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Support to the implementation of the judicial reform in Ukraine

ASSESSMENT OF THE 2014-2018 JUDICIAL REFORM IN UKRAINE AND ITS COMPLIANCE WITH THE STANDARDS AND RECOMMENDATIONS OF THE COUNCIL OF EUROPE

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TRANSFER TO THE THREE-LEVEL SYSTEM OF COURTS
JUDICIAL DISCIPLINE
TRUST IN THE JUDICIARY

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LIST OF ABBREVIATIONS

CCJE	Consultative Council of European Judges
CoE	Council of Europe
ECtHR	European Court of Human Rights
HCJ	High Council of Justice
HQCJU	High Qualification Commission of Judges of Ukraine

EXECUTIVE SUMMARY

1. The Ukrainian authorities have undertaken a comprehensive legislative reform, adopting unprecedented and exceptional measures. These impressive efforts in carrying out the legislative amendments as foreseen in the 2015-2020 Justice Sector Reform Strategy adopted in May 2015 (hereinafter "the Strategy, Justice Reform Strategy") are to be praised. It can be affirmed that the Strategy correctly identified the needs of the justice sector. At the legislative level and to a large extent at the institutional level the goals set out in the Strategy have been achieved.

2. The long awaited re-structuring of the judiciary from a four-tier system to a three-tier system has been finally introduced, dissolving the former system where the High Specialised Courts exercised the cassation functions. This re-organisation of the judiciary merits a positive assessment. It is positive in terms of efficiency and in ensuring coherence and uniformity of the legal system.

3. The new Supreme Court, whose case-law shall be binding, should help increase legal certainty and compliance with the law.

4. Though the whole structure and design of the Supreme Court are rather complex, they seem to work well with the new procedural legislation to ensure the role of the Supreme Court as the highest court instance securing the unity of case law.

5. The process for the re-structuring of the system has not been without debate; however, it should be assessed within the framework of specific circumstances in Ukraine. All judges of the previous Supreme Court of Ukraine were dismissed, and a new transparent competition process was carried out, and only those who have successfully passed the new competition, have been appointed. This procedure is based on the transitional constitutional provisions stating that in cases of reorganization or dissolution of particular courts, established before the Law of Ukraine "On Amending the Constitution of Ukraine (as to justice)" taking effect, judges concerned shall have the right to retire or apply for a new position through a competition according to the procedure prescribed by law.

6. The re-qualification procedure undertaken in Ukraine also has to be assessed within the exceptional circumstances of Ukraine. Such an unusual measure of re-examining all sitting judges was accepted by the Venice Commission within the Ukrainian context, as long as strict procedural safeguards were observed.

7. While the process of re-structuring of the judiciary shows a trend towards greater efficiency and transparency, together with the adoption of measures for the cleansing of the judiciary and preventing corruption, it also has raised some doubts as to the delays in the re-qualification of judges who applied for it. However, these delays may be seen as understandable given the scale of the reforms carried out in Ukraine and the volume of work necessary to complete it, involving more than 6 000 sitting judges to be evaluated against criteria of competence, integrity, and professional ethics.

8. With regard to the accountability of judges while respecting judicial independence, there is a clear improvement in the legal regulation of the disciplinary proceedings

following the Council of Europe (CoE) standards and recommendations.

9. The description of the disciplinary offences and the procedural safeguards are in compliance with European standards. Pending concerns regarding the composition of the disciplinary chambers within the High Council of Justice (HCJ) shall be overcome in practice. The system of filtering manifestly unfounded complaints might need to be reviewed in the future for efficiency reasons. The legal framework is now aligned almost completely with the CoE standards.

10. The cleansing procedure and the measures to restore the trust in the judiciary seem to be reversing the situation of widespread corruption within the judiciary. CoE recommendations were followed in this field, and therefore despite the almost "revolutionary" situation, the legal framework, being exceptional, can be considered to be aligned with the CoE standards.

11. In sum, the CoE standards have been generally followed, and most parts of the opinions and recommendations of CoE institutions have been taken into account in the course of the re-structuring of the judiciary, reforming judicial accountability and restoring trust in the judiciary. Therefore, the Justice Reform Strategy and its implementation in 2014-2018 merit a positive appraisal. It is visible that the authorities have made an enormous effort in adopting decisive steps towards greater transparency, integrity, efficiency and professionalism of the judiciary.

12. From the legislative point of view, the implementation of the Justice Reform Strategy has contributed to bringing the Ukrainian justice system closer to the European standards. Compliance with CoE standards is generally achieved at the legislative level. Minor issues will need further adjusting and fine-tuning.

13. The next challenge is to ensure the full and correct implementation of the adopted legal framework so that the trust in the judiciary really increases and judges become more independent. At present the whole process is still in a transitional stage, and its development in the future is to be followed.

14. The judicial reforms, if correctly implemented, show the path towards the strengthening of the rule of law and the democratic principles in Ukraine.

15. On the question of how far the implementation of the Strategy has led to effective changes in practice, it is too early to firm draw conclusions.

16. Despite the advancement in the fight against corruption and the drastic cleansing process that has been put in place, there are, however, certain remaining gaps, as well as uncertainties as has been expressed above. Therefore it is recommended:

    - To follow the development of the institutional resetting of the judiciary, including new competitions, structural optimization, evaluation of all judges based on competence, ethics and integrity criteria and ensuring a transparent, balanced and professional approach to those procedures.

    - To follow the process of execution of ECtHR judgments regarding the applications related to the dismissal of judges, as there are a number of

applications pending at present.

17. As the whole process of cleansing and re-examination has faced some delays, it is recommended to further streamline and optimize the procedures to finalize them as early as possible. In any case, it is important to maintain and improve the existing safeguards to keep the whole procedure transparent so that judges are recruited and evaluated taking into account only their merits, skills and integrity.

18. To follow the appeals of former judges of the Supreme Court of Ukraine who were not re-appointed to the new Supreme Court, and to ensure that the examination of their individual applications is in compliance with all the fair trial guarantees provided by Article 6 of the European Convention on Human Rights. The objective of all these measures is to sanction those who have breached their duties as judges and prosecute those judges who have committed criminal offences, all with the aim of achieving the ultimate aim of restoring trust in the judiciary. This objective seems not to have been fulfilled yet. It is recommended to analyse not only the perception indicators, but to make a follow-up of the investigations into corruption, and the verification of the assets of judges and their relatives.

I. INTRODUCTION

19. From 2014 to 2018, Ukraine has undertaken a comprehensive legislative effort in order to adjust the judicial system to the principles of the Rule of Law and to strengthen the judicial independence to allow that the judiciary effectively plays a role in ensuring the democratic checks and balances between the different state powers. At the same time, those reforms have also been directed towards making the judiciary more efficient, transparent and above all, more trustworthy. Besides constitutional legitimacy, the judicial power is based upon functional legitimacy[1], which needs a high quality of the judgments and an impeccable ethic conduct. Confidence in the judiciary is a core element of every democracy, and trust needs to be accompanied by a reliable system of accountability. During the last years, Ukraine has striven to pass the necessary legal framework to achieve that balance between independence, accountability and efficiency, all elements crucial for building up trust in the judicial power.

20. In fact, the number of legal amendments passed in the field of the judiciary show how the Ukrainian authorities (Parliament of Ukraine, Ministry of Justice of Ukraine, Administration of the President of Ukraine, as well as judicial institutions) have committed themselves to adapting the institutional setting as well as the functioning of the judiciary to the CoE standards. The reform has operated in three stages: firstly, the laws "On the restoration of the trust to the judiciary in Ukraine" and "On ensuring the right to a fair trial" were adopted in 2014 and in 2015 respectively, they addressed the most urgent issues of the judiciary and preceded the constitutional reform; secondly, the amendments to the Constitution and the new version of the law "On the judiciary and the status of judges" (hereinafter – the law On the Judiciary) were adopted on 2 June 2016 in order to align the legislative framework on the judiciary with European standards on judicial independence; and, thirdly, adoption of other legislative acts (such as the laws "On the High Council of Justice", "On the Constitutional Court of Ukraine", the new procedural codes, and others) and implementation of the new legislation.

21. The Ukrainian authorities have put great effort into reforming the judiciary. Some figures will illustrate the scope of the reforms and some of its more salient consequences. Indeed, legislative reforms of an unprecedented scale have been undertaken, with a much-debated vetting and qualification process for all serving judges. According to the Ukrainian authorities, at the legislative level, around 90% of the objectives set out in the Justice Sector Reform Strategy for the judicial reform has been accomplished. It has to be acknowledged that this has been done in a very efficient way. The institutional re-organisation of the judiciary and the selection of judges have also to a great extent been accomplished, while the regulation of the bar is a process that is still on-going.

[1] CCJE(2015)4, Opinion No. 18 (2015), "The position of the judiciary and its relation with the other powers of state in a modern democracy", London, 16 October 2015: "19. Like all other powers, the judiciary must also earn trust and confidence by being accountable to society and the other powers of the state. It is therefore necessary next to examine why and how the judicial power and individual judges are to be accountable to society."

22. The system introduced obliges every judge to undertake a qualification test to remain in office. This has produced the following effects: out of approx. 8.000 serving judges, once the law was passed, approx. 2000 resigned voluntarily, not wishing to undergo the qualification test for various reasons. By the end of this year all presently serving judges (5700) who have requested to undergo the qualification test, should have been tested. According to the information provided by the High Qualification Commission of Judges of Ukraine (HQCJU) from October 2017 until August 2018 they have evaluated approx. 2000 judges, with approximately 4000 judges still to be tested. Those who have been tested receive aa much higher salary than those who have to wait to be tested. This has caused tensions among the judges.

23. The resignation of 2000 judges has also created a notable shortage of judges, having now around 2500 vacancies in the judiciary (approx. 1700 at the local courts and 800 at the appellate courts). 120 vacancies in the Supreme Court were covered in the first competition process, and the HQCJU has opened now a second competition to cover further 80 vacancies[2].

24. The aim of this expertise is to provide an assessment of the steps undertaken by the Ukrainian authorities in 2014-2018 to implement the reform of the judiciary with a focus on the compliance of the reform with the standards and recommendations of the CoE, including the execution of relevant judgments of the European Court of Human Rights by Ukraine (ECtHR).

25. This assessment was commissioned by the CoE projects "Supporting Ukraine in execution of judgments of the European Court of Human Rights", which is funded by the Human Rights Trust Fund, and "Support to the implementation of the judicial reform in Ukraine". Both projects are being implemented in Ukraine by the Justice and Legal Co-operation Department of the Council of Europe. The assessment followed the request of the Judicial Reform Council, an advisory body established by the President of Ukraine.

26. The assessment is prepared by Prof. Dr. Lorena BACHMAIER WINTER, Universidad Complutense Madrid, Kingdom of Spain.

II. SCOPE AND METHODOLOGY

27. The present assessment seeks to analyse the main measures introduced as part of the judicial reform carried out in Ukraine during the period from 2014 to 2018, with the aim of assessing their compliance with CoE standards, and also with the aim of identifying further steps of the reform that still need to be addressed, and outlining the issues that have appeared. In particular, the assessment will focus on the question of whether the judicial reform has adequately addressed the problems of the Ukrainian judiciary; if the authorities have correctly defined the areas of reform in order to achieve the planned goals; and what have been the main results of the reform.

[2] On 19-20 March 2019, the HCJ reviewed the applications to the Supreme Court and decided to forward a list of 67 candidates for formal confirmation of appointment by the President of Ukraine. The review of applications of 8 candidates was postponed and 1 application was declined.

28. In so far as possible, the whole judicial reform process will also be assessed in comparison to major reforms of the judiciary carried out in other CoE countries. Although the comparative approach is always limited, as the political, economic and social context of legal reforms is diverse, it might nevertheless be useful in providing another tool for assessing the success of the judicial reform in Ukraine.

29. To that end, the expert will analyse to what extent the Ukrainian authorities have followed the opinions and recommendations of the relevant CoE institutions. Although the assessment cannot enter into every detail of the content of all the reforms undertaken, nor summarise the previous opinions that have been prepared by experts of the CoE, by the Venice Commission, as well as by other international organizations (as e.g. OSCE), those opinions will serve as a basis for this assessment.

30. Furthermore, it will be checked if the whole process has been transparent and inclusive, two requirements that are crucial in assessing the democratic level of any legal reform process. In this context, it has to be recalled that as of 2015, the Ukrainian government in the Justice Reform Strategy already stated that the situation "shows very low level of confidence of the society in the judicial system caused by ineffective and corrupted system of justice" and identified the main grounds of such a negative situation[3].

31. Therefore, in assessing now whether Ukraine has identified adequately the problems of the Ukrainian judiciary and has undertaken the necessary steps in order to overcome the detected problems, the report will also address the transparency of the whole procedure of the judicial reform, and the involvement of the different stakeholders in such reforms. The aim goes beyond the description of the reforms carried out, but by identifying the key results and the implementation of the whole judicial strategy, it will be assessed what has been the real advancement in overcoming the existing problems and, at the end, in advancing in terms of democracy. To that aim, the report shall also take stock of the practical implementation of the judicial reform, in order to be able to evaluate whether the legal amendments have really produced the desired improvements since 2014.

32. The main goal of the Justice Reform Strategy is to "define priorities for ensuring the rule of law in the administration of justice, compliance with public expectations for an independent judiciary and fair trial, on the basis of European values and standards for the protection of human rights."

33. In identifying the priorities for the judicial reform, the Strategy underlines as one of the priority goals the implementation of the principle of independence, impartiality and neutrality of judges. This includes optimization of judicial governance and self-governance as well as organizational changes of the agencies responsible for the

[3] Some of the shortcomings identified in the Strategy back in 2015 were: low level of legal culture and legal awareness of the society; low professional level of judges, lack of proper motivation for career growth; high level of corruption in the judicial system; lack of functional and structural independence and integrity of judges; inadequate systems of internal control and anti-corruption; poor use of IT capabilities, lack of e-justice system, lack of universal and uniform electronic document flow; and low level of publicity of judicial sector, among other reasons.

career growth of judges.

34. It is to be addressed now how far the steps taken in the implementation of the Strategy contributed to achieving this main goal of ensuring the rule of law in accordance with European values and standards for the protection of human rights, and to what extent compliance with CoE standards is in place. Furthermore, this assessment shall include recommendations for future action.

Methodology

35. The assessment has included a desk research and an on-site mission during which the experts could meet and interview the main stakeholders in the judicial field in Ukraine.

36. The desk research and evaluation focused on the selection of the relevant legislation, studies and policy papers. To this end legal documents were studied and analysed. These included the relevant Ukrainian legislation, the Strategy, case-law of the ECtHR, various policy papers and recommendations of the organs of the CoE and other international bodies, relevant opinions prepared by the CoE Directorate General of Human Rights and the Rule of Law[4], as well as studies of various civil society organisations in so far as these last were useful.

37. It is an assessment based mainly on the CoE related documents, its aim is to show if the reforms are successful with regard to making the Ukrainian judiciary more compliant with CoE standards. To that end, the information provided in the main legal texts, reports and opinions was complemented and confronted with the information obtained from the representatives of the institutions in exercise of their office[5].

38. The consultation visit took place during two days, on 3-4 July 2018. The CoE project "Supporting Ukraine in execution of judgments of the European Court of Human Rights" organized meetings of the experts with representatives of the following institutions or organizations (heads or deputy heads): the Supreme Court; the Administration of the President of Ukraine; the High Council of Justice; the High Qualification Commission of Judges of Ukraine; the State Judicial Administration of Ukraine; the Council of Judges of Ukraine; the National School of Judges of Ukraine; the EU project PRAVO-Justice; and the Public Integrity Council.

39. The interviews served as an effective tool to get an insight into the implementation of the judicial reform and the results achieved so far. It should be noted that the expert team did not deploy any quantitative or qualitative empiric research methods. As a result, the information gathered during these interviews should serve only as an indication of the results and/or problematic developments that might occur in the relevant assessment field.

40. The report was prepared on the basis of the above-mentioned materials. It is important that the evaluation does not produce any biased or unreliable results. The

[4] A list of the main documents analysed and/or consulted is included under Annex 1.

[5] Although the experts met with the most relevant stakeholders, it has to be underlined that some important actors of the justice sector were not interviewed (as e.g. public prosecution, law enforcement bodies, NGOs).

expert is bound by the principles of impartiality, transparency and professionalism and has acted in good faith during the whole assessment process. Furthermore, the expert is not affiliated to any of the institutions and stakeholders responsible for the implementation of the specific areas that were evaluated.

III. COMMENTS ON SPECIFIC AREAS OF THE REFORM OF THE JUDICIARY

TRANSFER TO THE THREE-LEVEL SYSTEM OF COURTS

Aim of the Judicial Reform Strategy

41. The Strategy provides that the justice sector reform will be based on a number of pillars, one of them is "increasing efficiency of justice and streamlining the competences of different jurisdictions".

42. Further, the Strategy states that the above goal can be achieved through the following measures: "Revision of the courts system by development of clear-cut criteria and mechanisms to delineate competences of administrative, commercial and general (civil and criminal) jurisdictions; optimisation of the courts network based upon careful gap analysis and impact assessment, duly taking into account the interests of efficiency and fairness; consolidation of the court system at various levels (in particular, creation of inter-district courts, consolidation of appellate regions)".

    The reduction from a four-level system of courts to a three-level system is thus embodied within a major re-structuring of the court's systems. This re-organization is mainly characterized by the elimination of the former local courts, and the establishment of new district courts (while there where 716 local and district courts, after the reform there are only 336 district courts). In total the whole reform has ended up in fewer and larger courts at the district level. Therefore, this re-structuring should be analysed together with: 1) the new appointment procedure for selecting Supreme Court judges; 2) the new codes of procedure; and 3) the abolishing of the Supreme Court of Ukraine and three High Specialised Courts.This assessment will focus only on the transfer from a four-level to a three-level system of courts.

43. Some concerns have been raised with regard to the right to access to court, as at present there are persons who might have to travel around 200 km to get to the nearest court. Although these problems are not subject to the present assessment, any territorial re-structuring of the system of courts has to be well-designed taking into account the needs for ensuring the right to access to court and an adequate distribution of cases.

Measures adopted

44. One main aspect of the re-structuring of the court's systems has been the dissolution of the Supreme Court of Ukraine and of the three former High Specialized Courts (the High Specialized Court on Civil and Criminal Cases, the High Commercial Court and the High Administrative Court), so that the judgments of the appellate courts should be final, except when there are grounds for cassation.

45. The law implements the structure introduced by the 2016 Constitutional amendments to the existing system, which involved changing from a four-tier system to a three-tier system (first and second instance courts, and the Supreme Court with specialized integrated courts of cassation).

46. The four-tier system has been changed into a three-tier system to promote efficiency, but also to improve the coherence and consistency of the jurisprudence.

47. The Venice Commission already in 2011 criticised the draft law "On the judiciary and status of judges" presented then because "there has been no change in the number of levels of courts which, as mentioned above, was criticised in previous Venice Commission joint opinions. The Constitution should be amended to change this." (para.20)[6].

48. This change was assessed already in the Opinion of OSCE-ODHIR of 30 June 2017[7] in a positive way: "It is understandable that the Ukrainian legislator has sought to impose a degree of unity in jurisprudence by merging the cassation courts and creating a Grand Chamber to resolve potential disparities in jurisprudence between the 'Courts' within the new Supreme Court" (para. 35).

49. The new Supreme Court is divided into four cassation chambers – called cassation courts, – whose functions are defined in the new procedural codes. In addition, the Grand Chamber of the Supreme Court has been created to ensure uniformity of judicial practice. Two specialised courts have also been created: the High Court on Intellectual Property and the High Anti-Corruption Court. The need for establishing these two specialised courts is questionable, the first one – because it is claimed there might not be enough cases on intellectual property that justify a specialised court; and with regard to the second court, although it has been established following a recommendation of the International Monetary Fund, it is doubtful that in the Ukrainian context it will serve to improve the fight against corruption.

50. The transitional provisions of the law "On the judiciary and the status of judges" provide:

"7. Starting from the day of commencement of the operations of the Supreme Court in the composition determined by this Law, the Supreme Court of Ukraine, High Specialized Court of Ukraine for Civil and Criminal Cases, High Commercial Court of Ukraine, and High Administrative Court of Ukraine shall cease their operations and shall be liquidated within the procedure stipulated by law.; and

51. "14. Justices of the Supreme Court of Ukraine, judges of the High Specialized Court of Ukraine for Civil and Criminal Cases, High Commercial Court of Ukraine, and High Administrative Court of Ukraine shall have the right to participate in the competition for positions of justices of the Supreme Court in relevant cassation courts within the procedure established by this Law."

52. Provisions of the law "On the judiciary and status of judges" have to be read in connection with the provisions included in the procedural codes, which define the exact scope of the appeals in cassation, its grounds and the whole formal requisites for its admissibility.

53. In abstract, the simplification of the system seems to be logical, efficient and also positive from the point of view of reducing delays. The concept of concentrating the cassation powers at the Supreme Court, with a strong admissibility filter, is not only the most common along the European democracies, but is also the system that has proven to serve better the needs for a coherent and uniform high quality jurisprudence.

[6] CDL-AD (2011)033 Joint Opinion "On the Draft Law Amending the Law on the Judiciary and the Status of Judges and other Legislative Acts", of 18 October 2011.

[7] Accesible under https://www.osce.org/odihr/335406?download=true

54. The whole process is still in a transitional phase, and it is too early to make any definitive assessment. The new Supreme Court started functioning on 15 December 2017, and as of July 2018 the judges of the Supreme Court were preparing a report on the experience of the first six months.

55. The long-standing recommendation of the Venice Commission in its Opinion[8] requested a transfer to the three-tier system of courts, which led to the abolishment of the Supreme Court of Ukraine and of the High Specialised Courts and the introduction of the new role of the Supreme Court as a true Cassation Court. This needs to be assessed positively.

56. The process has also created some dysfunctions. First, a few Supreme Court judges refused to take part in the Supreme Court competition or did not succeed in the competition. They claim they have a right to work at the new Supreme Court as judges, because of their acquired rights. However, according to the legislation in force, only those judges selected following the newly introduced competitive process can serve at the Supreme Court. Therefore these judges have been offered to be transferred to appellate courts, upon the recommendation of the HQCJU. The problem is still not solved, and this case is pending before the Constitutional Court. According to the law, it is claimed that judges of the former Supreme Court of Ukraine have no legitimate ground for keeping their positions as judges at the Supreme Court, and this seems to be also the opinion within the Supreme Court.

57. As to the judges of the Supreme Court of Ukraine and of the High Specialised Courts, who successfully went through qualification assessment, the solution applied is to offer them to be transferred to appellate courts. This transfer to a lower court might result in losing some of the social benefits they enjoyed in the previous position. This may be compensated by an increase in salary – now as appeals level judges they would earn more than the former High Specialised Court judges. It seems that most of the judges are willing to accept this transfer, but not all of them. Transfers without consent to a lower court could be problematic.

58. Irremovability of judges is one of the most important safeguards of judicial independence, as set out in paragraph 49 of the CoE Committee of Ministers' Recommendation Rec(2010)12 "Judges: Independence, efficiency and responsibilities." This Recommendation also limits the transfers of judges to other positions, and as a rule such transfer should only take place upon free consent of the relevant judge. However, this principle also admits exceptions, as set out under point 52:

"A judge should not receive a new appointment or be moved to another judicial office without consenting to it, except in cases of disciplinary sanctions **or reform of the organisation of the judicial system**."

59. It is clear that as a rule a permanently appointed judge should not be "downgraded" to a lower category because of a legal change seeking more professionalism or competences of the members of the judiciary. Such a transfer (in

[8] See CDL-AD (2011)033 Venice Commission Joint Opinion, where it is already stated that: "The Supreme Court (…) should be the ultimate guarantor of the uniformity of the jurisprudence of all courts"(para. 29).

this case "downgrade") would run counter the principles of the theory of acquired rights and the safeguards for granting the judicial independence.

60. Nevertheless, when assessing the law "On restoring trust in the judiciary" and the special qualification examination for sitting judges in Ukraine, the Venice Commission did not find this measure to be against CoE standards as long as it is "subject to extremely stringent safeguards"[9]. The issue to be checked is if the process has complied with those "extremely stringent safeguards".

61. In sum, taking into account that the transfer of judges of the Supreme Court to appellate courts is motivated by a "judicial re-organization", as long as it is done with sufficient safeguards, it will not run counter the CoE standards.

62. As to the number of judges within the Supreme Court, as stated above, 118 (out of 120 vacancies) were already selected and appointed, and it is planned to appoint 80 more judges. According to the information received, the Ukrainian authorities are still trying to figure out what would be the adequate number of judges, as the workload in the near future is unknown. To that end, the present 6 month-period assessment should shed some light on this.

63. The total number of cases before the Supreme Court will depend on how the admissibility criteria are applied and for now they are being applied in a very cautious way, while the judges are getting adjusted to the new procedural rules. There appears to be a clear overload in the Grand Chamber of the Supreme Court, with more than 100 cases/week to be decided. Cases that have to be decided by the Grand Chamber (currently consisting of 17 judges, with 14 constituting the quorum) are the cases where new doctrine has to be established, the prior doctrine needs to be revised or there is a conflict of jurisdictions between cassation courts. Precisely with regard to this last competence, the Grand Chamber is faced with numerous repetitive cases where two courts claim to have jurisdiction, but the Supreme Court has already set the precise criteria for how to solve it.

64. The OSCE ODHIR Opinion of 30 June 2017 already warned that it is vital that the internal rules of procedure of the Supreme Court "adopt an approach that seeks to avoid a 'fourth-instance'-type internal system, whereby all matters can be appealed to the Grand Chamber, since this would likely overburden the capacity of the new Grand Chamber and could lead to delays. At the same time, the Grand Chamber should have adequate competencies to resolve genuine jurisprudential disparities between the cassation courts within the Supreme Court." (para. 36).

65. The internal rules shall establish clear criteria on admissibility of cases to the Grand Chamber to avoid this Chamber becoming a *de facto* fourth instance, or collapse because of excessive workload.

66. None of the interviewees mentioned problems with the transfer of the cases pending before the Supreme Court of Ukraine and High Specialised Courts to the Supreme Court. More information is needed to make a more precise assessment on this issue. With regard to the internal organization of the Supreme Court, the distribution of powers between the President of the Supreme Court and the Presidents of each of the cassation courts does not seem to be adequately balanced.

[9] CDL-AD(2015)007-e, para.71.

Although it does not seem to have caused problems up to now, the opinion is that the legal provision is not adequate.

67. While in general the opinions gathered from the institutional representatives interviewed were positive with regard to the change of the four-tier system to a three-tier one, certain problems – typical during a transitional phase - are likely to appear, such as for example the adjustment of the internal rules of procedure to establish criteria that allow the handling of the number of cases. However, none of the persons interviewed pointed to grave or severe problems in this new structure, except the ones derived from the transfer of certain judges of the former Supreme Court of Ukraine and High Specialized Courts to lower courts.

68. It is difficult to assess if the selected model of transition from four levels to three levels has been optimal as precise data on pending cases and transitional timeframes have not been analysed. It should be considered to interview practising lawyers as to their experience during this transitional phase too. As for the judges, if out of all of those who decided not to resign only 14 have expressed disagreement with the situation, their transfer to appellate courts is, of course, not optimal, but it might also be acceptable, as it is motivated by a re-organisation of the court system. Transitional phases are never easy and they require some time for everyone to get adjusted to the new legislative and institutional setting. Maintaining their status and social benefits could aid in avoiding conflict situations.

69. In this regard, all stakeholders coincide in their opinion that it is too early to draw conclusions on the change from a four to a three level system, although the general impression appears to be positive and no one has criticised the reduction of levels. There is a general agreement that it contributes to greater efficiency, as around 97% of the cases are finished at the second instance. There is still a concern about the scope of the cassation review and the admissibility procedure, as some persons have voiced their fear of possible arbitrariness in selecting cases to the Supreme Court. Such concern is understandable, and it is always expressed when the scope of remedies is limited. Nevertheless, as long as the procedural rules establish clear criteria for admissibility, such rules are foreseeable, and their application is consistent, so that there is legal certainty at the admissibility stage, there should not be reasons for concern. But again, it is too early to make any statement on this.

Achievements

70. The CoE has since long requested the re-organization of the court system into three levels, and the restoring of the original role of the Supreme Court as a cassation court is one of the most salient achievements of the judicial reform.

71. The fact that the re-structuring of the system into a three tier system is accompanied by the new selection process for appointing judges to the Supreme Court, ensuring their high competence and integrity, should also be viewed as a very positive achievement. This has to be assessed positively.

72. The three-tier system will promote greater efficiency, while the Grand Chambers should ensure that the inconsistencies in the legal interpretation are avoided. In that sense this reform contributes to improving the compliance with CoE standards. There are still several gaps that need to be either corrected or followed to ensure that those standards are fully respected.

Recommendations:

73. To assess the internal rules of procedure of the Supreme Court in order to be able to establish if the admissibility of cases to the Grand Chambers and the distribution of powers among its members is balanced.

74. To monitor the way in which the transfer of Supreme Court judges to appellate courts has been done in practice, so that it does not cause their rights to be unduly cut. A solution could be keeping the category as judges of the Supreme Court, but with a lower rank. This is done in practice in other EU countries, where the promotion of judges does not always entail a change to a higher court, if the judge does not wish to move.

75. To follow up the implementation of the rules on admissibility of the appeals in cassation in order to prevent /detect arbitrariness.

76. To analyse the new functioning of the Supreme Court as a true cassation instance, together with the outcome of the selection process for the judges of the Supreme Court.

77. To provide necessary safeguards against the infringement of the rights of judges who have lost their former position, ensuring that the process is carried out with "extremely stringent safeguards" and eventually compensating the downgrade with the maintenance of some former benefits.

JUDICIAL DISCIPLINE
Aim of the Judicial Reform Strategy

78. In the Judicial Reform Strategy, one of the priority objectives defined was to "increase transparency of judges and their level of accountability". Specifically, the Strategy aimed at:

    - Improving ethical rules, strengthening their clarity and foreseeability;

    - Improving the disciplinary framework, including a proportionate system of disciplinary penalties, revision of the statute of limitations for bringing judges to discipline, improved disciplinary proceedings by prevention of court challenges during disciplinary investigations, effective right to appeal against disciplinary decisions;

    - Establishing an exhaustive list of clear-cut grounds and circumstances for dismissal of a judge;

    - Development of internal oversight tools, including an improved regulatory framework based on the status and duties of judicial inspection, introduction of the judge's dossier.

79. These objectives where defined already in the "Basic Principles for the Reform of the Judiciary and Related Legal Institutions" of 12 December 2014 (a first version of the Strategy) and according to the assessment of those principles by the Justice and Legal Cooperation Department on behalf of the CoE Directorate General of Human Rights and Rule of Law, the identification of the shortcomings, the proposed actions and the definition of the goals to be achieved, were correct. Moreover, it was concluded that "the Basic principles meet the purpose to promote immediate measures to reform the judiciary in Ukraine and to contribute to overcoming the low level of public confidence in courts due to the direct violation of fundamental rights", and that in general "the Basic Principles take into account the recommendations of the Council of Europe and the Venice Commission, the Association Agreement with the European Union, the European Convention on Human rights and Fundamental Freedoms, the Practice of the European Court for Human Rights."[10]

80. As the final text of the Strategy corresponds to those "Basic Principles", consequently the assessment on the present Strategy is also positive. The shortcomings of the disciplinary proceedings, as set out in the ECtHR *Volkov* judgment, were correctly acknowledged by the Ukrainian authorities in the Strategy, and in this field the status quo, goals and measures are adequately identified.

[10] From a formal point of view, in the Basic Principles it was however noted "that the document should be supplemented by some more concrete documents, such as an Action Plan and Road Map. Each measure should be backed up with responsible institution and a timeframe for its implementation. Measures should be prioritised and priority indicators should be developed".

CoE standards regarding accountability of judges and disciplinary liability

81. The relevant standards on judicial discipline are set out, among other instruments, in the European Charter on the Statute for Judges of 1998, and in CCJE Opinion No. 3 "On the principles and rules governing judge's professional conduct, in particular, ethics, incompatible behaviour and impartiality" of 19 November 2002. The CCJE Opinions No. 10 of 2007 "On the Council for the Judiciary at the service of society" and No. 17 "On the evaluation of judges' work, the quality of justice and respect for judicial Independence", have been also taken into account. The U.N. Bangalore Principles of Judicial Conduct are also to be taken into account.

82. CoE Recommendation R(2010)12 states 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 and provide the judge with the right to challenge the decision and sanction. Disciplinary sanctions should be proportionate." (para. 69)[11].

83. CCJE Opinion No. 3 of 2002 does not require a particular level of specification of the disciplinary offences. Even if the CCJE does not consider it possible to define at the European level what should be the behaviours that should fall under the judicial disciplinary offences in each country, it considers it "desirable" to strive for precision and try to avoid general formulations[12].

84. As to the proceedings, according to the standards set by the CoE, including the Venice Commission, disciplinary proceedings can only take place where judges fail to carry out their duties in an efficient and proper manner (CM/Rec(2010)12 of the Committee of Ministers to member states on judges: independence, efficiency and responsibilities[13]). Such proceedings should be conducted by an independent authority or a court with all the guarantees of a fair trial and provide the judge with the right to challenge the decision and sanction.

85. As to the disciplinary sanctions, the European Charter on the Statute for Judges (Article 5.1) states that "the scale of sanctions which may be imposed is set out in the statute [the law] and must be subject to the principle of proportionality". The CCJE has endorsed the need for each jurisdiction to identify the sanctions permissible under its own disciplinary system, and for such sanctions to be, both in principle and in application, proportionate (para. 74).

Measures adopted

86. Ukraine undertook a comprehensive reform on the disciplinary liability of judges and the corresponding proceedings in the Law "On the right to fair trial" of 12 February 2015, which introduced amendments also to Section VI of the law "On the judiciary and the status of judges" (former articles 92 - 99 of the law "On the judiciary and the

[11] Recommendation CM/Rec (2010) 12 of the Committee of Ministers to member states on judges: independence, efficiency and responsibilities – at https://www.coe.int/en/web/execution/recommendations
[12] Para. 64-65 of CCJE Opinion No.3.
[13] Adopted by the Committee of Ministers on 17 November 2010 at the 1098th meeting of the Ministers' Deputies, para. 69.

status of judges), now articles 106-111). While this represented a significant improvement of the system for ensuring accountability, and also from the point of view of legal certainty, foreseeability, fairness and impartiality of the proceedings for establishing disciplinary liability and imposing sanctions, it was noted that there was still room for arbitrariness: former article 92.3 still included some broad catch-all formulation, which is to be found now in article 109.9.1 of the law "On the judiciary and the status of judges":

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

where further interpretation is still needed to define the conducts that fall within this provision.

87. This was criticised already in the Venice Commission Opinion stating that the general penalisation of breaches of codes of ethics is too general and vague and insisted that "much more precise provisions are needed where disciplinary liability is to be imposed".[14]

88. Concerns regarding the principle of guilt, such as article 109.9.3 of law "On the judiciary and the status of judges" (former article 92.1.12), where the law provides for a sanction upon a presumption of illicit assets (discrepancy between the judge's lifestyle and the declared profits), was also were also expressed. This rule, aiming to re-enforce some lustration practices based on external appearances of possible corruption or illicit enrichment, raises doubts as to its compliance with the presumption of innocence.

89. As to the proportionality of the sanctions, CCJE (2002) Opinion No. 3[15] in its para. 74 resumes the principles applicable to disciplinary sanctions in the following way:

"The European Charter on the Statute for Judges (Article 5.1) states that "the scale of sanctions which may be imposed is set out in the statute and must be subject to the principle of proportionality". The CCJE endorses the need for each jurisdiction to identify the sanctions permissible under its own disciplinary system, and for such sanctions to be, both in principle and in application, proportionate. But it does not consider that any definitive list can or should be attempted at the European level."

90. The ECtHR already emphasized the lack of a range of disciplinary sanctions in order to ensure the principle of proportionality in the case of *Oleksandr Volkov v. Ukraine*[16], (paras. 182, 183): providing for dismissal and reprimand as the only possible disciplinary sanctions did not allow complying with the principle of proportionality. Although former article 97 (now article 109 of the law "On the

[14] CDL-AD(2015)007-e Joint Opinion by the Venice Commission and the Directorate of Human Rights and the Rule of Law "On the law on the Judiciary and the Status of Judges and Amendments to the Law on the High Council of Justice of Ukraine", of 23 March 2015, para. 50.

[15] CCJE (2002) Opinion No. 3 "On the principles and rules governing judges' professional conduct, in particular ethics, incompatible behaviour and impartiality, of 19 November 2002.

[16] *Oleksandr Volkov v. Ukraine,* Appl. No. 21722/11, of 9 January 2013

judiciary and the status of judges") corrected the previous shortcomings by introducing a wide scale of sanctions, its application was still subject to former Article 126 of the Constitution, which provided for "breach of oath" as a ground for dismissal. Once Article 126 was amended by the reform of the Constitution on 2 June 2016, this problem was also corrected.

91. The system of disciplinary sanctions in the law "On the judiciary and the status of judges" in its wording before 2016 did not define which offences were considered very grave, grave or less grave. Thus, it was difficult to ensure the principle of proportionality when imposing severe sanctions. These shortcomings were addressed later in the course of the reform of the law "On the judiciary and the status of judges" of 2 June 2016. A disciplinary offence is now being assessed based on its severity, and the sanctions are imposed accordingly under Article 109 of the law "On the judiciary and the status of judges", with full respect for the proportionality principle. Moreover, Article 109.2 of the law "On the judiciary and the status of judges" provides additional elements that should be considered in deciding on the imposition of sanctions.

92. With regard to the transfer of a judge to a lower court, although this sanction has not been eliminated – despite being very humiliating and not being coherent with the need to strengthen the confidence in justice – it has been improved. Before the 2016 law "On the judiciary and the status of judges", this transfer was decided by the Verkhovna Rada or by the President of Ukraine. Following the last version of this law, this measure shall be adopted by the same body that takes the decision on disciplining a judge - the HCJ.

93. It can be said that the Strategy identified correctly the problems related to the disciplinary liability of judges and that the measures envisaged by the Strategy have been implemented. Therefore, from the legislative point of view, the reforms undertaken for ensuring accountability of judges, while respecting the independence of the judiciary, are in accordance with the objectives defined in the Justice Reform Strategy. The reforms are also in line with CoE standards, although some provisions will need to be fine-tuned in practice in order to fully meet those standards.

94. As to the proceedings, the law "On the HCJ" of 21 December 2016 established that the disciplinary proceedings against judges will be within the powers of the HCJ. The disciplinary proceedings will be carried out by the disciplinary chambers whose majority should consist of judges elected by their peers. The rapporteur in a case will not vote in the process of adopting the decision on the disciplinary liability, in order to keep an adversarial procedure and to prevent bias. The HCJ member who "investigates" the case does not take part in the decision. The rules on these disciplinary proceedings included in the law "On the HCJ" were previously assessed by CoE experts, and in general it was agreed that the final text was in line with the CoE standards[17].

[17] Judge Reissner and Prof. Dr. Bachmaier followed the drafting of the HCJ Law during 2016. The first preliminary opinion was discussed with Ukrainian authorities on 29 August 2016 and after subsequent discussions on the draft law on 7 September 2016, the experts could confirm that most of the comments and

95. However, as was stated in the CoE assessment prepared by Prof. Dr. Lorena Bachmaier, Judge Gerhard Reissner, and Mr Eric Svanidze[18] "not all comments and recommendations where taken on board in the process of drafting this law and thus they are not reflected in the final legal text adopted". For example, the CoE experts insisted that in order to have in place more safeguards in the disciplinary proceeding, the chambers should be made up of a majority of judges.

96. While sharing this assessment, the Ukrainian authorities indicated that from a practical point of view – taking into account the mixed composition of the HCJ, with only a very tight majority of judges, – this could not be ensured. It was agreed then that, since it is difficult to ensure that all disciplinary chambers are made up of a majority of judges, this composition is counterbalanced by the rule that provides that all decisions of a disciplinary chamber – if at least one member of the chamber objects to a decision – can be reviewed by the Plenary of the HCJ. This seemed to be a fair solution, and was reflected in that way in the Law on the HCJ.

97. Further, the reforms undertaken have followed to a great extent the CoE standards. This has been confirmed recently by the statements made by the CoE Committee of Ministers during its 1318th meeting (5-7 June 2018 (DH), within the supervision of the execution of the ECtHR judgments in the *Salov* group of cases (Application No. 65518/01) and *Oleksandr Volkov* case (Application No. 21722/11).

98. With respect to the general measures undertaken by Ukraine the Committee of Ministers has:

"-- noted with satisfaction the progress achieved on the issues concerning judicial discipline and careers previously identified by the Committee as outstanding;

-- welcomed the fact that the High Council of Justice and its Disciplinary Chambers, as well as the new composition of the Supreme Court, including its Grand Chamber, are now fully operational under the new regulations and that these bodies have developed consistent practice on the application of disciplinary sanctions to judges, based on respect for the fundamental principles identified in the Convention, the case-law of the Court and Council of Europe recommendations."

99. Recently the Court has found again a violation of the dismissal proceedings against a judge. In its judgment *Denisov v. Ukraine*[19] the Court found that there had been a violation of Article 6 of the Convention. The case concerned the applicant's removal from the post of President of the Kyiv Administrative Court of Appeal. The Court found that the way that the HCJ had dismissed Mr Denisov from his position of president of the court owing to his managerial inefficiency, and the manner in which the Higher Administrative Court of Ukraine had later unsuccessfully reviewed that

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recommendations that had been expressed were taken into account. A post-adoption assessment was also undertaken in February 2017.

[18] "Post-adoption review of the Law of Ukraine On the high Council of Justice" and also the "Opinion On the Rules of Procedure of the High Council of Justice of Ukraine", both prepared in February 2017, and this last only prepared by Judge Gerhard Reissner and Prof. Dr. Bachmaier.

[19] *Denisov v. Ukraine*, Application No. 76639/11, of 25.9.2018.

decision, revealed issues similar to those observed in the case of *Oleksandr Volkov v. Ukraine*. The first body had not been sufficiently independent and impartial, and the second had not been able to remedy the defects of the first set of proceedings. There had therefore been a violation of the right to a fair trial.

100. Nevertheless, given that the facts of this case date back to 2011[20] and affect only the managerial functions of the president of the court, this case does not have a direct bearing on the assessment which is undertaken here. The enforcement of this judgment should however be followed.

101. The transfer of powers to decide on disciplinary liability of judges from the HQCJU to the HCJ is now in a transitional phase. The HCJ has taken over 12.000 complaints that were pending before the HQCJU, which already represents an enormous challenge for the new HCJ. Although the HCJ considers that disciplinary proceedings should not be its main task, in reality it absorbs most of its time and resources.

102. Prior to the legal reform of the law "On the HCJ" of 21 December 2016, the disciplinary proceedings were divided between the HQCJU and the HCJ, and such a division created uncertainties, because the two bodies did not apply the same criteria. Concentrating all the disciplinary proceedings in one body overcomes the undesired divergences in interpretation, but logically also concentrates all the work in one body. Due to this, the HCJ seems to be somewhat overwhelmed with the number of complaints it has to deal with.

103. The practice of the three newly-established disciplinary chambers offers some divergent approaches in certain cases, but it is claimed that such discrepancies are overcome by way of the possible appeal to the HCJ plenary, which provides for uniform criteria. All in all, the HCJ considers it needs to reduce the workload at the level of the chambers as well as at the level of the Plenary.

104. From February 2017 till June 2018, 3360 disciplinary complaints were rejected and 582 cases opened. As to the sanctions, there were 66 dismissals, 60 warnings, 18 reprimands + fine, 15 severe reprimands + fine and 13 temporary suspensions with order for re-training. The 66 dismissals were mostly related to the Maidan judgments, some of them also led to the pressing of criminal charges for miscarriage of justice. Currently, there are 11500 cases pending before the HCJ.

105. The reforms undertaken with regard to improving the accountability of judges while preserving the judicial independence through the reform of the disciplinary proceedings, is in line with CoE standards. Nevertheless, there are certain aspects that need to be commented on.

106. First, the fact that up to now the composition of the HCJ was not completely in line with CoE standards, has caused some concerns as to the HCJ's capacity to ensure the independence of judges. It is true that during a transitional period there were vacancies in the HCJ and, consequently, the composition of the HCJ did not

[20] The applicant, Judge Denisov, was dismissed from his administrative position on 23 June 2011, remaining in office as a judge of the same court.

have a majority of judges, which is contrary to the requirements of the CoE, despite the fact that the law on the HCJ is in conformity with these requirements. This shortcoming will be solved in the future as according to the law the majority (half + one) of HCJ members will be judges. As for the decisions taken in disciplinary proceedings, it seems that the disciplinary chambers are usually made up of a majority of judges although this is not always the case. Apparently, only the Third Disciplinary Chamber is always composed by a majority of judges. Therefore the composition of the HCJ as a whole still has an impact at the appellate level when the HCJ sits in plenary format. If at this level there has been some arbitrariness or infringement, it is unknown to this expert. Thus, it should be assumed that the initial lack of a majority of judges in the HCJ has not led to problems with regard to the decisions on disciplinary sanctions, but this has not been confirmed completely. The figures show that 131 sanctions were appealed, 65 reviewed, and out of those, in 52 cases the appeal was accepted, while in 13 it was rejected.

107. The high number of dismissals is due to the exceptional circumstances that led to the adoption of the lustration law of 8 April 2014 and the high number of violations and unjust decisions detected during the period of the Maidan events.

108. There seem to be certain issues in the implementation of the system for accountability of judges which deserve some attention: the high number of disciplinary complaints; the criticism expressed against the criminal liability for unjust decisions; and closely linked to the last one, the disciplinary liability linked to the delivery of judgments by the ECtHR.

109. With regard to the first one, the thousands of complaints pending before the HCJ is a serious problem, compromising its functioning, especially in view of the fact that most of the complaints are not based on disciplinary infringements. Many complaints are unfounded, pertaining to the disagreement of the parties with the outcome of the proceedings.

110. In every system there are persons who file complaints when they are not satisfied with the behaviour or the decision of a judge. This happens in many other countries too. The alternatives are: to require legal assistance for filing a complaint, so that the ordinary member of the public may not be able to convey their complaints to the HCJ directly; or to admit any kind of complaint filed by any individual and then filter those which are admissible. Both systems have advantages and disadvantages. In the context of Ukraine, it was considered that allowing everyone to file complaints would be the better approach in a context of lustration and distrust against the judges.

111. However, such a system needs to apply effective admissibility filters, so that the institution can shed unfounded complaints easily, quickly and with limited right to review. It seems that since the entering into force of the new rules on disciplinary liability, the number of disciplinary complaints against judges has increased significantly. The reasons for this increase may be manifold: because people have greater trust in the reaction of the HCJ in dealing with those proceedings and checking the grounds for the complaints; or because the public are more aware of their options; or because the distrust against judges is still very high. Whatever the

reasons are – and we lack the means to analyse these reasons – the increase in the number of complaints leads to a higher workload of the HCJ, which may cause not only an overload, but also a distortion of its functions, being seen by judges only as a disciplinary body, rather than a body to protect their independence.

112. As to the second problem expressed, it is mainly related to the offence regulated in Art. 375 of the Criminal Code of Ukraine: criminal liability for knowingly delivering an unjust verdict, judgment, ruling or order. It appears that the application of this rule is causing problems and posing risks to the judicial independence, due to the fact that the elements of the offence are not clearly understood or defined. In practice it seems it has caused several judges to be investigated by law enforcement in order to see if their judgements were unjust or not.

113. Establishing criminal liability for deliberately infringing the law in rendering a judgment is also provided in several other European criminal codes, and as such, criminalising such behaviour is not against CoE standards as long as its scope is limited and is in accordance with Paragraph 66 of CoE Rec(2010)12[21].

114. In any event, if the practice in Ukraine undermines the judicial independence, the necessity of such an offence should be reconsidered, or certain safeguards should be established to avoid that law enforcement enters into revising the merits of a judgment.

115. Finally, Article 109.12 of the Law on the judiciary reads: "if a decision of the European Court of Human Rights has found the facts which may constitute grounds for imposing a disciplinary sanction on a judge, the mentioned period shall be calculated starting from the date when such decision of the ECtHR becomes final."

116. There is the risk that this provision is interpreted in the sense that if a judge delivers a judgment which later will be explicitly or implicitly reviewed by the ECtHR, this can amount to a disciplinary sanction.

117. The broad definition of this disciplinary offence is problematic, because the finding of a breach of the Convention by the ECtHR in a judge's decision or judgment cannot per se lead to a disciplinary sanction, unless such an infringement entails malice or gross negligence. Such requirements should be included in the definition of the elements of the offence, and by not doing so, if the scope of this provision is not corrected in practice, it may be problematic. Indeed, It would be important to avoid any automatic negative consequences for the judge or prosecutor whose case is the subject of an unfavourable judgment by those courts[22].

118. Two more minor shortcomings where highlighted during the mission. On the one hand, practice has shown that the application of the sanction of temporary

[21] Para. 66: "The interpretation of the law, assessment of facts or weighing 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."

[22] CM Recommendation 2010(12) on judges: independence, efficiency and responsibilities, paragraph 70, and Venice Commission Opinion on "The law amending the law on the judicial council and the law amending the law on courts", "The former Yugoslav Republic of Macedonia", 22 October 2018, paragraph 76.

suspension and re-training with re-evaluation poses relevant difficulties. Firstly, this is because the suspension ends up generating more workload for the rest of the judges of the court during the suspension time. And secondly, if a single judge needs to be re-trained and evaluated, for the judicial school it is difficult to organise such a tailor-made course and test for a single judge. And finally, the measure is also criticised for having almost no deterrent effect.

119. Once a judge has been sanctioned, it is unclear what the effects of such sanction are for the future career of the judge. Rehabilitation after the imposition of a minor sanction should take place after 6 months, and more severe ones after one year. Nevertheless it seems that there will be a permanent record on the disciplinary proceedings in the dossier of the judge, regardless of the ending of it. It should be ensured that those proceedings which concluded without sanction should not appear in the dossier of the judge. And those, which concluded with a sanction, should disappear from the dossier once the sanctioned person has been rehabilitated. Of course, the records of such proceedings will be kept within the HCJ files under enough safeguards of the rights to data protection, but not in the career dossier of a judge.

120. The new regulation - by defining and specifying the acts that can lead to disciplinary liability and also by introducing a diversity of sanctions to be imposed in view of the gravity of the infringement and according to the proportionality principle - has brought the disciplinary proceedings in compliance with CoE standards. The proceedings are also respectful of the impartiality principle and the due process safeguards, as required in the ECtHR judgment in the *Volkov* case. On the other hand, those proceedings have avoided the application of a more drastic lustration procedure that could have led to a massive dismissal of all judges, as was demanded by civil society. Some of the drawbacks lie in the fact that so much openness in the filing of disciplinary complaints – most of which are unfounded – has put the judges in an uncomfortable situation. Judges fear becoming targets of a disciplinary complaint and having to undergo the discomfort of the proceedings. All this makes them feel under undue pressure, and may also cause distrust in the judiciary, as the complaints and disciplinary proceedings are public.

Achievements

121. The Justice Reform Strategy foresaw improving the ethical rules. This has been accomplished. It has to be underlined, however, that this objective is instrumental in ensuring full integrity within the justice system. To what extent the elaboration of such ethical rules has led to a more ethical judiciary is still to be evaluated. The trend seems to be that there is a reduction of corruption, but more analysis needs to be done.

122. With regard to the objective of improving the disciplinary framework (including a proportionate system of disciplinary penalties, 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 the precision of disciplinary offences, the proportionality of the sanctions and the fairness of the proceedings. Nevertheless, some provisions will need to be

corrected in practice so as to bring some aspects of the disciplinary proceedings in line with the CoE standards.

Recommendations

123. While acknowledging the significant improvement of the system of judicial accountability, in order to fully ensure that disciplinary proceedings serve their purpose and do not interfere with the independence of the judiciary, it is recommended to follow closely the implementation of the legislative framework on disciplinary liability of judges, in particular:

124. To ensure that the composition of the disciplinary chambers always includes a majority of judges elected by their peers, especially when more severe sanctions may be imposed.

125. To reconsider the adequacy of the temporary suspension of a judge from office, as this type of sanction can end up overloading the rest of the judges and have adverse consequences for the public as court users. The same applies to the sanction of re-training, the effectiveness and disadvantages of which, including additional costs, should be also evaluated.

126. To follow closely the application of Art. 375 of the Criminal Code and to ensure that in practice it does not lead to an undue interference in judicial independence.

127. To follow closely the application of Art. 109.9.1 of the law "On the judiciary and the status of judges" to ensure a restrictive interpretation of this very broadly drafted disciplinary offence.

128. To follow closely the application of Art. 109.12 of the law "On the judiciary and the status of judges", as only a narrow interpretation of this provision is acceptable from the perspective of the CoE standards.

129. To ensure that disciplinary proceedings and sanctions are removed from the judicial dossier within a reasonable time, so that a minor breach cannot damage the judge's career and promotion in a disproportionate way.

130. To monitor the filtering of manifestly unfounded disciplinary complaints so that the filtering does not lead to covering up certain offences, but at the same time, that the lack of filtering does not result in the whole system of judicial accountability collapsing.

131. To ensure that precise statistics are being elaborated, not only on the number of cases and types of sanctions, but also on the type of infringements detected.

132. To follow closely the implementation of the system of controlling the integrity of judges and also of the members of the HCJ.

TRUST IN THE JUDICIARY
Aim of the Judicial Reform Strategy

133. The first action taken was the adoption of the laws "On restoring trust in the judiciary" of 8 April 2014 and "On cleansing the power" of 16 September 2014. This legislation allowed a complete screening of the members of the judiciary by way of new examinations and re-appointment of judges, as well as by controlling their assets as one of the measures to check the integrity of the judges. To that end, a requirement of submission of a detailed declaration of property, income and expenses by judges and their families was introduced.

134. The cleansing of the judiciary using transparent and fair criteria and mechanisms also became one of the tasks defined in the 2015 – 2020 Strategy. Under point 5.3 of the Strategy (Increasing accountability of the judiciary) the following goals were set out:

- Development of mechanisms to perform oversight and check integrity, notably extended declarations of assets, income and expenditures by the judges and their family members, introduction of proportional penalties for failure to declare or incomplete or false declarations; practical and effective investigatory mechanism to uncover corruption and other serious offences committed by judges, including an effective system for authorising the application of intrusive measures against allegedly corrupt judges and reviewed regulatory framework concerning immunities, retaining only functional immunities of judges;

- Ensuring effective investigation of corruption and other serious offenses committed by a judge.

135. With regard to the first objective of restoring trust in the judiciary, it has to be analysed what have been the main characteristics of the so-called lustration process in Ukraine. Lustration can be contrary to the safeguards of judicial independence, and this is why the whole procedure on restoring trust in the judiciary was followed closely to check its compliance with the CoE standards.

CoE standards regarding lustration procedures

136. The case-law of the ECtHR regarding lustration and cleansing are set out mainly in the cases of *Bobek v. Poland,* 68761/01, of 17 July 2007, and *Matyjek v. Poland,* 38184/03 of 24 April 2007.

137. CoE Parliamentary Assembly Resolution 1096 (1996) "On measures to dismantle the heritage of former communist totalitarian systems" of 27 June 1996 stated:

Para. 7: "The Assembly also recommends that criminal acts committed by individuals during the communist totalitarian regime be prosecuted and punished under the standard criminal code. If the criminal code provides for a statute of limitations for some crimes, this can be extended, since it is only a procedural, not a substantive matter. Passing and applying retroactive criminal laws is, however, not permitted. On the other hand, the trial and punishment of any person for any act or omission which at the time when it was committed did not constitute a criminal offence

according to national law, but which was considered criminal according to the general principles of law recognised by civilised nations, is permitted. Moreover, where a person clearly acted in violation of human rights, the claim of having acted under orders excludes neither illegality nor individual guilt."

Para. 8: "The Assembly recommends that the prosecution of individual crimes go hand-in-hand with the rehabilitation of people convicted of "crimes" which in a civilised society do not constitute criminal acts, and of those who were unjustly sentenced. Material compensation should also be awarded to these victims of totalitarian justice, and should not be (much) lower than the compensation accorded to those unjustly sentenced for crimes under the standard penal code in force."

138. As was expressed in the Opinion of the Venice Commission "On the law on Government Cleansing"[23], "Lustration does not constitute a violation of human rights *per se*, as a democratic state is entitled to require civil servants to be loyal to the constitutional principles on which it is founded.[24] However, in order to respect human rights, the rule of law and democracy, lustration must strike a fair balance between "defending the democratic society on the one hand and protecting individual rights on the other" [25] (para.17).

139. While lustration has been shown to support certain kinds of political trust building, promote good governance, and support democratization, its effects are often indirect. After the 1991 break-up of the Soviet Union, Ukraine abolished the KGB and banned the Communist Party in 2015 but chose not to pursue lustration. Following the Orange Revolution in 2004-2005 two lustration laws were proposed in 2005 but rejected by both the President and Parliament.[26] Lustration was an option at various turning point moments in Ukraine, but was rejected. A new push for lustration came after the Euromaidan uprising, following the removal of the President in 2014. There was a significant bottom-up support for lustration, with social groups riding a post-Maidan wave of popular calls for reforms.

140. The examples of late lustration in Poland and Romania highlighted the potential instrumentalisation of lustration measures by political parties against their opponents. This was a risk that was especially present in the 2014 lustration procedure in Ukraine. However, due to the fact that in 1992 Ukraine did not undergo a comprehensive lustration procedure, there might be justification that it was carried out after the Maidan revolutionary movement.

Measures adopted

[23] Opinion no. 788/2014, CDL-AD (2014)044 of 16 December 2014 "On the Law on Government Cleansing" of Ukraine.
[24] See ECtHR, *Vogt v. Germany*, 17851/91, of 26 September 1995.
[25] ECtHR, *Zdanoka v. Latvia,* 58278/00, of 16 March 2006, para. 100.
[26] L. Stan, (ed.), *Transitional Justice in Eastern Europe and the Former Soviet Union: Reckoning with the Communist Past*, New York, 2009, p. 239.

141. The law "On restoring trust in the judiciary in Ukraine" was passed on 8 April 2014[27]. This lustration measure focused narrowly on the judicial system, requiring all court chairs appointed under the previous government to be dismissed and all judges to be screened for corruption and/or evidence that they had acted unlawfully during the Euromaidan protests. The scope of the lustration was temporarily and objectively limited to the events between 21 November 2013 and 21 February 2014[28]. With respect to broader lustration efforts across the public sector, the Verkhovna Rada passed the law "On government cleansing" (Lustration Law) on 16 September 2014. The original aim was to remove the officials and bureaucrats appointed under the previous government, but there were also elements resembling those adopted in the 90's for dismantling communist regimes. The law also contemplated sanctioning measures against those who had acted against Euromaidan protesters.

142. Out of these two main lustration laws – part of a constellation of other lustration/vetting measures and supporting agencies, bills and amendments – only the law on the lustration of the judiciary will be assessed here.

143. The Law On Restoring Trust in the Judiciary in Ukraine stressed the commitment of Ukraine to promote and protect human rights and freedoms and to provide individuals with the opportunity to exercise these rights (especially the right to a fair trial). At the same time, the law aimed to react against the fact that domestic courts had rendered judgments in clear violation of ECtHR judgments, and it also sought to respond to the widespread corruption amongst some judges. These various phenomena had compromised the level of public confidence in the judiciary, and this is why the law provided for undertaking a vetting procedure for the judges to re-establish the rule of law and legality in society and to restore trust in the judiciary. This was to be achieved through the dismissal of holders of judicial office on account of infringements of their duties or because their level of professionalism was incompatible with the standards expected of the office.

144. The text of the finally adopted law "On restoring trust in the judiciary in Ukraine" included most of the recommendations formulated by the CoE experts' opinions in order to be in line with European standards, in particular, with regard to safeguarding the independence of the judiciary, the right to a fair trial, legal certainty and equality before the law. Several recommendations that were not followed in the adoption in that law - in particular with regard to the special temporary commission – are not relevant anymore.

145. The CoE Committee of Ministers during its 1318th meeting (5-7 June 2018 (DH) "noted that the information submitted by the authorities regarding the appeals by judges against their dismissal by Parliament in the transitional period pending the introduction of the Constitutional amendments does not contain the grounds for the decisions taken thus far; and encouraged the authorities to provide detailed information in this regard and to complete rapidly those proceedings still pending in line with Convention principles and the case law of the Court and keep the

[27] Law of Ukraine No. 1188-VII On Restoring Trust in the Judiciary in Ukraine, of 8 April 2014.
[28] Article 3.9, On restoring trust in the Judiciary in Ukraine.

Committee informed."

146. The legal reforms adopted for the cleansing of the judiciary in general are in line with CoE standards. This is also due to the fact that CoE experts were involved in the whole process of drafting those laws. In that sense, the conclusion is clear: the Strategy has been complied with and it followed CoE standards at the legislative level, despite certain initial shortcomings affecting the special temporary commission and the lengthy procedure to appoint the new members of the HCJ.

147. Another important reform adopted with the aim of increasing the honesty and integrity of the judiciary as well as their professionalism is to be found in the Law On the Judiciary and Status of Judges, namely the qualification tests that all sitting judges have to take. Judges of the Supreme Court and of the high specialised courts were to be assessed first (within six months as of the date of the enactment of the Law), followed by judges of appellate courts (within two years), and finally all other sitting judges.

148. This was seen as an exceptional measure by the Joint Opinion of the Venice Commission "On the Law on the Judiciary and Status of Judges"[29]. Insofar as the qualification assessment provided in the new law is to be carried out with respect to sitting judges and not only for candidates seeking initial appointment, a promotion, or a transfer to specialised courts, the Venice Commission noted that it should be "subject to extremely stringent safeguards" (para. 74).

149. This extraordinary qualification assessment was accepted as a preferred alternative to the dismissal of all judges, dismissal that was rejected for not being in conformity with CoE standards, nor with the constitutional provisions on the irremovability of permanently appointed judges. With the aim of increasing trust in the judiciary, not only the integrity, but also the quality and competence of judges needed to be ensured and the Venice Commission did not object to it, as long as it was carried out with all guarantees.

150. This was the justification for the special qualification assessment, to be taken on a voluntary basis. The process has taken much time and resources, and has caused certain dysfunctions. Thus, many of those judges who applied to be assessed had to wait for several months, which created unequal situations in practice: while those who have undergone the qualification assessment see their salary substantially increased, those who are ready to be examined are not granted the increased salary. This is against the principle of equality and has caused discomfort among judges.

151. As to the impact of the cleansing of the judiciary on the trust in the judiciary and fighting corruption, it is still too early to make an assessment of the whole process, as the evaluation process by the HQCJU has not ended yet. However, there are certain facts that allow identifying a positive trend, in part due to the reforms put in place. First, the selection process of judges to the Supreme Court has in general been assessed positively. The quality of the judgments seems to have improved and the transparency of the selection procedure has acted as a dissuasive

[29] CDL-AD(2015)007-e, para.71.

measure for those who might not have been adequately prepared or were openly corrupt.

152. The screening proceedings and the obligation to declare all assets of judges and their family members have also discouraged certain profiles from staying or wanting to enter the judiciary. The fact that when these laws entered into force, approximately 2000 judges resigned, may indicate that it has acted as a kind of cleansing mechanism. On the other hand, it is recognised also that this system was considered by some prestigious judges to be humiliating and excessive, and they decided to resign for reasons of dignity. The interviewees recognised that the judiciary has also lost many good and honest judges.

153. If these reforms produced the desired effect of increasing trust in the judiciary is not easy to answer. It appears that those who are involved in litigation feel greater trust and identify a clear trend towards reducing corruption. However, it seems there is still a generalised distrust by the public. We have not assessed confidence perception studies – should they exist – so it is difficult to determine if the distrust is legitimate or if it is the result of targeted campaigns or single cases in the media.

154. There is, however, a certain feeling that although the legislative framework has changed, the situation will remain the same. One example of this can be found in the implementation of the 2014 law "On restoring trust in the judiciary in Ukraine". This law introduced a provision on an immediate dismissal of court presidents, and of all members of the HCJ and the HQCJU. However, initially this did not help much with the changing of the court presidents, as almost two thirds were re-elected. This situation seems to have improved since the implementation of the Law on the Judiciary and Status of Judges. As for the HCJ and the HQCJU, dismissal of their members resulted in the suspension of the work of these institutions (one year – for the HCJ and 9 months – for the HQCJU) because the procedure of election and appointment of members of these bodies is quite complex and lengthy. This delay in the functioning of the institutions might have added to the distrust in the judiciary, as for the moment the population may not have seen properly the effects of the legislative amendments.

155. It is interesting to underline that while certain stakeholders affirm that the structure and attitude of the judiciary has changed dramatically and in a positive way, others affirm that there is a need to overcome the Soviet stereotype of the judiciary and the self-perception of judges: it is necessary to make the judges aware of their own role as an independent branch of power. To that end the mixed composition of the Supreme Court – including academics and practising lawyers – as well as a better gender balance, may strengthen the trust in the judiciary.

156. As the duration of the transitional period is turning out to be longer than desired, the effects of all the legal reforms undertaken are not visible yet. This may explain why the trust in the judiciary remains low, with a slight tendency towards improving.

Achievements

157. Restoring trust in the judiciary requires both fighting corruption and the dismissal of judges who have acted in clear breach of fundamental rights. As stated in the Judicial Reform Strategy, one of the main reasons for the judiciary not to meet the high standards set for them, and therefore lack of trust in them, is corruption. What have been the achievements in this regard?

158. The Strategy has been successful in establishing a legal framework for the screening and re-examination of judges, for controlling their assets and providing for the dismissal of judges who have manifestly infringed their duties to protect the rule of law and individuals' human rights. What has been expressed above as a positive achievement with regard to disciplinary proceedings is to be applied also here, as most of the judges to be "lustrated" in relation to the Maidan events have undergone disciplinary proceedings and many of them have been dismissed.

159. With regard to the Law on the Judiciary and Status of Judges, most of the recommendations made by the Venice Commission were taken into account.

160. The screening procedures are being carried out at present, and the institutional framework for integrity checks and for controlling the declaration of assets of judges is in place. These proceedings are in general aligned with CoE standards (although European countries do not provide for such a screening of sitting judges nor require a declaration of their assets and those of their relatives).

161. There is a general perception that the transparency of the judiciary has increased and that the quality of judgments has improved.

162. The screening process has caused around 2.000 judges to leave the judiciary voluntarily: this may be seen as a success in cleansing, but also as a failure because a number of good and honest judges have also left within this process.

163. The promotion of integrity is to be achieved also by way of a clean and merit-based selection procedure. In this regard, the general appraisal of the new procedure for selecting Supreme Court Judges can be seen as a success in improving the trust in the judiciary and fighting corruption.

Recommendations

164. Despite the advancement in the fight against corruption and the drastic cleansing process that has been put in place, there are certain remaining gaps, as well as uncertainties as has been expressed above. Therefore, it is recommended:

165. To follow the institutional reset of the judiciary, including new competitions, structural optimization, evaluation of all judges based on competence, ethics and integrity criteria, and ensure a transparent, balanced and professional approach to those procedures.

166. To follow the execution of ECtHR judgments related to the dismissal of judges, as there are a number of applications pending at present

167. As the whole process of cleansing and re-examination has faced some delays, it is recommended to further streamline and optimize the procedures to finalize them as early as possible. In any case, it is important to maintain and improve the existing safeguards to keep the whole procedure transparent so that judges are recruited and evaluated taking into account only their merits, skills and integrity.

168. To follow the appeals of former judges of the Supreme Court of Ukraine who were not re-appointed to the new Supreme Court, and to ensure that the examination of their individual applications is in compliance with all the fair trial guarantees provided by Article 6 of the European Convention on Human Rights.

169. The objective of all these measures is to sanction those who have breached their duties as judges and prosecute those judges who have committed criminal offences to achieve the ultimate aim of restoring trust in the judiciary. This objective seems not to have been achieved yet, as the general perception of the public is still very negative towards the judiciary. It is recommended to analyse not only the perception indicators, but to make a follow-up of the investigations against corruption and the control of the increase of the assets of judges and their relatives.