



Group of States against Corruption  
Groupe d'États contre la corruption

COUNCIL OF EUROPE



CONSEIL DE L'EUROPE

Adoption: 23 June 2017  
Publication: 8 August 2017

Public  
GrecoEval4Rep(2016)9

## FOURTH EVALUATION ROUND

Corruption prevention in respect of  
members of parliament, judges and prosecutors

### EVALUATION REPORT

### UKRAINE

Adopted by GRECO at its 76<sup>th</sup> Plenary Meeting  
(Strasbourg, 19-23 June 2017)



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## EXECUTIVE SUMMARY

1. Corruption was one of the catalysts for Ukraine's Revolution of Dignity (so-called Euromaidan), which led to the fall of the Government, the flight of the President and most of his Cabinet, in February 2014. Since then, a number of key reforms have been launched on the anticorruption front through the so-called Anticorruption Package, i.e. Anti-Corruption Strategy for 2014-2017 and its Action Plan, which led to the establishment of the National Agency on Corruption Prevention (NACP), the National Anti-Corruption Bureau (NABU), the Special Anti-Corruption Prosecutor's Office (SAPO), and the Asset Recovery Management Agency (ARMA). In Ukraine, there is a coalition of forces pushing for change, including the international community, but also, very importantly, civil society, journalists and NGOs. With all these on-going reforms, citizens' expectations on actual delivery are high. However, recent research and opinion polls show there is still a popular sense that corruption is pervasive and that grand corruption remains a most pressing challenge. Public mistrust is also troublesome with respect to the judiciary and politicians.

2. With respect to the specific issues under evaluation in the present report, the National Agency on Corruption Prevention (NACP) plays a key role in the implementation of a central piece of legislation in preventing corruption in Ukraine, i.e. the Law on Prevention of Corruption (hereinafter LPC). This law applies to all categories of public officials, including members of Parliament (MPs), judges and prosecutors; it lays out fairly detailed rules on conflicts of interest and integrity related matters such as professional restrictions, gifts, ethics and asset declarations. With around one million public officials subject to asset disclosure requirements, it is clear that the NACP holds crucial responsibility for the e-declaration system to be both fair and effective. Likewise, the NACP has a key role to play in providing tailored guidance and advice on the applicable corruption prevention rules and the rationale behind them, as well as in promoting self-governance and compliance within distinct areas of public service. To this end the actual independence of the NACP, both on paper and in practice, and its means and resources are to be fully secured as a matter of priority. Likewise, it is critical that the administrative and criminal liability regime applicable to violations of e-declaration rules efficiently reinforce each other, not only in law, but also in practice; consequently, the NACP and the NABU interactions must take place in a swift and cooperative manner.

3. Regarding parliamentarians, positive measures have been taken to enhance transparency and increase public awareness of the Verkhovna Rada: an Open Parliament Action Plan was launched in 2015; work has started towards the adoption of an E-Parliament Strategy and a Communication Strategy. The parliamentary Committee for Preventing and Curbing Corruption has been remarkably transparent and proactive in fulfilling its important legislative, advisory and control responsibilities in anticorruption matters. However, more can still be done to ensure that legislation is processed with an adequate level of transparency and public discussion, including by introducing specific rules on the interaction of parliamentarians with lobbyists and other third parties seeking to influence law-making. Likewise, there is no comprehensive framework on parliamentary ethics and conduct, nor on principles of parliamentarians' integrity and due performance, supervision, advisory and training set-up and accountability mechanisms. For parliamentarians, the issue of business links and independence is a live one: reducing the influence of vested interests remains a critical challenge in legislative decision-making. Finally, one of the main public criticisms regarding the legislature relates to the misuse of immunity provisions, including for acts of corruption.

4. Turning to judges and prosecutors, since the "Revolution of Dignity" significant reforms have been initiated with international support including from the Council of Europe. Notably, a new Law on the Prosecutor's Office was adopted in 2014, a new version of the Law on the Judicial System and Status of Judges entered into force in September 2016, in the framework of constitutional reform, and the Law on the High

Council of Justice was enacted in January 2017. The new legislation includes many positive features such as the appointment of judges on the recommendation of the High Council of Justice, the abolition of the five-year probationary period for junior judges, the reinforcement of the High Council of Justice, the introduction of a three-level court system with a strengthened and unified Supreme Court, limitations on judges' immunity, as well as a considerable reduction of the previously very broad functions of the prosecution office. The main challenge now lies in effective implementation of these laws.

5. The authorities are urged to continue the reform process directed at strengthening the independence of the judiciary and the prosecution service and protecting it from undue political influence and to demonstrate credibly the will for real change. This requires, among other things, that the new self-governing bodies of both branches act in an independent and reform-oriented manner and that the recently established anti-corruption bodies, namely the NABU and the SAPO, are provided with sufficient resources and tools. It is recommended that a review of the rules on appointment and dismissal of the Prosecutor General be considered in order to make this process less prone to political influence. Moreover, legislative adjustments in several specific areas are necessary, e.g. with respect to regular performance evaluation of judges and prosecutors, case allocation, disqualification rules and disciplinary liability. Finally, it is crucial that judges and prosecutors are provided with further dedicated, regular training and illustrative guidance on ethics and integrity, prevention of conflicts of interest and corruption.

6. Despite the long list of matters to be addressed, it should be stressed that Ukraine is already engaged in a reform process which appears promising and is being supported by the international community. At the same time, there seems to be high resistance to change by large parts of the established system; the reforms can only succeed if they are taken seriously, supported by strong political will and thus implemented properly in practice. Moreover, it is clear that the fight against corruption must be fully embedded in Ukrainian society, and cannot merely be a matter of rules alone. GRECO's Evaluation Report must be seen, in this wider context, as a contribution to the move towards a modern, well-functioning democracy whose representatives and officials merit the trust of their citizens.

## I. INTRODUCTION AND METHODOLOGY

7. Ukraine joined GRECO in January 2006. Since its accession, it has been subject to evaluation in the framework of GRECO's Joint First and Second (in November 2006) and Third (in April 2011) Evaluation Rounds. The relevant Evaluation Reports, as well as the subsequent Compliance Reports, are available on GRECO's homepage ([www.coe.int/greco](http://www.coe.int/greco)).

8. GRECO's current Fourth Evaluation Round, launched on 1 January 2012, deals with "Corruption Prevention in respect of Members of Parliament, Judges and Prosecutors". By choosing this topic, GRECO is breaking new ground and is underlining the multidisciplinary nature of its remit. At the same time, this theme has clear links with GRECO's previous work, notably its First Evaluation Round, which placed strong emphasis on the independence of the judiciary, the Second Evaluation Round, which examined, in particular, the public administration, and the Third Evaluation Round, which focused on corruption prevention in the context of political financing.

9. Within the Fourth Evaluation Round, the same priority issues are addressed in respect of all persons/functions under review, namely:

- ethical principles, rules of conduct and conflicts of interest;
- prohibition or restriction of certain activities;
- declaration of assets, income, liabilities and interests;
- enforcement of the applicable rules;
- awareness.

10. As regards parliamentary assemblies, the evaluation focuses on members of national Parliaments, including all chambers of Parliament and regardless of whether the Members of Parliament are appointed or elected. Concerning the judiciary and other actors in the pre-judicial and judicial process, the evaluation focuses on prosecutors and on judges, both professional and lay judges, regardless of the type of court in which they sit, who are subject to national laws and regulations.

11. In preparation of the present report, GRECO used the responses to the Evaluation Questionnaire (GrecoEval4(2016)9) by Ukraine, as well as other data, including information received from civil society. In addition, a GRECO Evaluation Team (hereafter referred to as the "GET"), carried out an on-site visit to Ukraine from 12-16 December 2016. The GET was composed of Mr Vladimir GEORGIEV, State Adviser, Secretariat of the State Commission for Prevention of Corruption ("the former Yugoslav Republic of Macedonia"), Mr Rainer HORNUNG, Deputy Chief Prosecutor, Lörrach Prosecution Office (Germany), Mr Duro SESSA, Justice, Supreme Court (Croatia) and Ms Marja TUOKILA, Counsel to the Legal Affairs Committee, Parliament (Finland). The GET was supported by Mr Roman CHLAPAK, Mr Michael JANSSEN and Ms Laura SANZ-LEVIA from GRECO's Secretariat.

12. The GET interviewed representatives of the National Agency on Corruption Prevention, the National Anti-Corruption Bureau and the Special Anti-Corruption Prosecutor's Office, members and staff of the national Parliament, judges and prosecutors of the various jurisdiction levels in Ukraine, representatives of the High Council of Judges, the High Qualification Commission of Judges, the Council of Judges, the National School of Judges and the National Academy of Prosecutors. The GET also spoke with representatives of the Association of Judges, of NGOs (Anticorruption Headquarter, Anti-Corruption Research and Education Centre, Centre of Political and Legal Reforms, Chesno, Civic Lustration Committee, EIDOS, Institute of Development of Regional Press, Transparency International) and of the EU Delegation and Consultative Mission of the EU, IMF, OECD, OSCE, Project "Edge", UNDP, USAID and the US Embassy.

13. The main objective of the present report is to evaluate the effectiveness of measures adopted by the authorities of Ukraine in order to prevent corruption in respect of Members of Parliament, Judges and Prosecutors and to further their integrity in appearance and in reality. The report contains a critical analysis of the situation in Ukraine, reflecting on the efforts made by the actors concerned and the results achieved, as well as identifying possible shortcomings and making recommendations for further improvement. In keeping with the practice of GRECO, the recommendations are addressed to the authorities of Ukraine, which are to determine the relevant institutions/bodies responsible for taking the requisite action. Within 18 months following the adoption of this report, Ukraine shall report back on the action taken in response to the recommendations contained herein.

## II. CONTEXT

14. Corruption was one of the driving forces of Ukraine's Revolution of Dignity (so-called Euromaidan), a three-month popular uprising, that culminated with the fall of the Government, the flight of the President and most of his Cabinet, in February 2014. Since then, Ukraine has capitalised on a new President, Government and Parliament, bringing about reform of the political and economic system, and thereby trying to comply with the demands of the Association Agreement with the European Union (EU).

15. The turbulent political environment in Ukraine for many years has not made the necessary reforms an easy task to accomplish; having said that, the Government of Ukraine has recently taken important legislative steps as regards corruption. In its preceding Evaluation Rounds, GRECO made a vast number of recommendations to Ukraine, many of which required fundamental reforms, including constitutional, legislative, organisational and policy changes. GRECO acknowledged in recent follow-up reports (2015), the efforts made to address the large majority of GRECO's recommendations in an adequate way, but stressed the need to oversee their proper implementation<sup>1</sup>.

16. The adoption of the so-called Anticorruption Package, in October 2014, was a key milestone, which paved the way for the development of the Anti-Corruption Strategy for 2014-2017, and its Action Plan, as well as the establishment in 2016 of specialised anticorruption bodies, i.e. the National Agency on Corruption Prevention (NACP), the National Anti-Corruption Bureau (NABU), the Special Anti-Corruption Prosecutor's Office (SAPO) and the Asset Recovery Management Agency (ARMA). Full independence from political interference, clear professional competence and adequate material resources of the specialised institutions are critical for the anticorruption framework to be credible and effective.

17. The Anti-Corruption Package also contains amendments to the Law on the Public Prosecution Service, the Civil Code, the Administrative Code, the Commercial Code, the Law on Registration of Business, the Law on Prevention of Corruption, the Law on Civil Service, and the Criminal Procedure Code. More particularly, considerable progress has been achieved in respect of criminalising corruption activities under the Criminal Code (as opposed to dealing with such matters as administrative offences), liability of legal persons for corruption, regimes for confiscation and seizure, access to information, public procurement procedures<sup>2</sup> etc.

18. There is a coalition of forces pushing for reform in Ukraine, including the international community, but also, very importantly, civil society, journalists and NGOs. As mentioned above, EU support has helped secure the package of much-needed new legislation. The EU, in cooperation with Denmark, launched in June 2017 a new programme to fight corruption in Ukraine. The anti-corruption scheme is worth €16 million and spans over three years. It is based on four pillars: building and developing institutions to fight corruption; strengthening parliamentary oversight; working with local governments; and supporting civil society organisations and investigative journalists. Likewise, the [Council of Europe Action Plan for Ukraine \(2015-2017\)](#) includes specific measures to strengthen Ukrainian government capacity to prevent corruption, while also bolstering law enforcement agencies' institutional capacity to investigate and prosecute corruption-related offences; activities already underway refer, for example, to training on the liability of legal persons for corruption offences, strengthening of asset declaration system, establishment of transparent and accountable institutions etc. [Resolution 2145\(2017\) of the Parliamentary Assembly of the Council of Europe \(PACE\) on the Functioning of Democratic Institutions in Ukraine](#) acknowledges the ambitious

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<sup>1</sup> [Joint First and Second Evaluation Round, Fifth Addendum to the Compliance Report on Ukraine \(July 2015\)](#).  
[Third Evaluation Round, Second Compliance Report on Ukraine \(December 2015\)](#)

<sup>2</sup> The Ukrainian electronic procurement system ProZorro won the World Procurement Award in May 2016.

anticorruption reform agenda underway, but also underscores that the implementation pace of the fight against corruption is too slow; it calls for further action on four different fronts, notably, monitoring of the e-declaration system, resources of Specialised Anti-Corruption Prosecutor, establishment of a specialised anti-corruption court, and finally, implementation of civil service reform.

19. With all these reforms in the pipeline, citizens' expectations on actual delivery are high; by contrast, public perceptions regarding trust in key institutions of the State and corruption instances have not improved much as compared to the pre-Euromaidan period. In a survey carried out in mid-2015 by the National Democratic Institute (NDI Ukraine), corruption ranked fourth on the list of priority problems (the first concern being rising prices, the second the conflict in Eastern Ukraine and the third unemployment); anticorruption reform ranks first on the list of national priority policies, while judicial reform follows closely as a fourth priority concern. The Transparency International (TI) [Report on People and Corruption: Europe and Central Asia \(2016\)](#) indicates that 70% of Ukrainians do not see a decrease in corruption after Euromaidan; they think that public officials (65%), MPs (64%), tax officials (62%), judges (61%), the President and Prime Minister (60%) are the most prone to corruption. Ukraine is ranked in 131<sup>st</sup> position (out of 176 countries, where 1 = least corrupt) in TI's 2016 Corruption Perception Index.

20. As regards the specific categories of persons covered in this report, in Ukraine, the level of popular support for Parliament (Verkhovna Rada) has traditionally been low. In a 2015 survey by the Kyiv International Institute of Sociology, respondents called the Verkhovna Rada the most corrupt political institution in the country; with 60.6% of those surveyed saying it was a centre of corruption<sup>3</sup>.

21. Euromaidan protesters listed judiciary reform at the top of their agenda. Corruption among judges was determined to be the key issue undermining confidence in the judicial system by a majority (94%) of respondents; among other issues respondents identified were dependence of judges upon politicians (81%) and oligarchs (80%); paid-for court decisions (77%); and mutual cover-up in the system of justice (73%)<sup>4</sup>. A survey carried out in May-June 2016 by GFK Ukraine in the framework of the USAID Fair Justice Project demonstrated particular low levels of trust in the judiciary (10% of respondents) and the prosecution service (11%)<sup>5</sup>. According to a survey conducted by Dragon Capital and the European Business Association in September 2016, foreign investors believe that the biggest obstacles for investment in Ukraine are widespread corruption (average score – 8.5 points out of 10 possible) and lack of trust in the judiciary (7.5 points). Among the most positive actions that the Government of Ukraine has to take to attract foreign investment, businesspeople mentioned re-launching the judiciary by vetting existing members and hiring new judges (average score – 7.6 points out of 10 possible), and the prosecution of large numbers of high-level officials and judges for corruption (7.4 points)<sup>6</sup>.

22. Despite the anticorruption reform underway, there is still a popular sense that corruption is pervasive and grand corruption not effectively addressed with prosecutions of high level officials failing systematically, hence exemplary convictions non-existent. On the other hand, survey polls also indicate that citizens often pay petty bribes to make their lives easier. For example, a recent poll, released by the Centre for Insights Poll in

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<sup>3</sup> [Survey on Corruption in Ukraine carried out by the Kyiv International Institute of Sociology in 2015](#)

<sup>4</sup> [Public opinion poll conducted by Ilko Kucheriv Democratic Initiatives Foundation in cooperation with Razumkov Center Sociology Service in December 2014](#)

<sup>5</sup> [National public opinion survey on democratic, economic and judicial reforms, including implementation of the Law on the purification of government](#)

<sup>6</sup> The survey was conducted on the joint initiative of Dragon Capital investment bank and the European Business Association (EBA) with the analytical support of the Centre for Economic Strategy from 25 August to 2 September, 2016. In total, the survey involved 102 respondents, including Dragon Capital clients and foreign investor-EBA members (including portfolio and direct investors who already have investments and who plan to invest in Ukraine). The survey was conducted by method of online interviews.

2016, shows that over 25% of respondents report having to do a favour, provide a gift or a bribe to a public official to get things done<sup>7</sup>. Both petty and grand corruption are equally detrimental to human rights and to confidence in democracy, governance and the rule of law; it is clear that the fight against corruption must be fully embedded in Ukrainian society, and cannot merely be a matter of rules alone. GRECO trusts that the recommendations issued in this report will further assist Ukraine in achieving this.

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<sup>7</sup> [Public opinion survey of residents of Ukraine conducted by the Centre for Insights in Survey Research in May-June 2016](#)

### III. CORRUPTION PREVENTION IN RESPECT OF ALL CATEGORIES UNDER REVIEW: THE LAW ON PREVENTION OF CORRUPTION AND THE NATIONAL AGENCY ON CORRUPTION PREVENTION

23. With respect to the specific issues under evaluation in the present report, the National Agency on Corruption Prevention (NACP) plays a key role in the implementation of a principal piece of legislation in preventing corruption in Ukraine, i.e. the Law on Prevention of Corruption (hereinafter LPC). This law applies to all categories of public officials, including members of Parliament (MPs), judges and prosecutors; it lays out fairly detailed rules on conflicts of interest and related matters such as professional restrictions, gifts and asset declarations.

24. The LPC defines the NACP as a central executive authority with special status and responsibilities, responsible to and controlled by Parliament, and ultimately accountable to the Government. The GET asked for clarification regarding the reference made in the LPC to the NACP being "controlled" by Parliament and accountable to Government, since such a formulation raises doubts, rather than justification, as to the independence and accountability of the NACP. It was then made clear to the GET that, notwithstanding this erratic and in the GET's view somehow unfortunate wording, "Parliament control" refers no more than to the obligation for the NACP to submit activity reports to Parliament, which then the latter debates with no other further consequence. The GET considers that, as experience with the law evolves and further legislative improvements may occur in such a process, it would be better that its wording leaves no scope of doubt to the real meaning of the process, which ultimately refers to reporting and public accountability goals of the NACP vis-à-vis Parliament, rather than real control of the latter over the former (a possibility that would run counter to due independence of the NACP).

25. Civil control over the work of the NACP is ensured through the Public Council of the Agency, while financial spending of the NACP is controlled by the Accounting Chamber. The independent status of the NACP is stated in law: its leadership (five Commissioners) are selected through a special procedure by an ad-hoc Competition Commission, which is composed of eight members, appointed by Parliament (one person), the President of Ukraine (one person), the Government (one person), the civil service agency (one person) and by civil society groups (four persons). On the basis of the recommendations made by the latter body, the Commissioners are appointed by the Cabinet of Ministers for a period of four years (renewable once) and receive remuneration for their work. The NACP is provided with its own budget.

26. At the start, the GET wishes to underscore the significance of the establishment of the NACP and the potential this institution has to further contribute to anticorruption efforts in the country. The creation of the NACP has not been an easy path: legislation setting up the NACP dates back to 2014, but the body began operations only in 2016. Thus, the NACP is a very new body, which needs to acquire capacity, experience and confidence as it operates. The GET was made aware of certain shortcomings in the so far limited record of the NACP: these points, which will be described below in detail, rather than questioning the pivotal role that the NACP is to play in the anticorruption field, call for further readjustments and fine tuning of the system.

27. Firstly, during the on-site visit, the GET heard reiterated misgivings about the role played to date by the NACP's decision-making structures. A first obvious challenge relates to frequent blockage and paralysis of its voting procedures. In point of fact, at the time of the on-site visit, the fifth Commissioner had not yet been appointed after the resignation of the previous one. Since decisions of the NACP governing body require majority (i.e. at least three votes of its five Commissioners), with only four Commissioners, decisions are blocked because, most frequently, voting results in a tie. Criticism also related to the transparency and objectivity of the Commissioners' selection

procedure, in the absence of clear-cut rules on the working methods of the ad-hoc Competition Commission.

28. Secondly, public doubts were also expressed regarding the performance of lifestyle monitoring by the NACP and its potential for misuse as a means of political reprisal, in particular, for the lack of a clearly defined and publicly announced methodology for this particularly sensitive type of monitoring. The GET considers that, given the decisive role that the NACP holds in corruption prevention policy, the mere perception of it being politically biased has a seriously chilling effect in recasting citizens' trust in the anticorruption machinery as a whole. For the NACP to work effectively, it must be, and be seen to be, independent and free of any political interference both in law and, principally, in practice. What worries the GET more, is not only this perception, but the fact that the NACP is not providing full justification for its decisions.

29. Thirdly, public questions have been raised regarding the proactivity of the NACP and the protraction of internal regulations to render some of its multifaceted responsibilities operational; this was a salient problem in relation to the e-declaration regime as will be explained later. Part of this problem relates to the fact that for NACP regulations to enter into force, they require registration by the Ministry of Justice (which, as some interlocutors underlined, to some extent decreases the level of independence of the NACP from the executive).

30. Fourthly, while much emphasis has been put, at least in paper, in the principle of independence of the NACP, most interlocutors referred to the lack of well-articulated channels to make it accountable and fully transparent in its activity. A draft law proposing concrete amendments on NACPs operations and oversight was registered by a group of MPs after the on-site visit, in April 2017<sup>8</sup>; it is reportedly aimed at increasing professionalism and accountability of the NACP, as well as to strengthen its independence. It refers *inter alia* to the composition and method of work of the ad-hoc Competition Commission for the appointment of the NACP Commissioners, the adoption of NACP internal regulations, the evaluation of the NACP performance by an Evaluation Committee (with a mixed composition comprising both governmental and civil society representatives). The proposed draft also includes specific requirements on publicity of NACP's work: e.g. mandatory publication of its regulations, minutes of its meetings on the NACP's website, defined list of requirements for NACP annual activity reports which should contain information on the overall NACP performance, on the prosecution of corruption-related offences, and the results of consideration of lawsuits filed by the NACP with the courts.

31. In the GET's view, and in the light of the different considerations which have been described above, the current set-up and working procedures of the NACP would clearly benefit from further adjustment. This is a pressing task which could impinge on the effectiveness and impartiality of the corruption-prevention system under review in the Fourth Evaluation Round. Consequently, GRECO recommends (i) developing appropriate measures, including of a regulatory nature to enhance the independence and impartiality of the National Agency on Corruption Prevention (NACP) decision-making structures; and (ii) laying down detailed, clear and objective rules governing NACP's work, in particular, its investigative tasks, in order to fully secure transparency and accountability in practice of NACP action.

32. Much upheaval concerning the NACP action (or rather inaction) to date relates to its responsibility to control asset declarations. While an asset declaration system is no new feature in Ukraine, the level and manner of disclosure of the newly introduced regime is unprecedented. The 2011 Law on Access to Public Information, as amended, has been key in this respect as it opens up a number of databases held by public authorities,

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<sup>8</sup> Draft Law No. 6387, registered at the Verkhovna Rada on 14 April 2017

including on asset declarations of public officials, but also other public registers with property rights information (land cadastre, immovable property rights, vehicle registration). During the on-site visit, various interlocutors placed much hope on the current reforms, which had been called for, *inter alia*, by both civil society and the international community. In point of fact, the setting up of an operative e-declaration system was a pre-requisite for Ukrainians to receive visa-free travel within the European Union, as well as financial aid from the International Monetary Fund (IMF), the World Bank and the EU. The rules on asset declarations are rather comprehensive; they provide for an online declaration system and publicity of declarations (some information is not disclosed to the public for privacy and security purposes: address, ID, other personal identification data)<sup>9</sup>.

33. The current Government has repeatedly reaffirmed its commitment to implementing the e-declaration system. However, the effective establishment of e-declaration has been challenged and faced hostility from its start; it has subsequently stalled in its implementation. The original August 2016 launch date was delayed because the software was not given security clearance; this meant, in practice, that no action could follow in case of false or incorrect reporting. Technical bugs have been a continued problem causing much discomfort among public officials, who have repeatedly complained about malfunctioning and difficulties in entering data into the system as deadlines approached. The latest incident in this respect occurred in March 2017 and resulted in a call by the Prime Minister for the NACP members to take political responsibility for the system's failure and to resign from their posts.

34. Several bills were tabled in Parliament aiming at either watering the reform down, or simply delaying it to the extent possible. At the time of the on-site visit, an appeal had been filed by 48 MPs before the Constitutional Court challenging several key aspects of the e-declaration system regarding the handling of personal data (i.e. obligation to report assets of family members, valuable movable property, cash, financial liabilities, significant changes in assets situation, assets belonging to third parties), as well as in relation to institutional matters (access of the NACP to registries from other authorities, power of the NACP to verify accuracy of forms and monitoring lifestyle of declarants). After the on-site visit, the GET was most troubled to hear about the move made by the Verkhovna Rada to subject the representatives of anticorruption NGOs to e-declaration requirements, pursuant to the recent amendments introduced in Article 3 of the LPC in March 2017, which will enter into force from 2018<sup>10</sup>. The GET shares the concern voiced by other international organisations and donors about the discriminatory nature and intimidating intent of such a requirement solely targeting anticorruption activists and urges the authorities to reconsider their position. It would appear that the President of Ukraine has now announced the establishment of a task force, involving civil society representatives, to look again at the matter and seek remedial action. The GET is of the firm view that a fair balance between transparency and proportionality must be sought for the public interest.

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<sup>9</sup> The provisions of the LPC relating to the financial control of asset declarations were subject to an Expert Opinion of the Council of Europe (as per the request of the Verkhovna Rada). CoE/EU Eastern Partnership Programmatic Cooperation Framework (PCF). PCF Project: Fight against Corruption in Ukraine. ECCU-PCF-UA-7/2016

<sup>10</sup> The initial core of the draft amendment was to provide an exemption for contracted military service personnel and mobilised soldiers from obligations to file e-declarations, notably due to technical constraints to do so on time – or even at all (lack of necessary computer equipment in their locations, lack of access to secure Internet networks, necessity to be present in person for some preparatory steps, e.g. applying for e-signature). The proposed draft was modified during the Parliament session discussion, including by adding a specific requirement for anticorruption NGOs to file e-declarations in the same form envisaged for public officials.

Table of Registrable Interests and Thresholds

Category	Must Declare	Thresholds
Real estate (in ownership, joint ownership, possession, usage/rent)	✓ (own and family members*)	All declarable
Movable property (in ownership, joint ownership, possession, usage/rent)	✓ (own and family members)	When value exceeds 50 minimum wages
Commercial interests (shares, stocks, partnership, sole entrepreneur)	✓ (own and family members)	All declarable
Intangible assets, including property rights	✓ (own and family members)	All declarable
Income (salary, honoraria, dividends, royalties, pension, etc.)	✓	All declarable
Gifts	✓	Individual gift when value exceeds one minimum wage; if several gifts by same person/organisation, when aggregated value exceeds two minimum wages
Monetary assets (cash, funds lent to third parties, etc.)	✓	When value exceeds 50 minimum wages
Debts, loans, expenditure and financial transactions	✓	When value exceeds 10 monthly subsistence minimums. If value does not exceed 50% of minimum wage, only overall value is to be indicated
Secondary positions or jobs	✓	All declarable
Participation in management, supervisory bodies of non-commercial firms (public associations, charities, professional associations, etc.)	✓	All declarable
Non-Financial interests		

\**Note:* In case of refusal of a family member to provide the information required, the declarant must indicate this in the declaration form, as well as all known information to him/her about such family member.

35. In September 2016, a certified electronic register went live. The e-declaration system is mandatory for all public officials, managers of State and communal enterprises, and other employees who are paid by the State. It covers the categories under review in the present report: parliamentarians, judges and prosecutors. The declaration requirement applies on an annual basis during the term of office, by 1 April every year, as well as within one year upon termination of office. At the time of the on-site visit, a total of 105 000 declarations had been received by the NACP (i.e. "first wave" of declarations subject to mandatory scrutiny); this has been a remarkably high turn-over of declarations as only 1 500 were initially expected. It is anticipated that, by mid-2017, around 1 000 000 declarations will be in the hands of the NACP (i.e. "second wave" of declarations to be randomly checked). Again, in the GET's view, as experience with the law evolves, the system needs further streamlining. For example, interlocutors referred to an important loophole in the universe of persons subject to disclosure requirements: officials of the State Security Service, an institution perceived by citizens as corruption-prone, are exempt from the LPC public disclosure requirements. They are understood to be covered by a special regime of a private-internal nature, but this has not been developed to date. The GET was told that this was a rather restrictive (and doubtful) understanding of the LPC, which provides for a publicity waiver regarding members of the personnel of the agencies that conduct operative and investigative or intelligence-

gathering or counterintelligence activities, whose affiliation to the above authorities constitute a State secret (Article 59(1), LPC).

36. According to the LPC, the NACP is to carry out a complete examination of asset declarations, within 90 days of their filing; more particularly, it is to ascertain the reliability of the declared data, the accuracy in the evaluation of the declared assets, as well as the presence of a conflict of interest and signs of illicit enrichment (so-called "lifestyle monitoring"). When results of the complete examination of the declaration show false information included in the declaration, the NACP shall notify in writing the head of the relevant authority, where the respective declarant works, and other specialised bodies in the field of combating corruption. The NACP is empowered to access other authorities' databases (e.g. tax authorities, real estate registry, etc.), as necessary while performing its verification task. If the NACP detects minor violations of the rules (failure to submit an asset declaration within the time limit), it is itself responsible for imposing rather significant fines ranging from 50 to 100 gross minimum wages depending on the seriousness of the infringement (2 500 to 5 000 €), as well as a professional ban of up to one year. In more serious cases, i.e. where it was found that an official presented deliberately incomplete or incorrect data, as punishable under Article 366(1) of the Criminal Code, or where there are signs of illicit enrichment, as punishable by Article 368(2) of the Criminal Code), it refers the cases to the National Anti-Corruption Bureau (NABU). Criminal sanctions consisting of imprisonment, fines and/or professional bans are applicable in such cases.

37. It is clear that the monitoring work by the NACP is of prime importance for the e-declaration system to operate properly given that, as described above, it is the main entry point for checking the information and possibly detecting irregularities. Accordingly, the GET deems it crucial that a range of measures follow to ensure effective scrutiny of asset declarations, as established in the LPC.

38. Firstly, it is indispensable that every effort be made to equip the relevant division of the NACP with adequate personnel and material resources. In this connection, the recruitment process of staff (with civil servant status) is an on-going process: the NACP should have 311 employees, but it currently functions with 186 (60% of its statutorily fixed resources)<sup>11</sup>. It was foreseen that a total of 56 officials would be performing asset declaration verification; currently, there are 36 officials who have been recruited to this aim. Material and technical shortages were also reported on-site (office premises, equipment, office furniture either lacking or in unusable condition, electricity black-outs). The GET considers that the issue of personnel means of the NACP needs to be framed in a broader context as to its technical resources, including through the development of automated databases and appropriate back-up software for those. The GET notes that, since its establishment, staff recruitment of the NACP has proceeded at a reasonable pace, and various interlocutors, raised the concern that rather than a shortage in resources, what the NACP was mostly lacking at present was proactivity and determination in pursuing its role. The budget of the NACP in 2016 amounted to approximately €828,000 (74% of which is devoted to party funding monitoring).

39. Secondly, the GET notes that, at the time of the on-site visit, the NACP had not been in a position to start verification of asset declarations given that it lacked the requisite internal regulations for doing so<sup>12</sup>. This was signalled as a most troubling situation by all interlocutors met. Moreover, the United Nations Development Programme (UNDP) offer to provide the software required for undertaking automated verification of e-declarations met with reluctance from the NACP, which, in turn, has opted for hand-picking manual verification of "first wave" declarations, and subsequently

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<sup>11</sup> The GET was further informed, after the on-site visit, that competitions for the remaining vacancies have now been completed and it is expected that the NACP will fill all posts by the second half of 2017.

<sup>12</sup> The GET was informed, after the on-site visit, that Regulations for Control and Full Verification of E-Declarations were enacted on 17 February 2017.

tendering out, in the future, the development of software for automated verification. Such an option departs from objective verification means and can only contribute to spreading suspicions of bias in the process. It is clear that the use of technology could better allow for comparability across time of asset and income variations could well facilitate early detection of potential anomalies and irregularities. The GET is firmly convinced that, for the verification process to be considered transparent, fair and balanced, it is essential that clear criteria, deadlines and order of inspections are laid down in regulation, and that appeal channels are in place for non-compliance decisions. Likewise, decisions of the NACP must be fully justified and public; both criteria which the GET was told were missing at present when looking into the way in which the NACP is operating (see also misgivings noted above, in paragraph 29).

40. Another outstanding issue relates to the requisite access of the NACP to the registries held by other authorities, and the actual interoperability of databases - safe respect for privacy rights, a process that is currently under development, but yet needs to be concluded. The GET understands the advantage of forming new specialised bodies, particularly, in a context where former structures were tainted by corruption; however, it is important to ensure that mandates do not overlap and that they all coordinate efficiently and swiftly with one another to get things done.

41. The GET was worried to hear repeated criticism regarding the inefficiency and irresponsibility of the NACP in this particularly sensitive matter; several interlocutors went further in stressing that these were all deliberate delays and that the NACP inconclusive attitude was obstructing *de facto* the effective operability of the e-declaration system. The GET can only be perplexed as to the current state of affairs and the inability of the NACP to conduct this matter in a more expeditious manner. GRECO recommends that appropriate regulatory, institutional and operational measures be taken to ensure effective supervision of the existing financial declaration requirements, including, but not limited to the enactment of by-laws allowing the NACP to perform its verification tasks; the adoption of an objective lifestyle monitoring procedure<sup>13</sup>; the introduction, without delay, of automated cross-checks of data and interoperability of databases, with due regard for privacy rights; and the institution of appeal channels for sanctions imposed.

42. Thirdly, it must be noted that the National Anti-Corruption Bureau (NABU) – which is competent for the prevention, detection, suppression, investigation and solving of corruption offences committed by senior officials – has enforcement responsibilities in the implementation of the asset disclosure system. Notably, it is entrusted with determining investigative and sanctioning attributions in the event of suspicions of criminal activity, tax evasion or illicit enrichment. Since its establishment in 2016, the NABU has proven to be an efficient institution in countering corruption in Ukraine, as evidenced by its strong track record of investigations. There have been some worrying signs going in the direction of curtailing NABU's remit; such moves could put in question the actual political will to tackle corruption, not only with words, but also in practice. It is crucial that the NABU is further supported by the Ukrainian authorities, and shielded from improper influence or pressure, for it to continue its work as determinedly and efficiently as it has done to date.

43. The NABU has also been fairly proactive in verifying the veracity of the financial disclosure forms available online for public consultation. At the time of the on-site visit, it had opened 10 criminal proceedings, a number of which concern MPs and judges. Pursuant to Article 17(3) of the Law on the National Anti-Corruption Bureau, the NABU has the right to obtain information on asset declarations; however, the NACP had refused to give full access to the registry of declarations (including information which is not

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<sup>13</sup> The Ukrainian authorities indicated that, after the on-site visit, a methodology for life-style monitoring has now been developed. GRECO will assess both the contents and the operability of this newly adopted methodology in the framework of its compliance procedure.

publicly available, i.e. personal identification data) to the NABU. This refusal by the NACP raises doubts as to its willingness to swiftly cooperate with a natural partner in implementation of the law; the provisions of the LPC clearly aim at the NACP and the NABU mutually reinforcing their roles and effectiveness.

44. After the visit, the GET heard that on 13 January 2017, the NABU and the NACP had signed a Memorandum of cooperation and exchange of information providing, among other things, the NABU with full access to the register of e-declarations, once the required technical arrangements have been made. The GET welcomes this step; it is of prime importance that full and unhindered access is now swiftly ensured in practice. It is equally important for the NABU's work to have proper access to relevant national and regional databases necessary for further investigations, once criminal proceedings have been initiated on the basis of the information contained in the asset declarations. While article 17(3) of the Law on the NABU sets a legal basis for such access to relevant information, it would appear that the practice does not always follow. For example, the GET heard shortly after the visit that the Prosecutor General's Office (PGO) had blocked the access by NABU to the unified register of pre-trial investigations. It is for those reasons that GRECO recommends ensuring that in practice, the NABU is granted proper and unhindered access a) to the complete asset declarations received by the NACP and b) in the framework of criminal proceedings started on the basis of such declarations, to all national and regional databases necessary for the proper scrutiny of asset declarations.

45. The GET further refers to another grey area of the LPC regime, notably, with respect to gifts. In this connection, the LPC establishes a general ban on gifts, with two exceptions: gifts which meet "generally accepted notions" of hospitality and gifts below a certain threshold. The maximum threshold of "acceptable gifts", other than hospitality, applies as follows: (i) individual gifts must not exceed one minimum monthly salary, as determined on the day such gift was accepted (52€); and (ii) the aggregate value of individual gifts received from the same person, or group of persons, within a year must not be more than twice the rate of the cost of living (97€), as determined for an able-bodied person as of 1<sup>st</sup> January of the year in which the respective gifts were accepted (Article 23, LPC)<sup>14</sup>. The notion of gift is broad and encompasses cash or other property, advantages, privileges, services, intangibles, given/received free of charge or at a price below the minimum market price (Article 1, definitions of LPC).

46. The LPC also establishes a procedure for reporting unlawful gifts (Article 24, LPC), which consists of the following steps: rejecting the proposal, identifying the offeror and involving witnesses whenever possible, and finally, notifying in writing the immediate superior, within one business day of the irregularity taking place. The GET could not gather satisfactory explanations as to how this reporting process is being channelled for any of the professions under the scope of the Fourth Evaluation Round, or whether such a process has ever been set in motion.

47. The GET acknowledges the steps taken by the authorities to further regulate gifts, limit their acceptance and increase transparency of the system. None of the interlocutors met (from either governmental or non-governmental sectors) raised any particular concern as to the issue of gifts. That said, the GET has specific misgivings about the current system. Firstly, the maximum permissible thresholds per individual gift, as well as the aggregated value of gifts per year, are tied to salary/cost of living scales which in the GET's view, may raise doubts as to the actual appropriateness of the gifts received. It may also convey a wrong signal to the general public as to the level of tolerance within the categories of professionals covered in this report concerning gifts. While the thresholds may not seem high today, they are prone to increase in the future as they are tied to salary levels. Secondly, it is unclear what really constitutes hospitality in practice;

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<sup>14</sup> The 52€ and 97€ thresholds refer to the data on minimum monthly salary/cost of living in 2016.

the law is quite vague in this respect as it refers to “generally accepted notions”. Thirdly, there is no valuation system for in-kind benefits. Fourthly, reporting mechanisms still need to be developed in practice. These concerns apply not only in relation to MPs, but also in the case of the other two groups of officials reviewed in this report, i.e. judges and prosecutors. GRECO recommends (i) further developing the rules applicable to the acceptance of gifts by members of parliament, judges and prosecutors, in particular, by lowering the threshold of acceptable gifts; providing for more precise definitions to ensure that they cover any benefits including those in kind; clarifying the concept of hospitalities which may be accepted; (ii) establishing internal procedures for the valuation and reporting of gifts, and return of those that are unacceptable<sup>15</sup>.

48. Finally, as the system matures, the GET deems it essential to better involve officials themselves in understanding the obligations of the LPC and ensuring self-responsibility in compliance. The NACP, in cooperation with the UNDP, launched in November 2016 an information campaign “Conflict of Interest: Need to Know” consisting of a series of workshops organised in 13 Ukrainian oblasts. The GET was informed that the NACP has mainly focused, since it started to operate, on public administration officials (central and local levels); additional steps are yet to be taken for other categories of persons under the scope of the LPC (including parliamentarians, judges and prosecutors). In this connection, the GET considers that for the LPC to work, it needs firstly to be understood, secondly, regarded as legitimate and “internalised” by those who have to abide by the rules, and thirdly, suited to the needs and particularities of their profession. The GET understands that this is an on-going reflection process, leading to continued fine-tuning of the LPC in order to ensure its effective implementation across the entire public sector. As implementation of the law evolves, it will be crucial that any future changes or adjustments introduced in the system are worked in close cooperation and with full involvement of the different categories of public officials covered by the law. GRECO recommends that the NACP, in close coordination with Parliament, the judicial and prosecution services, further develops communication and advisory channels with the latter and prepares tailored guidance on implementation of the Law on Prevention of Corruption, as applied to each of the respective professions.

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<sup>15</sup> The Ukrainian authorities indicated that, after the on-site visit, rules had been adopted for the valuation and reporting of gifts. GRECO will assess the newly introduced rules in the framework of its compliance procedure.

#### IV. CORRUPTION PREVENTION IN RESPECT OF MEMBERS OF PARLIAMENT

##### Overview of the parliamentary system

49. The unicameral national Parliament (the Verkhovna Rada) is composed of 450 members who are elected for a five-year term, with half of the members elected according to a model of proportional representation with closed party lists based on a 5% threshold. The other half is elected in 225 single-seat districts according to a relative majority.

50. The current legislature (2014-2019) has 423 members (out of whom 52 women, i.e. about 12% of the total number of MPs). The political composition of the present legislature (2014-2019) is as follows:

Faction of the party Petro Poroshenko Block	141
Faction of the party People's Front	81
Faction of the party Opposition Block	43
Faction of the party Samopomich' Union	26
Group Revival	26
Faction of the Oleh Liashko Radical Party	20
Faction of the party All-Ukrainian Union Batkivshchyna	20
Group People's Will	19
Independent MPs	47

51. The Verkhovna Rada holds exclusive legislative power in Ukraine (Article 75, Constitution). Moreover, the Parliament, *inter alia*, determines the principles of domestic and foreign policy, introduces constitutional amendments, adopts laws, approves the State budget, calls for presidential elections, impeaches the President, declares war and peace, appoints the Prime Minister, appoints or approves certain officials (e.g. military, Central Election Commission, Cabinet, etc.), elects judges to permanent office, ratifies and denounces international treaties, exercises parliamentary control functions, etc. (Article 85, Constitution). The Rules of Procedure of the Verkhovna Rada, as laid out in the Ukrainian Constitution, regulate the establishment and operation of parliamentary groups, organisation of committees, operation of the Secretariat of the Parliament and other issues vital for the normal functioning of the parliament; the Rules are currently undergoing revision – a request from the Ukrainian Government for a legal opinion on the drafted legislative amendments was filed, on 28 February 2017, before the European Commission for Democracy through Law of the Council of Europe (Venice Commission).

52. The parliamentary mandate terminates at the end of the legislature. In addition, early termination may occur in the event of resignation, guilty verdict, judicial declaration of incapacity or missing, termination of Ukrainian citizenship or departure from Ukraine for permanent residence abroad, failure to put an end to an incompatibility situation and death. In addition, a deputy who changes his/her political formation can be deprived of his/her parliamentary seat by decision of the original political formation (Article 81, Constitution). The latter possibility has been criticised by the Venice Commission, as it deviates from the principle of representative mandate (the Constitution itself refers to "people's deputies") while enshrining *de facto* the principle of imperative mandate. In this connection, the Venice Commission stressed that the automatic loss of a parliamentary seat when an elected member of parliament moves from his/her original parliamentary formation to another formation reflects the view that s/he is a delegate forming part of a political formation and not a representative who is elected to freely exercise his/her discretion in the lifetime of that particular legislature<sup>16</sup>.

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<sup>16</sup> [CDL-AD\(2005\)015 Opinion on the amendments to the Constitution of Ukraine](#), June 2005.

53. Moreover, in a recent pronouncement, the Venice Commission expressed its concern on the recent Law No. 1006-VIII amending the Law on Elections of People's Deputies of Ukraine (Articles 1 and 2) empowering political parties to stifle political opinion or dissent within their own ranks by allowing them, at their absolute discretion, without any limitation, to remove from the party list a candidate with the potential to be legitimately elected by the voters, after election day and prior to such a candidate being so confirmed as elected by the Central Electoral Commission<sup>17</sup>.

54. The GET was further informed of discussions underway to move from the closed-list system to the open-list one. In this connection, it was clear to the GET that the current electoral system does not produce a Parliament which is sufficiently representative of the electorate, since it is composed, in the majority, of the political parties' elite who bring in their own business interests. This entails a non-negligible potential for conflicts of interests, opaque lobbying and privileging legislation that only benefits a few - rather than responding to the general interest - to the detriment of the legitimacy of Parliament and the legislation emanating from it. Likewise, closed and blocked lists result *de facto* in political party hierarchies deciding the composition of Parliament; they promote intra-party discipline at the expense of weakening the individual accountability of each politician vis-à-vis the citizens who elect him/her. The GET refers to the considerations made by the Venice Commission regarding the effects of closed-lists<sup>18</sup>, as well as the specific recommendation made to Ukraine to move into a new electoral system consisting of open lists and multiple regional constituencies<sup>19</sup>.

55. It is to be noted that the Council of Europe has been engaged in recent co-operation activities with the Verkhovna Rada in order to strengthen the functioning of this essential body. Through the Parliamentary Assembly of the Council of Europe (PACE), the Venice Commission and GRECO, procedural guidelines on the rights and responsibilities of the majority and the opposition were addressed, as set out in [PACE Resolution 1601](#). Moreover, assistance to newly elected legislators for issues pertaining to corruption is envisioned in the Council of Europe Action Plan for Ukraine (2015-2017), including peer-to-peer exchanges, assistance in the amendment of the Rules of Procedure of Parliament, lobbying regulations and staff training, and the development of a code of conduct for parliamentarians to respond to concerns arising regarding political favouritism, conflict of interest and the use of parliamentarians' mandate. Likewise, the European Parliament has issued a [Report and Roadmap on Internal Reform and Capacity-Building for the Verkhovna Rada](#), detailing concrete deliveries and their corresponding deadlines. The support of other key actors of the international community, particularly the OSCE-ODIHR and the USAID Responsible, Accountable, Democratic Assembly Project (RADA) is proving to be crucial to supporting a long term, sustained political commitment regarding integrity matters in Parliament, as will be further described in this report.

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<sup>17</sup> [CDL-AD\(2016\)018 Opinion on the amendments to the Law on Elections regarding the exclusion of candidates from party lists](#), June 2016.

<sup>18</sup> [CDL-AD\(2015\)001 Report on Proportional Electoral Systems: The allocation of seats inside the lists \(Open/Closed Lists\)](#), March 2015.

<sup>19</sup> [CDL-AD\(2011\)037 Joint Opinion on the Draft Law on Election of People's Deputies](#) and [CDL-AD\(2013\)026 Joint Opinion on Draft Amendments to Legislation on the Election of People's Deputies of Ukraine](#), October 2011 and October 2013, respectively.

## Transparency of the legislative process

56. In Ukraine, the impetus for legislation originates mostly in Parliament, rather than in Government. As to the latter, proposals may be introduced by the President, by its Cabinet of Ministers or by the National Bank of Ukraine. In Parliament, legislative initiatives are introduced either by parliamentary committees or MPs themselves. In point of fact, parliamentarians generate a large number of proposals, the majority of which do not become law in the end<sup>20</sup>. Legislative proposals are further dealt with by the relevant parliamentary committee, which has 30 days to consider legislation and recommend it to the plenary; however, this statutory deadline is rather flexible in practice due to the large amount of bills received and the different consultation stages they may need to undergo (e.g. working groups, hearings, etc.). Laws, resolutions and other acts require at least 226 votes to be adopted.

57. The GET heard discomfort, among both the public and parliamentarians themselves, as to the excessive number of legislative proposals tabled by individual members of Parliament and their distracting effect on practical implementation of legislation already in vigour (a clear case being the multiple legislative proposals aimed at blocking and watering down the e-declaration system). This situation was labelled as “legislative spam” and is quite pressing for the current legislature. Potential solutions were reportedly being discussed in the Verkhovna Rada to deal with the admissibility of draft legislation prior to its registration, including, but not limited, to requiring a minimum number of 10 MPs supporting a legislative proposal before the latter could be registered. In the GET’s view, there are ample possibilities for streamlining and rationalising the system. The GET welcomes the reflection process under way, which can only boost the quality and efficiency of legislative work.

58. Plenary sessions are to be held in public; a closed sitting may be held subject to a majority voting (Article 84, Constitution). Resolutions of the Verkhovna Rada are adopted by registered open roll-call vote; secret vote is exceptional (e.g. impeachment of the President). The legislative framework on access to public information, considerably reinforced in 2014-2015, marked an important turning point in improving public access to parliamentary work. The dedicated website of the Verkhovna Rada was improved and an open data portal created, as the law required all public bodies to promote open government and publish certain types of information without individual request, in particular on their respective websites. During July-September 2015 the Regional Press Development Institute NGO (RPDI) conducted a nation-wide civil society monitoring of official websites of the higher courts of Ukraine and five key national authorities: Verkhovna Rada of Ukraine, Presidential Administration of Ukraine, the Prosecutor General’s Office of Ukraine, the Higher Qualification Commission of Judges, and the Security Service of Ukraine. During that monitoring exercise, the Verkhovna Rada received a remarkably high score (75.34%) regarding the transparency of its website.

59. As to committee work, the Verkhovna Rada has 27 committees, including a Committee on Corruption Prevention and Counteraction which is responsible for scrutinising corruption-related legislation and monitoring reform implementation, and a special commission (Ad-Hoc Supervisory Body on Privatisation). The GET highlights the valuable role played by the Committee on Corruption Prevention and Counteraction as an active catalyst of anti-corruption reform; this positive assessment was shared by all interlocutors met, and in particular, civil society representatives, who reported close cooperation with the Committee. A clear example of good practice by the Committee on Corruption Prevention and Counteraction is “corruption proofing” of legislative proposals. This entails, in practice, the verification in draft normative proposals of any provision that may facilitate the commission of a corruption-related offence. In the present legislature,

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<sup>20</sup> In 2016, a total of 3 226 legislative proposals were tabled, 1 343 (42%) of which emanated from MPs, but only 72 (2%) of those became law.

the Committee has identified around 400 proposals entailing corruption risks; none of these proposals has been passed by the Verkhovna Rada.

60. The applicable regulatory framework for committee proceedings, i.e. 1995 Law on Committees of the Verkhovna Rada of Ukraine, was amended in 2015 to infuse greater transparency into the process. The general rule now is that committee meetings are public, unless the committee decides to conduct a closed meeting (only if discussing restricted information protected by law, Article 29 Law on Committees of the Verkhovna Rada of Ukraine); committees are also bound to inform the public about their working plan, schedule of meetings, acts adopted, protocols and minutes of meetings and hearings (Article 9, Law on Committees of the Verkhovna Rada of Ukraine).

61. It is up to the respective committee to decide on whether or not to conduct an expert hearing. In particular, committees can initiate committee hearings to discuss the most important draft laws, to assess the effectiveness of the implementation of adopted laws, to receive information on the issues under consideration and to study and discuss these issues, “involving wide circles of (civil) society” (Article 29, Law on Committees of the Verkhovna Rada of Ukraine). Rules are also in place as to how these hearings are to be organised if they are to be held openly (Articles 15, 28 and 29, Law on Committees of the Verkhovna Rada of Ukraine). Information is available online regarding the drafting stages of a proposed law (registration number and date, authors, committee work, expert hearings, text of the draft, etc.). Committees’ agendas, minutes, decisions, names of the experts heard, etc. are put online. The GET was also informed that two draft bills on Transparency and Public Consultation, respectively, were under consideration (an English translation of the relevant drafts was not available); the OSCE-ODIHR was assisting the authorities in this domain<sup>21</sup>.

62. It emerged from the interviews carried out by the GET that, despite the legislative requirements in place, the practice regarding the openness of the meetings and the calling of experts was at broad variance, depending on the relevant committee and its *modus operandi*. This raises particular concern in Ukraine given that many legislative drafts originate from Parliament and the composition of committees is allegedly permeated by sectorial interests (see also considerations made later in this report as to conflicts of interest being prevalent in the Verkhovna Rada, paragraphs 78-80, and transparency of contacts with third parties, paragraphs 87-88). It is also to be noted that the relevant parliamentary committee has to consider the draft legislation in 30 days. It is important that the committees work efficiently. However, the GET is of the view that the timeframe of 30 days is in itself relatively short and may prove to be inadequate in some cases, for example, where the draft legislation is broad or concerns controversial issues. As the authorities have confirmed, this has indeed been the case in practice. In the GET’s view, it is important that the timeframes for committee work are appropriate so that they allow for meaningful consultation and discussions in practice.

63. Furthermore, the use of the so-called fast-track procedure in the adoption of laws has been no rare occurrence in the current legislature. Such fast-track procedures not only entail risks for the quality of legislation and affect the overall transparency of the legislative process; they also reduce the time available for consultation and discussion and thereby disregard proper public debate. It is to be noted that, although the Rules of Procedure of the Verkhovna Rada make reference to the possibility of resorting to a

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<sup>21</sup> ODIHR in cooperation with the OSCE Project Coordinator’s Office in Ukraine is developing concrete guidelines on ways to integrate more systematically public consultations as part of the existing procedure of drafting and adopting legislation. In 2016, the Office issued the [OSCE-ODIHR Opinion on the Draft Law of Ukraine on Public Consultations](#). The scope of application of the draft is wide since it defines the procedure for holding public consultations in the process of drafting acts and regulations; national, regional and local policy documents by the public authorities.

simplified legislative procedure (Article 31), there is no further concrete articulation of such a principle<sup>22</sup>.

64. On the basis of the above, GRECO recommends ensuring that all legislative proposals are processed with an adequate level of transparency and consultation, notably by (i) safeguarding inclusiveness of parliamentary committee work both on paper and in practice, including through public consultations and expert hearings, as well as adequate timeframes; (ii) introducing precise rules regarding the fast-track legislative procedure in Parliament and ensuring that it is applied only in exceptional and duly justified circumstances.

#### Remuneration and economic benefits

65. The fixing of MPs' pay is assimilated to that of the members of the Cabinet of Ministers, and currently consists of 17 425 UAH net/month (approximately 585 € net/month. The minimum wage in Ukraine in 2017 amounts to 3 200 UAH net/month (108 €); the average wage can be estimated at 5 590 UAH net/month (190 €). Complementary sums of a maximum of up to 40% of the base salary are allocated to specific positions of responsibility within Parliament, i.e. chairman and his/her deputies, for representative purposes. In addition, funds are secured for the hiring of assistant/advisory personnel, accommodation and travel costs (if the MP's place of residence is located more than 30 kilometres away from Kyiv), as well as for the reimbursement of expenses associated with the performance of parliamentary functions. MPs are also provided with free medical care. Information on MPs' salaries and benefits is in the public domain and available on the website of the Committee on Rules of Parliamentary Procedure and Support to Work of the Verkhovna Rada of Ukraine.

66. The Secretariat of the Verkhovna Rada is responsible for supervising the use of parliamentary benefits. Until recently, the budget of Parliament could only be audited by the Accounting Chamber, upon request of Parliament itself. A new law was passed in 2015, which now provides the Accounting Chamber with the right to audit Parliament's accounts without the consent of the latter. Moreover, in February 2015, the Parliament adopted legislation on budgetary openness, i.e. the Law of Ukraine on Open Use of Public Funds, requiring that all data on budgetary expenditures, including real-time data on State treasury transactions, be published on a dedicated web-portal (<http://spending.gov.ua/>).

67. The fixing of MPs' pay has been subject to much fluctuation in recent years and is significantly lower than that of other public officials. As a point of comparison, the pay of an MP equates to that of a trainee judge. Owing to the economic crisis, the MPs' pay has been frozen since 2005; further, it was reduced once in 2014. This has had severe implications in real terms given the progressive devaluation of the national currency (Ukrainian hryvnia): while in 2005 the 17 425 UAH pay equated around 1 600 USD, the same UAH amount equalled 550 USD in 2016. Despite a recent cross-cutting sector policy to raise public salaries as part of a drive to reduce incentives to corruption and improve governance, none of the attempts to revise MPs' salaries has succeeded to date (the latest attempt took place in January 2017, but the corresponding legislative proposal was rejected). Following publication of e-declarations in November 2016, which revealed the scale of some MPs' wealth (including considerable amounts of cash reserves, extensive property holdings etc.), the Verkhovna Rada's demands for a pay rise were given up in an effort to defuse public anger.

68. The GET notes that, as compared to all other 45 GRECO member States reviewed to date in the on-going Fourth Evaluation Round, remuneration and benefits package of

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<sup>22</sup> The Anti-Corruption Network for Eastern Europe and Central Asia, of the Organisation for Economic Co-operation and Development (OECD), has also highlighted these deficiencies in its peer-review of Ukraine. See [Round 3 Monitoring Report on Anti-Corruption Reforms in Ukraine \(2015\)](#).

Ukrainian MPs fall in the lowest category, even when compared with economically similar countries in Europe. The issue of adequate pay is not a trivial one for corruption prevention purposes and it does play a critical role in the composition of Parliament. If the level of pay is low, it is almost inevitable that members need to resort to additional means to eventually sustain both their parliamentary commitments and their living. MPs are also subject by law to a strict restriction on outside employment – at least in law (see also paragraph 82), which means that the performance of the parliamentary function should be the sole professional occupation of an MP (with the very few exceptions exhaustively listed by law); this would consequently need to be reflected in his/her pay. This situation, in the GET's opinion, calls for action and must be seen in conjunction with the considerations made later in this report regarding pervasive conflicts of interest in the legislature. The GET understands that a salary rise is a politically difficult issue, but a balance ought to be reached between giving MPs adequate resources to do their jobs (which are vital for a vibrant democracy) and providing value for money for the taxpayer, with due observance of the principle of accountability of the public funds provided to avoid any potential misuse for personal gain.

#### Ethical principles and rules of conduct

69. MPs must take an oath prior to assuming office; refusal to do so results in loss of the parliamentary mandate (Article 79, Constitution). Additionally, reference is made in the Law on the Status of People's Deputy of Ukraine to the observance of general rules of morality, dignity and honour (Article 8, Law on the Status of People's Deputy of Ukraine). Similarly, the Rules of Procedure of Parliament include some provisions on discipline and ethics, namely referring to order and decorum aspects (Articles 51-53, Rules of Procedure of Parliament). Failure to adhere to the latter is punishable with expulsion from plenary discussions (up to five plenary sessions); if this occurs, voters are informed through the publication of the sanction in the newspaper Voice of Ukraine. This sanction has not been applied to date.

70. MPs are also subject to the provisions of the 2015 Law on Prevention of Corruption (LPC), which covers a broad number of public officials, and lays down requirements on the prevention of conflicts of interest (e.g. ban on gifts, declaration of interests, outside employment and post-employment restrictions, etc.). The Law includes a specific section on ethical conduct establishing general requirements of neutrality, impartiality, competence and efficiency, confidentiality and legality (Articles 37-44, Law on Prevention of Corruption).

71. There is no code of conduct for MPs, but a debate has been going on for three years now regarding its adoption. In actual fact, the OSCE-ODIHR, together with the USAID RADA Programme and the Agency for Legislative Initiatives have made steps towards raising awareness and facilitating dialogue concerning the need to elevate the discussion on ethics reform since 2013, including by issuing policy papers on the matter<sup>23</sup>. The process has further gained momentum with the [European Parliament's Report and Roadmap on Internal Reform and Capacity Building for the Verkhovna Rada](#), issued in 2016. Committee hearings and "parliamentary ethics dialogues" have been held recently to raise awareness of ethical and professional standards; these events have brought together MPs, parliamentary staff and civil society representatives<sup>24</sup>. This is indeed an area where several allegations of misconduct have emerged over the years, including voting in place of another MP, lack of discipline during sessions, use of oversight mechanisms (e.g. requests and appeals) to hamper or favour specific private

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<sup>23</sup> See for example, [Code of Conduct for Parliamentarians: European Good Practices, Ukrainian Reality and Prospects](#).

<sup>24</sup> OSCE-ODIHR "Strengthening dialogue among civil society and with key governmental stakeholders in Ukraine", USAID "Responsible, Accountable, Democratic Assembly Project (RADA)".

interests, lack of transparency regarding the financial situation and business interests of MPs, misuse of immunity prerogatives, etc.<sup>25</sup>.

72. The GET highlights the added value of the adoption of a code of conduct for both parliamentarians themselves and their public image. The GET believes that the educational value of the preparation of a code, and of keeping it up to date, is fundamental in an institution which is striving to overcome an acute credibility crisis. An essential condition for the code to work, once adopted, is active involvement of all parliamentarians in proposing and discussing ideas for the code, drafting, revising and finalising its provisions. Whilst the GET is aware of the key responsibilities of the NACP on conflicts of interest and integrity matters for public officials (including parliamentarians), the GET considers it essential to develop a member-driven culture of accountability rather than solely transferring accountability to an external monitoring authority. Parliamentarians themselves must think expansively regarding opportunities for on-going dialogue on issues on ethics and integrity, and for promoting greater self-governance and compliance. Self-control and responsibility must come first from within the House for the system to be meaningful and effective. Indeed, ownership among parliamentarians is critical for truly embedding the newly developed Code in the working culture of the Verkhovna Rada; it will also demonstrate to the public that parliamentarians are willing themselves to take determined action to instil, maintain and promote integrity in the parliamentary mandate. Moreover, appropriate channels can be sought to help engage civil society in such a process.

73. Furthermore, the adoption of such a code must be coupled with additional guidance of a practical nature. In particular, more needs to be done to provide additional support to orient parliamentarians concerning the rules and expectations of Parliament and the challenging matter of dealing with potential or actual conflicts of interest (see, for example, the considerations made later in this report concerning the disclosure of outside ties, the acceptance of gifts, relations with third parties, etc.). In this context, as recommended in paragraph 48, it is crucial that improved coordination channels are built up with the NACP, given the key monitoring and advisory role with which it is entrusted in respect of all categories of public officials, including parliamentarians. GRECO recommends (i) that a code of conduct for members of Parliament be developed and adopted with the participation of MPs themselves and be made easily accessible to the public; and (ii) that it be coupled with detailed written guidance on its practical implementation (e.g. prevention of conflicts of interest when exercising the parliamentary function, ad-hoc disclosure and self-recusal possibilities with respect to specific conflict of interest situations, gifts and other advantages, third party contacts, etc.).

#### Conflicts of interest

74. The LPC defines and regulates conflicts of interests for public officials, including parliamentarians. In particular, a conflict of interest is a (real/potential) contradiction between the private interest of a person and his/her official or representative activities which affects the objectivity or impartiality of his/her decisions and commitment or non-commitment of actions in the exercise of such activities.

75. The following course of action is to be taken when a conflict of interest emerges/may emerge: (i) taking measures to prevent the occurrence of real or potential conflict of interest; (ii) reporting - no later than the next business day from the date when the person found out or should have found out about having a real or potential conflict of interest – to the immediate supervisor, and if the person holds the position that does not provide for having an immediate supervisor or the position in a collective

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<sup>25</sup> [Report on Problems of Parliamentary Ethics in Public Opinion Polling](#), Ukrainian Centre for Independent Political Research (UCIPR), 2015.

body – to report to the NACP or other authority or a collective body determined by the law, where the conflict of interest occurred while exercising authority, respectively; (iii) refraining from taking actions/decisions when exposed to a situation of a real conflict of interest; and (iv) taking measures to address a real or potential conflict of interest.

76. The LPC recognises that, for specific categories of persons – including MPs, rules for resolving conflicts of interest may be further determined by the laws governing the status of the respective persons and on the basis of the organisation of the respective bodies. The LPC further specifies that, for collective State/local bodies, individuals in a real/potential conflict of interest are to refrain from participating in decision-making processes, or otherwise make an ad-hoc declaration prior to the discussion of the given matter; such an ad-hoc declaration must be reflected in the minutes of the meeting (Article 35, LPC).

77. When looking at the particular situation of parliamentarians, the GET understood that, although the Rules of Procedure (Articles 31(1), 37, 85 and 87), provide for a requirement to disclose conflicts of interest prior to a decision-making process in the Verkhovna Rada (deliberations in plenary, voting processes, election to interim commissions), it remains silent as to the course of action to take if this obligation is not observed. Only one case has been recorded when this ad-hoc disclosure was used by an MP at the outset of a voting procedure.

78. Conflict of interest is a burning issue in Ukraine. During the interviews, the Verkhovna Rada was referred to as a millionaire's club in which powerful business tycoons enjoy immunity and use their offices to shape the political process. With a substantial bulk of the legislative proposals emanating from individual members, and taking into account that committee work is not always carried out with a uniform level of transparency and public discussion, these allegations are worrying. The e-declarations submitted to date have also revealed the considerable wealth of a number of MPs who, in turn, have claimed that the property was acquired prior to holding the parliamentary function. The problematic matter of imperative mandate (which runs counter to the democratic principle of free and independent tenure), introduces further doubts as to other interests permeating the legislative process - other than loyalty of the MP to his/her electorate.

79. The Committee on Rules of Parliamentary Procedure and Support to Work of the Verkhovna Rada of Ukraine has traditionally been in charge of overseeing conflict of interest rules in Parliament (Article 223, Rules of Procedure). Accordingly, the Committee is to examine the respective materials and submit recommendations to the Speaker of the Verkhovna Rada who shall, within 10 days, take the cause to court to dissolve parliamentary mandate, or return the materials to the Committee with a well-founded justification to reject the motion to take legal action. In the latter case, if the Committee disagrees with the decision of the Speaker, it can introduce a motion to reconsider the matter by the Verkhovna Rada in plenary session and thereby pass a resolution by open vote. A court decision on early dismissal of a parliamentarian based on failure to comply with incompatibility provisions is final and not subject to approval by the Verkhovna Rada. In the current legislature, there have been 26 cases of incompatibility; only one of those was not put to an end and has actually reached discussion in plenary.

80. Information gathered on-site clearly suggests that the current mechanisms established in the Rules of Procedure (i.e. regarding ad-hoc disclosure and incompatibility) have not really been invoked or resorted to in practice. It also seems that it is not clear how the concept of conflict of interest in the LPC is interpreted and applied in relation to the parliamentary function. It is therefore crucial that MPs' awareness of conflicts of interest, and the need to avoid and prevent them, is raised and that detailed guidance is provided to them, *inter alia*, through the code of conduct recommended above (paragraph 73). Moreover, credible supervision and enforcement of

the rules need to be ensured; a recommendation has also been issued in this respect (paragraph 95).

### Prohibition or restriction of certain activities

#### *Gifts*

81. The general rules on gifts contained in articles 23 *et seqq.* LPC, as described in paragraph 45, are applicable to MPs. A recommendation aimed at further developing the LPC rules on the acceptance of gifts, including by lowering the threshold of acceptable gifts, has been made (see paragraph 47).

#### *Incompatibility*

82. MPs cannot hold another representative mandate, be a civil servant, undertake profit making activity (the sole exceptions being teaching, research or creative activities, and medical practice), be a member of a management body or supervisory board of an enterprise/profit making organisation (Article 78, Constitution, as further developed by Article 3 of the Law on the Status of People's Deputy of Ukraine and Article 25 LPC). With particular reference to the management of companies and the holding of corporate rights in the latter, MPs are banned from transferring those to their family members. During the parliamentary mandate, provision must be made for those corporate rights to be managed on an interim basis by a third party. The LPC exhaustively enumerates the possibilities for doing so and prescribes that a notarised copy of the respective arrangements be communicated to the NACP. In the event that an MP engages in an incompatible activity, s/he is to put an end to the latter within a maximum deadline of 20 days, or otherwise renounce the parliamentary function.

83. As noted before, the incompatibility clause has proven to be highly contentious in practice; it has also triggered bitter disputes in court. In this connection, in September 2012, the Constitutional Court of Ukraine ruled that the High Administrative Court of Ukraine should be the first judicial instance authorised to unseat MPs combining parliamentary work with other types of activities. Practice in this respect throughout the years has proven to be more controversial than effective since it has evidenced problems linked to the courts' impartiality and independence from undue political influence.

84. Moreover, although the rules appear strict on paper, the GET was concerned to hear from MPs, civil society representatives and other interlocutors that conflict of interest risks in the legislature have been identified as very high with 2/3 of parliamentarians indirectly - but actively - engaged in entrepreneurial activities. In point of fact, although, as described above, several pieces of legislation concur in setting in place a strict incompatibility regime on secondary activities, this framework is circumvented as, in practice, MPs hold corporate rights or/and interests in commercial companies. In many cases, the businesses are registered under the names of related persons or other close relatives. In the eyes of many observers one of the most pressing corruption issues in Ukraine is the blurred line between the political elite and business interests. It was repeatedly stated that this phenomenon – rather than lobbying by external professional lobbyists, businesses or interest groups – critically undermines the democratic process. This situation calls for priority action and must be seen in conjunction with the considerations made earlier in this report regarding the low level of pay of MPs. In view of the above, GRECO recommends undertaking further appropriate measures to prevent circumvention of the restrictions of parliamentary members' engagement in entrepreneurial activities, not only in law, but also in practice. Moreover, strict supervision and enforcement of the rules are urgently required, as recommended below (paragraph 95).

### *Contracts with State authorities*

85. There are no restrictions on parliamentarians, in a private capacity, entering, either directly or through a business interest, into contracts with a State authority. The Law on Public Procurement includes specific provisions banning participation in public tenders if the person/legal entity has been involved in a corruption-related offence or does not have a corruption prevention programme in place, as applicable.

### *Post-employment restrictions*

86. A cooling off period of one year applies which bans public officials, including parliamentarians, from (i) entering into employment agreements (contracts) or performing transactions in business with legal entities of private law and natural persons with whom the public official has exercised control, supervision or decision-making powers – any agreement concluded in violation of this ban is deemed null and void; and (ii) representing the interests of any person in the cases (including those heard in court) where another party is an authority, enterprise, institution, organisation, where they had been working at the time of termination of their mandate. Also, it is forbidden to disclose, or otherwise use for their interests, information that becomes known to them in connection with the performance of official duties, except for cases stipulated by law (Article 26, LPC).

### *Misuse of confidential information and third party contacts*

87. The LPC sets a ban on public officials, including parliamentarians, disclosing or otherwise using confidential and other information with restricted access, which has become known to them in connection with their official duties, except as required by law (Article 43, LPC). In addition, MPs are banned from disclosing secret or confidential information that they may come across in the exercise of the parliamentary function, or in relation to discussions held in camera.

88. As mentioned before, in Ukraine, unlike other countries, many key pieces of legislation originate from Parliament itself, rather than from the Government. Against this background, there are no rules on lobbying which could shed more light on the many interests that may permeate the legislative process. In the GET's view, it is important that there is appropriate transparency on this type of dealing in order to protect the legislative process from improper influence or the mere impression of such. Improved transparency in this regard can only contribute to boosting the image of and the trust in the Parliament, as well as the individual MPs. Therefore, GRECO recommends the introduction of rules on how members of Parliament engage with lobbyists and other third parties who seek to influence the legislative process.

### *Misuse of public resources*

89. There are no specific rules/sanctions on the misuse of public resources by MPs; however, embezzlement, abuse of office and position, bribery and other corruption-related offences are punishable subject to criminal law. The LPC also bans the use of any State or municipal property or funds for private interests (Articles 22 and 65 LPC).

### Declaration of assets, income, liabilities and interests

90. As explained in detail in paragraph 32, the recently introduced financial disclosure system will hopefully become a valid tool in preventing corruption and disclosing blatant instances of conflicts of interest and illicit enrichment. At the time of the on-site visit, all MPs, with the exception of one, had submitted declaration forms to the NACP. According to the calculations of local experts, based on the filed declarations, the 423 members of the Ukrainian parliament together own about €480 million in cash and on their bank

accounts. Such figures raise questions in society about the origin of these funds given the low level of salary of parliamentarians.

91. E-declaration has faced frontal opposition from many members of the Verkhovna Rada and many of its key features were, at the time of the on-site visit, being challenged before the Constitutional Court. Given the prominent role that this tool has been given in the anticorruption policy of Ukraine, and the expectations placed by citizens in its effectiveness, its independent and credible implementation is of primary importance. A recommendation has been issued in this respect (paragraph 41).

#### Supervision and enforcement of integrity framework

92. Regarding breaches of the rules specifically regulating the status of parliamentarians, i.e. as comprised in the Law on the Status of People's Deputy of Ukraine and the Rules of Procedure of Parliament, sanctions include oral warning, denying the floor, suspension from plenary sessions (up to five sessions). The Committee on Rules of Parliamentary Procedure and Support to Work of the Verkhovna Rada of Ukraine is entitled to demand that MPs who fail to perform their duties for no valid reason be denied allowances. The Committee is also responsible for assessing failure to comply with incompatibility provisions. The role played to date by the aforementioned Committee has been, to say the least, timid. No sanctions have ever been applied, and parliamentarians themselves raised doubts as to the capacity and willingness of the Committee to monitor integrity matters and proactively prevent conflicts of interest.

93. The GET has serious misgivings as to the efficiency, sufficiency and dissuasiveness of the current supervision and enforcement arrangements on integrity-related matters in Parliament. In the GET's view, greater institutional safeguards are needed in order to strengthen credibility and accountability of the integrity system in Parliament. Also bearing in mind the recommendation to further develop the rules on MPs' conduct, the GET believes that it is only natural to require some improvement in the monitoring and enforcement of such standards by competent bodies, as several of its interlocutors clearly recognised.

94. Obviously, it is up to the Ukrainian authorities themselves to decide how appropriate monitoring could best be organised and improved, with due respect for the defence rights of MPs. While such a role could be exercised by existing parliamentary bodies, provided they are equipped with adequate resources and investigative powers, the GET sees merit in introducing an element of independence into the supervisory regime of Parliament. This is all the more important in Ukraine given the troubling level of public unease with its political class. If public trust is to be restored and ensured on a long-term basis, a model that relies solely on politicians regulating themselves is unlikely to retain citizens' credibility. Some procedural elements could be introduced to address the public misgivings about Parliament being too inward-looking and potentially acting as judge and jury when investigating and punishing misconduct. In this connection, the GET draws the attention of the authorities to the experience already developed in some other countries to bring in lay expertise and involvement, i.e. to include in the oversight process and mechanism persons or institutions external to Parliament, whose appointment and role are vested with adequate guarantees of legitimacy, impartiality, transparency and efficacy. This would not only demonstrate to the public Parliament's willingness to adopt a more proactive approach towards upholding the integrity of its members, but also its commitment to continue infusing transparency, independence and accountability in-house.

95. Finally, in order to be credible, the system will have to foresee the imposition of appropriate sanctions in case of infringements of the rules. For the system to operate with broad parliamentary and public support, it must be regarded as independent, legitimate and proportionate. GRECO recommends significantly strengthening the

internal control mechanisms for integrity in Parliament so as to ensure independent, continuous and proactive monitoring and enforcement of the relevant rules. This clearly presupposes that a range of effective, proportionate and dissuasive sanctions be available. Such arrangements will also need to be reflected in the code of conduct recommended before.

### *Immunities*

96. MPs are guaranteed parliamentary immunity by Article 80 of the Constitution; they are not legally liable for the results of voting or for statements made in Parliament, with the exception of insult or defamation. Members of Parliament shall not be held criminally liable, detained or arrested without the consent of Parliament.

97. The procedure for lifting the immunity of a parliamentarian is laid out, in detail, in the Rules of Procedure of the Verkhovna Rada (Chapter 35). A request for lifting the immunity of an MP must be submitted and supported by the Prosecutor General. A separate motion is to be introduced for each mode of pre-trial measure, i.e. charge of criminal liability, detention, arrest. An adversarial procedure follows, by which the person subject to the request is asked to submit a written explanation, within five days, to the Committee on Rules of Parliamentary Procedure and Support to Work of the Verkhovna Rada. The latter shall deal urgently with the matter, within no more than 20 days. The Committee holds a hearing at which the person subject to the request, as well as the Prosecutor General, are present. The Committee may also ask for additional information, proof etc. At this stage, and with a motivated conclusion by the Committee, the Speaker of the Verkhovna Rada may return the matter to the requesting authority for further evidence. The Committee discontinues consideration of the motion until receipt of the said evidence.

98. In case the lifting of immunity is considered by the Committee, the request is submitted to the plenary meeting of Parliament for a presentation of the Committee's position and debate, within seven days. The decision to lift the immunities is taken by simple majority during an open name voting procedure. A criminal case against an MP follows the ordinary rules on court jurisdiction. Since 2012, the Verkhovna Rada has granted consent to prosecution, detention or arrest with respect to seven deputies; there is however no information regarding the total number of initiated proceedings for lifting immunity.

99. Regarding the application of special investigative techniques, pursuant to Article 27 of the Law on the Status of People's Deputy, the search or detention of an MP or the inspection of his/her personal belongings and private premises or office, the interception of private correspondence, telephone conversations, electronic and other correspondence and the taking of any other measures restricting his rights and freedom are only possible with the consent of Parliament to criminal prosecution, and only if it is impossible to obtain the information by other methods. However, these restrictions do not, in principle, prevent the initiation of an investigation.

100. In its First and Second Joint Evaluation Report on Ukraine, GRECO noted with concern that immunities are "absolute" in their character with regard to all officials concerned. There is no exception in respect of situations where officials are caught in the act of committing a crime ("*flagrante delicto*"). In particular with regard to serious crime, including corruption, this provides officials with an unnecessarily high level of protection. GRECO also had misgivings regarding the length of the procedure for lifting immunity which, in practice, could well take more than a month, and even longer, as a request must be submitted for each and every measure requested, for example, search, detention, prosecution etc., in the same case.

101. In the ensuing GRECO compliance procedure, the Ukrainian authorities indicated that they were considering amending the Constitution, *inter alia*, by introducing changes to the immunity regime. The draft amendments tabled at the time were subject to assessment by the OSCE-ODIHR<sup>26</sup>, on the one hand, and the Venice Commission<sup>27</sup>, on the other. Both separate opinions highlighted the merits of keeping inviolability provisions in Ukraine. It was underlined that in countries where the rule of law is not yet consolidated, there can be real reason to fear political pressures over political opponents and, for that reason, the institution of immunity can prove to be an indispensable tool to protect democracy.

102. The present legislature has, since early 2015, re-launched the debate as to the suppression/limitation of parliamentary immunity. The GET refers to the Twenty Guiding Principles (Principle 6) which call upon limiting immunity from investigation, prosecution or adjudication of corruption offences to the degree necessary in a democratic society. In the particular context of Ukraine, two different issues must be balanced. One is the proper functioning and autonomy of Parliament, and in particular, the need to keep immunity as a tool to protect parliamentarians (especially minority and opposition voices) from politically motivated indictments or arrests. The other concern relates to misuse of the immunity clause as a shield from criminal investigations, in particular, regarding corruption. In this connection, it would appear that one of the main public criticisms regarding the Parliament relates indeed to the misuse of immunity provisions, including for acts of corruption<sup>28</sup>; more particularly, according to a 2016 survey poll carried out by Rating Group Ukraine/International Republican Institute and a 2015 survey poll carried out by Kyiv International Institute of Sociology, the most pressing issues for Ukrainian citizens were abolishing MPs' immunities (46%) and raising salaries of State employees (37.5%).

103. It was clear to the GET that the issue of parliamentary immunity merits further reflection: additional mechanisms must be developed to prevent interference in the activity of Parliament while facilitating the fight against corruption. Immunity should under no circumstances protect against preliminary investigations, as long as these are conducted in a way that does not unduly harass the member concerned. Indeed, investigations may be crucial to establishing the facts of the case and the use of special investigative techniques proves to be key in this respect. Decisions on immunity should be taken swiftly, but, at the same time, with appropriate procedural safeguards to avoid unjust prosecution of political opponents. In its different pronouncements on this matter, GRECO has underscored that it is crucial that the procedure for lifting MPs' immunities is transparent, efficient, based on objective criteria and not subject to misuse.

104. For example, substantive criteria is to be developed regarding the lifting of protection for cases where the member concerned has been caught in *flagrante delicto*, in cases concerning particularly serious crimes, when proceedings have reached an advanced stage of maturity, or where the alleged offence is unrelated to any kind of parliamentary function. Regarding the latter, GRECO has pointed to the need to clarify with appropriate criteria the extent to which an act is connected to official functions of a parliamentarian and thus whether the inviolability of that member applies and can/needs to be lifted. Such criteria can be useful for the prosecutorial bodies themselves, to prevent lengthy hesitations and consultations. Much inspiration can be drawn from the experience already gathered in other GRECO member States in this domain and the consolidated guidance of the Venice Commission on the scope and lifting of parliamentary immunities<sup>29</sup>. GRECO recommends that determined measures be taken in order to

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<sup>26</sup> [OSCE-ODIHR Opinion on Amendments to Certain Laws of Ukraine passed on 16 January 2014.](#)

<sup>27</sup> [Venice Commission Opinion on Draft Constitutional Amendments on the Immunity of Members of Parliament and Judges. CDL-AD\(2015\)013.](#)

<sup>28</sup> Report on Problems of Parliamentary Ethics in Public Opinion Polling, Ukrainian Centre for Independent Political Research (UCIPR), 2015.

<sup>29</sup> [Venice Commission Report on the Scope and Lifting of Parliamentary Immunities. CDL-AD\(2014\)011](#)

ensure that the procedures to lift the immunity of parliamentarians do not hamper or prevent criminal proceedings in respect of members of parliament suspected of having committed corruption related offences, notably by introducing guidelines containing clear and objective criteria in this respect.

#### Advice, training and awareness

105. The Secretariat of the Parliament distributes, no later than seven days after the results of the elections, among elected MPs, the relevant statutory regulations which govern the parliamentary function (e.g. Constitution, Rules of Procedure of Parliament, Law on the Status of People's Deputy, etc.). In this connection, the Secretariat is a permanent body providing legal, scientific, organisational, documentary, informational, expert-analytical, financial and logistical support to the activities of the *Verkhovna Rada*, its organs and its individual members. The authorities underscore that, at present, the main emphasis is placed on self-education upon distribution of the relevant materials among MPs, as soon as they have taken the oath of office.

106. With 56% of newcomers in Parliament, a serious lack of trust in older members from previous legislatures, and more generally, of the *Verkhovna Rada* as a whole, there is surely room for improvement in the current arrangements for raising the awareness of MPs about integrity and providing advice when necessary. Putting values into effect needs communication of core standards, as well as guidance and regular training to raise awareness and to develop skills which will assist in confronting and then resolving ethical dilemmas. A more institutionalised training and counselling system would raise the profile of integrity matters within Parliament and sharpen the awareness of MPs. Furthermore, as a sign of politicians' commitment to repairing their image and recapturing public confidence, the *Verkhovna Rada* needs to keep exploring ways to instil, maintain and promote a strong culture of integrity in its members. This requires more than just accountability mechanisms. It needs visible commitment and political will, as well as effective opportunities to engage in individual and institutional discussions on integrity and ethical issues related to parliamentary conduct. GRECO recommends developing efficient internal mechanisms to promote and raise awareness on integrity matters in Parliament, both on an individual basis (confidential counselling) and on an institutional level (training, institutional discussions on ethical issues, active involvement of leadership structures).

107. Finally, to support and strengthen public trust in Parliament, GRECO believes it is essential that the public continues to be made aware of the steps taken and the tools developed to reinforce the ethos of parliamentary integrity, to increase transparency and to institute real accountability.

## V. CORRUPTION PREVENTION IN RESPECT OF JUDGES

### Overview of the judicial system

108. The judicial system in Ukraine is established by the Constitution (Chapter 8, "Justice") and the Law on the Judicial System and Status of Judges (LJSJ). A new version of the latter was adopted on 2 June 2016 and entered into force on 30 September 2016, together with new constitutional provisions on justice. Moreover, shortly after the on-site visit, on 21 December 2016, a new Law on the High Council of Justice was adopted which entered into force on 5 January 2017. It regulates the organisation and activities of the reshaped High Council of Justice (HCJ) including in respect of appointment and disciplinary proceedings.

109. The GET acknowledges that significant judicial reforms have been initiated since the "Revolution of Dignity", with international support, including from the Council of Europe which remains actively engaged in the process.<sup>30</sup> The 2016 constitutional reform has largely benefited from the expertise of the Venice Commission and includes many positive features, e.g. the appointment of judges on the recommendation of the HCJ (instead of their election by Parliament), the abolition of the five-year probationary period for junior judges, the reinforcement of the HCJ and changes in its composition (ensuring a majority of judges), the introduction of a three-level court system with a strengthened and unified Supreme Court, limitations on judges' immunity, as well as amendments to the rules governing the prosecution office (*inter alia*, a considerable reduction of its previously very broad functions).

110. As far as the new LJSJ is concerned, it has not been reviewed (since its adoption) by any Council of Europe body. Further legislative adjustments appear necessary, e.g. with respect to the appointment and regular performance evaluation of judges, as outlined further below. As for the newly shaped Supreme Court – which will also replace the previous high specialised courts – the competition for positions at this court is currently underway. According to some interlocutors, that process is of prime importance and could set standards to pave the way for a renewal of the judicial corpus, through the qualification assessment of all judges (see below) which will continue once the appointment of Supreme Court justices has been completed.

111. Notwithstanding the considerable reform efforts which translated into a new legal framework for the judiciary, practice will yet have to prove the effectiveness of the measures initiated. For many years, the judiciary has been considered as weak, politicised and corrupt,<sup>31</sup> dominated by a strong prosecution service<sup>32</sup> headed by a political appointee. Correspondingly, citizens' trust in judges is particularly low.<sup>33</sup> This impression was confirmed during the interviews held by the GET on site; several interlocutors also denounced the lack, in practice, of effective sanctioning of judges' misconduct.

112. Against this background, it may be understandable that it has been decided to submit all sitting judges to a qualification assessment including vetting before granting them life tenure, in order to ensure that judges have both the required professional capacity and integrity for their work (the procedure was launched in February 2016) – in addition to the vetting procedures initiated after the "Revolution of Dignity" under the Law on the Restoration of Trust in the Judiciary in Ukraine and the Law on Government

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<sup>30</sup> Information on relevant on-going projects is provided, *inter alia*, on the [website of the Council of Europe Office in Ukraine](#).

<sup>31</sup> See e.g. the statements made in the [Resolution 2145\(2017\) of the Parliamentary Assembly of the Council of Europe \(PACE\)](#) and its Explanatory memorandum; the [IMF Country Report Ukraine No. 16/319](#) of September 2016; the Freedom House study "[Nations in Transit 2016 – Ukraine](#)"; [Transparency International's 2015 National Integrity System Assessment Ukraine](#).

<sup>32</sup> The acquittal rate at criminal courts is extremely low (around 1%).

<sup>33</sup> See the chapter "Context" above (paragraph 21).

Cleansing (Lustration law). At the same time, such drastic measures<sup>34</sup> give rise to concerns,<sup>35</sup> not least for practical reasons. Already at the time of the visit, in some 20 courts there were no more judges and many others were critically understaffed: about 1 500 judges resigned in 2016. Several interlocutors asserted that many of those judges wanted to avoid the qualification assessment – as well as the electronic and public declaration of their assets which was launched in September 2016. However, the authorities stress that the reasons for those' resignations in 2016 have not been analysed and that one reason evoked by many of the judges concerned was that they did not want to lose their lifelong maintenance allowance which the state periodically considered abolishing. At present, there are 8 418 judge posts but only approximately 7 000 acting judges, of whom around 50% are women.

113. In accordance with article 126 of the Constitution, the independence of judges is guaranteed by the Constitution and laws of Ukraine, and any influence on judges is prohibited.<sup>36</sup> Courts are to exercise justice on the basis of the Constitution, the laws and the rule of law. Notwithstanding those provisions, the GET was concerned to hear that in practice the independence of judges seems to be extremely fragile. Information gathered by the GET clearly suggests that influence by politicians on judicial activity and pressure by prosecutors on judges not to acquit the accused have been frequent phenomena to date. Moreover, the GET has the impression that the current unstable professional situation of judges makes them particularly vulnerable to threats on their independence. In this context, the GET notes that the new Law on the HCJ foresees i.a. a complaints mechanism for instances of intrusion in judges' activity, coupled with a verification by the HCJ of such claims, publication of the results and the possibility to take measures in response (e.g. turning to the law enforcement authorities), cooperation with other relevant bodies and civil society, etc. Those new provisions are clearly to be welcomed as a step in the right direction.

114. The GET wishes to draw attention to one specific threat on judges' independence, namely the use by prosecutors of certain criminal offences – in particular, "Delivery of a knowingly unfair sentence, judgment, ruling or order by a judge" (article 375 CC)<sup>37</sup> – as a means of pressure against judges. In this connection, it refers to Council of Europe standards which make it clear that "the interpretation of the law, assessment of facts or weighing of evidence carried out by judges to determine cases should not give rise to criminal liability, except in cases of malice."<sup>38</sup> Even though article 375 CC is, according to the letter of the law, limited to "knowingly unfair" decisions, several of the GET's interlocutors stated that this provision is abused by prosecutors against judges in order to influence their decision-making; in contrast, it seems that little use is made in practice of article 376 CC which prohibits interference with the activity of judicial authorities. According to a 2016 survey among judges, 5.5% of all judges (and 6.6% of trial court judges) indicated that they had been threatened by the prosecution about refusing to make the "necessary decision"; almost 3.0% pointed to the fact that allegations made against them or proceedings launched had been done so under article 375 CC; a similar

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<sup>34</sup> The current qualification assessment is a compromise; many political forces and society had been in favour of dismissing all sitting judges and having them reapply for their positions. That idea was opposed by the Venice Commission as violating European standards with regard to the independence of the judiciary and the rule of law.

<sup>35</sup> See also below under "Recruitment, career and conditions of service" (paragraph 137).

<sup>36</sup> See also article 129 of the Constitution and articles 6 and 48 LJSJ.

<sup>37</sup> The provisions of article 375 CC read as follows:

"1. Delivery of a knowingly unfair sentence, judgment, ruling or order by a judge (or judges) shall be punishable by restraint of liberty for a term up to five years, or imprisonment for a term of two to five years.

2. The same actions that caused any grave consequences, or committed for mercenary motives or for any other personal interests or in order to prevent the legal activity of a journalist shall be punishable by imprisonment for a term of five to eight years."

<sup>38</sup> See, in particular, [Recommendation Rec\(2010\)12 of the Committee of Ministers of the Council of Europe to member States on judges: independence, efficiency and responsibilities](#), paragraph 68.

number of respondents indicated that in their case other CC provisions had been applied.

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115. The GET underscores how important it is that all necessary measures be taken to respect and protect the independence and impartiality of judges.<sup>40</sup> In the context described above, this might best be achieved by abolishing article 375 CC. Should the authorities nevertheless consider that such a provision is necessary in Ukraine, it would have to be made clearer in the law that it only criminalises the deliberate miscarriage of justice. Moreover, complementary measures need to be taken to prevent any possible misuse of this provision and of any other CC provisions which could be used against judges in connection with their decision-making. Such measures could include e.g. interpretative guidance in the explanatory report to the law or in specific guidelines for prosecutors, inclusion of the matter in training activities, stricter application by law enforcement authorities of article 376 CC on interference with the activity of judicial authorities, etc. Consequently, GRECO recommends abolishing the criminal offence of "Delivery of a knowingly unfair sentence, judgment, ruling or order by a judge" (article 375 of the Criminal Code) and/or, at the least, otherwise ensuring that this and any other criminal offences criminalise only deliberate miscarriages of justice and are not misused by law enforcement agencies to exert undue influence and pressure on judges.

116. The GET was furthermore highly concerned to hear from judges about the lack of adequate security measures. They referred to fire and bomb attacks against courthouses where no police or even water were available, the murder of a judge and threats by criminals. The GET notes that such instances, even if limited to isolated cases, considerably endanger not only judges' physical integrity but also their independence and impartiality by making them vulnerable to external pressure and corruption. During the visit, the GET was informed that previous (before Euromaidan) instructions and special security units for the protection of judges are no longer in place. According to the above-mentioned 2016 survey among judges, 88% of respondents do not feel safe in court premises.<sup>41</sup> In this connection, attention is drawn to Council of Europe standards which make it clear that "all necessary measures should be taken to ensure the safety of judges. These measures may involve protection of the courts and of judges who may become, or are victims of, threats or acts of violence."<sup>42</sup> In view of the above, GRECO recommends that measures be taken to ensure the safety of judges to make them less vulnerable to external pressure and corruption.

### *The courts*

117. The Constitutional Court is to guarantee supremacy of the Constitution as the basic law of the State on the territory of Ukraine. The Supreme Court is the highest court of general jurisdiction. It is to provide the continuity and unity of judicial practice. The high specialised courts which had been established under the previous legislation will cease to exist once the reformed Supreme Court has started operating. The system of courts of general jurisdiction furthermore comprises courts of appeal and local (district) courts. The judicial system is based on the principles of territoriality, specialisation and instance hierarchy.<sup>43</sup> The courts of general jurisdiction specialise in the consideration of civil, criminal, economic, administrative cases and cases of administrative offences.

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<sup>39</sup> See [http://www.fair.org.ua/content/library\\_doc/FAIR\\_Judges\\_Survey\\_Summary\\_2016\\_ENG1.pdf](http://www.fair.org.ua/content/library_doc/FAIR_Judges_Survey_Summary_2016_ENG1.pdf), page 14.

<sup>40</sup> Cf. [Recommendation Rec\(2010\)12 of the Committee of Ministers of the Council of Europe to member States on judges: independence, efficiency and responsibilities](#), paragraph 14.

<sup>41</sup> See [http://www.fair.org.ua/content/library\\_doc/FAIR\\_Judges\\_Survey\\_Summary\\_2016\\_ENG1.pdf](http://www.fair.org.ua/content/library_doc/FAIR_Judges_Survey_Summary_2016_ENG1.pdf), page 8.

<sup>42</sup> Cf. [Recommendation Rec\(2010\)12 of the Committee of Ministers of the Council of Europe to member States on judges: independence, efficiency and responsibilities](#), paragraph 38.

<sup>43</sup> See article 17 LJSJ.

118. The LJSJ in its amended form foresees the establishment of two “High Specialised Courts”, namely the High Intellectual Property Court and the High Anti-Corruption Court. According to Section XII item 16 of the LJSJ, the High Anti-Corruption Court is to be established and a competition for positions as its judges is to be announced within the twelve months after the entry into force of the law which determines special requirements with respect to judges of this court. The LJSJ is silent about its exact competences and *modus operandi*. The idea seems to be to limit the scope of its competences to specific corruption-related offences by high-ranking officials – similarly to the competences of the new specialised law enforcement authorities i.e. the National Anti-Corruption Bureau (NABU) and the Specialised Anti-Corruption Prosecutor’s Office (SAPO). After the on-site visit, the GET was informed that draft legislation had been submitted to Parliament.

119. Many domestic and international players support the creation of the High Anti-Corruption Court. They consider it particularly relevant in the context of Ukraine where, several years after the “Revolution of Dignity”, still not a single top official has been convicted for a corruption-related offence. During the interviews conducted on site, several of the GET’s interlocutors indicated that NABU and SAPO performed well and had investigated and prosecuted a number of high-ranking officials but that the process was stuck at court level. While some observers blamed the judiciary for this unsatisfactory state of affairs, others drew attention to the fact that first instance courts – which are presently responsible for trying high-level corruption cases – were not well equipped for that task, that their judges lacked specialisation and felt vulnerable in the current political and (unstable) professional environment.

120. The GET clearly agrees with various stakeholders that something must be done in order to “break the ice” and deliver results when it comes to criminal proceedings against high-ranking officials. The current stalemate is irreconcilable with the principle of equality of justice, and it sends highly dangerous signals to acting officials as well as to the larger public whose expectations after Euromaidan have been particularly high. At the same time, the GET observes that the establishment of specialised anti-corruption courts is an exceptional measure which appears to be rare among member States. The GET recalls in this respect that the Consultative Council of European Judges (CCJE) stressed in its Opinion No. 15 that “specialist judges and courts should only be introduced when necessary because of the complexity or specificity of the law or facts and thus for the proper administration of justice.”<sup>44</sup> In the specific context of Ukraine, the GET indeed sees a clear need to entrust the handling of high-profile corruption cases – which often imply complex financial transactions or elaborate schemes – to specialised judges. This might possibly be accompanied by the establishment, at least for a transitional period, of a specialised court as foreseen by the LJSJ – provided that the institutional set-up and the procedure for appointing judges to that court guarantee the unity of the judicial system<sup>45</sup> and that the same court is competent to also deal with criminal offences connected to corruption, e.g. money-laundering if the proceeds of corruption have been laundered.

121. In any case, as for any judge, it is of utmost importance that specialised judges for high-level corruption cases be selected in a transparent process based on objective criteria. It is also critical that such judges are adequately protected from undue external – e.g. political – influence and from any possible attack on their independence and safety. The GET again draws attention to the CCJE Opinion No. 15 according to which specialist judges (and courts) “should always remain a part of a single judicial body as a whole”, “must meet the requirements of independence and impartiality”, “should be of equal status” with generalist judges (e.g. with respect to rules of ethics and liability of

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<sup>44</sup> See the [Opinion No.15\(2012\) of the CCJE on the specialisation of Judges](#).

<sup>45</sup> The authorities themselves favour identical rules for the appointment procedure of judges, disciplinary proceedings, legal status and guarantees of independence.

judges), and "specialisation must not dilute the quality of justice, either in 'generalist' courts or in specialist courts."

### *Judicial self-governing bodies*

122. The law makes it clear that judicial self-governance is one of the guarantees of judges' independence.<sup>46</sup> According to the law, the Congress of Judges is the supreme body of judicial self-governance. Its decisions are binding on the other self-governance bodies and on all judges. It is composed of delegates of all courts elected by the meetings of judges (at court level) and, *inter alia*, it elects the Constitutional Court Justices and members of the Council of Judges, the High Council of Justice and the High Qualifications Commission of Judges. The Council of Judges is composed of judges of different court levels and is tasked with ensuring the implementation of decisions of the Congress of Judges.

123. The High Council of Justice (HCJ) has a prominent role in the appointment and dismissal of judges, supervision of incompatibility requirements on judges (and prosecutors) and in disciplinary proceedings. The 2016 constitutional reform set the basis for the establishment of a new HCJ (*Vyshcha Rada Pravosuddya*).<sup>47</sup> Four new members were elected on 15 March 2017 at the 14<sup>th</sup> extraordinary Congress of Judges of Ukraine. In comparison with the HCJ formed under the previous legislation (*Vyshcha Rada Yustytzii*), the new HCJ has enlarged competences which also include giving consent to the detention or taking into custody of a judge, taking measures to ensure the independence of judges, deciding on the transfer of judges from one court to another, etc.; moreover, it is now competent for all disciplinary proceedings against judges.<sup>48</sup>

124. The 21 members of the new HCJ serve a four-year term; they cannot hold two consecutive terms. Ten members are elected by the Congress of Judges from among judges or retired judges, two are appointed by the President of Ukraine, and two each are elected by Parliament, by the Congress of Advocates, by the national conference of prosecutors and by the Congress of law schools and scientific institutions. The chair of the Supreme Court is a member *ex officio*. HCJ members must belong to the legal profession and meet the criterion of political neutrality, they cannot belong to political parties, trade unions, engage in any political activity, hold a representative mandate, occupy any other paid positions – with a few exceptions. The chair of the HCJ and his/her deputy are elected by secret ballot from among its members for a two-year term. The HCJ's organisation and activity are regulated more in detail by the new Law on the HCJ which entered into force on 5 January 2017.

125. The GET welcomes the constitutional reform regarding the HCJ which also received a largely favourable opinion from the Venice Commission.<sup>49</sup> It is noteworthy that the widening of the HCJ's competences went hand in hand with important changes to its composition. In particular, the Minister of Justice and the Prosecutor General are no longer members *ex officio*, HCJ members may not engage in any political activity, and ten instead of three members are elected by the Congress of Judges from among judges or retired judges – thereby securing a majority of judges (together with the chair of the Supreme Court as a member *ex officio*). Those new rules are in line with Council of Europe standards and reference texts according to which judges elected by their peers should make up not less than half the members of councils for the judiciary,<sup>50</sup> and their members should not be active politicians, in particular members of the government.<sup>51</sup>

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<sup>46</sup> See article 126 LJSJ.

<sup>47</sup> See article 131 of the Constitution, as amended.

<sup>48</sup> The old HCJ was only responsible for disciplinary proceedings regarding Supreme Court Justices as well as considering complaints about disciplinary decisions against judges (and prosecutors).

<sup>49</sup> See [Opinion of the Venice Commission CDL-AD\(2015\)027](#), page 5.

<sup>50</sup> Cf. [Recommendation Rec\(2010\)12 of the Committee of Ministers of the Council of Europe to member States on judges: independence, efficiency and responsibilities](#), paragraph 27.

126. The High Qualifications Commission of Judges (HQC) is a permanent State judicial self-governance body.<sup>52</sup> Its main tasks are related to the appointment procedure and the qualifications examination of judges. Its competence to consider disciplinary proceedings against judges of local courts and courts of appeal has been transferred to the HCJ; however, it completes those proceedings which had been started prior to the reform. According to the new legislation, the HQC has 16 members who serve a four-year term, and they cannot hold two consecutive terms. Eight members are elected by the Congress of Judges from among the judges who have experience as a judge for at least ten years, or retired judges, two members each are elected by the Congress of Advocates and by the Congress of law schools and scientific institutions, and two members each are appointed from among persons who are not judges by the Parliament Commissioner for Human Rights and by the Head of the State Court Administration. HQC members must have higher legal education and professional experience in the field of law for at least 15 years. Like the HCJ members, HCQ members are subject to strict rules on incompatibilities and may not occupy any other paid positions - with a few exceptions.

127. Organisational and financial support to the judiciary is provided by the State Court Administration.<sup>53</sup> It is a State body accountable to the HCJ. It has a variety of functions including representing the courts in their relations with the Cabinet of Ministers and Parliament during the preparation of the annual State Budget, ensuring proper conditions for the activity of courts and other bodies of the judiciary, etc. Its chair is appointed and dismissed from by the HCJ on a competitive basis.

#### Recruitment, career and conditions of service

128. Judges are appointed for life by the President of Ukraine on the recommendation of the HCJ. They are guaranteed irremovability until they reach the age of 65, except in the case of dismissal or termination of their powers in accordance with the Constitution and the LJSJ.<sup>54</sup> The 2016 reform abolished the first time appointment of judges for five years after which they could be elected for life by Parliament on the recommendation of the HQC.

129. Preconditions for holding the office of judge include a minimum age of 30 years, a university education in law and at least five years of professional activity in the field of law, competency and honesty, command of the State language.<sup>55</sup> Certain persons are excluded, e.g. those who have been convicted or are serving a sentence. Moreover, a person may not be a candidate for the position of judge if s/he was previously dismissed from a judicial position as a result of the qualifications evaluation or for committing a substantial disciplinary offence, gross or systematic neglect of duties which is incompatible with the status of judge or which has revealed his/her incompatibility with the office, violation of incompatibility requirements, violation of a duty to certify the legality of the source of property or in connection with entry into force of a conviction regarding such persons. The law sets out additional requirements for appointment as a judge of the Supreme Court – at least ten years of experience as a judge, lawyer or scientist,<sup>56</sup> as a judge of the courts of appeal – at least five years of experience as a judge,<sup>57</sup> and of a High Specialised Court.<sup>58</sup>

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<sup>51</sup> [Opinion No.10 \(2007\) of the Consultative Council for European Judges on the Council for the Judiciary at the service of society](#), paragraph 23).

<sup>52</sup> See articles 92 LJSJ *et seqq.*

<sup>53</sup> See articles 151 *et seqq.* LJSJ.

<sup>54</sup> See articles 80 and 53 LJSJ.

<sup>55</sup> See article 65 LJSJ.

<sup>56</sup> See article 38 LJSJ.

<sup>57</sup> See article 28 LJSJ.

<sup>58</sup> See article 33 LJSJ.

130. The procedure on appointment of judges<sup>59</sup> starts with the decision and public announcement by the HQC that candidates will be selected in order to fill the forecast number of vacant judicial positions. The HQC verifies that applicants meet the legal requirements for candidates on the basis of the documents submitted, and conducts an eligibility assessment – in the form of anonymous testing to check the general theoretical knowledge of the applicants, their command of the State language, personal moral and psychological qualities of the candidate – the results of which are published on the HQC website.

131. In the subsequent “special verification procedure”,<sup>60</sup> the HQC requests the competent authorities to verify the respective information about the candidates and prepares a report on the results; private individuals and legal entities may also submit information on candidates to the HQC. Any information received that may indicate that a candidate does not meet the legal requirements for holding the position of judge is considered by the HQC in the presence of the candidate. The latter has the right to access the relevant information, provide appropriate explanations, refute and deny it. The HQC then takes a motivated decision on whether to terminate further participation of the candidate in the selection procedure. The authorities indicate that this decision can be appealed to court. In addition to the “special verification procedure”, judicial candidates have to submit their asset declarations – which are subject to a complete check by the competent authority i.e. the NACP – as well as the declarations of family members which are published on the HQC website.<sup>61</sup>

132. Candidates who have successfully completed the above procedure undergo 12 months’ special training at the National School of Judges followed by a qualification assessment by the HQC which evaluates the candidates’ competency, professional ethics and integrity. In the evaluation of the latter two criteria, the HQC is assisted by the Public Council of Integrity whose 20 members may be representatives of human rights civic groups, law scholars, attorneys, journalists who are known specialists in the sphere of their professional activity, have a high professional reputation and meet the criteria of political neutrality and integrity.

133. The qualification assessment results in a decision by the HQC on the candidates’ aptitude to work as a judge. The decision must be motivated and can be challenged by unsuccessful candidates before the court in accordance with the provisions of the Administrative Offences Code, but only on certain procedural grounds.<sup>62</sup> Successful candidates are included in a reserve and rating list which is published on the HQC website. It is to be noted that the HQC must ensure transparency of the eligibility assessment and qualification examination. Media, NGOs, judges, lawyers, representatives of bodies of judicial self-government, and any candidate for the position of judge who participated in the relevant assessment, may be present at each stage and during the review of works.<sup>63</sup>

134. According to the number of vacant judges’ positions in local courts, the HQC then conducts a contest on the basis of the rating of candidates and submits its recommendations to the HCJ. The HCJ reviews the recommendations made and decides on whether to make corresponding proposals on judicial appointments to the President of Ukraine. The HCJ may refuse the HQC’s recommendations only if the statutory procedure has been violated or if there are reasonable doubts as to the compliance of a candidate with the criterion of integrity or professional ethics or other circumstances which may have a negative impact on public trust in the judiciary.<sup>64</sup> The HCJ decision to refuse an

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<sup>59</sup> See article 70 LJSJ.

<sup>60</sup> See article 74 LJSJ.

<sup>61</sup> See articles 75 and 76 LJSJ.

<sup>62</sup> See article 88 LJSJ.

<sup>63</sup> See article 72 LJSJ.

<sup>64</sup> The decision-making by the HCJ is regulated in more detail in articles 36 *et seq.* of the Law on the HCJ.

appointment proposal must be motivated and can be appealed to the Supreme Court, but only on certain procedural grounds.<sup>65</sup> The final appointment decision takes the form of a presidential decree. The authorities indicate that the President cannot refuse to appoint the candidates proposed by the HCJ.

135. The law provides for a special procedure for the appointment of judges of a High Specialised Court or the Supreme Court.<sup>66</sup> The HOC verifies that applicants meet the legal requirements for such posts, conducts a special examination/background check and a qualification assessment of candidates, establishes a rating list and makes recommendations to the HCJ. The latter takes a decision which becomes effective by presidential decree. The authorities indicate that the President cannot refuse to appoint the candidates proposed by the HCJ.

136. The GET acknowledges the significant reform of the appointment of judges which was introduced by the 2016 amendments to the Constitution and the LJSJ. The abolishment of the five-year probationary period for junior judges and the introduction of lifetime appointment on the binding recommendation by the HCJ are conducive to strengthening the independence of judges from external influence. Furthermore, the current legislation regulates in detail the different procedural steps including an eligibility assessment, background checks ("special verification procedure") and a qualification assessment; it is to be welcomed that the law clearly establishes candidates' competence, professional ethics and integrity as the decisive criteria. That said, it is too early at this stage to draw any final conclusions on the new regime which now has to be tested in practice.

137. The GET reiterates in this context its concerns about the fact that all sitting judges are currently subject to a complete qualification assessment. While this move may indeed contribute to making the judicial body more healthy, the GET heard during its interviews that it bears at the same time the risk of blocking the judiciary for a considerable period of time – and of being perceived as an attempt to install judges favoured by the current government. The GET was also concerned to hear that because of the qualification assessment, judges were now afraid to take decisions in politically sensitive cases. Moreover, the overlap with the vetting procedures initiated after the "Revolution of Dignity" under the Law on the Restoration of Trust in the Judiciary in Ukraine and the Law on Government Cleansing (Lustration law) – which in themselves are not unproblematic either<sup>67</sup> – appears questionable. It is crucial that the process is limited in time and carried out swiftly, effectively and with the utmost care.<sup>68</sup>

138. Leaving the current special evaluation process aside, the GET also has some general reservations about the institutional set-up which appears quite complicated. The selection procedure is the responsibility of the HOC; in the qualification assessment of judicial candidates, the HOC is assisted by the new Public Council of Integrity; the HOC recommendations are then decided upon by the HCJ; the final appointment is effected by the President of the Republic. The GET is of the opinion that this involvement of different bodies and persons may hinder the effectiveness of the process and increase the risk of external influence at different stages. As the Venice Commission repeatedly pointed out, this complex system "bears the risks of overlaps and conflicts" and "ideally, in order to ensure a coherent approach to judicial careers, the HOC should become part of the HJC, possibly as a chamber in charge of the selection of candidates for judicial positions."<sup>69</sup>

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<sup>65</sup> See article 79 LJSJ.

<sup>66</sup> See article 81 LJSJ.

<sup>67</sup> Amendments to the lustration process as drafted in response to recommendations by the Venice Commission have still not been adopted.

<sup>68</sup> Cf. the statements made by the Venice Commission with respect to the previously planned dismissal and reappointment of all sitting judges: [Opinion of the Venice Commission CDL-AD\(2015\)027](#), paragraph 38.

<sup>69</sup> See *inter alia* the [Opinion of the Venice Commission CDL-AD\(2015\)026](#), paragraph 35; and its [Opinion CDL-AD\(2013\)034](#), paragraph 35.

139. As for the Public Council of Integrity, which was first established on 11 November 2016 under the new LJSJ, the GET notes that its role is subject to debate. The involvement of civil society in the evaluation of the ethics and integrity of judicial candidates may have some merit – at least for a transitional period – in a country like Ukraine where judges are largely perceived as highly corrupt and where citizens' trust in existing institutions is low. At the same time, the GET takes note of the concerns expressed by some of its interlocutors that the involvement of such a non-judicial body in the appointment process of judges raises questions about possible infringements of the principle of the independence of the judiciary. It also heard that current members of the Public Council of Integrity consider that it is their role to oversee the procedure carried out by the HQC – whereas it was designed to only support the latter in the selection process.

140. Given that the HCJ has been recently reformed and established as a central body of judicial self-governance, the GET encourages the authorities to examine the need for maintaining additional bodies such as the HQC and the Public Council of Integrity in the long run – if the reshaped HCJ proves its independence, impartiality and efficiency in practice. It is vital that the functioning of the appointment system – and the activity of the HCJ in particular – is followed closely, to ascertain the possibility and advisability of further streamlining the procedures and simplifying the architecture of judicial self-government bodies.

141. Regarding more specifically the Public Council of Integrity, several of the GET's interlocutors pointed to the fact that the involvement of such a body in judges' appointment may generate risks of conflicts of interest. Even if the LJSJ provides rules on incompatibilities (e.g. judges and prosecutors are excluded) and self-recusal, the possible membership e.g. of practicing attorneys – which is explicitly permitted by the law – appears questionable; moreover, the lack of a control mechanism with respect to conflicts of interest is highly unsatisfactory. In addition to those concerns, the GET also sees a need for more precise rules to ensure the representation of various groups of society in the Council, in order to achieve the objective of including the knowledge and judgment of civil society at large and of increasing citizens' trust in the judiciary. Given the preceding paragraphs, GRECO recommends (i) reviewing the need to reduce the number of bodies involved in the appointment of judges; (ii) defining more precisely the tasks and powers of the Public Council of Integrity, further ensuring that its composition reflects the diversity of society, and strengthening the rules on conflicts of interest – including through the provision of an effective control mechanism.

142. The GET appreciates the fact that unsuccessful candidates have the right to appeal before a court decisions taken at various stages of the appointment procedure. They may challenge decisions taken by the HQC, after the performance of the special verification procedure, to terminate their participation in the selection procedure; decisions taken by the HQC, after the qualification assessment, on their aptitude to work as a judge; and decisions by the HCJ to refuse an appointment proposal by the HQC. However, the latter two types of decision can only be appealed on the grounds of certain – very limited – violations of the procedure such as participation in the decision-making by a member of the HCJ/HQC without the powers to do so, or a missing signature. In the context of Ukraine where corruption in the judiciary is a significant problem and citizens' trust in this branch of power is particularly low, it is essential that the whole appointment process is highly transparent and based on objective factors. One key element for ensuring this is providing for the full review of any decisions taken in the process, both with respect to the merits and any procedural aspects – in line with GRECO's previous pronouncements on this matter. In view of the above, GRECO recommends broadening the appeal possibilities for candidate judges in appointment procedures to ensure that decisions taken in such procedures can be appealed by unsuccessful candidates both on substantive and procedural grounds.

143. Chief judges (chairs) of courts and their deputies are elected by majority vote for three-year terms by judges of the relevant court, from among the judges of that court, by a secret ballot.<sup>70</sup> More than two consecutive terms in such positions are prohibited. Chief judges and their deputies may be dismissed early at the initiative of at least one third of all the judges of the respective court, by a vote by secret ballot of at least two-thirds of the judges, on the grounds of their application, continuous unsatisfactory discharge of their duties, or systematic or gross violation of the law while discharging their duties. The Chief Justice of the Supreme Court is elected from among Supreme Court justices – for a four-year term – and dismissed by the Plenum of the Supreme Court, by a majority vote of the total membership of the Plenum, by secret ballot.<sup>71</sup>

144. The HCJ is responsible for the transfer of judges from one court to another.<sup>72</sup> As a rule, judges are irremovable and may not be transferred to another court without their consent, except a transfer following reorganisation, liquidation or termination of the court, as a disciplinary measure or in connection with deprivation of the minimum rank that is required for a court of the respective level. Apart from those exceptions, judges may be transferred to another court only on the recommendation of the HOC on the grounds of the results of a competition for vacant judge positions. Otherwise, there are no specific rules on the promotion of judges.

145. Judges must follow on-going training at the National School of Judges, for at least 40 academic hours every three years. They are subject to regular evaluation<sup>73</sup> which is aimed at identifying the judges' individual needs for improvement and incentives for maintaining their qualification at the proper level and for professional growth. Evaluation is conducted by lecturers at the National School of Judges based on the results of training and replies to a questionnaire and, as an optional addition, by other judges of the court concerned filling in a questionnaire, by the judge himself/herself filling in a self-appraisal questionnaire and by public associations carrying out an independent evaluation of the judge's work during court sessions. The judge concerned can object to the evaluation results presented by the National School of Judges which may complete a new questionnaire. The judge's evaluation questionnaire, upon completion of each training course, any possible objections to the evaluation results and revised evaluation questionnaire are included in the judge's dossier. The results of regular evaluations are to be taken into consideration in connection with the competition for filling a vacancy in the relevant court.

146. The GET is quite puzzled about this rather unusual evaluation system. It clearly shares the concerns expressed by some practitioners that evaluation by lecturers of the National School of Judges hardly guarantees objectivity and equal treatment of judges, since it will depend on short-term impressions and on the particular training attended by them and not on their daily work. Some interlocutors stated that the consequences of such evaluations were rather limited, but the GET notes that they are to be taken into account in competitions for court positions.<sup>74</sup> Moreover, the LJSJ does not ensure that evaluations are conducted peer to peer, by judges; this is clearly unsatisfactory, even though the GET was told that in practice a majority of lecturers at the National School of Judges are judges. According to Council of Europe standards and reference texts, evaluation of individual judges – which is “necessary to fulfil two key requirements of any judicial system, namely justice of the highest quality and proper accountability in a democratic society” – “should be based on objective criteria”; and “in order to safeguard

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<sup>70</sup> See article 19 LJSJ.

<sup>71</sup> See article 19 LJSJ. Special rules on the early dismissal of the Chief Justice – following a no-confidence vote by the Plenum of the Supreme Court – are provided by article 41 LJSJ.

<sup>72</sup> See articles 53 and 82 LJSJ. See also article 55 LJSJ which regulates temporary secondment in specific situations, with the consent of the judge concerned.

<sup>73</sup> See article 90 LJSJ.

<sup>74</sup> See article 91 LJSJ.

judicial independence, individual evaluations should be undertaken primarily by judges.”  
<sup>75</sup> Given the above, GRECO recommends that periodic performance evaluation of judges is carried out by judges on the basis of pre-established, uniform and objective criteria in relation to their daily work.

147. In accordance with article 126 of the Constitution, the powers of a judge are terminated ipso facto on reaching the age of 65, in the event of death, loss of citizenship or acquisition of the citizenship of another State, in the case of a criminal conviction or if a valid court decision rules that the judge is missing, dead, incapable or partially incapacitated. The grounds for dismissal of a judge are failure to exercise his/her powers for health reasons; violation of the incompatibility regulations; commission of a substantial disciplinary offence, gross or systematic neglect of duties which is incompatible with the status of judge or which has revealed his/her incompatibility with the office; resignation or voluntary termination of service; refusal to be transferred to another court in case of dissolution or reorganisation of a court; breach of the obligation to prove the legality of the sources of his/her assets. The HCJ is competent to decide on the dismissal of judges.<sup>76</sup>

148. Judges' remuneration consists of a base salary and additional payments for length of service, holding an administrative position in court (e.g. chief judge), scientific degree and work that involves access to State secrets.<sup>77</sup> Moreover, regional factors are applied. The base salary is between 30 minimal salaries<sup>78</sup> for local court judges, 50 minimal salaries for appeal court and high specialised court judges, and 75 minimal salaries for Supreme Court justices. The gross monthly base salary thus ranges from approximately 1 766€ for local court judges to approximately 4 416€ for Supreme Court justices. Judges are entitled to social insurance and, in case of need, service housing at the location of the court.

#### Case management and procedure

149. Cases in courts are considered by a judge individually or, in cases prescribed by the procedural law, by a panel of judges, also with the participation of jurors.<sup>79</sup> Pursuant to article 15 LJSJ, the assignment of a judge/of judges to consider a specific case is carried out by the automated case management system in the manner determined by procedural law. The criteria for case allocation are the specialisation of judges, the caseload of each judge, bans on participating in the review of decisions for a judge who participated in rendering the court decision in question (except for the review of newly discovered circumstances), judges' leave, absence due to temporary incapacity to work, business trips and in other cases provided for by law when a judge may not render justice or participate in a case. The automated system is not used only if there are circumstances that objectively render its functioning impossible and which last for more than five working days, in which case the distribution of cases is determined by the Regulations on the Unified Court Information (Automated) System adopted in 2010 and frequently amended in subsequent years. “Unlawful interference with the work of the automated workflow system of court” entails criminal liability under article 376-1 CC.

150. The GET welcomes the legal regulations on the automated case management system and the criteria for case allocation among judges. That said, it was concerned to hear that risks of manipulation of the system, which appeared to have been a significant

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<sup>75</sup> Cf. [Recommendation Rec\(2010\)12 of the Committee of Ministers of the Council of Europe to member States on judges: independence, efficiency and responsibilities](#), paragraph 58 ; [Opinion No.17\(2014\) of the CCJE](#) to the attention of the Committee of Ministers of the Council of Europe on the evaluation of judges' work, the quality of justice and respect for judicial independence, paragraph 49.

<sup>76</sup> See article 131 of the Constitution.

<sup>77</sup> See article 135 LJSJ.

<sup>78</sup> In 2016, the minimal salary amounted to 1 600 UAH/approximately 58.88€.

<sup>79</sup> See article 15 LJSJ.

problem previously,<sup>80</sup> still remain. For example, it was stated that the chief judge could influence the distribution of cases by determining the area of specialisation of a judge, by offering a judge strategically timed sick leave, etc. Another example of manipulation referred to was the submission by a plaintiff of several identical complaints; the plaintiff would then pay court fees only for the complaint which was allocated to the desired judge. The GET is also alarmed about the fact that due to several recent developments including the resignation of numerous judges mentioned above,<sup>81</sup> in many courts there are presently only a very few judges. It is clear that this makes it particularly difficult to ensure random case allocation based on objective factors (such as specialisation) and to prevent any manipulation. The authorities stress, however, that recent reforms protect the system from being circumvented or manipulated and that it is currently planned to remove any possible remaining deficiencies. While the GET acknowledges the recent measures taken by the Council of Judges and the State Court Administration to increase transparency in the process (automatic registration and publication of case allocation, subsequent blocking of the system to prevent later changes to allocation), it encourages the authorities to keep the application in practice of the new system under review and to ensure stringent control of case assignment.

151. A judge may be removed from a specific case only for the reasons set out by law. The grounds and procedure for rejecting a judge are specified by the procedural laws. The rules on disqualification of a judge under the procedural laws are described further below.

152. Every person is guaranteed protection of their rights, freedoms and interests within reasonable time frames by an independent, impartial and fair trial.<sup>82</sup> Violation by a judge of these principles – including unreasonable delay or failure to take action on considering an application, complaints or case within a timeline established by law, delays in drafting a motivated court decision, untimely submission of a copy of a court decision by a judge to be entered into the register – result in disciplinary liability.<sup>83</sup>

153. Court decisions, court hearings and information on cases considered by courts are as a rule open.<sup>84</sup> Consideration of a case *in camera* is permitted upon a substantiated decision of the court exclusively in cases determined by law. No one may be restricted in their right to receive in court oral or written information about the results of consideration of their lawsuit. Information about court proceedings, including the parties to the dispute, the essence of the claim and the current status of the proceedings is open and immediately published on the official web-portal of the judiciary.<sup>85</sup> Persons present in the courtroom including media representatives may take photographs, video and audio recordings without specific permission from the court, but subject to restrictions stipulated by law. Broadcasts of court hearings require permission from the court. Violation by a judge of the principles of publicity and openness of a trial gives rise to disciplinary liability.<sup>86</sup> Court decisions are accessible through an online register.

### Ethical principles, rules of conduct and conflicts of interest

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<sup>80</sup> See e.g. the 2009 study "[Corruption risks in criminal process and judiciary](#)" prepared in the framework of the Joint EU/Council of Europe Project against Corruption in Ukraine (UPAC), pages 116 *et seq.*, 137 *et seq.*; and the 2014 "Legal opinion on the Law on the Restoration of Trust in the Judiciary in Ukraine", page 10. The GET was also informed that several criminal cases involving manipulation of case assignment were pending before court.

<sup>81</sup> Cf. the above section "Overview of the judicial system": about 1 500 judges resigned in 2016 to avoid the qualification assessment and the electronic and public declaration of their assets. Other factors include the lustration process and the political developments in Eastern Ukraine.

<sup>82</sup> See article 7 LJSJ.

<sup>83</sup> See article 106 LJSJ.

<sup>84</sup> See article 11 LJSJ.

<sup>85</sup> See <http://reyestr.court.gov.ua/> and [www.court.gov.ua](http://www.court.gov.ua).

<sup>86</sup> See article 106 LJSJ.

154. The Constitution and the LJSJ state that in exercising justice, judges are to be independent of any improper influence and guided by the rule of law.<sup>87</sup> The basic principles of judicial proceedings include equality of all parties to the court proceedings before the law and the court, and adversariality of the parties and their freedom to present their evidence to the court and to prove the weight of such before the court. Article 56 LJSJ contains the rights and obligations of judges, including the obligation to fairly, impartially and timely consider and resolve lawsuits according to law; comply with the rules of judicial ethics, including by manifesting and maintaining high standards of conduct in any activity in order to strengthen public trust in the court, and ensure public confidence in judicial integrity and incorruptibility; demonstrate respect to parties in a case; comply with and adhere to restrictions established by law for the prevention of corruption; report interference in their work as a judge to the HCJ and the Prosecutor General within five days. Moreover, judges are to take an oath of office, the text of which is signed by the judge and kept in his/her judicial dossier.<sup>88</sup>

155. Matters of judicial ethics are defined by the Code of Judicial Ethics,<sup>89</sup> which was approved by the Council of Judges in December 2012 and adopted by the Congress of Judges on 22 February 2013. During the preparation of the code, international standards of professional judicial ethics were taken into consideration. The code is composed of the three chapters "general provisions", "judicial conduct in the administration of justice" and "judicial conduct off-the-bench" (altogether 20 articles). The authorities indicate that the Code of Judicial Ethics is disseminated to all judges. It is also made available to the general public on the Internet.<sup>90</sup> In addition, in 2016 the Council of Judges issued a "Commentary to the Code of Judicial Ethics" which is also published on the Internet,<sup>91</sup> and online training on judicial ethical has been introduced.

156. Judges are included in the definition of "persons authorised to perform functions of the State or local self-government" in the meaning of the LPC and thus subject to the relevant LPC provisions on prevention of corruption and conflicts of interest. The general rules on the prevention and management of conflicts of interest contained in chapter V of the LPC have been described above with respect to MPs. In particular, no later than the next business day after the date when a judge was aware or should have been aware of a real or potential conflict of interests, s/he must submit a report to the Council of Judges. Further details are regulated in a Decision by the Council of Judges of 49 February 2016 (No. 2).<sup>92</sup> The GET was informed that at 23 March 2017, the Council of Judges had received 51 reports of real or potential conflicts of interest of judges, 17 of which had been made by judges themselves. Failure by a judge to report, or untimely reporting, to the Council of Judges gives rise to administrative<sup>93</sup> or disciplinary<sup>94</sup> liability, unless the conflict of interests is regulated otherwise by procedural laws. In this respect, reference is made to the procedural law provisions on the disqualification of a judge (see below).

157. In 2014, an Ethics Committee was established under the Council of Judges. According to new regulations adopted in February 2016, the Ethics Committee is competent to counsel judges on questions of ethics and conflicts of interest, to verify that judges respect the relevant rules and notify any violations to the competent authorities, to prepare proposals for further regulations, etc. Anyone can file complaints to the

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<sup>87</sup> See article 129 of the Constitution and article 6 LJSJ.

<sup>88</sup> See article 57 LJSJ.

<sup>89</sup> See article 58 LJSJ.

<sup>90</sup> See <http://court.gov.ua/userfiles/Kodex%20sud%20etiki.pdf>.

<sup>91</sup> The commentary was endorsed by the HCJ on 4 February 2016.

See [http://www.vru.gov.ua/legislative\\_acts/20](http://www.vru.gov.ua/legislative_acts/20).

<sup>92</sup> Decision by the Council of Judges on the "Procedure for control over observance of legislation concerning conflicts of interest in the work of judges and other members of the judiciary and its settlement"

<sup>93</sup> See article 172-7 Administrative Offences Code.

<sup>94</sup> See article 28 LPC and articles 106 and 133 LJSJ.

Committee and judges can ask it for advice. The Committee is also engaged in training activities and cooperates with the National School of Judges.

158. The GET heard during the on-site visit that judges' low awareness of ethical questions has been a source of concern for many years and contributed to citizens' marked mistrust of the judiciary.<sup>95</sup> Against this background, it very much welcomes recent initiatives to establish clear and modern ethical standards, to promote them actively and offer advice to judges, and also to monitor compliance with the ethical rules and conflict of interest regulations. It is crucial that those moves, which have benefitted considerably from foreign and international support,<sup>96</sup> are carried on and further developed on a long-term basis. A recommendation to that effect is made further below in the section on "Advice, training and awareness".<sup>97</sup>

#### Prohibition or restriction of certain activities

##### *Incompatibilities and accessory activities, post-employment restrictions*

159. Under article 127 of the Constitution, judges may not belong to any political party or trade union, engage in any political activity, hold a representative mandate, occupy any other paid position, or perform other remunerated work except of a scientific, educational or creative nature.

160. More detailed regulations on judges' incompatibilities are contained in the LJSJ.<sup>98</sup> They make it clear, for example, that judges may not be members of the governing body or a supervisory board of a company or organisation that is aimed at making profit; and that they are obliged to transfer shares, corporate rights or other proprietary rights/interests in the operations of a legal entity (aimed at earning income) to the management of an independent third person for the term of judicial office (without the right to give instructions to such persons regarding the use of such shares, corporate or other rights or regarding the exercise of rights which arise therefrom).

161. Persons subject to a ban according to the Law on Government Cleansing (Lustration Law) may not be a judge. That law was adopted on 16 September 2014, after the "Revolution of Dignity", and is aimed at protecting society from individuals who, due to their past behaviour, could pose a threat to the newly established democratic regime, and at clearing the public administration of individuals who have engaged in large-scale corruption. It provides for bans on the holding of specified offices including the office of judge by persons who, *inter alia*, helped the previous authorities to usurp power, acted or failed to act in a way that undermined the foundations of the national security of Ukraine, served in leading positions in the Soviet Union, or ordered or abetted the police action against Euromaidan protesters. The law foresees an inspection procedure for persons holding an office which is subject to lustration as well as for persons aspiring to such an office. The authorities indicate that the Ministry of Justice conducted such inspections in respect of 60 acting judges during the period December 2014 to December 2015. As a result, three judges had to resign from office.

162. In addition, the general rules on incompatibilities contained in the LPC are to be taken into account, including the restrictions on other part-time activities and on joint work with close persons.<sup>99</sup>

163. The authorities indicate that judges are obliged to report the allowed activities they are engaged in and related income to the NACP in their annual e-declarations and

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<sup>95</sup> The authorities disagree with that statement.

<sup>96</sup> In particular from USAID, see the "[Fair Justice Programme](#)".

<sup>97</sup> See paragraph 195 below.

<sup>98</sup> See article 54 LJSJ.

<sup>99</sup> See articles 25 *et seqq.* LPC.

income tax declarations. The authorities state that in practice, judges commonly engage in teaching and research activities, but no statistics are kept on accessory activities exercised by judges.

164. The post-employment restrictions mentioned above in the chapter on MPs apply to judges. Namely, article 26 LPC stipulates one year cooling-off periods in certain cases, e.g. before entering into employment agreements/performing transactions in business with persons with respect to whom the judge has exercised control, supervision or decision-making powers.

#### *Recusal and routine withdrawal*

165. The conditions for disqualification of a judge are specified in the procedural laws.<sup>100</sup> A judge cannot participate in the trial if s/he was previously involved in the case, if s/he is directly or indirectly interested in the outcome of the case, if s/he is a family member or close relative<sup>101</sup> of the party or other persons involved in the case, if there are other circumstances that raise doubts about the judge's objectivity and impartiality, and if the procedure for allocating the case to a judge has been violated. In the presence of such reasons, the judge must withdraw from the case. Parties to the case or the prosecutor involved in the trial may also challenge the judge's participation.

166. The GET notes with concern that under the different procedural laws, the judge whose participation has been challenged is – in certain situations – involved in the consideration of the motion; the only exception being administrative law proceedings, where the challenged judge is clearly always excluded. For instance, when in criminal proceedings one or several judges of a panel are challenged, the motion is considered by the panel and the decision is taken by simple majority.<sup>102</sup> In other words, in such cases a judge who is challenged participates in the consideration of the motion and may have a decisive vote. A judge who might have a conflict of interest would thus be the judge of his/her own case, which is highly unsatisfactory. The situation is similar – or even more disturbing – when it comes to civil and commercial law proceedings: a motion to disqualify a judge is, as a rule, decided “by the same composition of the court” which is to try the case itself. During the interviews conducted on site it was explained to the GET that in practice therefore even single judges decide on motions for their own disqualification in such proceedings.

167. The GET clearly shares the view expressed by the practitioners interviewed that challenged judges should always be excluded from the decision regarding their disqualification or removal from particular proceedings in order to ensure objectivity and impartiality in the decision-making process. For the same reasons, possibilities to appeal decisions on disqualification motions need to be introduced. Currently, they can be appealed only together with the judgment on the merits of the case.<sup>103</sup> Consequently, GRECO recommends ensuring that in all court proceedings any decisions on disqualification of a judge are taken without his/her participation and can be appealed.

#### *Gifts*

168. The general rules on gifts contained in articles 23 *et seqq.* LPC as described above in paragraphs 45/46 are applicable to judges. In particular, they are prohibited from

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<sup>100</sup> Cf. articles 75 *et seqq.* of the Criminal Procedural Code, articles 20 and 23 of the Civil Procedural Code, article 20 of the Commercial Procedural Code, articles 27 and 29-32 of the Code of Administrative Procedure.

<sup>101</sup> I.e. husband, wife, father, mother, stepfather, stepmother, son, daughter, stepson, stepdaughter, brother, sister, grandfather, grandmother, grandson, granddaughter, adopter or adopted, guardian or trustee, a family member or a close relative of the person.

<sup>102</sup> By contrast, when a single judge is challenged, the motion is to be considered by another judge of the court.

<sup>103</sup> In addition, violation by a judge of the rules on self-recusal constitutes a disciplinary offence, see article 106 LJSJ.

demanding, asking for, receiving gifts for themselves or close persons from legal entities or individuals in connection with their activity as a judge or from subordinate persons. Otherwise, they may accept gifts which correspond to generally accepted notions of hospitality,<sup>104</sup> if their value does not exceed approximately 52€ and the aggregate value of individual gifts received from the same person, or group of persons, within a year does not exceed approximately 97€.

169. If a judge is offered an unlawful gift or benefit, s/he must reject it, try to identify the person who made the offer, involve witnesses, if possible, and notify in writing the court chair and the NACP about the proposal. In cases of doubt, advice can be sought from the NACP. The authorities indicate that they are not aware of any recent cases of judges receiving gifts. A recommendation aimed at further developing the LPC rules on the acceptance of gifts, including by lowering the threshold of acceptable gifts, has been made earlier in this report.<sup>105</sup>

#### *Third party contacts, confidential information*

170. Judges are obliged to inform the HCJ and the Prosecutor General about instances of interference into their exercise of rendering justice, including being addressed by the trial participants or other persons, including persons authorised to perform State functions about specific cases that are under consideration of a judge if such an application took place in any other way than provided for by procedural law, within five days after they became aware of such instances. Violation of this rule constitutes a disciplinary offence.<sup>106</sup>

171. In addition, the Code of Judicial Ethics states that judges are to avoid *ex parte* communication with one of the parties or their representative in the absence of the other parties; to avoid inappropriate contacts which can influence their independence and impartiality; to take into account that family, social, or other relationships and interference from legislative and executive branches should not impact judicial conduct in rendering judgments; to use social network accounts, Internet-forums etc. only in a way that does not undermine the authority of a judge and the judiciary.<sup>107</sup>

172. As far as the use of confidential information is concerned, the law makes it clear that judges are prohibited from disclosing information that constitutes a secret protected by law, including a secret of the deliberation room or information which became known to a judge during the consideration of a case at a closed court session. Violation of this rule gives rise to disciplinary liability.<sup>108</sup>

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<sup>104</sup> This concept is explained in Methodological recommendations on the prevention and solution of conflicts of interest adopted by NAPC Decree of 14 July 2016 #2. It includes e.g. formal gifts (souvenirs) and other signs of hospitality (meals and equivalent hospitality, for instance, invitation to join to have coffee or dinner), that are conventionally used for maintaining good formal relations and strengthening working relations. Gifts given by close persons/relatives and gifts which take the form of publicly accessible discounts on goods or services may also be accepted.

<sup>105</sup> See paragraph 47 above.

<sup>106</sup> See articles 56 and 106 LJSJ.

<sup>107</sup> See articles 14, 17, 19 and 20 of the Code of Judicial Ethics.

<sup>108</sup> See articles 56 and 106 LJSJ. In addition, see article 43 LPC.

## *Declaration of assets, income, liabilities and interests*

173. Judges are obliged to submit annual asset declarations to the NACP in accordance with the provisions of chapter VII of the LPC.<sup>109</sup> Declarations are entered into the Unified State Register held by the NACP which provides open access to the register and checks the content of the declarations submitted. Non-submission, untimely submission of an asset declaration or submission of knowingly inaccurate (including incomplete) information constitutes a disciplinary offence. Moreover, administrative and criminal liability is provided for by the Administrative Offences Code and the Criminal Code. Reference is made here to the chapter on corruption prevention in respect of all categories under review, which includes more details on the rules applicable as well as a recommendation aimed at independent and credible implementation of those rules.<sup>110</sup> After the visit, the GET was informed that at March 2017 all judges except for seven had submitted their asset declarations and that the NABU had instituted 15 criminal proceedings against judges for non-submission or submission of inaccurate data.

174. In addition, under the LJSJ, judges must annually submit to the HQC a “declaration on family relations” and a “declaration on judicial integrity” by filling them out on the HQC website, where they are available to the public.<sup>111</sup> In the declaration on family relations, judges are to indicate whether they have such relations with persons who hold or have held during the last five years specified positions such as the position of judge, court staff, prosecutor, employee of a law enforcement body, lawyer, notary, member or employee of the HCJ or the HQC, President of Ukraine, MP, government member, etc.

175. In the declaration on judicial integrity, judges have to make several specified statements, e.g. the congruity of their level of life with the property owned and income received by them as judges and their families, non-commitment of corruption offences, lack of grounds for disciplinary action, diligent fulfilment of judicial obligations and observance of the oath, non-interference with justice rendered by other judges, undergoing vetting of judges in line with the Law on the Restoration of Trust in the Judiciary in Ukraine and its results, lack of bans determined by the Law on Government Cleansing (Lustration law). Non-submission or untimely submission of such declarations or submission of knowingly inaccurate (including incomplete) information results in disciplinary liability.

## Supervision and enforcement

176. Supervision over judges’ conduct is divided between several bodies. The NACP is competent to monitor compliance with the LPC rules, including on asset declarations. The system has been described above in the chapter on corruption prevention in respect of all categories under review which includes a recommendation aimed at independent and credible implementation of those rules.<sup>112</sup>

177. It is to be noted that pursuant to article 60 LJSJ a complete check of asset declarations – including verifying the accuracy of declared information, accuracy of evaluation of declared assets, and checking the availability of a conflict of interests and signs of illicit enrichment – is to be conducted by the NACP with regard to each judge at least once every five years and on a request by the HQC or the HCJ. Violations by judges of the declaration requirements may result in disciplinary, administrative or criminal liability (also simultaneously), depending on the case. If the NACP detects signs of a criminal offence, it must submit relevant information on the cases to the NABU. If there

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<sup>109</sup> See article 56 LJSJ.

<sup>110</sup> See paragraph 41 above.

<sup>111</sup> See articles 61 and 62 LJSJ.

<sup>112</sup> See paragraph 41 above.

is evidence of a disciplinary offence, the NACP must submit the case to the HQC and the HCJ.

178. The NACP is also tasked with monitoring judges' lifestyles, on the request of the HCJ or the HQC, in order to verify whether their lifestyle corresponds to the property owned and income received by them as judges and their families.<sup>113</sup> If it detects any inconsistencies, it will proceed to a full verification of the declaration. If the lifestyle monitoring reveals signs of corruption or of a corruption-related offence,<sup>114</sup> the NACP informs the NABU. Results of the lifestyle monitoring may also be used to evaluate the compliance of a judge with judicial ethics rules, and they are attached to the judicial dossier.

179. Regarding judges' annual declarations on family relations and declarations on judicial integrity, data submitted by judges are deemed as credible, in the absence of any other evidence. However, the HQC has to verify the declaration if it receives information which may indicate the unreliability (including incompleteness) of data submitted.<sup>115</sup>

180. The GET notes that strict rules apply to judges in Ukraine in respect of the declaration of interests concerning themselves as well as close family members, and reporting instances of interference by third parties. Although such obligations may also impact on judges' independence, the GET takes the view that they are necessary in the current situation in Ukraine. That said, a careful balance should be struck between such strong supervision of judges and the independence of judges and the judiciary.<sup>116</sup>

181. As mentioned above, compliance by judges with the rules on conflicts of interest contained in the LPC and further specified in the relevant Decision by the Council of Judges of 9 February 2016 is monitored by the Council's Ethics Committee. Failure to report or untimely reporting of a real or potential conflict of interests to the Council of Judges results in administrative<sup>117</sup> or disciplinary<sup>118</sup> liability, except when the conflict of interests is regulated otherwise by procedural laws.

182. Disciplinary misconduct by judges as specified in article 106 LJSJ gives rise to disciplinary liability, including for violation of the rules on self-recusal; unreasonable delay in court proceedings; conduct which disgraces the status of judge or undermines the authority of justice, in particular, on the issues of morals, integrity, incorruptibility, congruence of the lifestyle of a judge with his/her status, compliance with other norms of judicial ethics and standards of conduct which ensure public trust in court, etc.; disclosure of a secret which is protected by law; failure to inform the HCJ and the Prosecutor General about an instance of interference in the activity of a judge aimed at rendering justice; failure to inform or untimely informing of the Council of Judges about an actual or potential conflict of interests; non-submission or untimely submission of asset declarations, declarations on family relations or declarations on judicial integrity, or submission of knowingly inaccurate (including incomplete) information; incongruence of the level of life of a judge with declared income; using the status of a judge with the aim of illegitimate receipt of material or other benefits by him/her or third persons; committing a corruption offence or corruption-related offence in cases stipulated by law.

183. The GET welcomes the catalogue of specific disciplinary offences in article 106 LJSJ as amended in 2016. That said, it is concerned that the catalogue still includes

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<sup>113</sup> See article 59 LJSJ and article 51 LPC.

<sup>114</sup> In accordance with article 1 LPC, a corruption-related offence in the meaning of this law means an act that does not have signs of corruption but violates requirements, prohibitions and restrictions established by the LPC, for which the law establishes criminal, administrative, disciplinary and/or civil liability.

<sup>115</sup> See articles 61 and 62 LJSJ.

<sup>116</sup> The authorities agree and take the view that such a balance could be reached by clearly defining how and by which bodies the information contained in the declarations can be used.

<sup>117</sup> See article 172-7 Administrative Offences Code.

<sup>118</sup> See article 28 LPC and articles 106 and 133 LJSJ.

references to some imprecise concepts such as “conduct which disgraces the status of judge or undermines the authority of justice” and “compliance with other norms of judicial ethics and standards of conduct which ensure public trust in court” (see in particular paragraph 1, item 3 of that article). The authorities and other interlocutors interviewed on the subject explained that the latter terms are to be understood as a violation of the “Code of Judicial Ethics”.<sup>119</sup> Such general references to a code of ethics or ethical principles have been repeatedly criticised, e.g. by the Venice Commission, as too vague.<sup>120</sup> On the one hand, they are insufficient to ensure consistent and foreseeable decision-making and to prevent possible misuse of disciplinary proceedings; on the other hand, they bear the risk of being rarely applied at all, which seems to be the case in Ukraine. Those concerns were shared by practitioners met on site; they appear particularly pressing as poor enforcement of the rules on judges’ accountability has been highlighted repeatedly in recent years.<sup>121</sup> Consequently, GRECO recommends defining disciplinary offences relating to judges’ conduct more precisely, including by replacing the reference to “norms of judicial ethics and standards of conduct which ensure public trust in court” with clear and specific offences.

184. Disciplinary penalties<sup>122</sup> include admonishment; reprimand – with deprivation of the right to receive bonuses to the salary of a judge for one month; strict reprimand – with deprivation of the right to receive bonuses for three months; proposal on temporary (one to six months) suspension from the administration of justice – with deprivation of the right to receive bonuses, and mandatory training and subsequent qualification evaluation for confirmation of the judge’s ability to administer justice in the relevant court; proposal on transfer of the judge to a lower-level court; and proposal on dismissal of the judge.

185. When selecting the type of disciplinary sanction against a judge, the nature of the disciplinary offence, its implications, personality of the judge, the extent of his/her guilt, availability of other disciplinary sanctions, other circumstances which influence the possibility of disciplining a judge, as well as the principle of proportionality are to be taken into account. Following the 2016 reform, a proposal to dismiss a judge can be made if the judge violated the duty to prove the legality of the sources of his/her assets, or if s/he committed a substantial disciplinary offence, gross or systematic neglect of duties which is incompatible with the status of judge or which has revealed his/her incompatibility with the office.<sup>123</sup> The GET welcomes the new rules, in particular that “breach of oath” is no longer a ground for dismissal. That concept had been criticised by many as too vague and bearing the risk of unpredictable and inaccurate decision-making; according to some observers, it had been widely misused to get rid of judges who did not prove their loyalty to public officials.

186. The recent judicial reforms considerably changed the rules on disciplinary proceedings. According to the amended LJSJ provisions of 2016, proceedings are conducted by the disciplinary chambers of the HCJ, within the procedure established by the new Law on the HCJ, in force since 5 January 2017.<sup>124</sup> Each chamber is composed of – at least four – HCJ members; at least half or a substantial part of chamber members must be judges or retired judges. Disciplinary proceedings may be initiated on the basis of a written complaint by any person or on the initiative of the disciplinary chambers of the HCJ or of the HOC in cases specified by law. They include a preliminary review by a member of the HCJ (rapporteur), the opening of a disciplinary case by a disciplinary chamber, the hearing of the complaint and the adoption of a decision to discipline a

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<sup>119</sup> Although article 4 of the code states that violation of its rules cannot by itself be used to establish grounds for judicial disciplinary liability and determine the gravity of misconduct.

<sup>120</sup> See e.g. the [Opinion of the Venice Commission CDL-AD\(2015\)007](#), paragraph 50, which contains further references.

<sup>121</sup> See e.g. [Transparency International's 2015 National Integrity System Assessment Ukraine](#), pages 60/68.

<sup>122</sup> See article 109 LJSJ.

<sup>123</sup> See article 126 of the Constitution. The above-mentioned concepts are further specified in article 109 LJSJ.

<sup>124</sup> See, in particular, articles 42 *et seqq.* of the Law on the HCJ.

judge or not. Complaints may be dismissed by the rapporteur for specified formal grounds or by the disciplinary chamber. As a rule, chamber hearings are open to the public. Decisions are adopted by simple majority of votes. Decisions on dismissal of a judge are taken by in a full complement session of the HCJ, following a recommendation by the disciplinary chamber.

187. Disciplinary liability of judges is subject to statutes of limitation, i.e. the limitation period terminates three years after the date of the disciplinary misconduct, excluding any period of temporary incapacity to work or of leave, or of relevant disciplinary proceedings. Information on disciplining a judge is published on the websites of the HCJ and of the court where the judge works. A judge may challenge a disciplinary decision<sup>125</sup> to the HCJ; the complainant has the right to appeal only if permission is granted by the disciplinary chamber. The members of the relevant disciplinary chamber do not participate in the consideration of the appeal. The decision by the HCJ on the appeal may be appealed to court<sup>126</sup> only on certain procedural grounds. The procedure is different in case of HCJ decisions on dismissal of a judge: such decisions can be appealed (only on certain procedural grounds) directly to court.<sup>127</sup>

188. The GET takes the view that the new regime for disciplinary proceedings and for dismissal of judges includes many positive features. It welcomes in particular that the HCJ (with its disciplinary chambers) is now competent for all disciplinary proceedings, in contrast to the previous situation where competences were divided between the HCJ and the HOC. This move favours a unified management of disciplinary proceedings and consistent and foreseeable practice. That said, the GET is of the firm opinion that the practical application of the new regime must be kept under review, with a view to ascertaining possible needs for further adjustments in the future. For example, some of the possible grounds for the (non-appealable) dismissal of complaints by the rapporteur – such as repeated unsuccessful complaints by the same person or if the complaint contains “obscene remarks” – appear questionable. Furthermore, the rule that the complainant has the right to appeal the decision by the disciplinary chamber only if permission is granted by the latter – without specifying in what situations permission should be given – appears too restrictive. Practical experience with the application of those rules will have to be followed closely.

189. Judges may be subject to criminal proceedings and sanctions. However, they enjoy immunity in accordance with article 126 of the Constitution. Thus, “without the consent of the HCJ a judge may not be detained or held in custody or under arrest before s/he is convicted by a court, except for detention of a judge during or immediately after the commission of a grave or especially grave crime” (inviolability). Moreover, “a judge may not be held liable for a judgment that s/he has made, except for the commission of a crime or disciplinary offence” (non-liability).<sup>128</sup>

190. The GET welcomes the shift of power to lift judges’ immunity from a political organ – Parliament – to the HCJ and the possibility to detain or arrest judges without the HCJ’s consent in certain cases. Those amendments were part of the 2016 constitutional reform; the previous regime had been widely criticised as a serious obstacle to the fight against corruption in the judiciary.<sup>129</sup> That said, the practical application of the new rules needs to be kept under review. The GET was concerned to hear about judges having fled to escape punishment under the previous legislation. In the view of the GET, the current requirement of HCJ consent to judges’ detention, custody or arrest carries the risk that

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<sup>125</sup> See articles 51 *et seqq.* of the Law on the HCJ.

<sup>126</sup> The authorities state that according to article 19, paragraph 18 of the Code of Administrative Procedure the High Administrative Court is competent to decide on appeals against acts by the HCJ and the HOC.

<sup>127</sup> See article 57 LJSJ.

<sup>128</sup> The authorities indicate that in 2015 i.e. under the previous legislation, judges’ immunity was lifted in 31 cases (in 2014: in 17 cases); in 11 cases, Parliament refused to lift judges’ immunity.

<sup>129</sup> See e.g. [Transparency International's 2015 National Integrity System Assessment Ukraine](#), page 67.

such cases also occur in the future – bearing in mind the time necessary to prepare a well-reasoned motion to be submitted by the Prosecutor General to the HCJ which has five days for considering the matter. Moreover, the exceptions to the requirement of HCJ consent – in cases of *in flagrante delicto* – are limited to the commission of grave or especially grave crimes, which do not cover, for example, ordinary cases of bribery.<sup>130</sup> GRECO recommends analysing the practical application of the new constitutional and legal provisions on judges' immunity and, if necessary for effective law enforcement, taking appropriate legal measures to further limit their immunity.

191. Judges can be suspended from exercising justice by HCJ decision as a result of being disciplined (see above), when undergoing a qualification assessment or when facing criminal charges.<sup>131</sup> In the latter case, a reasoned motion by the Prosecutor General or his/her deputy is required and the suspension may not exceed two months; however, the period can be prolonged for a further two months.

#### Advice, training and awareness

192. The National School of Judges is a State institution with a special status within the system of justice, which is established under the HQC. Its chair (the rector) is appointed and dismissed by the HQC. The National School of Judges is tasked with training judicial candidates, judges and court staff, carrying out research, etc. It is to organise mandatory training as well as training that judges may choose as an option depending on their needs. Judges must take on-going training at the National School of Judges, for at least 40 academic hours, every three years.<sup>132</sup>

193. The National School of Judges provides continuous training on questions of ethics and conflicts of interest, in cooperation with the Ethics Committee of the Council of Judges. The GET was informed that during the period January 2016 to April 2017, a number of training activities were organised for altogether around 2 800 judges on anti-corruption legislation and its implementation. Moreover, training was provided to 30 trainers. Around 2 500 judges followed online lectures.

194. The Ethics Committee of the Council of Judges also offers advice on questions of ethics and conflicts of interest. The authorities indicate that at 23 March 2017, 59 judges had requested the Ethics Committee to provide explanations on the existence or not of a conflict of interest. The GET was furthermore informed that in 2016, 22 judges had submitted written requests for advice on conflicts of interest and 12 regarding ethical dilemmas. The COJ support staff keeps the registry of such requests and the respective explanations provided by the Ethics Committee.

195. The GET acknowledges the recent initiatives to provide judges with training and advice on questions of ethics and conflicts of interest. In the context of Ukraine, as described above, it is of prime importance that regular training, awareness-raising and advice for judges on such matters are continued and further increased – not least to increase public confidence in the judicial system. Such measures need to be actively promoted and made available to all judges, and the role of the Ethics Committee of the Council of Judges needs to be strengthened. Some of the GET's interlocutors emphasised the weak capacity of that body as it consists of only four permanent members, namely three first instance court judges and a retired judge as its chair. Given the number of judges in Ukraine (around 7 000) and the range of tasks of the Ethics Committee (advice, monitoring, preparation of regulations, etc.), this appears insufficient for it to play a strong and proactive role. In this context, as recommended in paragraph 48, it is crucial that improved coordination channels are built up with the NACP, given the key

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<sup>130</sup> I.e. only aggravated cases of bribery are covered, see articles 12 and 368 CC.

<sup>131</sup> See articles 62 *et seqq.* of the Law on the HCJ.

<sup>132</sup> See articles 56 and 89 LJSJ.

monitoring and advisory role it has in respect of all categories of public officials, including judges. Consequently, GRECO recommends providing to all judges dedicated, regular training as well as further illustrative guidance on ethics and integrity, prevention of conflicts of interest and corruption, raising judges' awareness of such matters and strengthening the Ethics Committee of the Council of Judges to enable it to play a proactive role in this context and to offer advice to a large number of judges.

## VI. CORRUPTION PREVENTION IN RESPECT OF PROSECUTORS

### Overview of the prosecution service

196. Similarly to the judiciary, the prosecution service has, since the “Revolution of Dignity”, been reformed with international support including from the Council of Europe, notably the Venice Commission. A new Law on the Prosecutor’s Office (LPO) was adopted on 14 October 2014 and the relevant constitutional provisions were revised in 2016. While the present report is based on the new legislation, it needs to be borne in mind that its implementation is an on-going process which has only just started.

197. According to the new article 131.1 of the Constitution, the prosecution service exercises 1) public prosecution in the court; 2) the organisation and procedural leadership during pre-trial investigations, decision of other matters in criminal proceedings in accordance with the law, supervision of undercover and other investigative and search activities of law enforcement agencies; 3) representation of interests of the State in the court in exceptional cases and under the procedure prescribed by law.

198. The GET welcomes the fact that recent reforms have included several important amendments, above all the abolishment of the general supervisory function of the prosecution service which was contrary to European standards; Ukraine thereby honoured one of its remaining accession commitments to the Council of Europe. Moreover, the reforms introduced provisions to secure the independence of prosecutors, more specific criteria and processes for the appointment of prosecutors and for disciplinary action against them, and arrangements to secure self-governance within the prosecution service.

199. That said, as is the case with respect to the judiciary, practice will yet have to prove the effectiveness of the measures initiated. Despite reforms and a considerable reduction in prosecutors in recent years, the prosecution service is still a particularly powerful branch linked directly to the executive and headed by a political appointee who is a close ally of the President of the Republic. Several interlocutors interviewed by the GET on site confirmed the persistence of a general perception that the prosecution office is politicised and corrupt and that misconduct of prosecutors mostly goes unpunished;<sup>133</sup> the authorities disagree and stress that during the period January 2016 to March 2017, seven prosecutors were found criminally liable. Moreover, 89 indictments against prosecutors are pending in court. A renewal of prosecutors has been initiated but only at the local level; in 2016, 599 prosecutors were appointed to local prosecution offices, 462 of whom had not worked in the prosecution service before. That said, several interlocutors expressed their disquiet about the fact that no new, reform-oriented prosecutors had yet been appointed to higher-level and key positions.

200. Furthermore, the GET was concerned to hear about attempts by individual MPs to roll back the recent constitutional reforms, through draft legislation amending the LPO and other laws to bring them in line with the amended Constitution – which included a number of additional, more critical, amendments; the the draft legislation which was submitted by individual MPs to Parliament would i.a. have returned instruments of general supervision to the prosecution service, limited the role of the National Anti-Corruption Bureau, etc. The authorities stress, however, that the relevant committee decided on 5 April 2017 to finalise the draft legislation, taking into account the opinions

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<sup>133</sup> See also the statements made, for example, in the [Resolution 2145\(2017\) of the Parliamentary Assembly of the Council of Europe \(PACE\)](#) and its Explanatory memorandum; the [IMF Country Report Ukraine No. 16/319](#) of September 2016; the Freedom House study [“Nations in Transit 2016 – Ukraine”](#); [Transparency International's 2015 National Integrity System Assessment Ukraine](#).

provided by experts of the Council of Europe<sup>134</sup> and of the EU Advisory Mission. The GET urges the authorities to continue the reform process directed at strengthening the independence of the prosecution service and protecting it from undue political influence and to demonstrate credibly the will for real change. The legislative process needs to be continued with much care, following the path of reform set by the 2014 and 2016 legal and constitutional amendments. Moreover, the success of the reform will depend on effective implementation of the new provisions. In particular, the activity of the new self-governing bodies is to be followed closely and the recently established anti-corruption bodies, namely the National Anti-Corruption Bureau (NABU) and the Specialised Anti-Corruption Prosecutor's Office (SAPO), need to be further supported (see further below).

201. Article 3 LPO sets forth the principles of operation of the prosecution service, which include the "independence of prosecutors, which implies the existence of safeguards against illegal political, financial or other influence on a prosecutor in connection with his/her decision-making when performing official duties". Article 16 LPO contains a list of such safeguards, including special procedures for appointment, dismissal and disciplinary sanctions, the functioning of prosecutorial self-governance institutions, etc.

202. The prosecutorial system is composed of the Prosecutor General's Office, regional prosecution offices, local prosecution offices, the military prosecution office and the Specialised Anti-Corruption Prosecutor's Office,<sup>135</sup> and is essentially based on the structure of the court system and on the principle of hierarchy. In recent years, the number of prosecutors was reduced from approximately 18 500 to currently around 11 300, of whom around 33.5% are women. The GET notes that 11 000 prosecutors for 43 million inhabitants still represents one of the highest densities of prosecutors in the Council of Europe member States.

203. The Prosecutor General's Office (PGO) organises and coordinates the operation of all prosecution offices in order to ensure efficient performance of the prosecution service. The Prosecutor General has a wide range of duties, *inter alia*, to represent the prosecution service in relations with State authorities and other bodies, organise the operation of the prosecution offices, appoint and dismiss prosecutors, decide on disciplinary sanctions.<sup>136</sup> A General Inspectorate was recently set up in the PGO to oversee the legality of the actions of prosecutors and investigators throughout the prosecution service, except prosecutors of the Specialised Anti-Corruption Prosecutor's Office (SAPO).<sup>137</sup>

204. The Prosecutor General is appointed by the President of Ukraine with the consent of Parliament for a six-year term which may not be renewed. S/he appoints his/her deputies on the recommendation of the CoP. The Prosecutor General must be a Ukrainian citizen with a university education and work experience in the field of law or work experience in a legislative and/or law-enforcement body of not less than five years, and have high morals, performance and professional qualities and organisational capacities.<sup>138</sup>

205. According to the amended articles 42 and 63 LPO which entered into force on 15 April 2017, the Prosecutor General may be dismissed from his/her administrative position by the President of Ukraine with the consent of Parliament on the basis of and in

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<sup>134</sup> The Verkhovna Rada had requested the Council of Europe to draft an Opinion on the draft amendments to the laws concerned with the functioning of Prosecution in view of the amendments to the Constitution of Ukraine, under the auspices of the CoE Project "Continued Support to the Criminal Justice Reform in Europe" and the CoE/EU Eastern Partnership PCF Project: Fight Against Corruption in Ukraine. DGI (2016)20.

<sup>135</sup> See article 7 LPO.

<sup>136</sup> See article 9 LPO.

<sup>137</sup> The authorities indicate that it is planned to entrust the State Bureau of Investigation which is currently being established with oversight of SAPO prosecutors, and that in the meantime the NABU is competent.

<sup>138</sup> See article 40 LPO.

accordance with the scope of the dismissal motion of the QDC or the HCJ; his/her powers in the administrative position are also terminated in case of a no-confidence vote by Parliament.

206. The GET notes that the position and activities of the Prosecutor General have been surrounded by much controversy in recent years. The incumbent Prosecutor General is the sixth officeholder since 2014. The incumbent before his predecessor was widely considered to be blocking reforms and was dismissed under massive pressure from the public and also from abroad. That said, it did not improve the reputation of the office that the law was changed expressly to allow for the appointment of the current Prosecutor General, who has no law degree. It is clear that the manner in which the Prosecutor General is appointed – and recalled – plays a significant role in the system for guaranteeing the correct functioning of the prosecution service. In this context, the GET has several important reservations about the current system in Ukraine, as outlined below.

207. The involvement of the executive and/or the legislative body in the appointment of a Prosecutor General is common in many European countries, and according to Recommendation Rec(2000)19 of the Committee of Ministers on the role of public prosecution in the criminal justice system,<sup>139</sup> a plurality of models is accepted; at the same time, GRECO has repeatedly stressed that it is clearly preferable if the procedure for the appointment of prosecutors, and especially of the Prosecutor General, serves to prevent any risk of improper political influence or pressure in connection with the functioning of the prosecution service. This is particularly true in the situation of Ukraine described above, and where according to a number of interlocutors the prosecution office still remains – despite recent reforms – an extremely powerful authority closely linked to the executive. The authorities disagree with that statement. According to Council of Europe reference texts, “it is important that the method of selection and appointment of the Prosecutor General is such as to gain the confidence of the public and the respect of the judiciary and the legal profession.”<sup>140</sup>

208. To achieve this, “professional, non-political expertise should be involved in the selection process,” e.g. by seeking advice on the professional qualification of candidates from relevant sources such as representatives of the legal community (including prosecutors), the prosecutorial self-governing bodies, or at the level of Parliament, through preparatory work by a parliamentary committee, etc. The present laws of Ukraine do not provide for any such safeguards; no mechanism is in place to provide for expert advice before the President and Parliament take their decision.<sup>141</sup> The GET also sees a clear need for increasing transparency of the process, not least in order to restore public trust. In addition, it is clearly in favour of reintroducing in the law a stipulation that any candidate Prosecutor General should preferably have a law degree.<sup>142</sup>

209. Moreover, the GET is concerned that the dependence of the Prosecutor General on political organs may endanger the autonomy of the prosecution service. In view of the preceding paragraphs, GRECO recommends that due consideration be given to reviewing the procedures for the appointment and dismissal of the Prosecutor General in order to make this process less prone to undue political influence and more oriented towards objective criteria on the merits of candidates.

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<sup>139</sup> [Recommendation Rec\(2000\)19 of the Committee of Ministers of the Council of Europe to member States on the role of public prosecution in the criminal justice system](#)

<sup>140</sup> See [Venice Commission CDL-AD\(2010\)040](#), Report on European Standards as regards the independence of the Judicial System- Part II, The Prosecution Service, paragraph 34. See also [Opinion No. 9 of the Consultative Council of European Prosecutors \(CCPE\)](#) on “European norms and principles concerning prosecutors” (“Rome Charter”), Explanatory Note, paragraph 56.

<sup>141</sup> See also the critical remarks made in that respect in the [Joint Opinion CDL-AD\(2013\)025](#) by the Venice Commission and the Directorate General for Human Rights and the Rule of Law, paragraphs 132 and 199.

<sup>142</sup> See also [Venice Commission CDL-AD\(2010\)040](#), Report on European Standards as regards the independence of the Judicial System- Part II, The Prosecution Service, paragraph 47.

210. The Specialised Anti-Corruption Prosecutor's Office (SAPO) is established at the PGO and is entrusted with the supervision of the observance of laws during the detective and investigative activities, pre-trial investigation conducted by the NABU; prosecution duties in relevant proceedings; representation of citizen's or the State's interests in court in cases stipulated by the LPO and connected with corruption or corruption related offences.<sup>143</sup>

211. The Criminal Procedure Code (CPC) furthermore foresees the establishment of the State Bureau of Investigations (SBI). Though the Law on the SBI was adopted by Parliament on 12 November 2015 and signed by the President of the Republic on 14 January 2016, the SBI is not as yet operational. It would appear that the selection of the SBI chair has been delayed due to irregularities in the constitution of the selection panel. The SBI will be involved in investigating crimes that were earlier under the jurisdiction of the prosecution office – in particular, crimes committed by senior officials, civil servants, judges and law enforcement officers (including NABU officials and SAPO prosecutors), except for offences that fall within the scope of jurisdiction of the NABU, and war crimes. During the on-site visit, several interlocutors raised concerns about the broad mandate and far-reaching powers of the SBI which might potentially conflict with the recent reform of the prosecution office aimed at limiting its supervisory competences. In the view of the GET, this question will have to be followed closely, in light of the practice developed by the SBI once it has become operational. Prior to that, it is essential that the selection of the chair and other senior officials of the SBI is carried out in a transparent and objective manner.

212. The All-Ukrainian Conference of Prosecution Employees (AUCEP) is the highest body of prosecutorial self-governance.<sup>144</sup> Its decisions are binding on the Council of Prosecutors and on all prosecutors. The AUCEP is competent, *inter alia*, to appoint members of the HCJ, the Council of Prosecutors and the Qualifications and Disciplinary Commission. Its delegates are elected at the meetings of prosecutors from the different levels of prosecution offices. The AUCEP elects the presidium by secret ballot. Its decisions are adopted by a majority of all delegates. As required by the new LPO provisions which entered into force on 15 April 2017, the newly elected delegates to the AUCEP held a first conference within two weeks, on 26 April 2017.

213. The Council of Prosecutors (CoP), as established under the new LPO, is competent e.g. to make recommendations on the appointment and dismissal of prosecutors from administrative positions (such as head or deputy head of a prosecution office), oversee measures to ensure the independence of prosecutors, etc.<sup>145</sup> It consists of 13 members including 11 prosecutors representing prosecution offices of different levels and two scholars appointed by the Congress of law schools and scientific institutions. They serve five-year, non-renewable terms. The CoP elects the chair, vice-chair and secretary from among its members. In accordance with the new LPO provisions, CoP members were elected from among prosecutors by the AUCEP on 26 April 2017.

214. Furthermore, the new LPO introduced the Qualifications and Disciplinary Commission (QDC). It is a collegial body empowered to establish the level of professional requirements for candidate prosecutors, decide on disciplinary liability, transfer and dismissal of prosecutors.<sup>146</sup> It consists of 11 members including five prosecutors appointed by the AUCEP, two scholars appointed by the Congress of law schools and scientific institutions, one defence lawyer appointed by the congress of defence lawyers and three individuals appointed by the Parliamentary Commissioner for Human Rights following approval by the competent parliamentary committee. They serve three-year terms and may not be reappointed for two consecutive terms. The QDC elects, by secret

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<sup>143</sup> See article 8 *et seqq.* LPO.

<sup>144</sup> See articles 67 *et seqq.* LPO.

<sup>145</sup> See article 71 LPO.

<sup>146</sup> See articles 73 *et seqq.* LPO.

ballot, its chair from among its members for three years. Its decisions are adopted by the majority of its full membership. In accordance with the new LPO provisions, QDC members were elected from among prosecutors by the AUCEP on 26 April 2017.

215. The GET acknowledges the recent positive reforms aimed at strengthening prosecutorial self-governance and thereby the autonomy of the prosecution service and its independence from political influence. It wishes to emphasise how important it is that the self-governing bodies credibly represent – and are also seen to do so – the whole prosecutorial corpus. It also draws attention to the fact that in Ukraine, those bodies are endowed with core responsibilities including in personnel matters (QDC). It is therefore of prime importance that their activity is assessed carefully in order to ascertain whether they assume their role as independent and pro-active self-governing bodies.

216. One specific area where there is room for further improvement is the composition of the QDC. While the GET agrees that the involvement in such a body of experts from outside the prosecution service may in principle contribute to unbiased decision-making, it is on the other hand concerned that the current legislation does not secure a majority of prosecutors in the QDC. This contrasts with the situation in virtually all member States which have put in place similar bodies. As GRECO has pointed out on previous occasions, ensuring a majority of prosecutors elected by their peers in prosecutorial self-governing bodies is an appropriate means to help them to fully assert their legitimacy and credibility and to strengthen their role as guarantors of the independence of prosecutors their legitimacy and credibility and to strengthen their role as guarantors of the independence of prosecutors and the autonomy of the prosecution service. Consequently, GRECO recommends amending the statutory composition of the Qualifications and Disciplinary Commission to ensure an absolute majority of prosecutorial practitioners elected by their peers.

#### Recruitment, career and conditions of service

217. Prosecutors are appointed for an indefinite period; their powers of office may be terminated only on the grounds and in the manner prescribed by the LPO.<sup>147</sup> Candidates for prosecutor must be citizens of Ukraine having a higher legal education degree, at least two years' work experience<sup>148</sup> in the field of law and a good command of the national language. The procedure for the selection and appointment of prosecutors has been substantially amended by the 2014 LPO.<sup>149</sup> The new provisions, which entered into force on 15 April 2017, stipulate that prosecutors are appointed by the head of the relevant prosecution office on the recommendation of the QDC.

218. According to the new rules, candidates applying for the position of prosecutor for the first time, at a local prosecution office, are selected on a competitive basis. The procedure starts with the decision and public announcement by the QDC of a selection procedure. The QDC verifies that applicants meet the legal requirements for candidates for prosecutor, on the basis of the documents submitted which must include an asset declaration covering the previous year as well as information on the integrity check, if any. It then conducts a proficiency test the results of which are published on the QDC website, together with a ranking list.

219. Successful candidates undergo vetting organised by the QDC in accordance with the LPC regulations ("special verification procedure").<sup>150</sup> For this purpose, the competent authorities are requested to verify the respective information about the candidates; private individuals and NGOs may also submit information on candidates to the QDC.

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<sup>147</sup> See article 16 LPO.

<sup>148</sup> For positions at the regional prosecution office, three years' work experience are required and at the PGO, five years.

<sup>149</sup> See articles 28 *et seqq.* LPO.

<sup>150</sup> See articles 56 *et seqq.* LPO.

Upon receipt of any information that may indicate dishonesty of a candidate, the QDC considers it in the presence of the candidate who may provide explanations, refute or deny the information. The QDC may decide to exclude the candidate from further stages of the procedure. The authorities indicate that this decision can be appealed to court. Successful candidates undergo 12 months' special training at the National Academy of Prosecutors which covers knowledge, practical skills and prosecutorial ethics. The Academy adopts a reasoned decision on the successful or unsuccessful completion of the training, based on a final examination. The decision can be appealed by unsuccessful candidates to the QDC.

220. In accordance with the number of vacant positions in prosecution offices, the QDC then conducts a contest on the basis of the rating of candidates and submits its recommendations to the heads of the prosecution offices concerned. The latter are competent to take the appointment decision, on the basis of the results of the selection process and the QDC's recommendation.

221. Prosecutors may be transferred to another prosecution office only with their consent.<sup>151</sup> Transfer to a higher level prosecution office is to be based on the results of a competition carried out by the QDC in accordance with the procedure established by the latter. The competition includes an assessment of professional skills, experience, moral and professional qualities of the prosecutor. There are no other specific rules on the promotion of prosecutors.

222. The recent reform of the appointment procedure is to be welcomed. Notably, the selection of prosecutors on a competitive basis and involving a specific vetting procedure, carried out by a collegial body – the newly established QDC – is clearly a step in the right direction. That said, the GET has misgivings about the absence of specific rules on prosecutors' promotion, unless it involves transfer to a higher level prosecution office. In line with GRECO's previous pronouncements on this issue, the GET is of the firm opinion that clear, precise and uniform procedures and criteria, notably merit, need to be enshrined in the law, not only for the first appointment of prosecutors but also for promotion and career advancement; procedures need to be transparent and decisions taken to be reasoned. In this connection, the GET again refers to Council of Europe standards and reference texts according to which "the careers of public prosecutors, their promotions and their mobility must be governed by known and objective criteria, such as competence and experience"<sup>152</sup> and "should be regulated by law and governed by transparent and objective criteria, in accordance with impartial procedures, excluding any discrimination and allowing for the possibility of impartial review."<sup>153</sup>

223. This leads to another matter of concern, namely the insufficient regulation of appeals against decisions on prosecutors' careers. At present, no such regulations exist for decisions on promotion and career advancement. The GET refers to the preference given by GRECO on several occasions for clear regulations requiring that any decisions in appointment and promotion procedures are reasoned and can be appealed to a court, by (any) unsuccessful candidates. To conclude, the GET wishes to stress that the further amendments advocated for in the preceding paragraphs will be conducive to strengthening the independence and impartiality of the prosecution service – as well as public trust in this institution – in line with the intentions underlying the recent reforms. GRECO recommends regulating in more detail the promotion/career advancement of prosecutors so as to provide for uniform, transparent procedures based on precise, objective criteria, notably merit, and ensuring that

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<sup>151</sup> Cf. article 38 LPO

<sup>152</sup> Cf. [Recommendation Rec\(2000\)19 of the Committee of Ministers of the Council of Europe to member States on the role of public prosecution in the criminal justice system](#), paragraph 5b

<sup>153</sup> Cf. [Opinion No. 9 of the Consultative Council of European Prosecutors \(CCPE\)](#) on "European norms and principles concerning prosecutors" ("Rome Charter"), Article XII

any decisions on promotion/career advancement are reasoned and subject to appeal.

224. Heads of local and regional prosecution offices are appointed by the Prosecutor General on the recommendation of the CoP for a five-year term.<sup>154</sup> The CoP must consider the professional and moral qualities of the candidate, as well as his/her management and organisational skills and work experience. A refusal by the Prosecutor General to appoint the prosecutor recommended by the CoP must be motivated in writing and may be appealed by the candidate to the QDC. Heads of local and regional prosecution offices may be dismissed from their administrative position (for reasons specified by law) by the Prosecutor General on the recommendation of the CoP.

225. The powers of a prosecutor are terminated on reaching the age of 65, in the event of death or if recognised as missing or dead, or if the QDC decides that it is impossible for the prosecutor to maintain his/her position.<sup>155</sup> The QDC may take such a decision if a grave disciplinary offence or a disciplinary offence while under disciplinary measures has been committed by the prosecutor. Prosecutors of the local and regional prosecution offices may be dismissed by the head of the competent regional prosecution office, and prosecutors of the PGO by the Prosecutor General. The authorities indicate that the dismissal order can be appealed to the administrative court.

226. According to the amended article 62 LPO which entered into force on 15 April 2017, the decision to dismiss a prosecutor may be made solely on the basis of and in accordance with a motion of the QDC or the HCJ. The grounds for dismissal of a prosecutor are inability to perform his/her duties for health reasons; violation of the incompatibility regulations; entry into force of a judgment on administrative liability for corruption offences related to the violation of LPC regulations; inability to transfer to another position or lack of consent thereto due to direct subordination to a close person; entry into force of a conviction; loss of citizenship or assuming the citizenship of another State; voluntary resignation; impossibility of further holding a temporary position; liquidation or reorganisation of the prosecution office.

227. The authorities state that in accordance with the Rules of the QDC performance evaluation can be conducted, if necessary, during disciplinary proceedings opened against a prosecutor on the grounds of failure to perform or improper performance of official duties. Such an evaluation must be based on a motivated decision by the QDC following the proposal of the QDC member who carried out the inspection within three days and sent to the Performance Evaluation Commission. In this connection, the GET is concerned that prosecutors are not subject to performance evaluation at regular intervals. It draws attention to the preference given by GRECO to regular assessments of prosecutors' performance, based on objective and pre-determined criteria and in a fair procedure.<sup>156</sup> During the interviews conducted on site, the GET was interested to hear from the PGO that the current absence of such regular evaluations (which existed before 2014) was considered to affect the quality of the personnel and that an initiative had recently been taken to prepare draft legislation on that matter. A working group established in 2016 is tasked with analysing the performance of prosecution bodies and developing criteria for assessing individual prosecutors' performance.

228. The GET is convinced that the establishment of formal quality assessment reviews within the prosecution service would not only allow for the proper monitoring and evaluation of a prosecutor's performance, but also contribute to creating a more objective and transparent promotion process, free from any possible undue influence.<sup>157</sup>

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<sup>154</sup> See articles 39 and 41 LPO.

<sup>155</sup> See articles 51 *et seq.* LPO.

<sup>156</sup> See also [Opinion No. 9 of the Consultative Council of European Prosecutors \(CCPE\)](#) on "European norms and principles concerning prosecutors" ("Rome Charter"), Explanatory Note, paragraphs 65 *et seq.*

<sup>157</sup> Cf. paragraph 223 above.

This seems particularly important in the context of Ukraine, bearing in mind the frequent allegations of political interference and the low trust of citizens in the prosecution service. Regular evaluations within the prosecution service should be guided by guarantees of procedural fairness, giving prosecutors the opportunity to express their views on the assessment that is made of them. Such evaluations would clearly be an asset in promotion procedures. Consequently, GRECO recommends introducing by law periodic performance evaluation of prosecutors within the prosecution service – involving the self-governing bodies – on the basis of pre-established and objective criteria, while ensuring that prosecutors have adequate possibilities to contribute to the evaluation process.

229. Prosecutors' remuneration consists of a base salary, bonuses and additional payments for years of service, holding of an administrative position and other payments established by law. Article 81 LPO stipulates that base salaries of prosecutors in local prosecution offices amount to 12 minimal salaries<sup>158</sup> (as from January 2017) and those of other prosecutors are based on coefficients multiplying the same salary base. Gross monthly base salaries would thus range from approximately 707€ for prosecutors in local prosecution offices to approximately 1 380€ for the Prosecutor General. However, the authorities state that article 81 LPO is currently applied in the manner and amount established by the Cabinet of Ministers on the basis of the available financial resources of State and local budgets, according to the Law on the State Budget of Ukraine for 2016. In other words, prosecutors' actual base salaries are currently substantially lower than provided for by article 81 LPO. On the other hand, it would appear that prosecutors receive in addition quite significant allowances and bonuses. Prosecutors are also entitled to social insurance and, in case of need, service housing at the location of the prosecution office.

#### Case management and procedure

230. According to article 37 CPC, the prosecutor for a particular criminal proceeding is designated by the head of the relevant prosecution office after the start of the pre-trial investigation. The authorities indicate that by Order of the Prosecutor General, heads of prosecution offices at all levels and sectoral divisions are to nominate immediately the procedural heads of the pre-trial investigation, taking into consideration the complexity and publicity of a case, projections of procedural work and their professional skills and experience.<sup>159</sup> As a rule, the prosecutor is competent for a case from the start until the end of the proceedings. However, the head of the relevant prosecution office may assign the case to another prosecutor in certain circumstances specified by law such as the prosecutor's disqualification, serious disease, dismissal or, exceptionally, ineffective supervision over the compliance of the pre-trial investigation.

231. As GRECO has repeatedly pointed out, the allocation of cases ought to be guided by strict criteria and be subject to sufficient checks and balances, in order to avoid arbitrary decisions. The LPO in its present form does not contain any such safeguards. After the visit, the GET was informed that in 2017 the "Commission for the Assessment of Corruption Risks in the Activity of the Prosecution Offices" had studied possibilities for minimising corruption risks by introducing random (electronic) case allocation. The Commission identified a number of problems in the implementation of the mechanism and could not see how to define exhaustively the necessary criteria for case allocation (professional level of a prosecutor, specialisation, workload, etc.). While the GET takes due note of those considerations, it is of the firm opinion that case assignment needs to be regulated much more precisely, as is the case in many other member States. It should follow strict and objective pre-established criteria and be operated through

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<sup>158</sup> In 2016, the minimal salary amounted to 1 600 UAH/approximately 58.88€.

<sup>159</sup> Cf. paragraph 2.3 of the Order of the Prosecutor General No. 4rH of 19 December 2012 "On the Organisation of the Prosecutor's Activities in Criminal Proceedings".

random<sup>160</sup> distribution as a main rule, while providing for the possibility to allocate individual cases to specialised prosecutors as necessary. At the same time, it is vital that such a new system is effectively protected against any possible manipulations. Therefore, GRECO recommends introducing a system of random allocation of cases to individual prosecutors, based on strict and objective pre-established criteria including specialisation, and coupled with adequate safeguards – including stringent controls – against any possible manipulation of the system.

232. In accordance with article 17 LPO, prosecutors are subordinated to their superiors with respect to the implementation of written administrative orders related to organisational aspects of prosecution work and the operation of prosecution offices. When exercising powers associated with the performance of prosecutorial functions, they “shall be independent and independently make decisions on the procedure of exercising such powers in compliance with the laws”. That said, higher level prosecutors have the right to give instructions to lower level prosecutors, to approve their decision-making and to exercise other actions directly connected to the implementation of the prosecution functions only within the limits and in line with the procedure prescribed by law; the Prosecutor General has the right to give instructions to any prosecutor.

233. Orders and instructions directly relating to the prosecutor's exercise of prosecutorial functions, which are issued in writing within the competence defined by law, are binding upon the prosecutor concerned. A prosecutor given an oral order or instruction is to be provided with a written confirmation. A prosecutor is not obliged to follow a higher prosecutor's orders and instructions if there are doubts as to their legality unless s/he receives them in writing, or obviously criminal orders or instructions. S/he is entitled to report to the CoP a threat to his/her independence due to an order or instruction issued by a higher prosecutor. The Council considers the application and may take appropriate action, i.e. notify the relevant authorities of grounds for criminal, disciplinary or other liability; initiate protection measures; publish instances of violation of prosecutorial independence; notify international organisations; etc.).<sup>161</sup>

234. The GET discussed the matter of hierarchical instructions in individual files with a number of interlocutors. It acknowledges that the 2014 reform introduced several positive amendments, which require higher prosecutors to issue or confirm instructions in writing and provide for some protection of prosecutors against illegal instructions. At the same time, the GET was concerned to hear about allegations that despite the existing legal safeguards, oral instructions, especially by the Prosecutor General, were frequent in practice. Moreover, a few interlocutors stated that some proceedings against the highest-ranking officials were initiated after an informal consent by the leadership of the country to the Prosecutor General. The GET was not in a position to verify such claims. The authorities strongly disagree with that statement and stress that there is not any evidence for such alleged occurrences. The GET wishes to emphasise, however, that any such possible practices – or even suspicions about them – may considerably harm citizens' trust in the prosecution service. As GRECO has consistently stressed in this context, it is crucial for public confidence that prosecution is, and is seen to be, impartial and free of any improper influence, particularly of a political nature. Given that the above allegations were made during the on-site visit, the authorities are invited to shed light on the situation and to carry out a study regarding any possible influence on criminal proceedings against the highest-ranking prosecutors. Furthermore, while internal instructions to inferior prosecutors as such are not contrary to European standards, instructions by the Prosecutor General in individual cases could be problematic in the country-specific context where the Prosecutor General is a political appointee and where according to a number of interlocutors the reputation of that office is damaged by public perceptions of undue political influence.<sup>162</sup> The GET is of the firm opinion that those

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<sup>160</sup> Not necessarily electronic.

<sup>161</sup> See article 71 LPO.

<sup>162</sup> The authorities disagree with that statement.

concerns need to be taken seriously and that the question of whether the right of the Prosecutor General to issue instructions in individual cases should be abolished warrants due consideration by the authorities.

235. Unreasonable delay in consideration of an application gives rise to disciplinary liability.<sup>163</sup>

#### Ethical principles, rules of conduct and conflicts of interest

236. According to article 19 LPO, prosecutors are to abide by the rules of prosecutorial ethics, in particular, not behave in a way that may compromise them as prosecutors or damage the reputation of the prosecution service.<sup>164</sup> A regular (two or more times within one year) or one-off gross violation of prosecutorial ethics results in disciplinary liability, as well as any actions which discredit the prosecutor and may raise doubts about his/her objectivity, impartiality and independence and about the integrity and incorruptibility of prosecution offices.<sup>165</sup> Moreover, prosecutors are to take the prosecutor's oath, the text of which is signed by the prosecutor and kept in his/her personal file.<sup>166</sup> They are to be held liable for a breach of oath as established by law.

237. The "Code of professional ethics and rules of professional conduct for the office of the prosecutor"<sup>167</sup> was adopted by the AUCEP on 27 April 2017. It defines the basic moral norms and principles to be followed by the prosecutors when exercising their official duties and when off duty. Prosecutors are to be held liable for violations of the code of ethics in accordance with applicable legislation.

238. The GET acknowledges that following the constitution of the new self-governing bodies, a new code of ethics has now been adopted. In terms of content, it builds on the previous code of 2012 but is more specific, e.g. on conflicts of interest and the principle of presumption of innocence. It is also to be welcomed that the 2017 version contains new provisions on respect for the independence of judges and on the prevention of corruption. On the other hand, the GET sees a need for supplementing the rather general ethical standards with further written illustrative guidance, explanatory comments or practical examples (e.g. with regard to risks of corruption and conflicts of interest). It was interested to hear, after the visit, that such guidance was under preparation. The GET wishes to stress that clear guidance must also be provided on the acceptance of gifts, which is regrettably not addressed by the code of ethics itself. Finally, it is crucial that the code and further guidance are brought to the attention of all prosecutors and made public. In view of the foregoing, GRECO recommends (i) that the new code of ethics for prosecutors be complemented by illustrative guidelines (e.g. concerning conflicts of interest, gifts and other integrity-related matters) and (ii) that those documents be brought to the attention of all prosecutors and made public.

239. Prosecutors are included in the definition of "persons authorised to perform functions of the State or local self-government" in the meaning of the LPC and are thus subject to the relevant LPC provisions on prevention of corruption and conflicts of interest. The general rules on the prevention and management of conflicts of interest contained in chapter V of the LPC have been described above with respect to MPs. In particular, no later than the next business day after the date when a prosecutor was aware or should have been aware of a real or potential conflict of interests, s/he must submit a report to his/her direct superior. Failure by a prosecutor to report or untimely

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<sup>163</sup> See article 43 LPO.

<sup>164</sup> See article 19 LPO.

<sup>165</sup> See article 43 LPO.

<sup>166</sup> See articles 19 and 36 LPO.

<sup>167</sup> See [http://www.gp.gov.ua/ua/vkpp.html?\\_m=publications&\\_t=rec&id=182813](http://www.gp.gov.ua/ua/vkpp.html?_m=publications&_t=rec&id=182813) (Ukrainian only).

reporting gives rise to administrative<sup>168</sup> or disciplinary liability. In addition, the CPC includes rules on conflicts of interest in the provisions on the disqualification of a prosecutor (see below).

#### Prohibition or restriction of certain activities

##### *Incompatibilities and accessory activities, post-employment restrictions*

240. Pursuant to article 18 LPO, a prosecutor may not hold offices at any State authority, other State body, local government authority or having a representative mandate in public elective positions. Prosecutors have the right to be seconded to the QDC, the National Academy of Prosecutors or other institutions as prescribed by law. Prosecutors may not be members of a political party or take part in political actions, rallies or strikes.

241. In addition, the general rules on incompatibilities as contained in the LPC are to be taken into account, including the restrictions on other part-time activities (such as paid activities other than teaching, research and creative activity, medical practice, being a sports instructor or judge) and on joint work with close persons.<sup>169</sup>

242. The authorities indicate that prosecutors are obliged to report the allowed activities they are engaged in and related income to the NACP in their annual e-declarations and income tax declarations. There are no statistics on accessory activities exercised by prosecutors. The authorities state that, for example, some prosecutors of the PGO carry out research activities at the National Academy of Prosecutors and deliver lectures to junior prosecutors.

243. The post-employment restrictions mentioned above in the chapter on MPs are applicable also to prosecutors. Namely, article 26 LPC provides for one year cooling-off periods in certain cases, e.g. before entering into employment agreements/performing transactions in business with persons with respect to whom the prosecutor has exercised control, supervision or decision-making powers.

##### *Recusal and routine withdrawal*

244. Article 77 CPC provides the reasons for disqualification of the prosecutor. In particular, a prosecutor has no right to participate in a criminal proceeding if s/he is an applicant, victim, civil plaintiff, civil defendant, a family member or close relative of a party, applicant, victim, civil plaintiff or civil defendant; if s/he participated in the same proceeding as investigating judge, judge, defence counsel or representative, witness, expert, specialist, interpreter; if s/he him/herself, his/her close relatives or family members have an interest in the outcome of criminal proceedings or there are other circumstances that cause reasonable doubts as to his/her impartiality.

245. In such situations, prosecutors are required to recuse themselves, and they may be challenged by individuals who participate in criminal proceedings. Challenges filed during pre-trial investigation are considered by the investigating judge or, if filed during court proceedings, the court trying the case. The CPC does not provide the possibility to appeal the decision concerning disqualification of a prosecutor during criminal proceedings. The GET finds this situation – especially as a prosecutor's decision *not* to recuse him/herself cannot be appealed – unsatisfactory. In the situation of Ukraine where citizens' trust in State institutions including the judiciary and the prosecution service is particularly low, it is all the more important to provide for effective control mechanisms to prevent conflicts of interest and ensure objectivity and impartiality in criminal

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<sup>168</sup> See article 172-7 Administrative Offences Code.

<sup>169</sup> See articles 25 *et seq.* LPC.

proceedings. For the same reasons, it is imperative that prosecutors are regularly made aware of their duty to recuse themselves from a case wherever there may be reasonable doubts as to their impartiality. After the discussions held on site, the GET had the impression that practitioners quite rarely recuse themselves and that awareness about risks of bias needs to be strengthened. Consequently, GRECO recommends (i) encouraging prosecutors in suitable ways to recuse themselves from a case whenever a potential bias appears; (ii) ensuring that any decisions on disqualification of a prosecutor can be appealed.

### *Gifts*

246. The general rules on gifts contained in articles 23 *et seqq.* LPC as described in paragraphs 45/46 are applicable to prosecutors. In particular, the latter are prohibited from demanding, asking for, receiving gifts for themselves or close persons from legal entities or individuals in connection with their activity as a prosecutor or from subordinate persons. Otherwise, they may accept gifts which correspond to generally accepted notions of hospitality,<sup>170</sup> if their value does not exceed approximately 52€ and the aggregate value of individual gifts received from the same person, or group of persons, within a year does not exceed approximately 97€.

247. If a prosecutor is offered an unlawful gift or benefit, s/he must reject it, try to identify the person who made the offer, involve witnesses, if possible, and notify in writing the immediate supervisor/the head of the respective prosecution office and the NACP about the proposal. In cases of doubt, advice can be sought from the NACP. Checks can be conducted by the NACP and by the PGO's General Inspectorate. A recommendation aimed at further developing the LPC rules on the acceptance of gifts, including by lowering the threshold of acceptable gifts, has been made earlier in this report.<sup>171</sup> Moreover, the recommendation made in the section on "Ethical principles, rules of conduct and conflicts of interest" includes regular awareness-raising about the existing rules on the acceptance of gifts.<sup>172</sup>

### *Third party contacts, confidential information*

248. The LPO does not contain any specific rules concerning communication between a prosecutor and third parties outside the official procedures. The code of ethics makes it clear that in their dealings with parties to court proceedings, prosecutors must abstain from unofficial communication and from any relationships with the parties outside of the scope of the proceedings. It also states that prosecutors are to refrain from personal relations, financial or business relationships that could influence their impartiality and objectiveness in the exercise of their powers, discredit the office of the prosecutor, and to refrain from actions, statements or behaviour that could harm their personal reputation or the authority of the office of the prosecutor, or cause negative public attention.

249. Prosecutors must not disclose information that is confidential under the law. Disclosure of secrets protected by law which became known to the prosecutor while exercising his/her powers gives rise to disciplinary liability.<sup>173</sup>

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<sup>170</sup> This concept is explained in Methodological recommendations on the prevention and solution of conflicts of interest adopted by NACP Decree of 14 July 2016 #2. It includes e.g. formal gifts (souvenirs) and other signs of hospitality (meals and equivalent hospitality, for instance, invitation to join to have coffee or dinner), that are conventionally used for maintaining good formal relations and strengthening working relations. Gifts given by close persons/relatives and gifts which take the form of publicly accessible discounts on goods or services may also be accepted.

<sup>171</sup> See paragraph 47 above.

<sup>172</sup> See paragraph 238 above.

<sup>173</sup> See articles 19 and 43 LPO. In addition, see article 43 LPC.

## Declaration of assets, income, liabilities and interests

250. Prosecutors are obliged to submit annual asset declarations to the NACP in accordance with the provisions of chapter VII of the LPC. Declarations are entered into the Unified State Register held by the NACP which provides open access to the register and checks the content of the declarations submitted. Violation of the legal procedures for the submission of the declaration of assets, income, expenses and financial liabilities constitutes a disciplinary offence. Moreover, administrative and criminal liability is provided for by the Administrative Offences Code and the Criminal Code. Reference is made here to the chapter on corruption prevention in respect of all categories under review, which includes more details on the rules applicable as well as a recommendation aimed at independent and credible implementation of those rules.<sup>174</sup>

251. In addition, under the LPO, prosecutors must annually submit personally completed applications on integrity, which are published on the website of the PGO.<sup>175</sup> On this basis, internal security units carry out a secret integrity test according to a procedure approved by the Prosecutor General.<sup>176</sup>

## Supervision and enforcement

252. Supervision over prosecutors' conduct is divided between several bodies. The NACP is competent to monitor compliance with the LPC rules, including on asset declarations. The system has been described above in the chapter on corruption prevention in respect of all categories under review which includes a recommendation aimed at independent and credible implementation of those rules.<sup>177</sup>

253. It is to be noted that prosecutors are among the officials holding responsible positions in the meaning of the LPC, whose asset declarations are subject to mandatory complete checks by the NACP – including verifying the accuracy of declared information, accuracy of evaluation of declared assets, and checking the availability of a conflict of interests and signs of illicit enrichment.<sup>178</sup> Violations by prosecutors of the declaration requirements may result in disciplinary, administrative or criminal liability (also simultaneously), depending on the case. If the NACP detects signs of a criminal offence, it must submit relevant information on the cases to the NABU. If there is evidence of a disciplinary offence, the NACP must submit the case to the HQC and the QDC.

254. Internal security units carry out annual, secret integrity tests of prosecutors according to a procedure approved by the Prosecutor General.<sup>179</sup> This mainly involves comparing living standards with the officially declared legal sources of the family's income. For this purpose, channels for receiving information from civil society and media representatives have been established. If the test reveals the commission of a disciplinary offence, disciplinary proceedings are mandatory. Internal security units exist at the level of the PGO. They are competent to test prosecutors of the PGO and of the regional prosecution offices.

255. It is the task of the General Inspectorate in the PGO<sup>180</sup> to oversee the legality of the actions of prosecutors and investigators throughout the prosecution service, except

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<sup>174</sup> See paragraph 41 above.

<sup>175</sup> See article 19 LPO. Prosecutors who are appointed the first time must submit the application on integrity within 30 calendar days after the date of appointment.

<sup>176</sup> The Prosecutor General by virtue of the Order № 205 of 16 June 2016 approved the procedure for secret inspection of the integrity of prosecutors, which is available on the official [website of the PGO](#).

<sup>177</sup> See paragraph 41 above.

<sup>178</sup> See article 50 LPC.

<sup>179</sup> See article 19 LPO.

<sup>180</sup> The General Inspectorate was set up by the Prosecutor General's Decree "On priority measures to ensure the formation of personnel structure of the General Inspection" of 8 August 2016. It operates on the basis of

prosecutors of the SAPO. It is to identify and investigate corruption and misconduct by employees at all levels and to check the origin and nature of the assets of prosecutors. Its main tasks are pre-trial investigations and public prosecution of criminal offences committed by prosecutors, oversight of the observance of the law during operational activities, internal investigations of prosecutors, prevention of offences in the prosecution service. The General Inspectorate is composed of 87 staff. It became operational in January 2017.

256. Under article 43 LPO, the following give rise to disciplinary liability: failure to perform, or the improper performance by the prosecutor of official duties; unreasonable delay in consideration of an application; disclosure of secrets protected by law; violation of the legal procedures for the submission of asset declarations (including the submission of incorrect or incomplete information); actions which discredit the prosecutor and may raise doubts on his/her objectivity, impartiality and independence and on integrity and incorruptibility of prosecution offices; a regular or one-off gross violation of prosecutorial ethics; violation of internal service regulations; intervention or other influence in cases in a manner other than that established by the law.

257. The provisions on disciplinary procedures and sanctions were substantially amended in 2014.<sup>181</sup> According to the new provisions, which entered into force on 15 April 2017, disciplinary proceedings against prosecutors are conducted by the QDC on the basis of complaints which can be submitted by any citizen but must not be anonymous.

258. Disciplinary sanctions include reprimand; ban for up to one year on a transfer to a higher prosecution office or on appointment to a higher position (except for the Prosecutor General); dismissal from office. The QDC may decide that a prosecutor (except for the Prosecutor General) can no longer hold office if the disciplinary offence constitutes a gross violation, or if the prosecutor committed a disciplinary offence while under disciplinary measures; in the case of the Prosecutor General, the QDC and the HCJ are competent to submit a motion for dismissal to the President of Ukraine (see above). The QDC adopts decisions in disciplinary proceedings by a majority vote of its members. It must take into account the nature of the offence, its consequences, the personality of the prosecutor, the degree of guilt, and the circumstances affecting the choice of the type of the disciplinary action. Information on disciplining a prosecutor is published on the website of the QDC.

259. The GET welcomes the recent amendments to the rules on prosecutors' disciplinary liability but sees some room for further improvements. First, it is concerned that, as is the case with respect to judges, the catalogue of specific disciplinary offences still includes some quite vague concepts such as "actions which discredit the prosecutor (...)" and regular or one-off "gross violation of prosecutorial ethics". Such terms appear insufficient to ensure effective enforcement of the rules, to provide for legal certainty and to prevent possible misuse of disciplinary proceedings. The authorities indicate that the term "prosecutorial ethics" is to be understood by reference to the code of ethics. In this connection, the GET wishes to stress that such a general reference has been repeatedly criticised by GRECO as too vague. It is crucial that specific disciplinary offences are defined precisely and comprehensively directly in the law. The GET was also concerned to hear from practitioners that "breach of oath" might result in criminal or disciplinary liability, based on article 19 LPO, although that provision merely states that breach of oath leads to liability "as established by law". In order to remove any ambiguities in the law and to ensure that no sanctions are issued on the basis of the vague concept of breach of oath, the reference in the LPO to that concept should be deleted.

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the Regulation on the General Inspectorate approved by the Order of the Prosecutor General No. 204 of 16 June 2016.

<sup>181</sup> See articles 44 *et seqq.* LPO.

260. Second, the GET notes that the range of disciplinary sanctions is quite limited. What is more, only the lightest and harshest sanctions available, reprimand and dismissal, appear to be relevant in practice. The only intermediate sanction available, the ban on transfer to a higher prosecution office or on appointment to a higher position, is only very rarely applied. GRECO has repeatedly stressed the importance of a sufficiently broad range of sanctions, in order to ensure proportionality and effectiveness. In the view of the GET, such sanctions may include, for example, reprimands of different degrees, temporary salary reduction,<sup>182</sup> temporary suspension from office, etc. In view of the above, GRECO recommends (i) defining disciplinary offences relating to prosecutors' conduct and compliance with ethical norms more precisely; (ii) extending the range of disciplinary sanctions available to ensure better proportionality and effectiveness.

261. The GET furthermore identified several shortcomings in the relevant procedural rules. Namely, disciplinary liability of prosecutors terminates if one year has passed from the date of committing disciplinary misconduct, regardless of the time of the prosecutor's temporary disability or vacation. Such a short limitation period is a great source of concern: not all cases can be disclosed in such a timely manner, and attempts could be made to delay the commencement of proceedings until the limitation period has expired. Thus, appropriate amendments to the statute of limitations – in particular, an adequate extension of the limitation period – would constitute a further deterrent to misconduct which could be potentially linked to corruption.

262. Moreover, the GET has misgivings about the fact that disciplinary proceedings against prosecutors can be launched only on the basis of citizens' complaints which must not be anonymous and must fulfil certain criteria such as the indication of specific facts underlying allegations of misconduct. The GET understands that some kind of filter may be necessary to prevent the QDC from being overloaded with unsubstantiated charges. At the same time, the complaints mechanism must not hamper the start of disciplinary proceedings for purely formal reasons. In the view of the GET, this could be prevented by giving the relevant prosecutorial self-governing bodies (which are not entrusted with decision-making in disciplinary proceedings) and heads of prosecution offices the right to start a disciplinary case, e.g. on the basis of anonymous complaints received or any other sources of information. This is currently not clearly provided for in the law. The authorities see no need for such regulation as the General Inspectorate can conduct internal investigations based on anonymous complaints received through helplines set up at the General Inspectorate and at prosecution offices of all levels. However, the GET is convinced that giving the above bodies/persons the right to act *ex officio* would be a further asset for effectively fighting corruption within the prosecution service.

263. The GET also notes that a prosecutor has the choice to challenge a disciplinary decision either before the administrative court or the HCJ. Such a choice seems unnecessary and unfortunate, since it may lead to inconsistent decision-making. Moreover, in light of the creation of new prosecutorial self-governing bodies, the link to the HCJ does not appear justified any longer.<sup>183</sup> By contrast, according to Council of Europe reference texts "an appeal to a court against disciplinary sanctions should be available."<sup>184</sup> Given the preceding paragraphs, GRECO recommends enhancing the efficiency of disciplinary proceedings by extending the limitation period, ensuring that proceedings can be launched also by the relevant self-governing bodies (which are not entrusted with decision-making in disciplinary proceedings) and heads of prosecution offices, and providing that appeals

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<sup>182</sup> In this context, the authorities indicate that the imposition of disciplinary sanctions prevents the prosecutors concerned from receiving bonuses and thus may lead to financial losses.

<sup>183</sup> See also the [Joint Opinion CDL-AD\(2013\)025](#) by the Venice Commission and the Directorate General for Human Rights and the Rule of Law, paragraph 140.

<sup>184</sup> See [Venice Commission CDL-AD\(2010\)040](#), Report on European Standards as regards the independence of the Judicial System- Part II, The Prosecution Service, paragraph 52.

against disciplinary decisions can ultimately (after a possible internal procedure within the prosecution service) only be made to a court, both on substantive and procedural grounds.

264. Reasons for dismissal of a prosecutor other than the commission of disciplinary offences include violation of the incompatibility regulations, entry into force of a judgment on administrative liability for corruption offences related to the violation of LPC regulations, entry into force of a court judgment of guilt against him/her, etc.

265. Prosecutors may be subject to the ordinary criminal proceedings and sanctions; they do not enjoy immunity. The NABU is competent to carry out pre-trial investigations of crimes committed by prosecutors; in the case of the Deputy General Prosecutor or prosecutors of the Specialised Anti-Corruption Prosecutor's Office, this is within the competence of the State Bureau of Investigations.<sup>185</sup>

266. Finally, the authorities indicate that in cases of improper conduct by a prosecutor which does not incur legal liability (criminal, administrative or disciplinary), the head of the prosecution office can impose on him/her measures such as a warning to discontinue the improper conduct and a warning that disciplinary sanctions could be imposed. Such measures are to be recorded by protocol.

267. According to statistics provided by the PGO, 32 prosecutors had been notified that they were suspected of having committed corruption offences in 2016 (in 2015: 20; in 2014: 8). Criminal charges were brought against two of those prosecutors, who were held criminally liable (one of them was given an unsuspended prison sentence). Furthermore, the authorities indicate that disciplinary action was taken against 59 prosecutors in 2016 (of whom 40 were dismissed) and against 50 prosecutors in 2015 (of whom 43 were dismissed).

#### Advice, training and awareness

268. Article 19 LPO requires prosecutors to regularly take training courses at the National Academy of Prosecutors which "shall include the rules of the prosecutorial ethics." The National Academy of Prosecutors is a public institution with special status operating under the PGO. Its focus is on special training of candidate prosecutors and advanced training of acting prosecutors.<sup>186</sup>

269. The authorities indicate that advanced professional training of prosecutors is organised by the National Academy of Prosecutors on a regular basis. As a rule, one training session lasting one or two weeks is attended by 70 prosecutors (2 representatives for each region of the State). The subjects of professional ethics of prosecutors and prevention of corruption are included in the advanced training. At 1 December 2016, 1 206 prosecutors had attended relevant training (781 of whom participated in full-time study and 425 in distance learning).

270. The authorities furthermore refer to recent specific training programmes, including training provided in 2016 to around 600 prosecutors (namely heads of local prosecution offices, their first deputies and deputies) which was organised with international support including from the Council of Europe<sup>187</sup> and included the theme "The professional ethics of a prosecutor. Combating corruption among prosecutors". The authorities add that in

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<sup>185</sup> See article 216 CPC, paragraphs 5 and 4; paragraph 4 enters into force from the day the State Bureau of Investigations of Ukraine begins its operations, but not later than within five years after the CPC has entered into force.

<sup>186</sup> See article 80 LPO.

<sup>187</sup> In the framework of the project "[Continued support for criminal justice reform in Ukraine](#)"

view of the launch of the electronic asset declaration system in 2016, the NACP has planned regional awareness-raising campaigns in 22 regions, jointly with the UN.<sup>188</sup>

271. During the on-site visit, the GET was informed that prosecutors can turn to the higher-level prosecution office or to the PGO's General Inspectorate for advice on questions of conduct. The PGO tries to find a uniform approach to such questions and involve other relevant bodies such as the NACP or researchers. It would appear, however, that such cases do not occur frequently in practice.

272. The GET welcomes the work already undertaken and supports the current initiatives to organise further training activities for prosecutors. It is important that questions of ethics and conduct are kept high on the agenda. Information gathered by the GET clearly suggests that more needs to be done to raise prosecutors' awareness of ethical dilemmas they may encounter in their professional life, of the existing standards, and to provide practical guidance on how principles apply in daily practice and help in solving concrete dilemmas. This might be achieved through a range of practical measures such as the provision and active promotion of confidential counselling within the prosecution service, specific training activities of a practice-oriented nature and awareness-raising – including regular reminders about existing rules on conflicts of interest, gifts and other integrity-related matters. In this context, as recommended in paragraph 48, it is crucial that improved coordination channels are built up with the NACP, given the key monitoring and advisory role it has in respect of all categories of public officials, including prosecutors. Consequently, GRECO recommends providing to all prosecutors dedicated, regular training and confidential counselling on ethics and integrity, prevention of conflicts of interest and corruption, and raising prosecutors' awareness of such matters.

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<sup>188</sup> In the framework of the UN Development programme in Ukraine "Transparency and integrity in the public sector"

## VII. RECOMMENDATIONS AND FOLLOW-UP

273. In view of the findings of the present report, GRECO addresses the following recommendations to Ukraine:

### *All categories under review*

- i. (i) developing appropriate measures, including of a regulatory nature to enhance the independence and impartiality of the National Agency on Corruption Prevention (NACP) decision-making structures; and (ii) laying down detailed, clear and objective rules governing NACP's work, in particular, its investigative tasks, in order to fully secure transparency and accountability in practice of NACP action (paragraph 31);
- ii. that appropriate regulatory, institutional and operational measures be taken to ensure effective supervision of the existing financial declaration requirements, including, but not limited to the enactment of by-laws allowing the NACP to perform its verification tasks; the adoption of an objective lifestyle monitoring procedure<sup>189</sup>; the introduction, without delay, of automated cross-checks of data and interoperability of databases, with due regard for privacy rights; and the institution of appeal channels for sanctions imposed (paragraph 41);
- iii. ensuring that in practice, the NABU is granted proper and unhindered access a) to the complete asset declarations received by the NACP and b) in the framework of criminal proceedings started on the basis of such declarations, to all national and regional databases necessary for the proper scrutiny of asset declarations (paragraph 44);
- iv. (i) further developing the rules applicable to the acceptance of gifts by members of parliament, judges and prosecutors, in particular, by lowering the threshold of acceptable gifts; providing for more precise definitions to ensure that they cover any benefits including those in kind; clarifying the concept of hospitalities which may be accepted; (ii) establishing internal procedures for the valuation and reporting of gifts, and return of those that are unacceptable (paragraph 47);
- v. that the NACP, in close coordination with Parliament, the judicial and prosecution services, further develops communication and advisory channels with the latter and prepares tailored guidance on implementation of the Law on Prevention of Corruption, as applied to each of the respective professions (paragraph 48);

### *Regarding members of parliament*

- vi. ensuring that all legislative proposals are processed with an adequate level of transparency and consultation, notably by (i) safeguarding inclusiveness of parliamentary committee work both on paper and in practice, including through public consultations and expert hearings, as well as adequate timeframes; (ii) introducing precise rules regarding the fast-track legislative procedure in Parliament and

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<sup>189</sup> The Ukrainian authorities indicated that, after the on-site visit, a methodology for life-style monitoring has now been developed. GRECO will assess both the contents and the operability of this newly adopted methodology in the framework of its compliance procedure.

ensuring that it is applied only in exceptional and duly justified circumstances (paragraph 64);

- vii. (i) that a code of conduct for members of Parliament be developed and adopted with the participation of MPs themselves and be made easily accessible to the public; and (ii) that it be coupled with detailed written guidance on its practical implementation (e.g. prevention of conflicts of interest when exercising the parliamentary function, ad-hoc disclosure and self-recusal possibilities with respect to specific conflict of interest situations, gifts and other advantages, third party contacts, etc.) (paragraph 73);
- viii. undertaking further appropriate measures to prevent circumvention of the restrictions of parliamentary members' engagement in entrepreneurial activities, not only in law, but also in practice (paragraph 84);
- ix. the introduction of rules on how members of Parliament engage with lobbyists and other third parties who seek to influence the legislative process (paragraph 88);
- x. significantly strengthening the internal control mechanisms for integrity in Parliament so as to ensure independent, continuous and proactive monitoring and enforcement of the relevant rules. This clearly presupposes that a range of effective, proportionate and dissuasive sanctions be available (paragraph 95);
- xi. that determined measures be taken in order to ensure that the procedures to lift the immunity of parliamentarians do not hamper or prevent criminal proceedings in respect of members of parliament suspected of having committed corruption related offences, notably by introducing guidelines containing clear and objective criteria in this respect (paragraph 104);
- xii. developing efficient internal mechanisms to promote and raise awareness on integrity matters in Parliament, both on an individual basis (confidential counselling) and on an institutional level (training, institutional discussions on ethical issues, active involvement of leadership structures) (paragraph 106);

#### *Regarding judges*

- xiii. abolishing the criminal offence of "Delivery of a knowingly unfair sentence, judgment, ruling or order by a judge" (article 375 of the Criminal Code) and/or, at the least, otherwise ensuring that this and any other criminal offences criminalise only deliberate miscarriages of justice and are not misused by law enforcement agencies to exert undue influence and pressure on judges (paragraph 115);
- xiv. that measures be taken to ensure the safety of judges to make them less vulnerable to external pressure and corruption (paragraph 116);
- xv. (i) reviewing the need to reduce the number of bodies involved in the appointment of judges; (ii) defining more precisely the tasks and powers of the Public Council of Integrity, further ensuring that its composition reflects the diversity of society, and strengthening the

rules on conflicts of interest – including through the provision of an effective control mechanism (paragraph 141);

- xvi. broadening the appeal possibilities for candidate judges in appointment procedures to ensure that decisions taken in such procedures can be appealed by unsuccessful candidates both on substantive and procedural grounds (paragraph 142);
- xvii. that periodic performance evaluation of judges is carried out by judges on the basis of pre-established, uniform and objective criteria in relation to their daily work (paragraph 146);
- xviii. ensuring that in all court proceedings any decisions on disqualification of a judge are taken without his/her participation and can be appealed (paragraph 167);
- xix. defining disciplinary offences relating to judges' conduct more precisely, including by replacing the reference to "norms of judicial ethics and standards of conduct which ensure public trust in court" with clear and specific offences (paragraph 183);
- xx. analysing the practical application of the new constitutional and legal provisions on judges' immunity and, if necessary for effective law enforcement, taking appropriate legal measures to further limit their immunity (paragraph 190);
- xxi. providing to all judges dedicated, regular training as well as further illustrative guidance on ethics and integrity, prevention of conflicts of interest and corruption, raising judges' awareness of such matters and strengthening the Ethics Committee of the Council of Judges to enable it to play a proactive role in this context and to offer advice to a large number of judges (paragraph 195);

*Regarding prosecutors*

- xxii. that due consideration be given to reviewing the procedures for the appointment and dismissal of the Prosecutor General in order to make this process less prone to undue political influence and more oriented towards objective criteria on the merits of candidates (paragraph 209);
- xxiii. amending the statutory composition of the Qualifications and Disciplinary Commission to ensure an absolute majority of prosecutorial practitioners elected by their peers (paragraph 216);
- xxiv. regulating in more detail the promotion/career advancement of prosecutors so as to provide for uniform, transparent procedures based on precise, objective criteria, notably merit, and ensuring that any decisions on promotion/career advancement are reasoned and subject to appeal (paragraph 223);
- xxv. introducing by law periodic performance evaluation of prosecutors within the prosecution service – involving the self-governing bodies – on the basis of pre-established and objective criteria, while ensuring that prosecutors have adequate possibilities to contribute to the evaluation process (paragraph 228);

- xxvi. introducing a system of random allocation of cases to individual prosecutors, based on strict and objective pre-established criteria including specialisation, and coupled with adequate safeguards – including stringent controls – against any possible manipulation of the system (paragraph 231);
- xxvii. (i) that the new code of ethics for prosecutors be complemented by illustrative guidelines (e.g. concerning conflicts of interest, gifts and other integrity-related matters) and (ii) that those documents be brought to the attention of all prosecutors and made public (paragraph 238);
- xxviii. (i) encouraging prosecutors in suitable ways to recuse themselves from a case whenever a potential bias appears; (ii) ensuring that any decisions on disqualification of a prosecutor can be appealed (paragraph 245);
- xxix. (i) defining disciplinary offences relating to prosecutors' conduct and compliance with ethical norms more precisely; (ii) extending the range of disciplinary sanctions available to ensure better proportionality and effectiveness (paragraph 260);
- xxx. enhancing the efficiency of disciplinary proceedings by extending the limitation period, ensuring that proceedings can be launched also by the relevant self-governing bodies (which are not entrusted with decision-making in disciplinary proceedings) and heads of prosecution offices, and providing that appeals against disciplinary decisions can ultimately (after a possible internal procedure within the prosecution service) only be made to a court, both on substantive and procedural grounds (paragraph 263);
- xxxi. providing to all prosecutors dedicated, regular training and confidential counselling on ethics and integrity, prevention of conflicts of interest and corruption, and raising prosecutors' awareness of such matters (paragraph 272).

274. Pursuant to Rule 30.2 of the Rules of Procedure, GRECO invites the authorities of Ukraine to submit a report on the measures taken to implement the above-mentioned recommendations by 31 December 2018. These measures will be assessed by GRECO through its specific compliance procedure.

275. GRECO invites the authorities of Ukraine to authorise, at their earliest convenience, the publication of this report, to translate the report into the national language and to make the translation publicly available.

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## About GRECO

The Group of States against Corruption (GRECO) monitors the compliance of its 49 member states with the Council of Europe's anti-corruption instruments. GRECO's monitoring comprises an "evaluation procedure" which is based on Romania specific responses to a questionnaire and on-site visits, and which is followed up by an impact assessment ("compliance procedure") which examines the measures taken to implement the recommendations emanating from the Romania evaluations. A dynamic process of mutual evaluation and peer pressure is applied, combining the expertise of practitioners acting as evaluators and state representatives sitting in plenary.

The work carried out by GRECO has led to the adoption of a considerable number of reports that contain a wealth of factual information on European anti-corruption policies and practices. The reports identify achievements and shortcomings in national legislation, regulations, policies and institutional set-ups, and include recommendations intended to improve the capacity of states to fight corruption and to promote integrity.

Membership in GRECO is open, on an equal footing, to Council of Europe member states and non-member states. The evaluation and compliance reports adopted by GRECO, as well as other information on GRECO, are available at [www.coe.int/greco](http://www.coe.int/greco).

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