



ANALYSIS

**of the Criteria for the Evaluation of Integrity and Ethics of Judges in
Ukraine**

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Executive Summary

1. In Ukraine, more than 2000 judicial vacancies still need to be filled urgently, and the relevant legal framework requires further refinement, including by developing and publishing clear integrity assessment criteria and a scoring methodology. Furthermore, with the re-establishment of the High Qualification Commission of Judges, it is imperative to conduct periodic performance evaluations for judges. The assessments should be based on pre-established, uniform, and objective criteria that specifically pertain to their daily duties.

2. The usefulness of comparative method, by assessing the integrity criteria in comparison to developments in other member states, is limited, not only because member states seldom articulate the processes and detailed criteria guiding the assessment of integrity during the selection, promotion, and professional evaluation of judges, but also because the extraordinary political, economic, and social context in Ukraine necessitates tailor-made measures.

3. There is no universal analytical definition of judicial integrity; in fact, hardly any international documents made an attempt to define the term. The reason for this lies in the implicit quality of judicial integrity that may not be easily distilled into a set of concrete and universally applicable rules. In addressing the dilemma of whether 'integrity' is a broader or narrower term than 'judicial ethics,' the crux of the matter lies in the acknowledgment that, on one side, integrity is recognised as a principle in national judicial codes of conduct, often synonymous with honesty and righteousness. On the other hand, 'integrity' appears to be frequently used as an umbrella term, encompassing various aspects such as the absence of disciplinary sanctions, compliance with asset declaration regulation, and adherence to codes of conduct, among others. Putting aside theoretical concepts, a comparative review suggests that assessing judges' integrity typically involves considerations beyond mere compliance with the code of ethics.

4. It is imperative that the characteristics of judicial integrity in Ukraine should harmonise with the values and structure of the Ukrainian legal system, as well as align with the expectations of the public. Given the low level of public trust in the judiciary and recurrent judicial corruption cases, the absence of corrupt behaviour is an important integrity indicator; however, judicial integrity entails far more than the absence of corruption; it encompasses adherence of judges to a set of principles that uphold trust, fairness, and ethical conduct in their decision-making process.

5. In general, the material scope of the integrity criteria drawn up by the High Council of Justice aligns with the concept of integrity as understood in international standards. However, there are some shortcomings that warrant attention and improvement.

6. Criteria 7.2.-7.5. (7.2. 'Unlawful denial of access to justice'; 7.2.1. 'Failure to state in the court decision the reasons for accepting or rejection of the parties' arguments on the merits of the dispute'; 7.2.2. 'Violation of the principles of publicity and openness of the trial'; 7.2.3. 'Violation of the principles of equality of all participants in the trial before the law and the court, the competitiveness of the parties and the freedom of the parties to present their evidence to the court and to prove their convincing nature before the court'; 7.2.4. 'Denial of the accused's right to defence, obstruction of the rights of other participants in the trial'; 7.2.5. 'Violation of the rules on recusal (self-recusal)' refer to the grounds for disciplinary liability stipulated in subitems of Art. 106, part one, of the Law of Ukraine on Judiciary and Status of Judges. While the reliance on disciplinary liability as one of the integrity criteria aligns with international standards and mirrors practices in several member states, it is crucial to expressly state that the integrity criterion is the final disciplinary decision imposed on a judge. The factual

circumstances established in the High Council of Justice case law concerning these grounds for disciplinary liability, indicating that the judge failed to adhere to (civil or criminal) procedural rules, appear to be about adherence to procedural rules rather than about a violation of the broader ethical principles. Not every procedural error should automatically entail disciplinary liability. There is a consensus that the remedy for judicial errors (whether in respect of jurisdiction, substance or procedure) should lie in an appropriate system of appeals.

7. Similar arguments are applicable regarding the criterion 7.2.6 ('Violations related to the issuance of interim measures'). A judicial error is not in itself sufficient to conclude that any concerns as to judge's integrity/honesty are objectively justified. The judge's action does not automatically amount to a disciplinary conduct even if the judicial error by the judge is made. In this instance, the appropriate avenue for the complainant would have involved addressing the procedural error, if any, within the framework of judicial proceedings.

8. The case law summarized in the High Council of Justice criteria concerning criteria 5. ('Independence of a judge') and 6. ('Impartiality of a judge') can be categorised in two types: 1) forms of misconduct in performing judicial duties; 2) forms of misconduct in extrajudicial activities. When assessing the integrity of an individual judge in performing judicial duties, the integrity criterion should be the final disciplinary decision imposed on a judge. Some examples of the relevant case law summarized in the High Council of Justice criteria raise doubt about their compliance with international standards prohibiting the revision of judicial decisions outside the appeals process as provided for by law. More specifically, in relation to 'impartiality' in performing judicial duties, it should be noted, that to constitute a disciplinary misconduct, it must be determined whether, quite apart from the judicial error, there are ascertainable facts which may raise doubts as to judge's impartiality.

9. Certain High Council of Justice integrity criteria, such as Criteria 4. ('Impeccable behaviour of a judge in his/her professional and private life'), and 8. ('Violation of the rules of judicial ethics, which is not sufficient to bring a judge to disciplinary responsibility'), are inherently outlined in broad and imprecise terms. This bears the risk of their overbroad interpretation and abuse, which may be dangerous for the independence of judges. To mitigate this risk, the High Council of Justice put considerable efforts to detail behaviours contrary to judicial integrity by complementing established criteria with the High Council of Justice and Supreme Court case law. This practice of referencing and publishing case law clearly enhances the clarity and understanding of the criteria and should be pursued in the future.

10. Moreover, an adequate system of reporting case law is essential for ensuring uniform application of integrity criteria. Relevant judgments of the Supreme court and High Council of Justice decisions and opinions should be regularly published so that (candidate) judges and the general public understand what rules of behaviour should be followed by judges.

11. Concerning criterion 8 ('Violation of the rules of judicial ethics, which is not sufficient to bring a judge to disciplinary responsibility'), it is recommended to further enhance clarity by including a reference to the Code of Judicial Ethics. Supplementing this criterion with practical examples holds special importance.

12. Certain criteria, particularly criterion 2.1. ('Compliance of the expenses and property of the judge and his/her family members with the declared income'), criterion 2.2. ('Compliance of the lifestyle (level of living) of the judge and his/her family members with the declared income') and criterion 2.3. (Violation of the judge's declaration obligations) may raise questions about their compliance with Art. 8 of the European Convention on Human Rights with view to the right to respect for private life. In this context, the Venice Commission has already recommended that declarations of assets should only be used for sitting judges and not as a criterion or pre-condition for the appointment of judges.

13. As regards the relationship between criminal proceedings and disciplinary proceedings, more specifically, the autonomy of disciplinary proceedings, the High Council of Justice practice appears to align with that of most member states.

14. The Public Integrity Council's List of lack of integrity indicators give rise to several concerns. The most worrying are the indicators concerning the performance of judicial duties. Errors in judgement in themselves should not be interpreted as indicators of a lack of integrity.

15. Despite a different personal scope of the assessment conducted by the High Council of Justice from that of the Ethics Council — the former applies to (candidate) judges, and the latter is relevant to candidates for the position of a member of the High Council of Justice— the material scope of both acts should encompass a similar set of principles. A comparison demonstrates that, while there may be nuanced differences in wording and specific criteria, the overall objectives and principles of both sets are comparable in their pursuit of maintaining the highest standards of integrity, professionalism, and ethical conduct of judges/members of the High Council of Justice.

I. Introduction

1. This analysis is prepared in the framework of the Council of Europe project “Support to the functioning of justice in the war and post-war context in Ukraine”, on a request of the Ukrainian High Council of Justice (HCJ). It contains assessment of the conformity of the criteria for the evaluation of integrity and ethics of judges in Ukraine developed by the HCJ with the Council of Europe standards and the related best practice of the Council of Europe member-states, with emphasis on legal principles that should be taken into account in the practical application of the proposed criteria in individual cases and recommendations as to the amendments of the criteria in case there is a need to bring them in a better compliance with the Council of Europe standards. Furthermore, a brief analysis and a comparison is made between the criteria developed by the HCJ and those provided by other institutions in Ukraine, namely the Public Integrity Council (PIC) and the Ethics Council (EC). Given its limited scope, the analysis primarily examines the applicable criteria as instruments for ensuring integrity, with less emphasis on procedural aspects unless they are directly interconnected.

2. In a state governed by the rule of law, the public is entitled to expect general principles, compatible with the notion of a fair trial and guaranteeing fundamental rights, to be set out. The obligations incumbent on judges have been put in place in order to guarantee their independence, impartiality and integrity of their action for the benefit of the people. When judges do not live up to the high standards expected of them, public disquiet is palpable.

3. Corruption has damaging consequences for the functioning of state institutions, in particular the administration of justice. It decreases public trust in justice and weakens the capacity of judicial systems to guarantee the protection of human rights. While judicial systems can be target of corruption, it is within judicial systems that societies have their main instrument to prevent and fight corruption. In this vein, the United Nations Convention against Corruption¹ emphasizes the decisive role of the judicial branch in the fight against corruption, calling on the states to “take measures to strengthen integrity and to prevent opportunities for corruption among members of the judiciary. Such measures may include rules with respect to the conduct of members of the judiciary.” Nevertheless, judicial integrity entails far more than the absence of corruption; it encompasses adherence of judges to a set of principles that uphold trust, fairness, and ethical conduct in their decision-making process.

4. Central to public trust in the judiciary is the introduction of a credible and transparent selection procedure for appointments and promotions of judges. It is indisputable that all decisions concerning the appointment and the professional career of judges should be based on merit, following pre-determined and objective criteria set out in law, and open and transparent procedures. This extends to an essential part of the selection process, including promotion – the evaluation of the integrity of the candidates. In addition to the selection process of judges, the judicial integrity of the evaluated judge is an important element of a good system of the individual evaluation of judge's work.

5. This analysis is prepared by Nina Betetto, international consultant of the Council of Europe.

II. Background

¹ United Nations Office on Drugs and Crime, 9 December 2003, Art. 11(1).

6. Despite the Russian war of aggression, Ukraine continued to deliver justice services and made good progress on the implementation of the 2021 reform of the judicial governance bodies focused on integrity and professionalism. The HCJ and the High Qualification Commission of Judges (HQCJ) were re-established following a transparent process. Ukraine has reformed its rules on the selection of judges, introducing more transparency and meritocratic elements.

7. However, more than 2000 judicial vacancies still need to be filled urgently, and the relevant legal framework requires further refinement, including by developing and publishing clear integrity assessment criteria and a scoring methodology. Given the low level of public trust in the judiciary and recurrent judicial corruption cases, the sustained involvement of the PIC in both qualification evaluation and judicial selection procedures remains of critical importance.²

8. Furthermore, with the re-establishment of the HQCJ, it is imperative to conduct periodic performance evaluations for judges. These assessments should be based on pre-established, uniform, and objective criteria that specifically pertain to their daily duties.³

9. Ukraine is a state party to the United Nations Convention against Corruption (ratification in 2009), which, as one of its purposes, explicitly sets the task “to promote integrity, accountability and proper management of public affairs and public property” (Art. 1(c)).

III. International standards on judicial integrity

General

10. The Basic Principles on the Independence of the Judiciary⁴ state that “persons selected for judicial office shall be individuals of integrity and ability with appropriate training or qualifications in law. Any method of judicial selection shall safeguard against judicial appointments for improper motives. In the selection of judges, there shall be no discrimination against a person on the grounds of race, colour, sex, religion, political or other opinion, national or social origin, property, birth or status, except that a requirement, that a candidate for judicial office must be a national of the country concerned, shall not be considered discriminatory”.⁵ As for promotion, the document establishes

that it must “be based on objective factors, in particular ability, integrity and experience”.⁶

11. In 1987, the United Nations Special Rapporteur, in the Study on the Independence of the Judiciary, L. V. Singhvi, elaborated The Draft Universal Declaration on the Independence of Justice (Singhvi Declaration),⁷ stating that judges must be “individuals of integrity and

² European Commission, Ukraine 2023 Report, November 2023, p. 19-20.

³ See GRECO, Fourth evaluation round, Corruption prevention in respect of members of parliament, judges and prosecutors, Interim compliance report Ukraine, adopted by GRECO at its 93rd Plenary Meeting, Strasbourg, 20-24 March 2023. Rec. xvii. Available at <https://rm.coe.int/fourth-evaluation-round-corruption-prevention-in-respect-of-members-of/1680aaa790>.

⁴ Adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders in September 1985 in Milan, Italy, and endorsed by the General Assembly in its Resolution 40/32 of 29 November 1985. By resolution 40/146 of 13 December 1985, the General Assembly welcomed the principles inviting governments “to respect them and to take them into account within the framework of their national legislation and practice”. Available at <https://www.un.org/ruleoflaw/blog/document/basic-principles-on-the-independence-of-the-judiciary/>.

⁵ Id., para. 10.

⁶ Id., para. 13.

⁷ Available at http://digitallibrary.un.org/record/139884/files/E_CN.4_Sub.2_1985_18_Add.5_Rev.1-EN.pdf.

ability”.⁸ As for promotion, the Singhvi Declaration establishes that it must be based, inter alia, on an objective assessment of the judge's integrity.⁹

12. Value 3 of the Bangalore Principles of Judicial Conduct (Bangalore Principles)¹⁰ affirms that “integrity is essential to the proper discharge of the judicial office”. The United Nations Office on Drugs and Crime (UNODC), in the Commentary on the Bangalore Principles of Judicial Conduct, (Commentary on the Bangalore Principles)¹¹ underscores the notion of integrity, stating that it is “the attribute of rectitude and righteousness. The components of integrity are honesty and judicial morality. A judge should always, not only in the discharge of official duties, act honourably and in a manner befitting the judicial office; be free from fraud, deceit and falsehood; and be good and virtuous in behaviour and in character. There are no degrees of integrity. Integrity is absolute. In the judiciary, integrity is more than a virtue, it is a necessity”.¹²

13. The United Nations Convention against Corruption establishes as one of its objectives “to promote integrity, accountability and proper management of public affairs and public property”,¹³ calling on the states “to facilitate the reporting by public officials of acts of corruption”¹⁴ and to take “disciplinary or other measures against public officials who violate the codes or standards”.¹⁵ As the UNODC noticed, Art. 11 of the Convention against Corruption does not place integrity checking and independence of the judiciary as conflicting values: on the contrary, increased integrity strengthens the independence and authority of the judiciary, so “while /.../ states parties may be required to strike a balance between the two key principles of independence and integrity that underpin this provision of the Convention, measures adopted with the aim of supporting either of these core values are, more often than not, mutually reinforcing.”¹⁶

Specific standards: appointments, promotions and individual professional evaluation

14. The CCJE recommended in Opinion (2001) No. 1 on standards concerning the independence of the judiciary and the irremovability of judges (Opinion No. 1) 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.”¹⁷

15. GRECO, to ensure that transparent and uniform procedures are implemented with a view to maintaining judicial independence and promoting high standards, in the overview of the results of the 4th Evaluation Round: Prevention of corruption with respect to members of

⁸ Id., para. 9.

⁹ Id., para. 14.

¹⁰ Endorsed by the Economic and Social Council in Resolution 2006/23, adopted at the Forty-first plenary meeting, 27 July 2006, available at https://www.unodc.org/documents/commissions/CCPCJ/Crime_Resolutions/2000-2009/2006/ECOSOC/Resolution_2006-23.pdf .

¹¹ Available at

https://www.unodc.org/res/ji/import/international_standards/commentary_on_the_bangalore_principles_of_judicial_conduct/bangalore_principles_english.pdf .

¹² Id., para. 101.

¹³ UN Convention against Corruption, Art. 1 c.

¹⁴ Id., Art. 8 (4).

¹⁵ Id., Art. 8 (6).

¹⁶ The United Nations Convention against Corruption Implementation guide and evaluative framework for Article 11, New York, 2015, p. 5, available at

https://www.unodc.org/res/ji/import/international_standards/Article_11/Article_11_english.pdf .

¹⁷ CCJE Opinion No. 1, para. 25.

parliament, judges and prosecutors, *inter alia* recommended that “judicial appointments should be made as transparently as possible based on formal and objective criteria and that, along with evaluation procedures, these are applied with due regard to the independence, integrity and impartiality of judicial appointees.”¹⁸

16. The British Institute of International and Comparative Law notes that “it is usually necessary to establish that each applicant who might plausibly be shortlisted for the position of a judge is of good character. This includes verifying that the applicant does not have a history of criminal offences or disciplinary misconduct that would make them unsuitable for appointment as a judge.”¹⁹

17. As regards individual evaluation of judge’s work, the CCJE, in its Opinion No. 17 (2014) on the evaluation of judges’ work, the quality of justice and respect for judicial independence, stressed that “the formal individual evaluation of judges must be based on objective criteria published by the competent judicial authority. /.../. These objective standards should be based on merit, having regard to qualifications, integrity, ability and efficiency,”²⁰ and that “/.../ evaluators must consider all aspects that constitute good judicial performance, in particular legal knowledge, communication skills, diligence, efficiency and integrity. To do that, evaluators should consider the whole breadth of a judge’s work in the context in which that work is done /.../.”²¹

Declaration of assets and interests as a method for integrity assessment

18. A method increasingly used for the assessment of possible integrity problems within the judiciary is the establishment of mandatory declarations of financial interests or assets. UNODC sees this method as a way of addressing both conflicts of interest and potential cases of embezzlement or illicit enrichment, saying that in order for it to be efficient, it must go beyond mere financial interests and also include information related to outside affiliations and interests of judges, such as pre-tenure activities, affiliations with businesses (board memberships), connections with non-governmental or lobbying organisations and any unpaid or volunteer activities.²² Declarations should include the assets of judges, their parents, spouse, children and other close family members, should be regularly updated, inspected after appointment and monitored from time to time by an independent and respected official.²³

19. In the Explanatory Memorandum of Recommendation CM/Rec(2010)12, it is suggested that member states consider creating registers of interests in order to make public information on additional activities of judges, as a way of avoiding actual or perceived conflicts of interest.²⁴

19. GRECO recommended that that where declarations of assets are required, monitoring and follow up by the appropriate authorities must be reliable and robust and it should be clear

¹⁸ GRECO, Corruption prevention, members of parliament, judges and prosecutors: conclusions and trends, Council of Europe, 2017, p. 18.

¹⁹ The Appointment, Tenure and Removal of Judges under Commonwealth Principles - A Compendium and Analysis of Best Practice, Commonwealth Secretariat, 2015, p. 46.

²⁰ CCJE Opinion No. 17, para. 31

²¹ CCJE Opinion No. 17, para. 35.

²² The United Nations Convention against Corruption Implementation guide and evaluative framework for Article 11, New York, 2015, paras. 44 and 45, available at https://www.unodc.org/res/ji/import/international_standards/Article_11/Article_11_english.pdf

²³ Petter Langseth, Judicial Integrity and its Capacity to Enhance the Public Interest, UNODC, Vienna, October 2002, p. 13, available at

https://www.unodc.org/res/ji/import/academic_articles_and_books/judicial_integrity_and_its_capacity_to_enhance_the_public_interest/judicial_integrity_and_its_capacity_to_enhance_the_public_interest.pdf.

²⁴ Explanatory Memorandum of Recommendation CM/Rec(2010)12, para. 29.

whether the rules extend to all judicial posts, also remembering that providing false information constitutes a criminal offence.²⁵

20. The CCJE, in Opinion No. 21 (2018) on preventing corruption among judges (Opinion No. 18), considers that a robust system for declaring assets can contribute to the identification and subsequent avoidance of conflicts of interests if relevant steps are taken, and thereby leading towards more transparency and judicial integrity. It warns, however, to the need of proportionality, in order to guarantee the judge's right to privacy and the right to privacy of his/her family members, and to the fact that "in the many member states where corruption has not been an issue", the implementation of an obligation of systematic asset declaration may have as consequence that "suitable candidates for a judge's post might refrain from applying because they see such a far reaching obligation as an unjustified intrusion into their private lives". The CCJE also recommends that disclosure to stakeholders outside the judiciary should only be done on demand, and only if a legitimate interest is credibly shown and confidential information should never be divulged, and that the privacy of third parties, such as family members, should be protected even more strongly than that of the judges.²⁶

IV. Comparative perspective

Appointments and promotion

21. Most member states acknowledge that legal abilities are not the only quality required to be a judge. For instance, in Belgium, in addition to written and oral exam, candidate judges must take part in a psychological assessment based on a questionnaire and involving a discussion with a psychologist to assess their specific skills to become a judge (ability to take a decision, integrity, etc.).²⁷

22. In Bosnia and Herzegovina, amongst others, the following factors are taken into account: ability to perform impartially, conscientiously, diligently, decisively, and responsibly the duties of the office for which he or she is being considered; communication abilities; relations with colleagues, conduct out of office, integrity and reputation.²⁸

23. In Bulgaria, the eligibility criteria for a judge, amongst others, are these: a higher education in law; completion of an obligatory 6-months internship and passing a special exam; compliance with standards of ethics and professionalism; no criminal records for an intentional criminal act resulting in a custodial sentence, regardless of rehabilitation.²⁹

24. In England, the Judicial Appointments Commission (JAC) uses qualities and abilities to assess whether candidates should be selected to a judicial post. The JAC has the following statutory obligations: to select candidates solely on merit; to select only people of good character; to have regard to the need to encourage applications from a wider range of candidates.³⁰

²⁵ Corruption prevention, members of parliament, judges and prosecutors: conclusions and trends, Council of Europe, 2017, p. 21.

²⁶ CCJE Opinion No. 18, paras. 38-40.

²⁷ Questionnaire of the Special rapporteur on the independence of judges and lawyers, OHCHR, January 2018, available at

<https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=&cad=rja&uact=8&ved=2ahUKEwiJoYrwhZmEAXVF->

https://www.ohchr.org/sites/default/files/documents/issues/Judiciary/JudicialCouncils%2FBelgium.docx&usq=AOvVaw3Qk7FMTEdVHG_MdfWdTp9H&opi=89978449.

²⁸ ENCJ, Development of minimum judicial standards, Questionnaire report 2010-2011, p. 15.

²⁹ Id., p. 15.

³⁰ Id., p. 18.

25. In Finland, the following qualifications shall be required for appointment to a position in the judiciary: The applicant must be a Finnish citizen who has earned a Master's degree in law and who by his or her previous activity in a court of law or elsewhere has demonstrated the professional competence and the personal characteristics necessary for successful performance of the duties inherent in the position.³¹

26. In Lithuania, the first very important criterion to be taken into account is the impeccable reputation of a candidate. A person may not be held to be of high moral character and may not be appointed a judge if: under an effective court judgment he/she has been found guilty of commission of a criminal offence; has been dismissed from the position of a judge, a prosecutor, a lawyer, a notary, a bailiff, a police officer or an employee of the system of the interior or from the civil service for violation of professional ethics or malfeasance and if less than five years have lapsed after the dismissal; he/she abuses psychotropic substances, narcotic drugs, toxic substances or alcohol.³²

27. In the Netherlands, before being considered for admission, a judge's criminal record undergoes thorough investigation. Any conviction for a criminal offense will disqualify an individual from entering the judiciary, except in cases of a minor felony committed over ten years ago or a minor misdemeanour committed over five years ago. An independent selection committee, comprised of judges, academics, and other distinguished members of the legal profession, evaluates whether an applicant is deemed eligible for judicial candidacy.³³

28. In sum, if the need for the promotion of integrity is commonly accepted and reaffirmed in international and national documents, rarely do they objectively define the process and detailed criteria to be followed in the assessment of integrity during the selection and promotion of judges. It may be due to the fact that "while the ideal of integrity is easy to state in general terms, it is much more difficult and perhaps even unwise to do so in more specific terms. The effect of conduct on the perception of the community depends considerably on community standards that may vary according to place and time",³⁴ which led some international documents to expressly exclude its application to that field.³⁵ This means that, while universally acknowledged as a necessity, establishing objective criteria and mechanisms for assessing integrity is a challenging task as "the integrity of a person who applies to become a judge is difficult to assess other than by making inferences from references or previous convictions".³⁶

29. The Venice Commission in its Opinion No. 528/2009 (CDL-AD(2009)023)45³⁷ reached a similar conclusion with regard to the criteria for candidate judges in Serbia including honesty, conscientiousness, equity, dignity, persistence and the setting of good example (the latter including refraining from any indecent act, refraining from any action causing suspicion, raising doubts, weakening confidence, or in any other way undermining confidence in the court, refraining from hate speech, indecent or blunt behaviour, impolite treatment, expressing

³¹ Id., p. 19.

³² Id., p. 28. In OSCE's Best Practices in Combating Corruption", the example of the Lithuanian model is given as a good practice for establishing integrity criteria for candidate judges. See Office of the Co-ordinator for Economic and Environmental Activities, Vienna, 2006, p. 143 – available at <https://www.osce.org/files/f/documents/9/a/13738.pdf>.

³³ Id., p. 35.

³⁴ UNODC, Commentary on the Bangalore Principles of Judicial Conduct, para. 102.

³⁵ For instance, the Model Code of Conduct for Public Officials, approved by Recommendation No. R (2000)10, of the Committee of Ministers to Member States on codes of conduct for public officials, adopted at the 106th session, on 11 May 2000, expressly excludes its application to holders of judicial office (Art. 1 (4)).

³⁶ A. Sanders / R. Treibmann, Expert report on the outcomes of the working group's meeting on: Selection, evaluation and promotion of Judges, Council of Europe, 2016, p. 15 – available at <https://rm.coe.int/1680700f39>.

³⁷ Opinion on the Draft Criteria and Standards for the Election of Judges and Court Presidents of Serbia, 15 June 2009, available at [https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2009\)023-e](https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2009)023-e).

partiality or intolerance, using vulgar expressions, wearing indecent clothing and other improper behaviour). These factors were to be evaluated on the basis of the results of interviews, tests and other psychosocial techniques, and also by getting the opinions of persons the candidates have worked with, such as judges or members of the bar. The Venice Commission did not express any adverse comments about the criteria; however, it acknowledged that evaluating them in practice could prove challenging.

Individual professional evaluation

30. Judge's integrity and professional conduct factors are considered in the regular periodic evaluation process in most countries.³⁸ In some jurisdictions, the legislation appears to lay down a very detailed description of the integrity and professional conduct factors considered in the evaluation process. For instance, in Georgia, the characteristics of integrity criteria are: a) personal honesty and professional integrity; b) independence, impartiality and fairness; c) personal and professional conduct; d) personal and professional reputation; e) financial obligations. When assessing a judge based on personal honesty and professional integrity, the following qualities of a person, as a judge and a citizen, shall be taken into consideration: integrity, honesty, appropriate awareness of one's duties and responsibility, love of truth, transparency, civility and accuracy when performing official and other duties and fulfilling financial and other obligations (e.g. when completing a declaration of assets, paying bank or other loans). When assessing a judge based on independence, impartiality and fairness, account shall be taken of his/her adherence to principles, ability to independently make a decision, and resistance to influence, personal steadfastness and firmness, political or other type of impartiality, fairness, etc. When assessing a judge based on personal and professional conduct, account shall be taken of his/her adherence to judicial ethics, civility with regard to colleagues and other persons, conduct and image appropriate for a judge's high rank, restraint, the ability to manage one's emotions, appropriate conduct during disciplinary proceedings against him/her, in litigation to which the judge is a party, existence of criminal charges against the judge, etc. When assessing a judge based on personal and professional reputation, account shall be taken of his/her business and moral reputation and authority in legal circles and society, the nature and quality of relations with legal circles. When assessing a judge based on financial obligations, account shall be taken of information on his/her source of income, assets, property owned and/or used, and on debts and liabilities related to this property and income. Examination of financial obligations is intended to establish whether there are grounds for a conflict of interest, which may compromise judge's impartiality.

31. In Moldova, integrity is assessed based on the following indicators: a) observance of professional ethics; b) number of disciplinary sanctions applied during the period subject to evaluation; c) non-involvement in political activities; d) professional reputation; e) financial integrity.³⁹ In Portugal, Integrity assessment consists of analysing declarations of assets and complaints filed against the judge. In several counties (e.g. Belgium and Hungary) absence of complaints and disciplinary sanctions are considered.⁴⁰

³⁸ N. Betetto, How to assess the quality of the performance of judges: comparative analysis, CEPEJ 2024, Q. 14.

³⁹ Id.

⁴⁰ Id.

V. Review of the HCJ's criteria for assessing judge's integrity

32. This section endeavours to analyse the integrity criteria outlined by the HCJ, aiming to evaluate their compliance with the European Convention on Human Rights (ECHR) and Council of Europe standards. The usefulness of comparative method, assessing the criteria in comparison to developments in other member states, is limited, not only because, as demonstrated earlier, member states seldom articulate the processes and detailed criteria guiding the assessment of integrity during the selection, promotion, and professional evaluation of judges, but also because the extraordinary political, economic, and social context in Ukraine necessitates tailor-made measures.

33. So far, the following criteria have been identified by the HCJ:

Criterion 1: Judge's defection to the enemy

Criterion 2: Honesty of the judge

Criterion 2.1. compliance of the expenses and property of the judge and his/her family members with the declared income.

Criterion 2.2. compliance of the lifestyle (level of living) of the judge and his/her family members with the declared income.

Criterion 2.3: violation of the judge's declaration obligations

Criterion 2.4: existence of unsecured property liabilities that may have a significant impact on the administration of justice by the judge.

Criterion 3. Judicial incorruptibility

Criterion 3.1: Committing a corruption offence by a judge;

Criterion 3.2. Existence of criminal proceedings against the judge for committing a corruption offence;

Criterion 3.3: Extra-procedural relations of the judge that may be regarded as corrupt.

Criterion 4. Impeccable behaviour of the judge in professional and private life

Criterion 5. Judicial independence

Criterion 6. Impartiality of a judge

Criterion 7. Judicial diligence

7.1. Self-removal from performing judicial duties

7.2. Unlawful denial of access to justice

7.2.1. Failure to state in the court decision the reasons for accepting or rejection of the parties' arguments on the merits of the dispute

7.2.2. Violation of the principles of publicity and openness of the trial

7.2.3. Violation of the principles of equality of all participants in the trial before the law and the court, the competitiveness of the parties and the freedom of the parties to present their evidence to the court and to prove their convincing nature before the court

7.2.4. Denial of the accused's right to defence, obstruction of the rights of other participants in the trial

7.2.5. Violation of the rules on recusal (self-recusal)

7.2.6. Violations related to the issuance of interim measures.

Criterion 8. Violation of the rules of judicial ethics, which is not sufficient to bring a judge to disciplinary responsibility

Material scope of application of integrity criteria

34. There is no universal analytical⁴¹ definition of judicial integrity; in fact, hardly any international documents made an attempt to define the term. By way of example, the Commentary on the Bangalore Principles Bangalore indicates the meaning of 'integrity' by providing only a sample of its characteristics stating that "the components of integrity are honesty and judicial morality".

35. The reason for this lies in the implicit quality of judicial integrity that may not be easily distilled into a set of concrete and universally applicable rules. It involves nuanced judgments and the application of ethical principles. Legal systems in Europe vary in their traditions, values, and structures. What may be considered appropriate in one legal system might be perceived differently in another. The judge must consider whether – in the eyes of a reasonable, fair-minded and informed member of the community - the conduct is likely to call into question his or her integrity or diminish respect for him or her as a judge. As societal norms and expectations evolve over time, defining integrity must also take into account changing social values, making it a dynamic and challenging task. Judges, like any individuals, bring their personal ethics to their professional roles. Balancing personal beliefs with the impartiality required in judicial roles adds complexity to defining integrity. Moreover, the assessment of judge's conduct often hinges on the specific context of each case. What may be considered professional or ethical behaviour in one situation may not apply universally across different cases.

36. Therefore, the first conclusion reached is that due to its complexity, it is only possible to convey the meaning of 'judicial integrity' by pointing out examples (i. e. by using the ostensive definition) and not by an analytical definition.

37. A further question arises about whether 'integrity' is a broader or narrower term than 'judicial ethics.' The crux of the matter lies in the acknowledgment that, on one side, integrity is recognised as a principle in national judicial codes of conduct, often synonymous with honesty and righteousness. On the other hand, it appears that 'integrity' is frequently used as an umbrella term, encompassing various aspects such as the absence of disciplinary sanctions, compliance with asset declaration, and adherence to codes of conduct, among others. Putting aside theoretical concepts, a comparative review suggests that the assessment of judges' integrity typically involves considerations beyond mere compliance with the code of ethics.⁴²

38. Turning now to the question of the attributes of judicial integrity in Ukraine, it is imperative that the characteristics of judicial integrity in Ukraine should harmonise with the values and structure of the Ukrainian legal system, as well as align with the expectations of the public. Given the low level of public trust in the judiciary and recurrent judicial corruption cases, the absence of corrupt behaviour is an important integrity indicator; however, as mentioned earlier, judicial integrity entails far more than the absence of corruption; it

⁴¹ The analytical definition describes the necessary and sufficient conditions for a thing to be member of a specific set.

⁴² E. g., the practice in the Netherlands where the Council for the Judiciary drew up a Protocol for the investigation of integrity violations by judges supports this conclusion. Reports that may give rise to suspicions of an integrity violation may come from different sources, such as a police report, notification of a preliminary judicial investigation, a report by the judge him/herself, evaluation interviews with him/her, observation by a manager or colleague, complaint by a citizen or a media report.

encompasses adherence of judges to a set of principles that uphold trust, fairness, and ethical conduct in their decision-making process. The priority issues that were examined by GRECO in the fourth evaluation round - Corruption prevention in respect of members of parliament, judges and prosecutors ('GRECO list') – can serve as guidance:

- ethical principles, rules of conduct and conflicts of interest;
- prohibition or restriction of certain activities;
- declaration of assets, income, liabilities and interests;
- enforcement of the applicable rules regarding conflicts of interest,⁴³ including disciplinary mechanisms in cases of serious misconduct.

39. When comparing the GRECO list to the integrity criteria set by the HCJ, the following conclusions can be drawn:

40. The criteria 1 'Judge's defection to the enemy' and 3.1 'Committing a corruption offense by a judge' both constitute elements of enforcement regime necessary to develop and foster a true culture of judicial integrity. Their inclusion in the list of integrity indicators is therefore indisputable.

41. Criteria 2 ('Honesty of a judge') and 4 ('Impeccable behaviour') directly address the ethical principles and rules of conduct expected from judges. Based on the forms of misconduct identified by the HCJ, such as failure to submit a declaration to the National Agency on Corruption Prevention; failure to submit a declaration of integrity of a judge; false information in the said declarations;⁴⁴ committing a criminal offence; committing an administrative offence; failure of a judicial candidate to notify the HCJ of the fact of criminal, administrative or disciplinary liability, which is considered by the HCJ as intentional; pending criminal proceedings against a judge; closure of criminal proceedings due to non-rehabilitating circumstances,⁴⁵ it can be concluded that the established practice, in general, aligns with the concept of integrity as understood in international standards.

42. As shown in section III., declaration of assets/interests is increasingly used as a way of addressing systemic corruption. The criteria 2.1, 2.2, 2.3, and 2.4, specifically addressing the declaration of assets, income, liabilities, and lifestyle, therefore ensuring transparency and accountability, align with the category 'Declaration of assets, income, liabilities, and interests' (GRECO list) and should therefore constitute part of the integrity criteria.

43. The criterion 7.1. 'Self-removal from the performance of judicial duties' in the category 'Diligence' covers examples, as clarified by the HCJ, "of failure to fulfil professional duties by a judge who is in Ukraine and for unknown reasons does not appear at work for a long time".⁴⁶ Such behaviour, violating several universally recognised ethical standards and compromising judicial integrity, is unacceptable.

44. Criteria 7.2. (7.2.-7.2.5)⁴⁷ refer to the grounds for disciplinary liability stipulated in subitems of Art. 106, part one, of the Law of Ukraine on Judiciary and Status of Judges (LJSJ).

⁴³ Corruption prevention, members of parliament, judges and prosecutors: conclusions and trends, Council of Europe, 2017, p. 7.

⁴⁴ See HJC criteria, para. 25.

⁴⁵ See HJC criteria, para. 57.

⁴⁶ The following case is given as an example of 'Self-removal from the performance of judicial duties': "...judge S. was absent from the workplace for more than a year without valid reasons, and at a meeting of the High Council of Justice she refused to explain the reasons for her absence from the workplace, this fact indicates doubts about S.'s compliance with the criteria of integrity and professional ethics...".

⁴⁷ 7.2. Unlawful denial of access to justice; 7.2.1. Failure to state in the court decision the reasons for accepting or rejection of the parties' arguments on the merits of the dispute; 7.2.2. Violation of the principles of publicity and openness of the trial; 7.2.3. Violation of the principles of equality of all participants in the trial before the law and the

While the reliance on disciplinary liability as one of the integrity criteria aligns with international standards and mirrors practices in several member states, there is still room for improvement. It is a well-established principle that disciplinary proceedings against judges based on the rule of law should correspond to certain basic principles, namely: 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; and there should be a right to appeal to a higher judicial authority.⁴⁸ When assessing the integrity of an individual judge against these criteria (7.2.-7.2.5.) relating to interpreting and adapting the rules of law to apply them to specific factual situations, it is crucial to expressly state that the integrity criterion is the final disciplinary decision imposed on a judge.

45. The application of international standards in disciplinary proceedings does not fall within the scope of this analysis. Nonetheless, disciplinary sanctions imposed on a judge directly influence the assessment of their integrity. Therefore, some comments on this matter are warranted.

46. The practice of the Ukrainian disciplinary body in this respect give rise to certain concerns. To substantiate this conclusion, it is pertinent to first highlight relevant case law, with only a few examples quoted in this analysis.

47. Criterion 7.2. 'Unlawful denial of access to justice':⁴⁹ the judge did not ensure a full, comprehensive and objective consideration of the case in accordance with the procedure established by the procedural law; the formal nature of the trial, which did not ensure an objective resolution of the case and a fair decision; a number of gross violations of procedural law by the judge; violation of the rules of jurisdiction (rules of exclusive jurisdiction) by a judge is a significant violation of procedural law in the administration of justice, which led to a violation of the rules of jurisdiction; failure of a judge to comply with the mandatory written procedure of the proceedings; violation by the judge of the procedural law regarding the provision of proper reasons for accepting the arguments of the parties on the seizure of property and its cancellation; a judge going beyond the powers of the investigating judge; improper failure to fulfil the powers of the investigating judge; making a decision in absentia without complying with the conditions stipulated in part one of Art. 224 of the Civil Procedure Code of Ukraine; opening of proceedings without taking into account Art. 8 of the Law of Ukraine on Court Fee" and Art. 121 of the Code of Civil Procedure of Ukraine, absence of a decision on deferral or instalment of court fee payment indicates a significant violation of procedural law.

48. Concerning criterion 7.2.1. 'Failure to state in the court decision the reasons for accepting or rejection of the parties' arguments on the merits of the dispute', the types of behaviour assessed by the HCJ as dishonest were:⁵⁰ the decision did not allow to establish the proper, correlated with the content of the law, motives that guided the court in making these court decisions; the practice of consideration of cases was inconsistent; obvious deviations in the judge's case law were not properly motivated; the practice had no legal basis under national law; the court decision did not specify the reasons for accepting or rejecting the arguments of the parties; failure of the court to resolve the parties' motions; - the practice had no connection with the established facts and applicable law.

court, the competitiveness of the parties and the freedom of the parties to present their evidence to the court and to prove their convincing nature before the court; 7.2.4. Denial of the accused's right to defence; obstruction of the rights of other participants in the trial; 7.2.5. Violation of the rules on recusal (self-recusal).

⁴⁸ See e. g. Venice Commission, CDL-AD(2016)009, Final Opinion on the revised draft constitutional amendments on the judiciary (15 January 2016) of Albania, para. 34.

⁴⁹ See HJC criteria, para. 113.

⁵⁰ See HJC criteria, para. 122.

49. Criterion 7.2.2 'Violation of the principles of publicity and openness of the trial' includes judge's actions, such as depriving a party to a case of the opportunity to exercise the procedural rights granted to it to participate in court hearings, present evidence and participate in its examination; failure to notify a party/parties of court hearings in cases to which they are parties; copies of court rulings are not sent to the party/parties to the case.⁵¹

50. Criterion 7.2.4. 'Denial of the accused's right to defence, obstruction of the rights of other participants in the trial' is said to be evidenced by violation of the rules of criminal procedure legislation regarding the accused's right to defence; obstruction of the participants in the trial in the exercise of their rights in criminal proceedings; deviation from the European Court of Human Rights' (ECtHR) understanding of the right to defence in criminal proceedings.⁵²

51. The factual circumstances established in the presented case law, indicating that the judge failed to adhere to (civil or criminal) procedural rules, appeared to be about adherence to procedural rules rather than about a violation of the broader ethical principles. The failures such as to state in the court decision the reasons for accepting or rejecting the parties' arguments on the merits of the dispute; to deviate from the ECtHRs' understanding of the right to defence in criminal proceedings; to fail to notify a party/parties of court hearings or to fail to send copies of court rulings to the party/parties to the case, etc., are procedural errors rather than disciplinary offences. Not every procedural error should automatically entail disciplinary liability.

52. There is a consensus that the remedy for judicial errors (whether in respect of jurisdiction, substance or procedure) should lie in an appropriate system of appeals.⁵³ The erroneous construal of a procedural error as a disciplinary offence can unduly prejudice the evaluation of the judge's performance, leading to an unwarranted assessment of the merits of the case contrary to international standards pertaining to disciplinary proceedings against judges.

53. Disciplinary liability centres on individual accountability for actions or conduct that deviate from established professional standards, ethical codes, or legal norms. It is intrinsically tied to the personal actions, decisions, or omissions of the individual in question, reflecting a judgment of their behaviour and adherence to prescribed standards. Unlike no-fault liability, disciplinary liability typically requires a demonstration of causation and guilt. The focus is on whether the individual knowingly or acting with gross negligence engaged in conduct that led to a breach of professional or ethical standards. It requires an examination of the specific actions and intentions of the individual rather than attributing liability based solely on the occurrence of an event. Judges must be held accountable for their individual actions, promoting a culture of responsibility without compromising the autonomy of the judiciary. No-fault liability could risk undermining this independence by attributing responsibility without considering the specific actions of the judge.

54. Similar arguments are applicable regarding the criterion 7.2.6 'Violations related to the issuance of interim measures'. Two examples are indicative in this respect: "When deciding on interim relief, the court must take into account the interests not only of the plaintiff but also of other persons whose rights may be violated in connection with the application of the relevant interim relief. Judge M. did not take into account the subject matter and grounds of B.'s claim, did not make sure whether there was a real dispute between the parties and whether there

⁵¹ See HJC criteria, para. 130.

⁵² See HJC criteria, para. 127.

⁵³ See e. g. Opinion no. 3 of the Consultative Council of European Judges on the principles and rules governing judges' professional conduct, in particular ethics, incompatible behaviour and impartiality (Opinion No. 3), para. 76. i): "The remedy for judicial errors (whether in respect of jurisdiction, substance or procedure) should lie in an appropriate system of appeals."

was a real threat of non-enforcement or difficulty in enforcing a possible court decision to satisfy the claim." As a result of such actions, "the interim measures applied by the court of first instance are obviously disproportionate to the claims of PERSON 1, which was also established by the Court of Appeal of Lviv region". The actions of Judge M. in resolving the application for interim relief "are indicative of gross negligence of the judge and are qualified by the Third Disciplinary Chamber of the High Council of Justice as defaming the title of judge and undermining the authority of justice." "When issuing a ruling on interim relief, it was not taken into account that the measures taken should not interfere with the economic activity of a legal entity or an individual who carries out such activity and is registered in accordance with the law as an entrepreneur".⁵⁴

55. It should be repeated that a judicial error is not in itself sufficient to conclude that any concerns as to judge's integrity/honesty are objectively justified. The judge's action does not automatically amount to a disciplinary conduct even if the judicial error by the judge is made. In this instance, the appropriate avenue for the complainant would have involved addressing the procedural error, if any, within the framework of judicial proceedings. Several Venice Commission's opinions may serve as guidance in this regard, for instance:

- "Disciplinary proceedings should deal with gross and inexcusable professional misconduct but should never extend to differences in legal interpretation of the law or judicial mistakes."⁵⁵
- "The legal interpretation provided by a judge in contrast with the established case law, by itself, should not become a ground for disciplinary sanction unless it is done in bad faith, with intent to benefit or harm a party at the proceeding or as a result of gross negligence. While judges of lower courts should generally follow established case-law, they should not be barred from challenging it, if in their judgment they consider right to do so."⁵⁶
- "Independence of every judge is a precondition that must allow every judge and every panel of judges to make effort in order to change the practice – to adopt a different decision – if s/he thinks it appropriate in a particular case. Only stubborn resistance against an enhanced practice which leads to a repeated overturning in cases where there is a well-established and clear case-law should probably be counted as a blatant lack of professionalism. [...] The same criticism may be formulated regarding violation of rights so decided by the ECtHR. Judges should follow the European jurisprudence, but an erroneous decision should not necessarily result with their dismissal [...] Furthermore, the 'modification' of the lower court judgements may be relatively minor or reflect the discretionary power of the appellate court (for example, the appellate court may reduce a sentence imposed by a lower court even though the lower court acted lawfully and within the authorised limits)."⁵⁷
- "[...] [T]he absence of the reference to the fault of the judge in other provisions may be interpreted as implying that it is not a mandatory element for establishing the judge's liability, while it should be so. The liability of the judges should be considered in the light of their influence on workload and backlog. For example, delays in the court proceedings may be caused by the judge's lack of organisational skills but may as well be explained by

⁵⁴ See HJC criteria, para. 132.

⁵⁵ CDL-AD(2011)012, Joint Opinion on the constitutional law on the judicial system and status of judges of Kazakhstan by the Venice Commission and OSCE/ODIHR, §60.

⁵⁶ CDL-AD(2014)006, Joint opinion of the Venice Commission and the Directorate of Human Rights (DHR) of the Directorate General of Human Rights and Rule of Law of the Council of Europe, and of the OSCE Office for Democratic Institutions and Human Rights (OSCE/ODIHR) on the draft law on disciplinary liability of judges of the Republic of Moldova, §22.

⁵⁷ CDL-AD(2015)042, Opinion on the Laws on the Disciplinary Liability and Evaluation of Judges of "The Former Yugoslav Republic of Macedonia", §46-48.

objective reasons outside his/her control, for example, by the failure of the court bailiffs to ensure appearance of witnesses. [...] Actually, Article 74 of the Law on the Judicial Council does stipulate that in the sentencing process the Judicial Council has to take into account 'the degree of responsibility' of the judge. However, the very existence of a disciplinary breach (not only the sanction) should be conditioned upon the fault of the judge. The honest and hard-working judges should not be disciplined for the situations which result from the poor management of the judicial system as a whole or from other circumstances outside their control."⁵⁸

56. Independence and impartiality are separate and distinct values. They are nevertheless linked as mutually reinforcing attributes of the judicial office.⁵⁹ For this reason, requirements 5. ('Independence of a judge') and 6. ('Impartiality of a judge'), following the ECtHR common approach,⁶⁰ are considered together. The case law summarized in HCJ criteria can be categorised in two types: 1) forms of misconduct in performing judicial duties; 2) forms of misconduct in extrajudicial activities. When assessing the integrity of an individual judge based on criteria 5. and 6. in performing judicial duties, the integrity criterion should be the final disciplinary decision imposed on a judge. Some examples of the relevant case law summarized in the HCJ criteria raise doubt about their compliance with international standards prohibiting the revision of judicial decisions outside the appeals process as provided for by law. The HCJ practice, assessing the absence of proper motivation in a court decision as a doubt in compliance with the principle of impartiality, serves as a case in point.⁶¹

57. More specifically, in relation to 'impartiality' in performing judicial duties, it should be noted, that to constitute a disciplinary misconduct, it must be determined whether, quite apart from the judicial error, there are ascertainable facts which may raise doubts as to judge's impartiality. There are two possible situations in which the question of a lack of judicial impartiality may arise: The first is functional in nature and concerns, for instance, the exercise of different functions within the judicial process by the same person, or hierarchical or other links between the judge and other actors in the proceedings.⁶² In the latter case, the nature and degree of the relationship in question must be examined. The second situation is of a personal character and derives from the conduct of the judges in a given case or the existence of links to a party to the case or a party's representative which may raise doubts as to his/her impartiality. In sum, in navigating the complexities of judicial conduct, it is paramount to consistently distinguish between errors in judgment/procedural errors and actions compromising judicial integrity.

58. In the case of the latter group, which pertains to the assessment of a judge's extrajudicial activities,⁶³ involving a range of situations that could reasonably give rise to a

⁵⁸ CDL-AD(2015)042, Opinion on the Laws on the Disciplinary Liability and Evaluation of Judges of "The Former Yugoslav Republic of Macedonia", §18 and 19.

⁵⁹ UNODC, Commentary on the Bangalore Principles of Judicial Conduct, para. 51.

⁶⁰ *Kleyn and Others v. the Netherlands* [GC], para. 192.

⁶¹ HCJ criteria, para. 90. See also "Judge P. did not apply the rule of law, did not comply with the requirements of Article 5 of the Convention for the Protection of Human Rights and Fundamental Freedoms, did not take into account the case law of the European Court of Human Rights, in particular in the final judgment in the case of *Lutsenko v. Ukraine* of 19 November 2012" (HCJ criteria, para. 70).

⁶² See *Micallef v. Malta* [GC], 2009, paras. 97-98. This seems to have been the case in the following case; "... it was established that during the consideration of the said civil case, the judge of the Holosiivskiyi District Court of Kyiv PERSON_5 had extra-procedural relations with PERSON_2, who acted in the interests of the plaintiff PERSON_1, in order to assist the latter in resolving the dispute in his favour, which was being considered by judge PERSON_5." (HCJ criteria, para. 93).

⁶³ As for examples, see e. g. UNODC, Commentary on the Bangalore Principles of Judicial Conduct, paras. 65-68.

perception of an absence of impartiality, the HCJ's practice appears to align with international standards. This aspect should continue to be included in the assessment of judge's integrity.

59. The same holds true for the criterion 8. 'Violation of the rules of judicial ethics, which is not sufficient to bring a judge to disciplinary responsibility'. It is a well-established principle that a code of ethics should not be directly applied as a ground for criticism or disciplinary sanctions; nevertheless, serious violations of ethical norms could also imply fault and acts of negligence that, in accordance with the law, lead to disciplinary sanctions. While the inevitable interplay between the principles of ethical conduct and those of disciplinary regulations prevents a clear-cut differentiation between unethical behaviour and disciplinary offences, commitment to clarity and uniform application of criteria can help ensure a fair, transparent and consistent assessment (see below, p. 61-65).

Compliance of the integrity criteria with fundamental principles

60. As we embark on the assessment of the existing integrity criteria, it is imperative to ensure their compliance with fundamental principles. These include commitment to clarity in defining criteria; equal and uniform application of the criteria; and compliance with human rights and freedoms.

a. Commitment to clarity and uniform application of the criteria

61. Certain HCJ integrity criteria, such as Criteria 4. ('Impeccable behaviour of a judge in his/her professional and private life'), and 8. ('Violation of the rules of judicial ethics, which is not sufficient to bring a judge to disciplinary responsibility'), are inherently outlined in broad and imprecise terms. This bears the risk of their overbroad interpretation and abuse, which may be dangerous for the independence of judges.

62. To mitigate this risk, the HCJ put considerable efforts to detail behaviours contrary to judicial integrity by complementing established criteria with HCJ and Supreme Court case law. This practice of referencing case law clearly enhances the clarity and understanding of the criteria and should be pursued in the future.

63. To further strengthen these positive initiatives, it is recommended that the HCJ takes steps to publish relevant case law associated with integrity criteria. This publication would serve as a valuable resource for judges, providing explicit examples and insights into what is expected from them. Publishing relevant case law would not only aid judges in understanding these criteria better but also contribute to a more consistent and transparent evaluation process.

64. Despite these positive developments, specifically concerning criterion 8 ('Violation of the rules of judicial ethics, which is not sufficient to bring a judge to disciplinary responsibility'), it is recommended to further enhance clarity. At the very least, a reference to the Code of Judicial Ethics (Art. 58 LJSJ) should be included. Supplementing this criterion with practical examples holds special importance. In this context, GRECO invited member states to build integrity frameworks that go beyond the mere adoption of general codes of conduct. Codes of conduct should include explanatory comments and/or practical examples to ease implementation.⁶⁴

65. The uniform application of the law is essential for the principle of the equality before the law. Moreover, considerations of legal certainty and predictability are an inherent part of the

⁶⁴ See GRECO, Corruption prevention, members of parliament, judges and prosecutors: conclusions and trends, Council of Europe, 2017, p. 19.

rule of law. In a state governed by the rule of law, (candidate) judges (like any other citizen) justifiably expect to be treated as others and can rely on the previous decisions in comparable cases so that they can predict the legal effects of their acts or omissions. The case law serves as a supplementary tool of interpretation of law. An adequate system of reporting case law is essential for ensuring uniform application of integrity criteria. Relevant judgments of the supreme courts and HCJ decisions and opinions should be regularly published so that (candidate) judges and the general public understands what rules of behaviour should be followed by judges.

b. Compliance with human rights and freedoms

66. As a country bound by several international human rights instruments, including the ECHR, the HCJ criteria need to comply with international human rights standards, in accordance with Art. 3 of the Constitution of Ukraine. Given the precedential value of the case law of the ECtHR, the assessed criteria should also be evaluated through the lens of the ECtHR judgements.

67. As the integrity assessment of judges is based on specific information disclosed by the (candidate) judge or collected and proceeded by public institutions or bodies, certain criteria, particularly criterion 2.1. 'Compliance of the expenses and property of the judge and his/her family members with the declared income', criterion 2.2. 'Compliance of the lifestyle (level of living) of the judge and his/her family members with the declared income' and criterion 2.3. 'Violation of the judge's declaration obligations' may raise questions about their compliance with Art. 8 ECHR with view to the right to respect for private life. According to the case law of the ECtHR, the notion of 'private life' is broad. It encompasses the personal autonomy; everyone can freely pursue the development and fulfilment of his or her personality and establish and develop relationship with others.⁶⁵ One part of 'private life' in the meaning of Art. 8 ECHR is the collection of data and information on an individual. The right to private life protects individuals against disclosure of information concerning them that is in the possession of public authorities.⁶⁶ The definition of the right to respect for private life as given in para. 1 of Art.8 ECHR is supplemented by a second paragraph that restricts the scope of the right. Interferences with the right to respect for private life are justified if they are prescribed by law, pursue a legitimate aim and fulfil the proportionality test ("necessary in a democratic society").

68. The scope of this report does not include a comprehensive examination of any detail of the integrity assessment of judges according to the law in Ukraine with view to the right to respect for private life, or more concretely, the right to data protection. It should be noted that the Venice Commission has already recommended that declarations of assets should only be used for sitting judges and not as a criterion or pre-condition for the appointment of judges as 'only an increase of property during the mandate of the judge should trigger further investigation into possible corruptions'. If candidate judges are required to declare property and that declaration is taken into consideration for the appointment decision, it may lead to discrimination on the basis of the social/property status.⁶⁷ However, with respect to Albania, it held, somewhat at odds with the position concerning Ukraine, that "Draft Article 136/a now

⁶⁵ ECtHR, *Niemietz v. Germany*, para. 29; *Barbulescu v. Romania* [GC], para. 70; *Denisov v. Ukraine* [GC], para. 95 et seq.

⁶⁶ ECtHR, *Leander v. Sweden*, para. 48; ECtHR (GC), 16.2.2000, *Amann v SUI*, No. 27798/95, §§ 69, 80; ECtHR (GC), 4.5.2000, *Rotaru v ROM*, No. 28341/95, § 46.

⁶⁷ Venice Commission, CDL-AD(2014)031, Joint Opinion of the Venice Commission and the Directorate of Human Rights of the Directorate General of Human Rights and Rule of Law of the Council of Europe on the Draft Law on amendments to the Organic Law on general Courts of Georgia, 14 October 2014, para. 51

contains a general provision that candidates for judicial office are to be selected based on a transparent and open procedure, which ensures a merit-based selection of the most qualified candidates “having moral and ethical integrity”. The Article also requires candidates to pass an evaluation of their “assets and their background” as well as to have graduated from the School of Magistrates. A similar provision appears in Article 148 in relation to prosecutors. These regulations are in accordance with the Venice Commission recommendations in the Interim Opinion.”⁶⁸

68. Art. 6(2) ECHR embodies the principle of the presumption of innocence. It requires, inter alia, that: 1) when carrying out their duties, the members of a court should not start with the preconceived idea that the accused has committed the offence charged; 2) the burden of proof is on the prosecution, and 3) any doubt should benefit the accused. According to the ECtHR, proceedings concerning the dismissal of a judge do not involve the determination of a criminal charge, and thus Art. 6 is not applicable under its criminal head.⁶⁹

69. As rightly pointed out by the HCJ, unlike criminal liability, disciplinary liability has different components and applies different standards of proof.⁷⁰ Consequently, conduct that does not give rise to penal consequences may nevertheless be subject to disciplinary measures. As regards the relationship between criminal proceedings and disciplinary proceedings⁷¹ concerning the same acts, more specifically, the possible binding character in disciplinary proceedings of findings of fact made in criminal proceedings, such binding effect is to be found in the vast majority of legal orders. However, it should be made clear, first, that it is very often subject to the condition that the acts in question are identical – findings of fact made in criminal proceedings are binding on the disciplinary authority where the proceedings concern the same conduct. Only a very small number of legal systems are based on the principle of independence of disciplinary and criminal proceedings.⁷²

VI. Review of the PIC’s indicators for a lack of integrity

71. The PIC assists the HQCJ in determining whether a judge (candidate for the position of judge) meets the criteria of professional ethics and integrity for the purposes of qualification assessment. It is not authorised to check whether the competence (legal and other) criteria are met.

72. To fulfil its task, the PIC provides, if there are appropriate grounds, the HQCJ with a conclusion on the non-compliance of a (candidate) judge with the criteria of professional ethics and integrity, which is attached to the dossier of a candidate for the position of judge or to the judicial dossier (Art. 87(6) point 3 LJSJ). In order to exercise its powers, the PIC has the right to create an information portal for collecting information on professional ethics and integrity of (candidate) judges (Art. 87(6) point 5 LJSJ; in addition, PIC members are granted free and full access to open state registers (Art. 87(7) LJSJ). More specifically, according to the Regulation of the PIC (Art. 20(2)), in order to collect information about a (candidate) judge, a PIC member may: organize a search for information on the PIC information portal and other sources on the

⁶⁸ CDL-AD(2016)009 [Final Opinion on the revised draft constitutional amendments on the Judiciary \(15 January 2016\) of Albania, 11-12 March 2016, para. 25](#)

⁶⁹ Volkov v. Ukraine, 2013, paras. 93-95.

⁷⁰ HCJ criteria, para. 36.

⁷¹ The issue is discussed in the HCJ criteria, paras. 32-47.

⁷² Court of Justice of the EU, Research note: Impact of ongoing criminal proceedings on the conduct of disciplinary proceedings, 1 March 2020, paras. 6, 10-21 and 41, available at: https://curia.europa.eu/jcms/upload/docs/application/pdf/2022-09/ndr_2020_001_neutralisee_en.pdf.

internet; organize a search for information in the PIC's correspondence; 3) organize search for information in open state registers; perform other actions in accordance with the recommended algorithm of collection, verification and analysis of information about a (candidate) judge, as well as additional actions that he/she deems necessary.

73. The List of indicators of lack of integrity (PIC criteria) developed by the PIC includes the following criteria:

- i. In the dossier file and/or explanations of the judge, there is no convincing information about the sources of the origin of liquid assets, expenses, benefits received (by them, family members or relatives), and/or legal income, which, in the opinion of a prudent observer, raises doubts about their sufficiency to acquire such property, make such expenses, receive benefits.
- ii. A judge (candidate for the position of judge) or a person related to him/her received property, income, or benefit, the legality of which, in the opinion of a prudent observer, raises reasonable doubts (interest-free loan in significant amounts to the detriment of the lender, receipt as a gift, free use or with a significant discount of liquid property, receipt of liquid property from the owner for whom there is no confirmation of the legality of income for the purchase of such property, underestimation of the value of such property, etc.).
- iii. A judge (candidate for the position of judge) without valid reasons allowed judicial delay, if this led to the violation of reasonable terms of consideration of the case, as a result of which, for example, certain participants in the case received benefits or advantages or suffered unjustified losses, the case was closed due to expiration of the terms, the violators avoided punishment, the protection of violated rights became significantly complicated, impractical or impossible, etc.
- iv. A judge allowed actions (inaction) or made decisions based on political motives, corporate solidarity, manipulating circumstances or legislation, or had an economic, corrupt or other personal interest in making (not making) a certain decision.
- v. A judge made illegal decisions under the illegal influence (interference) of another person.
- vi. A judge (candidate for the position of judge) used administrative, organisational and administrative or other powers to pressure (influence) another judge in order to make a certain decision or in response to the judge's refusal to take such actions (direct instructions, pressure through administrative levers of influence, creating an appropriate atmosphere, etc.) incited another judge to commit illegal acts or assisted in it.
- vii. A judge allowed behaviour that led to significant violations of the rules of the process, or a significant violation of fundamental rights and freedoms, or an obvious and significant violation of the right to a fair trial, or to a significant public outcry in the presence of facts that testify to the validity of doubts about honesty, impartiality or the incorruptibility of the judge and the lack of motivation of such actions of the judge, which negatively affects the authority of justice and public trust in the court (an additional indicator for this can be the decisions of the European Court of Human Rights, decisions of higher authorities, separate decisions, bringing to disciplinary responsibility, the obvious nature of violations, mass protests, appeals by international organizations, authoritative public or professional organizations, restrictions on access to justice, etc.).

- viii. A judge (candidate for the position of judge) adopted or issued court decisions or their copies with a gross violation, namely without actual consideration of the case (issue), the conduct of which is required by law.
- ix. A judge arbitrarily set restrictions on the exercise of the right to peaceful assembly, which nullified the exercise of the freedom of peaceful assembly, for example, for an unlimited number of people and (or) for a long time and (or) for an unlimited place.
- x. A judge (candidate for the post of judge) is connected to political powers and the influence of this connection on his career and (or) the activity of the judge, which is perceived as political dependence (for example, making decisions in favour of political powers or persons) can be traced, related to these forces, relationships of a non-public nature that influence career decisions, in particular, the influence of political power on the appointment or transfer of a judge, etc.). The judge similarly violated the principle of political neutrality.
- xi. A judge (candidate for the position of judge) allowed actions (inaction) that led to the avoidance of lustration of him or another person in obvious violation of the law.
- xii. A judge (candidate for the position of judge) clearly avoided participation in the procedures necessary for the proper investigation of facts containing signs of crimes, administrative, disciplinary or other offenses in the qualification evaluation procedure (for example, failure to appear when summoned to the investigator, prosecutor, investigator judge, court in criminal proceedings, refusal to provide explanations in administrative or disciplinary proceedings, etc.), or provided knowingly false or distorted information.
- xiii. A judge gave an obvious unjustified procedural advantage to one of the parties, allowed discrimination against a participant in the process or another person.
- xiv. A judge (candidate for the position of judge) used the status to satisfy his/her interests or the interests of other persons, or by his/her actions or inactions allowed other persons to use his/her status to obtain illegal benefits or an unjustified and unjust advantage.
- xv. A judge (candidate for the position of judge) used family, friendship, and other informal connections to pursue a career or obtain unjustified preferences.
- xvi. A judge (candidate for the position of judge) allowed regular communication with members of a criminal/terrorist organization, representatives of the occupation administration of the Russian Federation outside of the administration of justice.
- xvii. A judge committed acts that indicate support for aggressive actions of other states against Ukraine, collaboration with representatives of such states, the occupation administration or their accomplices (for example, he visited the Russian Federation without an urgent need after the start of armed aggression, temporarily occupied territories).
- xviii. Results of scientific research, published by the authorship of a judge, contain signs of non-compliance with academic integrity.

74. The PIC criteria give rise to several concerns. The overarching concern is centered on the reliability of information. The primary duty of judges is to administer justice impartially and fairly, adhering to the principles of law. Their role is not to deliver popular decisions but to uphold the rule of law and ensure the just resolution of legal matters. Due to the extensive array of sources available to the PIC members and their discretion in forming opinions, the information channel is susceptible to misuse, including disgruntled parties seeking retribution.

An illustrative example is an unfavorable decision, which, from the perspective of an unhappy party, may be perceived as 'a decision based on political motives' (indicator iv.).

75. As mentioned earlier (see above, para. 68), declarations of assets (indicator i.) should only be used for sitting judges and not as a criterion or pre-condition for the appointment of judges as 'only an increase of property during the mandate of the judge should trigger further investigation into possible corruptions.

76. The most worrying are the indicators concerning the performance of judicial duties. It is crucial to reiterate that any remedy for judicial errors, be it related to jurisdiction, substance, or procedure, should be anchored in an appropriate system of appeals. This ensures a comprehensive and fair mechanism for addressing and rectifying any potential errors within the judicial process, thereby upholding the principle of judicial independence. The failures, such as allowing judicial delay (indicator iii.), allowing behaviour that led to significant violations of the rules of the process, or a significant violation of fundamental rights and freedoms etc. (indicator vii.), adopting court decisions with a gross violation, namely without actual consideration of the case (indicator viii.), arbitrarily setting restrictions on the exercise of the right to peaceful assembly (indicator ix.), are procedural lapses rather than a deliberate acts questioning the judge's integrity. Integrity, as per international standards of judicial conduct and national codes of ethics, pertains to honesty, impartiality, and ethical behaviour, and a procedural mistake may not inherently compromise these principles. Errors in judgement in themselves should not be interpreted as indicators of a lack of integrity.

VII. Review of the EC's criteria for assessing compliance of a candidate to the position of the member of the HCJ with the criterion of professional ethics and integrity

19. The purpose of the establishment of the EC is to create a truly independent judiciary, including the members of the HCJ, by removing members who do not fulfil the criteria of integrity. The evaluation is therefore a mechanism to regain judicial independence. Thus, the evaluation does not contradict independence, but it is a guarantee for it.⁷³

20. The purpose of this section is to briefly analyse the integrity criteria drawn up by the EC, particularly in comparison with the HCJ criteria. The Methodology for assessing compliance of a candidate to the position of the member of the HCJ and members of the HCJ with the criterion of professional ethics and integrity⁷⁴ (Methodology) was adopted in accordance with clause 2 of Art. 9¹(20) of Law of Ukraine on the HCJ and determines methodology for assessing compliance with the criterion of professional ethics and integrity of candidates to the position of the member of the HCJ and HCJ sitting members.

21. The Methodology follows a logical and clear structure consisting of the following elements: 1) sources and evidence (para. 1.2.); 2) criteria indicators and evidence rules (para. 1.3.); 3) gravity of violation as one of the factors determining compliance with the criterion of professional ethics and integrity (para. 1.4.).

22. According to the Methodology (para. 1.3.), indicators for the criterion of professional ethics and integrity are independence, honesty, impartiality, incorruptibility, diligence,

⁷³ Venice Commission, CDL-AD(2022)023-e Joint amicus curiae brief of the Venice Commission and DGI on certain questions related to the election and discipline of the members of the High Council of Justice, 21-22 October 2022, para. 36.

⁷⁴ Decision of the EC, 9 December 2021, No. 5.

compliance with ethics norms and impeccable behaviour in professional activities and personal life, as well as absence of doubts regarding legality of the sources of origin of property, conformity of the candidate's (sitting member's) level of life or that of his family members with declared incomes, conformity of the candidate's (sitting member's) lifestyle to his status. The broad formulation of these criteria finds a counterbalance in the practice of publishing EC reasoned decisions,⁷⁵ thereby significantly enhancing the clarity and understanding of the criteria.

23. Despite a different personal scope of the assessment conducted by the HCJ from that of the EC — the former applies to (candidate) judges, and the latter is relevant to candidates for the position of a member of the HCJ — the material scope of both acts should encompass a similar set of principles promoting trust, fairness, and ethical conduct among judges/HCJ members. A comparison demonstrates that, while there may be nuanced differences in wording and specific criteria, the overall objectives and principles of both sets are comparable in their pursuit of maintaining the highest standards of integrity, professionalism, and ethical conduct among judges/HCJ members.

	HCJ	EC
Core principles	honesty, compliance with financial declarations, lifestyle conformity with declared income, incorruptibility, impeccable behaviour, judicial independence, impartiality, diligence, and compliance with judicial ethics	independence, honesty, impartiality, incorruptibility, diligence, compliance with ethics norms, and impeccable behaviour in professional and personal life
Incorruptibility	addressing corruption offenses, criminal proceedings related to corruption, and extra-procedural relations that may be regarded as corrupt	focusing on corruption or corruption-related offences
Financial and lifestyle considerations	compliance with financial declarations, lifestyle conformity with declared income, and the existence of unsecured property liabilities	absence of doubts regarding the legality of property sources and conformity of lifestyle to status
Compliance with professional ethics	violation of judicial ethics, which is not sufficient to bring a judge to disciplinary responsibility	compliance with the rules of professional ethics and other ethical norms

Table: HCJ and EC integrity/ethics criteria – comparison

⁷⁵ See decisions of the Ethics Council, available at: https://court.gov.ua/eng/ec/pres-centr/rishenna_er/.