



## **Support to the implementation of the judicial reform in Ukraine**

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

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#### **PROCEDURE OF SELECTION AND APPOINTMENT OF JUDGES TO THE SUPREME COURT IN UKRAINE**

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## ABBREVIATIONS

Administration of the President of Ukraine	APU
Consultative Council of European Judges	CCJE
Council of Judges of Ukraine	CJU
High Administrative Court of Ukraine (before 15 December 2017)	HACU
High Commercial Court of Ukraine (before 15 December 2017)	HCCU
High Council of Justice	HCJ
High Qualification Commission of Judges of Ukraine	HQCJU
High Specialised Court of Ukraine on Civil and Criminal Matters (before 15 December 2017)	HSCU
Judicial Reform Council	JRC
National Association of Advocates of Ukraine	NAAU
National School of Judges of Ukraine	NSJU
Non-governmental organization	NGO
Public Integrity Council	PIC
State Judicial Administration of Ukraine	SJUA
Supreme Court (since 15 December 2017)	SC
Supreme Court of Ukraine (before 15 December 2017)	SCU

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## INTRODUCTION

1. During a meeting in Strasbourg on the 11<sup>th</sup> of September 2017 the Ukrainian authorities requested the Council of Europe (further - CoE) to provide an expert opinion on the compliance of the procedure of the selection of judges to the new Supreme court (SC) with the standards and recommendations of the CoE. The CoE invited Associate Professor Dr. Diana Kovatcheva (further – the Expert) to provide the assessment of the procedure in question.
2. The current Opinion aims to provide information on the compliance of the legislative framework for the procedures for selection and appointment of judges in Ukraine with the standards of the CoE. It also provides recommendations in view of improvement of the legislation. Jointly with the Judicial Reform Council (JRC) and the High Qualification Commission of Judges of Ukraine (HQCJU) it was agreed that the Expert will assess the following issues:
  - 1) Do the evaluation and competition procedures provided by the Ukrainian legislation meet the standards of the CoE related to the evaluation and appointment of judges and judicial candidates?
  - 2) Did the HQCJU complete the evaluation of candidates and competition procedures according to the standards of the CoE related to evaluation and appointment of judges and judicial candidates?
  - 3) Did the activities of the PIC raise any issues as regards the standards of the CoE related to evaluation and appointment of judges and judicial candidates?
3. The Opinion is divided into four parts.
  - a. The First part aims to provide a short description of the new procedure for the selection and appointments of judges in the SC.
  - b. The Second part provides answers to the questions set in the assignment. The information in this part is organised in three sections for each issue:
    - standards of the CoE, related to the selection and appointment of judges;
    - comments on the legislative framework of Ukraine relevant for the selection and appointment of judges;
    - recommendations aiming to contribute to the improvement of the legislative framework and to bring it closer to the standards of the CoE.
  - c. The Third part provides a short general assessment of the legislative framework for selection and appointment of judges to the SC.
  - d. The Fourth part includes the general conclusions with a summary of the recommendations.
4. This Opinion takes into consideration a large number of documents such as the national legislation of Ukraine (the Constitution of Ukraine, laws, sub-laws and regulations, related to the conduct of the competition), legal documents related to the conduct of the procedure of the competition, and documents in which the standards of the CoE on appointment of judges and their independence are regulated. Websites of the relevant judicial institutions were consulted as well. The list of documents analysed and used for the elaboration of the Opinion is attached as an annex.
5. The opinion of the Expert is based on the translated version of the laws and documents received from the CoE.
6. The Opinion is based on a desk research and meetings with relevant stakeholders held in Kyiv on the 12<sup>th</sup> and 13<sup>th</sup> of February 2018. The list of the stakeholders which took part in the meetings is provided in an annex.

## PART ONE

### SHORT DESCRIPTION OF THE NEW PROCEDURE FOR THE SELECTION OF JUDGES TO THE SUPREME COURT

7. The years 2016 and 2017 are marked by a significant development in the process of the judicial reform in Ukraine. The overall objective is to secure the integrity, transparency and efficiency of the judicial system. The activities of the authorities were focused both on the amendment of the legislative framework and the launch of a process of selection and appointment of the best candidates, eligible for judicial positions in Ukraine.
8. The procedure was elaborated and improved on the basis of a significant number of international and European recommendations. The amendments of the legislative framework were completed in 2016 and this enabled the launch of a competitive procedure for selection and appointment of judges. The relevant legislative framework comprises a considerable amount of normative acts and legal documents, involves more than one authority and aims to provide a selection, based on objectivity, transparency and publicity.
9. **The elaboration of the legislative framework, which in large sense involves not only the Constitution and the Law on the Judiciary and the Status of Judges but also a large number of rules of procedure and methodologies, took a lot of effort and finally can be evaluated as a successful exercise.**
10. In addition, when providing a general assessment of the legislation for the selection and appointment of judges one should take into consideration the fact that it designs a very complex procedure which is applied for the first time ever. That is why it will be extremely valuable to use the lessons learned as an opportunity to bring some improvements in the process of selection and appointment of judges in Ukraine.
11. The legislative framework for the selection and appointment of judges in Ukraine provides for detailed and comprehensive rules which were known well in advance. One of the important assets of the procedure is that the competition was conducted in an atmosphere of extremely high publicity. All documents, relevant to the competition, were publicly available prior to its launch (<http://vkksu.gov.ua/ua/ociniuwannia-suddiw/dokumienti/>).
12. On the other hand, the review of the legislative framework reveals a procedure for selection and appointment of judges which can be assessed as lengthy and fairly complicated as it is held on different consecutive levels, involving a large number of bodies with diverse functions and powers: some with both technical and decision-making functions (HQCJU), some with decision-taking functions (HCJ), some with purely advisory functions (PIC) and some with ceremonial functions (the President of Ukraine).
13. The first application of the procedure confronted challenges which resulted in delays in the process of the conduct of the competitions and some technical difficulties. They are all noted in the current evaluation. However, when making the assessment, it should be kept in mind that although they cannot be neglected, these constraints are due to the fact that this is an extraordinary procedure which is applied for the first time ever. These problems should be taken into consideration in view of the remaining vacant positions of judges in the SC, for the other important pending selections, such as the one for the new High Anti-Corruption Court and for another 5000 judges which should be subject to competitions or evaluations in the near future. A side effect of a lengthy procedure could also be an increased caseload for the judiciary and this should be tackled too. It could be expected that in time with the process of its regular application the procedure will be smoother because it will be applied to less candidates which, most probably, will decrease the delays in the future significantly.
14. In addition it should be mentioned that the challenges of such a fundamental judicial reform can be significantly reduced by means of excellent cooperation among the competent institutions. This can be achieved through improved relations between the HQCJU and, possibly, the HJC, on the one side,

and the PIC, on the other, which will also contribute to safeguarding the trust of the society in the judiciary.

15. The new approach for selection and appointment of judges is based on the entry into force of the amendments to the Constitution of Ukraine, the new version of the Law on the Judiciary and the Status of Judges and the new version of the Law on the HCJ. The first stage of the competition is held before the HQCJU with the involvement of the PIC. The recommendations for the successful candidates are considered by the HCJ which makes the final proposal to the President for their appointment. The President issues a decree to appoint the competition winners to the positions of judges in the SC.
16. The first round of selections of the candidates is conducted by the HQCJU - a state body of judicial governance, which operates on a standing basis within the system of justice. It consists of 16 members whose tasks under Article 93 of the Law on the Judiciary and the Status of Judges involve qualification evaluations, organisation of competitions for judicial vacancies, selection of judges, and submitting of recommendations on judicial appointments to the HCJ. Eight members of the HQCJU are elected by the Congress of Judges of Ukraine.
17. The competition before the HQCJU involves several stages:
  - a professional exam (computer-based anonymous testing of professional knowledge and resolving a mock case);
  - testing of personal moral and psychological qualities and general skills;
  - candidates' interviews with professional psychologists who provide the HQCJU with a psychological profile and psychodiagrams of the candidates;
  - HQCJU's review of the candidates' dossiers and interviews with the candidates with the participation of the PIC;
  - HQCJU's decision on the final scores of the candidates.
18. The scoring system in the competition envisaged that a candidate can get a maximum of 1000 points, which consists of the maximum of 500 points given for the candidate's competence and the maximum of 500 points given for the candidate's integrity and ethics.

Competence			Professional ethics	Integrity
professional	personal	social		
300	100	100	250	250

19. Another body involved in the selection procedure is the PIC. The PIC was established to provide an advisory opinion for the purpose of the evaluation procedure. The opinion is focused on the eligibility of the judicial candidate in terms of the criteria of professional ethics and integrity. The PIC is a non-governmental body envisaged by law with the aim to assist the HQCJU in evaluating professional ethics and integrity of the candidates. The PIC consists of 20 members elected by NGOs that meet the formal criteria provided by law. Lawyers, journalists and members of NGOs are the current members of the PIC.
20. The HQCJU holds a plenary session to decide on the PIC's opinion on each candidate. It approves the final rating according to the scores earned by the candidates in the qualification evaluation and sends a proposal to the HCJ.
21. According to art. 1 of the Law on the HCJ, the HCJ is a collective independent constitutional body of public authority and judicial governance which functions in Ukraine on a permanent basis to guarantee the independence of the judiciary and its functioning on the grounds of responsibility, accountability before the society, to guarantee establishing an honest and highly professional judicial

corps in compliance with the provisions of the Constitution and the laws of Ukraine, as well as with the professional ethics in the functioning of judges and prosecutors.

22. The initial selection of the candidates is made by the HQCJU which proposes to the HCJ a list of successful candidates. In the framework of the procedure the HCJ is competent to review the recommendations of the HQCJU. The HCJ makes the final selection based on a procedure developed in the Law on High Council of Justice (Chapter 2, art. 36 – 37).
23. At its plenary session the HCJ deliberates on the candidate for a judge based on the results of a review of the recommendation of the HQCJU, following the presentation of the report by the HCJ rapporteur and the dossier of the candidate. The candidate for a judge, whose appointment is being considered, is invited to the plenary session of the HCJ. The HCJ adopts a decision and presents submission for the appointment of a judge to the office of the President. (art. 128, para. 1 Constitution of Ukraine and art. 3 para. 1 p. 1 from the Law on High Council of Justice)<sup>1</sup>.
24. At the end of the procedure the successful candidates are to be appointed by the President of Ukraine who issues a decree of appointment on the basis of the submissions of the HCJ.
25. The new procedure was applied for the first time for the selection and appointment of 120 judges to the SC and the competition was launched on the 7<sup>th</sup> of November 2016. According to the law the maximum number of judges in the SC should not exceed 200. The selection of candidates started with a high number of applications (1436 candidates for 120 positions, 113 of which were occupied by the successful candidates at the end of the procedure<sup>2</sup>). According to the information from the HQCJU, it has considered 126 negative conclusions of the PIC, regarding candidates who have passed the second stage of the qualification assessment, and 80% of those who received negative opinions were not included in the final rating.
26. The procedure aimed to bring a change among the judges working in the SC prior to the competition. The new legislative framework allowed professionals with different backgrounds to compete. According to the public information, at the end of the procedure among the elected judges were 91 candidates with judicial background (judges), 9 attorneys-at-law, 16 legal researchers with academic background and 4 lawyers with mixed background. They represent a diverse selection in terms of geography and gender.

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<sup>1</sup> Constitution of the Ukraine, art. 128, "A judge is appointed to office by the President of Ukraine on submission of the HCJ according to the procedure prescribed by law".

<sup>2</sup> By February 2018 two proposals for appointment were still pending before the President waiting to receive an Order for Appointment. Currently the President of Ukraine has appointed 118 Supreme Court judges.

## PART TWO

### SELECTION AND APPOINTMENT OF JUDGES TO THE SUPREME COURT: STANDARDS OF THE COUNCIL OF EUROPE AND NATIONAL REGULATIONS

1. Standards for the establishment of institutions/bodies that should be responsible for evaluation of the judges and judicial candidates

#### *Standards of the Council of Europe*

27. The rule of law in a democracy requires not only judicial independence but also the establishment of competent courts rendering judicial decisions of the highest possible quality. However guarantees must be available to ensure that the evaluation is not abused and **no political or other pressure is put on the judges and judicial candidates** or to the individual judgments<sup>3</sup>.
28. According to Opinion 10 of the CCJE for the maintenance of the independence of the judiciary it is essential that both the appointment and promotion of judges are made in an independent way. Judges should not be appointed or promoted by the legislature or the executive - according to the European standard **appointments and promotion of judges should preferably be made by a Council for the Judiciary**.
29. **Furthermore, the authority taking the decision on the selection and career of judges should be independent of the government and the administration.** In order to safeguard its independence, rules should ensure that its members are selected by the judiciary and that the authority decides itself on its procedural rules<sup>4</sup>.
30. In addition to being a constitutional body, according to the standards of the CoE a Council for the Judiciary is considered independent when it has the autonomy to decide on its own operating methods and on subjects for discussion. A Council for the Judiciary is also obliged to safeguard from any external pressure or prejudice of a political, ideological or cultural nature, the unfettered freedom of judges, to decide cases impartially, in accordance with their conscience and their interpretation of the facts, and in accordance with the prevailing rules of the law<sup>5</sup>. One of the important guarantees for the independence of the judiciary is the setup and the composition of the judicial bodies.
31. According to the Venice Commission, the new democracies who did not have the chance to develop legal culture and traditions (which grow over long time), in order to restrain the attempts of the executive to infringe the independence of the judiciary, should have **explicit constitutional provisions as a safeguard to prevent political abuse by other state powers in the appointment of judges**<sup>6</sup>. A Council for the Judiciary is equipped with guarantees for independence when it is positioned at the constitutional level with clear provisions of its setting up and functions.
32. As regards the existing practice of the CoE related to the composition of a Council for the Judiciary, “a basic rule appears to be that **a large proportion of its membership should be made up of members of the judiciary and that a fair balance should be struck between members of the judiciary and other *ex officio* or elected members**”. Thus, a substantial element or a majority of the members of the Council for the judiciary, should be elected by the Judiciary itself<sup>7</sup>. According to Opinion 1 of the CCJE, Recommendation (2010) 12 of the Committee of Ministers and the European Charter on the Statute for Judges<sup>8</sup>, every decision affecting the selection, recruitment, appointment, career progress or termination of office of a judge, envisage the intervention of an authority independent of the executive and legislative powers within which **at least one half of those who sit**

<sup>3</sup> See Opinion 18 (2015), on the position of Judiciary and its relations with the other powers of state in a modern democracy, CCJE, para. 30

<sup>4</sup> See Principle I.2.c of Recommendation No. R (2010) 12 of the Committee of Ministers of the CoE.

<sup>5</sup> Opinion 10 on Council of Judiciary at the service of of society, CCJE, para. 11, para. 13 and para. 14.

<sup>6</sup> See Venice Commission, Judicial appointments, CDL-AD(2007)028, para. 5 and para. 6.

<sup>7</sup> See Venice Commission, Judicial appointments, CDL-AD(2007)028, para. 29.

<sup>8</sup> European Charter on the statute for judges adopted in Strasbourg in July 1998 (DAJ/DOC(98)23).



**are judges elected by their peers** following methods guaranteeing the widest representation of the judiciary. The Explanatory Memorandum explains that the “intervention” of an independent authority was intended in a sense wide enough to cover an opinion, recommendation or proposal as well as an actual decision<sup>9</sup>.

33. The CCJE considers that **such a mixed composition would present the advantages both of avoiding the perception of self-interest, self-protection and cronyism** and of reflecting the different viewpoints within society, thus providing the judiciary with an additional source of legitimacy. However, even when membership is mixed, the functioning of the Council for the Judiciary shall allow no concession at all to the interplay of parliamentary majorities and pressure from the executive. It should be free from any subordination to political party consideration, so that it may safeguard the values and fundamental principles of justice<sup>10</sup>. When there is a mixed composition (judges and non-judges), the CCJE considers that, in order to prevent any manipulation or undue pressure, a substantial majority of the members should be judges elected by their peers “following methods guaranteeing the widest representation of the judiciary at all levels”<sup>11</sup>.
34. **According to the standards of the CoE, the members of a Council for the Judiciary<sup>12</sup>, whether judges or not, must be selected on the basis of their competence, experience, understanding of judicial life, capacity for discussion and culture of independence.** The non-judge members may be selected among other outstanding jurists, university professors with a certain length of professional service, or citizens of acknowledged status. Modern management of the judiciary might even require wider contributions from members experienced in areas outside the legal field (e.g. in management, finances, IT, social sciences)<sup>13</sup>. **The CCJE considers that the composition of a Council for the Judiciary should reflect as far as possible the diversity in the society<sup>14</sup>.**
35. **In conclusion, according to the standards of the CoE, the selection and appointment of judges must be made by a politically neutral body, usually a Council for the Judiciary.** Its autonomy and independence should be material and real as a concrete affirmation and manifestation of the separation of powers of the State.<sup>15</sup> **The Venice Commission is of the view that a Council for the Judiciary should have a decisive influence on the appointment and promotion of judges<sup>16</sup>.**

*Comments on the legislative framework of Ukraine*

36. According to the new legislative framework, the procedure for the selection and appointment of judges in Ukraine is divided among different bodies. The HCJ and the HQCJU play the main role. The role of PIC is advisory and its involvement is not obligatory according to the law. The role of the President is purely formal and ceremonial – signing and legitimising the procedure, without any right to reject or refuse the candidates<sup>17</sup>.

<sup>9</sup> See Committee of Ministers Recommendation No. R 2010 (12) and Opinion 10 concerning the independence of judiciary and the irremovability of judges, CCJE, para 38.

<sup>10</sup> See Opinion 10, CCJE, para. 19.

<sup>11</sup> See Opinion 10, CCJE, para. 18 and para27.

<sup>12</sup> The term “Council for the Judiciary” is the usual term used in the CoE standards to indicate a body responsible for the selection, appointment and evaluation of judges as well as for all issues related to their independence. The same term shall be used in this Opinion when a general reference to such a body is being made.

<sup>13</sup> See Opinion 10, CCJE, para. 21 and para, 22.

<sup>14</sup> Opinion 10, CCJE, para. 24

<sup>15</sup> See Venice Commission, Opinion on Recent Amendments to the Law on Major Constitutional provisions of the Republic of Albania, CDL-INF(1998)009, para. 5

<sup>16</sup> See Venice Commission, Judicial appointments, CDL-AD(2007)028, para. 25

<sup>17</sup> See Venice Commission Opinion, CDL-AD(2013)034, Opinion on Proposals Amending the Draft act on the Amendments to the Constitution to Strengthen the Independence of Judges of Ukraine, §16. According to it there is “no objection against appointment of judges by the Head of State when the latter is bound by a proposal of the judicial council and acts in a ‘ceremonial’ way, only formalising the decision taken by the Judicial Council in substance. Even where the President has the real (not ceremonial) power to choose, his/her choice should be limited to candidates having significant support within the judiciary. See also Opinion of the Venice Commission CDL-AD(2017)031, 11 December 2017, Opinion on the Draft Act Amending the Act

37. The statute and the functions of the HCJ are regulated by the Constitution of Ukraine (art. 131). According to art. 131 the HCJ is competent of presenting submission for the appointment of a judge to the President. Its status is further developed by the Law on the HCJ and the Rules of Procedure of the High Council of Justice.
38. The procedure for selection and appointment of judges is in the focus of the Constitution of Ukraine (art. 128) which states that a judge is appointed on the basis of a competition. The procedure is further developed in the Law of the Judiciary and the Status of Judges, the Law on the HCJ, the Rule of procedure of the HCJ and a number of relevant legal documents. The Constitution of Ukraine regulates the requirements for appointment to a judicial position (art. 127 para. 3) and the functions of the HCJ (art. 131). The judicial body in Ukraine which is directly engaged with the procedure for selection of judges is the HQCJU. Its status and functions are regulated by the Law on of the Judiciary and Status of Judges (art. 92 – 103). The HQCJU is not regulated at the constitutional level.
39. The conduct of the competition is governed by a number of regulations about the procedure, among which the most important are the Regulation on the procedure and methodology of the qualification assessment, eligibility indicators according to qualification assessment criteria and means of their determination, the Regulation on the procedure of the exam taking and methodology of its assessment during qualification assessment and the Regulation on the Procedure and maintenance of the Judicial Dossier. All these documents are related to the conduct of the competition and the powers of the institutions and bodies involved in it.
40. Based on the above-mentioned it could be concluded **that the legislative grounds for the process of selection and appointment of judges, as well as the key judicial institution involved in it, are set at the highest possible level** (in the Constitution of Ukraine) which can be evaluated as the first and indispensable step in for the conduct of an objective process. The constitutional text makes a necessary guarantee against political pressure and influence on the decisions of the judicial bodies, responsible for the procedure.
41. As far as the procedure for the selection and appointment of judges is concerned, the HQCJU is the body entrusted with the technical conduct of the competition and makes the first round of selection among the candidates. The law accredits to the HQCJU the autonomy to decide independently on the selection of judges within the framework of its competence without external supervision or interference by any of the other three bodies. Eight of its sixteen members are elected by the judiciary. It has the power to recommend the candidates who successfully passed the entire procedure for selection and who obtained the highest scores. The PIC is an advisory body comprised of civil society representatives whose role in the procedure is related to providing opinions about the integrity and professional ethics of the candidates. Although not a governmental body, the PIC was institutionalised with an explicit provision in the Law (art. 87) and the issue of its independence is important in the context of its capacity to influence the selection procedure. The Law on Judiciary and the Status of Judges does not provide for explicit provisions about its independence.
42. The HCJ is a constitutional body whose independence is provided for in the Ukrainian legislation. According to the Law on the High Council of Justice, the HCJ is a collective independent constitutional body of public authority and judicial governance which is part of the process of selection and appointment of the judges (art. 1). 10 out of 21 members of the HCJ are elected by the judges and one is the President of the SC acting as an ex officio member. HCJ's role in the procedure is to make the final selection of candidates and to propose to the President the successful candidates for the position of judges.
43. The procedure is dependent both on the individual efficient work of the HQCJU and the HCJ and on

the cooperation among them. Any delay in the work of one of the bodies affects the next stages, any conflict and lack of mutual cooperation among them can also lead to delays.

44. It may happen that the same elements about the same candidate are sent both to the HQCJU and the HCJ and they each have to review it. Here it is important to maintain the distinct responsibilities of each of the two bodies as regulated by the legislative framework: the HQCJU that of delivering a technical competition and the HCJ that of taking final decisions concerning the candidates.
45. **The division of the procedure for selection and appointment of judges to separate segments entrusted to different bodies is generally in line with the standards of the CoE** as long as the process as a whole provides sufficient safeguards against appointments not based on merit.
46. In the long-term with the progress of the judicial reform in Ukraine a simplification of the selection and nomination procedure could be considered as one of possible further steps of the future. The recommendation of the Venice commission is to entrust the entire procedure of the selection and appointment of the judges to one of the judicial institutions, preferably to the HCJ (who has the constitutional mandate)<sup>18</sup>. In this way the HQCJU, which is currently burdened with the technical part of the completion, could become part of the HCJ and continue to do its work as a Commission on selection, which will again have the power to make the initial filter of the selection of the candidates and to propose them for appointment to the HCJ for the formal selection for confirmation of appointment.
47. However, when considering the adoption of such recommendations it should be kept in mind that such decision should be considered as a long-term reform and that that such a reform would require a constitutional amendment.
48. The last actor in the procedure is the President of Ukraine who is responsible for the direct appointment of judges upon the proposal by the HCJ. According to the standards of the CoE, it is widely accepted that the final act of appointment or promotion can be made by an official act of the Head of the State, yet given the importance of judges in society and in order to emphasise the fundamental nature of their function, **Heads of States must be bound by the proposal from the Council for the Judiciary**<sup>19</sup>. The same standard, involving only a ceremonial role of the President, is applied in Ukraine and it does not allow him/her to appoint a candidate not included in the list submitted to it by the HCJ.
49. In the mixed model for the selection and appointment of judges in Ukraine, the legislative framework guarantees that the main role in the process is given to a judicial body, set up with constitutional guarantees of independence. The President is bound by the proposal made by the HCJ and thus the appointment of the judge does not appear to be problematic from the point of view of the standards of the CoE<sup>20</sup>.
50. The only concern may be related to some delays in the issue of the presidential decree for appointment which might remain in a pending position for some time. Avoiding this is a matter of good practice and coordination among the institutions involved in the procedure.

### Recommendations

51. The institutional model for the procedure for selection and appointment of the judges provided for by the legislative framework could be subject to simplifications in future amendments of the legislation.
52. Some of the delays and difficulties in the procedure are due to discrepancies between the legal regulations and their first implementation in practice. The strict application of the legal framework will contribute to the improvement of some aspects of the procedure.

<sup>18</sup> See, Venice Commission, Opinion on the Draft Law on the amendments to the Constitution, Strengthening the Independence of Judges and on the Changes to the Constitution proposed by the Constitutional Assembly of Ukraine, para. 40, CDL-AD(2013)014.

<sup>19</sup> See Opinion 10, CCJE, para. 49.

<sup>20</sup> See Venice Commission, Judicial appointments, CDL-AD(2007)028, para. 13 – 16.

## 2. Objective criteria and appointment on the merits

### Standards of the CoE

53. According to Recommendation No. R 2010 (12) para 44. judicial appointments should be based on “objective criteria pre-established by law or by the competent authorities. Such decisions should be based on merit, having regard to the qualifications, skills and capacity required to adjudicate cases by applying the law while respecting human dignity”<sup>21</sup>. In addition, political considerations should be inadmissible. The objective criteria provide the possibility to exclude any political influence<sup>22</sup>.
54. The same requirement can be found in Opinion No 1 (2001) of the CCJE, according to which “every decision relating to a judge’s appointment or career should be based **on objective criteria** and be either taken by an independent authority or subject to guarantees to ensure that it is not taken other than on the basis of such criteria”.
55. As mentioned by the Venice Commission, “in Europe, methods of appointment vary greatly according to different countries and their legal systems; furthermore they can differ within the same legal system according to the types of judges to be appointed<sup>23</sup>”. However, the general principles pointed out in the Recommendation and the Opinions of CCJE are applicable to all procedures for judicial appointments in order to safeguard the independence of judges, regardless of the specifics of the legal system.
56. According to the Report on the Independence of the Judicial System Part I: the Independence of Judges of the Venice Commission<sup>24</sup> and Opinion No. 1 of the CCJE, “the authorities, responsible in member States for making and advising on appointments and promotions, should now introduce, publish and give effect to **objective criteria**, with the aim of ensuring that the selection and career of judges are “**based on merit, having regard to qualifications, integrity, ability and efficiency**”.
57. **Merit is not solely a matter of legal knowledge analytical skills or academic excellence. It also should include matters of character, judgment, accessibility, communication skills, efficiency to produce judgments, etc.**
58. According to ENCJ Report 2012-2013, section 4.8.31, the criteria for the evaluation of professional performance of judges should be **comprehensive**, and should include **both quantitative and qualitative indicators**, in order to allow a full and deep assessment of the professional performance of judges<sup>25</sup>.
59. According to Opinion 10 of the CCJE, para 93, “transparency in the appointment and promotion of judges, will be ensured by publicising the appointment criteria and disseminating the post descriptions”. **Any interested party should be able to look into the choices made and check that the Council for the Judiciary applied the rules and criteria based on merits in relation to appointments and promotions.**
60. According to Opinion 17 of the CCJE the individual evaluation of judges is relevant to both the judicial independence and the maintaining and improving the quality and the efficiency of the judicial

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<sup>21</sup> See Recommendation CM/Rec (2010) 12, adopted by the Committee of Ministers of the Council of Europe on 17 November 2010, on the proposal of the European Committee on Legal Co-operation (CDCJ), para. 44.

<sup>22</sup> See Recommendation No. R 2010 (12) of the Committee of Ministers of the CoE, para. 36 Therefore it is necessary to regulate their composition, the appointment of members and respect for pluralism in order, for example, to reach a gender balance, transparency and reasoning of their decisions and to ensure that they are free from political or corporate influence

<sup>23</sup> See Venice Commission, Judicial appointments, CDL-AD(2007)028, para. 7

<sup>24</sup> See the Report on the independence of the judicial system Part I: the independence of judges, (2010) Venice Commission para.

<sup>25</sup> See the ENCJ Report 2012-2013, section 4.8. 31.

systems. In this Opinion, the phrase “individual evaluation of judges” comprises the assessment of individual judges’ professional work and their abilities. Opinion 17 is referring mainly to the evaluation of serving judges (individual evaluation of judges who have already been appointed to office for their period of tenure) and does not discuss judges’ initial appointment. However, some of the general principles in the Opinion could be used to indicate the standards for evaluation in the context of a competition.

61. As far as the concrete evaluation of the judicial candidates is concerned in most member states, **a number of quantitative and qualitative criteria are used for the individual evaluation of judges. The criteria for the evaluation of the professional performance of judges should be comprehensive, and should include both quantitative and qualitative indicators, in order to allow a full and deep assessment of the professional performance of judges**<sup>26</sup>

Furthermore, and by way of background, factors such as the number of cases decided by the evaluated judge, the time spent on each case and the average time to complete a judgment are frequently taken into account as “quantitative” criteria. Many member states consider as important the number of decisions issued by the evaluated judge and/or the number of cases otherwise concluded (e.g. by settlement or withdrawal). In some member states, the productivity of a judge is measured against a fixed quota or against the average number of decisions handed down by other judges. **As “qualitative” criteria, the quality of a judge’s analysis and the way in which the judge handles complex cases is considered of great importance in the evaluation process.** In many member states, the number or percentage of decisions reversed on appeal are factors that are considered of great importance in the evaluation process. In others, because of the principle of judicial independence, neither the numbers of decisions reversed on appeal nor the reasons for the reversal are taken into account, unless they reveal grave mistakes. Other factors considered are the ability to mediate between parties, the ability to draft clear and comprehensible judgments, the ability to cooperate with other colleagues, to work in areas of law that are new to the judge and the readiness to take on extra activities within the court’s administration such as mentoring and educating recently appointed judges or lawyers. Organisational skills, work ethics or scholarly activities such as publications and lecturing are also treated as factors. Violations of ethical and professional rules/standards are considered in the evaluation process in almost all member states where there is an evaluation of judges and such principles are laid down. All member states which completed the questionnaires differentiate between the process of evaluation and disciplinary measures<sup>27</sup>.

62. Objective standards are required not merely in order to exclude political influence, but also for other reasons, such as to avoid the risk of a possible impression of favouritism, conservatism and cronyism, which exists if appointments/evaluations are made in an unstructured way or on the basis of personal recommendations. **These objective standards should be based on merit, having regard to qualifications, integrity, ability and efficiency**<sup>28</sup>. The CCJE considers that a heavy reliance on the number of cases a judge has decided is problematic because it might lead to false incentives<sup>29</sup>.

#### **Comments on the legislative framework of Ukraine**

63. The process of selection of the candidates in the competition for judges is part of a formal system in which the aims of the process of selection, the eligibility criteria used, the composition of the selecting body, the grading system, are **all clearly set out in advance in a number of regulations**<sup>30</sup>. The selection of judges based on a competition is regulated by the Constitution of Ukraine, the Law on the Judiciary and the Status of Judges, the Law on the HCJ, the Rules of Procedure of the HCJ and several legal acts elaborated for this purpose, namely the Regulations on the Procedure and Methodology of Qualification Assessment, Eligibility Indicators, according to

<sup>26</sup> Opinion 17 CCJE, para. 32

<sup>27</sup> Opinion 17, para. 13

<sup>28</sup> See Opinion 17 CCJE, para. 31.

<sup>29</sup> See Opinion 17, para. 34.

<sup>30</sup> See Opinion 17 on the evaluation of judges’ work, the quality of justice and respect for judicial independence, para. 9.

Qualification Assessment Criteria and Mean of Determination, the Regulation of Exam taking and Assessment and the Regulation on the Procedure of Maintenance of the Judicial Dossier.

64. The Regulations on the Procedure and Methodology of Qualification Assessment, Eligibility Indicators, according to Qualification Assessment Criteria and Mean of Determination (Regulations on the Procedure and Methodology) is one of the key documents regulating the conduct of the competition. It provides for the concrete rules of the qualification assessment procedure which are detailed and comprehensive and gives exhaustive information on the concrete indicators and the way they are determined. The Regulations on the Procedure and Methodology enumerates the indicators to be used for the evaluation of the eligibility of the judge. In addition, it provides for detailed information of the score making approach for the indicators. This information is important to the candidates and provides for clarity of the procedure. **The document is publicly available on the website of the HQCJU and is accessible for the society and the candidates.** Thus the candidates can get acquainted with it prior to the competition. The predictability of the procedure brings a higher level of confidence in society about the integrity and the credibility of the results. In addition, it should be mentioned that **all relevant documents related to the competition are public and can be found on the website of the HQCJU** which enables the candidates to be aware in advance about the all conditions and the consequences of the procedures related to the competition.
65. The Regulations on the Procedure and Methodology provide for information on the stages of the qualification assessment and involve: **exam taking and review of a judges' file (dossier) and an interview.** There are three main qualification criteria according to the Regulation on the Procedure and the Methodology: competence (professional, personal, social, etc.), professional ethics and integrity. The Regulations on the Procedure and Methodology and the Regulation of Exam Taking and Assessment regulate the eligibility indicators for professional competence. The eligibility of the candidate is based on the assessment of his/her professional, personal, psychological and social competence, as well as professional ethics competence and integrity of the candidate. Thus both Regulations refer to the ways in which the different types of assessments shall be conducted, for example psychological testing, general skills testing, results from surveys of representatives of the parties, information from training institutions and other consultative bodies.
66. The indicators of the eligibility of the judicial candidate according to qualification assessment criteria are studied separately from each other and in their integrity as well. One of the important rules for assessment which gives rise to an objective assessment is that the quality indicators prevail over quantity ones. The Regulation provides for detailed and explicit rules for the qualification assessment methodology. The indicators are exhaustive and encompass a variety of the abilities needed for a judge to perform his or her judicial functions in a professional way. The eligibility indicators are explicitly mentioned in a very detailed manner. Each indicator is further developed so that its content is clarified accordingly with more sub-indicators.
67. The choice of the criteria in the Regulations on the Procedure and Methodology are in line with the standards of the CoE mentioned above and provide a good basis for objective decisions in the framework of the competition. An important asset of the selection process is the fact that the scientific work of the candidates is also taken into consideration for the sake of the evaluation (12,2% of the successful candidates have a scientific background). In addition, it should be mentioned that specific eligibility indicators are elaborated for judges who participate in the competition, which include level of the knowledge of law and law enforcement, skills and abilities in the holding of court hearings and issuance of court rulings, efficiency in judicial administration and efforts to improve professional level. Information on the candidate is provided for by the National School of Judges in Ukraine as well.
68. The HQCJU takes into account the professional work of the judge-candidates for the SC through review of some of their judicial acts on the basis of random selection. Some of the important indicators which reveal the professional competence and aptitude are related to the ability to hold a court hearing and to pass court decisions, the ability to systematise and generalise information; the ability to clearly and understandably formulate and set out the legal standpoint; the ability to compile clear and reasoned court decisions; the ability to substantiate the reasons for accepting or rejecting the

arguments of the parties on the merits of the case in a court decision; and the compliance with the norms of procedural law by the judge in a court hearing. Attendance of an open court hearing in the case selected at random by the HQCJU inspector, without prior notification of the judge undergoing assessment, is provided for as well.

Integrity is determined on the ground of indicators taking into consideration the information from the asset declarations, the conflict of interest declarations, compliance with ethical standards, limitations set for gift taking and opinions of the PIC.

The personal qualities of the candidates such as organisational capacity, general personal characteristics, ability to control one's emotions, rationality, self-control, ability to act as a mediator in conflict situations, ability to set priority, ability to plan and use working hours and influence resistance are assessed as well. In addition to the information about the candidates gathered in the framework of the competition, the final assessment is made on the basis of information and documents submitted by the judicial candidate as well as any other information available, including information from qualifications and disciplinary commission of the Bar, academic institutions, research entities, higher educational institutions, public organisations carrying out scientific and sci-tech activity.

69. A positive aspect in the procedure is the information about the candidates, provided by different public authorities including National Police, National Anticorruption Bureau of Ukraine (NABU) and National Agency for Prevention of Corruption.
70. It should be mentioned that the HQCJU is using contemporary means for assessment of the candidates, such as computer based tests (for the general ability testing) and audio recordings of court sittings. The development of a special software complex for the test and the practical assignment compilation is arranged by HQCJU. A 360° assessment aims to get the data on how professional and personal qualities of the judge find expression in his/her daily activities and what is the perception of the style, methods and results of his/her work. A positive approach in the procedure is also that the test is prepared by the National School of Judges of Ukraine under the Qualification Assessment Exam Program. The development of test variants is an important prerequisite for prevention of leakages of information on the contents of the relevant test.
71. The rules and procedures for the conduct of the exam are regulated by Regulation on the procedure of exam taking and methodology of its assessment during qualification assessment. It provides for information on the methodology of exam grading. The rules provide for anonymity of the candidates which is an important prerequisite for the confidentiality of information, objectivity of the evaluation, impartiality of the scoring of each candidate and the evaluation of the qualities of the candidates. The methodology of the qualification assessment provides for detailed information about the approach in which the HQCJU evaluates the information on the relevant candidate and calculates the points. In general, the competition procedure can be assessed as predictable and marked by a high level of publicity.
72. **It could be concluded that the assessment of the candidates in the context of the competition was based on a thorough, extensive, broad and public examination of the qualities of each candidate.** The indicators for assessment refer to the professionalism, personal quality, integrity and efficiency of judicial work of the relevant candidate. This approach enables the HQCJU to make a complete and in-depth assessment of the candidates in the framework of the competition. The approach taken for the assessment provides the HQCJU with the necessary basis for ensuring equal and impartial treatment of all the candidates in the competition.
73. The information about the qualification assessment is posted on the HQCJU's official website. The course of the qualification assessment is registered by technical means including video recordings of examinations and audio recording of interviews. According to the Regulation on the procedure and methodology, the audio recordings of the meetings constitute an integral part of the minutes of the meeting which brings publicity to the procedure.
74. The HQCJU sessions in which the PIC opinions are discussed are open according to the law and broadcast via the Youtube. A PIC representative can participate and take the floor in each session.



The HQCJU members pose questions to the candidate and PIC representative to clarify the facts. The specifics of the system of assessment of selection of judicial candidates which involves both governmental and non-governmental bodies requires sufficient level of transparency of the decision making process of all stages. This is especially true for situations where there are conflicting views. Such open sessions are recommended in the context of competitions for judges. They are different in their logic compared to the procedures of evaluation of the performance of acting judges in view of their regular assessment and promotion, where the process of assessment should remain confidential in order to secure their reputation and trust in the judiciary<sup>31</sup>. When the question is about selection of judicial candidates in a competitive process it should be as open as possible and all issues should be clarified in advance to the final selection of candidates. This extreme transparency in this case is a key issue which builds trust and makes citizens confident that the candidates with compromised qualities are evaluated accordingly and will not be selected. The Venice Commission supports the idea of public hearings<sup>32</sup>. According to it, “in principle, all decisions concerning the appointment and the professional career of judges, which should include the appointment to the highest posts within the judiciary, should be based on merit, following pre-determined objective criteria set out in law, and **open and transparent procedures**”<sup>33</sup>. A threat to the independence according to the Venice Commission could be “Submitting a candidate’s performance as a judge to scrutiny by the general public” but not the public hearing itself: a campaign of “petitions” by citizens and others who feel disgruntled by their decisions, for example, may have a “chilling” effect and impact their independence<sup>34</sup>.

75. As envisaged by law, the HQCJU deliberates in camera on each candidate and returns to the session room to announce the decision. Deliberation in camera (in a deliberation room) is an important safeguard to ensure the independence and unbiased status of the HQCJU members. This can be assessed as a very positive development because it provides for opportunities for direct public control over the process of assessment of the candidates
76. **The publicity of the results from the exam should be positively assessed as well.** The publicising of the results of the exam follows a procedure provided for by the Regulation on the exam taking. The results are being made public on the official web-site of HQCJU on the next business day after they are determined at the latest.
77. The second part of the selection process of the candidates is related to the conduct of an interview which enables the HQCJU to acquire a personal and direct impression on the candidate. The interview lies in the discussion of the results from the exam and study of the dossier. It also involves several predetermined stages, including provision of explanations, questions and discussion of the data and information available in the dossier. The candidate is provided with an opportunity to expand and clarify or refute the information presented in the report and acquired so far. Although the interview is not public by definition, it may be attended in the observer capacity by any stakeholder, by a judicial self-government body and/or representatives of the PIC. This option provides for publicity of the interview and is a guarantee against subjective behavior of some of the interviewing members.
78. In the framework of the procedure, the HQCJU has the possibility to use the conclusions of the PIC, which, although not binding, provides information on the qualities of each candidate. The PIC provides HQCJU with its opinion of non-eligibility of the judicial candidate according to professional ethics and integrity criteria. If there is a negative PIC opinion, HQCJU holds a plenary session in

<sup>31</sup> On regular evaluation of judges see Opinion 17 on the Evaluation of Judges Work, the Quality of Justice and Respect for Judicial Independence (2014), CCJE, para. 48

<sup>32</sup> See Venice commission, CDL – AD (2017)018, Opinion No 855/2016 on the Judicial System Act of Bulgaria note 58, p. 21. See also the Venice commission, Venice commission Opinion on the Draft Judicial code of Armenia, CDL-AD(2017)019, para. 118 on the need of reasonable explanation of about the procedure for selection of judges.

<sup>33</sup> See [CDL-AD\(2016\)025](#), Joint Opinion on the Draft Law “On Introduction of Amendments and Changes to the Constitution” of Kyrgyz Republic, para. 52.

<sup>34</sup> See Venice commission Draft Joint Opinion on the Law on the Judicial System and the status of judges in Ukraine, CDL-AD(2010)026, Opinion No. 588 / 2010, para. 60



which all the HQCJU members participate. In the plenary session the HQCJU either supports or overrules the PIC opinion. Based on the results of an individual qualification assessment stage the HQCJU adopts a resolution confirming the eligibility of the judicial candidate or resolution not confirming the eligibility of the candidate (art. 32). The final resolution adopted by the HQCJU contains a reasoning part. It takes into consideration the Opinion of the PIC about non-compliance of the relevant candidate as far as the criteria of professional ethics and integrity is concerned. The reasoning part of the resolution states the reasons for the adoption or rejection of the PIC opinion. This approach should be assessed in a positive way. The judicial candidate who disagrees with the HQCJU's resolution following his/her qualification assessment may appeal it on the grounds provided for in art 88 and 101 of the Law.

79. **Based on the above-mentioned information it can be said that the procedure for the exam taking was marked by clarity and predictability and a high level of publicity.**
80. In the context of the evaluation of the judicial candidates a big credit should be given to the methodology for assessment. Despite of some recommendations mentioned below, whose aim is to improve and strengthen it, it should be mentioned that the methodology for assessment of the judicial candidates should be assessed in a very positive way. It is comprehensive and provides for an objective process of selection through the scoring system. One of the important assets of the methodology is the fact that it was published well in advance to the procedure so that the candidates and the public can get acquainted with it. This approach provides for the first time a very good basis for transparent and fair selection of the candidates. In this way the new approach to make the methodology public and accessible prior to the competition makes a real difference to the previous approach where no transparency, openness and predictability of the process were provided for. With no intention to underestimate the positive aspects of the procedure for the selection of judges, some comments can be made with a view to an ideal model of a scoring system. The greater part of these observations was shared by the stakeholders during the meetings held in Kyiv, after the completion of the procedure for the selection and appointment of the judges in the SC. In this respect it could be mentioned that in the process of evaluation it is best if the objective indicators prevail over the subjective ones. In view of this, the scoring system could reflect a balance in which the capacity (professional, personal and social) could bring more points than the total of the professional ethics and integrity. According to the standards of the CoE, the selection of judges should be **based on merit, having regard to qualifications, integrity, ability and efficiency**<sup>35</sup>. Obviously, integrity is one of the important aspects of the evaluation, but the other three characteristics such as qualifications, ability and efficiency of the candidate should also have their relevant weight in the process of assessment.
81. It should be mentioned that the professional ethics and the integrity are both related to the professional behavior and ethical standards, necessary to exercise a particular profession. When evaluating the professional ethics and the integrity of a candidate, it is not possible to put a very strict line between the indicators which assess them. The Codes of conduct (Ethical codes) usually regulate also the issues of integrity through the checks of the conflict of interest and the assets of the judges which makes the integrity an important aspect of the ethical behavior of a judge. Disciplinary issues as part of the ethics also have a bearing to the integrity of candidate.
82. Last but not least, the HJC has the possibility to attribute additional weight to the integrity and personal ethics after the final decision of the HQCJU on a candidate has been referred to it for consideration. According to art 79. Para. 19, the “High Council of Justice [new] may refuse to submit a proposal to the President of Ukraine regarding appointment of a judge to the office exclusively on the following grounds: 1) **if there is reasonable doubt that the candidate meets the criterion of integrity or professional ethics or other circumstances which may have a negative impact on public trust** in the judiciary due to such appointment; “.

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<sup>35</sup> See Opinion 17 CCJE, para. 31

83. Thus, the ratio which is now 500:500 could be made 600:400 which will give more weight to the assessment of the indicators for the competence of the participants and still will attribute the necessary importance to the indicators related to the integrity and professional ethics. Such balance could bring more weight to the more objective indicators from an assessment. For example, some more precision could be attached to the content of p. 5.2.2 “Other indicators which brings 150 points” in order to clarify it. The same is valid for the content of p. 5. 3. 2 “Other indicators – 150 points”. In addition, it could be considered that they could bring 100 each, instead of 150 points. The remaining 100 extra points could be transferred to the indicators related to the “Competence”.

Competence			Professional ethics	Integrity
professional	personal	social		
300	150	150	200	200

Note has been taken of the careful explanations provided by the Judicial Reform Council as to the background to the choices made in terms of the weighting of the indicators. These are valid considerations, arising out of the context in Ukraine where a particular emphasis on integrity has been important in connection with the appointment of judges. One could envisage that with time, as the results of the measures introduced to strengthen the integrity of the judiciary take root, there would be scope for a more pronounced focus on professional competence as compared to integrity. Both are clearly crucial, the issue is one of emphasis.

84. In addition, in the context of the professional competence evaluation for the senior judicial positions, it could be suggested that the test evaluating the knowledge of the law could carry less weight than the practical assignment and the assessment of the ability to conduct court proceedings, capacity to write reasoned decisions, the ability to cope with the workload, decide, the openness to new technologies, the ability to mediate, the respect for the parties, and, the ability to lead for those whose positions require it. The knowledge of law is an important prerequisite for the junior judges. However, for the senior judicial position the knowledge of law is expected and it is much more important to evaluate the ability of the candidate to do judicial work. In view of this within the 90 points, fewer points could be attributed to the level of knowledge in the field of law and more to the level of practical skills and abilities in law application.
85. In the context of the scoring system, the issue with the regulation of the **minimum passing score** during the competitions for judges should also be mentioned. In a situation of many candidates it is useful to determine a minimum passing score in order to select the best candidates. In view of this, the inclusion of a regulation for the minimum passing score can be assessed as a necessary part of the Rules for the procedure of the Methodology. According to the regulation, the minimum acceptable score constitutes the score awarded following the assessment under a qualification assessment criterion, which entitles the candidate to proceed with the qualification assessment (art. 6, p. 6.1).
86. There would be value in making sure that the Rules of procedure indicate the stage at which the minimum acceptable passing score should be defined. In order to provide impartiality to the process it is best if the minimum passing score is defined in advance, before the personalisation of the results.
87. Some comments can also be shared about the practical exercise as it has a serious importance in the context of the assessment procedure for the evaluation of the professional competence of the candidates. The legislation provides explicit regulation for the professional exam which involves a computer-based anonymous MCQ testing of professional knowledge and **resolving a mock case**. The usual practice in similar competitions is to use hypothetical (mock) cases which provide the participants with the opportunity to show their level of knowledge, practical skills and abilities in the application of the law, ability to administer justice at the relevant court and with the relevant specialisation. This approach is much more appropriate than using real judicial cases, which can be

familiar to some or most of the judges. This is why it could be recommended for future competitions to use real cases only to the extent to which it is necessary for the development of a hypothetical case for the practical assignment. In this way the case will be new to all the candidates and they shall be put in equal conditions.

88. Furthermore, some commentaries can be made about the judicial dossiers of the candidates. According to the law, all the information about the candidate is kept in a judicial dossier whose goal is to reflect the objective information on the judge when assessing his/her professional activity. This dossier is also of use for the selection work and the decision of HQCJU when discussing the recommendations.
89. The regulations and the rules for the judicial dossier can be found in a separate document entitled Regulation on the Procedure of Maintenance of the Judicial Dossier. This document was elaborated in advance, prior to the beginning of the competition for the SC which should be assessed in a positive way. The information contained in the dossier aims to provide for a complete and thorough information for the candidate, his/her professional and personal qualities and his/her integrity. The Regulation for the dossier provides for a unified sample form of the dossier, annexed to it. The dossier is in compliance with the relevant legislation in force including the Law on the Personal Data and the Law on Access to information.
90. According to the Regulation on the Procedure of Maintenance of the Judicial Dossier, the Judicial Dossier is a set of documents with restricted access containing information for internal use and stored in the appropriately equipped location, except for the information and documents whose making public is stipulated by law. A register with the dossiers of all candidates is set up. The register is not accessible to the public. But according to the law, for the time of the delivery of the competition, the dossiers are publicized at the HQCJU website. When the competition is over, the dossiers are removed. In view of the above, it should be mentioned that the high number of candidates and the heavy procedure for the competition naturally leads to some difficulties related to the implementation of this stage of the competition. The HQCJU has to gather, scan and organise a huge number of documents which refer to the judicial dossier of each of the candidates in the competition. This is a time-consuming operation which leads to technical difficulties especially as far as the scanning of thousands of pages is concerned. The delay of the procedure and the heavy burden on the HQCJU are inevitable. According to the law (art. 85 para. 6) the judicial dossier (dossier of judicial candidate) should be created and maintained in an automated system compiling and maintaining judicial dossiers (dossiers of judicial candidates), which should become operational within two months after the entry into force of the Law (art. 41).
91. The lack of such automated system during the entire procedure of the competition makes the process of gathering the information and especially the process of its scanning very difficult, which in turn delays the possibility for the HQCJU to ensure public access to the information as provided by the law.
92. In the absence of an automated system, the deadline of two months provided in the law could be reconsidered. Based on the experience with the amount of information which is to be made publicly available, the HQCJU could make a recommendation for a deadline which is achievable and which takes into consideration the technical constraints and all aspects of the procedure.
93. In a best case scenario, all the relevant information shall be organised in an integrated automated system which will significantly shorten the deadlines and simplify the work of the HQCJU. In its most efficient modification the automated system should serve the entire judicial system and thus it can greatly contribute to meeting the deadlines provided in the law, the management of the information and its publicity.
94. One significant point of concern during the process of the assessment of the candidates is the use of the ungrounded sources of information as indicator for the evaluation of their integrity, which is made part of their assessment according to the Regulation on the PIC. Such indicator should be used with utmost care and attention. This should be assessed in a very positive way and be regarded as a positive improvement.

95. As mentioned above, the examination and the analysis of the information by the HQCJU, HCJ and the PIC **should be based on clear and objective criteria (indicators) and should be justified**. This is why the ungrounded sources of information about a judge cannot be the main and only source of information, because it is unclear and also because the individual evaluation process for career or promotion purposes should not take account of public views on a judge (Opinion 17, para 48). Furthermore, the legislative framework for the competition for the SC does not require the institutions involved in the procedure to give opinions on the reputation of a judge.
96. In the view of the CCJE, the individual evaluation process for career or promotion purposes **should not take account of public views on a judge**. They may not always be the result of complete or fully understood information or such views may possibly even be based on a misunderstanding of the judges' work overall<sup>36</sup>. The Venice Commission has already commented on these issues in 2011 underlying that "Submitting a candidate's performance as a judge to scrutiny by the general public, i.e. including by those who have been the object of unfavourable rulings, constitutes a threat to the candidate's independence as a judge and a real risk of politicisation"<sup>37</sup>. Judges must feel free to render decisions that are sometimes unpopular with politicians or which certain persons do not like, judges should not be subjected to the prospect of campaign of "petitions" by citizens and others who feel disgruntled by their decisions. **In the same way of thinking, the judgment of the reputation and the integrity of the judge should not be subject of scrutiny by the general public**<sup>38</sup>.
97. **The negative reputation of a judge or a judicial candidate cannot be ignored in the evaluation procedure but it should be checked against objective criteria, the information should be verified and the conclusion cannot be based unverified sources of evidence**. Even in the case of publications in the media the information should be checked and verified as much as possible<sup>39</sup>.
98. In order to provide a complete and thorough analysis of the legislative framework for the selection of judges it should be mentioned that during the meetings with stakeholders, held in Kyiv, they shared some views about the competition for the SC. These comments are valuable in view of the fact that they give information about the implementation of the legislative framework for the selection of judges. Some of them, who have been shared several times, could be mentioned in view of the fact that they can contribute to the improvement of the legislation or the practices in the upcoming competitions.
99. One of the main concerns was that the complicated procedure for the competition led to serious delay in the procedure which took one year instead of the planned six months. This provoked a general concern among the participants, especially those who were serving judges and who had to simultaneously do their judicial work and prepare for the competition. In addition, the long and delayed procedure for the SC affects the deadlines for the other planned competitions, whose potential delay risks to bring a general postponement to the entire reform process.
100. Other concerns go to timing for the exam as the timeframe is reported to have been too tight and the participants did not know how much time they had and how to plan their timing.
101. In addition, the use of handwriting during the exam was assessed as too slow, tiring and difficult for the correction of mistakes, rearrangement of paragraphs or parts of the document. Typing was assessed as a faster and much more convenient method for writing in addition to the fact that thus the text can be read much more easily by the HQCJU members, which would have saved time from the process of assessment.
102. As far as the clarity of the methodology for assessment is concerned, some of the critical remarks went to the lack of methodology of the assessment published by the PIC which prevented the participants from being informed in advance about the assessment that they would undergo.

<sup>36</sup> See Opinion 17, CCJE, para. 48.

<sup>37</sup> See Venice commission Draft Joint Opinion on the Law on the Judicial System and the status of judges in Ukraine, CDL-AD(2010)026, Opinion No. 588 / 2010, para. 60

<sup>38</sup> See Opinion on the Rules and Procedure of the PIC of the CoE, para. 3.2.

<sup>39</sup> Opinion on the Rules and Procedure of the PIC of the CoE, para. 3.5

## Recommendations

103. The developed methodology and its scoring system should continue to be applied in future procedures as this brings objectivity and predictability to the procedure.
104. Amendments to the Rules of procedure of the methodology could be considered in order to indicate the stage at which the minimum acceptable passing score should be defined.
105. Some technical improvements could be considered, such as the use of only hypothetical cases for the practical assignment.
106. The introduction of an automated system compiling and maintaining judicial dossiers could significantly speed up the procedures and facilitate the work of the HQCJU. The two-month deadline provided for in the law for the introduction of an automated system could be reconsidered.
107. Amendments to the Regulation of the PIC could be introduced to prevent the use of the ungrounded sources of information about a judge as the main and only source of information, because it is unclear and also because the individual evaluation process for career or promotion purposes should not take account of public views on a judge. A negative reputation of a judge or a judicial candidate could not be ignored but it should be checked against objective criteria, the information should be verified and the conclusion cannot be based on rumours.

### 3. The role of the High Judicial Council of Justice in the appointment of the judiciary

#### Standards of the CoE

108. As mentioned above, according to the standards of the CoE the role and the influence of a Council for the Judiciary in the selection, appointment and promotion of judges should be decisive. This view is shared by the Venice Commission<sup>40</sup>. It is so in view of the protection of the independence of judiciary and the need to exclude any possible influence by the other state powers on the process of the selection and appointment of judges.
109. A Council for the Judiciary should be a politically neutral body, whose autonomy and independence should be material and real as a concrete affirmation and manifestation of the separation of powers of the State<sup>41</sup>. The authority taking the decision on the selection and career of judges should be independent of the government and the administration<sup>42</sup>. In addition a Council for the Judiciary is also obliged to safeguard the judiciary from any external pressure or prejudice of a political, ideological or cultural nature, the unfettered freedom of judges, to decide cases impartially, in accordance with their conscience and their interpretation of the facts, and in accordance with the prevailing rules of the law<sup>43</sup>.
110. The maintenance of the independence of the judiciary is among the important tasks of a Council for the judiciary and according to Opinion 10 of the CCJE it is essential that both the appointment and promotion of judges are made in an independent way.
111. The selection and appointment of judges made by a Council for the Judiciary is also related to the need to secure the functioning of an efficient judiciary composed of judges with indisputable professional capacity and integrity<sup>44</sup>.

<sup>40</sup> See Venice Commission, Opinion on Recent Amendments to the Law on Major Constitutional provisions of the Republic of Albania, CDL-INF(1998)009, para. 5.

<sup>41</sup> See Venice Commission, Opinion on Recent Amendments to the Law on Major Constitutional provisions of the Republic of Albania, CDL-INF(1998)009, para. 5.

<sup>42</sup> See para. 46 from Recommendation No. R (2010) 12 of the Committee of Ministers of the CoE.

<sup>43</sup> See Opinion 10 on Council of Judiciary at the service of of society, CCJE, para. 11, para. 13 and para. 14.

<sup>44</sup> See Opinion 18 (2015), on the position of Judiciary and its relations with the other powers of state in a modern democracy, CCJE, para. 30.

112. One important issue related to the maintenance of the independence and impartiality of the judiciary is the prevention of conflict of interest. The CoE treats the existence of conflict of interest as a serious infringement of the integrity and ethical standards within the judicial system. According to Opinion 18 of the CCJE “ In their professional and private relations with the representatives of the other powers, judges must avoid any conflict of interest and avoid any behaviour that might create a perception that judicial independence and impartiality and the dignity of the judiciary in general is impugned”<sup>45</sup>. As part of the policy for prevention of corruption, a judge has to recuse him or herself where there may be an actual or perceived conflict of interest<sup>46</sup>. In order to support the national systems in the process of curbing the conflict of interests, the CoE has provided a model “Code of conduct for public officials” which suggests a definition according to which “conflict of interests arises from a situation in which the public official has a private interest which is such as to influence or appear to influence the impartial and objective performance of his or her official duties”. According to this Code of conduct, the private interest includes any advantage to the public official to his/her family, close relatives, friends and persons or organisations with whom he/she has had business or political relations. It includes also any liability, whether financial or civil related thereto<sup>47</sup>.

### **Comments on the legislative framework of Ukraine**

113. Following the completion of the selection of judges as part of the procedure applied by the HQCJU, the latter makes a recommendation to the HCJ for the appointment of the successful candidates. The procedure for the review of the recommendation is regulated by Chapter 2 art. 36 – 38 from the Law on HCJ. According to it, the HCJ adopts a decision as to the motion of the President on the appointment of a judge, based on the results of a review of the recommendation of the HQCJU, accompanied by a personal file dossier of the candidate judge. A HCJ rapporteur is appointed to draft a preliminary review and report on the possibility of a judicial appointment and submits the report for consideration to the HCJ. The report is presented to a session of the HCJ. The HJC can approve or refuse to submit a judicial appointment to the President of Ukraine. Art. 37 from the Law on HCJ regulates the refusal to submit a proposal for judicial appointment. Such a refusal should be reasoned. The justification of the decision is a positive aspect. It should include reference to the grounds envisaged by the law and based on which the HCJ came to the respective conclusions. **The justification should be an integral part of the decision and made public without delay.** This will guarantee a high level of transparency of the procedure and especially of the decision-making process.
114. The legislation provides to the HCJ the power to refuse to propose a candidate recommended by the HQCJU for appointment to the President on two grounds only: when the HJC receives information about the candidate which was not available to the HQCJU or when this information was available but the HQCJU did not provide due assessment of this information within the procedure of qualification. When verifying such information, the HCJ uses the procedures provided for it in the legislative framework for the competition. In order to thoroughly examine such information, the HCJ should have enough time for its verification. This is why a deadline for sending such information could be set in order to secure enough time for its verification prior to taking the final decision on the candidate in question.
115. It should be acknowledged that in some cases the delay in the procedure is due to objective reasons such as pending disciplinary procedures when the decision is dependent on the outcome of the disciplinary case.
116. Another issue which could be considered is the conflict of interest of the members of the HCJ and the conditions under which they can withdraw from deliberations and voting. In case the legislation does not provide for sufficiently clear procedural rules for conflicts of interest, such rules could further be developed. The members of the HCJ could be involved in training on identification and

<sup>45</sup> See Opinion 18 of the CCJE, para. 42.

<sup>46</sup> See Opinion 18 of the CCJE.

<sup>47</sup> See Model Code of Conduct for Public Officials art. 13 “Conflict of interests”, adopted by the Committee of Ministers at its 106 session on 11 May 2000.

recognition of a conflict of interest, so that they can better address situations with their recusal or remaining in the procedure.

117. The decision of the HCJ can be appealed and revoked on the grounds established by the Law on the Judiciary and the Status of Judges.

### **Recommendations**

118. The justification should be an integral part of the decision of the HCJ.
119. Deadlines fixing a moment after which no additional information from external sources about the candidates should be submitted to HCJ could be considered.
120. Strengthening of the capacity of the members of the HCJ could be provided to help them better identify the situations of the conflict of interest and, consequently, decide on possible withdrawals.

### **4. Participation of other professionals in the procedure for the selection and evaluation of judicial candidates<sup>48</sup>**

#### **Standards of the CoE**

121. The opinions of a number of European bodies, such as the Venice Commission, the CCJE, the European Commission for the Efficiency of Justice (CEPEJ), and the Committee of Ministers of the CoE do not refer directly to bodies similar to the PIC of Ukraine and its status and functions. However, some of the general principles in their opinions may be used and conclusions could be drawn as regards the PIC.
122. As far as the evaluation and assessment of judges is concerned, according to Opinion 3 of the CCJE: **“evaluation should be undertaken mainly by judges”** in order to protect the judicial independence<sup>49</sup>. It should be mentioned that the standards of the CoE do not forbid that professionals may take part in the evaluation process if they can make a useful contribution. **However their role could be only advisory and not decisive.**
123. According to Opinion 10 of the CCJE, associating persons external to the judiciary (lawyers, academics, representatives of the civil society, other governmental authorities) into the process of development of ethical principles is justified in order to prevent possible perception of self-interest and self-protection, while making sure that judges are not deprived of the power to determine their own professional ethics<sup>50</sup>.
124. It should be mentioned that according the Compilation of Venice Commission Opinions and Reports concerning Courts and Judges, **“The evaluation of judges with the involvement of prosecutors and advocates is a very sensitive issue. Of course, both prosecutors and advocates are well placed to know a judge’s strengths and weaknesses. However, they are not disinterested observers”**<sup>51</sup>. There is a risk that a judge may tailor his or her relations with particular prosecutors or advocates to secure a more favourable assessment **or may be perceived as doing so**. Furthermore, there is a particular risk in involving prosecutors in the assessments of judges in legal cultures where historically the prosecutors dominated the judiciary. These considerations would not have the same force if retired advocates or prosecutors were to be used as assessors.
125. 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

<sup>48</sup> For more detailed information on each of the questions please refer to the full text of the Opinion on the Rules of Procedure of the PIC of the CoE.

<sup>49</sup> See, Opinion 3 of the CCJE, para. 37.

<sup>50</sup> Opinion 10 of the CCJE Para. 62.

<sup>51</sup> Compilation of Venice Commission opinions and reports concerning courts and judges, p. 26

and experience of the judicial system to be capable of properly evaluating the work of judges<sup>52</sup>.

126. Another issue which is usually at stake in the course of the evaluation of the judges is the question of the assessment of their judgments. Standards of the CoE exist as regards the assessment of judicial decisions as well.
127. In its Opinion No. 11 (2008), the CCJE discusses the importance of high quality judgments. In order to evaluate the quality of a judge's decision, evaluators should **concentrate on the methodology a judge applies in his/her work overall, rather than assessing the legal merits of individual decisions. The latter must be determined solely by the appeal process.**
128. The same conclusion is reached in Opinion 18 of the CCJE, according to which "In accordance with the fundamental principle of judicial independence, the appeal system is in principle the only way by which a judicial decision can be reversed or modified after it has been handed down and the only way by which judges can be held accountable for their decisions, unless they were acting in bad faith"<sup>53</sup>.
129. Evaluators could consider all aspects that constitute good judicial performance, in particular legal knowledge, communication skills, diligence, efficiency and integrity. To do that, evaluators should consider the whole breadth of a judge's work in the context in which that work is done. Therefore, the CCJE continues to consider it problematic to base evaluation results on the number or percentage of decisions reversed on appeal, unless the number and manner of the reversals demonstrates clearly that the judge lacks the necessary knowledge of law and procedure<sup>54</sup>.

#### **Comments on the legislative framework of Ukraine**

130. As mentioned earlier the PIC is established with the purpose to assist the HQCJU in the process of verification of the information and the delivery of the final conclusions for the evaluation of judges and candidates for judges. Its status is regulated by art. 87 of the Law on Judiciary and Status of Judges and its status and by the Rules of Procedure of the PIC. The PIC takes part in the process of the individual evaluation of judges and judicial candidates, therefore its work should aim at improving the judiciary while ensuring the highest quality possible.
131. The purpose of the work of the PIC is described in detail in art. 87 of the Law on the Judiciary and the Status of Judges and is related to assisting the HQCJU in determining the eligibility of a judicial candidate in terms of the criteria of professional ethics and integrity for the purposes of qualifications evaluation. This is the leading regulation for the mandate of the PIC. The Rules and procedures on the PIC further develop the Law on Judiciary and according to its art. 2 para. 1, the main task of the PIC, is to facilitate the work of the HQCJU in establishing compliance of a judge to the criteria of professional ethics and integrity for the purposes of qualification evaluation by providing information on findings and non-compliance of a judge /judicial candidate with these criteria.
132. In general terms it could be said that not all the regulations in the Rules of Procedure of the PIC take account of the standards of the CoE on the independence of judiciary. As far as some of aspects of its work are concerned (the conflict of interest rules; the verification of information, the review of judicial decisions and the methodology available in advance of the procedure) it should be mentioned that they do not comply with the standards of the CoE and the recommendations and comments listed in the Opinion on the Rules and Procedure of the PIC could be taken into consideration in order to bring the Rules in closer compliance with the standards for the independence, evaluation of judges and appointment of judicial candidates<sup>55</sup>.
133. According to art. 88 of the Law on the judiciary and the status of judges, if the PIC issues a

<sup>52</sup> See Opinion 3, CCJE, Para. 37

<sup>53</sup> Opinion 18, CCJE, para. 25

<sup>54</sup> See Opinion 17 on the Evaluation of Judges Work, the Quality of Justice and Respect for Judicial Independence (2014), CCJE, para. 35

<sup>55</sup> Additional information on the PIC, see in Opinion on the Rules and Procedures of the Public Integrity Council of Ukraine, from April 2017, at: <https://rm.coe.int/council-of-europe-opinion-on-the-rules-of-procedure-of-the-public-coun/1680722415>.



negative conclusion on a judge or judicial candidate, the HQCJU can overrule this conclusion and confirm the eligibility of the judge to administer justice. This article should be assessed as a positive amendment to the text of the Law in compliance with the standards of the CoE. The importance of the conclusion on non-conformity of the PIC is very high and can be overruled by the HQCJU only by qualified majority. As rightly mentioned in the Rules of procedure of the PIC, the HCJ only facilitates the work of the HQCJU in the process of qualification evaluation of judges and cannot take the final decision on the integrity and ethics of a judge.

134. This regulation is in compliance with the standards of the CoE, notably para. 37 of Opinion 3 of the CCJE: “In order to protect judicial independence, evaluation should be undertaken mainly by judges”. This principle should be applied when the final decision for the appointment of judges and judicial candidates in Ukraine is taken. It should be mentioned that the standards of the CoE do not forbid to professionals who can make a useful contribution to the evaluation process to participate in it, **however their role could be only advisory and not decisive.**
135. In reference to the decision of the PIC, the same standards about the verification of information about the judicial candidates apply. Unverified information should not be included or used when drafting the conclusion.
136. Conflict of interest situations should be tackled accordingly, in order to ensure the highest standards for transparency and integrity of the members of the PIC. In view of this, the respect of the principle of independence of the judiciary requires to follow the general principles that serving attorneys-at law and prosecutors cannot take part in the process of evaluation of judges. Since the mandate of the members of the PIC is two years, simple withdrawals based on conflict of interest is not a suitable option, because in the course of two years serving lawyers or prosecutors could appear before any of the judges (judicial candidates) under evaluation.
137. In addition, the PIC is taking part not only in the selection of the judicial candidates but also in the evaluation of the regular judges. The power to evaluate judges may in general **have a chilling effect** even on judges that are not currently under evaluation, when members of the PIC appear before them in Court. In view of this, the recommendations of the CCJE to use retired lawyers as members of such bodies could be considered, because it is not realistic for serving lawyer to stop his/her practice for at least two years and sit on an advisory body without any payment to make his/her living.
138. As far as the process of setting up of the PIC is concerned, some recommendations could be made about the nomination and election of its members. A procedure for public nomination and selection for the civic organisations in the PIC exists and this should be assessed as a positive approach. However, the organisations selected for members of PIC, in practice are represented by concrete persons whose nomination and selection are not open or known to the public. In view of this, transparent rules for the nomination and selection of the concrete persons representing the civil organisations in the PIC should be provided for to guarantee a high level their professional competence and personal integrity. For example, a public audition of their motivation/concept for work could be held, involving questions from a selection committee, NGOs and experts. Asset declarations and declaration of conflict of interest of the members of the PIC could be provided as well. It would be good if proof of their professionalism (education diplomas, related work experience, specialisations etc.) are provided for in addition to the CV. The professionalism and the integrity of the members of the PIC should be beyond reproach.
139. On the level of ethical standards and integrity, the good European practices recommend the establishment within the judiciary of one or more bodies or persons having a consultative and advisory role and being available to judges whenever they have some uncertainty related to integrity and ethical rules.
140. In view of the need for further improvement of the Law on the Judiciary and Status of Judges and the Rules of Procedure for the work of the PIC, several particular remarks should be made:
- 1) One of the key conclusions on the competence and powers of the PIC is that **its decisions cannot be binding on the HQCJU** due to the advisory role that the PIC has under the procedure of the competition.

- 2) According to the Law, the PIC is empowered to analyse and check **only information related to the integrity and ethics of the judges**, but it does not have the competence to consider the credibility of judicial decisions. This regulation is in compliance with the standards of the CoE because **no institution or body outside of the judiciary and the judicial control should be able to evaluate the credibility of the acts or actions of judges**. About their decisions judges are accountable through the appeal process (“judicial accountability”)<sup>56</sup>.

141. In view of this, as far as the powers of the PIC are concerned it can give opinions only on the professional ethics and the integrity of a judge or judicial candidate and not on the credibility of his/her decisions or acts. The evaluation of a judge (judicial candidate), e.g. the assessment of his/her professional knowledge and competence, moral, ethical and psychological integrity is the task of the body entrusted with the process of evaluation (in this case the HQCJU) and the opinion of the PIC is an element which should be related only to the ethics and integrity of the judges and the judicial candidates. The use of the ungrounded sources of information about a judge should not be allowed. Even in the case when information is published in the mass media, it should be checked and confirmed as thoroughly as possible.
142. Thus, the criteria for the evaluation of the judges, which the PIC is part of, should be related only to the scope of its mandate: “determining the eligibility of a judge (judicial candidate) in terms of the criteria of professional ethics and integrity for the purpose qualifications evaluation” (art. 87). The evaluation of the competence of the judge (professional, personal, social) remains only within the mandate of the HQCJU (art. 83).
143. Only the verified information should be included in the final opinion on a particular candidate.
144. Organisations and members of the public may provide information about a candidate’s integrity to the HQCJU but the candidate for a judicial position is entitled to study such information, provide explanations and contest or deny it.

### **Recommendations**

145. The involvement of civil society in the process of selection and assessment of judicial candidates can bring more transparency and objectivity to the procedure by identifying information on candidates which otherwise might remain hidden to the public.
146. The role of the PIC in the procedures for the selection and appointment of judicial candidates as well as for the evaluation of judges, should remain purely advisory and their opinion cannot be binding on the HQCJU or the HCJ.
147. Strict principles of verification of the information used for the evaluation should be applied at all times by all bodies involved in the competition procedure (PIC, HQCJU and HCJ).
148. A negative conclusion of the PIC should always be based only on verified information, especially in a situation when the conclusions and the opinions will become public.
149. The ungrounded sources of information about a candidate or a judge cannot be used without a process of verification of the information.
150. No body outside of the judiciary and the judicial control should be able to evaluate the credibility of the decisions of the judges. This is why the PIC can give an opinion only on the professional ethics and the integrity of a judge and not on the credibility of his/her decisions or acts.

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<sup>56</sup> Opinion 18 2015), on the position of Judiciary and its relations with the other powers of state in a modern democracy, CCJE, para. 25: “In accordance with the fundamental principle of judicial independence, the appeal system is in principle the only way by which a judicial decision can be reversed or modified after it has been handed down and the only way by which judges can be held accountable for their decisions, unless they were acting in bad faith”.

151. In order to have a transparent and credible result, it could be suggested that the PIC elaborates and publishes in advance a methodology for the evaluation of judges and judicial candidates undertaken by it. Such a methodology could provide for the objective criteria for evaluation used by the PIC instead or in addition to the Rules of Procedure and provide more information to the candidates on the evaluation that they will undergo.

## 5. Standards of transparency and publicity of information

### Standards of the CoE

152. Transparency is an essential factor in the trust that the public has in the functioning of the judicial system and is a guarantee against the danger of political influence or the perception of self-interest, self-protection and cronyism within the judiciary.

153. Transparency in the appointment and promotion of judges will be ensured by publicising the appointment criteria and disseminating the post descriptions. Any interested party should be able to look into the choices made and check that a Council for the Judiciary applied the rules and criteria based on merits in relation to appointments and promotions.

154. CCJE Opinion 10 para. 50 states that, although the system for the appointment and promotion of the judiciary is essential, it is not sufficient. There must be **total transparency in the conditions for the selection of candidates**, so that judges and society itself are able to ascertain that an appointment is made **exclusively on a candidate's merit and based on his/her qualifications, abilities, integrity, sense of independence, impartiality and efficiency**.

155. Therefore, according to the standards of the CoE, it is essential that, in conformity with the practice in certain States, the appointment and selection criteria **should be made accessible to the general public by every Council for the Judiciary**. A Council for the Judiciary shall also ensure, in fulfilling its role in relation to the court administration and training in particular, that procedures for judicial appointment and promotion based on merit are opened to a pool of candidates as diverse and reflective of society as a whole as possible.

156. In addition, where more senior posts are concerned, particularly that of a head of jurisdiction, general profiles containing the specificities of the posts concerned and the qualities required from candidates should be officially disseminated by the Council for the Judiciary in order to provide transparency and accountability over the choice made by the appointing authority. This choice should be based exclusively on a candidate's merits rather than on more subjective reasons, such as personal, political or an association/trade union interests<sup>57</sup>.

157. All decisions by a Council for the Judiciary on appointment, promotion, evaluation, discipline and any other decisions regarding judges' careers **must be reasoned**<sup>58</sup>.

158. Last but not least, according to Opinion 10, para. 91, of the CCJE, given the prospect of considerable involvement of the Council for the Judiciary in the administration of the judiciary, **transparency in the actions undertaken by this Council must be guaranteed**.

### Comments on the legislation of Ukraine

159. The assessment of the level of transparency and publicity of the procedures for the selection and appointment of judges can be made based on the assessment of the legislative framework of the procedures for the competition, the assessment of the opinions of the PIC, the procedure for the recommendation by the HQCJU and the HCJ, and the content of institutional websites<sup>59</sup>. The opinions and comments of international and European organisations can also be taken into consideration in this respect.

<sup>57</sup> See Opinion 10, CCJE, para. 51.

<sup>58</sup> Ibid., para. 92 and 93.

<sup>59</sup> The transparency of the procedure was discussed also in the context of the general overview of the process of selection of the judicial candidates.

160. The procedure of the competition and the exam taking before the HQCJU was marked by a high level of publicity of the information about the procedure of the competition and the successful candidates. Information can be found on the website of the HQCJU and is accessible both for the candidates and for the public at large.
161. The stages of the competition and the results from the exam at each stage were published on the website of the HQCJU, all interviews were videotaped, available for watching and streamed via the YouTube. All persons concerned could attend all the qualification assessment stages and be present during the evaluation.
162. According to information from the HQCJU, it held 5 press conferences, 10 meetings with regional media, more than 50 meetings with international organisations, more than 20 interviews for electronic and print media and dozens of comments in TV and radio channels. During the exam, 120 video cameras were recording the process in the presence of 30 representatives of media and the PIC. 25 observers from 7 international NGOs monitored the qualification assessment.
163. Although with a delay, all dossiers were scanned and published on the official website of the HQCJU via a link.
164. All these facts lead to the conclusion that during the competition for the SC, all necessary measures were taken to make the process transparent and open to monitoring in order to eliminate suspicions about deficiencies of the procedure or manipulation of the rules of the competition.
165. On the other hand, it should be mentioned that the Law on the HCJ does not include explicit provisions about the transparency of the procedures and it remains unclear which documents from the decision-making process can be publicly available.
166. As far as the sessions of the PIC are concerned, these are not always public and transparent, although the documents with the conclusions are published via website. In the context of the high level of transparency in work of the judicial bodies engaged in the process of selection of judicial candidates it should be mentioned that the PIC does not follow similar standards as far as its session for deliberation on the candidates are concerned. The entire process of the selection of judges should be totally open and transparent so that it does not generate any doubts about the impartiality and fairness of the process. This is why it is extremely important to provide for full transparency of the discussions of the PIC as far as the candidates are concerned.

### **Recommendations**

167. The standards of transparency and publicity of information during the selection process should be assessed in a very positive way as they indicate a new approach in the process of selection and appointment of judicial candidates which is based on the highest standards of the CoE.
168. Introduce clear rules on which documents related to the procedure can be publicly available.
169. Complete the Rules and Procedures for the work of the PIC in order to provide for full transparency of its sessions and the documents when the candidates for judicial positions are deliberated.

## **6. Sources of information**

### **Standards of the CoE**

170. Opinion 17 of the CCJE, as it applied to in-service evaluations, provides options on the sources of information used in the evaluation process and **requires that the sources are reliable**<sup>60</sup>. This is especially so in respect of information which is the basis for an unfavorable evaluation. Also, according to the standards of the CoE, it is essential that such evaluation is based on sufficient

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<sup>60</sup> See Opinion 17, CCJE, para. 39.

evidence. The evaluated judge or judicial candidate should have immediate access to any evidence intended to be used in an evaluation so it can be challenged if necessary.

171. The formal individual evaluation of judges, where it exists, should help to improve and maintain a judicial system of high quality for the benefit of the public of the member states. **This should thereby help maintain public confidence in the judiciary.**
172. This requires that the public must be able to understand the general principles and procedure of the evaluation process. **Therefore, the procedural framework and methods of evaluation should be available to the public.**
173. Moreover, in the view of the CCJE, the individual evaluation process for career or promotion purposes **should not take account of public views on a judge.** Such views may not always be the result of complete or fully understood information, or such views may possibly even be based on a misunderstanding of the judges' work overall.
174. Last but not least, it is largely recognised that it is extremely difficult to reconcile the issues of judicial independence with the procedures for evaluation of judges. An evaluation of judges and judicial candidates which is held with respect for the independence of judges and which does not affect the reputation of the judicial system, is likely to contribute to raising a low level of confidence of the public in the work of the judiciary<sup>61</sup>.

#### **Comments on the legislation of Ukraine**

175. As far as the sources of evidence are concerned, the standard is set in Opinion 3 of the CCJE, according to which **the sources of information used in the evaluation process must be reliable.** This is especially so in respect of information on which an unfavorable evaluation is to be based<sup>62</sup>.
176. In addition, it is essential that such an evaluation **is based on sufficient evidence.**
177. The evaluated judge should have immediate access to any evidence intended to be used in an evaluation so that it can be challenged if necessary.
178. An individual evaluation of judges and the inspection assessing the work of a court as a whole should be kept entirely separate. However, facts discovered during a court inspection, can be taken<sup>24</sup> into account in the individual evaluation of a judge . As far as the standards for processing and handling of the information collected during the evaluation of candidates are concerned (including the standards for protection of the confidentiality of personal information), the rules of personal data legislation should be applied accordingly. In addition, all the information used during the evaluation, especially the one which becomes public, **should be carefully verified to the greatest possible extent. Unverified information should not be used in the process of the competition of the judicial candidates.** The unverified information, especially when it is negative, lowers the trust of the public in the judiciary.
179. The laws and regulations regulating the procedure of selection and evaluation for the HQCJU provide for reliable sources of information and verification of the information about the candidates.
180. The Regulation of the powers of the PIC could also be improved with rules for verification of the information about the candidates so that the standards of the CoE can be met.

#### **Recommendations**

181. Only verified information could be used in the assessment qualification of candidates or evaluation of judges by all institutions and bodies taking part in these procedures.
182. The regulative framework could be further improved to meet the standards of the CoE in light of the rules for the evaluation and verification of information about the candidates by the PIC.

<sup>61</sup> See Opinion on the rules of procedure of the Public Council of Integrity of Ukraine of the CoE.

<sup>62</sup> See Opinion on the rules of procedure of the Public Council of Integrity of Ukraine of the CoE.

## GENERAL ASSESSMENT OF THE LEGISLATIVE FRAMEWORK OF THE PROCEDURE FOR SELECTION AND APPOINTMENT OF JUDGES TO THE SUPREME COURT

183. The change in the concept for selection and appointment of the judiciary as a whole is a big challenge not only for the institutions but also for the society of each country. This is why in all new democracies such reforms should be carried out with utmost care and attention, in order to safeguard the independence of the judiciary and to eliminate any suspicion of political interference in this process.
184. The CoE envisages comprehensive and clear standards for the selection and appointment of judges in which the main requirements are related, on the one hand, to objective criteria for selection, based on merit and, on the other to the independence of the judicial bodies engaged in this important choice. According to the standards of the CoE, the selection of judges is a substantial part of the process of safeguarding the independence of the judiciary as a whole.
185. In 2016-2017, a fundamental reform of the judiciary was undertaken in Ukraine with the aim to bring a change to the selection and appointment procedure of the judiciary and to bring this procedure in line with the CoE standards. The overall objective is to provide an opportunity for the best candidates to fill the positions of judges.
186. The reform had two significant stages. The first one related to the amendments of the legislation in force which regulates the selection and appointment of judges. This phase aimed to provide a legal framework introducing objectivity, integrity, transparency and publicity to the procedures. The second stage is related to the conduct of highly competitive procedures which aim to select the best candidates for the positions of judges in Ukraine.
187. **The legislative framework took into consideration a large number of international and European recommendations and to a great extent is in compliance with the standards of the CoE.** It provides for detailed and comprehensive rules which were known well in advance. This allowed for the conduct of a competition for the SC marked by an atmosphere of extremely high publicity.
188. When assessing the implementation of the new legislation during the competition for the SC it should be kept in mind that this is a very complex procedure which was applied for the first time. In order to be fulfilled it goes through different consecutive levels and involves a large number of bodies with diverse functions and powers. All of this makes the procedure for selection and appointment fairly complicated. However, the high public interest and the significance of the process justify the need of a detailed procedure which is transparent and credible at all its stages.
189. The challenges of the remaining competitions and procedures of evaluation of judges can be overcome by small amendments and by confronting some technical difficulties which became obvious during its first application. An excellent cooperation among the competent institutions could bring a positive effect to the application of the procedure. This can be achieved through improved relations between the HQCJU and the HJC, on the one hand, and the PIC, on the other. This will also contribute to safeguarding the trust of the society in the judiciary.
190. The general assessment of the procedure reflects the overall conclusions from the evaluation of the legislative framework and their compliance with the standards of the CoE. In addition to the general remarks above, the conclusions are further divided into three parts in order to reflect the three main questions about the procedure set in the assignment for drafting the current opinion.

**Do the evaluation and competition procedures provided by the Ukrainian legislation meet the standards of the CoE related to the evaluation and appointment of judges and judicial candidates?**

191. The recent amendments to the Ukrainian legislation are part of an in-depth and large-scale reform of the judiciary. It provides for an entirely new procedure which is applied for the first time and encompasses a large number of candidates. The review of the legislative framework for the selection and evaluation of judges in Ukraine indicates that although there is room for improvement, the procedures meet to a great extent the standards of the CoE in this field. The legislative framework can be assessed as an impressive development and its strict application should be encouraged in the future procedures as well.
192. **Some minor recommendations still remain but it is important to mention that the overall change is very positive.** This endeavour should be encouraged especially in the context of its first launch and the extraordinarily high number of candidates which were subject to assessment.
193. **Although some discrepancies between the law and its application were registered, the legislative framework should be assessed in a very positive way. One of the biggest assets of the legal regulation is that it provides a procedure which is marked by transparency, objectivity and predictability.** In this respect it differs to a huge extent from the previous one. The conduct of the procedure is based on a methodology announced well in advance and available to the candidates and society at large. The objective and subjective criteria for assessment are in relatively good balance.
194. In Ukraine, the complicated multi-level process of selection and appointment of judges involves more than one body, each responsible for a different segment of the procedure. This approach is in general in line with the standards of the CoE. If it incorporates the relevant guarantees for the protection of the independence of the judiciary, it represents no danger to the rule of law.
195. The selection and appointment procedure for judges is regulated in detail by the Ukrainian legislation and provides a new approach for a highly competitive and public reform of the judiciary. **The legislative framework involves a large number of legal documents which in general can provide an opportunity for the conduct of a comprehensive, inclusive and clear procedure, marked by a very high level of publicity.**
196. The qualification assessment procedure is regulated in a set of documents which are public and accessible. The methodology, indicators for assessment and the scoring system are developed in detail and are available in advance. The use of contemporary methods for the conduct of the competition, together with the fact that a large number of relevant institutions are consulted in the process of selection, brings more objectivity to the procedures. In addition, the process of selection of the candidates is marked by a high level of publicity which enables efficient external scrutiny over the competition.
- The review of the legislative framework indicates that some recommendations could be made with a view to its improvement. It should be mentioned that some of the recommendations to the procedure for the selection and appointment are not related to lack of compliance with the standards of the CoE but rather to problems resulting from the large number of candidates, from technical problems and from the fact that the procedures have been applied for the first time.
197. CoE suggestions which could be considered by the Ukrainian authorities relate to the scoring system which could give more weight to the objective indicators and the assessment of the professional competence and judicial qualities of the candidates; defining the minimum passing score in advance; the introduction of an automated system which will significantly shorten the deadlines and simplify the work of the HQCJU to ensure full transparency of the procedure and faster access to documents.
198. In the long-term, a simplification of the procedure could be considered as one of further steps in the future through the perspective of entrusting the entire process of selection and appointment of

judges to one judicial body (preferably one with a constitutional mandate), which will make the process much faster and simpler.

199. Last but not least, improvements to the Rules of Procedure for the PIC could be made in order to bring them into compliance with the standards of the CoE. The recommendations concern several aspects: resolve internal issues of conflict of interest (serving lawyers evaluating judges), introduce a public methodology for the assessment of the candidates, enhance the procedure for the verification of information, refrain from using the ungrounded sources of information of the candidates and refrain from evaluation of judicial decisions.

**Did the HQCJU complete the evaluation of candidates and competition procedures according to the standards of the CoE related to evaluation and appointment of judges and judicial candidates?**

200. As mentioned above, the legislation, regulating the competition, is in its greater part in compliance with the standards of the CoE. The legislative framework involves a large number of legal documents which in general provide a very good basis for the conduct of a comprehensive, objective, inclusive and clear procedure, marked by an extremely high level of publicity.

When assessing the legislative framework it should be taken into consideration that the procedure that it regulates is being applied for the first time and on a critically high number of candidates. Despite of some discrepancies between the law and the practice of its application, it should be noted that the new regulation for the procedure makes a great difference to previous cases in which selection, assessment of judicial candidates and evaluation of judges have been made. This positive trend should be encouraged and assessed in a very positive way. Hopefully with the decrease of the number of the candidates in the future the procedure will be applied in less extraordinary environment and will become smother and faster.

201. The current opinion focuses on the compliance of the relevant Ukrainian legislation with the standards of the CoE. However, further in-depth research may need to be undertaken to assess the overall practice of the HQCJU in the application of this legislation.

**Did the activities of the PIC raise any issues as regards the standards of the CoE related to evaluation and appointment of judges and judicial candidates?**

202. The legal status and the legislative framework of the PIC were subject to a separated analysis which can be found in the CoE Opinion on the Rules and Procedures of the Public Integrity Council of Ukraine, done in April 2017.

203. As far as the compliance of the regulatory framework about the PIC is concerned several remarks could be made. On the one hand, it should be mentioned that the participation of civil society representatives in the process of assessment of the candidates for judicial positions can be assessed as a valuable input which brings more transparency to the procedure and could cast light on information which could otherwise remain hidden to the public. **Forms of public control over the selection process are welcome as long as they remain purely advisory.**

On the other hand, when the involvement of civil society in the procedure for assessment of judicial candidates is regulated by the law, it should be in full compliance with the standards of the CoE in the same way as this is required for the regulations about the public bodies. The legal status and the practice of the PIC should be in line with the standards of the CoE in order to secure objectivity and fairness of the entire procedure in which they participate as well.

204. **The assessment indicates that some amendments to the Rules and Procedure of the Public Integrity Council could be seriously considered in order to bring the work of PIC in compliance with important standards of the CoE** which are meant to secure the independence of judges and the



process of their selection and assessment. Some of the recommendations go to the process of verification of information which is also crucially important to the final conclusions about any judicial candidate. In view of this the regulatory framework should reflect the standard about the use of verified information in the course of the assessment of candidates or evaluation of judges. The practice of PIC should be amended accordingly.

In addition, both the sessions and documents related to the deliberations of the PIC should be subject to transparency. The selection of the concrete representatives of the civil society organisations which constitute the PIC should also be subject to public rules of selection in order to secure high professionalism and integrity. Last but not least, the lack of methodology which describes all the methods of assessment and is published prior to the procedure, prevented the transparency and predictability of the process of assessment by the PIC and was not in compliance with the standards of the CoE.

205. In view of all this it could be concluded that the regulation of the PIC is still not in full compliance with the CoE. Bringing the regulation in line with the recommendations can be considered as a positive development of the entire procedure in order to secure its fairness and legal certainty.

## MAIN RECOMMENDATIONS

206. As stated above, the large-scale reform of the judiciary in Ukraine provided for an entirely new procedure for the selection and evaluation of judges and it, to a great extent, complied with the standards of the CoE. At the same time, a few recommendations of a minor character still remain and these are summarized as follows:

- 1) The methodology, together with its scoring system, should be further applied by the HQCJU in future procedures. The methodology can be assessed as an impressive development introducing objectivity, publicity, competitiveness, transparency and predictability to the procedure for the selection of judicial candidates.
- 2) Discrepancies between the legal regulations and the practice due to their first implementation should be avoided in the future, including delays in the issue of documents regarding candidates, a difficult access to information, the use of real cases in the test.
- 3) Consideration could be given to adjusting in due course the scoring applied in the methodology of selection in order that the criterion of capacity (professional, personal and social) may bring more points than the total of the assessment of candidates' professional ethics and integrity.
- 4) The introduction of an automated system compiling and maintaining judicial dossiers may be considered to significantly speed up the procedures and facilitate the work of the HQCJU. The two-month deadline provided for in the law for the introduction of an automated system could be reconsidered.
- 5) A deadline for provision of external additional information on candidates to judges to the HCJ should be defined in order to secure sufficient time for its verification.
- 6) Strict principles of verification of the information used for the evaluation should be applied at all times by all bodies involved in the competition procedure (HCJ, HQCJU, PIC).
- 7) The role of the PIC in the procedures for the selection and appointment of judicial candidates, as well as for the evaluation of judges, should remain purely advisory and their opinions cannot be binding either for the HQCJU or the HCJ.
- 8) Amendments to the Rules of Procedure of the PIC could be introduced to prevent the use of the ungrounded sources of information. A negative information about a judge or a judicial candidate should not be ignored but it should be checked against objective criteria, the information should be verified and the conclusion cannot be based on unverified information.
- 9) **A negative conclusion of the PIC should always be based only on verified information, especially in a situation when the conclusions and the opinions will become public.**
- 10) No body outside of the judiciary and the judicial control should be able to evaluate the credibility of the judicial decisions of the judges. This is why the **PIC can give opinion only on the professional ethics and the integrity of a judge and not on the credibility of his/her decisions.**
- 11) The Rules of Procedure of the PIC should be amended **in order to provide for full transparency of its sessions and the documents** when the candidates for judicial positions are deliberated.
- 12) In order to achieve a transparent and credible result, **it could be suggested that the PIC elaborates and publishes in advance their methodology** for the evaluation of judges and judicial candidates. Such a methodology could set out the objective criteria for the evaluation and inform the candidates about the evaluation that they will undergo.

**ANNEX 1****THE UKRAINIAN LEGISLATION ON THE JUDICIARY ADOPTED OR AMENDED IN 2014-2017**

- Law of Ukraine No. 1401-19 On amendments to the Constitution of Ukraine (concerning justice), adopted on 02 June 2016
- Law of Ukraine No. 192-19 On ensuring the right to a fair trial, adopted on 12 February 2015
- Law of Ukraine No. 1402-19 On the judiciary and the status of judges, adopted on 02 June 2016
- Law of Ukraine No. 1798-19 On the HCJ, adopted on 21 December 2016
- Decree of the President of Ukraine No. 276/2015 On the strategy of reforming of the judicial system, judicial procedure and related legal institutions for 2015-2020, adopted on 20 May 2015

**BY-LAWS RELATED TO THE PROCEDURE OF SELECTION OF JUDGES OF THE SC**

- Rules of Procedure of the HCJ, adopted on 24 January 2017
- Rules of Procedure of the HQCJU, adopted on 17 November 2016
- Regulation of the HQCJU on the procedure of management of the judicial dossier, adopted on 05 June 2017
- Regulation of the HQCJU on the procedure and methodology of qualification assessment, eligibility indicators according to qualification assessment criteria and means of their determination, adopted on
- Regulation of the HQCJU on the procedure of exam taking and methodology of its assessment during qualification assessment, adopted on 04 November 2016
- Rules of Procedure of the PIC, adopted on 23 November 2016

## ANNEX 2

### DOCUMENTS CONCERNING THE COMPLIANCE WITH STANDARDS OF THE COE ON THE JUDICIARY

- Convention on the Protection of Human Rights and Fundamental Freedoms
- Recommendation CM/Rec 2010(12) of the Committee of Ministers of the CoE to member states On judges: independence, efficiency and responsibilities
- Opinions Nos. 1-20 of the Consultative CoEan Judges
- the following Opinions of the Venice Commission on Ukraine:
  - CDL-AD(2015)007-e Joint opinion by 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 amendments to the Law on the HCJ of Ukraine
  - CDL-AD(2015)012-e Adopted Final Opinion on the Law on Government Cleansing (Lustration Law) of Ukraine as would result from the amendments submitted to the Verkhovna Rada on 21 April 2015
  - CDL-AD(2015)013-e Opinion on draft constitutional amendments on the immunity of Members of Parliament and judges of Ukraine
  - CDL-AD(2015)026-e Opinion on the Amendments to the Constitution of Ukraine regarding the Judiciary as proposed by the Working Group of the Constitutional Commission in July 2015
  - CDL-AD(2015)027-e Opinion on the Proposed Amendments to the Constitution of Ukraine regarding the Judiciary as approved by the Constitutional Commission on 4 September 2015
  - CDL-AD(2015)043-e Secretariat Memorandum on the compatibility of the Draft Law of Ukraine on amending the Constitution of Ukraine as to Justice as submitted by the President to the Verkhovna Rada on 25 November 2015 (CDL-REF(2015)047) with the Venice Commission's Opinion on the proposed amendments to the Constitution of Ukraine regarding the Judiciary as approved by the Constitutional Commission on 4 September 2015 (CDL-AD(2015)027)
  - CDL-AD(2016)034-e Ukraine - Opinion on the draft Law on the Constitutional Court

Also, the OSCE/ODIHR Opinion on the 02 June 2016 Law of Ukraine “On the Judiciary and Status of Judges” (issued on 11 August 2017) should be taken into account as the CoE has not provided any opinion on this law.

- the following Opinions of the CoE’s the Directorate General of Human Rights and the Rule of Law, the Justice and Legal Co-operation Department :
  - Assessment of the law On restoring trust in the judiciary in Ukraine, issued on 08 April 2014
  - Assessment of the basic principles for the reform of the judiciary and related legal institutions (a first version of the strategy of reforming of the judicial system, judicial procedure and related legal institutions for 2015-2020), issued on 12 December 2014
  - Assessment of the draft law amending the law On the Bar and the Practice of Law, issued on 15 December 2014
  - Opinion on the draft law On the HCJ, issued on 10 September 2016, and the post-adoption review of the law On the HCJ, issued on 01 March 2017
  - Opinion on the rules of procedure of the HCJ, issued on 15 March 2015
  - Opinion on the rules of procedure of the PIC of Ukraine, issued on 10 April 2017

- Opinion on the draft regulation on the procedure and methodology of qualification assessment, eligibility indicators according to qualification assessment criteria and means of their determination, issued on 06 October 2016
- Opinion on the compliance of the draft regulation of the HQCJU on the procedure of exam taking and methodology of its assessment during qualification assessment, issued on 10 October 2016

### **ANNEX 3**

#### **LIST OF THE STAKEHOLDERS WHO PARTICIPATED IN THE MEETINGS ON THE 12TH AND 13TH OF FEBRUARY 2018, HELD IN KYIV**

1. Meeting with the HQCJU
2. Meeting with the HCJ
3. Meeting with the Administration of the President of Ukraine
4. Meeting with representatives of the PIC and civil society organisations
5. Meeting with representatives of international organisations working in the judiciary in Ukraine
6. Meeting with the President of the SC, Ms Valentyna Danishevskaya and judges of the SC