



LEGAL ANALYSIS
**of the status of the institutional and functional aspects as well as the existing
challenges for judicial evaluation and training in Ukraine**

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Abbreviations and acronyms

CCJE	Consultative Council of European Judges
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
EJTN	European Judicial Training Network
ENCJ	European Network for Councils for the Judiciary
ERA	Academy of the European Law
HCJ	High Council of Justice
HQCJU	High Qualification Commission of Judges of Ukraine
LOJSJ	Law of Ukraine in on the Judiciary and the Status of Judges
NSJU	National School of Judges of Ukraine
ODIHR	Office for Democratic Institutions and Human Rights
OSCE	Organisation for Security and Co-operation in Europe
PIC	Public Integrity Council
TNA	Training Needs Assessment

EXECUTIVE SUMMARY

The legal analysis elaborates two separate topics: judicial training (initial and ongoing) and performance evaluation of judges in Ukraine. The level of harmonisation of the Ukrainian legal framework governing these topics was put in relation to international and European standards and best practices by reviewing the existing legislation. The quality and the level of implementation of the respective national legislation was discussed with representatives of Ukrainian judicial self-governing bodies. Therefore, this document describes the institutional and functional aspects of the existing system of evaluation of judicial performance and the judicial training system, identifies challenges, and makes recommendations for further improvements.

Judicial training is an essential element of an efficient system of justice, as it secures the competency of the judiciary. To ensure that the Council of Europe values are fully protected and implemented, a strong, independent, and effective judiciary is necessary. Courts require judges with the best possible ethical standards and in-depth knowledge of the law and society in order to perform their duties effectively.

The issue of the training of candidates to judges before they take up their posts (initial/induction training), as well as the professional upgrade of practicing judges (ongoing/in-service/continuous training), is given a significant attention both at international and European level. The Council of Europe instruments dealing with judicial training such as the Committee of Ministers' Recommendation No. (2010)12 on judges: independence, efficiency and responsibilities; Recommendation No. (2004)4 on the European Convention on Human Rights in university education and professional training; the Opinions of the Consultative Council of European Judges (CCJE) No 1 (2001) and No 3 (2002); the European Charter on the Statute for Judges and most importantly the CCJE (2003) Opinion No 4 on appropriate initial and in-service training for judges at national and European level¹, are the guidelines that secure the mission of the judiciary can only be successfully carried out with the aid of education and training.

In respect to **judicial training**, Ukrainian legislation is generally in line with the Council of Europe standards and best practices. Though, improving the quality of training (both initial and continuous) is always recommended so as to meet the challenges of the evolving society. Therefore, the academic training only is no longer sufficient, and it needs to be complemented with practical and contemporary training methods based on specific cases, addressing the reality of the court work. Legal education methods need to be adapted to meet the challenges and to equip judges with skills that the modern society requires.

Furthermore, extending court practice duration, particularly for candidates with no court work experience, in favour of the schooling part is recommended with regard to initial training programmes. Also, improvements of the qualification examinations are proposed that they should evaluate better the 'judgecraft' skills of a future judge. As for the continuous training, recommendations are made concerning the selection of mandatory training topics and the evaluation of the impact of respective training programmes.

Whilst the system of judicial training of judges in Ukraine requires only minor improvements, the system for evaluation of the performance of judges requires a more substantial adjusting, including the long-term absence of the judicial self-governing body in charge of these issues - the High Qualification Commission of Judges of Ukraine (HQCJU).

Similarly, as in judicial training, when it comes to **evaluation of judge's performance**, several documents were identified on the international level as relevant to the issue of the

¹ <https://rm.coe.int/1680747d37>

performance evaluation of judges. These documents include the OSCE ODIHR Kyiv Recommendations on Judicial Independence in Eastern Europe, South Caucasus and Central Asia, June 2010, the Recommendation CM/Rec(2010)12 of the Committee of Ministers to member states on judges: independence, efficiency and responsibilities and finally the most relevant is the CCJE² “Opinion N° 17 (2014) on the Evaluation of Judges’ Work, the Quality of Justice and Respect for Judicial Independence”. They are all taken into consideration when analysing the functioning of judicial evaluation system in Ukraine.

One of the recommendations of the legal analysis is to redesign or abolish the “examination” of sitting judges. The format of qualification assessment of sitting judges, which is currently in place in Ukraine, bears a strong resemblance to a constant vetting process. Therefore, qualification assessment as an instrument for the evaluation of judges in this format should be considered obsolete and recommended to be abolished fully or redesigned significantly in order to serve the purpose of a proper performance evaluation systems.

² CCJE - Consultative Council of European Judges

I. Introduction

1. In the framework of the Council of Europe project “Ensuring the effective implementation of the right to a fair trial (article 6 of the ECHR) in Ukraine” the international consultant Ms Naumovska Milevska³ (hereinafter - “the consultant”) was requested to provide an analysis of the status of the institutional and functional aspects as well as the existing challenges for judicial evaluation and training in Ukraine.
2. The methodology for the analysis incorporated desk research and consultations with relevant stakeholders. The desk research included a review of relevant legal framework, reports and analyses conducted by international organisations and other experts, and data available through internet sources. Three online consultations, as well as a workshop in The Council of Europe Strasbourg, were organised with representatives of Ukrainian judicial self-governing bodies. The main goal of the consultation process was to discuss institutional and functional aspects of the existing system of evaluation of judicial performance and the judicial training system in Ukraine, identify existing challenges, and propose recommendations for improvements.
3. This paper is structured in such a way that each topic elaborated is put in relation to international and Council of Europe standards and/or best practices. For the areas where further improvements are needed, recommendations are proposed.
4. Two issues were analysed: judicial training (initial and ongoing) and performance evaluation of judges in Ukraine, Respectively, they are elaborated under two separate chapters.

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II. Judicial Training

5. Education and training are of key importance in the fulfilment of the judiciary's mission. To perform judicial work professionally and diligently, judges should have great professional ability, acquired, maintained, and enhanced by the training which they have the duty, as well as the right, to undergo. Thus, judges should continuously enrich their knowledge, maintain their skills, and acquire new ones. Judicial training techniques need to be adapted to enable judges to meet challenges that the new time brings and acquire new skills and developing an understanding of the wider social context of litigation. Purely academic training is not enough and must be complemented by a wider variety of training methodology and concrete cases in line with the reality of court work.
6. The Council of Europe has developed a set of instruments governing key aspects for establishing an efficient system of education and training of judges. These include the Committee of Minister's Recommendation No. (2010)12 on judges: independence, efficiency and responsibilities; Recommendation No. (2004)4 on the European Convention on Human Rights in university education and professional training; the Opinions of the Consultative Council of European Judges (CCJE) No 1 (2001) and No 3 (2002); the European Charter on the Statute for Judges and most importantly the CCJE (2003) Opinion No 4 on appropriate initial and in-service training for judges at national and European level. They are all considered when proposing recommendations below.

National School of Judges of Ukraine

7. Training of judges should be in the hands of judges – as recommended by the CCJE, “under the authority of the judiciary or other independent body, training should be entrusted to a special autonomous establishment with its own budget, which is thus able, in consultation with judges, to devise training programmes and ensure their implementation.” Furthermore, “in order to shield the establishment from inappropriate outside influence, the CCJE recommends that the managerial staff and trainers of the establishment should be appointed by the judiciary or other independent body responsible for organising and supervising training.”
8. In line with the CCJE recommendations, the National School of Judges of Ukraine (hereinafter: "NSJU" or "The School") is established under the Law of Ukraine on the judiciary and the status of judges⁴ (hereinafter: "LOJSJ"⁵) under the umbrella of the HQCJU. It is a state institution in the hands of the judiciary with a special status in the judicial system that ensures the training of highly qualified professionals for the judicial system. The NSJU is a vocational institution and therefore not governed by the legislation on higher education. Although the NSJU is established under the HQCJU, it is an autonomous legal entity with separate financing envisaged in the state budget. The Charter (Statute) of the NSJU is approved by the HQCJU. Furthermore, HQCJU also appoints its director and the deputy directors, the latter

⁴ Article 104, Law of the Ukraine on the judiciary and the status of judges

⁵ As amended by the following laws:

No. 1774-VIII dated 06.12.2016, BVR, 2017, No. 2, Art. 25

No. 1798-VIII dated 21.12.2016, BVR, 2017, No. 7-8, Art. 50

No. 2147-VIII dated 03.10.2017, BVR, 2017, No. 48, Art. 436

No. 2509-VIII dated 12.07.2018, BVR, 2018, No. 35, Art. 267

No. 2704-VIII dated 25.04.2019, BVR, 2019, No. 21, Art. 81

No. 193-IX dated 16.10.2019, BVR, 2019, No. 50, Art. 354

No. 263-IX dated 31.10.2019, BVR, 2020, No. 2, Art. 5}

based on the recommendation of the NSJU director. Neither the LOJSJ nor the Charter of the NSJU contain any requirements for the director's or deputy director's positions, as well as the provisions about the term of office of the rector/director and deputy rectors/directors. The current rector/director was appointed by the HQCJU in 2013, whereas the deputy director was appointed a few years earlier, in 2011.

9. The LOJSJ allows the NSJU to establish regional branches. Currently, there are four branches: in Lviv, Kharkiv, Odesa, and Dnipro.
10. According to Article 105 of the LOCSJ, the HSJU has a wide portfolio which includes several training programmes for different target groups within the judiciary:
 - special training program for judicial candidates (hereinafter Initial Training Programme);
 - ongoing training of judges, including those who are selected for administrative positions in courts;
 - ongoing training of judges for improving professional skills;
 - ongoing training of judges who are temporarily suspended from the administration of justice;
 - initial and ongoing training for court staff;
 - initial and ongoing training of the staff of the Court Security Service.
11. The NSJU also performs other functions, such as conducting academic and research analysis on the issues of the functioning of the judiciary. More specifically, these additional functions of the NSJU include conducting research for the improvement of the judiciary, the status of judges and judicial proceedings, studying international practices of organisation and operations of courts, and providing scientific and methodological support to the functioning of courts, the HQCJU, and the HCJ.
12. Information on the training and the results thereof are included in each judge's dossier⁶. Following the training, the NSJU issues the trainees a certificate of training. According to Article 90 of the Law, following each training, the lecturer (trainer) of the NSJU gives the judge written recommendations on self-improvement as well as, if necessary, recommendations for additional training. Therefore, the NSJU may conduct additional training for judges if such a need is identified for a specific judge. Besides, the results of the judges' training during the term of their office are taken into consideration during their qualification assessment.
13. For this purpose, the NSJU and its regional branches organise face-to-face training activities based on contemporary adult training methods and a trainee-centred approach. The NSJU also uses remote forms of training in different e-learning formats. Just looking at the Evaluation Methodology and the Concept of judicial training it is more than obvious that the NSJU embraces new contemporary trends in adult training promoted by professional judicial training institutions such as the EJTN and the ERA and follows development in judicial training.

Summary and Recommendations

14. The legal framework secures independence and autonomy of the judicial training and therefore one could say that it gives sufficient safeguards for the NSJU to provide training as a guarantee of judicial independence and impartiality, in accordance with the requirements of the ECHR. To secure that training is in the hands of the judiciary, the requirements for the rectors/director should be listed in the LOJSJ or in the secondary legislation. One of the key requirements to this position should be the considerable judicial experience.

⁶ Article 85, LOJSJ

Initial Training

15. Both the LOJSJ and the Regulation on Special Training for candidates to judges⁷ regulate the initial training for candidates to judges, the first by providing the legal grounds and the latter by elaborating in detail on the initial training process, content, and duration. It seems that the process is well designed and transparent, and the training quality is secured by following all stages of the training cycle management process.
16. According to the LOJCJ, the responsibility to ensure initial training for the candidates for the position of judge (hereinafter: initial training) is given to the NSJU. The initial training is implemented after the HQCJU selects the candidates for the position of judge for the first time. The procedure, curriculum, and timeline of the initial training programme are approved by the HQCJU based on the recommendation made by the NSJU. The schooling part is a combination of theoretical and practical approaches in a ratio of 90:10 in favour of practical elements. Even if some trainings are organised in universities and delivered by academics, they are interactive and practical, as explained by the participants in the consultation process. This schooling part lasts for twelve months (unless otherwise decided by the HQCJU) and is a full-time study. In 2018, the last year of initial training provided, the HQCJU approved a 12-month duration for the General Initial Training Programme (Special Preparation Programme) for all candidates and a three-month reduced Initial Training Programme for judicial assistants who have worked in that position for three or more years.
17. This approach is in line with the recommendations made by the CCJE⁸. That is, no matter whether judges recruited are selected from among the best lawyers or recruited from universities or training institutions, "*both groups should receive initial training: the performance of judicial duties is a new profession for both and involves a particular approach in many areas, notably with respect to the professional ethics of judges, procedure, and relations with all persons involved in court proceedings*". Therefore, specific features should be taken into consideration in order to target and adapt the training programmes appropriately for each individual group, or "*mandatory initial training by programmes appropriate to appointees' professional experience*"⁹ similarly as it is the case in Ukraine.
18. Regarding the content of the initial training, it seems that initial training is mostly comprised of the "schooling part" within NSJU or outsourced trainings in selected universities; thus, there is no real court practice included in the schooling part. According to the Regulation for initial training, an internship exists as a part of the initial training, but it is not clear how much time is dedicated to court practice nor if it is implemented at all. Visits to courts, prosecution offices, and other relevant institutions are organized but it looks like they are more for orientation purposes.
19. The judicial school's curriculum in other European countries includes a schooling part and a type of internship/court practice in either a prosecutorial or judicial setting. The duration of the initial training varies from: from 6 to 12 months for the schooling part, and 6 to 24 months for the internship (including practice in courts, prosecutor's offices, lawyer's offices, investigation bodies, administration, etc). Also, as recommended by the CCJE, "*depending upon the existence and length of previous professional experience, training should be of significant length in order to avoid its being purely a matter of form.*" Though there is a noticeable tendency of increasing the internship part.

⁷ Approved by the HQCJU on 12.02.2018

⁸ Para. 24 of the CCJE's Opinion 4 on Training of judges

⁹ Para. 26 of the CCJE Opinion 4.

20. Even yet, each professional lawyer appointed to serve as a judge in a common law or comparable system must undergo some initial instruction in the qualities that a judge must possess (known as "judgecraft"). This initial training in judicial skills should typically be completed before a newly appointed judge takes on his or her judicial responsibilities. It is a requirement at the very least to ensure that any newly appointed judge has the fundamental abilities needed of any judge to evaluate the evidence in a case, to maintain control of his courtroom, and to be able to deliver a reasoned judgment.
21. In Ukraine, the court practice might not be important for the candidates coming from judicial assistants; therefore, it would be justified if no internship is envisaged for the candidates coming from the pool of the experienced judicial assistants. However, the court practice time is most certainly very important for those candidates coming from other legal professions with no court/judicial experience.
22. There is no formal evaluation of the initial training programme. The qualification exam that is administered by the HQCJU could be considered a formal way of evaluating the skills and competencies gained through the initial training programme. The process for conducting the qualification exam has been put in place, and it seems transparent, objective, and fair. It is conducted in premises specially equipped for that purpose and recorded, and mass media and representatives of trade unions and human rights organizations are allowed to be present at any stage of the process. The procedure for administering the qualification exam and methods of evaluation of candidates are established, and they secure the anonymity and confidentiality of the examination. If a person has scored less than 75 percent of the maximum possible score in the qualification exam, from both theoretical and practical assignments, he/she shall be deemed to have failed the qualification exam. The theoretical part is based on randomly chosen multiple choice questions from the HQCJU database, while the practical assignment consists of rendering a judgment based on the desired area of practice. The selection of the case studies for the practical assignment is made randomly through the database. Furthermore, candidates can take tests in several areas of law (administrative, criminal, civil, commercial, etc.).
23. Although there are specialised first-instance courts in Ukraine, there is no specialisation during the initial training, nor is there a "court practice/internship" dedicated to the candidate's desired law area of work. It might be considered that specialisation should be introduced through the internship part.
24. A person who failed the qualification exam may retake it no earlier than one year thereafter. A person who has not passed the qualification exam again may be admitted to the next assessment no earlier than two years thereafter. The candidates are ranked according to the points scored in the qualification exam. The ranking shall separately display points scored on the tasks that test the candidate's ability to be a judge by respective specializations. Information on the results of the qualification exam and a candidate's place in the ranking for the position of judge is made publicly available and published on the official website of the HQCJU.
25. And finally, the HQCJU shall add to the reserve list those candidates who have scored at least 75 percent of the maximum possible score in the qualification exam. The results of the qualification exam are valid for three years from the date of the assessment.
26. During the initial training, the candidates for the position of judge receive a scholarship in the amount of the fixed salary of a judicial assistant at a local court. If a candidate for the position of judge breached the initial training programme procedure, for instance, he/she has failed to demonstrate the sufficient level of achievement, he or she ceases participation in the initial training programme and loses the right to participate in the selection process. In addition, the candidate judge has to compensate the whole amount allocated from the budget for his/her training. The equivalent compensation procedure is used when a candidate decides to withdraw from further selection stages or does not participate in the competition for a

vacant position for a judge of the first-instance court within three years of his or her term in the candidate pool.

27. The procedure, duration, content, and evaluation of the initial training are regulated, the process transparent and fair. As to the practical implementation of the procedure, the experience is so far limited to only two groups of candidates that underwent the 12-month initial training programme in 2013 and in 2018 respectively. Since the suspension of functioning of the HQCJU in November 2019, no initial training has been organised. It should also be mentioned that 350 candidates who successfully passed the initial training programme and the theoretical part of the qualification exam before 2019, are still waiting for the delivery of the final stage of the qualification exam. In the meantime, the three-year limit to apply for and be appointed to the post of a first-instance judge will expire. No initial training programme has been so far organised by the NSJU in the absence of the HQCJU, on the background of more than 2000 vacancies in the Ukrainian judiciary.

Summary and Recommendations

28. It should be noted that the initial training programme, as defined by the Ukrainian legal framework, is well designed and in line with European standards and best practices. Improving the quality of the initial training for future judges is always possible, and therefore these recommendations go in line with the general principles of further and continuous enhancement of the quality of the initial training programme.
29. It is recommended to extend the court practice (internship) part of the initial training programme. Judicial assistants might be excluded from the obligation to participate in court practice; hence, they already have experience in court work.
30. Further improvement of the qualification examination is recommended. Instead of checking the knowledge gained through multiple choice questions, evaluating the candidates' skills should be a priority. Therefore, it is recommended that the practical assignment of drafting court decisions based on a case study, envisaged currently as a second step in the examination process, be used as the first step. And as for the practical part of the testing, a moot court or participating in a real adjudication might be a better method to check if a candidate has the necessary 'judgecraft' skills and is ready to take on the position of a future judge.
31. The initial training, or the "schooling part", should not repeat the topics from the law studies in order to level up the knowledge of different candidates. It should be focused on empowering candidates to judges with skills and knowledge relevant to their future functions. All candidates would presumably know how to read the law, and the initial training should equip them with the skills as to how to apply the law. Therefore, they should be taught to master the 'judgecraft' skills, as well as social skills that modern society requires.
32. If law universities are still involved in some of the training actions, their involvement should be reduced to a minimum until it is completely avoided.

Temporary recommendation for the period of transitional justice

33. To address the large shortage of judges in the courts, temporary one-off measures could be undertaken by offering a reduced initial training programme of three months for all candidate judges that have at least five years of experience as a judicial assistant, prosecutor, or lawyer. A second solution to cope with the lack of judges could be that judges are appointed, and their skills are enhanced through induction training at later stages.

Ongoing/in-service or continuous training of sitting judges

34. The ongoing training for sitting judges is seen as very important by the Ukrainian judiciary. Given the nature of the training, one could say that it is mandatory, though certain aspects of voluntarism are noticed in the selection of the training topics. At the same time, a mandatory training is also used as one of the sanctions when a judge is found disciplinary liable.
35. According to Article 56 of the LOJSJ ¹⁰ "A judge shall have the right to improve his/her qualification level and undergo the respective training for that purpose." *Meaning that in general, participation in training for sitting judges in Ukraine is on a voluntary basis. However, furthermore, later in the same article*¹¹, The LOJSJ obliges all the judges to complete an advanced training at least once every three years: "A judge shall undergo training at the National School of Judges of Ukraine no less frequently than once in three years."
36. The continuing judicial training should therefore be considered both as the right of every judge, and as the duty imposed on judges by the judicial ethics, since judges should constantly update their knowledge and develop their proficiency.
37. Article 89⁹ defines the number hours for the training, which shall be at least 40 academic hours, within a period of three years of holding the position of a judge, and identifies the NSJU as a training provider in charge of the ongoing training for sitting judges too. In the same article, the legislator provided the NSJU with another additional task regarding the mandatory training: "The National School of Judges shall organize trainings that are mandatory as part of the training course and trainings that a judge may choose as an option depending on his/her needs". In the opinion of the expert, the identification of the mandatory tasks is not a usual task of a training institution but rather a responsibility of a relevant judicial self-governing body.
38. Regarding the mandatory trainings, the CCJE recommends that "*the in-service training should normally be based on the voluntary participation of judges*" although "*that there may be mandatory in-service training only in exceptional cases; examples might (if the judicial or other body responsible so decided) include when a judge takes up a new post or a different type of work or functions or in the event of fundamental changes in legislation*"¹².
39. In addition to the regular training responsibilities, one more form of the obligatory training that is foreseen for judges is aimed at those judges that are imposed the disciplinary sanction in the form of 'suspension from administration of justice and the mandatory referral to the NSJU to study'. Namely, a judge may be brought into disciplinary liability within the procedure of disciplinary proceedings in case of "*failure to pass ongoing training at the National School of Judges of Ukraine upon a referral made by a body which conducts disciplinary proceedings with regard to judges or failure to pass further qualifications evaluation to confirm the capability of a judge to administer justice in a relevant court or failure to confirm the capability of a judge to administer justice in a relevant court based on the results of such qualifications evaluation*".¹³
40. As a result, one of the disciplinary sanctions that might be imposed on a judge is "*a proposal to temporarily (from one to six months) suspend a judge from the administration of justice, with deprivation of a right to receive bonuses to judicial salary and compulsory referral of a judge to the National School of Judges of Ukraine to pass an ongoing training course determined by the body that conducts disciplinary*

¹⁰ Part 5 of the Article 56, LOJSJ

¹¹ Part 2, Article 89, LOJSJ (2016)

¹² Para. 37 i and ii, CCJE Opinion No 4

¹³ Article 106 Part 1 point 14, amended with LOJSJ ([No. 193-IX dated 16.10.2019](#))

*proceedings against judges and further qualifications evaluation to confirm the capability of a judge to administer justice in a relevant court".*¹⁴

41. And finally, the LOJSJ states that the respective disciplinary sanctions can be annulled (lifted) from the judge's record if *"within two years from the date of approving a decision on imposing a disciplinary sanction in the form of a proposal to temporarily suspend a judge from the administration of justice, a new disciplinary sanction is not imposed on him/her and there are no grounds for imposing a new sanction during the mentioned period, and on the condition of successful completion of a re-training program prescribed by the body that conducts disciplinary proceedings against judges and further confirmation of capability to administer justice in a relevant court based on qualification exam"*.
42. After each training session, the NSJU issues the trainees a certificate of training. Information about the training and the results thereof are included in each judge's dossier¹⁵. Therefore, the results of the judges' training during the term of their office are taken into consideration during their qualification assessment when reviewing an individual's dossier.
43. Besides, following each judge's training, the professor (trainer) of the NSJU gives the judge written recommendations on self-improvement and further additional training. It is one of the methods for qualification assessment (evaluation) where the lecturers are tasked with evaluating the learning impact on judges participating in the training. Specifically, according to Part 2, Point 1, of Article 90 of the Law, the regular training shall be conducted by *"lecturers (trainers) of the National School of Judges of Ukraine based on the results of training and completion of a questionnaire"*. As a result, the NSJU may conduct an additional training for judges if a need for the additional training is identified for a specific judge.
44. As stated in CCJE Opinion No. 4, *"In order continuously to improve the quality of judicial training, the organs responsible for training should conduct frequent assessments of programmes and methods. An important role in this process should be played by opinions expressed by all participants to training initiatives, which may be encouraged through appropriate means (answers to questionnaires, interviews). While there is no doubt that performance of trainers should be monitored, the evaluation of the performance of participants in judicial training initiatives is more questionable. The in-service training of judges may be truly fruitful if their free interaction is not influenced by career considerations."*
45. Consequently, evaluation of the training impact should only be focused on judges' perceptions regarding knowledge and skills gained during training and the quality of the training delivery. In the case of sitting judges, apart from the self-assessment, other forms of evaluation of judges' knowledge and skills are not recommended. On the contrary, trainers should be evaluated by the judges, not vice versa. As the NSJU methodology recommends, when implementing Kirkpatrick's training evaluation model, the evaluation should be implemented after each training, and the post-training evaluation questionnaire should serve as a base for improving the quality of training delivery. Judges' needs should be assessed through a comprehensive TNA process, and one of the methods used in the TNA is the feedback from the post-training evaluation questionnaire.
46. Regarding the assessment of training (both initial and ongoing), CCJE Opinion No. 4 gives the following three recommendations:
 - *"That training programmes and methods should be subject to frequent assessments by the organs responsible for judicial training;*
 - *that, in principle, participation in judges' training initiatives should not be subject to qualitative assessment; their participation in itself, objectively considered, may however be taken into account for professional evaluation of judges;*

¹⁴ Article 109, Part 4, LOJSJ

¹⁵ Article 85, LOCSJ

- *that the quality of performance of trainees should nonetheless be evaluated, if such evaluation is made necessary by the fact that, in some systems, initial training is a phase of the recruitment process."*¹⁶

47. Therefore, with respect to the ongoing training of judges in Ukraine, it could be said that the process is harmonised with the Council of Europe standards and recommendations, though some improvements would be recommended for a better training impact.

Summary and Recommendations

48. With respect to the ongoing training of judges in Ukraine, it could be said that the process is harmonised with the Council of Europe standards and best European practices, though some improvements could be recommended for a better training impact.
49. The evaluation of the training impact should only be focused on judges' perceptions. The post-training evaluation questionnaires based on the Kirkpatrick training evaluation model and interviews should be the most relevant tools for evaluating the training impact of ongoing training activities.
50. Training evaluation should be carried out by NSJU educational specialists through training evaluation reports, elaboration on training impact based on the post-training evaluation questionnaire, and observation during training delivery. This form of evaluation aims at improving the quality of future trainings and identifying future training needs, not evaluating the level of knowledge and skills gained by individual judges participating in trainings.

¹⁶ Part 42, CCJE Opinion 4 on Training of Judges (2003)

III. Performance evaluation of judges

51. At the beginning of this chapter, it should be noted that it deals only with the performance evaluation of the individual judges and not with the performance evaluation of the courts or the judiciary in general.
52. Several documents at the international level regulate the issue of the performance evaluation of judges. The international regulations upon which the recommendations are based are as follows:
- Recommendation CM/Rec(2010)12 of the Committee of Ministers to member states on judges: independence, efficiency and responsibilities
 - The CCJE¹⁷ "Opinion N° 17 (2014) on the Evaluation of Judges' Work, the Quality of Justice and Respect for Judicial Independence"
 - OSCE ODIHR Kyiv Recommendations on Judicial Independence in Eastern Europe, South Caucasus and Central Asia, June 2010.
53. Recommendation CM/Rec (2010)12 (para 58) states: *"where judicial authorities establish systems for the assessment of judges, such systems should be based on objective criteria. These should be published by the competent judicial authority. The procedure should enable judges to express their view on their own activities and on the assessment of these activities, as well as to challenge assessments before an independent authority or a court"*. This clause gives the guidelines how a proper system for performance evaluation of judges should look like:
- it can be formal or informal;
 - it should be based on the objective criteria;
 - it should be implemented by a competent judicial authority;
 - the procedure should be transparent and inclusive allowing judges to be part of the process throughout the evaluation;
 - the appeal of evaluation decisions should be secured.

These guidelines give sufficient grounds for national legislators to design a proper and objective performance evaluation system.

54. Nevertheless, as mentioned earlier several international documents are dealing with this issue and give sufficient guidelines regarding the standards of performance evaluation of judges, which are of great importance when designing a national model of performance evaluation of judges.

Performance evaluation systems

55. Two basic types of evaluation systems of professional performance of members of the judiciary in the European countries are so far identified: formal and informal. The evaluation of professional performance of judges, mostly in common law jurisdictions, tends to be made in an informal way. On the other hand, the European continental countries, in line with the tradition of the civil law, developed formal and complex mechanisms for the evaluation of the professional performance of judges. Thus, the evaluation of judges' professional performance is made on a periodical basis through highly formalized procedures.
56. CCJE "Opinion N° 17 (2014) on the evaluation of judges' work, the quality of justice and respect for judicial independence"¹⁸, defines what formal and informal evaluations

¹⁷ CCJE - Consultative Council of European Judges

¹⁸ <https://rm.coe.int/16807481ea>

mean in light of the performance evaluation of judges in the member states of the Council of Europe.

57. According to Part II, Chapter D, paras 9 & 10 of the Opinion, *“in the case of most formal evaluations, the aims of the evaluation, the criteria used, the composition of the evaluating body, the procedure for evaluation and its possible consequences are all clearly set out in advance of any evaluation exercise. If evaluation is conducted in such a formal way, the rights and duties of the evaluated judge and the evaluating body will be regulated by means of primary or subordinate legislation.”* Also, *“an informal evaluation will not use either formalised ratings or criteria. It will usually have no direct consequences for the evaluated judge. An informal evaluation might be conducted by way of a discussion which will allow the evaluated judge to address problems, show his or her abilities and agree on career goals. An informal gathering of information about a judge who is a candidate for promotion might also be regarded as an informal evaluation.”*
58. In Ukraine, a formal evaluation system is envisaged which is established by legislation, primarily the LOJSJ. In this law two chapters are dedicated to the evaluation of sitting judges: Chapter 1: “Qualifications Evaluation of Judges” and Chapter 2 “Training and Regular Evaluation of Judges” of Section V. The LOJSJ regulates the roles of different institutions and the types and procedures for performance evaluation, though it requires the details to be regulated by the secondary legislation. Therefore, though in reality the legal basis for the performance evaluation of sitting judges exists, it is not implemented in full.
59. Regarding the formal or informal performance evaluation systems, the CCJE recommends the following:
- “4. The CCJE encourages all member states to use informal evaluation procedures that help improving the skills of judges and thereby the overall quality of the judiciary. Such means of informal evaluation include assisting judges by giving them an opportunity for self-assessment, providing feedback and informal peer-review (paragraph 25).*
- 5. The basis and main elements for formal evaluation (where it exists) should be set out clearly and exhaustively in primary legislation. Details may be regulated by subordinate legislation which should also be published. The Council for the Judiciary (where it exists) should play an important role in assisting in formulating these matters, especially the criteria for evaluation (paragraph 30).”*

The purpose of evaluating judges

60. The purpose of the system of evaluation of professional performance of judges, whether formal or informal, is more or less the same from country to country. According to the ENCJ Report¹⁹ the main tasks are as follows:
- a) To improve the efficiency of the judicial systems. This specific aim links evaluation of professional performance of judges with the systemic evaluation of the judicial systems.*
- b) To safeguard of professional quality of judges, in order to improve the service provided by the judicial systems to the public.*
- c) Skill development of judges, including continuing training if this appears to be necessary in view of the outcome of the evaluation.*
- d) To prevent problems and malfunctions of the judicial systems.*
- e) To improve the motivation and satisfaction of judges in the development of their professional activities.*

¹⁹ Development of Minimum Judicial Standards III, Minimum Standards regarding evaluation of professional performance and irremovability of members of the judiciary, Report 2012-2013, ENCJ

f) To improve management and leadership abilities within the judiciary and, indirectly, judicial accountability and public confidence in the judicial systems.”

61. As a result, the purpose of the performance evaluation systems can generally be divided into three main tasks: namely for self-improvement purposes, i.e., to enhance the performance and professional accountability of judges; to increase public confidence; and to aid judicial institutions in deciding upon issues of career and promotion within the judiciary.
62. According to Article 83 of the LOJSJ, *“qualifications evaluation shall be conducted by the High Qualification Commission of Judges of Ukraine in order to identify the capability of a judge (judicial candidate) to administer justice in a relevant court according to criteria determined by law. The criteria of qualifications evaluation shall be:*
- 1) competence (professional, personal, social, etc.);*
 - 2) professional ethics; and*
 - 3) integrity.*
- Qualifications evaluation based on criterion of professional competence shall be conducted taking into account the principles of instances and specialization.”*
63. Competence evaluation is primarily delivered by the HQCJU inspectors, while the professional ethics and integrity – by the Public Integrity Council (PIC). Consequently, although not clearly stated, the purpose of the evaluation of judges in Ukraine is two folded – for the self-assessment purposes and to aid judicial institutions in deciding upon issues of career and promotion within the judiciary.

Types of performance evaluations of judges in Ukraine

64. There are two types of performance evaluation of judges in Ukraine. The first type called “qualification assessment” conducted by the HQCJU, which by its nature could be called an ad-hoc or extraordinary evaluation, and the second one called “regular evaluation”, conducted irregularly by different subjects.
65. The first type or qualification assessment of judges was introduced in Ukraine in 2014, while the 2016 amendments to the Constitution of Ukraine provided for one-time assessment of all the judges. This overall assessment of all judges by the HQCJU has not been finalised yet.
66. According to Article 83 Part 4 of the LOJSJ, there are two grounds for conducting qualification assessments of judges:
- “1) judge’s (judicial candidate’s) application for sitting for qualifications evaluation including participation in the competition;*
 - 2) decision by the High Qualification Commission of Judges of Ukraine on making a judge sit for qualifications evaluation in cases stipulated by law.”*
67. The purpose of the competition is to determine the winner with the higher rating. Moreover, the rating list is formed based on the score obtained by the judges at the qualification assessment. The qualification assessment procedure and methodology, the indicators of conformity to the qualification assessment criteria and tools for establishment thereof are developed by the HQCJU, such as the Procedure for conducting the examination and the Guidelines for establishment of results of the qualification assessment. In that respect, one could say that the criteria for the assessment of judges are established, and they are published by the competent judicial authority.
68. Article 85 of the LOJSJ defines two stages of the qualification assessment procedure: examination, and review of the dossier and interview. The whole qualification assessment procedure includes the following steps:

- submission of an application for qualification assessment by the judge;
- decision of the HJCJ on conducting qualification assessment of the judge (up to three months);
- anonymous written testing of the judge;
- practical task performed by the judge;
- review of the judicial dossier by the HJCJ;
- interview of the judge by the HJCJ;
- decision of the HJCJ based on the qualification assessment results.

69. The LOSJS defined the goal of the examination as to identify *“compliance of a judge with the criterion of professional competence and it shall be conducted by way of a written anonymous test and performance of a practical assignment to identify the level of knowledge and practical skills law application, and ability to administer justice in a relevant court with relevant specialisation.”* This process very much mirrors the examination envisaged for a candidate judge for the first-time post.
70. The examination stage is the most debatable in the whole qualification assessment process. According to Part 2 of the article 85 of the LOSJS, the examination *“shall be a major means to identify the compliance of a judge (judicial candidate) with the criterion of professional competence and shall be conducted by way of a written anonymous test and performance of a practical assignment to identify the level of knowledge and practical skills law application, and ability to administer justice in a relevant court with relevant specialization.”*
71. First of all, it should be noted that the evaluation of judges through written tests and assignments as a performance assessment tool is not practiced in any of the European countries. The examination in this format is not considered even during trainings, as shown above in the training part of this analysis. Secondly, the anonymous testing and the practical task to be performed by judges during the qualification assessment do not differ from the procedure of the qualification examination during the procedure of the selection of candidates for the position of a judge for the first time.
72. With the suspension of the functioning of the HJCJU in 2019, both processes have not been exercised since then.
73. In addition to these two testing mechanisms, the LOSJS also defines that *“for the purposes of forming a judicial dossier (dossier of judicial candidate) the High Qualification Commission of Judges of Ukraine may approve a decision on introducing and conducting other tests in order to check personal moral and psychological qualities, general abilities and on using other means to identify the compliance of a judge (judicial candidate) with the criteria of qualifications evaluation.”* According to the available HJCJU documents, such testing does not add to the specific score to be obtained by a judge, but it is considered in the total passing score for the examination.
74. On the other hand, the evaluation based on carefully defined criteria as those that are part of the judicial dossier, such as *“information about the efficiency of the justice administration by the judge, in particular”* is relevant, justifiable, and therefore recommended.
75. The attention should also be paid to harmonising the assessment criteria for the selection of candidates to judges and for the competitions for sitting judges, as these two categories of persons may both take part during the competition, and the procedures for the qualification exam and the qualification assessment exam are different, therefore the scores and ranking could be incompatible.
76. According to recommendation 11 of the CCJE Opinion No 17, *“it is essential that there is procedural fairness in all elements of individual evaluations. In particular judges must be able to express their views on the process and the proposed conclusions of an evaluation. They must also be able to challenge assessments, particularly when it affects the judge’s “civil rights” in the sense of Article 6 of the*

European Convention for the Protection of Human Rights and Fundamental Freedoms".

77. Under article 88 of the LOJSJ, a decision of the HQCJU may be appealed. Explicitly, *"a judge (judicial candidate) who disagrees with the decision of the High Qualification Commission of Judges of Ukraine about his/her qualifications evaluation may challenge the decision in the manner stipulated by the Code of Administrative Proceedings of Ukraine."* Although the right of appeal is secured for a limited number of grounds, this list should be extended.
78. The LOJSJ does not also contain clear clauses on whether results of the qualification assessment passed by the judge can be considered in a new competition. It is stated in Article 84 of the LOJSJ that the Procedure for considering the results of the latest qualification assessment of a judge shall be established by the decision of the HQCJU, but no information on adoption of such document by the HQCJU has been found.
79. The LOJSJ and the rulebooks of the HQCJU do not establish clear timeframe for specific stages of the qualification assessment, which makes it impossible to determine the duration of the whole procedure.
80. And finally, the non-conformity of a judge with the position based on the criteria of competence, professional ethics or integrity that is detected during such assessment, or the judge's refusal to undergo such assessment, shall be a basis for the dismissal of the judge. In this regard, recommendation 12 of CCJE Opinion No 17 states: *"An unfavourable evaluation alone should not (save in exceptional circumstances) be capable of resulting in a dismissal from office. This should only be done in a case of serious breaches of disciplinary rules or criminal provisions established by law or where the inevitable conclusion of the evaluation process is that the judge is incapable or unwilling to perform his/her judicial functions to an objectively assessed minimum acceptable standard. These conclusions must follow a proper procedure and be based on reliable evidence"*.

Summary and recommendations

81. The mere nature of the testing imposed on sitting judges casts shadows on the whole qualification assessment process. However, having in mind that the HQCJU has not been functional since November 2019, this mechanism was not practiced since.
82. Nevertheless, the qualification assessment as an instrument for the evaluation of judges in this format should be considered obsolete and recommended to be abolished or at least redesigned significantly.
83. The examination part (testing of knowledge by anonymous testing and checking the skills through a practical assignment) should be completely abolished.

Links to documents quoted in the analysis

- [Law of Ukraine on the judiciary and the status of judges](#)
- [Procedure for conducting the examination and Guidelines for establishment of results of the qualification assessment](#)
- [Methodology for the evaluation of personnel training for justice systems at the National School of Judges of Ukraine](#)
- [OSCE ODIHR Kyiv Recommendations on Judicial Independence in Eastern Europe, South Caucasus and Central Asia, June 2010,](#)
- [Recommendation CM/Rec\(2010\)12 of the Committee of Ministers to member states on judges: independence, efficiency and responsibilities](#)
- [CCJE Opinion N° 4 \(2003\) on appropriate initial and in-service training for judges at national and European level](#)
- [CCJE "Opinion N° 17 \(2014\) on the Evaluation of Judges' Work, the Quality of Justice and Respect for Judicial Independence"](#)

Reports of the Council of Europe projects:

- Executive summary for the outline of institutional and procedural setup of judicial self-governing and other bodies
- [Outline of the Institutional and Procedural Setup of the Judicial Governance Bodies and Other Institutions in the Judicial System of Ukraine \(Other than Courts\)](#)

WEB pages of the [HQCJU](#) and [NSJU](#).