



Support to the implementation of the judicial reform in Ukraine
Підтримка впровадженню судової реформи в Україні

**OPINION ON THE
RULES OF PROCEDURE OF
THE PUBLIC COUNCIL OF INTEGRITY OF UKRAINE**

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General remarks

The Public Council of Integrity (PCI) is established with the purpose to assist the High Qualification Commission of Judges of Ukraine (art. 87) and its status and functions are further developed in the Rules of Procedure of the Public Council of Integrity.

The current document aims to provide an opinion on the compliance of the Rules of Procedure of the PCI and the European standards on independence, evaluation and appointment of the judges and judicial candidates. In addition it takes into account the compliance of the Rules of Procedure with the Law On Judiciary and Status of Judges (the Law), as the Law has significant relevance to the status and functions of the PCI. The Rules of Procedure of the PCI should be in full compliance with the Law.

The PCI is established as a public body, facilitating the work of the High Qualification Commission of Judges of Ukraine which has the main responsibility to verify the information and the delivery of the final conclusions for the evaluation of judges and candidates for judges. The PCI is taking part in the process of individual evaluation of judges and judicial candidates, therefore its work should aim at improving the judiciary while ensuring the highest quality possible. According to the Council of Europe standards the evaluation of judges must be done in the interest of the public as a whole¹.

The mandate and the competences of the PCI are regulated both in the Law and the Rules of Procedure. The legal basis of the status and powers of the PCI can be found in art. 87 of the Law *On the Judiciary and the Status of Judges*. The competences of the PCI are based on the regulations on the ethics and integrity of the judges and judicial candidates as provided in the Law. The obligation of the judges to comply with the rules of judicial ethics and to ensure public trust in judicial integrity and incorruptibility is regulated in art. 56 para. 7 p. 2 of the Law. P. 3 of the same article is about the obligation to submit a declaration of judicial integrity and family ties. These obligations are further developed in art. 61 and 62 of the Law. Art. 61 is dealing with the declarations of family ties and their verification is the competence of the High Qualification Commission of Judges of Ukraine. Art. 62 is dealing with the declaration of Judicial Integrity and the High Qualification Commission of Judges of Ukraine is responsible for the verification of the information contained in this declaration.

¹ See Opinion 17(2014) on the evaluation of judges' work, the quality of justice and respect for judicial independence, Consultative Council of European Judges (CCJE), para. 4

A number of European bodies, such as the Venice Commission, the Consultative Council of European Judges (CCJE), the European Commission for the Efficiency of Justice (CEPEJ), and the Committee of Ministers of the Council of Europe have provided their opinions on issues on the independence of judges, their evaluation and appointment. However these opinions and recommendations are more focused on the work of judicial bodies and do not refer directly to bodies similar to the PCI of Ukraine and their status and functions. This is why the opinion on the compliance of the Rules of Procedure of the PCI with the European standards will be based on the generally accepted European standards and principles for the protection of the independence of the judiciary which should be respected in the evaluation and appointment of judges and judicial candidates. The main argument for this approach is that the protection of the independence of judges is a principle which should be respected at all times by any body in charge of the evaluation or involved in this process.

In general terms it could be said that the Rules of Procedure of the PCI take account of European standards for independence of judiciary. The recommendations and comments listed below aim to bring the Rules to closer compliance with the standards for independence, evaluation of judges and appointment of judicial candidates.

The current opinion is based on the study of the Law on the Judiciary and the Status of Judges and the Rules of Procedure of the PCI. The opinion takes account of the opinions and recommendations of the Venice Commission, the CCJE, the Committee of Ministers of the Council of Europe, CEPEJ, the Bangalore principles, all related to the independence of judges, their evaluation and appointment and the role of the Judicial Councils. It also takes into account the information received during the meetings with the PCI, the High Qualification Commission of Judges of Ukraine and the High Council of Justice.

The opinion will focus on the following issues:

- I. Independence of judges and judicial candidates and their accountability;
- II. Mandate, composition and conclusions of the Public Council of Integrity;
- III. The evaluation procedure of the Public Council of Integrity.

I. Independence of judges and judicial candidates and their accountability

- 1.1 It is largely recognized that it is extremely difficult to reconcile the issues of judicial independence with the procedures for evaluation of judges. As expected, this is the main difficulty faced by the PCI and its members in the context of the evaluation of judges and judicial candidates and especially in the context of elaboration of the Rules of procedure and other documents related to its work.
- 1.2 It is equally important to keep the balance between the independence of judges and their evaluation alive in the process of implementation of the Rules of procedure, so that both the regulation and the practice of the PCI respect the independence of judges and judicial candidates. Resolving potential conflicts between the independence of judges/judicial candidates and their evaluation is also an important basis for the smooth and fruitful cooperation of the PCI with the other bodies taking part in procedures related to judges – the High Qualification Commission of Judges of Ukraine and the High Council of Justice. Last but not least, an evaluation of judges and judicial candidates which is held with respect to the independence of judges and which does not affect the reputation of the judicial system will contribute to raising the low level of confidence of the citizens in the work of the judiciary.
- 1.3 According to the European standards the judicial independence does not mean that judges are not accountable for their work². On the first hand, judges are accountable through the appeal process (“judicial accountability”)³.

CCJE, Opinion 18, Para. 23

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.**

² See Opinion 17 (2014) on the evaluation of judges' work, the quality of justice and respect for judicial independence, Consultative Council of European Judges (CCJE), para 4

³ Opinion 18, CCJE, para. 25

On the second hand, judges must work in a transparent fashion (open hearings, explaining the law publicly in judicial session; respect the rules of fair trial (art. 6 ECHR), they should provide for reasoned judgments, available and comprehensive to the public (“explanatory responsibility”).

In the third place, when improper actions are committed, this should lead to disciplinary procedures or criminal responsibility (“punitive responsibility”). Annual Reports, available to the public, are also a good way to hold the judiciary accountable. Such report could be sent to the High Council of Justice and the Parliament⁴.

Last, but not least, judges are held accountable through the process of individual evaluation (appraisals, assessment). 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 evaluation is not abused and no political or other pressure is put on the judges and judicial candidates or to the individual judgments⁵.

CCJ, Opinion 18, para. 30

Individual evaluation must not be abused, e.g. to put political pressure on a judge **or to question individual judgments.**

The individual evaluation should comprise of the assessment of individual judges' professional work and their abilities⁶. It should also take account of their ethics and integrity.

1.4 In the course of the evaluation procedures of different types it is extremely important to exclude the factors that could challenge the impartiality of judges: “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 appraisal. **If one must choose between the two, judicial independence**

⁴ Opinion 18, CCJE, para. 29

⁵ 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

⁶ See Opinion 17 (2014) on the evaluation of judges' work, the quality of justice and respect for judicial independence, Consultative Council of European Judges (CCJE), para. 1

is the crucial value.”⁷ This is a basic rule which could be taken into consideration in the course of the work of the PCI.

II. Mandate, composition and conclusions of the PCI

The mandate, the composition and conclusions of the PCI are regulated both in the Law and the Rules of procedure.

1. Mandate of the PCI

1.1 The purpose of the work of the PCI is described in detail in art. 87 of the Law On the Judiciary and the Status of Judges (the Law) and is related to **assisting** the High Qualification Commission of Judges of Ukraine **in determining the eligibility of a judge (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 PCI.

The Rules and procedures on the PCI further develop the Law and according to its art. 2 para. 1, the main task of the PCI, is **to facilitate the work** of the High Qualification Commission of Judges of Ukraine 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.

1.2 The amendment of art. 88 from the Law, according to which if the PCI issues a negative conclusion on a judge or judicial candidate, the High Qualification Commission of Judges of Ukraine can overrule this conclusion and confirm the eligibility of the judge to administer justice, **should be assessed as a positive amendment in compliance with the European standards.**

As rightly mentioned in the Rules of procedure of the PCI, the Council **only facilitates** the work of the High Qualification Commission of Judges in Ukraine in the process of qualification evaluation of judges **but cannot take the final decision on the integrity**

⁷ See Report on the independence of the judicial system, Part I: the independence of judges Venice Commission (2010), para. 37 and the Report on Judicial Appointments (CDL-AD (2007) 028), Venice Commission, para. 42

and ethics of a judge. This regulation is in compliance with the European standards and, namely, with 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 European standards 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.**

CCJ, Opinion 3

Para. 37 In addition, other professionals who can make a useful contribution to the evaluation process might participate in it. However, it is essential that such assessors are able to draw on sufficient knowledge and experience of the judicial system to be capable of properly evaluating the work of judges. **It is also essential that their role is solely advisory and is not decisive.**

1.3 The analysis indicates a discrepancy in the powers of the PCI as regulated in the Law and in the Rules of Procedure. According to the Law the PCI 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 the judicial decisions.** This regulation is in compliance with the European standards because no body outside of the judiciary and the judicial control should be able to evaluate the credibility of the acts or actions of the judges. About their decisions judges are accountable through the appeal process (“judicial accountability”)⁸

This should be taken into consideration in view of the text of art. 18 para. 1 point 1 from the Rules and procedure according to which the PCI can submit information to the High Qualification Commission of Judges in Ukraine that shows “the positive reputation of a judge (judicial candidate), **the credibility of his/her decisions and actions”.**

⁸ Opinion 18 2015), on the position of Judiciary and its relations with the other powers of state in a modern democracy, CCJE, para. 25

CCJE, Opinion 18, para. 23

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.**

In view of this as far as the powers of the PCI are concerned it can give opinion only on the professional ethics and the integrity of a judge 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 (High Qualification Commission of Judges in Ukraine) and the opinion of the PCI is an element which should be related only to the ethics and integrity of the judges and the judicial candidates.

About the option of measuring the number of successful appeals and use it as a criteria in the course of evaluation of judges the Venice Commission considers that:

Compilation of Venice Commission opinions and reports concerning courts and judges, p. 26

Measuring the ‘stability of judicial acts’ [...] is questionable. It effectively means counting the number of successful appeals. Such a measure should be avoided because it involves an interference with the independence of the judge.

[...]Where a case is overturned on appeal, who is to say that the court of first instance got it wrong and the appeal court got it right? The decision of the judge of the first instance court quashed by the Court of Appeal could well later be supported by the decision of the Court of Cassation, the Constitutional Court or the European Court of Human Rights. [...]

1.4 In addition, although not mentioned explicitly in art. 19, the credibility of the decisions of a judge can not be subject of consideration also in the context of the conclusion on non –conformity of a judge (judicial candidate) for the reasons mentioned above.

2. Composition of the PCI

2.1 According to the Law (art. 87) the PCI consists of representatives of human rights civic groups, law scholars, attorneys, journalists who are recognized specialists in the sphere of their professional activity and have a high professional reputation and meet the criterion of political neutrality and integrity.

The Rules of procedure provide for restrictions for persons who cannot be members of the PCI. According to one of them (para. 4 point 6) judges or judges emeritus cannot be accepted as members of the PCI. Given the civic nature of the PCI this restriction can be explained with the endeavour to set up a body that is absolutely external to the judiciary. However, the PCI takes active part in the process of evaluation of judges and the European standards about the evaluation of judges and judicial candidates are already well established. It is true that these standards refer mainly to judicial councils but it is so because of the general concept that evaluation of judges is a process that takes place in the framework of the judiciary and is undertaken by judicial bodies. Since there are no concrete standards on the composition of civil body which evaluate judges and judicial candidates the existing general standards for evaluation could be used as a reference.

2.2 Conflict of interest situations should be tackled accordingly, in order to ensure the highest standards for transparency and integrity of the members of the CPI. In view of this the respect of the principle of independence of the judiciary requires to follow the general principles that acting lawyers (attorneys-at law) and prosecutors cannot take part in the process of evaluation of judges. Since the mandate of the members of the PCI is two years the simple withdrawals based on conflict of interest is not a suitable option, because in the course of two years acting lawyers or prosecutors could appear before any of the judges (judicial candidates) under evaluation. In addition 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 PCI appear before them in Court.

Compilation of Venice Commission opinions and reports concerning courts and judges, p. 26

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.

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 assessments of judges in legal cultures where historically the prosecutors dominated the judiciary. However, these considerations would not have the same force if retired advocates or prosecutors were to be used as assessors.

On the issue of composition of the PCI, see also the comments in Section II, point 1, subpoint 1.2 of this Opinion.

2.3 Below are some of the European principles which refer to the composition of the bodies which evaluate judges:

Report on Judicial appointments (2007), Venice Commission

18. 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.**

Report on Judicial appointments (2007), Venice Commission

Para. 25. The Venice Commission is of the opinion that a judicial council should have a decisive influence on the appointment and promotion of judges.

Opinion 10 (2007) on the Council for the Judiciary at the service of society, CCJE

16. The Council for the Judiciary can be either composed solely of judges or have a mixed composition of judges and non judges. In both cases, the perception of self-interest, self protection and cronyism must be avoided.

17. When the Council for the Judiciary is composed solely of judges, the CCJE is of the opinion that these should be judges elected by their peers.

CCJE, Opinion 10

Para. 60 There are several solutions for determining the competent body which should be responsible for judicial ethics:

- (i) to entrust this activity to the Council for the Judiciary, if this Council does not have a disciplinary function or has a special body for disciplinary matters with a separate composition within the Council for the Judiciary;
- (ii) or to create, alongside the Council for the Judiciary, an ethics committee whose only function would be the drafting and monitoring of rules of professional ethics. Problems with the latter choice may arise from the criteria of selection of the committee members and the risk of conflict or disagreement between this committee and the Council for the Judiciary.

The body entrusted with ethics could also, as the CCJE suggested in Opinion No. 3, advise judges on matters of professional ethics with which they are likely to be faced throughout their career.

Para. 62. In addition, the CCJE considers that **associating persons external to the judiciary (lawyers, academics, representatives of the society, other governmental authorities)** in 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.

2.4 Some recommendations could be made in the context of the nomination and election of members of the PCI. A procedure for public nomination and selection is attributed to the civic organizations represented in the PCI and this should be assessed as a positive approach. However the Rules and procedure do not cover the nomination and selection of the very representatives of the civic organisations in the Council, which are the ones who will actually take part in the evaluation of the judges (judicial candidates) and take the decisions about their ethics and integrity. In view of this their personality, professional competence and reputation should be beyond any doubt.

This is why it could be suggested that the process of their nomination and selection could also be subject to a public procedure including, for example, a public audition of their motivation/concept for work. It would be good if questions could be asked from a selection committee, NGOs and experts. Assets declarations and declaration of

conflict of interest of the members of the PCI could be provided as well. It would be good if proofs about their professionalism (education diplomas, related work experience, specializations etc.) are provided for in addition to the CV. The professionalism and the integrity of the members of the PCI should be beyond any doubt.

CCJE, Opinion 3

Para. 37 In addition, other professionals who can make a useful contribution to the evaluation process might participate in it. However, it is essential that such assessors are able to draw on **sufficient knowledge and experience of the judicial system to be capable of properly evaluating the work of judges.**

2.5 Further on, a public procedure for the personal composition of the Panels of the Council could be introduced such as for example a random “allocation” of persons to the panels, so that there are no doubts about it. In the absence of special software a lot could be drawn to ensure the randomness of the composition. (art. 6 para. 3 and ar. 12 para. 1 and para. 3)). In addition the principle of random allocation of cases (dossiers) for evaluation to the relevant panels is indispensable in view of the transparency and impartiality of this process.

2.6 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 referred to the integrity and ethical rules. The presence of such bodies or persons could encourage discussion within the judiciary on the content and significance of ethical rules. To take just two possibilities, such bodies or persons could be established under the aegis of the Supreme Court or judges’ associations. They should in any event be separate from and pursue different objectives to existing bodies responsible for imposing disciplinary sanctions⁹. The body entrusted with ethics could also, as the CCJE suggested in Opinion No. 3, advise judges on matters of professional ethics with which they are likely to be faced throughout their career.

⁹ See Opinion 3,(2002) to the attention of the Committee of Ministers of the Council of Europe on the principles and rules governing judges’ professional conduct, in particular ethics, incompatible behaviour and impartiality, CCJE, para., 29

3. The conclusions of the PCI

3.1 Art. 19 from the Rules and procedures regulates the conclusion on non-conformity of a judge (judicial candidate). An amendment to the paragraph 1 could be suggested as the article provides for a choice between the analysis and the verification of information on a judge (judicial candidate). The importance of the conclusion on non-conformity of the PCI is very high and could be overruled by the High Qualification Commission of Judges of Ukraine only by qualified majority. **Unverified information should not be included or used when drafting the conclusion about a judge or judicial candidate.** In view of this I would recommend the first part of para. 1 “upon the analysis and (or) the verification” to be amended to “upon the analysis **and** verification”. *Please see below additional information on the verification of the information in the process of the evaluation by the PCI.*

3.2 In addition, the verification of the information is provided only for the conclusion on non-conformity, but is not used for the conclusion of conformity in art. 18. It is good to have it expressly provided for as well.

3.3 Furthermore, I would suggest that the information and the conclusion of the PCI are **on the compliance or non-compliance of the judge with the ethical and integrity standards and not about his/her reputation.** The arguments are that the Law does not provide such requirement and also because the final decision is taken by the High Qualification Commission of Judges of Ukraine and not by the PCI. *For additional information on the reputation as criteria, please see below in the comments on the criteria for evaluation.*

3.4 It should be said that art. 19 is not mentioning the obligation of the PCI to issue **reasoned conclusion.** This is good to bring this article in compliance with art. 87 para. 3 which is stressing that the PCI should produce “justifiable reasons”. The reasons in the conclusion are important for the High Qualification Commission of Judges of Ukraine in order to take its final decision but also to provide for transparency of the motives of the PCI when making their conclusion.

CCJE, Opinion 10

Para. 92 All decisions by the Council for the Judiciary on appointment, promotion,

evaluation, discipline and any other decisions regarding judges' careers must be reasoned.

3.5 Last but not least, although it was mentioned that it is a case of bad wording of the article, I would suggest a revision of the text of art. 19 para. 3 according to which “The Council may decide to:

2) return the conclusion to the Panel for revision.”

The current revision of this article suggests that the PCI has the power to return the conclusion to the Panel “for revision”, so that the Panel has to amend its initial decision. In my opinion the PCI could not have the right to return the decision to the panel and could only request for additional clarifications. The Council should not be able to ask the Panel to revise its opinion, once it becomes final, because this would infringe the independence of the panel and the PCI as a whole. If there are doubts about the credibility or fairness of the opinion or the Panel, the case could be distributed to another Panel (based on transparent procedure for allocation of the assessment) and the issue about the credibility of the first Panel should be raised.

III. The evaluation procedure of the PCI

1. Scope of evaluation

1.1 According to the Law and the Rules of procedure the scope of evaluation made by the PCI is limited to the professional ethics and the integrity of the judges and the judicial candidates. The obligation of judges to comply with the rules of judicial ethics and judicial integrity as well as the duty to submit a declaration of judicial integrity a declaration of family ties and to comply with the anticorruption legislation, is explicitly mentioned in the Law on Judiciary (art. 56 para. 7). This makes a good basis for the integrity checks as part of the evaluation process of the judges and judicial candidates.

However it should be pointed out, that neither the law nor the Rules of procedure provide for a definition or explanation of what the integrity of judges means. This issue could be further considered.

1.2 As mentioned above the criteria for evaluation of the judges in which the PCI 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 High Qualification Commission of Judges of Ukraine (art. 83).

1.3 The checks made by the PCI should refer both to professional and private life of judges and judicial candidates to the extent in which the Ethical Code is regulating such issues.

CCJE, Opinion 3

Para. 29 Judges should conduct themselves in a respectable way in their private life. In view of the cultural diversity of the member states of the Council of Europe and the constant evolution in moral values, the standards applying to judges’ behaviour in their private lives cannot be laid down too precisely.

2. Principles of the evaluation of the judges

2.1 The evaluation of the ethical standards and the integrity of the judiciary, as mentioned above, must pay attention to two fundamental matters: the protection of judicial independence¹⁰ and the ways of maintaining and improving the quality and efficiency of judicial systems¹¹.

2.2 The clear and objective criteria for evaluation of judges are extremely important. According the European standards these objective criteria should be based on merit, having regard to qualifications, **integrity**, ability and efficiency¹² (Opinion 17, para. 31). In this way the individual evaluation of judges and judicial candidates refers not only to assessment of their professional qualities but also to the assessment of their professional ethics and integrity.

¹⁰ See the CCJE Opinion No. 1(2001), for the attention of the committee of ministers of the Council of Europe on standards concerning the independence of the judiciary and the irremovability of judges, CCJE

¹¹ See the CCJE Opinions No. 3(2002), No 4(2003), No. 6(2004), No. 11(2008), No. 14(2011).

¹² See Opinion No. 1 (2001), for the attention of the committee of ministers of the Council of Europe on standards concerning the independence of the judiciary and the irremovability of judges, CCJE para 25.

Report on the independence of the judicial system Part I: the independence of judges, (2010)
Venice Commission

24. Opinion No. 1 of the CCJE recommends in addition (at 25) “that the authorities responsible in member States for making and advising on appointments and promotions should now introduce, publish and give effect to objective criteria, with the aim of ensuring that the selection and career of judges are “based on merit, having regard to qualifications, integrity, ability and efficiency”. 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.

CCJE, Opinion 17 para. 31 and the ENCIJ 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 judges¹³.

2.3 The Rules of Procedure of the PCI do not provide for clear and objective criteria on the basis of which the elaboration of the conclusion on non-conformity of a judge (judicial candidate) concerning his/her integrity and ethics shall be elaborated. Such criteria should be set in advance and made public for the information of the judges, judicial candidates and the general public. Opinion 17 of the CCJE deals with the evaluation referring to qualitative and quantitative criteria suitable for the cases where evaluation of the quality of work of the judges is at stake. However organisational skills, **work ethic**¹⁴ or scholarly activities such as publications and lecturing¹⁵ are also treated as factors in this respect. 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 down¹⁶.

¹³ See the ENCIJ Report 2012-2013, section 4.8.

¹⁴ Germany, Poland, Sweden.

¹⁵ Croatia, Germany.

¹⁶ See Opinion 17(2014) on the evaluation of judges' work, the quality of justice and respect for judicial independence, Consultative Council of European Judges (CCJE), para. 13

CCJE, Opinion 17 on the evaluation of judges' work, the quality of justice and respect for judicial independence

Para. 9 In the case of most formal evaluations, the aims of the evaluation, the criteria used, the composition of the evaluating body, the procedure for evaluation and its possible consequences are **all clearly set out in advance of any evaluation exercise**. If evaluation is conducted in such a formal way, the rights and duties of the evaluated judge and the evaluating body will be regulated by means of primary or subordinate legislation.

2.4 The objective criteria for the evaluation made by the PCI could be provided for and further developed in the Rules of Procedure for the PCI and when PCI collects, checks and analyses the information about a judge/judicial candidate, 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 recommendations¹⁷.

2.5 In view of achieving a transparent and credible result it could be suggested that the PCI 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 of the PCI instead or in addition to the Rules of Procedure. In addition to the criteria of the evaluation such a methodology could provide information on the approach for evaluation, on the approach of gathering and verification of the information on the integrity and ethics of the judges and judicial candidates and on the procedures of evaluation process held by the PCI. The existence of a methodology will contribute to the unification of the approach for evaluation undertaken by the PCI.

This recommendation is in line with the standard set in Opinion 3, para. 10 concerning the evaluating body: “the evaluation, the criteria used, the composition of the evaluating body, the procedure for evaluation and its possible consequences are all clearly set out in advance of any evaluation exercise”.

¹⁷ See Opinion No. 1 (2001), for the attention of the committee of ministers of the Council of Europe on standards concerning the independence of the judiciary and the irremovability of judges, CCJE para 24.

CCJE, Opinion 3

Para 10. In the case of most formal evaluations, the aims of the evaluation, the criteria used, the composition of the evaluating body, the procedure for evaluation and its possible consequences are all clearly set out in advance of any evaluation exercise. If evaluation is conducted in such a formal way, the rights and duties of the evaluated judge and the evaluating body will be regulated by means of primary or subordinate legislation.

3. Criteria for evaluation, confidentiality and verification of the information

3.1 Further improvement of the text of art. 18 and art. 19 forms the Regulation on the PCI could be considered. As mentioned above the examination and the analysis of the information by the PCI should be based on clear and objective criteria (indicators) and should be justified. **This is why the reputation of 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 Law does not require the PCI to give opinion on the reputation of a judge but to “provide the High Qualification Commission of Judges of Ukraine **with the conclusion that a judge (a judicial candidate) does not meet professional ethics and integrity criteria**, which shall be included in the dossier of a judicial candidate or the dossier of a judge.”

CCJE, Opinion 17

Para. 48 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 of member states. This should thereby help maintain public confidence in the judiciary. 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.**

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**. 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.

The process and results of individual evaluations must, in principle, remain confidential

and must not be made public. To do so would almost certainly endanger judicial independence, for the obvious reason that publication could discredit the judge in the eyes of the public and possibly make him/her vulnerable to attempts to influence him/her. In addition, publication may mean the judge is subjected to verbal or other attacks.

3.2 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. Judges must feel free to render decisions that are sometimes unpopular with politicians or which certain persons do not like. In the minds of some judges the prospect of being subjected to a campaign of “petitions” by citizens and others who feel disgruntled by their decisions”¹⁸. **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.**

3.3 According to the Venice Commission’s Opinion on the Law of the judiciary and status of judges (2011) para. 47. “Organisations and citizens may provide information about a candidate’s integrity to the High Qualification Commission of Judges of Ukraine, **but it is now expressly provided that the candidate for a judicial position is entitled to study such information, provide explanations and contest or deny the information.** This represents an improvement of the earlier texts, as the Venice Commission had already stated 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.” (CDL-AD(2010)026, para.60). “This highly questionable feature is not compensated by the fact that the candidate will have the right to have access to the information received by the High Qualifications Commission of Judges of Ukraine and to comment on it although this right in itself is a good thing. (CDL-AD(2010)026, para. 61).”

¹⁸ Compilation of Venice commission opinions and reports concerning courts and judges (p. 27)

3.4 The CCJE also takes the view that 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.

3.5 The negative reputation of a judge or a judicial candidate could not 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 on rumors. A negative reputation of a judge or judicial candidate could be mentioned in the final conclusion but if there are no concrete proofs it cannot be the argument for the conclusion of the PCI. Even in the cases of publications in the media the information should be checked and verified as much as possible.

For example, in the case of suspicions for corruption a more detailed check of the declaration of assets (and the income and expenditure) should be requested by the competent body or the prosecution should be approached and the conclusion of the PCI shall be based on the results of this check.

3.6 As far as the regular evaluation of judges is concerned the procedure and the criteria should be public. However the process and results of it must, in principle, **remain confidential and must not be made public**. Their public announcement would almost certainly endanger judicial independence, for the obvious reason that publication could discredit the judge in the eyes of the public and possibly make him/her vulnerable to attempts to influence him/her. In addition, publication may mean the judge is subjected to verbal or other attacks. (See Opinion 17 , para 48).

The disclosure of negative evaluation of a judge to the public could ruin not only the reputation of the judge but the authority of the judiciary as a whole and even could provoke disobedience towards judicial decisions.

CCJE, Opinion 17

Para. 48. The process and results of individual evaluations must, in principle, remain confidential and must not be made public. To do so would almost certainly endanger judicial independence, for the obvious reason that **publication could discredit the judge in the eyes**

of the public and possibly make him/her vulnerable to attempts to influence him/her. In addition, publication may mean the judge is subjected to verbal or other attacks.

3.7 On the other hand, the evaluation of a judicial candidate for the purposes of his/her appointment should be open and transparent. In the case of a competition for judicial position the results from the evaluation of judicial candidates should be made public in order to justify the scoring. The judicial candidate has accepted to become part of a highly competitive procedure of selection. The evaluation of the judicial candidate is part of the process of ranking the candidates and should be part of the reasoning of the final decision to propose or not to propose the candidate for appointment by the Judicial Council. **However, the same strict principles of verification of the information used for the evaluation should be applied.**

3.8 In the course of such evaluation both the PCI and the HQC should be very careful on verifying any information that they make public and in the process of the verification by all means ensure the possibility of the judge to provide explanations and additional information and clarifications. The recommendation about the amendment of art. 19. para. 1 in order to be brought in compliance with art. 87 para. 6 point 1 was already discussed in Section II. point 3. subpoint. 3.1 of this opinion. **The negative conclusion should always be based only on verified information, especially in a situation when the conclusion of the PCI will become public.**

3.9 The evaluated judge (judicial candidate) should be informed who the evaluators are and the judge must have the right to ask for the replacement of any evaluator who might objectively be perceived as biased¹⁹.

CCJE, Opinion 17, Para. 48

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 of member states. This should thereby help maintain public confidence in the judiciary. 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

¹⁹See Opinion 3, (2002) to the attention of the Committee of Ministers of the Council of Europe on the principles and rules governing judges' professional conduct, in particular ethics, incompatible behaviour and impartiality, CCJE, para.36

public... The process and results of individual evaluations must, in principle, remain confidential and must not be made public.

3.10 In the context of a competition or evaluation process judges and judicial candidates should have means to defend their independence from false information, published in the media or publicly announced in the case when it discredits them in the eyes of society. Opinion 10 (2007) of the CCJE on the Judicial council and the service of society, regulates the issue of the protection of the image of judiciary, dealing with the issue of judges or courts challenged or attacked by the media or by political or social figures through the media “while the judge or court involved should refrain from reacting through the same channels, the Council for the Judiciary or a judicial body should be able and ready to respond promptly and efficiently to such challenges or attacks in appropriate cases.”²⁰

CCJE, Opinion 10

83. The Council for the Judiciary should have the power not only to disclose its views publicly but should also take all necessary steps before the public, the political authorities and, where appropriate, the courts to defend the reputation of the judicial institution and/or its members.

84. The Council for the Judiciary may also be the appropriate body to play a broader role in the field of the promotion and protection of the image of justice, as the performance of such a function often requires **striking a balance between conflicting freedom of individuals, social and political actors, and the media, on the one hand, and the public interest in an independent and efficiently functioning justice system, on the other hand.**

3.11 In order not to infringe the independence of judges the procedure of evaluation before the PCI should also be in line with the best standards for fairness of the procedures. In the course of the verification of the information and prior to the final conclusion of the PCI the evaluated judges (judicial candidates) should be given the right to defend themselves and provide explanation, additional documents and proofs. **In the case of a competition for a judicial position, this option should be available to the judicial candidate prior to the moment when information that is part of the**

²⁰ Opinion 10 (2007), CCJE, para. 82

evaluation is included in the final opinion of the evaluation body and before it is made public. It is good if this option is included in the public methodology of the PCI as part of the evaluation procedure to inform the judges and judicial candidates about their rights. The judges cannot be obliged to provide information to a body outside of the judiciary, however they should be provided with a clear chance to provide explanations or additional information and clarifications on the findings of the PCI before this information becomes public. The judges might choose to refuse to provide such information to the PCI and prefer to provide it to the High Qualification Commission of Judges of Ukraine, but they should be provided with such an opportunity.

However since the PCI is part of the process of evaluation, according to the Law, the judicial candidates have every interest to contribute to the process of verification of the information that concerns them.

CCJE, Opinion 17, para. 11

(d) Procedural fairness for the evaluated judge

41. As the CCJE has stated before, all procedures of individual evaluation should enable judges to express their views on their own activities and on the assessment that is made of these activities²¹. Any procedure should also enable them to challenge assessments before an independent authority or a court. The evaluated judge must therefore have the opportunity to contribute to the evaluation process in a way that is useful, for example by commenting on a preliminary draft or by being heard in the evaluation process.

Moreover, the evaluated judge must have an effective right to challenge an unfavourable evaluation, particularly when it affects the judge's "civil rights" in the sense of Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms. The more serious the consequences of an evaluation can be for a judge, the more important are such rights of effective review.

3.12 The same standards about transparency and openness of evaluation of judicial candidates should apply to the work of the High Qualification Commission of Judges

²¹ See Recommendation CM/Rec(2010)12, para 58. See also the ENCJ Report 2012-2013, section 4.19.

of Ukraine and its final decisions. Its members have to be extremely transparent about the verification of facts about the judicial candidates in their final decisions on their integrity, by providing serious and clear reasons for their conclusions, especially in the cases when they are overruling a negative conclusion of the PCI.

3.13 As far as the sources of information are concerned, para. 39 of the Opinion 3 and para. 9 of the Opinion 17 of the CCJE could be used to illustrate:

CCJE, Opinion 3

(b) How is it to be done: sources of evidence

Sources of information used in the evaluation process must be reliable²². This is especially so in respect of information on which an unfavourable evaluation is to be based. Also, it is essential that such an evaluation is based on sufficient evidence. The evaluated judge should have immediate access to any evidence intended to be used in an evaluation so it can be challenged if necessary²³. 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 account in the individual evaluation of a judge²⁴.

CCJE, Opinion 17

Para. 9 The sources of evidence on which evaluations are based must be **sufficient and reliable, particularly if the evidence is to form the basis of an unfavourable evaluation** (paragraphs 39, 44).

3.14 As far as the organisation of the activities of the PCI is concerned, it is important to stress on the fact that evaluators should have sufficient time and resources to permit a comprehensive assessment of every judge or judicial candidate²⁵.

²² See the ENCJ Report 2012-2013, section 4.16.

²³ See the ENCJ Report 2012-2013, section 4.19.

²⁴ As in Austria or Bulgaria.

²⁵ See Opinion 3 (2002) to the attention of the Committee of Ministers of the Council of Europe on the principles and rules governing judges' professional conduct, in particular ethics, incompatible behaviour and impartiality, CCJE, para. 36