



**Justice and Legal Cooperation Department
Directorate General of Human Rights and Rule of Law (DG I)**

OPINION

ON THE DECISIONS OF THE CONSTITUTIONAL COURT OF UKRAINE

NO. 2-P/2020 AND NO. 4-P/2020

By Prof. Dr. Diana Kovatcheva

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ABBREVIATIONS

Consultative Council of European Judges	CCJE
Constitutional Court of Ukraine	CCU
Council of Europe	CoE
European Convention on Human Rights	ECHR
European Court on Human Rights	ECtHR
Ethics and Integrity Commission	EIC
High Council of Justice	HCJ
High Qualification Commission of Judges of Ukraine	HQCJU
Public Integrity Council	PIC
Selection Board	SB
Supreme Court (since 15 December 2017)	SC
Supreme Court of Ukraine (before 15 December 2017)	SCU
Venice Commission	VC

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INTRODUCTION

1. On 16 October 2019 the Verkhovna Rada of Ukraine adopted Law No. 193 amending some key provisions of the Law “On the Judiciary and the Status of Judges” and of the Law “On the High Council of Justice”. A number of significant changes concerning the judiciary were proposed in the new Law.
2. Law No. 193 was adopted in the context of a new political situation, after the presidential elections in 2019 and suggests a new vision of the judicial reform in Ukraine.
3. It should be noted that these changes followed the comprehensive judicial reform of 2014-2018, which was not completed in some areas. A significant part of the 2014-2018 reform was focused on the process of the selection of judges and the new composition of the SC, which started its work in December 2017 and which was a marked improvement over the system that existed before. The CoE was active in providing legal assistance and opinions regarding this reform and the general conclusion was that the competition for the selection of the judges of the SC was to a great extent in line with the standards of the CoE¹.
4. By letter of 4 October 2019, the Chair of the Monitoring Committee of the Parliamentary Assembly of the CoE requested an opinion of the Venice Commission on the amendments to the legal framework in Ukraine governing the SC and judicial self-governing bodies, which concerned the amendments introduced by Law No. 193. That opinion was published in December 2019.
5. A first decision of the CCU (CCU No 2-p/2020) was adopted on the 18th of February 2020 in constitutional case № 1-15/2018(4086/16) upon the constitutional petition of the SCU on the compliance of specific provisions of paragraphs 4, 7, 8, 9, 11, 13, 14, 17, 20, 22, 23, 25 of Section XII ‘Final and Transitional Provisions’ of the Law ‘On the Judiciary and Status of Judges’ with the Constitution (constitutionality) dated June 2, 2016 No 1402-VIII.
6. A second CCU decision (CCU No 4-p/2020) was delivered on 11 March 2020 in constitutional case No 1-304/2019(7155/19) upon the SC’s constitutional petition on the compliance of specific provisions of the Law ‘On the Judiciary and Status of Judges’ dated June 2, 2016 No 1402-VIII, ‘On amending the Law of Ukraine
7. ‘On the Judiciary and Status of Judges’ and certain Laws of Ukraine regarding activity of judicial governance bodies’ dated October 16, 2019 No 193-IX, ‘On

¹ In view of this, see the Assessment of the 2014-2018 judicial reform in Ukraine by Bachmaier Winter, Kovatcheva, Engstad and Reissne. This could serve as a starting point for an impact analysis (<https://www.coe.int/en/web/human-rights-rule-of-law/-/assessment-of-the-2014-2018-judicial-reform-in-ukraine>). See also the Opinion on the Procedure for Selection and Appointment of Judges to the SC in Ukraine with the Focus on its Compliance with the Standards of the CoE (October 2017 – February 2018), <https://rm.coe.int/coe-opinion-competition-sc/168093d89e>; and the Opinion on the Rules of Procedure of the Public Council of Integrity of Ukraine, by Diana Kovatcheva, 2017, <https://rm.coe.int/council-of-europe-opinion-on-the-rules-of-procedure-of-the-public-coun/1680722415>.

the High Council of Justice' dated December 21, 2016 with the Constitution (constitutionality) 2016 No 1798-VIII.

8. The current Opinion seeks to provide answers to two main questions:
 - a) to which extent the recommendations in the VC Opinion on Law no. 193 are addressed in the CCU decision, and
 - b) whether the two CCU decisions introduce any additional issues which raise issues as regards compliance with the CoE standards.
9. It should be noted that some problematic issues remain which are outside the scope of the CCU review either due to the fact that they are not part of the constitutional request or because they are not in contradiction with the Constitution. In view of this, it should be noted that the VC opinion is broader and considers a wider scope of problematic issues raised in the context of the intended reform.
10. Although it could not be expected that the CCU decisions would address all the recommendations of the VC directly, those recommendations could remain within the scope of the intended reform and be taken into account by the Ukrainian authorities in the process of further legislative amendments. Therefore, from a formal point of view, it could be noted that both CCU decisions address some of the main concerns of the VC and emphasise the importance of the VC Opinion.
11. The current assessment examines the CCU decisions and some aspects of Law No 193 by using the VC opinion and relevant CoE standards as reference points. The aim is to identify some of the main problematic issues and to evaluate them from the point of view of the CoE standards. In addition, specific comments on Law No. 193 are added, in order to distinguish other issues which might not be in compliance with the CoE standards. In this way potential problems arising from the intended reform could be highlighted. The intention with the current opinion is to produce a study of the most relevant problematic issues and provide recommendations based on the CoE standards in order to support the reform of the Ukrainian judiciary.
12. This assessment has been prepared by Assoc. Prof. Dr. Diana Kovatcheva² upon the English translation of the CCU decisions, provided by the CoE, as part of the activities of the CoE project "Support to the implementation of the judicial reform in Ukraine".
13. The CCU decisions found a contradiction between the Constitution of Ukraine and a number of provisions of Law No. 193. Consequently, the envisaged judicial reform is hampered until the adoption of new legal provisions, which should be in compliance with the Constitution.

² Assoc. Prof. Dr. in International Law and Law of the EU, expert of the CoE.

14. The VC opinion refers to a considerable part of the provisions which are declared unconstitutional by the CCU. It points out some problematic matters which are not in direct contradiction with the Constitution but raise issues with regard to the standards of the CoE. In a situation in which a large number of provisions of Law No. 193 are declared unconstitutional and cannot be applied, the VC opinion and the CoE standards could be used as reference points for proposed legislative amendments needed to replace the unconstitutional texts.
15. It should be noted that in the perspective of the current judicial reform the CCU decisions demand from the government a clear vision for the direction, priority and the next steps which should be undertaken. The CCU decisions clearly indicate that the judicial reform could continue only if it does not contradict the Constitution and if it takes into account the leading European standards in the field.
16. This provides a valuable chance for the executive and legislative authorities to reconsider some points of the intended reform which might be problematic in the context of the independence of the judiciary. This also provides an opportunity for a comprehensive debate with the active participation of judges and civil society. Such a debate can outline indispensable reforms and distinguish them from those that could be detrimental to the judiciary.
17. In view of this, and according to the VC, the principle of stability and consistency of laws is essential for the foreseeability of laws for individuals, including judges and others serving in the affected institutions. Frequent changes in the rules, concerning judicial institutions and appointments, can lead to various interpretations, including even alleging *mala fide* intentions for these changes.
18. The question of when and how often the legislation should be changed falls within the responsibility of the legislature. However, from the point of view of the CoE standards, too many changes within a short period of time should be avoided if possible, at the very least in the area of the administration of justice³. Therefore, the right balance should be found between the need to further improve the performance of the judiciary and the necessity to protect its independence from the negative influence of too many reforms which come in a short time.
19. In the context of the low level of public trust and high social expectations for justice and integrity in the judiciary, one of the proposed measures for the achievement of positive developments is related to the involvement of the international community in the judicial process. Although not in contradiction with the CoE standards, such extraordinary and exceptional measures should be implemented during a limited time and be based on mutual consent, clear, transparent and predictable procedures and well-defined assessment criteria⁴. The ultimate goal of the implementation of such mechanisms should be to provide support to the national judicial bodies in strengthening their capacity. However, the ownership of the reform should remain in the hands of the national authorities and their constitutional mandates should be respected.

³ See Opinion No. 18, CCJE, para. 45.

⁴ See VC Opinion 986/2017 on the Draft Law on Anticorruption Courts in Ukraine, para. 61.

20. New Law No 193 introduced major changes in three main areas which are discussed in the VC opinion:
- a) new provisions on the structure and role of HCJ and on the composition and status of the HQCJU;
 - b) provisions on reducing the number of judges of the SC; and
 - c) procedures related to disciplinary measures.
21. The VC opinion makes a thorough analysis of a number of issues introduced by new Law No. 193 which are related to the intended judicial reform. Based on this analysis it outlines three main recommendations:

The main focus of reform should be the first and second instance courts. New judges who passed the re-evaluation procedure should be appointed speedily to fill the high number of vacancies. The work the HQCJ has done so far should be the basis for these urgent nominations.

The provision reducing the number of judges of the SC to 100 effectively amounts to a second vetting and should be removed. A vetting of all SC judges because of doubts about the integrity of a few of them, is clearly not proportionate. The goal of reducing the number of judges may be pursued in a long term, once the SC has cleared its current backlog of cases and access filters have become effective for new cases. The reduction of the number of judges could probably be achieved by means of natural reduction (retirements) or voluntary transfers.

The disciplinary procedure should be simplified by reducing the excessive number of remedies available: against disciplinary decisions of the HCJ, an appeal should lie directly with the SC and no longer with the Kyiv City Administrative Court and the administrative court of appeal; on the other hand, some of the deadlines in disciplinary proceedings shortened by Law No. 193-IX should be re-established.

22. The analysis of the VC recommendations indicates that, although they are essential for the intended reform, not all of them are within the CCU competence and therefore they are not addressed in the decisions in question.
23. The first VC recommendation is not addressed by the CCU because it is more about the general reform policy and it is not for the CCU to formulate such policies. For the same reason, the third recommendation is reflected only in the part referring to the disciplinary decisions. The analysis of the CCU decisions indicates that the second recommendation of the VC is fully reflected.

The reform of the SCU/SC

24. Prior to addressing the main and specific issues of the intended judicial reform in Ukraine brought by Law No. 193, it is necessary to note an important question regarding the reform in the SCU and the SC.
25. The issue is discussed in the CCU decision No 4-p/2020 and then reiterated in the conclusions of the CCU decision No 2-p/2020. The main conclusion is that the SC is a constitutional body and despite the change of name, this is the same institution.
26. The CCU rightly points out that the SC did not experience any constitutional changes, in particular with regard to its status of 'the highest judicial body in the Ukrainian system of general courts' and 'the highest court in the Ukrainian judiciary'. In the opinion of the CCU, the exemption of the word 'Ukraine' from the phrase 'the Supreme Court of Ukraine' does not influence the constitutional status of this state power body.
27. This is why it should be acknowledged that the principle of institutional continuity applies to the functioning of the highest institution of the judicial power, which after adoption of Law No.1401, continues to function as "the Supreme Court".
28. This CCU conclusion should be assessed as relevant and should be supported as it is essential for other issues such as the decrease in the number of the judges of the SC and the implementation of the principle of irremovability of judges in Ukraine.

Reduction of the number of judges of the SC and selection of its judges

VC Recommendation:

"The provision reducing the number of judges of the SC to 100 effectively amounts to a second vetting and should be removed. A vetting of all SC judges when there are doubts about the integrity of a few of them is clearly not proportionate. The goal of reducing the number of judges may be considered in a long term, once the SC has cleared its current backlog of cases and access filters have become effective for new cases. The reduction of the number of judges could probably be achieved by means of natural reduction – retirements or voluntary transfers."

29. CCU decision No 4-p/2020 considers the legal provisions on a decrease in the number of the judges of the SC from 200 to 100 unconstitutional. It also indicates the formal list of reasons for dismissal of a judge which cannot be further developed by a law. The CCU rightly underlines that any decrease in the level of guarantees of independence of judges contradicts the Constitution.
30. Similarly, according to the VC Opinion, the reduction in the number of judges in the SC, under the given circumstances, is unacceptable and infringes the independence of the judiciary.

Decrease in the number of judges of the SC

31. The VC indicates that a decrease in the number of judges in supreme courts is not problematic in itself, if it is made through a natural reduction of judges. Some of the proposed approaches for reducing the number of judges is for example reaching the retirement age, voluntary retirement or the use of effective access filters.
32. With regard to the reform process in Ukraine it should be noted that a reduction in the number of SC judges should be considered once the problem with the huge backlog of cases is solved. Such an approach is important because a potential reduction by 100 SC judges would lead to the inability of the remaining judges to deal with the huge amount of cases within reasonable timeframes. This would trigger the problem of slow justice which is often considered as a denial of justice. This situation would infringe ECHR Art. 6 and could result in findings of violations to this effect by the ECtHR.
33. In the opinion of the VC, the SC should deal with its backlog in its current composition also because the proposal to use access filters for the current huge backlog is not realistic as such filters can be applied only to future cases. A retroactive application of access filter procedures in order to remove the pending cases from the court registry would raise serious issues of access to justice under Article ECHR 6⁵.
34. In addition, the intention for the decrease in the number of SC judges raises for the VC other points of concern, which are not addressed in the CCU decision due to the fact that they are not unconstitutional as such. However, they are important in the context of the envisaged reform.
35. In the first place, the VC points out deficiencies in the approach by which the reduction of judges is envisaged, namely the lack of an impact assessment, the lack of criteria or procedure for selection (which makes it arbitrary), and the perspective of demotion or dismissal of half of the 200 judges currently working in the SC.
36. In addition, the decision to decrease the number of the SC judges is unacceptable for the VC for several reasons: first, because it is not based on a change in the role of the SC within the judicial organisation, then, because there is no justification in the law for the drastic reduction of the judges, and also because this approach will seriously increase the backlog of cases and will certainly jeopardise the functioning of the SC.
37. Last but not least, the VC is of the opinion that the unmotivated and abrupt decrease of the SC judges infringes ECHR Art. 6.

⁵ See VC, Opinion No. 969/2019 on Amendments to the Legal Framework Governing the SC and Judicial Governance Bodies in Ukraine, CDL-AD(2019)027, Para. 49.

Security of tenure and the irremovability of judges

38. Another important issue, in the context of the reform of the SC, which is raised both by the VC and the CCU, is related to the principles of security of tenure and the irremovability of judges.
39. These principles are the “key elements of the judicial independence”⁶ and are reflected in a number of international and European standards, some of which are cited in the CCU decisions.
40. According to the CoE standards, a new parliamentary majority and government must not question the appointment or tenure of judges who have already been appointed in a proper manner. The tenure of individual judges can only be questioned if some breach of disciplinary rules or the criminal law by an individual judge is clearly established in accordance with proper procedures⁷.
41. According to Recommendation CM/Rec (2010)12 of the Committee of Ministers, independence, efficiency and responsibilities, the terms of office of judges should be established by law. “A permanent appointment should only be terminated in cases of serious breaches of disciplinary or criminal provisions established by law, or where the judge can no longer perform judicial functions. Early retirement should be possible only at the request of the judge concerned or on medical grounds⁸.”
42. Another issue, raised by the VC in the context of the intended reform, is related to the status of the SC judges who have just been subject to the public procedure of selection and appointment. This question is not addressed in the CCU decision.
43. One of the essential arguments against the re-evaluation of the SC judges is the fact that they have just undergone a serious competition in the context of a recent reform. Such an approach creates a genuine risk of a second vetting procedure in which “vetting” is perceived in its negative, political sense and would definitely infringe the independence of the judiciary in Ukraine⁹.
44. Therefore, it should be noted that the prospect of re-selection and re-evaluation of SC judges is not in line with the CoE standards on legal certainty and the protection of judges from the political pressure.
45. Within this perspective, the VC clearly points out that a vetting of all SC judges, based on doubts about the integrity of very few of them, is clearly not proportionate. According to the VC, the “substantive evaluation criteria should be the same as those that already exist under the law in order to avoid arbitrariness”.

⁶ See Recommendation of the Committee of Ministers to Member states on Judges: Independence, Efficiency and Responsibilities, CM/Rec (2010)12 and Explanatory Memorandum, <https://rm.coe.int/16807096c1>.

⁷ See Opinion No. 18, CCJE, para. 44.

⁸ See Recommendation of the Committee of Ministers to member states on judges: independence, efficiency and responsibilities CM/Rec (2010)12, Appendix, “Tenure and irremovability”, para. 50.

⁹ See VC Opinion No. 969/2019 on Amendments to the Legal Framework Governing the SC and Judicial Governance Bodies in Ukraine, CDL-AD(2019)027, para. 31-34.

46. The issue of evaluation of judges is always delicate and must be approached with utmost care so as to achieve the right balance with the need to protect judges' independence. Despite the laudable aim of ensuring high standards through a system of evaluation, it is notoriously difficult to reconcile the independence of the judge with a system of performance appraisal¹⁰.
47. According to the CCJE, the evaluation of judges is undertaken in order to assess the abilities of individual judges and the quality and quantity of the tasks they have completed¹¹.
48. In order to protect the independence of judges, some consequences, such as dismissal from office because of a negative evaluation, should be avoided for all judges who have obtained tenure of office, except in exceptional circumstances¹².
49. Last but not least, 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 citizens. This should thereby help maintain public confidence in the judiciary¹³.
50. Another essential issue in the context of security of tenure and irremovability is that judges who fail the selection procedure *may* be transferred to appellate courts, based on the rating of competition results. This issue is addressed by the CCU and its arguments are strengthened by a number of European standards.
51. The use of “*may*” instead of “*shall*”, raises concerns as to the possibility for some judges to be dismissed. A dismissal following an unsuccessful selection procedure, without the necessary procedural safeguards, would not be in line with the requirements of judicial independence.
52. According to the CoE standards, a judge should not receive a new appointment or be moved to another judicial office without consenting to it, except in cases of disciplinary sanctions or reform of the organisation of the judicial system¹⁴. It is fundamental for judicial independence that tenure is guaranteed until a mandatory retirement age or the expiry of a fixed term of office¹⁵ and the independence of the judiciary and the good administration of justice require that the judiciary be protected against arbitrary dismissal and interference in the exercise of the functions¹⁶.

¹⁰ See VC Report on Judicial Appointments, para. 42.

¹¹ Opinion No. 17, CCJE, on the Evaluation of Judges' Work, the Quality of Justice and Respect for Judicial Independence, para. 7.

¹² *Ibid.*, para. 47

¹³ *Ibid.*, para. 48.

¹⁴ See Recommendation of the Committee of Ministers to member states on judges: independence, efficiency and responsibilities CM/Rec(2010)12, Appendix, “Tenure and irremovability”, para. 52.

¹⁵ *Ibid.* para. 57. See also Opinion No. 1, CCJE, The European Charter on the Statute for Judges affirms that this principle extends to appointment or assignment to a different office or location without consent (other than in case of court re-organisation or temporarily), but both it and Recommendation No. R (94) 12 (repealed) contemplate that transfer to other duties may be ordered by way of disciplinary sanction.

¹⁶ In the Joint Opinion of the VC and the Directorate of Human Rights (DHR) of the Directorate General of Human Rights and the Rule of Law (DGI) of the CoE, on the Draft Law on Amendments to the Organic Law on

53. The VC indicates that judges can only be transferred without their consent in exceptional cases¹⁷ and points out that “neither a re-organisation within a court, nor a simple reduction of the number of judges are covered by this exception, which has to be interpreted narrowly”¹⁸.
54. It should be noted that the above CoE standards are not sufficiently reflected in the vetting procedure targeting the SC judges.
55. The case of the transfer of some of the judges from the old SCU to various appellate courts by the HQCJU in 2018 resulted in an application to the ECtHR which is still pending¹⁹. In view of this, the ECtHR is using several thresholds to judge whether the interference of the state is justified. In this context the ECtHR considers whether the measure adopted is prescribed by law, whether it could be linked to a legitimate aim and whether it was necessary in a democratic society. This test was used, for example, in the case *Baka v. Hungary* where the ECtHR found that the threshold was not met and could not be regarded as sufficient to show that the interference complained of was “necessary in a democratic society”²⁰.
56. According to the European Charter on the Statute for Judges, a judge cannot be assigned to another court or have his or her duties changed without his or her free consent. However, exceptions must be allowed where transfer is made within a disciplinary framework; when a lawful re-organisation of the court system takes place (for example, the closing down of a court) or when a temporary transfer is required to assist a neighbouring court. In the latter case, the duration of the temporary transfer must be limited by the relevant statute.²¹
57. Nevertheless, in view of the sensitivity of a transfer without consent, it should be recalled that the relevant judge has the right to appeal before an independent authority, which can investigate the legitimacy of the transfer²².

Comments and conclusions:

58. The CCU decision addresses the issue of the reduction in the number of judges of the SC in a relevant way by declaring its unconstitutionality. Thus, the CCU prevents a serious risk of infringement of the independence of judges.
59. However, it should be noted that the VC Opinion looks deeper into the reduction of SC judges and the principles of security of tenure and irremovability, by

General Courts of Georgia, adopted by the VC at its 100th Plenary Session (Rome, 10-11 October 2014, CDL-AD(2014)031), the issue of the termination of the mandates of court presidents was examined as follows (footnotes omitted). See case *Baka v. Hungary*, p. 39.

¹⁷ See Recommendation of the Committee of Ministers to member states on judges: independence, efficiency and responsibilities CM/Rec (2010)12, para. 52.

¹⁸ See VC, Opinion No. 969/2019 on Amendments to the Legal Framework Governing the SC and Judicial Governance Bodies in Ukraine, CDL-AD(2019)027, para. 38.

¹⁹ See ECtHR case Application no. 11423/19, *Gumenyuk and others v. Ukraine*.

²⁰ See ECtHR case Application no. 20261/12, *Baka v. Hungary*, para. 175.

²¹ See European Charter on the Statute for Judges, para. 3.4.

²² *Ibid.*, para. 1.4.

placing these matters in a more general context (as part of the policy for judicial reform).

60. The views of the VC on both unconstitutional and problematic matters could be used as important guidelines in the process of developing amendments to the specific articles of Law No. 193. The CoE standards as mentioned above, could contribute in a positive way to this process as well.
61. One of the important VC recommendations regarding the reform of the first- and second-instance courts is not directly addressed by the CCU because it is not a matter of constitutionality. The implementation of that recommendation is nevertheless dependent on a rapid process of bringing the unconstitutional articles of Law No. 193 in compliance with the Constitution and the international and European standards. This would allow for the next steps of the reform in the lower instance courts to take place.

In view of the above, the following conclusions could be made:

62. The unmotivated and abrupt decrease in the number of SC judges, as well as the retroactive application of access filters to the current huge backlog, raises serious issues of infringement of ECHR Art. 6.
63. A new parliamentary majority and government must not question the appointment or tenure of judges who have already been appointed in a proper manner.
64. The SC judges who have just undergone a comprehensive and public procedure of selection and appointment should not be re-selected and re-evaluated (vetting procedure).
65. Dismissal from office, as a result of a negative evaluation should be avoided for all judges who have obtained tenure of office, except in exceptional circumstances.
66. A judge should not receive a new appointment or be moved to another judicial office without consenting to it, except in cases of disciplinary sanctions or reform of the organisation of the judicial system. Moreover, a judge transferred without his or her consent should have the right of appeal before an independent authority, which can investigate the legitimacy of the transfer.

Disciplinary procedures

VC Recommendation:

“The disciplinary procedure should be simplified by reducing the excessive number of remedies available: against disciplinary decisions of the HCJ, an appeal should lie directly with the SC and no longer with the Kyiv City Administrative Court and the administrative court of appeal; on the other hand, some of the deadlines in disciplinary proceedings shortened by Law No. 193-IX should be re-established.”

67. The CCU, in its Decision No 4-p/2020, found that a number of regulations linked to the disciplinary procedures for judges are in contradiction with Art. 8, part one (principle of rule of law), Art. 126, part one (principle of independence) and part two (prohibition of influence on judges) of the Constitution of Ukraine.
68. The CCU addresses the VC opinion by reflecting the recommendation about the deadlines in the disciplinary procedures. In addition, the CCU considers some CoE standards and the case-law of the ECtHR.
69. As obvious from the constitutional decision, the CCU has a sustainable practice reaffirming that 1) a special procedure for imposing disciplinary liability on judges should be in place and 2) the guarantees of the independence and immunity of judges cannot be reduced through legislative intervention.
70. According to the CCU, the legislative amendments “do not provide reasonable, balanced (proportional) and predictable procedure of the disciplinary proceeding with regards to the judges, fair and transparent procedure of disciplinary liability on a judge”. The CCU rightly indicates that issues of disciplinary proceedings and disciplinary liability should be brought in line with the constitutional principle of independence of judges.
71. The CCU is of the opinion that disciplinary proceedings against judges should be held within an adequate timeframe and according to the procedures that comprehensively guarantee his/her defence. The disciplinary proceedings should not imply any evaluations of the merit of judges’ decisions and there should be filters in place to prevent any unsubstantiated claims.

General aspects of the disciplinary procedures

72. The CoE standards contain a number of principles as regards disciplinary procedures in the context of the protection of the independence of judges.
73. In the first place, the disciplinary procedures can be considered as an exception to the overall principle of the irremovability of judges²³. Therefore, the disciplinary proceedings should take place before an independent body, with the possibility of recourse before a court²⁴.
74. According to the European Charter on the Statute for Judges, states should set up “by law, a special competent body which has as its task to apply any disciplinary sanctions and measures, where they are not dealt with by a court, and whose decisions shall be controlled by a superior judicial organ, or which is a superior judicial organ itself”.
75. According to the ECtHR judgement on the case *Volkov v. Ukraine*, the accuracy and predictability of reasons for disciplinary liability are preferable given the goals of legal certainty, especially for ensuring the independence of judges²⁵.

²³ See CCJE Opinion No. 1, para. 59.

²⁴ See the CCJE’s Magna Charta of Judges, para. 6.

²⁵ See ECtHR judgement, case application no. 21722/11, *Oleksandr Fedorovych Volkov v. Ukraine*, para.79.

76. The ECtHR sees as problematic a situation in which the law does not provide appropriate guarantees against abuse and misuse of disciplinary measures to the detriment of judicial independence²⁶. In view of this, the law must provide a degree of legal protection against arbitrary interference by the authorities and be sufficiently foreseeable in terms of the conditions under which they are entitled to take measures affecting rights.
77. In addition, although violations of ethical and professional standards can be considered in the evaluation process, a clear differentiation must be made between evaluation and disciplinary measures. In view of this, the principles of security of tenure and of irremovability of judges are well-established key elements of judicial independence and must be respected²⁷.
78. According to the CoE standards, disciplinary proceedings should be conducted by an independent authority or a court with all the guarantees of a fair trial and provide the judge with the right to challenge the decision and sanction. The disciplinary sanctions should be proportionate²⁸.
79. Therefore the VC takes the opinion that disciplinary proceedings against judges, based on the rule of law, should correspond to certain basic principles, which include the following: the liability should follow a violation of a duty expressly defined by law; *there should be a fair trial with a full hearing of the parties and representation of the judge*; the law should define the scale of sanctions; the imposition of the sanction should be subject to the principle of proportionality; and there should be a right to appeal to a higher judicial authority²⁹.
80. Last but not least, disciplinary proceedings should deal with gross and inexcusable professional misconduct but should never extend to differences in legal interpretation of the law or judicial mistakes³⁰. Judges should not be personally accountable where their decision is overruled or modified on appeal³¹.

Specific aspects of the disciplinary procedures

81. Some of the specific issues considered by the CCU, which are also mentioned in the VC opinion, are the drastically reduced deadlines for disciplinary proceedings

²⁶ Ibid., para. 170 and para. 199.

²⁷ See CCJE Opinion No. 17, para. 29.

²⁸ See Recommendation of the Committee of Ministers to member states on judges: independence, efficiency and responsibilities CM/Rec (2010)12, para. 69.

²⁹ See VC Compilation of Opinions and Reports Concerning Courts and Judges, CDL-PI(2019)008 [https://www.venice.coe.int/webforms/documents/?pdf=CDL-PI\(2019\)008-e](https://www.venice.coe.int/webforms/documents/?pdf=CDL-PI(2019)008-e), para. 3.4.2.1. See also CDL-AD(2016)009, Final Opinion on the revised draft constitutional amendments on the Judiciary (15 January 2016) of Albania, para. 4 and CDL-AD(2014)006, Joint opinion of the VC and the Directorate of Human Rights (DHR) of the Directorate General of Human Rights and Rule of Law of the CoE, and of the OSCE Office for Democratic Institutions and Human Rights (OSCE/ODIHR) on the draft law on disciplinary liability of judges of the Republic of Moldova, para. 12. See also VC Opinion on the Law on Disciplinary Responsibility and Disciplinary Prosecution of Judges of Common Courts of Georgia, [https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2007\)009-e](https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2007)009-e).

³⁰ See VC Compilation of Opinions and Reports Concerning Courts and Judges, CDL-PI(2019)008 [https://www.venice.coe.int/webforms/documents/?pdf=CDL-PI\(2019\)008-e](https://www.venice.coe.int/webforms/documents/?pdf=CDL-PI(2019)008-e).

³¹ See Recommendation of the Committee of Ministers to member states on judges: independence, efficiency and responsibilities CM/Rec (2010)12, para. 70.

(three days), the disciplinary procedures held *in absentia* and procedures initiated anonymously. The VC takes the view that these regulations contradict to the right to a fair trial under ECHR Art. 6.

82. The shortened deadlines can seriously infringe the independence of judges³². They do not contribute to the implementation of the recommendation of the VC for speeding up the disciplinary procedures. Such shortened deadlines could easily result in unjustified decisions due to a lack of time on the side of the judges, but also for the HCJ to prepare properly.
83. As far as the issue of “procedures initiated anonymously” is concerned, it should be mentioned that this proposal does not find support in the CoE standards. Such procedures could open the door to a serious abuse of rights, to personal revenge and pressure. They could result in serious damage to the reputation of judges. In addition, anonymity does not provide the option to get in contact with the complainant and to gather additional information on the initiated procedure. In order to prevent these problems, in cases when a complainant insists on anonymity, mechanisms for concealing his/her identity could be introduced. Such mechanisms are often used for the protection of whistleblowers.
84. In this context, the VC is of the opinion that the complaints regarding actions, which may constitute disciplinary offenses, committed by judges, cannot be submitted by ‘any interested person’. It would be dangerous to give the right to initiate proceedings for the dismissal of a judge to every person as this can be interpreted as encouraging those losing a case to seek personal revenge against the judge. According to the VC, this does not serve the interest of justice³³.
85. Therefore, the right to submit complaints should be limited either to persons who have been affected by the acts of the judge or to those who have some form of ‘*legal interest*’ in the matter.
86. The European Charter on the Statute for Judges claims that each individual must have a possibility of submitting without specific formality a complaint relating to a miscarriage of justice in a given case if it is addressed to an independent body. This body should have the power, after a careful and close examination, to refer the matter to the disciplinary authority, or at the very least to recommend such referral to an authority normally competent in accordance with the statute, to make such a reference³⁴.
87. According to the VC, if every person is to be entitled to file a complaint, this should not directly result in initiating dismissal proceedings against the judge³⁵. In such case, a small expert body, composed solely of judges, might give an opinion

³² See VC, Opinion No. 969/2019 on Amendments to the Legal Framework Governing the SC and Judicial Governance Bodies in Ukraine, CDL-AD(2019)027, para 66.

³³ See VC Opinion on the Law on Disciplinary Responsibility and Disciplinary Prosecution of judges of Common Courts of Georgia: [https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2007\)009-e](https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2007)009-e).

³⁴ Ibid. para. 5.3.

³⁵ See VC Opinion on Draft amendments to Laws on the Judiciary of Serbia, CDL-AD(2013)005, para. 68.

on the capacity or behaviour of the judges concerned, before an independent body makes a final decision³⁶.

88. As far as the issue of disciplinary procedures *in absentia* is concerned, the European Charter on the Statute for Judges' Explanatory memorandum points out that the judge must be given a full hearing and be entitled to representation³⁷. The right to a full hearing means that the accused judge should have the right to be heard and represented before the plenary of the Judicial Council, which takes the actual decision and not only before the disciplinary panel within it³⁸.
89. In the opinion of the VC, in order to have a fair disciplinary procedure, all relevant parties should be heard. This may include even the complainant as a direct victim of the judge's possible disciplinary misconduct, who may have a legitimate interest in participating in the proceedings. This approach can be used in particular where the complainant's rights are infringed as a result of a judge's misconduct, because the input of the complainant may also clarify the concrete circumstances of a given case³⁹.
90. In the context of the full hearing, the accused judge should also be given the opportunity to have his or her witnesses heard during the examination of a disciplinary case⁴⁰.
91. Another issue in the VC opinion in the context of disciplinary procedures relates to the discipline of members of the HCJ and HQCJU. This matter is addressed by the CCU in its decision as well.
92. According to the CoE standards, Councils for the judiciary should deal with disciplinary matters⁴¹. It is appropriate to note that with respect to disciplinary proceedings against judges, the need for substantial representation of judges in the relevant disciplinary body has been recognised in the European Charter on the Statute for Judges.
93. The European Charter on the Statute for Judges points out that guarantees must be laid down for disciplinary hearings, notably that disciplinary sanctions must be

³⁶ See VC Memorandum: Reform of the Judicial System in Bulgaria, CDL-AD(2003)012, para. 15, see also See also VC Opinion on the Law on Disciplinary Responsibility and Disciplinary Prosecution of Judges of Common Courts of Georgia, [https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2007\)009-e](https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2007)009-e)

³⁷ See VC Compilation of Opinions and Reports Concerning Courts and Judges, CDL-PI(2019)008, para.23, [https://www.venice.coe.int/webforms/documents/?pdf=CDL-PI\(2019\)008-e](https://www.venice.coe.int/webforms/documents/?pdf=CDL-PI(2019)008-e).

³⁸ See VC Opinion on the Draft Law amending and supplementing the Law on Judicial Power of Bulgaria, CDL-AD(2009)011 para. 26.

³⁹ See Joint Opinion of the VC and the Directorate of Human Rights (DHR) of the Directorate of Human Rights and the Rule of Law (DGI) of the CoE, on the draft Law on Making Changes to the Law on Disciplinary Liability and Disciplinary Proceedings of Judges of General Courts of Georgia, CDL-AD(2014)032, paras. 47-48.

⁴⁰ See Joint opinion of the VC and the Directorate of Human Rights (DHR) of the Directorate General of Human Rights and Rule of Law of the CoE, and of the OSCE Office for Democratic Institutions and Human Rights (OSCE/ODIHR) on the draft law on disciplinary liability of judges of the Republic of Moldova, CDL-AD(2014)006, paras. 77 and 78.

⁴¹ See Recommendation of the Committee of Ministers to member states on judges: independence, efficiency and responsibilities CM/Rec (2010)12, para. 34.

imposed by “...a decision taken, following a proposal or recommendation or with the agreement of a tribunal or authority, at least one half of whose members must be elected judges⁴² .

94. The issue of dismissal of the members of the HQCJU and the HCJ upon a motion by the EIC is discussed in the below chapter Reform of the HCJ and the HQCJU.
95. The VC draws attention to the short deadline for making a decision in a disciplinary case (5 days only) and is of the opinion that such a system entails a risk of circumventing the powers of a constitutional body such as the HCJ. These changes could affect the balance between the bodies. In addition, it could be argued that they entail procedural flaws which hinder the defense and might infringe the right to a fair trial.
96. Last but not least, it should be mentioned that in the context of the principle of a fair trial, the VC considered an important issue which is not addressed in the CCU decision. It is related to the appeal of disciplinary decisions against judges which should lie directly with the SC and not with the still unreformed Kyiv City Administrative Court. This is viewed as a measure which could speed up the procedures by reducing the excessive number of remedies available.
97. The SC judges are selected in a public procedure and have undergone a procedure of assessment which gives additional guarantees for the respect of the principle of fair trial (ECHR Art. 6). According to the ECtHR, whether a court can be considered independent depends on the manner of appointment of its members and their term of office, the existence of safeguards against external pressure and whether the body presents an appearance of independence⁴³ .

Comments and conclusions:

98. The shortened deadlines in disciplinary procedures can seriously infringe the independence of judges. They could easily result in unjustified decisions due to a lack of time on the part of the accused judges, but also for the HCJ to be able to prepare properly.
99. Disciplinary procedures held *in absentia* and procedures initiated anonymously contradict to the right to a fair trial under ECHR Art. 6. In order to prevent these problems, in cases when a complainant insists on anonymity, mechanisms for concealing his or her identity could be introduced, similar to the ones for the protection of whistleblowers.
100. The right to submit complaints should be limited either to persons who have been affected by the acts of the judge or those who have some form of ‘*legal interest*’ in the matter.

⁴² See VC Opinion on the Law on Disciplinary Responsibility and Disciplinary Prosecution of Judges of Common Courts of Georgia, [https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2007\)009-e](https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2007)009-e), para. 23.

⁴³ See ECtHR judgement, case application no. 21722/11, *Oleksandr Fedorovych Volkov v. Ukraine*, para. 103.

101. Disciplinary procedures *in absentia* are not supported by the CoE standards, because the judge must be given a full hearing and be entitled to representation to defend him- or herself.
102. The appeal of disciplinary decisions against judges should lie directly with the SC rather than with the Kyiv City Administrative Court.

Reform of the HCJ and the HQCJU

103. Law No. 193 introduced amendments to the structure, mandates and membership of the HCJ and the HQCJU. The old HQCJU, which was in charge of the assessments of judges, was dismissed. Once established, the new HQCJU would be more dependent on the HCJ, which might simplify the process of appointment of judges. Due to the dismissal of the HQCJU and the contradictions with the Constitution established by the CCU, the new HQCJU can be formed following amendments to Law No. 193, taking account of the CCU decision. Until then, the reform of the HCJ, the HQCJU and the first and second instance courts can be considered to be postponed.
104. The reform of the HCJ and the HQCJU is subject to special attention in both the VC opinion and the CCU decision.
105. One of the important conclusions of the VC is that the existing system for the selection and appointment of judges has become less complicated through the subordination of the HQCJU to the HCJ. The recommendation about the simplification of the procedure was also made in the report of the CoE about the assessment of the competition for the SC⁴⁴.
106. However, apart from this positive conclusion, the VC opinion indicates a number of challenging issues introduced by Law No. 193 in the reform of the HQCJU and the HCJ.
107. In the first place, the VC sees as problematic the fact that immediately with the entry into force of Law No. 193-IX on 7 November 2019, all members of the HQCJU were dismissed, which interrupted all on-going assessment activities. In view of this, the VC points out with regret that the mandates of the members of the HQCJU are terminated *ex lege*, without any transitional provision, which completely stops the procedure for appointment of judges to the first and second instance courts. The position of the VC is that the members of the HQCJU should at least have been enabled to continue their work until they were replaced by the newly elected members.
108. It should be noted that the dismissal of the members of the HQCJU creates a vacuum in the system and interrupts the process of judicial reform related to the selection and appointment of the judges.

⁴⁴ See the Opinion on the Procedure for Selection and Appointment of Judges to the SC in Ukraine with the Focus on its Compliance with the Standards of the CoE (October 2017 – February 2018), paras. 12, 99, 188 and 194, <https://rm.coe.int/coe-opinion-competition-sc/168093d89e>.

109. The HCJCU is a state judicial self-governing body which operates on a standing basis within the system of the judiciary in Ukraine. In view of this, all the rules for independence for the judiciary apply to the HCJCU and its members as well. On many occasions the VC had an opportunity to observe that any changes in the area of the judiciary and the envisaged reforms as a whole should be fully in line with the requirements of the separation of powers and the rule of law⁴⁵.
110. In addition, the VC had many occasions to point out that the legislation “should not be used as a means to put an end to the term of office of persons elected or appointed under the previous Constitution”⁴⁶.
111. According to the CoE standards, it is a fundamental tenet of judicial independence that tenure is guaranteed until a mandatory retirement age or the expiry of a *fixed term of office*⁴⁷. This rule is valid not only for the judges but also for judicial bodies, *especially for bodies responsible for the management, selection, evaluation or appointment of judges*. Their independence should be beyond any doubt.
112. In its opinions, the VC has made observations regarding situations of premature termination of the mandates of court chairpersons and noted that “such radical change could give the impression that the only reason of the transitional rule is to create the opportunity of a radical change of court chairpersons”⁴⁸. In addition, the constitutional legitimacy of individual judges who have security of tenure must not be undermined by legislative or executive measures brought about as a result of changes in political power.⁴⁹
113. These observations of the VC are part of opinions on concrete legislative amendments or national reforms. However, they can be considered in a broader sense and applied to all judicial positions, including those in judicial bodies with functions related to the self-governing of the judiciary. They concern legal certainty, legitimate expectations and the independence of the judiciary as well as the requirement that the judiciary be free of political influence⁵⁰.

⁴⁵ See VC Opinion No. 621 / 2011 on the New Constitution of Hungary [https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CdI-Ad\(2011\)016-E](https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CdI-Ad(2011)016-E), para. 104; See also VC Opinion 663/2012 on Act CLXII of 2011 on the Legal Status and Remuneration of Judges and Act CLXII of 2011 on the Organisation and Administration of Courts of Hungary, para. 22 [https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CdI-Ad\(2012\)001-E](https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CdI-Ad(2012)001-E),

⁴⁶ See case *Baka v. Hungary*, p.13. The relevant extracts from the Opinion on Act CLXII of 2011 on the Legal Status and Remuneration of Judges and Act CLXI of 2011 on the Organisation and Administration of Courts of Hungary, adopted by the VC at its 90th Plenary Session (Venice, 16-17 March 2012, CDL-AD(2012)001).

⁴⁷ See Recommendation of the Committee of Ministers to member states on judges: independence, efficiency and responsibilities CM/Rec(2010)12, Appendix, “Tenure and irremovability”, para. 57. See also Opinion no. 1 (2001) of the CCJE, the European Charter on the Statute for Judges affirms that this principle extends to appointment or assignment to a different office or location without consent (other than in case of court re-organisation or temporarily), but both it and Recommendation No. R (94) 12 (repealed) contemplate that transfer to other duties may be ordered by way of disciplinary sanction.

⁴⁸ See Opinion on the Draft Law on Introducing Amendments and Addenda to the Judicial Code of Armenia (term of office of court presidents), CDL-AD(2014)021), observed with regard to the proposed termination of office of court presidents appointed for an indefinite term as follows, para. 50 and para. 51.

⁴⁹ See CCJE Opinion No. 18, para. 15.

⁵⁰ *Ibid*, para. 35.

114. This conclusion is supported by the European Charter on the Statute for Judges, which provides that the body taking decisions on the selection, recruitment or appointment of judges, the development of their careers or the termination of their office, should be “independent from the executive and the legislature”⁵¹.
115. Other points of concern of the VC and the CCU, linked to Law No. 193, relate to the composition of the HQCJU and the role of the two new bodies: the EIC and the SB. The CCU declared a number of provisions related to these matters unconstitutional.
116. The main task of the SB is to play a significant role in the formation of the new HQCJU. The main task of the EIC is to supervise the behaviour of the members of both the HCJ and the HQCJ.
117. Law No. 193 introduces a new procedure for the selection of the HQCJU members, which substantially affects the process of selection of judges in Ukraine. According to the new rules, the newly formed HQCJU will consist of 12 members appointed for four years by the HCJ, based on the outcome of a competitive selection. According to the CCU, the decrease in the members of the HQCJU from 16 to 12 is unconstitutional.
118. It should be noted firstly that the involvement of the EIC and the SB raises concerns about a further complication of the procedure for selection of the HQCJU members. The CCU underlines the fact that these bodies have no constitutional basis and cannot be provided with powers of control over the activities of the HCJ members. In some aspects the new selection procedure deviates from the European standards and limits the role of the HCJ in the process of constituting the HQCJU.
119. According to Art. 95 of Law No. 193, the selection of the HQCJU members is based on a competitive procedure, entrusted to the SB. The SB consists of three persons, elected by the HCJ from among its members and three persons from among the international experts proposed by the international organisations with which Ukraine cooperates in the field of preventing and combating corruption. The appointment of the HQCJU members is done by the HCJ according to the competition results.
120. The establishment of the SB changes the process compared to how the HQCJU used to be formed. Importantly, this approach departs from the previous rule for its composition, according to which half of the members of the HQCJU are judges elected by their peers. It should be noted that in the view of the CCJE, “in respect of every *decision affecting* the selection, recruitment, appointment, career progress or termination of office of a judge, the statute envisages the intervention of an authority independent of the executive and legislative powers within which *at least one half of those who sit are judges elected by their peers* following methods guaranteeing the widest representation of the judiciary”⁵². According to the

⁵¹ See European Charter on the Statute for Judges, p. 1, para. 1.3.

⁵² See CCJE Opinion No. 1, para. 38.

standards of the CoE this rule is important in order to prevent any manipulation or undue pressure⁵³.

121. According the previous method of formation of the HQCJU, the Congress of Judges had the authority to elect eight members of the HQCJU e.g. half of its composition. In addition, the previous composition of the HQCJU reflected the CoE standard for “widest possible representation”⁵⁴. The current proposal for the selection of the members of the HQCJU does not provide for any guarantees that this principle will be respected in the future. On the contrary, if this provision is maintained, the HQCJU shall be elected by three representatives of the HCJ and three international experts.
122. The tenet according to which decisions affecting the judiciary should be taken by “essentially non-political bodies with at least a majority of persons drawn from the judiciary”, is still seen by the CoE as one of the leading principles which guarantee the independence of the judiciary⁵⁵. This standard is upheld and confirmed also in the most recent CCJE opinions.
123. In addition, this standard is endorsed by the ECtHR. The Court has held that where at least half of the membership of a tribunal is composed of judges, including the chairperson with a casting vote, this will be a strong indicator of impartiality⁵⁶.
124. It should be noted that the principle “at least one half of those who sit are judges elected by their peers”⁵⁷ is not targeted simply at the judicial councils, due to the diversity of models in the member-states. This is why the standards proposed by the CoE refer to the *decisions* of bodies or authorities *which affect* the selection, election, evaluation, dismissal and career development of judges. The involvement of judges in the selection procedures for judicial bodies and authorities is a sign of independence of the judiciary and this is the logic behind the CoE standards about the predominant number of judges elected by their peers in such bodies.
125. It is clear that the HQCJU is a body whose decisions produce such effect on the judges and therefore it is recommended to bring its formation in compliance with this CoE standard. In addition, the requirement of independence refers to the HQCJU and therefore the principle of “half of the judges elected by their peers” should apply to it too.
126. Other Opinions of bodies of the CoE support the above-mentioned conclusions and indicate that this tenet is still seen by the CoE as one of the leading principles guaranteeing the independence of the judiciary. For example, one of the most

⁵³ See CCJE Opinion No.10 on the Councils for the Judiciary at the service of society, para. 17 – 18.

⁵⁴ See CCJE Opinion No. 1, para. 38. See also the European Charter on the Statute for Judges, para. 1.3 According to which for each body responsible for taking decisions affecting the “selection, recruitment, appointment, career progress or termination of office of a judge, the statute envisages the intervention of an authority independent of the executive and legislative powers within which at least one half of those who sit are judges elected by their peers following methods guaranteeing the widest representation of the judiciary.

⁵⁵ See CCJE Opinion No. 21, section B, Strengthening the integrity of judges.

⁵⁶ See *Le Compte, Van Leuven and De Meyere v. Belgium*, 23 June 1981, § 58, Series A no. 43.

⁵⁷ See CCJE, Opinion No. 1, para. 38.

recent opinions of the CCJE (issued in 2018) re-affirms that “the *decisions* should be merit-based and taken by essentially non-political bodies **with at least a majority of persons drawn from the judiciary**”⁵⁸.

127. As mentioned above Opinion No. 1 CCJE, para. 38, refers to “*every decision affecting the selection, recruitment, appointment, career progress or termination of office of a judge*” and sees it as **intervention** of an authority independent of the executive and legislative powers within which at least one half of those who sit are judges elected by their peers.
128. The CCJE considers the intervention “*in a sense wide enough to include an opinion, recommendation or proposal as well as an actual decision of an independent authority with substantial judicial representation chosen democratically by other judges*”.
129. Importantly, in its opinion, the CCJE points out that adhering to *this principle is particularly important for countries which do not have other long-entrenched and democratically proved systems*⁵⁹.
130. Last but not least, in cases of low confidence in the judiciary, it could be considered to strengthen the role of the Congress of judges in the process of election of half of the members of the HQCJU, by adopting rules for auditions of the nominated candidates, which could be broadcasted publicly. The rules for the auditions could provide a possibility for questions to the candidates asked by professionals or civil society representatives and could introduce procedures for integrity checks⁶⁰.
131. In case the selection of the HQCJU members is made with the involvement of the SB, the evaluation and selection process should be based on clear and comprehensive procedures. These procedures should allow a full and deep assessment of the professional and personal qualities of the candidates. The criteria should be objective and announced well in advance.
132. Another issue, which raises serious concerns, is related to the formation of the EIC and the SC. The involvement of representatives of the international community is not against the standards of the CoE, and may even be regarded as positive in order to ensure higher standards as regards impartiality and integrity. This approach is recommended by GRECO in the framework of its Fourth Evaluation Round Report on Ukraine⁶¹. Indeed, there may be situations where a particular body or a particular bench is perceived to be so compromised, or at risk, that bringing in an international element is one, possibly the only, way of ensuring the necessary credibility (such examples have been seen in the cases of Bosnia and Herzegovina and in Kosovo* notably, albeit in a different, post-conflict, context).

⁵⁸ See CCJE Opinion No. 21, according to which “the decisions should be merit-based and taken by essentially non-political bodies **with at least a majority of persons drawn from the judiciary**”.

⁵⁹ See CCJE, Opinion No. 1, para. 45.

⁶⁰ Similar procedure is provided in Bulgaria for the election of the candidates for the Supreme judicial Council of behalf of the general Assembly of judges.

⁶¹ See Greco report at <https://rm.coe.int/grecoeval4rep-2016-9-fourth-evaluation-round-corruption-prevention-in-/1680737207>.

133. The VC discussed this option in its Opinion on the Anticorruption Courts in Ukraine. According to the VC, international involvement seems to be justified in the specific situation in Ukraine, with due regard to the principle of Ukraine's sovereignty⁶² and as long as it is limited in time. However, some aspects of the functions and formation of these bodies, deeply involved in the evaluation and selection of judges and judicial bodies, seems to be in contradiction with the Constitution and with some essential standards of the CoE.

Special attention should be drawn to the authority and the functions of judicial bodies with international involvement. Regardless of their extraordinary character they should be *under the general obligation to respect and protect the independence of the judges and the judiciary*.

134. In the context of evaluation of the judges, the CoE standards refer to the involvement of "other professionals who can make a useful contribution to the evaluation process". However, according to the opinion of the CCJE, it is essential that such assessors should be able to draw on sufficient knowledge and experience of the judicial system to be capable of properly evaluating the work of judges. *It is also essential that their role is solely advisory and is not decisive*⁶³.

135. Due to the exceptional character of such measures and the high sensibility of the issue, strong legal safeguards should be provided in the national legislation. The legal provisions should regulate in detail the nomination, selection and appointment of both national and international members of such bodies in order to guarantee a high degree of transparency, objectivity and impartiality of their decisions. Compliance with the Constitution, the international and the European standards is required as well⁶⁴.

136. The analysis of Law No. 193 indicates, however, that the process of nomination and selection of the international experts for the SB and the EIC is not subject to any specific rules, reflecting the principles of professionalism, independence, impartiality, integrity, conflict of interest prevention, competitiveness, transparency and predictability. The lack of specific nomination and selection criteria marks the appointments of the members of such bodies with ambiguity and provides opportunities for undue pressure on judges, which deviates from the CoE standards.

137. Since the SB and the EIC, according to their functions, affect in a significant way the selection, appointment, evaluation and even a potential dismissal of members of the HQCJU and the HCJ, it could be recommended to provide rules for their nomination and appointment in the law, prior to the launch of the procedure for their selection. Currently neither the law nor any other act provides for clear rules in this respect, not even some minimum requirements for the professional or ethical qualities of the candidates for international experts.

138. The CCU has declared unconstitutional the provisions of Law No. 193 about the establishment of the EIC (art. 28, para. 1). This decision should be supported due

⁶² See VC Opinion 986/2017 on the draft Law on Anticorruption Courts in Ukraine, para. 49 and para. 61.

⁶³ See CCJE, Opinion No. 17, para. 38.

⁶⁴ See VC Opinion 986/2017 on the draft Law on Anticorruption Courts in Ukraine, para. 73.

to the lack of constitutional grounds of the powers of the EIC which, as a body established within a constitutional authority, cannot be provided with functions of control over it, if these functions are granted by the law and not by the Constitution.

139. According to the CCU, the names, composition and functions of the constitutional bodies must be amended only through changes to the Constitution. No other body or institution except the HCJ is “authorised to execute the constitutional functions of selection and evaluation of judges”⁶⁵.
140. In addition, the exclusive authority to exercise control and impose liability on justices of the SC is given to the HCJ, and these constitutional authorities can neither be delegated nor transferred to other bodies or institutions. The CCU rightly points out that an institution, established within a constitutional body, cannot be provided with the functions of control over it by a law. These conclusions of the CCU should be supported.
141. Based on these conclusions, a number of legal provisions of Law No. 193 are defined as unconstitutional and should be reconsidered in the context of future amendments. Among them is the function of the EIC to check the ethics and integrity of the HCJ members and to dismiss them (Art. 24 para. 3) as well as its power to monitor information about judges of the SC in order to identify “violation, gross systematic neglect of a judge of his/her duties incompatible with the status of a judge or his/her non-compliance with the position, violation of the duty to confirm the lawfulness of the source of property.” These functions are seen as problematic due to the fact that the HCJ is a body with a constitutional mandate and powers, regulated by the Constitution. These functions cannot be transferred or limited by unconstitutional bodies.
142. With regard to the integrity checks for judges, it could be mentioned that they are extremely important because judicial integrity is the foremost pre-condition for effective, efficient and impartial national justice systems. It is closely interlinked with the concept of judicial independence: the latter enables integrity, and integrity reinforces independence⁶⁶.
143. However, combating corruption should not be used to impair the independence of the judiciary. Guarantees should exist that the process of integrity checks “will be conducted by competent, independent, and impartial bodies”⁶⁷. A candidate who is rejected on the basis of such a control must have the right to appeal to an independent body and, to this end, have access to the results of such control⁶⁸. This is why the integrity checks should be tackled with utmost care and attention by taking into consideration the view of the VC, according to which independence is always the leading principle as far as judges are concerned. According to the VC “*despite the laudable aim of ensuring high standards through a system of evaluation, it is notoriously difficult to reconcile the independence of the judge*”

⁶⁵ See CCU No 4p 2020, p. 5.

⁶⁶ See CCJE, Opinion No. 21, para. 2.

⁶⁷ Ibid. para. 28.

⁶⁸ Ibid, para. 26.

*with a system of performance appraisal. If one must choose between the two, judicial independence is the crucial value*⁶⁹.

144. Another problematic issue is the authority of the EIC to submit motions to the HCJ and propose the dismissal of members of the HQCJU. According to the regulation in Law No. 193 the respective member of the HQCJU is removed from his/her post from the day of making this submission. This approach is unacceptable for several reasons.
145. First, it undermines the constitutional powers of the HCJ by delegating them to a body which has no constitutional mandate. Besides, if such powers are given to the EIC, its motion should be duly motivated and backed up with serious evidence the relevance and authenticity of which are beyond any doubt. The final decision should remain with the HCJ which has to dispose of its own mechanisms to check the information. This makes the procedure quite complicated. Judicial control should be provided as well.
146. The provision about the task of the EIC to exercise control over the ethics and the integrity of the HCQ and the HCQJCU raises a number of issues as well.
147. According to the CoE standards “a good system of performance appraisal also takes into account the judicial integrity of the evaluated judge. This is different from scrutinising individual decisions rendered by the judge, as this would constitute an evident infringement of judicial independence”⁷⁰.
148. In the first place, as far as the control over the ethical behavior is concerned, it should be noted that the rules on a judge’s proper conduct can serve as effective safeguard to prevent unethical behavior and corruption. The existing national ethical standards for judges and judicial bodies should be brought into compliance with the highest international and European standards in this field. These principles should as a general rule be elaborated either by a body/bodies of judicial self-governance, or the respective country’s judges’ association⁷¹.
149. The adopted ethical rules should be properly understood and applied in practice by the judges. According to the CCJE, the judges should be able to seek advice on ethics from a body within the judiciary which should provide proper guidance on how to behave when faced with specific ethical dilemmas⁷².
150. In the second place, the control over the integrity of the HCJ and HQCJU by the EIC also poses a number of issues. Some of them are linked to the rules and mechanisms of conduct of such checks and others refer to another complicated issue – the corruption in judiciary.

⁶⁹ See Venice commission, Report on the Judicial Appointments, 2007, CDL-AD(2007)028, para. 42.

⁷⁰ See CCJE Opinion No. 21, para. 29.

⁷¹ Ibid., para. 31.

⁷² See Recommendation of the Committee of Ministers to member states on judges: independence, efficiency and responsibilities CM/Rec (2010)12, para. 74. See also Opinion No. 1, CCJE, para. 32.

151. The CCJE takes the view that corruption of judges must be understood in a broader sense⁷³ due to the important role of the judges in the society. According to the CCJE, judicial corruption should comprise dishonest, fraudulent or *unethical conduct* by a judge in order to acquire personal benefit or benefit for third parties⁷⁴.
152. In addition, according to the CCJE, the perception of corruption in the judiciary can be as detrimental to the functioning of a democratic state as actual corruption.
153. As far as the integrity checks of judges are concerned, the CCJE strongly advises against background checks that go beyond the generally accepted checks of a candidate's criminal record and financial situation.
154. In its Opinion No. 21, the CCJE underlines that some countries carry out very thorough background integrity checks which include the personal, family and social background of the candidate. These checks are usually carried out by the security services. However, it should be underlined that in no circumstances should the fight against corruption of judges lead to the interference by secret services in the administration of justice. Corruption of judges is an offence and should therefore be tackled within the framework of established legislation.
155. The implementation of a system of integrity checks within the judiciary should always be strictly in line with the principle of proportionality and should respect the right to privacy and personal data.
156. According to the standards of the CoE, where integrity checks occur, they should be made according to criteria that can be objectively assessed. Candidates should have the right to have access to any information obtained. A candidate who is rejected on the basis of such a control must have the right to appeal to an independent body and, to this end, have access to the results of such control⁷⁵.
157. The fight against corruption in the judiciary should also encompass prevention of conflicts of interest, the principle of the natural judge, (random allocation of cases), rules on recusal and self-recusal, implementation or improvement of a system of asset declarations to comprehensively record in a regular – often annual – rhythm the judges' revenues and other assets. The declarations usually are extended to family members and are usually made publicly accessible.
158. These rules could be considered as to the extent to which they could contribute to the elaboration of the new legal provisions regarding a body, responsible for the ethics and integrity of the HCJ and the HQCJU. The responsible body should also target its work at fostering a climate of judicial integrity.
159. It could be noted that one of the grounds for dismissal of the members of the HQCJU - "violation of legal requirements related to corruption prevention" - is problematic in view of the fact that it is not clear and the law does not specify which these violations are.

⁷³ See CCJE Opinion No. 21, para. 10.

⁷⁴ Ibid., para. 6-7.

⁷⁵ Ibid., para. 26.

160. This is contrary to the principle of legality and proportionality of criminal offences and sanctions. In addition, the violation should be supported by strong evidence (judicial decision/verdict, administrative act, evidence of identified criminal or illegal assets etc.). A procedure for appeal against such decisions should be provided as well. This conclusion is supported by the VC and is in line with the CoE standards.
161. Last but not least, a deficiency in the procedures for the dismissal of members of the HCJ and the HQCJU is the lack of an effective remedy giving the right to challenge the decision through judicial appeal. The possibility of appeal shall ensure objectivity and transparency in the process. No such option is provided in the Law No. 193 against the motions of the EIC and the decisions of the HCJ for dismissal of a member of the HQCJU.

Conclusions and recommendations:

162. The dismissal of the HQCJU members prior to the end of their mandates and without a transitional period is problematic.
163. The new selection procedure of the HQCJU members deviates from the CoE standards and limits the role of the HCJ.
164. The HQCJU composition must not depart from the previous rule, according to which half of its members are judges elected by their peers.
165. The EIC and the SB have no constitutional grounds and cannot be empowered with tasks of control over the activities of the members of the HCJ and justices of the SC, as well as in the selection of the HQCJU members.
166. The introduction of any new bodies into the system of judicial self-governance should follow the respective CoE standards and recommendations. In the current format, the powers and procedures of both the EIC and the SB do not comply with these standards.
167. The evaluation and selection procedures for judges and members of judicial self-governing bodies should be based on clear and comprehensive procedures for assessment and objective criteria, announced well in advance and provided in the law.
168. The involvement of representatives of the international community in national bodies of the judiciary is not against the CoE standards. However, strong legal safeguards for the nomination, selection and appointments of both national and international members of such bodies are needed.
169. The competences of the EIC to check the ethics and integrity of the HCJ members and to dismiss them, as well as its power to monitor information about SC judges, are problematic. The existing ethical standards for judges, as well as the related procedures, should be in compliance with the highest international and European standards. Judges should be able to seek advice on ethics from a dedicated body within the judiciary.

170. The deficiencies in the procedures for the dismissal of members of the HCJ and the members of the HQCJU should be addressed. The law should specify the violations that may be grounds for dismissal of HQCJU members. A procedure for appeal against such decisions should be provided.

Remuneration of judges

171. As far as the remuneration of judges is concerned, the CCU decision identifies a contradiction of Law No. 193 with Art. 6, Art. 8 part one, and Art. 126, parts one and two of the Constitution of Ukraine. The main argument is that the legislative body cannot arbitrarily establish or change the amount of judge's remuneration by using its authority as an instrument of influence on the judiciary power.

172. The CCU addresses the arguments of the VC that the reduction of judges' salaries is not in itself incompatible with judicial independence. It also refers to the standards set by Opinion 1 of the CCJE, about specific provisions guaranteeing judicial salaries against reduction.

Conclusions and recommendations:

173. The issue about the reduction of the remuneration is in line with the VC opinion and the relevant CoE standards.

174. However, it should be noted that the CCJE Magna Carta of Judges emphasises that “in order to avoid undue influence, judges shall receive appropriate remuneration and be provided with an adequate pension scheme, to be established by law”⁷⁶.

The need to consult the judiciary

175. The VC Opinion considers another important issue which is not addressed by the CCU and is related to the requirement for the executive and legislative power to consult the judiciary in the process of the preparation of draft laws which concern them⁷⁷.

176. The VC sets out important arguments in favour of the need for a thorough analysis of the possible effects of a new wide-ranging and fast-track legislative process⁷⁸. According to the VC, the principle of stability and consistency of law, as a core

⁷⁶ See the CCJE's Magna Carta of Judges, 2010, para. 7.

⁷⁷ See CCJE Opinion No. 18 and the ECtHR case *Baku v. Hungary* on the need of the executive to consult draft laws with the judiciary.

⁷⁸ See VC Opinion No. 969/2019 on Amendments to the Legal Framework Governing the SC and Judicial Governance Bodies in Ukraine, CDL-AD(2019)027, para. 10 – 12.

element of the rule of law, requires stability in the judicial system⁷⁹ and “in this situation, convincing justifications have to be presented for yet another reform”⁸⁰.

177. These conclusions are made on the basis of the complaints by different stakeholders that Law No. 193, which affects significantly the judiciary in Ukraine, has not been the subject of proper consultation with judges or civil society representatives.
178. According to the CoE standards, this is regarded as a serious flaw and should be avoided because it can lead to the adoption of regulations which seriously infringe the independence of judges.
179. In its Opinion No. 18, the CCJE underlines the importance of judges participating in debates concerning national judicial policy. The judiciary should be consulted and play an active part in the preparation of any legislation concerning their status and the functioning of the judicial system.
180. The expertise of judges is also valuable when it comes to matters outside judicial policy. For example, by giving evidence to parliamentary committees, the representatives of the judiciary (e.g. the highest authority of the judiciary or the HCJ) can raise concerns about legislative drafts and give the perspective of the judiciary on various practical questions⁸¹
181. The judiciary can provide their insights on the possible effect of proposed legislation or executive decisions on the ability of the judiciary to fulfill its constitutional role⁸². Judges and the judiciary should be consulted and involved in the preparation of legislation concerning their statute and, more generally, the functioning of the judicial system⁸³
182. According to the Magna Carta of Judges (Fundamental Principles), the judiciary shall be involved in all decisions which affect the practice of judicial functions (organisation of courts, procedures, other legislation). The same view is taken by the CCJE in its Opinion No. 3, according to which judges should be consulted and play an active part in the preparation of legislation concerning their statute and, more generally, the functioning of the judicial system⁸⁴.
183. In addition, issues concerning the functioning of the justice system constitute questions of public interest, the debate of which enjoy the protection of ECHR Art. 10⁸⁵.

⁷⁹ See VC Rule of Law Checklist, CDL-AD(2016)007, II.B.4.i.

⁸⁰ See VC Opinion No. 969/2019 on Amendments to the Legal Framework Governing the SC and Judicial Governance Bodies in Ukraine, CDL-AD(2019)027, para. 15.

⁸¹ See CCJE Opinion No. 18, para. 31.

⁸² *Ibid.*, para. 41.

⁸³ See CCJE Opinion No. 3 para. 34 and the CCJE’s Magna Carta of Judges, para. 9. See also ECtHR case *Baka v. Hungary*, para. 168.

⁸⁴ See CCJE Opinion No. 3 para. 34.

⁸⁵ See ECtHR case *Baka v. Hungary*, para. 168 and para. 125.

Conclusions and recommendations:

184. Law 193 was not subject to proper consultation with the judiciary, which is a serious deficiency in the process of its adoption.
185. Judges should be consulted and involved in debates concerning their status and the functioning of the judicial system.
186. The functioning of the justice system constitutes an issue of public interest, the debate of which enjoys the protection of ECHR Art. 10.

RECOMMENDATIONS

187. CCU decision No. 2-p/2020 addresses a number of issues related to the transition from the Supreme Court of Ukraine to the Supreme Court, as well as to remuneration and pensions for judges and retired judges. The decision of the CCU is in general in line with the CoE standards. The implementation of these decisions, including any amendments to the legislation, should take into account the application to the ECtHR in the case of *Gumenyuk and others v. Ukraine*.
188. The analysis carried out indicates that CCU decision No 4-p/2020 addresses the most important recommendations in the VC opinion which refer to the unconstitutionality of the legislative provisions in Law No. 193.
189. The VC opinion provides a broader overview of the general reform policy and indicates a number of challenging issues of the judicial reform in Ukraine. Some of the problematic issues are not unconstitutional in the strict sense of the term, however they are not in line with the CoE standards and raise serious concerns regarding the independence of the judiciary.
190. With regard to the reform process, the VC opinion and the standards of the CoE should be used as reference for the expected legislative amendments which should replace the unconstitutional provisions of the Law No. 193.
191. The VC opinion provides useful guidelines about the ways to achieve compliance with the CoE standards, which have proven to be of value and might have positive effect on the intended reform. It could also influence the potential amendments to Law No. 193 and assist the authorities in avoiding similar mistakes in the future.
192. One of the important observations of the VC is related to the process of development of the legislation in question which was not subject to proper consultation with the judiciary and opened the door to a wide-ranging, fast-track legislative process. This process introduces a substantial reform, made in a limited time, without convincing arguments for its implementation. This endangers the rule of law and the stability of the judicial system.
193. Following the analysis of the CCU decisions, the VC Opinion and Law No. 193, key recommendations related to the current stage of judicial reform are:

Appointment and tenure of judges

194. The new parliamentary majority and the government should not question the appointment or tenure of judges who were appointed in a proper manner.
195. The unmotivated and abrupt decrease in the number of SC judges, as well as the retroactive application of access filters to the current case backlog, raises serious issues of infringement of ECHR Art. 6. The SC judges who passed the public procedure of selection and appointment should not be re-selected and re-evaluated (vetting procedure).
196. Dismissal from office, due to a negative evaluation, should be avoided for all judges who obtained tenure of office, unless in exceptional circumstances.

197. A judge should not receive a new appointment or be moved to another judicial office without consenting to it, except in cases of disciplinary sanctions or reform of the organisation of the judicial system. A judge transferred without his or her consent should have the right of appeal before an independent authority, which can investigate the legitimacy of the transfer.

Disciplinary proceedings

198. The shortened deadlines in disciplinary procedures can seriously infringe the independence of judges. They could easily result in unjustified decisions due to a lack of time on the part of the judges, as well as for the HCJ to be able to prepare properly.

199. Disciplinary procedures held *in absentia* and procedures initiated anonymously contradict to the right to a fair trial under ECHR Art. 6 and are not supported by the CoE standards. The judge must be given a full hearing and be entitled to representation to defend him- or herself.

200. In cases where a complainant insists on anonymity, mechanisms for concealing his/her identity could be introduced, similar to the ones for the protection of whistle-blowers.

201. The right to submit complaints should be limited to persons who have been affected by the acts of the judge or who have some form of '*legal interest*' in the matter.

HQCJU membership

202. The dismissal of the HQCJU members prior to the end of their mandates and without a transitional period is problematic. The new selection procedure of the HQCJU members deviates from the CoE standards and limits the role of the HCJ.

203. The HQCJU composition must not depart from the rule, previously observed, according to which a half of its members are judges elected by their peers.

Evaluation, selection and dismissal of members of judicial self-governing bodies

204. The EIC and the SB have no constitutional grounds and cannot be empowered with tasks of control over the activities of the members of the HCJ and justices of the SC, nor in respect of the selection of the HQCJU members.

205. The evaluation and selection procedures for judges and members of judicial self-governing bodies should be based on clear and comprehensive procedures for assessment and objective criteria, announced well in advance and provided in the law.

206. The introduction of new bodies into the system of judicial self-governance should follow the respective CoE standards and recommendations. In the current format,

the powers and procedures of both the EIC and the SB do not comply with those standards.

207. The involvement of representatives of the international community in national bodies of the judiciary is not against the CoE standards. However, strong legal safeguards in respect of the nomination, selection and appointments of both national and international members of such bodies are needed.
208. The competences of the EIC to check the ethics and integrity of the HCJ members and to dismiss them, as well as its power to monitor information about SC judges, are problematic. The existing ethical standards for judges, as well as the related procedures, should be in compliance with the highest international and European standards. Judges should be able to seek advice on ethics from a dedicated body within the judiciary.
209. The deficiencies in the procedures for the dismissal of members of the HCJ and the members of the HQCJU should be addressed. The law should specify the violations which can be grounds for the dismissal of HQCJU members. A procedure for appeal against such decisions should be provided.