COUNCIL OF EUROPE

CONSEIL DE L'EUROPE

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

(Prepared by Mr Gerhard Reissner, President of the District Court of Floridsdorf, Vienna, Austria)

PARTICIPATION OF CSOs IN THE SELECTION AND ASSESSMENT OF THE JUDICIARY
TRAINING AND ASSESSMENT OF THE JUDICIARY
SYSTEM OF JUDICIAL ADMINISTRATION AND THE POWERS OF COURT PRESIDENTS

April 2019

LIST OF ABBREVIATIONS

CCJE	Consultative Council of European Judges
CSOs	Civil society organisations
CoE	Council of Europe
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
JRC	Judicial Reform Council
HCJ	High Council of Justice
HQCJU	High Qualification Commission of Judges of Ukraine
NSJU	National School of Judges of Ukraine
PACE	Parliamentary Assembly of the Council of Europe
PIC	Public Integrity Council
SJAU	State Judicial Administration of Ukraine

EXECUTIVE SUMMARY

1. Following the 2016 amendments to the law "On the judiciary and the status of judges", the Public Integrity Council (PIC) representing civil society organisations (CSOs) was established to support the High Qualification Commission of Judges of Ukraine (HQCJU) in the qualification assessment of judges. The establishment of the PIC has been seen as the major step opening participation of the public in the processes of assessment and selection of the judiciary.

2. There are no Council of Europe (CoE) standards requiring or envisaging the involvement of CSOs in the assessment of judges. In general, if civil society is involved, it should be to inform and advise but not to have a direct impact on the decisions to be taken by the competent judicial authorities or institutions. On the other hand, the involvement of CSOs is a means to increase transparency which is one of the core elements of the functioning of the judiciary and of the rule of law principle. The reforms as a whole, which have been undertaken in the period since 2014, certainly resulted in a much more transparent and accountable justice system.

3. Although there are no CoE standards obliging CoE member states to introduce a system of assessment of sitting judges, and the testing or assessment of sitting judges is not in line with CoE standards, the establishment of such kind of assessment in Ukraine may contribute to the quality of the country's justice system. As a rule, such an assessment analyses the work and performance of a judge.

4. In accordance with CoE standards, every assessment has to follow objective pre-established criteria and should result in a reliable motivated decision. The legal regulations of the different procedures of assessment, which Ukraine introduced, seek to meet these standards. Positive efforts were made to guarantee that assessments and interviewing are transparent and public. The scoring system introduced provides for balancing different criteria of the assessment against each other. However, more justification could be useful with regard to scores assigned within the range of scores provided for each criterion. This is especially important with respect to the influence of the psychological testing on the overall result of the assessment, which should not weaken the reliability of the assessment as such.

5. It is also positive that a judge has the right to defend himself/herself and to bring evidence during or after the assessment procedure. However the possibility to challenge the decision of the HQCJU on the assessment, as far as the merits are concerned, is limited.

6. One of the positive achievements of the reform introduced by the recent constitutional amendments in Ukraine is the division between the powers of the HCJ, now the only body in charge of disciplinary proceedings, and the HQCJU, becoming the only body in charge of the qualification assessment of judges.

7. The overall self-government and administration of courts in Ukraine meet the CoE standards. The problem of infringement of the internal independence of judges as a result of influence by court presidents, which was frequently reported in the past,

has evidently been much reduced since 2014. The limitation of tenure of office of court presidents and the limitation of possibility for re-election has contributed to this positive development.

8. Whilst the selection of judges of the Supreme Court and the election of the President of the Supreme Court were seen positively by international observers, the possibility of dismissal of the President of the Supreme Court by a vote of no confidence puts permanent pressure on him/her and thus hampers his/her independence.

9. Key recommendations concerning the participation of CSOs in the assessment of judges, the training and assessment of judges, the administration of courts and the role of court presidents are summarised below:

- The functions of the PIC should be limited to the collection of information and provision of advice. The PIC should not have a direct impact on the deciding body or on its voting procedure.
- It may be considered if the intended contribution of CSOs in the assessment of judges warrants the existence of a separate body such as the PIC. Alternatively, the role of civil society may be strengthened through their inclusion in the composition of the HQCJU. If the PIC is to continue to exist as a separate body, the issue of its resources and the resources of its members should be examined.
- Additional qualification criteria of members of the PIC could be considered in order to safeguard the knowledge of the justice system and to guarantee political neutrality, which is required by the law.
- The procedural regulations of the HQCJU, as far as the link with the PIC is concerned, should be amended. Such procedural regulations should better be put in an ordinary law.
- The HQCJU must have the possibility to verify the reliability of claims, which are put forward against a judge, in order to deliver motivated decisions.
- The information that is collected by the CSOs during the monitoring of an open hearing must not be a part of the judicial dossier.
- Some of the rules of the qualification assessment, as provided for by the HQCJU, may be improved and transferred to the legislative level.
- The application of psychological testing may be reconsidered, and if such testing is kept, the authorities could elaborate on the possibilities of better justification of its results and of appealing against them.
- Testing should not be used in the assessment of sitting judges with permanent tenure. The testing has to be substituted by assessing the work and performance of a judge.
- Judicial remedies with regard to the merits of the decision on the assessment of judges may be considered.
- The results of the evaluation of individual judges should not be published, except for cases when the evaluation is exercised in the course of a competition for vacant positions.
- One-off qualification assessments of those judges who have applied for it should be exercised with a high priority. This would reduce the number of judges who receive lower salaries than those who already passed the test, despite the fact that both groups of judges do the same work.

- Respect for the principle of equality may prompt the authorities to consider the possibility to pay a higher salary to judges retroactively – from the date of application by a judge for the assessment, subject to the condition that a judge passed the assessment successfully.
- The possibility to dismiss the President of the Supreme Court by a vote of no confidence should be abolished or at least reduced as far as possible.

I. INTRODUCTION

10. The aim of this report is to provide an assessment of the reform undertaken by the Ukrainian authorities in 2014-2018 with regard to the participation of CSOs in the selection and assessment of the judiciary, the system of training for the judiciary, and the systems of judicial/court administration, including the powers of court presidents. To this end, the relevant Ukrainian legislation has been analysed against the background of the CoE standards and best practices of its member States. Furthermore, two expert missions were organised to Ukraine in June and in November 2018, aimed at discussing the issues with the Ukrainian stakeholders – state authorities, civil society and international organisations.

11. This assessment was prepared under 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 was prepared Mr Gerhard Reissner, President of District Court of Floridsdorf (Vienna, Austria), member and former President of the Consultative Council of European Judges (CCJE).

II. PARTICIPATION OF CSOs IN THE SELECTION AND ASSESSMENT OF THE JUDICIARY

Brief description of the procedure

12. At the end of 2013 – beginning of 2014, the so-called EuroMaidan events forced the then President of Ukraine to leave office, and led to Parliamentary and Presidential elections, followed by the formation of a new Cabinet of Ministers of Ukraine. These events were based on a civil society movement, which protested against the previous office holders, who were perceived as corrupt and misusing their powers. This reproach also included members of the judiciary, who were believed to abuse their powers and infringe human rights during the EuroMaidan events. All this created a general climate of mistrust towards the government and the judiciary,.

13. Up to this moment, the legal and especially constitutional framework in Ukraine provided an imbalanced situation between the three powers of the state. The independence of the judiciary was insufficiently guaranteed. The Parliament and the President had a decisive influence on the career of judges (appointment for a 5-year probationary period, appointment for permanent tenure, dismissal). An overall intention of the reform was to create a new legal framework in line with CoE standards, and to eliminate office holders, who got their positions only due to the possibilities which the previous system offered, or who had misused their positions. Civil society insisted on playing a role in this process.

14. Already on 8 April 2015, the Parliament (Verkhovna Rada of Ukraine) adopted the law "On restoring trust in the judiciary". According to this law, judges were dismissed from administrative positions they were holding (presidents of courts but also

members of the High Council of Justice (HCJ) and the High Qualification Commission of Judges of Ukraine (HQCJU)). In addition to this, a new body, the Special ad hoc Commission on the Screening of Judges, was established under the HCJ. The Special ad hoc Commission was tasked with assisting the HCJ in holding accountable those judges who by their decisions had infringed human rights during the EuroMaidan events between November 2013 and February 2014, or who had delivered decisions which the ECtHR had found in breach of the European Convention on Human Rights (ECHR).[1]

15. This Special ad hoc Commission was composed of five retired judges, appointed by the Supreme Court of Ukraine, and ten civil society representatives with law degree, five of whom were elected by Parliament and five appointed by the Government Commissioner for Anti-Corruption Policy.[2]

16. This Commission was entrusted with the analysis of decisions of judges on the above-mentioned topics, and forwarding its considerations and recommendations to the HCJ. In its turn, the HCJ could propose to the President of Ukraine the dismissal of a judge, or could initiate disciplinary procedure followed by a relevant sanction. This ad hoc Commission was established with a mandate for one year, which was later extended.

17. The Council of Judges of Ukraine, which is the standing executive body of the Congress of Judges of Ukraine, on 11 December 2014, adopted a strategic document – the Ukraine Judiciary Development Strategy 2015 to 2020. The Strategy again lists increasing the trust in the judiciary as one of its priorities: "Among other outcomes, transparency in the functioning of the judiciary will be ensured by facilitating access and information given to the public and the media about hearings, other relevant meetings and procedures."[3] The Strategy envisages the following tools to this end: a Court Performance Evaluation Framework and user satisfaction surveys[4], the establishment of a Judiciary Civil Oversight Board under the auspices of the Council of Judges[5] and trial monitoring surveys conducted by external observers[6].

18. In 2015 the Judicial Reform Council (JRC), which was established by the President of Ukraine and composed of national and international experts, elaborated a Justice Sector Reform Strategy for the same period of 2015-2020. One of the objectives of this Strategy was to "increase public confidence in the judiciary and other justice sector institutions"[7]. An "insufficient level of coordination and consultation with relevant stakeholders, including civil society organisations," was identified as an obstacle[8]. Consequently, the Justice Sector Reform Strategy sets the following goals:

---

1 Article 3 of the law "On restoring trust in the judiciary".

2 Ibid Article 4.

3 Ukraine Judiciary Development Strategy 2015 – 2020; Area 1: independence and Transparency of the Judiciary.

4 Ibid Activity 2.1.

5 Ibid Activity 3.1.

6 Ibid p.24 Impact indicators for all areas of the Strategy.

7 Justice Sector Reform Strategy 2015-2020 p.2.

8 Ibid p.3.

increasing transparency and accountability of the judiciary and increasing transparency and publicity of justice, better framework and more transparency in the selection procedures, "setting up a transparent internal review system of professional suitability, within the judiciary using objective criteria and procedures"[9], impartial and transparent procedures for the dismissal, and others[10]. The establishment or involvement of bodies composed of CSOs representatives are not mentioned in this strategy.

19. In June 2016, Parliament adopted amendments to the Constitution of Ukraine on justice, which brought the Ukrainian legislative framework in closer compliance with the CoE standards as far as the separation and balance of powers is concerned. Together with the constitutional amendments, the Parliament adopted the law "On the judiciary and the status of judges". This law established a new official legal task for CSOs by creating a new body, the Public Integrity Council (Article 87 of the law "On the judiciary and the status of judges").

20. The Public Integrity Council (PIC) is composed of 20 representatives of human rights civic groups, law scholars, attorneys, and journalists who are recognized specialists in the sphere of their professional activity and who have a highly recognized reputation and meet the criterion of political neutrality[11]. These 20 persons are elected by a meeting of representatives of civic organisations for a term of two years, which is renewable. Civic organisations, who would like to participate and have a voice in the meeting, in which the members of the PIC are elected, have to fulfil certain criteria and have to apply for participation, which is granted by the HQCJU[12].

21. The PIC may collect, check and analyse information about a judge or judicial candidate and provide this information to the HQCJU. The PIC might provide the HQCJU with a negative opinion – based on justifiable reasons – that a judge or a judicial candidate does not meet professional ethics and integrity criteria.[13]

22. If the HQCJU agrees with a negative opinion of the PIC, an appointment or promotion will not be possible or the judge has to terminate his/her function and may be dismissed by the HQCJU. A negative opinion of the PIC will have two immediate consequences: the opinion has to be added to the dossier of the judge or judicial candidate, and the HQCJU needs a higher quorum, if it wishes to disregard the PIC's opinion. In order to overcome the negative opinion of the PIC, 11 out of 16 members of the HQCJU have to vote accordingly.[14]

23. After the meeting of representatives of civic associations took place and the first 20 members of the PIC were elected, on 11 November 2016 the PIC adopted a Regulation which establishes the rules of procedure of the PIC, of its Chambers and its coordinators, with a particular focus on the collection of information and the

9 Ibid Objective 5.1.
10 Ibid.
11 Law "On the judiciary and the status of judges", Article 87 (3).
12 Ibid Article 87 (9) to (13).
13 Ibid Article 87 (6).
14 Ibid Article 88 amended.

delivery of opinions. It also contains rules on self-recusals of PI members in cases of incompatibility or conflict of interest. The Regulation also enumerates the grounds for exclusion of members by a decision – adopted by a qualified majority of three quarters – of other members of the PIC. The PIC uses the possibility, which is provided in the law, to run a website, where everybody can submit information about a judge and where certain information on judges and the result of the examination by the PIC are published.

24. In addition, articles of the law “On the judiciary and the status of judges” with regard to the regular evaluation of judges establish the right of CSOs "to organize independent evaluation of the judge´s work in open court sessions. Results of independent evaluation of independent evaluation of the judges’ work in a court session shall be recorded in a questionnaire, which includes such information as duration of the trial, observance of the procedural rules and respect of rights of the participants of the trial by the judge, culture of communication, level of the judges independence". The completed questionnaire may be attached to the dossier of the judge.[15]

25. The most direct participation of CSOs in the functioning of the judiciary may become the participation of jurors in the court proceedings. Article 124 (5) of the Constitution claims: "The people directly participate in the administration of justice through jurors." Their selection and their status are regulated in Articles 63 to 68 of the law “On the judiciary and the status of judges”. The specific rules with regard to the jurisdiction and the powers of jurors in the delivery of justice are contained in the procedural codes.

Relevant CoE standards and recommendations, key European practices

26. Article 6 (1) of the ECHR which provides for the right to a fair trial, establishes the minimal standard of publicity of court procedures and states that (at least) judgments have to be pronounced publicly. This standard is further developed by the Committee of Minister’s Recommendation 2010(12), Article 15, which states: "judgments should be reasoned and pronounced publicly." This Recommendation in its Paragraph 19 continues with the following wording: "judicial proceedings and matters concerning the administration of justice are of public interest. The right to information about judicial matters should, however, be exercised having regard to the limits imposed by judicial independence."

27. The CoE’s Consultative Council of European Judges (CCJE) in its Opinion No. 7 “On justice and society” underlines the necessity for a transparent and understandable justice system and proposes several means to foster this goal, like specific training, spokespersons, several outreach programs and use of understandable reasoning of decisions. When examining the questions on assessment of judges, in its Opinion No. 17 “On the evaluation of judge´s work, the quality of justice and respect for judicial independence” the CCJE raises the question of who should be involved in the assessment of judges. Paras. 37 and 38 of this Opinion state:

[15] Ibid Article 90 (5).

"In order to protect judicial independence, evaluation should be undertaken mainly by judges. The Councils for the Judiciary (where they exist) may play a role in this exercise. However, other means of evaluation could be used, for example, by members of the judiciary appointed or elected for the specific purpose of evaluation by other judges. Evaluation by the Ministry of Justice or other external bodies should be avoided; nor should the Ministry of Justice or other bodies of the executive be able to influence the evaluation process.

In addition, other professionals who can make a useful contribution to the evaluation process might participate in it. However, it is essential that such assessors are able to draw on sufficient knowledge and experience of the judicial system to be capable of properly evaluating the work of judges. It is also essential that their role is solely advisory and is not decisive. "

28. And finally, the balance between the independence and accountability of judges is also addressed in Opinion No. 18 of the CCJE "On the position of the judiciary and its relation with the other powers of state in a modern democracy". In this opinion the accountability of all powers of state including the judiciary to the society is underlined. The different elements of accountability are analysed (the system of remedies, open hearings and public delivery of judgments, dialogue with other powers of state and with the public, and others). In the context of ombudsman institutions, inspection systems, audit committees etc., the Opinion warns and advocates "a proper balance between accounting and external interference".[16]

29. There is no European legal document or standard, which deals with or even proposes a body like the PIC. This body also seems unique among CoE member states.

Assessment of the Ukrainian legislation and practice on the involvement of CSOs

30. In the light of the European standards mentioned above, the Ukrainian legislation is in line with the CoE's standards with regard to the participation of lay persons as jurors in the procedures, transparency and publicity of court procedures, and the merit-based and transparent career of judges (appointment, promotion and dismissal).

31. However, at the national level the debate arose with regard to transitional provisions to the law "On ensuring the right to a fair trial" insofar as they concerned the cleansing of the judiciary – a process in which CSOs played a role. In this regard, Resolution 1096 (1996) of the Parliamentary Assembly of the Council of Europe (PACE) and relevant judgments of the ECtHR in cases against Slovakia, Poland, Lithuania, Latvia and Romania – mostly delivered between 2004 and 2008 – are of assistance. These documents argue that only a change in the political system, such as a shift from communism to democracy, and not a mere change of government, allows such extreme measures as those defined by the law. The Venice Commission

[16] CCJE Opinion No. 18 "On the position of the judiciary and its relation with the other powers of state in a modern democracy", para 29.

in its Final opinion "On the law 'On Government Cleansing' (Lustration Law)" came to the conclusion that the special situation of Ukraine under the previous government may allow cleansing, however the requirements for such cleansing, as expressed in the Guidelines to the 1096(1996) PACE Recommendation should be followed.[17] At the same time, the Venice Commission criticised the fact that the law in question aims at sanctioning corruption, whereas the latter should have been fought by the usual legal means[18].

32. This being said, the application of the Lustration Law had a time-frame which already expired, consequently this law needs no further evaluation. Information on the practical outcome of the procedure under this law was not provided so far. Currently a claim is pending before the Constitutional Court of Ukraine with regard to the application in practice of the described procedures to judges .

33. As regards the two current tools of involvement of civil society – the PIC and the possibility of CSOs to monitor court hearings and to report on this monitoring and on a judge involved in a case – some remarks are necessary, because both may influence the career of judges and thus may have an impact on the independence of the judiciary.

34. As shown above, there is no European standard which explicitly deals with the involvement of civil society in the assessment of judges. Assessment should be exercised without infringing the independence of judges, and external influence – especially of legislative and executive branches of power – should be blocked. Assessment should be carried out following a fair procedure and based on objective criteria. The PIC plays an important role in the assessment, as described above.

35. The procedure of selection of the PIC's members is transparent, which cannot be criticized. This transparency prevents a direct influence of other powers of state on the assessment procedure - it would not be praised if CSOs participating in the election of PIC members were under political influence. The legislation requires "political neutrality" on the part of the PIC.[19] At the same time, PIC members perform their duties *pro bono* which might raise some issues.

36. The underlying idea of the establishment of the PIC is, on the one hand, to guarantee the transparency of the assessment procedure, but also to provide the HQCJU with additional information about a judge or judicial candidate. As a body tasked with the establishment of the capacity of a judge or a judge candidate, the HQCJU in any case is obliged to consider reliable information provided to it. The PIC is a tool for institutionalising and formalising such a source of information. This does not contradict CoE standards, and may as such be helpful.

---

17 Final Opinion "On the law 'On Government Cleansing' (Lustration Law)", CDL-AD(2015)012 of 12.6.2015.

18 Ibid para 29.

19 Law "On the judiciary and the status of judges", Article 83 (3).

37. The most important aspect is that the role of such a body should be solely advisory and not decisive.[20] In this regard, the legislation, on the one hand, defines the purpose of the PIC as "assisting the HQCJU" [21] and "providing information",[22] but, on the other hand, provides the PIC with the power to deliver negative opinions.[23] Furthermore, a higher quorum is necessary if the HQCJU wishes to deviate from a negative opinion of the PIC, and opinions of the PIC are included in judicial dossiers. Both may be seen as an external influence on the decision of the competent body – the HQCJU, which should not be acceptable.

38. The assistance of the PIC is limited to two out of the three criteria of professional capacity, which a judge must fulfil: professional ethics and integrity. The third criterion – competence – is not included. This is in line with CoE standards which emphasize that persons involved in evaluation should have the necessary knowledge, the assessment should mainly be conducted by judges[24] and, most importantly, that the content of judicial decisions and correctness of these decisions can only be assessed in the framework of procedural remedies.[25]

39. Whilst the law follows these requirements by limiting the functions of the PIC to assessing professional ethic and integrity, the Regulation of the PIC[26] foresees that the PIC also receives and examines the information about the "positive reputation" and "the credibility of the decisions and actions" of a judge. Both contradict the CoE standards.

40. In this regard, reputation is understood as a very subjective perception of a person by the public. It is a criterion which cannot be reliable. There may be many factors which influence this perception, among them the experiences based on very specific personal reasons which are far away from the proper criteria a judge should comply with. It is unclear what should be the sources for such a criterion, how these sources could be checked (if it is someone's individual opinion, or that of many, and how the objective reasons for this opinion can be identified). The CCJE in its Opinion No. 17 "On the evaluation of judges' work, the quality of justice and respect for judicial independence" states that "the individual evaluation process for career or promotion purposes should not take account of public views on a judge"[27].

41. The criterion "credibility of decisions and actions" is even more problematic: there is no exact definition of this criterion, which offers a possibility for an ambiguous interpretation and opens the door for misuse. Furthermore, this criterion goes against the above principle providing that the content and correctness of a judicial

---

[20] CCJE Opinion No 17 "On the evaluation of judges work, the quality of justice and respect for judicial independence, CCJE(2014)2, para 38)

[21] Law "On the judiciary and the status of judges", Article 87 (1).

[22] Ibid Article 87 (6).

[23] Ibid Article 87 (6/3).

[24] Ibid para 37.

[25] CCJE Opinion No. 18 "On the position of the judiciary and its relation with the other powers of state in a modern democracy", para 23.

[26] Regulation of the PIC of 23.11.2016, Article 23.

[27] CCJE Opinion No. 17 "On the evaluation of judges work, the quality of justice and respect for judicial independence", para 48.

decision could be examined exclusively in the framework of legal remedies and not be a topic of assessment.

42. The Regulation of the PIC does not foresee the participation of the judge concerned. It is therefore essential that there is sufficient possibility for a judge under evaluation to have access to all guarantees of a fair trial, at least during the procedure before the HQCJU. These guarantees include the right to know not only the content of the information or of the conclusion of the PIC, but also the sources of the relevant information and the PIC's reasoning, as well as to have the possibility to hear witnesses, to nominate witnesses, and other means of proof.

43. Summing up, there are no CoE standards which forbid the creation of a body like the PIC. However, the scope of information to be examined, and the powers of bodies involved in the assessment of judges are well described in the relevant CoE standards. In view of this, two consequences of a negative opinion of the PIC – HQCJU's quorum to overcome the PIC's negative opinion and the inclusion of a negative opinion in a judicial dossier – should be re-considered. A body like the PIC, if regulated well, could become an additional and helpful party tasked with gathering information, especially form persons outside the judiciary. It could even provide a filter function with regard to claims against judges – a filter, which is urgently needed to cope with the large volume of information concerning judges that the HQCJU or the HCJ have to process.

44. On the other hand, the transparency of the assessment and of the competitions does not require a body such as the PIC but should be secured by the assessment procedure itself. Taking into consideration the composition of the HQCJU, the question arises if such an additional CSO representation is necessary when one takes into account that the members of the HQCJU are elected democratically by institutions which are independent from the government and from Parliament. It also may be considered to enlarge the HQCJU. However, in this case one has to take into account that such a body should not be too large, and that each additional non-judicial member should be balanced by an additional member from the judiciary who is elected by his/her peers. In any case, it has been noted that the interaction of the two bodies (the HQCJU and the PIC) is conflict-prone, which should be avoided so as not to negatively affect the public's trust in the judiciary.

45. With regard to the other form of CSO participation in the assessment of judges – the possibility of CSO representatives to observe court hearings and prepare reports on their observations – it is not contrary to CoE standards because the latter require hearings to be public, and in principle everybody can attend them. So the envisaged observer activities should be possible. It should not be an obstacle that there are no selection criteria for CSOs who wish to perform such assessment, unlike the situation of CSOs wishing to participate in the election of members of the PIC.

46. However, it is problematic that the material gathered in the course of such observation is included in the judge's dossier[28], without any possibility to check the

[28] Law "On the judiciary and the status of judges", Article 90 (5).

reliability of this information. Thus, it is recommended that the relevant information should be excluded from a judge's dossier.

47. Regarding these issues, the following recommendations can be made:

- The functions of the PIC should be limited to the collection of information and provision of advice. The PIC should not have a direct impact on the deciding body or on its voting procedure.
- It may be considered if the intended contribution of CSOs in the assessment of judges warrants the existence of a separate body such as the PIC. Alternatively, the role of civil society may be strengthened through the composition of the HQCJU.
- If the PIC is to continue to exist as a separate body, the issue of its resources and the resources of its members should be solved.
- Additional qualification criteria for the members of the PIC could be considered in order to safeguard the knowledge of the justice system and to guarantee the political neutrality, which is required by the law.
- The procedural regulations of the HQCJU, as far as the link with the PIC is concerned, should be amended. Such procedural regulations would be better placed in an ordinary law.
- The HQCJU in any case must have the possibility to prove the reliability of claimsput forward against a judge, in order to deliver reasoned decisions.
- The information collected by the CSOs during the monitoring of an open hearing must not be a part of the judicial dossier.

III. TRAINING AND ASSESSMENT OF THE JUDICIARY

Brief description of the procedure of the assessment of judges

48. Delivery by judges of high quality decisions within a reasonable time requires well trained and capable professionals. To this end, judicial training is essential, and the relevant judicial assessment should guide the decisions on the career of judges. Judicial assessment could also be used to check the level of capability of judges, and help to improve it.

49. Ukraine's Judiciary Development Strategy of the Council of Judges of Ukraine dedicates a whole chapter to the area "Improvement of Competence". It envisages, among other proposals, a new Court Performance Evaluation Framework and users satisfaction surveys[29], establishing the National School of Judges of Ukraine (NSJU) as the sole provider of initial training for judges[30], continuous training courses for judges and other legal professionals[31] and trial monitoring surveys conducted by external observers as an impact indicator for all areas of the Strategy.

50. The Justice Sector Reform Strategy of the JRC declares "improving competence of the judiciary as one of the pillars of the reform". To this aim, it proposes a regular assessment of judges on the basis of the same transparent criteria and competitions

[29] Ukraine Judiciary Development Strategy 2015 – 2020; Activity 2 1:Point 1 and 11.

[30] Ibid Activity 2.2.1 point 1.

[31] Ibid Activity 2.2.2.

in all appointments,[32] improving the system of initial training, strengthening the NSJU[33] and developing the mechanisms for an oversight and integrity check, introduction of the judge´s dossier[34].

51. The NSJU was established to "ensure training of highly qualified personnel for the system of justice and conduct research and scientific activity".[35] The NSJU is entrusted, among other tasks, exclusively with the initial training of judicial candidates and with the provision of on-going training for judges and staff. It also provides scientific and methodological support to the HCJ and to the HQCJU.[36]

52. The legislation on higher education does not apply to the NSJU. The NSJU is established under the HQCJU and its statute has to be approved by the latter. The HQCJU also appoints and dismisses the NSJU rector. A concept of national standards for judicial training has been developed[37], which contains the principles of judicial training, a course development methodology and a course delivery methodology. The team of trainers in general is composed of about 300 judges, lawyers and academics[38], trainings for trainers are held regularly[39]. The requirements for becoming a trainer are set out in the above-mentioned concept of standards, which address "retired judges, university lectures and experts in relevant field with impeccable professional credit and strong moral stature"[40]. 65 training courses were developed[41], 227 training events took place[42] and covered a broad range of topics, starting from technical aspects on the application of the law to soft skills, such as communication or ethics, the prevention of corruption, and others[43].

53. Persons who fulfil the general requirements for becoming a judge[44] and who have successfully passed the admission examination, have to undergo an initial training of twelve months at the NSJU, which includes theoretical and practical parts[45]. When candidates successfully pass this training they are admitted to the qualification examination,[46] the positive result of which (75 of 100 possible points) puts them on the reserve list to become a judge. This list ranks the candidates according to the grades gained in the course of the qualifications examination, which plays an essential role in the competition to fill a vacant position of a judge.[47]

---

32 Justice Sector Reform Strategy 2015-2020 point 5.1.
33 Ibid point 5.2.
34 Ibid point 5.3.
35 Law On the Judiciary and the Status of Judges, Article 104.
36 Ibid Article 105.
37 Concept of the National Standards of Judicial Training in Ukraine.
38 Annual Report of the National School of Judges of Ukraine for 2017, p.4.
39 Ibid p.19.
40 Concept of the National Standards of Judicial Training in Ukraine.
41 Annual Report of the National School of Judges of Ukraine for 2017, p.4.
42 Ibid p.8.
43 Ibid p.3.
44 Law On the Judiciary and the Status of Judges, Article 65.
45 Ibid Article 77.
46 Ibid Article 78.
47 Ibid Article 79 para 11 to 15.

54. Judges have to undergo a regular training at the NSJU at least once every three years, each training session lasting at least 40 academic hours.[48]

55. Based on Article 131 para 10 of the Constitution, the law "On the judiciary and the status of judges" chooses the HQCJU as the body in charge of the assessment of judges.[49]

56. Before the law "On ensuring the right to fair trial" was adopted, there was no assessment of judges after their appointment for a permanent tenure. The appointment to vacant positions was not very transparent, and there was no involvement of civil society.

57. Now there are several assessments foreseen in the law "On the judiciary and the status of judges" and in the transitional provisions to the law "On ensuring the right to fair trial":
    - an "eligibility (admission) assessment" to select qualified persons to become a judicial candidate (who is a candidate to become a judge)[50],
    - a "qualification examination", which candidates have to pass after the initial training[51],
    - a "qualification assessment of judges" (Article 83-86 of the Law) carried out at the request of a judge,
    - a (general) "qualification assessment", which either follows the request of a judge or is ordered by the HQCJU in cases stipulated by the law.[52]

58. The results of the qualification assessment of judges and judicial candidates have to be taken into account when the HQCJU submits its proposal to the HCJ on the appointment of judges.[53]

59. There is a second group of assessments, which includes the so-called "regular assessments".[54] The results of these assessments are also incorporated into the judicial dossier but they "may be taken into account when considering the issue of conducting the competition for filling a vacancy in a relevant court", which means they can be used but this is not obligatory.[55]

60. The regulatory assessments may be exercised by lecturers of the NSJU after a relevant training[56], by CSOs[57], by other judges of the court or by the judge himself/herself.

---

48 Ibid Article 89.
49 Ibid Article 93.
50 Ibid Article 73.
51 Ibid Article 78.
52 Ibid Articles 83 to 86.
53 Ibid Article 79 para 8, 11 and 17.
54 Ibid Article 90.
55 Ibid Article 91.
56 Ibid Article 90 para 3 and 4.
57 Ibid Article 90 para 5.

61. A special type of assessment is the re-assessment, which takes place after a judge who has been suspended and ordered to take a special training – either by the HQCJU on the occasion of an assessment or by the HCJ on the occasion of a disciplinary procedure – has finished this special training programme. This re-assessment follows the rules of the qualification assessment of judges.

62. In addition, there are extraordinary reasons for the assessment. These are the competitions to fill the positions of judges at the newly-established Supreme Court, the High Court on Intellectual Property and the High Anti-Corruption Court. Although the requirements for judges of these courts differ from the requirement for judges of first instance and appeal courts, the procedure of the assessment of judges of or judicial candidates for all other courts is the same as provided for by Articles 83 to 86 of the law "On the judiciary and the status of judges".

63. This procedure also applies to the one-off extraordinary assessment, which is defined by para. 20 of the Final and Transitional Provisions to the law "On the judiciary and the status of judges". All judges appointed before the law "On amendments to the Constitution of Ukraine (as to justice)" entered into force, have to undergo an assessment. If they fail or if they refuse, they must be dismissed. However, the judges who successfully passed this assessment will be entitled to a remuneration, the amounts of which are provided for in the law, and which is much higher than the remuneration provided for by the previous legislation. Thus, the judicial salary would at least double compared to before the assessment.[58]

64. The procedure of qualification assessment is composed of two stages:[59] the first one is an examination, and the second stage is a review by the HQCJU of the judicial dossier and an interview of the judge concerned. The examination is a written anonymous test followed by a case study/practical task. The questions and the case which should be elaborated by the judge take account of the hierarchy of the court and its specialization, in which the judge works or for which he/she applies.[60] The interview aims at confronting the judge with the results of the review of the judicial dossier.[61] The criteria of each evaluation are 1) competence (professional, personal, social etc.) 2) professional ethics and 3) integrity.[62] It should be checked "whether the judge is capable of administering justice in the relevant court according to this criteria".[63] In order to assess if the judge fulfils the criteria of professional ethics and integrity, the PIC assists the HQCJU (see above section II).

65. The procedures of taking a written test and of a case study, as well as interviews, are public. Everybody has access to judicial dossiers, which are published on the website of the HQCJU, with the exception of personal data and the results of psychological tests.[64] The law entrusts the HQCJU with establishing the procedure and the

58 Ibid Final and Transitional Provisions points 24 and 25.
59 Ibid Article 85.
60 Ibid Article 85 para 2.
61 Ibid Article 85 para 9.
62 Ibid Article 83.
63 Ibid.
64 Ibid Article 85 para 7.

methodology of the assessment, and with the definition of the criteria of the assessment and the means of their verification. The law selects neither a certain model of assessment (points system etc.), nor a weighting scale for each criterion.

66. In spring 2017, the HQCJU adopted several regulations, which determine the procedures and methodology of the qualification assessment for all the different types of assessment.[65] It fixed a scoring system with a maximum number of points. 250 points are possible for integrity and professional ethics, the rest is dedicated to competence: 300 points for professional competence, 100 points for personal competence and 100 points for social competence. It determined the indicators, which shall be considered when the respective criteria are examined. It regulated the security measures to avoid manipulation of the testing and the organisational details for the testing and the interviews. It also defined how the background test is exercised and how the co-operation with the PIC should function. It also set up the panels which should carry out the interviews, and which are distributed to the panels by random allocation.

67. The questions for the multiple choice testing and the cases for the practical testing are developed by the NSJU, in the light of the different hierarchical levels and the specialisation of judges. This is in line with the law, as long as the HQCJU has the final say and exercises its task to approve the material, which is used for testing.

68. The HQCJU also introduced a combination of four different psychological tests[66] and interviews with psychologists. All persons, who had gained at least the minimum passing score for written tests, have to pass these psychological tests before they proceed to the interview.

69. The organisation and exercise of all these assessments place a heavy workload on the HQCJU. Nevertheless, in April 2017 the HQCJU announced a call for the first 600 positions at local courts. Out of 5338 applicants received, 700 passed the admission test. After the moral and psychological qualities were tested and the background check was done, the special initial training of three months started for those candidates, who had been judges' assistants for more than 3 years. In June 2018 the qualification examination started for those candidates who successfully finished the training.

70. The most important and challenging task was the competitive selection to fill 120 positions of justices of the Supreme Court, which started in November 2016 and ended with the appointment of 115 judges in December 2017[67]. Out of 1436 applicants who registered as candidates for the purposes of the competition, 625 were admitted to the first step of the selection procedure. 70,2 % of these candidates were judges, and other candidates were academics, advocates and other

---

[65] Procedure and methodology of qualification assessment of a judge; Procedure of Exam-Taking and Methodology of its Assessment; Procedure of taking the admission examination and the methodology of evaluating the results and others.

[66] HCS Integrity Check, BFQ-2, MMPI-2, and MBTI.

[67] See Serhiy Koziakov, Competitive Selection to the Supreme Court, Kyiv June 23, 2017 and Centre of Policy and Legal Reform: Establishment of the New Supreme Court: Key Lessons.

types of lawyers. After the multiple choice testing and the practical written task, 381 candidates remained, 75 % of which were judges. It is astonishing that 5 judges of the Supreme Court of Ukraine and 31 judges of the three higher specialized courts could not enter the second stage of assessment because of their poor performance in the first stage.

71. In the following interviews the candidates were confronted with the results of the examination of their respective judicial dossiers. The most important content of the dossier includes the following documents: assets declarations, the declarations of integrity and family ties, results of psychological testing, information on the professional performance of judges and the relevant opinions of the PIC with regard to the compliance of a judge with the standards of professional ethics and integrity.

72. The PIC concluded in 146 cases that a candidate does not meet the criteria of professional ethics and/or integrity. 8 of the candidates reacted by withdrawing their applications. In 51 out of the above 146 cases, where the PIC concluded negatively, the HQCJU followed this conclusion and eliminated the candidates from the on-going competition. 12 of the negative opinions of the PIC were reversed by the PIC itself after the candidates had provided additional information. In 76 cases the plenary of the HQCJU overruled the conclusions of the PIC, which made it possible that 30 of these candidates finally became justices of the Supreme Court.

73. In view of the deviation by the HQCJU from the conclusions of the PIC, there is a dispute between the two bodies. The HQCJU claims that the conclusions of the PIC lack sufficient evidence and motivation, whilst some members of the PIC blame the HQCJU and are of the opinion that, although the final scores are publicly available, the real motivation for the scoring is not given and there are marked differences between the impression which candidates delivered during an interview, and the scores they received.

74. International observers commented positively on the way in which the competition to the Supreme Court was implemented. Some NGOs claimed failures in this process. The psychological testing, the insufficient transparency of the scoring, the sometimes late disclosure of dossiers and the insufficient reasoning by the HQCJU of its decisions to overrule the negative conclusion of the PIC, were criticised.[68] It was, however, also reported to the delegation of experts that there were many positive comments about the performance of the new Supreme Court since its launch in December 2017.

75. Meanwhile, the competitions for the positions of judges of the High Court on Intellectual Property and the High Anti-Corruption Court were launched and follow the same procedure. This being said, the procedure of selection of judges of the High Anti-Corruption Court is somewhat different from the general procedure.

    As regards the task of the HQCJU to assess judges appointed before the law "On amendments to the Constitution of Ukraine (as to justice)" entered into force, until June 2018 1245 judges were assessed and 4298 judges are awaiting assessment.

[68] Centre of Policy and Legal Reform: Establishment of the New Supreme Court: Key Lessons.

76. The assessment in question raised two problems. More than 2000 judges left the judiciary to avoid this testing, which had an immense impact on the capacity of the justice system of Ukraine. As mentioned above, the much higher remuneration system is only applied to those judges who already successfully passed the qualification assessment. Judges who applied for the assessment and are waiting for it, receive the "old" amounts of remuneration for the same work as judges who have already been assessed. This has led to certain tensions in the courts.

77. When, with a view to promotion or transfer to another court, a judge undergoes a qualification assessment and the HQCJU adopts a decision that a judge in question is able to administer justice, this decision can be challenged before the Supreme Court in the manner prescribed by Article 266 of the Code of Administrative Justice of Ukraine.

CoE standards and recommendations, key European practices on the assessment of judges

78. The UN Basic Principles on the Independence of the Judiciary state that "persons selected for judicial office shall be individuals with appropriate training or qualification in law".[69] CCJE recommends that not only persons who are recruited at the start of their professional carrier but also those who are selected from among experienced lawyers should receive initial training. This training should correspond to the professional experience of the incoming judge.[70]

79. Judges have to maintain a high degree of professional competence.[71]Therefore, it is a right and a duty of judges to be provided with, and to attend, training. States have a duty to provide the necessary resources.[72] It is an ethical obligation of judges "to ensure, that they maintain a high degree of professional competence"[73]. But although the CCJE sees it as "unrealistic to make in-service training mandatory in every case"[74] because it may become simply a matter of form, and therefore recommends, that "the in-service training should normally be based on the voluntary participation of judges",[75] certain on-going training may be mandatory (e.g. on the occasion of new legislation). Several member states introduced systems where within a certain period of time judges have to choose and to attend a certain number or extent of trainings.

80. The authority which is responsible for the training should be independent. The responsibilities should neither be entrusted to the Minister of Justice nor to another authority answerable to the legislative or the executive.[76] The judiciary itself should

---

69 UN Basic Principles on the Independence of the Judiciary, para 10.

70 CCJE Opinion No. 4 "On appropriate initial and in-service training for judges on national and international level", para 23 to 26.

71 Ibid para 9 and CM Recommendation (2010) 12 on Judges: Independence, Efficiency and Responsibilities, para 65.

72 CCJE Opinion No. 4 para 11, CM Recommendation (2010) 12 on Judges: Independence, Efficiency and Responsibilities, para 56.

73 CCJE Opinion No. 3 para 25 and 50 (ix), and Bangalore Principles point 6.3. and 6.4.

74 CCJE Opinion No. 4 "On appropriate initial and in-service training for judges on national and international level", para 34.

75 Ibid para 37(i).

76 Ibid para 16.

play a major role in organising and supervising the training activities. The managerial staff should be appointed by the judiciary or the independent body.[77] The training should be carried out by judges and by experts in each discipline and should be chosen from among the best in their profession by the independent authority, which is in charge of training, and this body should also determine the training methods.[78]

81. The CCJE recommends that the independent authority in charge of the training should not be in charge of disciplining judges[79] and the persons who are responsible for training should not be directly responsible for appointing and promoting judges.[80]

82. With regard to the assessment (or evaluation) of judges, the systems put in place in CoE member states differ greatly. Following the fundamental requirement that appointments and promotions should be based on merit,[81] it is clear that such merit has to be established in the course of the appointment of a judge. It is also important that relevant and concrete complaints lead to criminal or disciplinary procedures and investigations. Assessment beyond these concrete occasions is done to check the quality of a judge´s work, which forms a central part of the quality of the justice system at large and aims at its further improvement.[82]

83. Due to the different legal systems and legal cultures, there is a great variety of systems of judicial evaluation. In 2014, 24 of the CoE 47 member states had in place different systems of evaluation of judges. Other CoE member states envisaged establishing such a system. The CCJE dealt with this topic in its Opinion No. 17 "On the evaluation of the judges' work, the quality of justice and respect of judicial independence". The Committee of Ministers of the CoE views the assessment of judges as an option and enumerates some requirements if member states choose this option.[83] The CCJE identified two types of evaluation: formal and informal ones. Both should fulfil the goals of providing the best possible quality of justice and of producing the necessary accountability of the justice system to the society. The CCJE recommended that each member state should analyse its judicial system, traditions and culture, and decide which type of evaluation is necessary for it to achieve the above goals.[84] Within member states which use formal evaluation systems, again there is a great range of models. The periodicity, the criteria, the sources and indicators for verification, the persons involved in the evaluation and the procedure vary considerably. In none of the member states a testing of already appointed judges is included in the assessment. The work of judges and their past behaviour are the subject of assessment. In no other member state a psychological testing of sitting judges takes place. Only a few member states use a psychological testing of judicial candidates, and none do so for sitting judges. There are two possible objectives of

77 CCJE Opinion 4 para 19.
78 Ibid para 19.
79 Ibid para 17.
80 Ibid para 18.
81 CCJE Opinion No. 1 para17 and 29, UN Basic Principles on the Independence of Judiciary para 13.
82 CCJE Opinion No. 17 "On the evaluation of judges´ work, the quality of justice and respect for judicial independence", para 22.
83 CM Recommendation (2010) 12 on Judges: Independence, Efficiency and Responsibilities, para 58.
84 Ibid para 23.

such testing: firstly, to find out if the candidate suffers from a mental disease or irregularity or how likely it is that such problems will occur in the future, and secondly, if the candidate complies with a certain profile. The latter necessarily requires agreement about that profile.

84. The criteria of the assessment have to be objective and published in advance[85]. Qualitative aspects are more important than quantitative ones. According to the Kyiv OSCE Recommendations on Judicial Independence in Eastern Europe, South-Caucasus and Central Asia,[86] criteria such as professional competence (knowledge of law, ability to conduct court proceedings, capacity to write reasoned decisions), personal competence (ability to cope with the workload etc.) and social competence (ability to mediate, respect for the parties etc., for those who have to do so: ability to lead etc.) are the criteria which seem to be adequate.[87] The use of the number or percentage of decisions reversed on appeal is seen as problematic, at least without further investigation.[88]

85. In its Opinion 17, the CCJE "cautions against expressing evaluation results only in terms of points, figures and percentages or number of decisions made. All such methods, if used without further explanations, can create a false impression of objectivity and certainty. The CCJE also considers detailed permanent ranking of judges as a result of their evaluation as undesirable." [89] However, a system of rating for specific purposes, such as promotion, can be useful.[90]

86. In order to protect the judicial independence, evaluation of judges should be mainly undertaken by judges. Judicial councils may play a role in this regard. Evaluation by the ministry of justice or other external bodies should be avoided.[91]

87. In the course of evaluation, the judges concerned shall have a say and the possibility to present their view and to challenge the assessment before an independent authority or court.[92]

Assessment of the relevant Ukrainian legislation and practice

88. As announced in the strategies and put into the legislation, the training and assessment of judges play a central role in the transformation of the Ukrainian judicial system. The results, as far as the level of primary legislation is concerned, meet the expectations of the society from an independent but accountable judiciary. Most of this legislation follows the CoE standards; some regulations are without

---

85 Ibid para 31 and CM Recommendation (2010) 12 para 58.

86 OSCE Kyiv Recommendation on Judicial Independence in Eastern Europe, South-Caucasus and Central Asia, para 27.

87 Ibid para 33.

88 Ibid para 35 and Kyiv Recommendation on Judicial Independence in Eastern Europe, South-Caucasus and Central Asia para 28.

89 CCJE Opinion No. 17, para 42.

90 Idem para 43.

91 CCJE Opinion No. 17 para 37, and CCJE Opinion No. 10 "On the councils for judiciary in the service of society", para 42 and 52 -56.

92 CM recommendation (2010) 12 para 58, and CCJE Opinion No. 17 para 41.

example in other CoE member states, and a few of these regulations may be seen as problematic. But it is not only the law, which has to be taken into account when judging the success of the reforms. The by-laws and the practice of application of the legislation also have to be considered.

89. In both areas, training and assessment, the HQCJU plays an important role, be it as the body which has to appoint and to dismiss the rector of the NSJU and approve the training concepts, programmes and the statute of the school, or as the body which organises and exercises the assessments. Due to the composition of the HQCJU, the requirements of its membership and status of its members, this body must be seen as one which fulfils all the requirements set by the CoE standards for councils for the judiciary.[93]

90. The institution in charge of training of judges should be independent, especially from the legislative and the executive powers. The NSJU fulfils this criterion and so does the HQCJU, which supervises the NSJU and is responsible for its organisation. The initial training is mandatory. There was also a short induction seminar for the newly appointed judges of the Supreme Court. The on-going training of judges is very broad in its content, offering a broad range of topics, not only regarding the legal knowledge but also the necessary soft skills. All these regulations and also the very ambitious implementation are fully in line with European standards.

91. It is unclear which role the regular assessment of judges by trainers of the school, which they provide after a judge has finished a training module, plays in practice.[94] According to the CoE recommendations, there should be no strong or direct impact of trainers on decisions regarding the career of judges. It is clear that trainers should assess the success of a judge during or after training, as far as the acquisition of knowledge is concerned, but it would be unusual if trainers were to give statements about other abilities of a judge which are not the topic of the particular training.

92. In its activity report, the NSJU questions the mandatory on-going training of judges as it is ordered in the law "On the judiciary and the status of judges"[95]as being in possible conflict with CoE standards, which is a misunderstanding. The CCJE only warned that concrete trainings, which are forced upon judges, may be less attractive and not successful. It does not argue against the possibility that certain trainings may be mandatory. The types of mandatory trainings, as provided for by the Ukrainian legislation, are appropriate. They are not only in line with European standards, but also exist in several CoE member states.

93. Speaking about the assessment, there is an obvious strong commitment of the legislator to establish a transparent and fair procedure following pre-established and published criteria and methods. This must be acknowledged. It is also expressed in the law that the regular, as well as the qualification, assessments should help to maintain or improve the quality of justice. This is the goal declared by all countries

93 CCJE Opinion No. 10 "On councils for the judiciary in the service of society". Et alt.

94 Law On the Judiciary and the Status of Judges, Article 90 para 3.

95 Ibid Article 89.

with a formal evaluation system of judges. In Ukraine, it seems that there is a second objective of the assessment, which is to compensate for the failure of other bodies and procedures to fight corruption, check assets and other declarations or investigate disciplinary offences. This brings additional challenges for the assessment.

94. There are several unusual elements of the procedure of judicial assessment in Ukraine – testing of sitting judges and the creation of the PIC. It is usual that judicial candidates have to undergo an examination, at least in countries where judges do not come from the ranks of experienced practitioners ("career judges"). This examination primarily consists of a test of legal knowledge and mostly also contains a practical task, for example to draft a judgment in a given case. During such examination it is also possible to check a criminal record and other information which might jeopardize the integrity of a candidate. As far as the assessment of judicial candidates is concerned, the Ukrainian law follows this model on knowledge testing. As regards integrity, the reasons for exclusion of a candidate from the competition are enumerated in the legal provisions.

95. The assessment conducted for the purposes of appointment of a judge to a higher court or a court with specialised jurisdiction is different. In this case, the assessment also needs to check the candidates' knowledge and abilities which are necessary for a specific court. The usual source of the necessary information is the examination of the previous work of the candidates. Often this assessment includes an interview with candidates, which also provides a possibility to get an impression of the qualities of the candidate. A multiple choice testing or a practical case study is unusual for the European practices. But there are no CoE standards which would forbid the testing as it is now provided for in the Ukrainian legislation on selection or promotion of judges.

96. A different view is necessary with regard to the qualification assessment of all sitting judges, who were appointed before the law "On amendments to the Constitution of Ukraine (as to justice)" entered into force.[96] This assessment is applied to sitting judges and has fundamental consequences for their tenure and their remuneration. The assessment is provided for by the law "On the judiciary and the status of judges"[97], and the failure to undergo it results in a dismissal. This assessment seems to be in conflict with the CoE standards. The Joint Opinion of the Venice Commission and of the Directorate General of Human Rights and the Rule of Law on the law "On the judiciary and the status of judges" underlined that such an assessment of all appointed judges with permanent tenure is not in line with CoE standards. But in the end the Joint Opinion conceded that if the explanation of the Ukrainian authorities were true, namely that in the past due to corruption reasons many persons undeservedly had become judges, extraordinary measures – like the invitation for all judges to undergo an assessment and the dismissal of those who failed it – may be necessary and justified. But such an assessment "needs extremely stringent safeguards to protect the other judges".[98] It is thus quite clear that such an

[96] Ibid Section XII Final and Transitional Provisions points 20 to 25.

[97] Para. 20 of the Final and Transitional Provisions to the Law On the Judiciary and the Status of Judges.

[98] Joint Opinion of the Venice Commission and the Directorate of Human Rights of the Directorate General of Human Rights and the Rule of Law on the Law on the Judiciary and the Status of Judges and the

extraordinary measure applied to sitting judges is an extreme and one-off exception. Sitting judges have to be assessed on the basis of their performance and not by testing them.

97. The criteria for the assessment as enumerated in the law (competence, professional ethics and integrity) and its sub-criteria[99] are in line with CoE standards. This is also the case for a great majority of the 70 indicators, which the HQCJU adopted for the purposes of qualification assessment.[100] The warning of the Joint Opinion to be careful is still valid for the interpretation of the numbers or percentages of judicial decisions reversed by a higher instance.[101] In line with CoE standards, the sub-criteria for the criterion of professional competence are quantitative and qualitative, and qualitative ones have a significant importance.

98. One of the novelties of the qualification assessment of judges in Ukraine is the psychological testing. As shown above, the use of such instruments is very limited in Europe. If the purpose of such an exercise is not only to identify mental diseases or the likelihood of them, but also to test certain characteristics or attitudes, it is necessary to agree on such attitudes in advance. An agreement on a particular desired profile needs consensus in the society. In the report of the Centre of Policy and Legal Reform and the DEJURE Foundation, it is alleged that one of the attitudes which is tested is loyalty[102]. One really has to doubt if this is an attitude which is adequate for a judge. Other issues arising with psychological testing are the reliability of the test and the possibility to challenge its results. The results of the test will not be disclosed, which is understandable in view of the need to protect the right to private life of the person being tested. However, this makes it impossible to identify what impact the psychological testing has on the overall result of the assessment. Sources, which should be used in the evaluation process, must be reliable.[103]

99. Another question arises with regard to how the HQCJU establishes the final result of the assessment. It has created a system of scoring. Such a system is possible from a point of view of the CoE standards and the practice of its member states, but the CCJE warns against it as it might give the wrong impression of objectivity.[104] Such a system would have to regulate how the points are distributed for each criterion, and how the different criteria are weighted in relation to each other. The HQCJU established a system in which different criteria and sub-criteria are given a certain

---

Amendments to the Law on the High Council of Justice of Ukraine (Opinion No 801/2015, CDL-AD(2015)007) para 71 to 76.

[99] Law On the Judiciary and the Status of Judges para 83.

[100] Regulation of the HQCJU on the Procedure and Methodology of Qualification Evaluation, Indicators of Compliance with the Qualification-Evaluation Criteria and Means of Their Establishment.

[101] Joint Opinion of the Venice Commission and the Directorate of Human Rights of the Directorate General of Human Rights and the Rule of Law on the Law on the Judiciary and the Status of Judges and the Amendments to the Law on the High Council of Justice of Ukraine (Opinion No 801/2015, CDL-AD(2015)007) para 64 and CCJE Opinion 17 para 35.

[102] Report of the Centre of Policy and Legal Reform and the DEJURE Foundation on Establishment of the New Supreme Court: Key Lessons point 43.

[103] CCJE Opinion 17 para 39.

[104] CCJE Opinion No. 17 para 42.

weight. A further examination might be useful with regard to how far this weighting is consistent, and whether it prevents certain criteria to be used more than others.[105]

100. In any case, the weighting rules were published and are transparent, which is fully in line with the requirements for the system of assessment. But with the exception of written tests, the system of scoring based on other criteria is not so reliable. In most cases, each member of the competent commission gives his or her score, and the final score is defined as an arithmetic mean of the scores of all the members of the panel. A motivation of the panel or of its members is not given. Those members of the PIC who met with the experts claimed that there were several cases with a large discrepancy between the impression which observers had of candidates, and the final scores awarded. [106].

101. It is evident that such doubts hamper the trust in the results. This is in contrast to the efforts which the HQCJU had undertaken to avoid any manipulation with the testing, and to ensure the transparency of the procedure, both during the written examination and the case study, and during the interviews. Is not enough that the final scores are published, these scores also have to be sufficiently reasoned.

102. The principle of transparency is of great importance. It has to be ensured in the course of the competition for vacant positions and in the course of the qualification examination of judicial candidates. But it is in conflict with the CoE standards that the same level of transparency is applied to the qualification assessment of sitting judges. "Principles and procedure on which judicial evaluation is based must be made available to the public. However, the process and results of individual evaluations must in principle remain confidential so as to ensure judicial independence and the security of the judge."[107] The public should trust that all judges who are in office fulfil the necessary requirements. Full transparency with regard to the specific qualification results of a specific judge is counter-productive and can reduce trust in the judiciary instead of fostering it.

103. Therefore, it is also problematic that the judges' dossiers - with the exclusion of private data - are open to the public at any time, even outside of any competition for appointment to vacant positions.

104. The so-called regular evaluation of judges by himself/herself[108] and by his/her colleagues[109] is a kind of informal evaluation. It is appreciated and is in line with European standards[110], even when it is applied in addition to a system of formal evaluation.

---

105 Report of the Centre of Policy and Legal Reform and the DEJURE Foundation on Establishment of the New Supreme Court: Key Lessons point 31.

106 Ibid point 76 and 77.

107 CCJE Opinion No. 17 para 48.

108 Law On the Judiciary and the Status of Judges, Article 90 para 2 point 2.

109 Ibid Article 90 para 2 point 3.

110 CCJE Opinion No. 17 para 25.

105. It is in line with every training system that those who passed the training receive confirmation of their success. But it is questionable if trainers are able to and should assess a judge insofar as qualities are concerned which are beyond the topic of the training.[111] It is also an evident contradiction when results of informal evaluation, other than training certificates, are officially incorporated into a judicial dossier. This is even more problematic in the case of the assessment of judicial performance, which CSOs are allowed to undertake.[112].

106. With regard to the above topics, the following recommendations can be made:

- Some of the rules of the qualification assessment, as provided for by the HQCJU, may be improved and transferred to the legislative level.
- It may be helpful if the indicators for several criteria be further clarified by interpretation guidelines, which could contribute to the objectivity and reliability of their application.
- The application of psychological testing may be reconsidered, and if such testing is kept, the authorities could at least elaborate on the possibilities of better justification of its results and of challenging them.
- Testing should not be used in the assessment of sitting judges with permanent tenure. The testing has to be substituted by assessing the work and performance of a judge.
- Judicial remedies with regard to the merits of the decision on assessment of judges may be considered.
- The results of the evaluation of individual judges should not be published, except for cases when the evaluation is exercised in the course of a competition for vacant positions.
- One-off qualification assessments of those judges who have applied for it should be exercised with a high priority. This would reduce the number of judges who receive lower salaries then those who already passed the test, despite the fact that both groups of judges do the same work. Nevertheless, this should not put pressure on the HQCJU to exercise its assessments with less quality.
- Respect for the principle of equality may prompt the authorities to consider the possibility to pay the higher salary to judges retroactively – from the date of application by a judge for the assessment, subject to the condition that the judge has successfully passed the assessment.

111 Ibid Article 90 para 3.

112 Ibid Article 90 para 5.

IV. SYSTEM OF JUDICIAL ADMINISTRATION AND THE POWERS OF COURT PRESIDENTS

Brief description of the procedure

107. Based on the Constitution of Ukraine, the state ensures the necessary funding and proper conditions for the functioning of the judiciary.[113] Expenditures for the maintenance of courts are allocated in the separate budget line of the state budget of Ukraine, taking into account proposals of the HCJ.[114] Judicial self-governance operates pursuant to the law and is tasked with protecting the professional interests of judges and deciding on the internal activities of courts.[115]

108. Organizational support to the operations of courts, judicial self-governing bodies and other state bodies and institutions of the justice system are exercised by the State Judicial Administration of Ukraine (SJAU), which is a state body itself and is accountable to the HCJ.[116] Among other tasks, it is responsible for ensuring proper conditions of the functioning of courts, for ensuring the necessary human resources, preparation of budget requests, providing all kinds of statistics, use of IT-facilities in the courts, including registers, e-court and video-conferencing, and supervising and organizing the activity of the Court Bailiffs Service and the Service of Court Security[117] XXXX

109. The SJAU has several regional departments and is in charge of the court staff, which includes 300 000 civil servants. The higher ranks of those staff are recruited following a competition. The Chief of Staff of a court is appointed by the SJAU on the proposal of the president of the court. As far as the SJAU is concerned, the legal framework has not changed since 2014. But during this period several tasks have successfully been implemented. In addition to the day-to-day business of the management of staff and maintaining court facilities, the SJAU provided assistance to the HQCJU in creating and maintaining the judicial dossiers of all 7780 judges, maintaining unified registers, providing statistics, and creating the Unified Judicial Information and Telecommunication System, and elaborating the concept of e-justice/e-court, which at the moment is being tested in 18 pilot courts.

110. One of the problems to be managed is the lack of judges. After the introduction of the qualification assessment, many judges retired or left office, so that by the beginning of 2018 30% of the posts of judges were vacant, at some courts of appeal even 40% and more. Representatives of the SJAU has indicated that the appointment procedure to become a judge is very complicated, especially the psychological testing, and it takes too much time.

111. The budget allocated to the judiciary has been increased in the last periods. Nevertheless, according to some of the interlocutors the experts met, for the fulfilment of the heavy workload which is envisaged for the next years (finalisation of

---

113 Constitution of Ukraine, Article 130, para 1.

114 Ibid Article 130 para 2.

115 Ibid Article 130/1.

116 Ibid Article 151.

117 Ibid Article 152.

the qualification assessments, change of the court structure etc.), additional means are necessary.

112. In every jurisdiction, presidents of courts play a role in the administration of justice. This role is more or less powerful. In Ukraine, it was reported by several interlocutors, especially by CSO representatives, that in the past presidents of court had been very powerful and influential. This is surprising because the competence of court presidents, as it is described in the law, does not envisage this.[118] Besides representation of a court, a president has to observe the activities of the staff, do the statistics, facilitate the observance of the requirements of in-service training, and convene and chair the meeting of the judges of the court and implement its decisions. These competences have barely changed since 2014. The obvious conclusion of this observation is that the powers of presidents have not been based on the legal provisions but on factual circumstances.

113. Previously presidents of courts were appointed by the HCJ on a motion of the Council of Judges of Ukraine for a period of five years, which could be repeated once . Only the President of the Supreme Court of Ukraine was elected by the general assembly of the judges of the Supreme Court of Ukraine from among the judges of this court. However, since the law "On restoring trust in the judiciary" came into force in 2014, presidents of court are elected by the judges of the respective court from among the judges of this court. The tenure of office was limited to one year and to two consecutive terms. This was changed in 2015 to two years and two consecutive terms, and again in 2016 to three years (four years for the Supreme Court) and two consecutive terms.

114. At the first election after the change from appointment to election of court presidents, in 2014, the dismissed presidents were re-elected in most courts. Despite that, the change of system is seen as positive by representatives of the judicial self-government and CSOs.

115. The law provides for the possibility of a premature end of the tenure of court presidents. Such a premature end of office requires a motion of one third of the judges of the respective court and a ground for dismissal, which is an "application or continuous unsatisfactory discharge of duties as chief judge".[119] The President of the Supreme Court can be dismissed by a "no-confidence vote" of the Plenary of the Supreme Court, and the Plenary has to be convened at the request of one third of its members, conducted in the presence of at least half of the judges of the court, and the decision has to be approved by a simple majority of votes. The reason for such a dismissal is the single fact of no-confidence.[120]

CoE standards and recommendations, key European practice

[118] Ibid Article 24 (Local Courts), 29 (Courts of Appeal), 34 (High Specialised Courts), 42 para 6 (Supreme Court).

[119] Ibid Article 20.

[120] Ibid Article 41.

116. Recommendation CM Rec (2010) 12 of the Committee of Ministers of the CoE states in Paragraph 4: "The independence of individual judges is safeguarded by the independence of the judiciary as a whole. As such, it is a fundamental aspect of the rule of law." The Committee of Ministers also states that CoE member states are obliged to allocate adequate resources to the judiciary[121] and that a sufficient number of judges and appropriately qualified support staff should be allocated to the courts.[122] Judges should be encouraged to be involved in courts administration[123].

117. The obligation of states to adequately staff the judiciary is also underlined by the UN Basic Principles on the Independence of the Judiciary[124] and by the Venice Commission.[125] The CCJE has recalled this duty in several of its Opinions and dedicated a whole opinion to this issue, which is Opinion No. 2.[126] In this Opinion, the CCJE expressed its view that judges should have a say in the drafting of the budget, and their view should be taken into account[127]. This was repeated in more detail in Opinion No. 10 "On the council for the judiciary in the service of society"[128]. Finally, the CCJE also examined the self-government of the judiciary in its Opinion on the relations of the judiciary with the other powers of the state.[129]

118. An eExamination of the legal framework and of the practices related to the powers of court presidents automatically leads to the aspect of internal independence of the judiciary. Judges should be free not only from external influence but also from an influence from inside the justice system. The Venice Commission summarizes the necessity of internal independence as follows: "The principle of judicial independence means the independence of each individual judge in the exercise of adjudicating functions. In their decision-making, judges should be independent and impartial and able to act without any restriction, improper influence, pressure, threat or interference, direct or indirect, from any authority, including authorities internal to the judiciary. Hierarchical judicial organisation should not undermine individual independence." [130]

119. The CCJE dealt with the role of presidents of courts in its Opinion No. 19.[131] Although there are many different competences of court presidents in CoE member states, the CCJE describes the (minimal) role of a court president in representing the court and his/her fellow judges, in ensuring the effective functioning of the court and

---

121 Recommendation CM Rec (2010) 12 para 33.

122 Ibid para 35.

123 Ibid para 41.

124 UN Basic Principles on the Independence of the Judiciary point 7.

125 Venice Commission Report on the Independence of the Judicial System Part I The Independence of Judges CDL-AD(2010)004 para 53.

126 CCJE Opinion No. 2 "On the funding and management of courts" with reference to the efficiency of the judiciary and to Article 6 of ECHR.

127 Ibid para 10 bis 12.

128 CCJE Opinion No. 10 "On the council for the judiciary in service for society", para 42 and 73 bis 76.

129 CCJE Opinion No. 18 "On the position of the judiciary in its relation with the other powers of state in a modern democracy", para 48 bis 51.

130 Recommendation CM; Rec (2010) 12 para22, in the same direction Venice Commission Report on the Independence of the Judicial System Part I. The Independence of Judges, para 64 – 72, and CCJE Opinion No. 1, para 64 – 68, and others,

131 CCJE Opinion No. 19 "On the role of court presidents".

in performing judicial functions.[132] Very often presidents of courts also have the duty to facilitate the possibility of training and encourage judges to participate.[133]

120. The most important principle that presidents of courts have to take into account is the respect for the internal judicial independence of other judges of their court. Any directives or pressure when adjudicating cases is forbidden. Further to that, it is even a duty of court presidents to "act as guardians of the courts' independence, impartiality and efficiency".[134] The CCJE states that due to the fact that courts are essentially collegial bodies, it is preferable to establish bodies composed of judges of the court which play an advisory role and which cooperate with the court president on key issues.[135]

121. In principle, there are two options for how judges become court presidents. They are either appointed following a procedure that is similar to the procedure for becoming a judge, which has to be based on the merit of the candidate, or presidents are elected by the judges of the respective court. In the CoE's member states both models exist. The CCJE recommends that in any of the said options, objective criteria of merit and competence should prevail, although the election process does not always show which merit-based aspects were taken into account by a voter. Further to that, the process of the election cannot be challenged on the substance of the outcome.

122. The terms of office of presidents of courts vary quite a lot in the CoE member states. There is no general recommendation to this end. The CCJE has stated that each system has to find a balance between, on the one hand, allowing the term of office to be long enough to ensure that a court president gains sufficient experience and can implement his or her ideas in practice, and, on the other hand, preventing the term of office from being too long, in which case it can lead to routine and hinder the development of new ideas.[136]

123. The safeguards of irremovability from office as a judge apply equally to the office of a court president[137]. A pre-term removal of a president from office has to have the same restrictions and safeguards as those surrounding the removal of a judge from office. In any case, there have to be clear and objective criteria and any political influence should be avoided.[138]

124. Regarding presidents of Supreme Courts, in many member states the procedure of their selection differs from the procedure of selection of other court presidents. Nevertheless, the CCJE maintains that with regard to the president of the Supreme Court, his/her selection should be merit-based, procedural safeguards should be in place and any political influence should be avoided. With regard to the

132 Ibid para 7.
133 Ibid para 10.
134 Ibid para 13.
135 Ibid para 19.
136 Ibid para 44.
137 Ibid para 45.
138 Ibid para 46 and 47.

latter, the CCJE sees a model, in which the President of the Supreme Court is elected by the judges of the Supreme Court as one with with particular value.[139]

Assessment of the Ukrainian legislation and practice

125. The system of self-government of the judiciary in Ukraine is fully in line with CoE standards and recommendations. The main positive development as regards the self-government is the exclusion of other branches of state power. The role of the President of Ukraine regarding the appointment of judges is reduced to a more or less formal step, in which he/she is to follow the proposal of the HCJ. In the long run, consideration may be given to combining different tasks of judicial self-government bodies into one or at least fewer bodies.

126. However, the influence of other branches of power on the judiciary may be exercised through budgetary dependence. In a democratic society, it is for the parliament to adopt the budget. In Ukraine, the powers of the HCJ and of the Council of Judges of Ukraine have developed positively in practice. Thus, the expenditures for the judiciary were increased; the remunerations of judges were raised to a level which is commensurate with their office and which guarantees their financial independence.

127. Regarding presidents of courts, it was reported to the experst that their influence in practice was reduced. This is in line with the role of court presidents as provided for by the CoE standards. This development obviously was a result of practical, rather than legislative, changes, because the jurisdiction of court presidents almost did not change.

128. The tenure of office changed several times since 2014. This shows that the legislator tried hard to find the balance, which the CCJE addressed in Opinion No. 19 "On the role of court presidents".[140] It looks like a three-year period with the possibility to renew it for a second term fits the situation in Ukraine.

129. A problem might exist in the procedure of dismissal of court presidents from their administrative office. Is such a special procedure necessary at all? Could it not be handled by means of an ordinary disciplinary procedure? The main problem of the procedure, as provided for by the current legislation, is that a decision on the dismissal of court presidents, which is adopted by a secret vote, cannot be motivated on the merits. The result is a "yes" or a "no", depending on the number of votes. It is also questionable if and how such a decision can be challenged. As mentioned above, the position of court presidents should be protected in the same way as the position of ordinary judges. External and internal independence are equally important for presidents of courts and for other judges. If a reasoned decision is not possible, there is not much difference if a minister dismisses a judge, or if a judge's colleagues do the same.

139 Ibid para 56.

140 Ibid para 44.

130. More questions arise in respect of the procedure for a premature end of tenure of the President of the Supreme Court. The legislation requires no reasons for such an end of tenure. It is simply enough if half of judges of the Supreme Court – or a half of the Plenary – vote for a dismissal of the President. The President of the Supreme Court therefore is under permanent threat of losing his/her position due to whatever reasons. This might jeopardise the position of the President within the court and in his/her relations with other state authorities. It might also weaken his/her ability to lead the court effectively, as well as his/her ability to ensure unity of practice. This provision should therefore be either abolished or aligned with the procedure of dismissal of presidents of other courts, and in any case the necessary quorum for the presence and for the majority has to be increased.

131. With regard to the above questions, the following recommendations can be made:

- An in-depth detailed study in order to increase the effectiveness of court administration and court procedures should be delivered;
- The possibility to dismiss the President of the Supreme Court by a vote of no confidence should be abolished or at least reduced as far as possible.