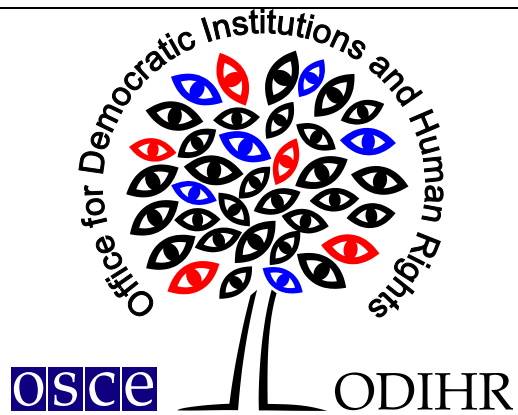


Warsaw, 12 November 2015

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## OPINION

# ON THE QUALIFICATION ASSESSMENT PROCEDURE OF JUDGES OF UKRAINE

**based on an English translation of relevant draft regulations provided by  
the High Qualification Commission of Judges of Ukraine**

*This Opinion has benefited from contributions made by Dr. Gar Yein Ng, independent expert  
on the independence of the judiciary*

OSCE Office for Democratic Institutions and Human Rights

Ulica Miodowa 10 PL-00-251 Warsaw ph. +48 22 520 06 00 fax. +48 22 520 0605

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## **I. INTRODUCTION**

1. *On 12 August 2015, the Chairman of the High Qualification Commission of Judges of Ukraine sent a letter to the OSCE Office for Democratic Institutions and Human Rights (hereinafter “OSCE/ODIHR”). In this letter, he requested a review of the “Draft Procedure and Methodology of Qualification Assessment of Judges of Ukraine” (hereinafter “the Qualification Assessment Procedure”) and of the “Draft Regulation on the Procedure of the Maintenance of the Judicial Dossier” (hereinafter the “Judicial Dossier Regulation”).*
2. *On 18 August 2015, the OSCE/ODIHR Director responded to this request, confirming the Office’s readiness to prepare a legal opinion on the compliance of the Qualification Assessment Procedure and Judicial Dossier Regulation with international human rights standards and OSCE commitments.*
3. *On 2 October 2015, the Chairman of the High Qualification Commission of Judges of Ukraine sent an updated version of the Qualification Assessment Procedure to the OSCE/ODIHR, noting that this version took into account certain amendments proposed by the Council of Judges of Ukraine. The OSCE/ODIHR has based its Opinion on this second version of the Qualification Assessment Procedure.*
4. *This Opinion was prepared in response to the above-mentioned request.*

## **II. SCOPE OF REVIEW**

5. The scope of this Opinion covers only the Qualification Assessment Procedure and Judicial Dossier Regulation, submitted for review. Thus limited, the Opinion does not constitute a full and comprehensive review of the entire legal and institutional framework governing the judicial system of Ukraine and the status and evaluation of judges.
6. The Opinion raises key issues and provides indications of areas of concern. In the interest of conciseness, the Opinion focuses more on areas that require amendments or improvements rather than on the positive aspects of the Qualification Assessment Procedure and Judicial Dossier Regulation. The ensuing recommendations are based on international and regional standards relating to judicial independence and the rule of law, as well as relevant OSCE commitments.
7. This Opinion is based on official translations of the Qualification Assessment Procedure and the Judicial Dossier Regulation provided by the High Qualification Commission of Judges of Ukraine, which are attached to this document as Annexes. Errors from translation may result.
8. In view of the above, the OSCE/ODIHR would like to make mention that the Opinion is without prejudice to any written or oral recommendations and comments related to legislation and policy regarding the judiciary of Ukraine which the OSCE/ODIHR may make in the future.

### III. EXECUTIVE SUMMARY

9. The documents under review outline four different procedures: the procedure for lifetime appointment of judges, the procedure for promotion of judges, the manner of applying judicial qualification assessment as a disciplinary sanction, and the initial and repeat qualification assessment of all judges of Ukraine, including judges appointed for life. At the outset, it is important to distinguish between assessment in the context of promotion and appointment for life, on the one hand, and the initial and repeat qualification assessment of judges. Whereas the first-mentioned procedures do not change the status or position of a judge if the judge in question fails the qualification assessment, the latter could result in the dismissal of the judge if he/she fails both the initial and repeat qualification assessment.
10. In the cases involving promotions and appointments for life, the qualification assessment procedure requires certain improvements and clarifications, to avoid situations where judges may feel under indirect pressure to deal with cases in a different substantive or procedural manner in order to be appointed for life or promoted. Such amendments would also help ensure the fairness of those proceedings. In addition, due to their vague and general nature, violations of judicial ethics should not play a role in decisions on promotion or lifetime appointment, and the marking of the assessment should be made more transparent.
11. However, OSCE/ODIHR would strongly advise to reconsider the provision outlining the dismissal of judges as a possible outcome of a “failed” qualification assessment of a judge, in particular when it comes to judges appointed for life. Such an outcome could raise concerns with regard to the principle of irremovability of judges, which is a fundamental guarantee of the rule of law and the right to a fair trial.

### IV. ANALYSIS AND RECOMMENDATIONS

#### 1. International Standards

12. International standards on judicial independence are found in a range of international instruments and documents. Overall, the independence of the judiciary is a prerequisite for the right to a fair trial, which is protected by Article 6 of the European Convention on Human Rights<sup>1</sup>. It provides that everyone is entitled to a fair and public hearing “[...] by an independent and impartial tribunal established by law”. This right is elaborated further in the jurisprudence of the European Court of Human Rights, which has also recognized the principle of irremovability of judges as a corollary of the independence of judges.<sup>2</sup> Article 14 of the International Covenant on Civil and Political Rights<sup>3</sup> also provides, in the context of the right to a fair trial, that “everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law”.

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<sup>1</sup> The Council of Europe’s Convention for the Protection of Human Rights and Fundamental Freedoms entered into force on 3 September 1953. The Convention was ratified by Ukraine on 11 September 1997.

<sup>2</sup> See e.g. *Urban and Urban v. Poland*, ECtHR judgment of 30 November 2010, appl. no. [23614/08](#), par 45 and

<sup>2</sup> See e.g. *Urban and Urban v. Poland*, ECtHR judgment of 30 November 2010, appl. no. [23614/08](#), par 45 and the cases cited there.

<sup>3</sup> The International Covenant on Civil and Political Rights (adopted by General Assembly resolution 2200A (XXI) on 16 December 1966). This Covenant was ratified by Ukraine on 12 November 1973.

13. OSCE commitments also protect the independence of the judiciary. The 1990 Copenhagen Document (par 5.12) provides that participating States will ensure “the independence of judges and the impartial operation of the public judicial service”. This was further elaborated in the 1991 Moscow Document, in which the participating States committed to “respect the international standards that relate to the independence of judges” (par 19.1) and “ensure that the independence of the judiciary is guaranteed and enshrined in the constitution or the law of the country and is respected in practice”. They also committed to a number of more specific obligations, including prohibiting improper influence on judges (par 19.2 i), guaranteeing tenure and appropriate conditions of service (par 19.2 v) and ensuring that the disciplining, suspension and removal of judges are determined according to law (par 19.2 vii).
14. Beyond these binding international obligations, a range of soft-law standards have been developed to provide further guidance on their implementation. These include UN texts,<sup>4</sup> Council of Europe recommendations<sup>5</sup>, opinions of the Consultative Council of European Judges<sup>6</sup> (hereinafter, “CCJE”), the European Charter on the Statute for Judges,<sup>7</sup> as well as the OSCE/ODIHR Kyiv Recommendations on Judicial Independence in Eastern Europe, South Caucasus and Central Asia (hereinafter, “Kyiv Recommendations”).<sup>8</sup>
15. At the same time, this Opinion will also take into account various reports on judicial independence issued by the European Commission for Democracy through Law of the Council of Europe (Venice Commission), including the 2007 Report on Judicial

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<sup>4</sup> UN Basic Principles on the Independence of the Judiciary, adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders held at Milan from 26 August to 6 September 1985 and endorsed by General Assembly resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985 (hereinafter “UN Basic Principles”); Human Rights Committee General Comment 32, “Article 14: Right to equality before courts and tribunals and to a fair trial”, U.N. Doc. CCPR/C/GC/32 (2007 (hereinafter “General Comment 32”); Report of the UN Special Rapporteur on the independence of judges and lawyers, A/HRC/11/41, 24 March 2009 (hereinafter “Report of the UN Special Rapporteur”).

<sup>5</sup> Recommendation No. R (94) 12 of the Committee of Ministers to Member States on the Independence, Efficiency and Role of Judges (adopted by the Committee of Ministers on 13 October 1994 at the 518th meeting of the Ministers' Deputies), subsequently superseded by Recommendation CM/Rec (2010)12 of the Committee of Ministers to member states on judges: independence, efficiency and responsibilities (adopted by the Committee of Ministers on 17 November 2010 at the 1098th meeting of the Ministers' Deputies) (hereinafter “Recommendation No. R (94) 12” and “Recommendation CM/Rec (2010)12”); the Magna Carta of Judges, Consultative Council of European Judges, Strasbourg, 17 November 2010, CCJE (2010)3 Final, hereinafter “Magna Carta of Judges”.

<sup>6</sup> Opinion no. 1 of the Consultative Council of European Judges on Standards concerning the independence of the judiciary and the irremovability of judges (hereinafter “CCJE Opinion No.1”); Opinion no. 3 of the Consultative Council of European Judges on the principles and rules governing judges' professional conduct, in particular ethics, incompatible behaviour and impartiality (hereinafter “CCJE Opinion No. 3”) and Opinion no. 17 of the Consultative Council of European Judges on the evaluation of judges' work, the quality of justice and respect for judicial independence (hereinafter “CCJE Opinion No. 17”).

<sup>7</sup> European Charter on the Statute for Judges (Strasbourg, 8-10 July 1998), adopted by the European Association of Judges, published by the Council of Europe, [DAJ/DOC (98)23] (hereinafter “European Charter on the Statute for Judges”).

<sup>8</sup> The OSCE/ODIHR Kyiv Recommendations on Judicial Independence in Eastern Europe, South Caucasus and Central Asia (2010), hereinafter “Kyiv Recommendations”, were developed by a group of independent experts under the leadership of ODIHR and the Max Planck Institute for Comparative Public Law and International Law – Minerva Research Group on Judicial Independence. The Kyiv Recommendations are available at <http://www.osce.org/odihr/KyivRec>.

Appointments<sup>9</sup> and the 2010 Report on the Independence of the Judicial System (Part I: the Independence of Judges);<sup>10</sup> the Opinion will likewise make reference to previous opinions adopted by the OSCE/ODIHR and/or the Venice Commission on this issue.

## 2. Outline and Purpose of the Documents under Review

16. The documents under review are the Qualification Assessment Procedure and the Judicial Dossier Regulation, both prepared by the High Qualification Commission of Judges of Ukraine to implement sections of the Law on the Judicial System and the Status of Judges and the Law of Ukraine on Ensuring the Right to a Fair Trial. Both of these documents set out four distinct processes. First, they regulate the Qualification Assessment Procedure in cases where judges apply for lifetime appointment. In Ukraine, judges are appointed for an initial five-year term by the President, and may then be appointed for life by the *Verkhovna Rada* (Parliament).<sup>11</sup> In order to be appointed for life, all judges must go through a special qualification assessment procedure in line with Article 83 par 1, subsection 2 of the Law on the Judicial System and the Status of Judges.
17. Second, the documents under review deal with the qualification assessment procedure for sitting judges who seek higher positions, and who need to be assessed as part of their application procedure in accordance with Article 73 par 4 of the Law on the Judicial System and the Status of Judges. Third, the documents under review regulate qualification assessment procedures for judges imposed as part of a disciplinary sanction, as provided in Article 97 par 1 subsection 4 of the Law on the Judicial System and the Status of Judges. Fourth, the above documents deal with the mandatory qualification assessment that all judges in Ukraine (including judges appointed for life) are required to undergo. This so-called “initial” assessment is mandated by Articles 6 and 7 of the Final and Transitional Provisions of the Law of Ukraine on ensuring the Right to a Fair Trial. These Articles set out a schedule for the qualification assessment of all judges in Ukraine by introducing an “initial” assessment and, if the judge fails this, a “repeat” assessment.
18. The procedure of the qualification assessment for judges is set out in Section 2 of the Qualification Assessment Procedure and is broadly similar for all four procedures, with some separate features discussed in more detail below. In all cases, a judicial dossier is compiled on each individual judge, in accordance with the Judicial Dossier Regulation, which compiles a judge’s personal data (Article 2.2), information and documents related to his/her career (Article 2.3), his/her professional efficiency (Article 2.4) information about disciplinary liability (Article 2.5) and data about the compliance of a judge with ethical and anticorruption criteria (Article 2.6). Taken together, this dossier essentially combines all available information on a given judge’s career, from his/her records in the National School of Judges to case-law and each judge’s ethical and disciplinary record.

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<sup>9</sup> Judicial Appointments, Report adopted by the Venice Commission at its 70th Plenary Session (Venice, 16-17 March 2007) (CDL-AD(2007)028).

<sup>10</sup> Report on the Independence of the Judicial System Part I: the Independence of Judges adopted by the Venice Commission at its 82th Plenary Session (Venice, 12-13 March 2010) (CDL-AD(2010)004).

<sup>11</sup> Article 128 of the Constitution of Ukraine.

19. The qualification assessment procedure itself is described in Articles 2.3 and 2.4 of the Qualification Assessment Procedure. This procedure consists of an *examination* (which has two parts: an anonymous test and a practical task), a *dossier review* (a review of the judge's cases in light of reversals on appeal and compliance with time limits, as well as complaints against the judge, disciplinary proceedings, the judge's temperament, stress resistance and communications skills) and an *interview* (which deals with the judge's cases, including the issue of reversals, disciplinary proceedings, as well as compliance with anti-corruption provisions and the Code of Judicial Ethics). This procedure takes place under the auspices of the Higher Qualification Commission of Judges of Ukraine.
20. In cases where the procedure is completed successfully, the Higher Qualification Commission of Judges will recommend the judge in question for promotion or lifetime appointment (Article 4.1.1 and 4.1.2, Qualification Assessment Procedure) or, where the disciplinary procedure is involved, the judge may return to work in his/her position (Article 4.5 and 6.10, Qualification Assessment Procedure). As to the initial qualification assessment and repeat qualification assessment, successful completion means that the High Qualification Commission of Judges "confirms the judge's ability to dispense justice in the court of relevance instance" (Article 4.1.1), which presumably means that in the former case, the judge may remain in his/her position. In the latter case, it would presumably mean that the suspension of the judge imposed by the negative decision on initial qualification assessment is lifted and that the judge may return to duty.
21. In cases where judges fail to successfully complete this process, there are different consequences, depending on the case: in cases involving the procedure for life-time appointment, the judge who fails the assessment is not appointed for life; in cases where a judge fails the test for promotion, he/she is not promoted. The judge who does not pass the assessment following a disciplinary procedure is not allowed to dispense justice in court unless and until he/she passes the assessment (Article 6.10 of the Qualification Assessment Procedure).
22. Where a judge fails the initial qualification assessment, he/she is suspended and needs to undergo retraining at the School of Judges of Ukraine (Article 5.9 of the Qualification Assessment Procedure). After retraining, the judge may then go through a repeat assessment, and the failure to pass this assessment results in his/her dismissal under the same Article 5.9. A judge is also dismissed if, without valid reasons, he/she fails to take part in the initial or repeat assessment procedure (Articles 5.12 and 5.13 of the Qualification Assessment Procedure, respectively).
23. It is important to clearly distinguish between these various procedures. In the case of the assessment for lifetime appointment and for judges' promotion to vacant positions, judges do not risk losing their current position, but merely remain in the position, and with the status that they have. In the case of the qualification assessment following a disciplinary procedure, the judge will already have been found guilty of violating disciplinary provisions of Ukrainian law, and the qualification assessment would be imposed following a full disciplinary procedure. In the case of initial and repeat qualification assessments imposed on all judges of Ukraine, however, very different issues arise. In particular, in cases where judges have been appointed for life, the vital principle of the irremovability of judges may be affected. Given the very different range of consequences of the above assessment procedures, this Opinion will review them separately.

### **3. Qualification Assessment for Lifetime Appointment and for Vacant Positions**

#### **3.1 Introduction**

24. The procedure for lifetime appointment and for vacant positions is regulated in Section 3 of the Qualification Assessment Procedure, and otherwise follows the methodology outlined in Section 2, which defines the criteria for qualification assessment and the factors to be taken into account when applying each of these criteria. In this context, it is important to point out that both the OSCE/ODIHR and the Venice Commission have repeatedly stated that probationary appointments of judges may violate judicial independence, as judges may feel under pressure to decide in a certain way during this period, to ensure that they are appointed for life afterwards.<sup>12</sup> The Venice Commission has also stressed the need for modifications to the manner of appointment of judges more generally, calling for a reduction in the role of the executive and legislature in the judicial appointment process.<sup>13</sup> This Opinion reiterates those comments, and at the same time welcomes the fact that the Government has announced its intention to abolish the five-year probationary period<sup>14</sup> and to reform the appointment procedure for judges.<sup>15</sup>
25. Generally, the documents under review, insofar as they contemplate judicial promotions and appointment for life, cover a wide range of relevant issues. In particular, it is welcome that in this procedure, judges may provide written comments on their judicial dossier, as will be discussed below in more detail below. At the same time, certain provisions would still benefit from further improvement and clarification.

#### **3.2 The Use of Reversal Rates as a Criterion**

26. The number of decisions taken by a judge that were reversed or canceled on appeal, also known as the “reversal rate”, is one of the criteria used to assess the personal competence of judges. The Qualification Assessment Procedure sets forth the use of

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<sup>12</sup> OSCE/ODIHR Opinion on the Law on the Selection, Performance Evaluation and Career of Judges of Moldova, 13 June 2014, Opinion-Nr.: JUD-MOL/252/2014, par 37; Joint Opinion by the Venice Commission and the Directorate of Human Rights of the Directorate General of Human Rights and the Rule of Law on the Law on the Judiciary and the Status of Judges and amendments to the Law on the High Council of Justice of Ukraine, adopted by the Venice Commission at its 102nd Plenary Session (Venice, 20-21 March 2015), CDL-AD(2015)007, par 37; Opinion on the Draft Law on the amendments to the Constitution, Strengthening the Independence of Judges and on the Changes to the Constitution proposed by the Constitutional Assembly of Ukraine, Adopted by the Venice Commission at its 95th Plenary Session (Venice, 14-15 June 2013), CDL-AD(2013)014, pars 16-18.

<sup>13</sup> Cf. Opinion on the Draft Law on the amendments to the Constitution, Strengthening the Independence of Judges and on the Changes to the Constitution proposed by the Constitutional Assembly of Ukraine, adopted by the Venice Commission at its 95th Plenary Session (Venice, 14-15 June 2013), CDL-AD(2013)014, pars 11-14; Opinion on the Proposed Amendments to the Constitution of Ukraine regarding the Judiciary as approved by the Constitutional Commission on 4 September 2015 adopted by the Venice Commission at its 104th Plenary Session (Venice, 23-24 October 2015), CDL-AD(2015)027-e, pars 26-29.

<sup>14</sup> Joint Opinion by the Venice Commission and the Directorate of Human Rights of the Directorate General of Human Rights and the Rule of Law on the Law on the Judiciary and the Status of Judges and amendments to the Law on the High Council of Justice of Ukraine, adopted by the Venice Commission at its 102nd Plenary Session (Venice, 20-21 March 2015), CDL-AD(2015)007, par 37.

<sup>15</sup> Opinion on the Proposed Amendments to the Constitution of Ukraine regarding the Judiciary as approved by the Constitutional Commission on 4 September 2015 adopted by the Venice Commission at its 104th Plenary Session (Venice, 23-24 October 2015), CDL-AD(2015)027-e, pars 26-29.



reversal rates as a criterion in various places<sup>16</sup> including whether violations of Ukraine's international obligations were found by international organizations (presumably, this refers mostly to the European Court of Human Rights) in respect of decisions that a judge has taken or was involved in.<sup>17</sup>

27. In principle, it is positive that judges may provide explanations as to the context of such reversals or in relation to findings of international organizations. At the same time, assessing the quality of a judge's work based on the reversal rate of his/her judgments may also create undue pressure on judges. Judges seeking lifetime appointment or promotion may feel an indirect pressure to reach decisions in accordance with what they believe to be the stance of higher courts, or indeed the European Court of Human Rights, rather than based on their own assessments and good judgment. Consequently, the Kyiv Recommendations, par 28 also state that: "Judges shall not be evaluated under any circumstances for the content of their decisions or verdicts (either directly or through the calculation of rates of reversal)."
28. As to the relevance of violations of Ukraine's international obligations found in respect of Ukraine by international bodies, this would not always appear to be an appropriate criterion. Although some violations found, e.g. by the European Court of Human Rights, may result from errors of individual judges, others may be caused by deficiencies in a country's legal system or in individual provisions. It would appear unfair to hold the judge in question responsible for the application of such laws or constitutional provisions.
29. Based on the above considerations, it is recommended to remove reversal rates regarding national court decisions from the Qualification Assessment Procedure. In addition, the provision taking into consideration violations found by international bodies relating to cases that the judge being assessed has dealt with should be either deleted, or rephrased to clearly cover only cases involving a clear responsibility of the judge or respective panel of judges.

### ***3.3 The Time Taken to Draft a Decision as a Criterion***

30. It is noted that the amount of time that a judge takes when drafting decisions is one of the criteria to be taken into account in the assessment.<sup>18</sup> This is supposed to take place on the basis of an indicator set by the State Judicial Administration of Ukraine (Article 2.5.2.2.2). The respective provision does not specify precisely how this indicator would be designed. As with the criterion of reversal rates, one should be cautious about assessing judges based on the speed with which they adjudicate, to avoid a situation where judges feel under pressure to reach decisions (too) quickly in order to pass a future qualification assessment. Indeed, certain court cases are more complex than others, and may require more extensive consideration, and thus time. Although it is welcome that this criterion will be assessed via an objective indicator, the relevant

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<sup>16</sup> References to canceled or amended judgments may be found in Articles 2.2.2.2.1, 2.2.2.2.3, 2.4.2.2, 2.4.2.4 and other Articles in Section 2 (Methodology of Qualification Assessment), as well as Articles 3.16.8.5.2 and 3.16.8.5.4 of Section 3 (Procedure for Qualification Assessment).

<sup>17</sup> See Articles 2.4.2.2 and 2.5.2.3.1 and other Articles in Section 2 (Methodology of Qualification Assessment) and Article 3.16.8.5.3 in Section 3 (Procedure for Qualification Assessment).

<sup>18</sup> See e.g. Section 2 (Methodology of Qualification Assessment), Article 2.2.2.2.2 and Section 3 (Procedure for Qualification Assessment), Article 3.16.8.5.6.

provisions do not provide a judge with the possibility to explain any delays in drafting decisions, as exists in other cases. As noted, there may be many valid reasons why a judge took longer than usual to draft a certain decision, and this should not be held against him/her if properly explained. It is therefore recommended to state in relevant provisions that judges may provide comments in order to explain why certain decisions/judgments took longer to prepare, in particular in Articles 2.2.2.2.2, 2.4.2.6 and 3.16.8.5.6, which regulate the use of this criterion as a means to assess personal leadership in the context of the interview and judicial dossier review.

### ***3.4 The Deadline for Providing Written Comments***

31. It is noted, and welcomed, that judges may provide comments on the various indicators not just during the interview, but also in the form of written comments which are then included in their judicial dossier. According to Article 3.16.5, written explanations shall be provided by a judge “not later than on [the] next working day after the day of their acquaintance with the materials of a judge's dossier.” This time limit appears to be very short, and would not allow judges to look up past cases and prepare a proper written statement explaining issues raised or dealt with in their dossier. It is thus recommended to extend the period within which judges shall provide written comments on their judicial dossiers. This may also require extending the number of days that a judge has to review the content of his/her dossier ahead of the interview under Article 3.16.5.

### ***3.5 Compliance with Ethical Standards as a Criterion***

32. The assessment procedure deals with a very wide range of issues. One of these is judges' compliance with ethical standards.<sup>19</sup> The discussion of ethics during the interview with the judge is compulsory (Article 3.17.2). Regarding ethical standards, it is important to point out that rules on professional ethics should not be equated with legislation.<sup>20</sup> In particular, it should be borne in mind that the purpose of a code of ethics is usually to provide general rules, recommendations or standards of good behaviour that guide the activities of judges. Such codes thereby enable judges to assess how to address specific issues which arise in their day-to-day work, or during off-duty activities. Codes of ethics are for the most part not, however, considered to codify duties and obligations which, if breached, would lead to a finding of wrongdoing and sanctions.
33. It is thus questionable whether adherence to ethical principles can even be measured for the purposes of assessing the work of judges. Consideration should thus be given to removing the compliance with ethical standards as a ground for such assessment from the Qualification Assessment Procedure and Judicial Dossier Review. At the same time, considering the importance of the issue of judicial ethics in general, it may nevertheless be appropriate to test the judge's knowledge and understanding of the Code of Judicial Ethics in written and/or oral form.

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<sup>19</sup> See Articles 2.1.6, 2.2.6, 2.5.6, and 3.16.8.6.

<sup>20</sup> See pars 44 and 46-47 of Opinion No. 3 of the CCJE.

### **3.6 The Number of Complaints Made against a Judge**

34. In accordance with Article 2.4.2.8, the review of a judge's dossier also includes the number of complaints made against him/her. This number may be high, average or low, and would also depend on the number of complaints taken into consideration during the assessment (Article 2.5.2.2.4). Article 3.16.8.5.8, in the context of assessing judges for vacant positions, likewise takes into account the number of complaints made against the judge candidate's actions during their tenures as judges "in relation to which there was a check". As also noted by the Venice Commission in its review of the underlying legislation<sup>21</sup>, the respective provisions should clearly state that only complaints which turn out to be substantiated upon review should be taken into account during the assessment. The simple number of complaints by itself appears to be an unfair marker, as certain litigants may raise any number of unjustified complaints, or complaints related to laws themselves, and not the conduct of the respective judge; this may artificially inflate the number of complaints. For this reason, it is recommended to include in the file only a description of substantiated complaints. Alternatively, if the total number of complaints is recorded, the respective provisions should clarify that only substantiated complaints shall be taken into account when assessing the judge, with due regard paid to the gravity of the subject-matter of the complaint.

### **3.7 The Number of Disciplinary Proceedings Conducted against a Judge**

35. Similar remarks may be made about the relevance of the number of disciplinary proceedings conducted against a judge. Currently, Article 2.5.2.2.5 assesses candidates based on the "[n]umber of disciplinary proceedings and their results - high, average, low (including applied disciplinary actions and their types)". Article 3.16.8.5.9 mentions only the "number of disciplinary proceedings", but without mentioning the results. It would be unfair to the judge, and potentially highly prejudicial to the pending disciplinary proceedings, if an assessment were to be based only on the simple number of disciplinary proceedings initiated against a judge. It is recommended to add and/or clarify, in sections 2 and 3 (and particularly in Articles 2.2.2.2.5, 2.5.2.2.5, 2.4.2.9 and 3.16.8.5.9), that disciplinary proceedings should only be taken into account where disciplinary complaints have been substantiated and are no longer subject to appeal. Also, the gravity of the disciplinary sanction in question should be taken into account.

### **3.8 The Issue of 'New' Allegations of Corruption raised during the Assessment**

36. The Qualification Assessment Procedure mentions, in various places, the issue of compliance with anti-corruption legislation. The respective judge's compliance with such legislation is discussed at the interview stage; it is also taken into account during the review of the judge's dossier.<sup>22</sup> Obviously, judges should comply with anti-corruption legislation, and it is vitally important that they both know and understand such legislation. However, the provisions on the Qualification Assessment Procedure do

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<sup>21</sup> Joint Opinion by the Venice Commission and the Directorate of Human Rights of the Directorate General of Human Rights and the Rule of Law on the Law on the Judiciary and the Status of Judges and amendments to the Law on the High Council of Justice of Ukraine, adopted by the Venice Commission at its 102nd Plenary Session (Venice, 20-21 March 2015), CDL(2015)007, par 64.

<sup>22</sup> See Articles 2.2.7.2, 2.4.3.6, 2.5.7.2 and 3.16.8.7.2.

- not appear to specify whether new cases of potential corruption may be raised during the qualification assessment procedure, for example at the interview stage.
37. In this context, it is noted that it would be inappropriate, in a procedure such as the qualification assessment, to raise specific or general accusations against a judge pertaining to his/her compliance with anti-corruption legislation, whether at the interview stage or at any other stage. In this procedure, judges do not, after all, have access to a lawyer. They also do not benefit, more generally, from all the various other procedural safeguards normally accorded to individuals accused of serious crimes in the context of other proceedings that focus on wrongdoing, namely disciplinary or criminal proceedings, such as the opportunity to prepare their defence and to call witnesses.
  38. At the same time, Article 3.17.2 specifies that during the interview, “data as to a judge's (judicial candidate's) compliance with ethical and anti-corruption criteria are subject to compulsory discussion”. This not only implies that accusations of corruption may well be raised, but also raises doubts as to whether the judge would in that case have the right to remain silent. While the qualification assessment procedure is, on the face of it, not a disciplinary or criminal procedure, discussions of this kind could well prejudice any future disciplinary or criminal proceedings against the respective judge, in particular since these discussions would be led by a body composed of a majority of judges.
  39. The above provisions should thus be amended to clarify that no new or pending accusations concerning violations of anti-corruption legislation should be raised at the interview stage or during other stages of the Qualification Assessment Procedure. It should also be made clear that such accusations should be dealt with in criminal law proceedings and/or disciplinary proceedings, and not during an assessment procedure. At the same time, it is noted that it may of course be relevant and even advisable to clarify, at some stage of the qualification assessment, whether the judge has a proper knowledge and understanding of anti-corruption legislation.

### ***3.9 The Marking of the Assessment***

40. The system for marking the various stages of the qualification assessment would also benefit from further clarification. Article 2.6.1 provides that the evaluation of a criterion during the qualification assessment is “determined by negative assessment of the majority of its values”. This may be a translation issue, but it is very difficult to understand how such evaluation would lead to an appropriate score. It would appear to be reasonably simple to develop a model answer sheet for the written test, with points attached to each question, and to give a mark for the practical task as well. It would also not seem unreasonable to provide at least an overall score for the judge’s performance during the interview, and for his/her ability to perform judicial functions based on a review of the judge’s dossier. At the same time, the judge should have sufficient opportunity to comment on the dossier and the Qualification Assessment Procedure should allow for the score to, where appropriate, be modified in light of the judge’s explanations and comments. Finally, the respective provisions of the Qualification Assessment Procedure should outline in detail how the total score for the judge (candidate) is determined. This could be done, for example, by stating the maximum number of points to be obtained for each part of the assessment, and by setting a reasonable minimum total score that will signify that the judge/candidate has successfully passed the evaluation.

### **3.10 Gender Equality**

41. It is noted that women are underrepresented in the higher echelons of the Ukrainian judiciary, and that not all relevant information on gender is readily available. For example, there is only one woman on the Supreme Court for every 3.5 men, and statistics are not kept for the lower or appellate courts.<sup>23</sup> Although a change to the underlying legislation may be required to achieve this, one part of the solution may be to promote individuals of the less represented gender in a particular court where candidates achieve an equal score on their assessment. It may also be advisable for the Higher Qualification Commission of Judges to keep statistics on the gender of judicial candidates and judges, and to publish this information, for example in its annual report. This would increase the available information on gender, as a possible basis for action in the interest of gender equality.

## **4. Qualification Assessment in the Context of Disciplinary Sanctions**

42. The special features of qualification assessments in the context of a disciplinary sanction are dealt with in Section 6 of the Qualification Assessment Procedure. Under Article 97 par 1 of the Law on the Judicial System and the Status of Judges, it is possible, next to other sanctions such as admonishment, reprimand or a recommendation for dismissal of the judge, to impose qualification assessment after a temporary suspension as a disciplinary sanction (subsection 4 of that Article). This appears to be a reasonable and indeed useful option in appropriate cases, in particular where a serious violation of a disciplinary provision has been established, but a recommendation for immediate dismissal is not considered to be a proportionate sanction. The issue of qualification assessment in the context of disciplinary sanctions is generally not problematic, as long as a fair procedure has been followed, and the use of this sanction is proportionate to the infraction in question. Overall, the qualification assessment in the context of disciplinary sanctions foreseen in the documents under review does not raise any further issues beyond those already discussed in the previous section.

## **5. Initial and Repeat Qualification Assessment of Judges**

43. Articles 6 and 7 of the Final and Transitional Provisions of the Law of Ukraine on ensuring the right to a fair trial require the Higher Qualification Commission of Judges to organize qualification assessments for all judges in Ukraine, starting with Supreme Court judges, then judges of the appellate courts, and then judges who have applied for lifetime appointment, as well as judges of local courts. Section 5 of the Qualification Assessment Procedure sets out how this is to be implemented.
44. In accordance with Article 5.6.1.3 of the Qualification Assessment Procedure, the qualification assessment of all judges of Ukraine, including those appointed for life, shall follow the general procedure outlined in Section 2 and Articles 3.16-3.18 of the Qualification Assessment Procedure. The procedure has two separate parts: the initial qualification assessment and the repeat qualification assessment. The initial qualification assessment is the same as the assessment procedure for lifetime appointment and for

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<sup>23</sup> See e.g.

[http://www.scourt.gov.ua/clients/vsu/vsuen.nsf/\(documents\)/04023D7BA7A57754C2257D0B003F4A78?OpenDocument&year=2014&month=07&](http://www.scourt.gov.ua/clients/vsu/vsuen.nsf/(documents)/04023D7BA7A57754C2257D0B003F4A78?OpenDocument&year=2014&month=07&)

vacant positions, except that in accordance with Article 5.6.1.1, the anonymous test shall be carried out “in the form of a written statement by a judge of the established legal views and practice of the European Court of Human Rights proposed by the Commission”. Also, Article 5.6.1.2 provides that the practical task involves “solving [a] model case proposed by the members of the Penal or Qualification Chamber with consideration for [the] specialization and judicial instance of a judge.”

45. The repeat qualification assessment is carried out if a judge fails the initial qualification assessment, after which he/she is suspended and required to undergo retraining at the School of Judges. After the judge completes his/her retraining, a new decision is taken on whether the judge may continue in his/her position on the basis of a report from the School of Judges outlining the results of retraining. Should the decision prove negative, then the judge is dismissed. This may raise questions with regard to the respect for the independence of the judiciary and the respect for private life protected by Article 8 ECHR.
46. Regarding the independence of the judiciary, the starting point of any analysis of international standards in this area is that it is a fundamental guarantee for the independence of judges that they are, in principle, appointed for life or until a specific retirement age and that once they have been so appointed, they are in principle irremovable.<sup>24</sup> The irremovability of judges is not a personal privilege, but a key prerequisite for judges to be able to fulfill their roles as guardians of the rights and freedoms of the people and of the rule of law. This principle is likewise a fundamental guarantee of the right to a fair trial<sup>25</sup> and of the separation of powers in a democratic state. At the same time, international standards also acknowledge that both the judiciary as a whole, and individual judges, must be accountable for their actions.<sup>26</sup> This is particularly the case for credible allegations of corruption.<sup>27</sup>
47. Stated in the most general terms, international standards require different responses to the various issues that may arise in the context of judicial competence and integrity. In each case, the response by the authorities must be appropriate to the situation, both in

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<sup>24</sup> Moscow 1991, par 19.1 and 19.2 v; Basic Principles on the Independence of the Judiciary, par 11: “The term of office of judges, their independence, security, adequate remuneration, conditions of service, pensions and the age of retirement shall be adequately secured by law”; *ibid.*, par 12: “Judges, whether appointed or elected, shall have guaranteed tenure until a mandatory retirement age or the expiry of their term of office, where such exists.”; CCJE Opinion No. 1, par 57: “It is a fundamental tenet of judicial independence that tenure is guaranteed until a mandatory retirement age or the expiry of a fixed term of office”; CCJE Opinion no. 1, par 60: “The CCJE considered (a) that the irremovability of judges should be an express element of the independence enshrined at the highest internal level”.

<sup>25</sup> CCJE Opinion no. 1, par 10: “Judicial independence is a pre-requisite to the rule of law and a fundamental guarantee of a fair trial. Judges are “charged with the ultimate decision over life, freedoms, rights, duties and property of citizens” [...] Their independence is not a prerogative or privilege in their own interests, but in the interests of the rule of law and of those seeking and expecting justice”; Venice Commission, Strasbourg 16 March 2010, CDL-AD(2010)004, Report on the Independence of the Judicial System, part I: the Independence of Judges, par 6; HRC/26/32, Report of the Special Rapporteur on the independence of judges and lawyers, Gabriela Knaul, 28 April 2014, par 23.

<sup>26</sup> Report of the Special Rapporteur on the independence of judges and lawyers, Gabriela Knaul, 28 April 2014, par 23: “both independence and accountability are essential elements of an efficient judiciary. They must therefore operate in conjunction with each other.”

<sup>27</sup> United Nations Convention against Corruption, Article 8, par 1 “in order to fight corruption, each State Party shall promote, inter alia, integrity, honesty and responsibility among its public officials, in accordance with the fundamental principles of its legal system”.

terms of severity and in terms of procedure. This precludes, as also noted by the Venice Commission, any summary measures, such as dismissing all judges.<sup>28</sup> As the Venice Commission has also emphasized, other measures, including the procedure under review, would need to adhere to stringent safeguards to ensure that the procedure does not also remove judges who are fit to occupy their positions.<sup>29</sup> In order to ensure the independence of the judiciary, and the rights of individual judges, the dismissal of judges should be based on legal grounds, and should constitute a necessary and proportionate measure, in the given circumstances.<sup>30</sup>

48. First, the dismissal of a judge appointed for life should be possible only in very exceptional cases involving serious infractions of law. After all, if judges could be removed from office for committing minor infractions, the principle of irremovability would lose much of its meaning. Generally, dismissal requires “serious breaches of disciplinary or criminal provisions established by law”<sup>31</sup> and/or cases where the judge “neglects his/her cases through indolence or [...] is blatantly incompetent”.<sup>32</sup> The Kyiv recommendations also note that in disciplinary proceedings, the responsibility of judges “shall not extend to the content of their rulings or verdicts, including differences in legal interpretation among courts; or to examples of judicial mistakes; or to criticism of the courts”.<sup>33</sup>
49. In the qualification assessment procedure, however, it is not entirely clear under which circumstances a judge would either pass or fail the qualification assessment. In particular in cases where the general assessment of all judges may lead to the dismissal of individual judges, the “lack of capacity to execute justice in a court of the corresponding level” would appear to be a quite vague, and very general basis for dismissing a judge from office. It is thus questionable whether, as a basis for dismissal, the current wording is specific enough to meet the standards discussed in the previous paragraph.
50. Second, the dismissal of a judge should always be based on a proper legal basis. As also noted by the Venice Commission,<sup>34</sup> while Articles 6 and 7 of the Final and Transitional

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<sup>28</sup> Joint opinion by the Venice Commission and the Directorate of Human Rights of the Directorate General of Human Rights and the Rule of Law on the Law on the Judiciary and the Status of Judges and amendments to the Law on the High Council of Justice of Ukraine, adopted by the Venice Commission at its 102nd Plenary Session (Venice, 20-21 March 2015), CDL(2015)007, pars 72 and 75.

<sup>29</sup> *Ibid.*, par 74.

<sup>30</sup> See, in this context, the ECtHR judgment in the case of *Oleksandr Volkov v. Ukraine* of 9 January 2013, application no. [21722/11](#), par 166, which noted that Article 8 of the ECHR (which protects, *inter alia*, the right to private life) is also applicable to the dismissal of judges, insofar as this would have serious consequences for their private lives.

<sup>31</sup> Council of Europe Committee of Ministers Recommendation CM(Rec)2010(12), par 50.

<sup>32</sup> CCJE Opinion no. 10, par 63. The UN Basic Principles on the Independence of the Judiciary contemplate suspension or dismissal “only for reasons of incapacity or behaviour that renders [judges] unfit to discharge their duties” (par 18); The Kyiv recommendations put the bar at “alleged instances of professional misconduct that are gross and inexcusable and that also bring the judiciary into disrepute” (par 25). Cf. also the extensive discussion of this issue in HRC/26/32, Report of the Special Rapporteur on the independence of judges and lawyers, Gabriela Knaul, 28 April 2014; see in particular e.g. pars 84 and 87.

<sup>33</sup> *ibid.*

<sup>34</sup> Joint Opinion by the Venice Commission and the Directorate of Human Rights of the Directorate General of Human Rights and the Rule of Law on the Law on the Judiciary and the Status of Judges and amendments to the

Provisions of the Law of Ukraine on ensuring the Right to a Fair Trial provide some legal basis, these articles would require some constitutional backing to authorize them. Moreover, an issue of this nature and importance should not ordinarily be dealt with in transitional provisions.<sup>35</sup>

51. Third, it is noted that the current assessment procedure is carried out in parallel to existing disciplinary procedures set out in Law on the Judicial System and Status of Judges. It is doubtful whether different parallel procedures carried out by different bodies will indeed ensure respect for the necessary safeguards for judges that do meet the required criteria.<sup>36</sup> At least in disciplinary procedures, these involve key fair trial rights, such as the requirement that such proceedings take place in the form of a fair hearing<sup>37</sup> before an independent body or tribunal,<sup>38</sup> which shall ensure that the issue in question is dealt with expeditiously and fairly.<sup>39</sup> The requirement of a fair hearing also includes, *inter alia*, the judge's right to defend him or herself, either directly or via legal counsel of one's choosing.<sup>40</sup> Additional fair trial rights are respect for the principle of the presumption of innocence and the right to be tried without undue delay.<sup>41</sup> In addition, the investigation and proceedings against judges should be kept confidential as, even if found innocent, the damage to their reputation could prove irreversible.<sup>42</sup> As to the decision on dismissal (and indeed on any sanction) itself, the respective judge should be fully informed of the grounds of the decision so that he/she can then decide

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Law on the High Council of Justice of Ukraine, adopted by the Venice Commission at its 102nd Plenary Session (Venice, 20-21 March 2015), CDL(2015)007, pars 77-78.

<sup>35</sup> Joint Opinion by the Venice Commission and the Directorate of Human Rights of the Directorate General of Human Rights and the Rule of Law on the Law on the Judiciary and the Status of Judges and amendments to the Law on the High Council of Justice of Ukraine, adopted by the Venice Commission at its 102nd Plenary Session (Venice, 20-21 March 2015), CDL(2015)007, pars 77-78.

<sup>36</sup> See the Venice Commission's Opinion on the Proposed Amendments to the Constitution of Ukraine regarding the Judiciary as approved by the Constitutional Commission on 4 September 2015 adopted by the Venice Commission at its 104th Plenary Session (Venice, 23-24 October 2015), CDL-AD(2015)027-e, par 44.

<sup>37</sup> Basic Principles on the Independence of the Judiciary, par 17; HRC/26/32, Report of the Special Rapporteur on the independence of judges and lawyers, Gabriela Knaul, 28 April 2014, par 79.

<sup>38</sup> Magna Carta of Judges, par 6: "Disciplinary proceedings shall take place before an independent body"; cf. Opinion no. 3 of the Consultative Council of European Judges, par 71: "disciplinary proceedings against any judge should only be determined by an independent authority (or "tribunal")"; Kyiv recommendations, par 26: "There shall be a special independent body (court, commission or council) to adjudicate cases of judicial discipline".

<sup>39</sup> Basic Principles on the Independence of the Judiciary, par 17; HRC/26/32, Report of the Special Rapporteur on the independence of judges and lawyers, Gabriela Knaul, 28 April 2014, par 79.

<sup>40</sup> CCJE Opinion no. 1, par 60(b); Kyiv Recommendations, par 26.

<sup>41</sup> Article 6, ECHR; Article 14, ICCPR; Report of the Special Rapporteur on the independence of judges and lawyers, Gabriela Knaul, 28 April 2014, par 79.

<sup>42</sup> Article 14, ICCPR; Report of the Special Rapporteur on the independence of judges and lawyers, Gabriela Knaul, 28 April 2014, par 79. Cf. Basic Principles on the Independence of the Judiciary, par 17 which contemplate confidentiality at least at the initial stage, "unless otherwise requested by the judge".



- whether or not to appeal against the decision.<sup>43</sup> An appeal to an independent body such as a court should always be possible.<sup>44</sup>
52. The qualification assessment procedure does contain some of these safeguards, notably the appeal to a court, which is set out in Article 4.15 of the Qualification Assessment Procedure. Such appeal should also be effective in practice, meaning that it should be able to lead to an effective reversal of the decision on removal in an administrative court.<sup>45</sup>
53. Overall, the OSCE/ODIHR understands that the purpose of the qualification assessment procedure is to deal with alleged incompetence and corruption within the Ukrainian judiciary.<sup>46</sup> It is of course legitimate for authorities to try and address such issues, and the challenges faced by the authorities in this area, and the urgent need to deal with them are fully understood. At the same time, it remains questionable whether the qualification assessment procedure, as it stands, is the appropriate means to address these issues, and whether it may not be clearer, and more in line with international standards to retain the assessment procedure as a pure evaluation tool aiming to improve the work of the judiciary, and to leave the question of sanctions and dismissal to existing disciplinary procedures. In cases where the initial and repeat assessment procedures lead to a recommendation for dismissal by the High Qualification Commission, this recommendation could then initiate disciplinary proceedings which would need to include the fair trial safeguards mentioned above.

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<sup>43</sup> CCJE Opinion No. 10, par 95; Kyiv Recommendations, par 26.

<sup>44</sup> Basic Principles on the Independence of the Judiciary, par 20: “Decisions in disciplinary, suspension or removal proceedings should be subject to an independent review. This principle may not apply to the decisions of the highest court and those of the legislature in impeachment or similar proceedings”; Opinion no. 3 of the Consultative Council of European Judges, par 72: “In some countries, the initial disciplinary body is the highest judicial body (the Supreme Court). The CCJE considers that the arrangements regarding disciplinary proceedings in each country should be such as to allow an appeal from the initial disciplinary body (whether that is itself an authority, tribunal or court) to a court”; cf. also Venice Commission, Report on the Independence of the Judicial System Part I: the Independence of Judges adopted by the Venice Commission at its 82th Plenary Session (Venice, 12-13 March 2010) (CDL-AD (2010) (004), par 43.

<sup>45</sup> Cf. ECtHR, *Oleksandr Volkov v. Ukraine*, op. cit. note 30, pars 124-131.

<sup>46</sup> Preliminary Opinion on the Draft Law on the Judicial System and the Status of Judges of Ukraine, taken note of by the Venice Commission at its 102nd Plenary Session (Venice, 20-21 March 2015) CDL-AD(2015)008-e, par 72.