settled.[27]

According to the LOCSJ the National School of Judges of Ukraine, a special entity under the umbrella of the HQCJ, administers a special training program for judicial candidates. The training is followed by a qualification assessment by the HQCJ, which evaluates the candidates' competency, professional ethics and integrity. The School of Judges, contrary to the HCJ and HQCJ, has adequate staffing and equipment to tackle the high volume of qualifications assessments of candidates to the position of a judge. Concerning the process of evaluation of the competency of judicial candidates, the consultants support the idea to use as much as possible the capacities of the National School of judges of Ukraine (under supervision of the HQCJ). Given the situation in Ukraine, this approach is favoured over outsourcing of necessary services to external providers.

3.3 Re-thinking the substantive requirements

Currently, the substantive requirements laid down by the LOCSJ the candidates must meet may be summarized as:

- compliance with formal legal requirements;
- admission exam;
- background check conducted by the HQCJ;
- 12 months' special training at the School of Judges and preparation for the qualification exam;
- qualification assessment by the HQCJ.

There seems to be a large consensus among the interlocutors on the need for simplification of these requirements. As mentioned, selection conditions in European jurisdictions correspond to implicit assumptions about the level of practical experience of the appointee. Judges in Ukraine are not recruited at the start of their professional career: formal criteria for holding the office of judge include, among others, a university education in law and at least *five years* of professional activity in the field of law. Thus, based on the assumption that the applicants have sufficient general theoretical knowledge, the consultants recommend considering the possibility to abolish the admission test as a criterion of judicial appointments. A command of the official language of the country, personal moral and psychological qualities of the candidate may be checked at a later stage, as part of the qualification assessment.

Alternatively, if places at the School of Judges are limited thereby making a selection of applicants inevitable, the scope of the admission exam should be limited in scope. In that event, duplication of content of admission exam and qualification exam should be avoided.

3.4 Duration of training

As outlined above, there are great differences among European countries with respect to the initial (and in-service) training of judges. More specifically, judicial systems differ significantly in terms of duration of the training. Nevertheless, in all jurisdictions there is a tight relationship between the judicial appointment methods and the characteristics of the initial judicial training offered. Recognising the urgency of the need to fill the high number of judicial vacancies and taking into account that the recruitment of judges in Ukraine is conditional upon prior professional experience, the consultants, provided certain conditions are satisfied, do not oppose the idea expressed by the interlocutors of shortening the duration of training.

It should be stressed, as the CCJE stated in its Opinion No. 4, "regardless of the diversity of national institutional systems and the problems arising in certain countries, training should be seen as essential in view of the need to improve not only the skills of those in the judicial public service but also the very functioning of that service."[28] It is important, nonetheless, to adapt the training programmes to the specific features of recruitment methods and appointees' professional experience.[29] On the basis of formal criteria for holding the office of judge in Ukraine, including a minimum age of 30 years, a university education in law, and at least five years of professional activity in the field of law, it can reasonably be assumed that in Ukraine all appointees to judicial posts have, before they take up their duties, extensive knowledge of substantive law and procedure. Therefore, a multidisciplinary and practical type of training, essentially intended for the transmission of professional techniques and values, which goes beyond simple legal education, should be given primacy. Legal education merely constitutes a necessary but insufficient prerequisite to become a judge. For example, it is a matter of learning how to question, learning how to work with investigators, how to conduct a hearing, how to determine the right position to take, how to treat the victims and the accused, or the parties to a civil trial with fairness, how to draft a rigorous decision, precise but intelligible… Moreover, theoretical and practical programmes should also include training in ethics and an

[27] Opinion CDL-AD(2020)022, paras. 77-80.
[28] Opinion No. 4, para. 7.
[29] Opinion No. 4, paras. 25 and 26.

introduction to other fields relevant to judicial activity, such as management of cases and administration of courts, information technology, foreign languages, social sciences and alternative dispute resolution.

Aside from the duration of training, the issue of the future content of training was discussed at the meeting of 23 June. Some interlocutors took the view that the training of judges should be limited to the areas of law where the applicants shall hold their office. The consultants are highly sceptical about this idea. In its Opinion No. 15,[30] the CCJE has stressed that all judges, whether generalist or specialist, must be primarily experts in the art of judging. Judges have the know-how to analyse and appraise the facts and the law and to take decisions in a wide range of fields. To do this they must have a broad knowledge of legal institutions and principles. In principle, judges should be capable of deciding cases in all fields. Their general knowledge of the law and its underlying principles, their common sense and knowledge of the realities of life give them an ability to apply the law in all fields, including specialist areas, with expert assistance if necessary. In any given court, generalist judges are usually assigned to various specialist sectors, changing assignments several times in the course of their careers. This gives them broad experience of a variety of legal fields, thus enabling them to adapt to new assignments and meet litigants' needs. This is why it is vital, from the outset, for judges to have general training in order to acquire the requisite flexibility and versatility to cope with the needs of a general court, which has to deal with an enormous variety of matters, including those requiring a certain degree of specialisation. Having acquired general initial training, in-service training may allow judges to increase their level of competence they need in order to deal with specific and complex issues in specialist fields.

V. Procedure for taking on the position of judge at appellate court

According to Article 81§ 3 of the LOCSJ an individual may be appointed to the position of appellate court if he/she meets the requirements to candidates for the judge position, has confirmed his/her ability to administer justice at a relevant court and by relevant specialization based on the qualifications evaluation results, and meets one of the requirements defined in Article 28§1: at least five years of experience as a judge; an academic degree in the field of law and at least seven years of scientific experience in the field of law; at least seven years of professional experience as a lawyer, including those representing clients in court and/or defending against criminal charges; and at least seven years on a general record of service (professional experience) according to requirements set forth in points 1-3 of this provision.

The stages of the procedure laid down by the LOCSJ (Article 81§5 to be appointed to the position of appellate court may be summarized as:

- qualification evaluation conducted by the HQCJ;
- background check by studying dossiers of judicial candidates and conducting an interview by the HQCJ;
- a decision made by the HQCJ on acknowledging or not acknowledging the capability of a candidate to administer justice in a relevant court;
- a proposal to the HCJ on appointing a candidate to judicial position;
- a proposal made by the HCJ to the President of Ukraine on appointing a candidate to judicial position;
- presidential decree.

The consultants find that the requirements and the procedure to be appointed to the position of appellate court are in line with international standards. It is positive that the law foresees the possibility to recruit appellate court judges not only among first instance judges but also among academics and experienced practicing lawyers. This follows the general trend that the appointment practices in European countries have become more hybridised throughout the decades (see Section IV. 2.), and may have the advantage of diversifying judges' backgrounds.[31] While the consultants do not dispose of the statistical data on appellate court judges coming from the bar and academia, they see some merits, with a view to diversity in the range of persons available for selection for appointment to the appellate court, in the introduction of quotas or at least targets in order to recruit applicants of non-judicial background. In that event, the recruitment should be followed by (mandatory) in-service training, putting the emphasis on professional techniques and values.

VI. Disciplinary system regarding judges. General Remarks.

This part of the analysis examines the constitutional and legal framework of the disciplinary system regarding judges on account its correspondence with the Council of Europe´s standards. It also tries to identify possible proposals which may be considered to further improvement of the disciplinary regime.

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[30] Opinion No. 15, paras. 24-27.

[31] CCJE Opinion No. 4, para. 30.

The consultants had the possibility to exchange with the Ukrainian stakeholders in an on-line meeting, where several questions were raised by the participants. The analysis refers to these questions and summarizes the considerations of the consultants thereon.

Following the understanding of democracy after the Enlightenment and the French revolution democracy must be accompanied by the rule of law and protection of human rights. Accordingly, the Council of Europe[32] as well as the European Union[33] are based on this triangle of fundamental principles. Meanwhile, certain backslides caused by populism showed that the undermining of one of these principles also endangers the other two principles.

Consequence of this close relation is the concept of balances of powers of the state, which is not only seen as separation of power but also as division of tasks in the interest of the common task to be in service for society, each within its competences. This also is combined with accountability of each state power to the other powers of the state on behalf of society.

The Consultative Council of European Judges (CCJE) in its Opinion 18[34] elaborates on these relations. The CCJE concludes that there are three different kinds how the judicial state power accounts to the parties of a case and to the society at large[35]. Firstly, there is the judicial accountability by the system of remedies. Secondly, there is the explanatory accountability, according to which all actions, measures, and activities of the judiciary at large, and every step of the individual judges, when exercising his or her office, are explained and reasoned. And finally, there is the punitive accountability which should take place if miscarriages occur. Disciplinary liability of judges is one of the elements thereof. An effective disciplinary regime not only holds the responsible judge accountable but also accounts that the judiciary is ready and able to deal with failures and problems.

1. The Legal Framework in Ukraine (status quo):

a) The Constitution of Ukraine:

"While administering justice, a judge is independent and governed by the rule of law"[36]" "Independence and inviolability of a judge are guaranteed by the Constitution and laws of Ukraine."[37]

Judges hold an office for an unlimited term."[38] But nevertheless certain circumstances may lead to an early termination of the office: "The grounds to dismiss a judge are the following …..3.) commission by him or her of a serious disciplinary offence, flagrant to permanent disregard of his or her duties incompatible with the status of judge or reveal his or her non-conformity with being in the office"[39].

"To decide on dismissal of a judge from office"[40] is in the jurisdiction of the High Council of Justice (HCJ). The HCJ is also competent to "review complaints on decisions of the relevant body imposing disciplinary liability on a judge."[41]

"The HCJ consists of twenty-one members: ten of them are elected by the Congress of Judges of Ukraine among judges or retired judges; two of them are appointed by the President of Ukraine; two of them are elected by the Verkhovna Rada of Ukraine; two of them are elected by the Congress of Advocates of Ukraine; two of them are elected by the All-Ukrainian Conference of Public Prosecutors; two of them are elected by the Congress of Representatives of Law Schools and Law Academic Institutions."[42] " The Chairperson of the Supreme Court is a member of the HCJ ex officio."[43]

"Term of the office for elected (appointed) members of the HCJ is four years. The same person cannot hold the office of a member of the HCJ for two consecutive terms. A member of the HCJ shall not belong to political parties, trade unions, take part in any political activity, hold a representative mandate, occupy any other paid office (except for the office of the Chairperson of the Supreme Court), engage in other paid work except academic, teaching or creative activity. Member of the HCJ shall be a legal professional and meet the requirement of political neutrality."[44] The Constitution opens the possibility to establish by law other bodies with jurisdiction in the justice system besides the HCJ: "In the system of the judiciary, according to the law, there are established bodies and institutions which provide selection of judges, prosecutors, their professional training, assessment, consider disciplinary responsibility cases, provide financial and organisational support for the courts."[45]

[32] Statute of the Council of Europe, Preamble
[33] Treaty on European Union, Preamble and Article 2
[34] CCJE Opinion 18(2015) on the Position of the Judiciary and its Relation with the other Powers of State in a Modern Democracy
[35] CCJE Opinion 18(2015) paras 24 - 34
[36] Constitution, Article 129 §1
[37] Constitution, Article 126 §1
[38] Constitution, Article 126 §2
[39] Constitution, Article 126 §3
[40] Constitution, Article 131 §1 point 4
[41] Constitution, Article 131 §1 point 3
[42] Constitution, Article 131 §2
[43] Constitution, Article 131 §4
[44] Cpnstitution, Article 131 §5-7
[45] Constitution, Article 131 §10

b) The Law on the Organisation of Courts and the Status of Judges and the Law on the High Council of Justice

The disciplinary liability of judges is regulated in the LOCSJ in its section VI "Disciplinary Liability of the Judge". The procedural provisions are mainly contained in the LHCJ, but also to a smaller part in the LOCSJ.

c) The Substantive Law on Disciplinary Cases

Article 106 of the LOCSJ enumerates the grounds for taking disciplinary action against a judge. Article 109 of the LOCSJ deals with the sanctions and Article 110 provides the possibility of expungement of disciplinary sanctions.

Article 106§1 lists 19 disciplinary offences - several of them with some sub-categories. The list covers a great variety of kinds of offences:

- Some deal with actions and decisions when exercising the judicial tasks.[46]
- Some deal with behaviour, which may be classified as corruption.[47]
- Several deal with the obligation to declare property, interest, integrity questions, which was not fulfilled, or delayed or incomplete, or falsely fulfilled.[48]
- Interfering or failure to inform about an interference in the activity of a judge.[49]
- Missing an ordered training [50]or
- "Conduct which disgraces a status of judges or undermine the authority of justice"[51]

Compared with the law before 2017, which saw as central offence the "breach of the oath", which was one of the critical points that provoked the judgment of the European Court of Human Rights in the case Volkov vs. Ukraine. The offences listed here are much more concrete. Nevertheless, the definition of several of them could be further improved.

As to the disciplinary offence Article 6§1 (point 1) of the LOCSJ explicitly intention or negligence (not limited to gross negligence) is required, whilst in many other points a hint to fault is missing.

Whilst Article 106§2 of the LOCSJ correctly states that "reversal or change of a court decision shall not result in disciplinary liability", it appears that several offences in this Article deal with the content of the decision.

Altogether, there is some space for interpretation in many of the definitions of offences, foremost of course in the "conduct which disgraces a status of judge or undermine the authority of justice"[52]

Article 109 provides a set of sanctions. They include[53]:

"1) admonishment.

2) reprimand – with deprivation of a right to receive bonuses to judicial remuneration during one month.

3) censure – with a termination of the right to receive bonuses to judicial remuneration during three months.

4) proposal to temporarily (from one to six months) suspend a judge from the administration of justice – with deprivation of a right to receive bonuses to judicial salary and compulsory referral of a judge to the National School of Judges of Ukraine to pass an ongoing training course determined by the body which conducts disciplinary proceedings against judges and further qualifications evaluation to confirm the capability of a judge to administer justice in a relevant court.

5) proposal to transfer a judge to a court of a lower level; and

6) proposal to dismiss a judge from the office."

Generally, the concrete sanction in a concrete disciplinary case should be selected considering "the type of disciplinary sanction against a judge a nature of a disciplinary offence, its implications, judicial personality, the extent of his/her guilt, availability of other disciplinary sanctions, other circumstances which influence the possibility of disciplining a judge shall be taken into account. A disciplinary sanction shall be imposed taking into account the principles of proportionality."[54]

The paragraphs which follow this article exclude some sanctions for certain types of offences or reserve certain sanctions for certain types of sanctions.[55]

It is most interesting which are the requirements that lead to the sanction of a proposal for dismissal. Such sanction shall be imposed if "1) a judge commits a substantial disciplinary offence, gross or systematic neglect of duties which is incompatible with a status of a judge or which has revealed his/her incompatibility with the office; and 2) a judge violates the duty to confirm the legality of the source of property"[56].

Whilst the second behavior is easily assessable, the first definition opens space for interpretation. Article

[46] Article 106 §1 points 1,2,4,5,7 of the LOCSJ
[47] Article 106 §11,12,15 of the LOCSJ
[48] Article 106 §1 points 9,10, 13, 15, 16, 17, 18, 19 of the LOCSJ
[49] Article 106 §1 points 8, 6 of the LOCSJ
[50] Article 106 §1 point 14 of the LOCSJ
[51] Article 106 §1 point 3 of the LOCSJ
[52] Article 106 §1 point 3 of the LOCSJ
[53] Article 109 §1 of the LOCSJ
[54] Article 109 §2 of the LOCSJ
[55] Article 109 §3, 4 and 8 of the LOCSJ
[56] Article 109 §8 of the LOCSJ

109§9 contains seven examples of behavior, which fall under that kind of offence and may therefore lead to a dismissal.

These examples are[57]:

"1) judge has allowed conduct which disgraces the title of a judge or undermines the authority of justice, including in the issues of moral, integrity, incorruptibility, congruence of the lifestyle of a judge with his/her status, compliance with other ethical norms and standards of conduct which ensure public trust in court;

2) judge has committed a disciplinary offence having an outstanding disciplinary sanction (except admonishment or reprimand) or has two outstanding disciplinary sanctions;

3) fact of judicial misconduct was found, including a judge or his/her family members making expenses which exceed income of such judge and income of his/her family members and the legality of sources of which is confirmed; incongruence of the level of life of a judge with declared income was found; using the status of a judge with the aim of illegal receipt of material benefits or other benefits by him/her or by third persons;

4) judge was found guilty of committing a corruption offence or offence related to corruption;

5) judge did not fulfill the requirements of decision of the body which conducts disciplinary proceedings against the judge approved based on point 4 of paragraph one of this Article or, based on results of qualifications evaluation prescribed according to point 4 of paragraph one of this Article, a judge did not confirm his/her capability to administer justice in a relevant court;

6) judge has deliberately failed to submit a declaration of integrity or declaration of family relations within the established timelines or has deliberately declared inaccurate (including incomplete) statements in the declaration of integrity; and

7) judge has committed another gross violation of law, which undermines public trust in court."

Analyzing this provision, one must conclude that many of the disciplinary offences listed in Article 106 LOCSJ may lead to a dismissal, although they are of quite different nature. The formulation of Article 109§8 LOCSJ: the sanction to propose dismissal "shall be imposed", raises the question on of the relation of this legal command with the principle of proportionality expressed in Article 109§2 LOCSJ.

As long as the disciplinary sanction is outstanding, the judge cannot participate in a competition on a vacancy in another court.[58]

A disciplinary sanction cannot be imposed after three years from the date, when the offence was committed,[59] if a decision of the European Court of Human Rights found facts, which may constitute grounds for a disciplinary sanction the three years period starts form the date, when the decision of the European Court of Human Rights became final[60]. The decision to discipline a judge must be published on the website of the respective court and the website of the HCJ.[61]

Depending on the kind of sanction the judge will be considered as such who has no disciplinary sanction after a corresponding period of time during which the judge had not committed a new offence.[62]

d) The Procedural Law on Disciplinary Cases:

Like criminal proceedings disciplinary proceedings have two stages, an investigative phase which leads either to an institution (indictment) of the case or to its termination, and a trial phase, which ends with the establishment of a disciplinary offence or with an acquittal. Appellate proceedings may follow.

The law entrusts disciplinary chambers of the HCJ to conduct the disciplinary procedures against a judge.[63] Disciplinary investigations and preparation of the case are exercised by the Disciplinary Inspection Service of the HCJ[64]. Remedies against the decision of the Disciplinary Chambers are lodged with and decided by the plenary of the HCJ. [65] Under certain, very restricted circumstances the decision of the HCJ can be appealed to a court and this may lead to a re-considering of the decision by the HCJ.[66]

"The number of the Disciplinary Chambers and the number of members of each Chamber shall be established by decision of the HCJ."[67] "Each Disciplinary Chamber shall include at least four members of the HCJ. The HCJ shall ensure that at least half or, if impossible, a substantial part of members of each Disciplinary Chamber shall be judges or retired judges."[68] "The Disciplinary Inspectors Service of the HCJ shall be formed from among individuals with higher legal education and at least 15-year legal professional experience of which at least eight years in total were

[57] Article 109 §90 of the LOCSJ
[58] Article 109 §7 of the LOCSJ
[59] Article 109 §11 of the LOCSJ
[60] Article 109 §12 of the LOCSJ
[61] Article 109 §13 of the LOCSJ
[62] Article 110 of the LOCSJ
[63] Article 108 of the LOCSJ
[64] Article 28 §4 and Article 43 of the LHCJ
[65] Article 51 of the LHCJ
[66] Article 52 of the LHCJ
[67] Article 26 §3 of the LHCJ
[68] Article 26 §4 of the LHCJ

spent on the positions of judge, prosecutor or attorney. Disciplinary inspectors of the High Council of Justice shall be appointed to the positions on a competitive basis according to the procedure set forth by the legislation on public service with allowance for specifics defined by this Law."[69] In addition, persons who after having passed the competition should be appointed as Disciplinary Inspectors have to undergo a special anti-corruption test and be checked for integrity and compliance with ethical standards set forth for a judge.

Any person has "the right to file a complaint about misconduct of a judge or a notice of committing a misconduct by a judge (the "disciplinary complaint"). Individuals shall exercise this right in person or through an attorney; legal entities shall do it through an attorney; and government agencies and local governments shall do it through their leadership or representatives."[70]

But there are some limiting safeguards: 1.) "Abuse of the right to apply to the body authorized to conduct disciplinary proceedings including initiating the issue of judicial liability without sufficient grounds, and usage of such right as a means of pressure on a judge with regard to his/her administration of justice shall not be allowed."[71] and 2.) "An attorney is obligated to check facts which may entail disciplining of a judge prior to filing a relevant disciplinary complaint."[72] and "a lawyer may be brought to disciplinary liability as prescribed by law for filing a knowingly unjustified disciplinary complaint."[73]

"A disciplinary case against a judge may not be opened based on a complaint which does not contain data on the availability of signs of a disciplinary offence of a judge as well as based on anonymous applications and notifications".[74]

The complaint will be checked by a disciplinary inspector, who will be appointed by the automated case distribution system. He or she will be the rapporteur for the case.

If the check reveals that certain formal requirements are not met, the disciplinary inspector has to return the complaint without further considerations. Otherwise, the disciplinary inspector must prepare materials and submits it to the Disciplinary Chamber with a proposal to open a disciplinary case or to refuse to open a disciplinary case.[75]

The Disciplinary Chamber decides on the opening of the case, without assessment of the credibility of the information on the signs of the disciplinary offence of the judge and evidence of such offence.[76] The decision to open a disciplinary case cannot be appealed[77], the decision to refuse to open a disciplinary case may be forwarded for approval to the plenary of the HCJ if either the disciplinary inspector – rapporteur requests it, or there is a dissenting opinion of a member of the Disciplinary Chamber[78].

Once a disciplinary case is opened, the disciplinary inspector of the HCJ – rapporteur shall prepare the case for hearing in the Disciplinary Chamber, identify witnesses or other persons to be summoned or invited to the hearing. Based on case preparation results, the disciplinary inspector of the HCJ – rapporteur – shall prepare an opinion and send it for consideration by the Disciplinary Chamber within thirty days of opening the disciplinary case.[79]

The review of the disciplinary case by the Disciplinary Chamber shall be open to the public the participants being the disciplinary inspector – rapporteur, the judge concerned, the complainant, and their representatives.[80] But the Disciplinary Chamber shall review the disciplinary case in camera: "if consideration in an open session may lead to disclosure of a secret protected by law or in order to prevent disclosure of information on the private lives of persons participating in consideration of a disciplinary case."[81]

The Disciplinary Chamber shall review the disciplinary case within ninety days, which may be extended to 120 days.[82]

"If the judge is absent for a good reason, consideration of the disciplinary case by the Disciplinary Chamber shall be postponed." But "if the judge is absent for the second time, the Disciplinary Chamber shall consider the disciplinary case without participation thereof except for cases when the judge was not notified or was notified with violation of Article 48§5 of this Law."[83]

The decision in the disciplinary case shall be adopted by a simple majority of votes.[84]

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[69] Article 28 §1 of the LHCJ
[70] Article 107 §1 of the LOCSJ
[71] Article 107 §4 of the LOCSJ
[72] Article 107 §1 of the LOCSJ
[73] Article 107 §5 of the LOCSJ
[74] Article 107 §6 of the LOCSJ
[75] Article 43 §1 of the LHCJ
[76] Article 44 §3 of the LHCJ
[77] Article 46 §2 of the LHCJ
[78] Article 46 § 3 of the LHCJ
[79] Article 48§1 of the LHCJ
[80] Article 49 §1 of the LHCJ
[81] Article 49 §2 of the LHCJ
[82] Article 49 §13 of the LHCJ
[83] Article 47 §4 of the LHCJ
[84] Article 50 §4 of the LHCJ

“The judge against whom the Disciplinary Chamber adopted a decision in a disciplinary case has the right to appeal the decision to the HCJ”, the complainant can appeal if the Disciplinary Chamber gives a permit to appeal.[85] The HCJ has to consider the appeal within thirty days.[86] Members of the HCJ, who had been members of the respective Disciplinary Chamber, are excluded from the proceeding on appeal.[87]

If the Disciplinary Chamber adopts a decision on disciplining a judge in the form of dismissal, the judge is automatically suspended from administrating justice by law from the day of the decision onwards until the decision of the HCJ on the dismissal is passed or the decision of the Disciplinary Chamber is revoked,[88]

Against the decision of the HCJ an appeal to a court is possible, but only on very restrictive reasons, which are: “1)The composition of the HCJ that adopted the corresponding decision did not have the powers to do so; 2)The decision was not signed by any of the members of the HCJ who approved it; 3)The judge was not duly notified of the session of the HCJ if any of the decisions referred to in Article 51§10 (para. 2-5) of this Law was adopted; or 4) the decision does not contain references to the statutory grounds of disciplinary liability of the judge or reasons for which the HCJ reached its findings.”[89] The right to appeal to a court is held by the judge concerned and the complainant, if the decision of the High Court of Justice is adopted on ground of the complainant´s complain.[90] If a court annuls the decision of the HCJ, which was adopted following a review of the complaint to the decision of the Disciplinary Chamber, the HCJ shall re-consider the relevant disciplinary case at a plenary session.[91]

If the decision in the disciplinary proceeding results in the sanction to propose the dismissal of the judge from the office, the HCJ has to consider this proposal in a session of the HCJ of which the judge concerned has to be notified. “The failure of the judge to attend the session, regardless of the reasons, does not preclude the session from reviewing the case in absentia.”[92]

A decision of the HCJ to dismiss a judge on the ground of committing a serious disciplinary offence may be appealed and revoked solely on the following grounds: “1)the composition of the High Council of Justice that adopted the decision did not have the power to do so; 2)The decision is not signed by any of the members of the High Council of Justice who adopted it; 3) the judge was not duly notified of the session of the HCJ ….4)The decision does not contain references to the statutory ground for the judge's dismissal or reasons for which the High Council of Justice reached its findings.”[93]

VII. The International and European Standards

In the United Nations Basic Principles on the Independence of the Judiciary[94] a section is devoted to discipline, suspension and removal. Article 17 recognises judges' "right to a fair hearing". Under Article 19, "all disciplinary (…) proceedings shall be determined in accordance with established standards of judicial conduct". Article 20 sets out the principle that "decisions in disciplinary, suspension or removal proceedings should be subject to an independent review".

The European Charter on the Statute for Judges states in its Article 5.1 that “The dereliction by a judge of one of the duties expressly defined by the statute, may only give rise to a sanction upon the decision, following the proposal, the recommendation, or with the agreement of a tribunal or authority composed at least as to one half of elected judges, within the framework of proceedings of a character involving the full hearing of the parties, in which the judge proceeded against must be entitled to representation. The scale of sanctions which may be imposed is set out in the statute, and their imposition is subject to the principle of proportionality. The decision of an executive authority, of a tribunal, or of an authority pronouncing a sanction as envisaged herein, is open to an appeal to a higher judicial authority.” and Article 5.3. adds: „Each individual must have the possibility of submitting without specific formality a complaint relating to the miscarriage of justice in a given case to an independent body. This body has the power, if a careful and close examination makes a dereliction on the part of a judge indisputably appear, such as envisaged at paragraph 5.1 hereof, to refer the matter to the disciplinary authority, or at the very least to recommend such referral to an authority normally competent in accordance with the statute, to make such a reference.“

The Committee of Ministers addresses disciplinary of judges in Recommendation (2010) 12 stating that “disciplinary proceedings may follow where judges fail to carry out their duties in an efficient and proper manner. Such proceedings should be conducted by an independent authority or a court with all the guarantees of a fair trial

[85] Article 51 §1 of the LHCJ
[86] Article 51 §7 of the LHCJ
[87] Article 51 §8 of the LHCJ
[88] Article 51 §5 of the LHCJ
[89] Article 52 §1 of the LHCJ
[90] Article 52 §2 of the LHCJ
[91] Article 52 §3 of the LHCJ
[92] Article 56 §3 of the LHCJ
[93] Article 57 §2 of the LHCJ
[94] UN Basic Principles on the Independence of the Judiciary adopted by the 7th UN Congress on Prevention of Crime and endorsed by the General Assembly 29.11.1958

and provide the judge with the right to challenge the decision and sanction. Disciplinary sanctions should be proportionate"[95].

The Venice Commission summarizes in an Opinion on Albania[96]: "Disciplinary proceedings against judges based on the rule of law should correspond to certain basic principles, which include the following: the liability should follow a violation of a duty expressly defined by law; there should be fair trial with full hearing of the parties and representation of the judge; the law should define the scale of sanctions; the imposition of the sanction should be subject to the principle of proportionality; there should be a right to appeal to a higher judicial authority."

"The interpretation of the law, assessment of facts or weighting of evidence carried out by judges to determine cases should not give rise to civil or disciplinary liability except in cases of malice and gross negligence.[97]"

The CCJE dealt extensively with disciplinary liability in its Opinion No.3[98]

The main findings of this section of the Opinion are[99]:

i) in each country the statute or fundamental charter applicable to judges should define, as far as possible in specific terms, the failings that may give rise to disciplinary sanctions as well as the procedures to be followed;

ii) as regard the institution of disciplinary proceedings, countries should envisage introducing a specific body or person with responsibility for receiving complaints, for obtaining the representations of the judge and for considering in their light whether or not there is a sufficient case against the judge to call for the initiation of such proceedings;

iii) any disciplinary proceedings initiated should be determined by an independent authority or tribunal, operating a procedure guaranteeing full rights of defence;

iv) when such authority or tribunal is not itself a court, then its members should be appointed by the independent authority (with substantial judicial representation chosen democratically by other judges) advocated by the CCJE in paragraph 46 of its Opinion N° 1 (2001);

v) the arrangements regarding disciplinary proceedings in each country should be such as to allow an appeal from the initial disciplinary body (whether that is itself an authority, tribunal or court) to a court;

vi) the sanctions available to such authority in a case of a proven misconduct should be defined, as far as possible in specific terms, by the statute or fundamental charter of judges, and should be applied in a proportionate manner."

VIII. The case law of the European Court of Human Rights

The Court regularly applies the fair trial requirements stemming from Article 6 of the Convention to disciplinary proceedings.

The Court regards as falling within the scope of Article 6§1 proceedings which, in domestic law, come under "public law" and whose result is decisive for private rights and obligations.[100] For the Court disputes concerning public servants fall in principle within the scope of Article 6§1. In Pellegrin v. France [GC], §§ 64-71, the Court adopted a "functional" criterion. In its judgment Vilho Eskelinen and Others v. Finland [GC], §§ 50-62, the Court decided to adopt a new approach. The principle is that there will be a presumption that Article 6 applies, and it will be for the respondent government to demonstrate, firstly, that a civil-servant applicant does not have a right of access to a court under national law and, secondly, that the exclusion of the rights under Article 6 for the civil servant is justified. Consequently, if the applicant had access to a court under national law, Article 6 applies. In Ukraine, judges have access to court in disciplinary matters. Therefore, disciplinary proceedings against judges in Ukraine must meet the fair trial criteria of Article 6 of the Convention.

In the light of these criteria laid down in the Vilho Eskelinen judgment, the Court declared Article 6§1 to be applicable to proceedings regarding the unfair dismissal of several public servants:[101] to proceedings regarding the right to obtain a certain post;[102]_to disciplinary proceedings against a judge;[103] or_to an appeal by a prosecutor against a presidential decree ordering his transfer[104] .

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[95] Recommendation (2010)12 para 69.

[96] Venice Commission Final Opinion on the Revised Draft Constitutional Amendments on Judiciary of Albania para 34

[97] Recommendation (2010) 12 para 66

[98] CCJE Opinion 3 (2002) paras 58 to74

[99] CCJE Opinion 3 (2002) para 77

[100] See among others Ringeisen v. Austria, § 94; König v. Germany, §§ 94-95, Sporrong and Lönnroth vs,v. Sweden, § 79:, Benthem v. the Netherlands, § 36; Chaudet v. France, § 30).

[101] An embassy employee (Cudak v. Lithuania [GC], §§ 44-47); a head accountant (Sabeh El Leil v. France [GC], § 39), a senior police officer (Šikić v. Croatia, §§ 18-20) or an army officer in the military courts (Vasilchenko v. Russia, §§ 34-36).,

[102] Parliamentary assistant (Savino and Others v. Italy;

[103] Olujic vs. Croatia; Volkov vs. Ukraine

[104] Zalli v. Albania

Following these principles of applicability, the Court established several infringements of fair trial requirements also in disciplinary proceedings (lack of independent and impartial tribunal, lack of access to information, right to be heard, etc.).

Several decisions establish an infringement of the right to an effective remedy (Article 13 ECHR). Article 13 ECHR secures the granting of an effective remedy before a competent national authority to everyone whose rights and freedoms as set forth in the ECHR have been violated.

In accordance with application of Article 13 protection afforded by this article does not go so far as to require any particular form of remedy, in view of that margin of appreciation afforded to Contracting States[105] A non-judicial body under domestic law may be qualified as a "court", in the substantive sense of the term, if it quite clearly performs judicial functions[106].

In the case Oleksandr Volkov v. Ukraine the judgement of 09.01.2013[107] not only established several infringements of the fair trail requirements but also emphasised the lack of a range of disciplinary sanctions in order to ensure the principle of proportionality (§§ 182, 183) and found a problem in a broad definition of a disciplinary offence like "breach of oath" without detailed rules of interpretation by by-laws or case law in conflict with the principle of legal certainty and foreseeability , which is also the case if there are no limitation in time to institute a proceeding on basis of a behaviour, which might constitute a disciplinary offence. Similar considerations were also expressed in the ECtHR´s judgement in the case Denisov v. Ukraine[108], regarding the dismissal of the applicant from his post as president of a court.

IX. Constitutional Court of Ukraine

The Constitutional Court of Ukraine had to deal with Law 193-IX of 16.10.2019, which among other provisions amended some provisions of the LOCSJ and the LHCJ regarding the disciplinary procedure. The Constitutional Court declared void several amendments, which shortened the time period for certain procedural steps, like the time period to provide court material, the time period between summoning of the judge and the hearing and the necessary time before the hearing, which the judge concerned must have to prepare for the case.

The CCU argued "disciplinary proceedings against judges must be consistent with the constitutional principle of the independence of judges. In addition, disciplinary proceedings against a judge must be handled within a reasonable time and according to a procedure that fully guarantees his or her right to defense. Disciplinary proceedings should not involve any assessment of court decisions since such decisions are subject to appeal and there must be filters in place to consider only merits of the substantive complaints. An analysis of the disputed provisions ... leads to the conclusion that they do not provide a reasonable, proportionate (proportionate) and predictable procedure for disciplinary proceedings against a judge, fair and transparent prosecution of a judge."[109]

X. The factual situation

Serious problems occur in the application of the reform of the disciplinary procedures in practice.

During their consultations with the Ukrainian stakeholders, the consultants were informed that more than 6000 complaints are pending, a backlog which is increasing from day to day, because of the factual standstill of the proceedings.

The HCJ is the central actor in disciplinary matters. It has the exclusive competence to dismiss a judge, it has the jurisdiction of deciding on appeals against decisions of the disciplinary chambers, it has to approve the Regulations on Disciplinary Inspectors Service and to appoint the Director of the Disciplinary Inspectors Service, who is in charge to approve the appointment and dismissal of disciplinary inspectors, for disciplinary measures and promotion regarding them. The HCJ is only competent if not less than fifteen of its members, the majority of whom being judges are elected (appointed). This requirement is not fulfilled since several months so that among other important tasks, which are in the competence of the HCJ, also the disciplinary proceedings are blocked.

The Ukrainian interlocutors during the online exchange reported that many complaints are pending more than a year and that all proceedings are stopped at the moment. A large number of complaints (estimated more than 50 %) are complaints of parties to the proceedings, who are not satisfied with the result and deal with the merits of the case. Several of them are attempts to influence the proceedings. Despite the high number of complaints only a few cases (45 in 2018) reached the stage of the Grand Chamber of the Supreme Court, which has jurisdiction for the remedy against the decision of the HCJ. The majority of these remedies was successful.

During the online meeting some of the participants regretted that there are divergences in the case-law of the HCJ and the Grand Chamber of the Supreme Court. Some also claimed that on both level equal facts are not always treated equally.

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105 (Budayeva andOthers v. Russia, 2008, § 190)

106 Oleksandr Volkov v. Ukraine, §§ 88-91

107 Oleksandr Volkov v. Ukraine, Application No. 21722/11 of 9.1.2013

108 Denisov v Ukraine, Application No. 76639/11, of 25.9.2018

109 Constitutional Court of Ukraine K4/20 of 11.3.2020, pages 14 - 15

XI. The assessment of the legal framework

The Volkov v. Ukraine judgement was a strong impetus for a legal reform of the disciplinary procedure and the possibility to dismiss a judge on constitutional level as well as on ordinary law level. The general term "breach of oath" was eliminated, and the Constitution now allows dismissing a judge in case of "committing a serious disciplinary offence"[110]. These and all other offences are now defined in the Law on the Judiciary and the Status of Judges in a much more concrete way. Limitations of time were introduced, and the range of possible sanctions was enlarged. Additional procedural safeguards were introduced.

Already in 2019, as part of an overall-assessment of the 2014-2018 Judicial Reform in Ukraine Council of Europe´s consultants Lorena Bachmaier-Winter, Nils Engstadt, Diana Kovacheva and Gerhard Reissner assessed the then new disciplinary system[111]. They concluded:

"23. The new regulation has brought the disciplinary proceedings in compliance with CoE standards, by defining and specifying the acts that can lead to disciplinary liability and by introducing a diversity of sanctions to be imposed according to the gravity of the infringement and the principle of proportionality. The proceedings are also respectful of the impartiality principle and due process safeguards, as required by the judgment in the landmark ECtHR case of Volkov v. Ukraine. Nevertheless, further fine-tuning with regard to the composition of the chambers could be undertaken, so as to ensure that the disciplinary chambers and the plenary of the HCJ – a new and welcome feature – are judges who have been elected by their peers.

24. With regard to the objective of improving the disciplinary framework (including a proportionate system of disciplinary sanctions, revision of the statute of limitations, improved disciplinary proceedings, etc.), this goal has been in general achieved. The newly adopted legal framework is aligned with CoE standards with regard to specification of the grounds for disciplinary liability, the proportionality of the sanctions and the fairness of the proceedings. Nevertheless, some aspects will need to be corrected in practice to bring some provisions in line with CoE standards, notably the high number of disciplinary complaints; the criminal liability for unjust decisions; and closely linked to the latter, the disciplinary liability linked to the delivery of judgments by the ECtHR. Moreover, it will be important to follow the implementation of the new disciplinary regime closely."

As far as the legal framework is concerned, the positive assessment of that previous study meets more or less also the results of the examination by the consultants of this analysis. The system will be further improved when the recently adopted amendments regarding the disciplinary inspectors will come into force. The consultants assess that the legal framework regarding disciplinary matters of judges after the amendments of 2018, 2019 and 2021 in general is in line with Council of Europe´s standards.

The main achievements are:

- the clarification that reversal or change of a court decision shall not result in disciplinary liability of a judge who participated in its adoption except cases when a cancelled or changed decision was adopted in the result of deliberate violation of the norms of law or mistreatment of duty;[112]
- the requirement of intention or negligence to be brought to disciplinary liability;[113]
- a differentiated system of sanctions (admonishment, reprimand with deprivation of a right to receive bonuses during one month, censure with deprivation of the right to receive bonuses during three months, proposal to temporarily suspension and compulsory referral to training, proposal to transfer to a court of lower level and proposal to dismiss a judge) and rules when which sanction should be applied, depending on the fault of a judge and the seriousness of the offence;[114]
- the introduction of time limitations to sanction a judge.[115]

Therefore, the consultants address the following four aspects only.

a) The definition of the disciplinary offences

The main problem before 2017 was the broad definition of disciplinary offence "breach of the oath".

Now 24 disciplinary offences are enumerated in Article 106 of the LOCSJ, most of them sufficiently precise. There are only the following, which are less precise and the application of which needs further interpretation:

- Article 106§1 (point 1a): "intentional or caused by negligence illegitimate denial of access to justice (including illegitimate refusal to accept a claim on the merits, an appeal, cassation claim, etc.) or other substantial violation of the norms of procedural law during the administration of justice which has made it impossible for the implementation by participants to the proceedings to procedural rights granted to them and fulfill procedural duties,

[110] Article 131 §6 point 3 of the Constitution of Ukraine

[111] Assessment of the 2014-2018 Judicial Reform in Ukraine and its Compliance with the Standards and Recommendations of the Council of Europe. April 2019, Consolidated Summary paras 21-24

[112] Article 106 §2 of the LOCSJ

[113] Article 106 §1 of the LOCSJ

[114] Article 109 §1-10 of the LOCSJ

[115] Article 109 §11,12 of the LOCSJ

or caused violation of rules regarding the jurisdiction or composition of court";

- Article 106§1 (point 3):" conduct which disgraces a status of judge or undermines the authority of justice, in particular, on the issues of moral, integrity, incorruptibility, congruence of the lifestyle of a judge with his/her status, compliance with other norms of judicial ethics and standards of conduct which ensure public trust in court, manifestation of disrespect to other judges, lawyers, experts, witnesses or other litigants";

- Article 106§1 (point 12): "judicial misconduct including making expenditures by the judge or members of his/her family in excess of incomes of the judge and his/her family; finding an incongruence of the level of life of a judge with declared income; failure to certify the legality of the source of the property";

The last offence is also problematic from the viewpoint (of potential infringement) of presumption of innocence. Regarding open space for interpretation there are even more dangerous provisions in Article 109§9 of the LOCSJ, which defines the "commitment of a substantial disciplinary offence, gross or systematic neglect of duties which is incompatible with a status of a judge or which has revealed his/her incompatibility with the office". It lists "in particular" (!) among others

- Article 109§9 (subpoint 1) a judge has allowed conduct which disgraces the title of a judge or undermines the authority of justice, including in the issues of moral, integrity, incorruptibility, congruence of the lifestyle of a judge with his/her status, compliance with other ethical norms and standards of conduct which ensure public trust in court; and

- Article 109§9 (subpoint 7): a judge has committed another gross violation of law, which undermines public trust in court.

A substantial disciplinary offence may be sanctioned by a proposal for dismissal. The demonstrative enumeration together with the broad terms which are used provide the opportunity to extensively use the sanctioning of proposal to dismiss a judge.

The ECtHR in the Volkov v. Ukraine judgement states:

"1. The experience of other States suggests that the grounds for the disciplinary liability of judges are usually couched in general terms, while the examples of detailed statutory regulation of that matter do not necessarily prove the adequacy of the legislative technique employed and the foreseeability of that area of law (see paragraph **Error! Reference source not found.** above).

2. Therefore, in the context of disciplinary law, there should be a reasonable approach in assessing statutory precision, as it is a matter of objective necessity that the *actus reus* of such offences should be worded in general language. Otherwise, the statute may not deal with the issue comprehensively and will require constant review and updating according to the numerous new circumstances arising in practice. It follows that a description of an offence in a statute, based on a list of specific behaviours but aimed at general and uncountable application, does not provide a guarantee for addressing properly the matter of the foreseeability of the law. The other factors affecting the quality of legal regulation and the adequacy of the legal protection against arbitrariness should be identified and examined.

3. In this connection, the Court notes that it has found the existence of specific and consistent interpretational practice concerning the legal provision in issue to constitute a factor leading to the conclusion that the provision was foreseeable as to its effects (see *Goodwin*, cited above, § 33). While this conclusion was made in the context of a common-law system, the interpretational role of adjudicative bodies in ensuring the foreseeability of legal provisions cannot be underestimated in civil-law systems. It is precisely for those bodies to construe the exact meaning of general provisions of law in a consistent manner and dissipate any interpretational doubts (see, *mutatis mutandis*, *Gorzelik and Others*, cited above, § 65)."

To avoid the lack of foreseeability which follows from these broad terms, which need further interpretation, it is necessary to develop guidelines and/or case law which will give orientation to judges and those in charge of disciplinary procedures. The envisaged establishment of a database of disciplinary decisions will help in this regard and is highly welcomed.

It should be underlined that uncertainty caused by broad formulations, which reserve large space for interpretation, foster the number of (unfounded) complaints and intensify the complexity of procedures, which both increases the workload and reduces the effectivity of the disciplinary system.

b) The position of the complainant

Regarding the procedural aspects the consultants also find them in line with Council of Europe´s standards. As in every field, it is not the legal framework alone, which guarantees an efficient procedure, but also the necessary resources must be available. There are also the constitutional restrains, which must be taken into account. The law provides the complainant with extensive rights. Of course, it is necessary that he and she may be involved in the pre-trial investigation and that he or she participate in the hearing of the disciplinary chamber. Also to lodge an appeal

for him or her to the HCJ should be welcomed; however, that he or she can initiate another round of the procedure by giving him or her the possibility to appeal (even if nobody else appeals) to the court, could be questioned. The question may be if there is any subjective right, which a disciplinary procedure should provide to the complainant. To have a correct procedure in the underlying case could only be reached in that procedure itself. A possible damage due to the misbehaviour of the judge must be claimed in a civil procedure. The punishment of the judge or his expulsion form office are rights of the state and not rights of the complainant. Article 13 of the ECHR grants one remedy and not several. Therefore, the consultants question if in case that the judge concerned does not appeal to the court the complainant should have this possibility, which not even the disciplinary inspector has.[116]

c) Hearing in absentia of the judge

The possibility to proceed with the disciplinary procedure regardless of if the judge concerned is present or absent is often seen as a means to speed up the proceeding and increase the efficiency. However, it is clear that this means clearly contradicts the requirements of a fair trial. The CCU had quashed the provision of Law 193-IX, which introduced such possibility to consider a disciplinary case *in absentia* by the Disciplinary Chamber, except in cases where the judge has not been properly informed.

The newly adopted Article 47§4 of the LHCJ now states "If the judge is absent for a good reason, consideration of the disciplinary case by the Disciplinary Chamber shall be postponed. If the judge is absent for the second time, the Disciplinary Chamber shall consider the disciplinary case without participation thereof except for cases when the judge was not notified or was notified with violation of Article 48§5 of this Law."

The consultants see the new version of this provision as a clear step forward. But the possibility to proceed if the judge is absent a second time even if there are good grounds still has not solved the problem to infringe the requirements of fair trial completely.

d) The Disciplinary Inspectors System:

The consultants agree that the new disciplinary inspector service will be another big step to increase the efficiency of the disciplinary proceedings, provided that the search for capable persons will succeed. The advantages of the new system are as follows:

They disciplinary inspectors will have the necessary experience in the justice field.

The integrity of the disciplinary inspectors will be checked and is therefore safeguarded

The disciplinary inspectors service will be part of the secretariat of the HCJ but will be functionally independent from the HCJ, which means that the members of the HCJ cannot give orders to the disciplinary Inspectors. The cases will be assigned by the automatic case distribution system. They will have a very strong position in the procedure proposing and preparing the decisions of the disciplinary chamber and the HCJ and have the right to an appeal. The long period of experience in the field of law and especially at courts or prosecution services will contribute that newly appointed inspectors will need only a short initial training, which will be concentrated on the legal framework of disciplinary system and the practical aspect of investigation in these procedures. Nevertheless, the consultants recommend a regular in-service training.

The involvement of two bodies, which are functionally independent from each other together with a strong system of time limits for different steps of the procedure will shorten the duration time of the overall procedure and support its effectiveness.

Outmost care will be necessary for the selection and appointment of the director of the disciplinary inspection service, who has a very powerful position. The consultants do not know what procedure is foreseen to find the best person for this position, but if the integrity of the director is not guaranteed, many of the positive achievements of the reform could be in vain. Obviously, the Law on Public Servants should apply, which the consultants do not know. However, the special importance of this position should be considered and if the provisions of the Law on Public servant are not sufficient, additional provisions should be adopted, and the LHCJ should be amended accordingly.

XII. Questions raised

In the exchange with the Ukrainian stakeholders some questions and proposals were put forward, which the consultants considered as follows:

1. Should the standstill caused by the blockade of the HCJ due to its insufficient composition be breached by starting the new disciplinary inspector's system with the competition of candidates and appointing inspectors by the members of the HCJ, who have already been elected and appointed so far?

The LHCJ entrusts the HCJ with the approval of the Regulation on Disciplinary Inspectors Service[117]and the appointment and dismissal of the Director of the Disciplinary Inspectors Service[118]according to the procedure set

[116] Article 52§2 of the LHCJ
[117] Article 27 §5 of the LHCJ
[118] Article 28 §3 of the LHCJ

forth by the legislation on public service, which the consultants are not familiar with. The legislation on public service also determines the rules of the competition for the positions of disciplinary inspectors.[119] Due to the constitutional restraint it is evident for the consultants that tasks which are assigned to the HCJ can be exercised by it only if the constitutional requirements for its competence are fulfilled (not less than 15 members, majority of whom being judges) and not as long as these requirements are missing.

If this should be changed on basis of the existing constitutional provision in any case an amendment of the LHCJ would be necessary. If a law lowered the number of necessary members to decide on the two issues, the question of the constitutionality of such law may arise.

The Constitution entrusts the HCJ with the review of complaints on decisions of the relevant body imposing disciplinary liability on a judge and decisions on dismissal of a judge from office[120]. Is it therefore possible to entrust the two competences regarding the disciplinary inspectors at stake to other bodies?

The 2019 reform wants to establish the disciplinary inspectors service as "functionally independent from the HCJ".[121] In some other Council of Europe´s member states the body which investigates is an independent body separate from the body, which decides on the establishment of disciplinary liability.[122] It might be concluded that the tasks at stage are not necessarily content of the constitutional guaranteed competences of the HCJ. On the other hand, when entrusting the two tasks to the HCJ the legislator was presumably envisaging balanced composition of the HCJ, which to keep is the aim of the limitations of competence by a minimum number of members. The legislator therefore most likely would be in favour of safeguarding this balance also for the two tasks at stake. The final word on this question of a possible legal amendment of course may have the CCU.

However, regarding not only this question, the consultants urge as far as possible to avoid additional uncertainties, which may provoke new claims and proceedings at the CCU and will once again delay the whole process of recovering of the justice system.

2. How could qualified persons be found and encouraged to become disciplinary inspectors?

The tasks of a disciplinary inspector not only need certain knowledge and experience of the justice field and its administration but also some willingness to be exposed to highly controversial and sometimes emotional situations, in which either parties or the judge concerned, or both try to prevent very serious consequences. They may be exposed to threats and corruption. The legal requirements (higher legal education, 15 years professional experience, 8 of which as judge or prosecutor or attorney and undergoing two integrity checks[123]) are high but necessary and apply to persons who have normally already settled in their professional career.

The consultants are not acquainted with the regulations which are provided for disciplinary inspectors in the Law on Public Servants, but they are convinced that it is necessary that those persons get a sufficiently high remuneration, which is commensurate to that of judges, whose behaviour they will have to investigate, thereby ensuring security of inspectors and their families.

3. Should the inspectors also investigate in cases regarding judges of the Supreme Court?

The consultants do not see any reason why there should be an exemption regarding judges of the Supreme Court. There is no difference between Supreme Court judges and other judges as far as criminal investigations or police investigation in administrative offences is concerned, and investigation in disciplinary cases follow the same principles and apply the same procedure regardless of who is the offender.

Considering this question, it may help to underline that the merits of a case should not be the content of an investigation, so it is not necessary for a disciplinary inspector to have the same degree of knowledge as a judge of the Supreme Court.

4. How to cope with backlogs?

The reported number of backlogs looks deterrent indeed. Such backlogs seriously may hamper the credibility of the disciplinary system. It is also important that disciplinary sanctioning follows in short time after they offences have been committed. Proceedings regarding recently committed offences should not be delayed to long due to backlogs. Nevertheless, the consultants remember that when the jurisdiction regarding judges of the first and second instance was shifted from the High Qualification Commission of Judges of Ukraine to the HCJ there was also a large number of backlogs, which over time could be remarkably reduced.

Considering that at least 50 % of complaints must be rejected on one of the existing grounds, it is important to increase the capacity in these filtering process by assigning extra staff to the disciplinary inspectors.

A drafting of by-laws could be envisaged, which prioritises cases according to the seriousness of the alleged offences and the possible punishment which may follow if the allegation is proved. It even could be considered to

[119] Article 28 §1 of the LHCJ
[120] Article 131 §3 and 4 of the Constitution of Ukraine
[121] Article 27 §5 of the LHCJ.
[122] e.g. Ethics Commission in Armenia
[123] Article 28 §1 of the LHCJ

adopt a law, which provides a kind of reprieve for minor severe offences committed in the past respectively terminates proceedings regarding such cases.

The consultants repeat that the most important means is to fill the vacancies of the HCJ as quickly as possible and to quickly put the new disciplinary inspectors service in place.

5. Should disciplinary inspectors have the right to reject obviously unfounded complains?

Disciplinary inspectors are entrusted with a preliminary check of disciplinary complaints. They can reject it, without referring the matter to the disciplinary chamber or a member of the disciplinary chamber on formal grounds (no signature etc.), or no signs of a disciplinary offence, no reference to any facts, or if it contains obscene remarks or if it is against a judge who already is dismissed or not in power anymore.[124]

If it is one of the many cases in which the complaint is based only on the arguments that can be verified solely by a higher instance court in accordance with the procedural codes the disciplinary inspector has to report to the disciplinary chamber, which will decide on refusal or opening the disciplinary case.[125] The law provides for an additional safeguard against undue refusal of a case. The disciplinary inspector or a member of the disciplinary chamber, who voted against refusal, can request that the decision of the disciplinary chamber is forwarded to the plenary of the HCJ for approval.[126]

Whilst there is no argument against filtering the complaints on basis of formalities by someone, who is not a member of the HCJ, it may be seen differently if such person has to decide on the substance of a claim. Also, in some of the mentioned cases, which need a decision to refusal of the disciplinary chamber itself, there might be some evidence of wilful wrong decision, which could lead to a criminal and disciplinary investigation.

The consultants also noticed that by providing a remedy against rejection of a complaint by the disciplinary chamber it is obvious that the legislator tried to avoid any suspicion of arbitrary refusal of a case. This makes sense in the interest of the trust in the disciplinary system and in judiciary at large. It can also be assumed that the involvement of the disciplinary chamber in this stage does not cause much extra effort and therefore does not save much capacity. The disciplinary inspector has to prepare the reasoning of the rejection in any case and the members of the disciplinary chamber must look through the complaint only and will in the overwhelming majority of cases agree with the prepared proposal.

6. Should fees for complaints be introduced?

Without doubt and proved by several studies fees are one of the obstacles to access to justice. It is evident that introducing fees will reduce the willingness to lodge a complaint. The higher the fees are the more they will reduce the number of complaints. Also, the more severe the underlying issue is the more likely a complaint will be filed irrespective of fee to be paid. A balance must be struck between introducing fees and access to justice.

The consultants recall Article 5.3. of the European Charter of Judges, which requires that everyone must have the possibility of submitting without specific formality a complaint relating to the miscarriage of justice in a given case to an independent body. However, this should not prevent to institute means to prevent complaints, which are unfounded from the very beginning.

If fees are introduced, it should be considered if and under which conditions this can be accompanied by amendments to the system of legal aid.

7. Should persons who want to lodge a complaint be represented by a lawyer?

To be represented by a lawyer normally is a benefit not only for the client but also for the court. Even if the claim is unfounded, the formalities will be in line with the law and totally unfounded claims will be rare.

There is also a disciplinary responsibility of a lawyer, which will prevent him or her from complaints, which a client without representation by a lawyer will not hesitate to lodge. In the Ukrainian law this disciplinary liability is explicitly ordered.[127]

Despite these advantages the same concerns regarding access to justice apply as expressed in the answer to the previous question. This is especially the case in complaints which concern cases where representation by a lawyer is not mandatory.

8. How to overcome the alleged different treatment of cases with equivalent facts.

The consultants were not provided with statistics about the success of remedies over time or concrete examples of alleged different application of the law on similar cases.

But it is astonishing indeed that a high percentage of the few remedies to the Grand Chamber of the Supreme Court was successful.

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[124] Article 43§1 point 2 and Article 44 §1 points 1-5 of the LHCJ
[125] Article 44§1 point 6 of the LHCJ
[126] Article 46§3 of the LHCJ
[127] Article 107§5 of the LOCSJ

Legal certainty is an important element of the rule of law. It is especially important, where the law, which should be applied uses terms, which need interpretation. This argument was for instance addressed in the Volkov v. Ukraine judgement [128].

To provide guidance and orientation it is therefore necessary to establish appropriate case law databases. The Ukrainian stakeholders reported that they already started to create a database where disciplinary decisions will be published, and which will be available to all judges and to the public at large. It is recommended that the decisions are anonymized.

Such system will not only help judges orient their behaviour and thereby reduce wrongdoing but also explain to the public, what they can expect and what they cannot expect, thereby reducing the number of unfounded complaints.

It is very much appreciated that the representatives of the Conference of Judges and all the other stakeholders agree on this intention.

The consultants also recommend considering the means, which are mentioned by the CCJE in its Opinion No 20 on the Role of Courts with Respect to the Uniform Application of the Law like regularly scheduled meetings, elaborating guidelines etc.[129]

9. Should the Grand Chamber of the Supreme Court get the possibility to terminate the case or even to change the sanction?

Article 52 of the LHCJ provides for only four grounds for an appeal to the court, which is the Grand Chamber of the Supreme Court; three are purely formal while the fourth allows an appeal if "the decision does not contain references to the statutory grounds of disciplinary liability of the judge or reasons for which the High Council of Justice reached its findings." The right to appeal is granted to the judge concerned and the complainant.

The Grand Chamber of the Supreme Court can either confirm the decision of the HCJ or annul it, in which case the HCJ must re-consider the case at a plenary session.

It is evident that an amendment of the law, which would give the Grand Chamber the power to terminate the case itself or to change the sanction, would save time and reduce workload. The problem might be that the Constitution foresees that the competence to dismiss a judge and the competence to review complaints on decisions of the relevant body imposing disciplinary liability on a judge lies with the HCJ. Therefore, it is a question of constitutionality if another (constitutional) body could decide on the merits to dismiss a judge or to sanction a judge as result of a disciplinary proceeding. This question to answer is the competence of the CCU.

XIII. Conclusions and Recommendations

1.As to the selection of judges to the first and second instance courts

1. The current judicial appointment system, overall, meets international standards. While judicial reforms in Ukraine have been considered necessary in order to increase public confidence in the judicial system, too frequent and hasty changes of justice system should be avoided.

2. Judicial vacancies have wide ramifications that affect a broad range of human rights, including the ability of people to access justice in a timely, fair, and effective manner. The following is recommended to tackle the situation as quickly as possible:

1) Speedy appointments of new members of the HCJ and HQCJ who passed the re-evaluation procedure are paramount. Merger of the HCJ and the HQCJ should not be addressed at this stage.

2) To devote greater attention to selecting reliable indicators and appropriate research designs needed to conduct more *ex post* evaluation of the judicial appointments system.. HCJ should play a pivotal role here.

3) To strengthen the co-ordination of the activities of all stakeholders involved in the judicial appointments procedure, and further develop and use ICT at all stages of the procedure.

4) In the process of evaluation of the competency of judicial candidates, to use as much as possible the capacities of the National School of judges of Ukraine (under supervision of the HQCJ).

5) To consider abolishing the admission test as a criterion of judicial appointments.

6) To consider shortening the duration of initial training of judges.

7) In initial training, to give primacy to multidisciplinary and practical type of training, essentially intended for the transmission of professional techniques and values, which goes beyond simple legal education.

8) Not to limit the initial training of judges to the areas of law where the applicants shall hold their office.

[128] Oleksandr Volkov v. Ukraine, §§174-180

[129] CCJE Opinion 20 (2017) on the role of Courts with Respect to the Uniform Application of the Law, paras 17-19

2. As to the disciplinary proceedings against judges

1) The legal framework of the disciplinary procedure against judges is in line with Council of Europe´s standards.

2) The new disciplinary inspector system, when implemented, will contribute to an efficient establishment of disciplinary liability of judges.

3) To make a re-start of disciplinary proceedings possible it is necessary as quickly as possible

a) to complete the composition of the HCJ at least insofar that the HCJ is competent to exercise its tasks

b) to carry out the competition to become a disciplinary inspector, exercise the necessary checks and appoint the disciplinary inspectors

c) to adopt the regulations for the disciplinary inspector service

4) It is recommended to further increase the legal certainty and foreseeability by

a) establishing a database of decisions in disciplinary procedures

b) providing guidelines for the application of the legal provisions especially regarding terms which reserve broad space for interpretation

Such increase of legal certainty will also increase the efficiency and reduce the workload

5) Backlogs should be reduced as quickly as possible, which may be done by providing additional supportive staff, by prioritizing cases or to terminate cases regarding less severe offences.

6) The establishment of a database of statistics, which should be published can be used to monitor the performance of the bodies involved in disciplinary proceedings and the effectiveness of the disciplinary system as well as the development of adhering of judges to their duties.

7) Disciplinary Inspectors should be provided with regular in-service training.