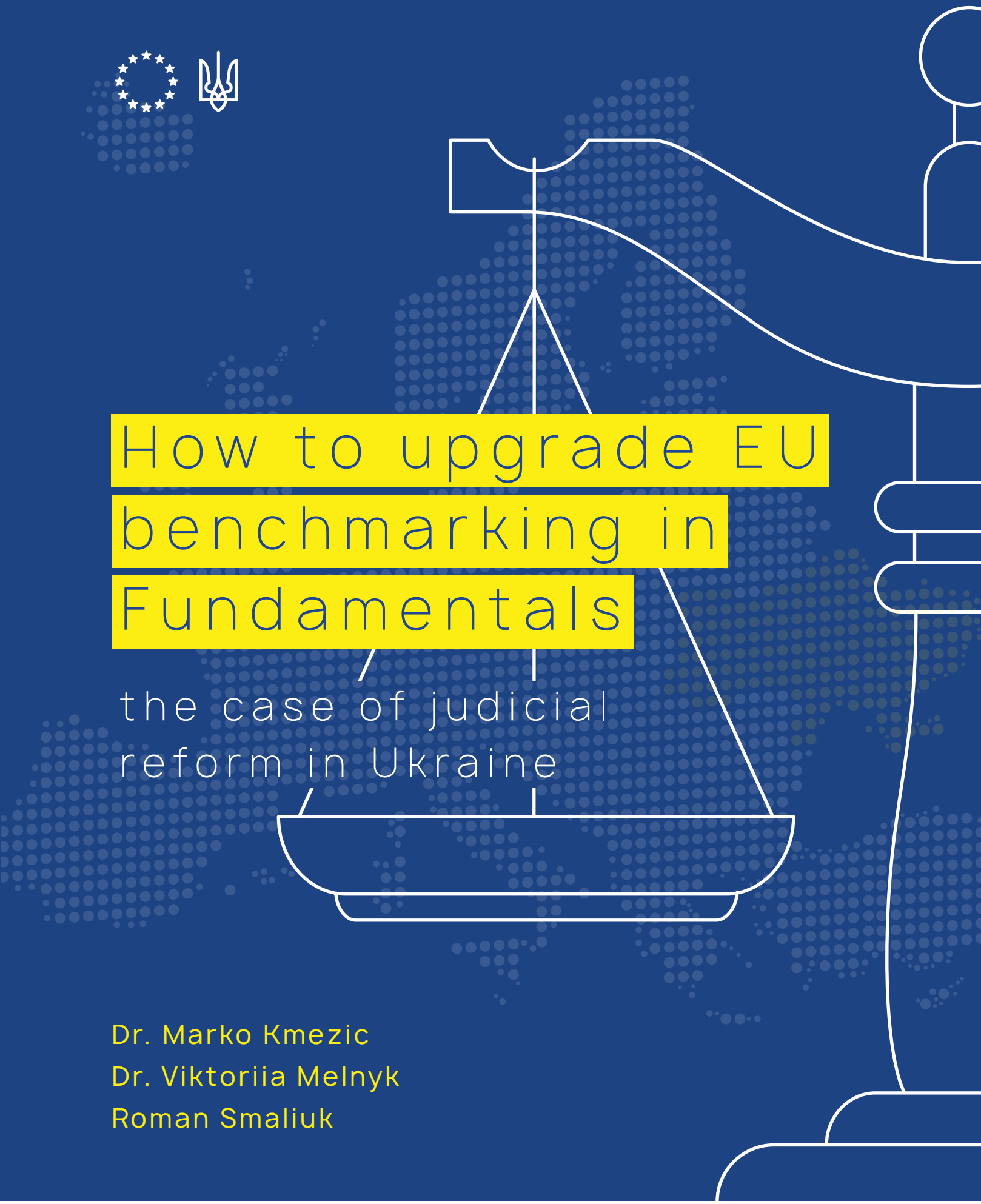

How to upgrade EU benchmarking in Fundamentals

the case of judicial reform in Ukraine

Dr. Marko Kmezic
Dr. Viktoriia Melnyk
Roman Smaliuk

KONRAD ADENAUER STIFTUNG
UCEP UKRAINIAN CENTRE FOR EUROPEAN POLICY
CPLR Centre of Policy and Legal Reform

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Authors:

Dr. Marko Kmezic

Lecturer and Senior Researcher at the Centre for Southeast European Studies at the University of Graz, Austria

Dr. Viktoriia Melnyk
Roman Smaliuk

Research fellows at the Centre of Policy and Legal Reform, Ukraine

Peer-review: **Nestor Barchuk**, International Relations Manager at DEJURE Foundatiion

The idea of the research was proposed by the team of Ukrainian Centre for European Policy (Kyiv, Ukraine) research fellows:

Dr. Liubov Akulenko, Dmytro Naumenko, Snizhana Diachenko, Dr. Oleksandra Bulana

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Contents

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List of Abbreviations

EU	European Union
TEU	Treaty on European Union
HCJ	High Council of Justice
HQCJ	High Qualification Commission of Judges
NGOs	Non-governmental organisations
PIC	Public Integrity Council
KDAC	Kyiv District Administrative Court
CEPEJ	European Commission for the Efficiency of Justice
UJITS	Unified Judicial Information Telecommunications System
CPD	Continuing professional development
NMT	National Multi-subject Test
MCT	Master's Comprehensive Test
USQE	Unified State Qualifying Examination
ECJ	European Court of Justice
EIT	External Independent Testing
UPEE	Unified Professional Entrance Exam
HEIs	Higher education institutions

Abstract

Russia's unprovoked invasion of Ukraine in February 2022 has prompted an evolution in the relationship between the EU and Ukraine. A few days after the invasion, Ukraine applied for candidate country status, and the EU, in turn, demonstrated a change in its approach to enlargement and Ukraine's future in its membership. At this stage, there was a shift away from the scepticism that had traditionally been inherent in some Member States, and eight Member States supporting an accelerated accession process. However, at the same time, EU policy makers emphasised that the accession process should be based on the fulfilment of conditions and was expected to be complex and lengthy. Already in December 2023, the European Commission launched accession negotiations with Ukraine, signalling progress but also emphasising the strict conditions, especially on the rule of law, under which accession negotiations would take place.

One of the main conditions for assessing a country's readiness for accession is the rule of law, as defined in Article 2 of the Treaty on European Union. Applicants for membership, including Ukraine, must demonstrate compliance with EU values and standards, especially in the area of the judiciary. The current enlargement methodology is well-structured, but its practical application to the Western Balkans has demonstrated the need for improvement in order to increase efficiency for both sides. Unlike the economic component of the accession process, which can be quantified, the assessment of the rule of law is very difficult due to its nature - this part is mostly regulated through state discretion and based on international standards. The Copenhagen criteria, established in the early 1990s, serve as a basis for EU accession, emphasising stable democratic institutions, a functioning market economy, and compliance with the acquis communautaire.

This study proposes to use the example of judicial reform to find a balance of flexibility and clarity to improve the **effectiveness** of Ukraine's accession negotiations.

This paper proposes a methodological approach to address these challenges, focusing on a normative and empirical analysis of the judiciary in Ukraine and offering policy recommendations that are appropriate for different stages of the negotiation process.

The paper includes a normative and empirical analysis of the state of judicial reform in Ukraine in order to understand its problems and needs in the context of European integration. The research methodology involves studying both legislation and its practical application in four components. The study results in the formulation of policy recommendations based on the identified gaps.

> The analysis demonstrates both the achievements of the reform and the challenges and areas where **comprehensive solutions** should be developed.

The key components of the **independence** include the role of judicial (self-)governance bodies, such as the HCJ and the HQCJ, which play an important role in judicial independence and can be both positive and negative actors in the process of ensuring judicial independence. In addition, the chapter highlights problems in judicial career processes, resource allocation and access to human resources that affect access to justice.

The paper delves deeply into the critical issue of judicial **accountability** in the context of the unfinished judicial reform in Ukraine. It highlights a strategic mistake made during the reform that skewed the balance between judicial independence and accountability in favour of the former. This imbalance, together with the challenges in cleaning up the judiciary and fighting corruption, has necessitated a complete overhaul of judicial governance bodies such as the HCJ and the HQCJ, with the involvement of independent international experts. The chapter further explores the key mechanisms aimed at ensuring judicial accountability, including judicial qualification assessment and disciplinary liability. It emphasises the need for transparency in the justice system, detailing various measures aimed at increasing openness and public trust. However, it recognizes that there are ongoing challenges and that further legislative improvements are needed to enshrine transparency guarantees.

The analysis also provides an overview of the **efficiency** of the judicial system in Ukraine, focusing on the network of courts, quantitative indicators of judicial efficiency, and the availability of information and communication technologies (ICT) for courts. It describes the structure of the judicial system, highlighting the challenges faced in the reforms launched in 2016, especially in improving the network of local and appellate courts. Despite efforts to increase efficiency, such as the implementation of the UJITS, significant obstacles remain, including delays in the system's implementation and insufficient resources. The chapter also discusses quantitative indicators of judicial productivity, pointing to a decline in efficiency in recent years, which is partly attributed to insufficient staffing. Furthermore, it emphasises the need for further development of ICT to increase digitalization and optimization of court processes, which will ultimately improve access to justice for citizens.

The **effectiveness** of the judicial system in Ukraine is assessed through several key mechanisms, including the selection and training of judges, as well as the evaluation of the quality of court decisions. The selection process includes examinations to assess the professional competence of candidates, including anonymous testing and practical tasks. However, there are questions about the transparency and consistency of these assessments, as well as the effectiveness of the testing methods. Training for judicial candidates and systematic professional development for judges is a separate issue. One of the shortcomings reflected in the study is the lack of systemic regulation for assessing the quality of judicial decisions. Recommendations include the introduction of EU methodologies for assessing judicial systems and improving the collection and analysis of statistical data for reforms and decision-making.

It also evaluates higher legal education as part of the **effectiveness**. Higher legal education in Ukraine plays an important role in training qualified professionals for the judiciary, legislative and executive branches. The introduction of selection systems since 2008 has helped to reduce corruption in admission. However, there are problematic aspects related to the structure of institutions providing legal education.

As a result of the study, the authors form two components of important conclusions. The first one is directly related to judicial reform - it highlights the country's progress since the Revolution of Dignity in 2014 towards building a justice system that meets European standards and identifies challenges that need to be addressed as part of a comprehensive judicial reform. The second set of conclusions concerns the issue of improving the effectiveness of the negotiation process and applying a problem-oriented approach to the development of recommendations. The authors suggest avoiding overgeneralization and striking a balance between clarity and flexibility. According to the research, such an approach will allow for progress in both reforms and Ukraine's accession. In turn, a detailed matrix for monitoring progress can serve as a tool for both monitoring and adjusting tasks based on the results of each stage of the negotiation process. The **clarity** of the tasks will allow all stakeholders to determine and monitor the status of political and legal reforms, and **flexibility** will allow them to take prompt action to improve ineffective or partially effective solutions. Such an approach may be a logical response to the complex nature of the reforms included in the fundamentals cluster.

1 Introduction

On 28 February 2022, only five days after the start of Russia's unprovoked and unjustified military invasion of the country, Ukraine applied for membership of the EU. Facing the unprecedented 'return' of the global realpolitik manifested in Russian aggression, which continues to undermine European and global security and stability, presidents of eight EU Member States called for an accelerated accession process for Ukraine. Indeed, Russia's war against Ukraine has completely changed the EU's narrative about the costs and benefits of admitting new states to the Union, hence, securing Ukraine's place in the EU has become a top political priority even in traditionally enlargement-sceptical countries, such as the Netherlands and France.

Nevertheless, European Commission president Ursula von der Leyen was quick to react to the developing enlargement enthusiasm, stating that despite her personal support of Ukraine's accession, entry wouldn't be immediate as the process would take time (Euronews 2022). Indeed, becoming a member of the EU is a complex procedure which does not happen overnight, and is based on the implementation of EU values, rules and regulations across integrated EU policy areas. Thus, it came as no surprise that simultaneously with the recommendation to approve the status of the candidate for Ukraine in June 2022, the European Commission has put forward a seven-point list of initial rule-of-law-related demands for Kyiv to implement reforms. Almost a year and a half later, the European Commission decided to open up accession negotiations with Ukraine in December 2023, which marked an initial step forward in the country's European integration ambitions. Yet, it is equally expected that opening of membership talks will be coupled with additional conditions related to the rule of law, which is subject to negotiation under Chapters 23 and 24 pertaining to 'Judiciary and Fundamental Rights' and 'Justice, Freedom and Security,' respectively.

> This policy paper focuses on the **normative and empirical analysis** of the effective functioning of the judiciary in Ukraine pending the opening up of the country's membership negotiations.

The goal of this text is not only to provide a legal and empirical picture of the present day situation of Ukrainian judicial apparatus, but also to draw a blueprint for necessary reforms bearing

in mind political conditions set by the EU in light of the country's EU accession. This paper will also address challenges with formulating benchmarks in the Fundamentals cluster by the Commission that Western Balkans countries have faced. In particular, the study proposes a new approach to combine the EU's flexibility in formulation with the need for clarity of requirements specific to the national context of Ukraine.

The results of the research presented in this paper are based upon a combination of two methodological strands:

1. *A normative approach, which involves a content-analysis of the legal rules and administrative regulations adopted and implemented as a basis upon which to raise the standards of Ukraine's judicial sector in order to meet the EU benchmarks. For the purposes of this paper, the existing legislative framework will be understood as a prescriptive set of statements whose internal consistency will be scrutinized against the external demands established for the aspiring Member States within the EU accession process.*

2. *Problem-oriented empirical approach, which will focus on the practical aspects of enforcing the rule of law, analysing progress, and signalling out gaps and potential malfunctions between legislation and implementation of reforms.*

The Importance of the Rule of Law

2

The rule of law is one of the founding values of the European Union and reflects the EU Member States' shared identity and common constitutional traditions. This has been enshrined in Article 2 of the TEU which lists 'respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities' as the shared values in which the Union is rooted. As the rule of law defines the collective identity of the whole organisation, it essentially determines the EU's action in the domestic and international realms as well as conditions for EU membership. In particular, a functioning rule of law is an important element of the EU's enlargement policy, as its implementation creates a key condition for aspiring members to join the Union (Article 49(1) EU).

The EU's comprehensive strategy to promote an effective rule of law among EU membership candidate countries consists of the progressive development of contractual relations and institutional ties based on an enhanced political dialogue and monitoring process, supported by financial assistance and technical aid. At the core of these processes is the demand from aspiring Member States to comply with a set of political conditions. In a nutshell, the EU relies on the obviously asymmetric relationship with candidate countries to set the rules that shape their public policymaking through the process of accession. The EU rewards governments that comply with their demands and, alternatively, withholds the reward from those that do not.

The most powerful conditionality tool with any candidate country is 'gate keeping' during the different phases of the EU accession process, particularly when it comes to achieving candidate status and starting accession negotiations. The biggest reward—full EU membership—is often distant, which makes the success of the rule of law promotion via conditionality largely dependent on the use of intermediary rewards. Examples include market access, enhanced financial aid and visa liberalisation. Moreover, the candidates must be assured that they will receive the promised rewards after complying with the EU demands, but, at the same time, they need to know that the reward will follow only after fully completing the compliance process. Thus, the credibility of conditionality depends on a reliable, merit-based application of the conditionality by the EU.

However, the accession process in recent years has not been transformative enough in regard to the rule of law. The Western Balkan present and potential

candidate countries – Albania, Bosnia and Herzegovina, Kosovo, Montenegro, North Macedonia and Serbia – have made little progress when it comes to the rule of law. The enduring problems are not new and have been noted over the years, including in the latest Freedom House Freedom in the World report that observes an absence of the rule of law and an increase in patronage networks and clientelism that threaten democratic institutions in the region. In the same vein, the European Commission departed from its usual technocratic account of the rule of law in its Communication on a credible enlargement perspective for the Western Balkans (2018) and declared that the countries show 'clear elements of state capture, including links with organised crime and corruption at all levels of government and administration, as well as a strong entanglement of public and private interests'[1]. The EU has tried to answer these challenges by making respect for the rule of law one of its 'fundamental' conditions for EU enlargement.

In the meantime, not only EU aspirants but also several EU Member States have been confronted with grave threats to the functioning of the rule of law. The systematic and deliberate erosion of the rule of law in Hungary under Viktor Orbán's government is already well-known and has been emulated by other EU Member States, particularly Poland.

Despite the far-reaching reforms enacted in preparation for EU membership, Bulgaria and Romania are still subject to a specific post-accession monitoring system in the sphere of rule of law. Moreover, not only 'new' Member States but also long-established EU countries are struggling with rule of law implementation, such as Italy with its problems in the sphere of media pluralism or Greece with poor governance as revealed by the euro crisis. The rule of law has also been openly challenged by the rise of populist and far right parties across Europe which openly reject the rule of law.

Thus, the EU is currently confronted with a double challenge of ensuring the rule of law within the Union and promoting it in future Member States. Acknowledging these dangers, European Commission President Ursula von der Leyen declared in her political guidelines that 'threats to the rule of law challenge the legal, political and economic basis of how our Union works'[2], and hence will be crucial for Ukrainian EU membership bid.

1) European Commission. 2018. A credible enlargement perspective for and enhanced EU engagement with the Western Balkans: COM(2018) 65 final, Strasbourg, 6 February.

2) von der Leyen, Ursula, 'A Union that strives for more: My agenda for Europe – Political guidelines for the next European Commission, 2019–2014', European Commission, July 16 2019. Available at: https://commission.europa.eu/system/files/2020-04/political-guidelines-next-commission_en_0.pdf

Rule of Law and Enlargement

3

Despite the fact that academic scholarship on democratic policies agrees on the rule of law as a legitimising principle for the exercise of state authority, there is no uniform 'European standard' for institution-building or monitoring activities by the EU in this area. An additional predicament arises from the difficulty of quantitatively verifying the achieved level of compliance in regard to the political accession criteria. In contrast to economic reform, which is easily measured against the benchmarks of inflation rate, gross domestic product, etc., little can be established with great accuracy in the field of the rule of law due to the very nature of this concept. While the EU promotes the rule of law during the accession process through various EU Justice and Home Affairs (JHA) policies, ranging from asylum and border control to the fight against corruption and organised crime, the Commission still tends to translate the rule of law into an institutional checklist with the primary emphasis on the judiciary.

The enforcement instrument assessing the respect for the rule of law in candidate countries is enshrined in Article 49 TEU. It reads that only European states that respect the EU values referred to in Article 2 TEU and are committed to promoting them may apply to become a member of the Union.

Against the background of a deeper relationship between the EU and the Central and Eastern European countries in the early 1990s, the well-known Copenhagen criteria were established followed by the Madrid Council criteria-linked accession and membership guidelines focusing on a set of economic and political conditions.

The Copenhagen criteria remain the blueprint for EU accession. The criteria require candidates to have stable democratic institutions, a functioning market economy and the capacity to adopt and implement the ever-growing body of the acquis communautaire. Therefore, the Copenhagen criteria remain an imperfect starting point towards grasping the essence of the EU's rule of law criteria. In fact, these are not elaborated in a single working document, but rather in the bulk of Copenhagen-related documents pertaining to the rule of law conditionality that can be divided into two groups:

- *The first group includes the documents pertaining to a particular candidate country, such as the Commission's Opinions on the Application for Membership of the EU, Country Reports on the candidates' progress towards accession, Accession Partnerships, Roadmaps, etc.*

- *The second group comprises documents of more general application, including the Commission's Agenda 2000, yearly Composite Papers and Strategy Papers, Comprehensive Monitoring Reports, etc.*

Furthermore, both groups of documents frequently reference credentials created by sources falling beyond the scope of EU law, thus effectively including international organisations such as the OSCE and the Council of Europe that indirectly contribute to the assessment of candidate countries' compliance, particularly in regard to the political criteria of democracy and the rule of law. By offering a variety of influence tools, the Copenhagen-related documents in fact provide the Commission with a complex system of reform promotion in that they allow it to make practical use of the conditionality principle for the benefit of both the European Union and candidate countries.

The evolution of the EU's political conditionality was particularly evident in 2011 with the introduction of 'good governance' criteria, the maintenance of the rule of law, an independent judiciary, and efficient public administration. The new EU approach to negotiating Chapters 23 and 24 that deal with 'Judiciary and Fundamental Rights' and 'Justice, Freedom and Security', introduced for the first time in the negotiating process on the accession of Croatia, is now fully integrated into the EU's negotiations with Montenegro, Serbia, North Macedonia and Albania and will most likely apply to all future accession talks in the region.

For the Western Balkan countries, this approach has meant that negotiations on the most difficult aspect—rule of law reforms—came first in order to allow enough time to build solid track records of implementation before opening other negotiating chapters. Furthermore, the 'new approach' envisages an interim benchmarking system that would assess the country's preparedness to open and close a negotiating chapter. This involves the introduction of safeguard measures, most notably the overall balance clause intended to stop negotiations on all other chapters if progress on the most difficult chapters, namely 'Judiciary and Fundamental Rights' and 'Justice, Freedom and Security', begins to lag behind. Hence, chapters 23 and 24 represent the main instrument of the European Union's strategy towards the Western Balkans, while the benchmarking system linked to these chapters aims to help a candidate country meet the EU requirements through specific tasks facilitating the measurement and evaluation of progress. These tasks are translated into:

1. *opening benchmarks related to the adoption of comprehensive Action Plans for chapters 23 and 24, whereby the candidate country proposes measures that can improve the situation in relevant programme areas;*

2. *interim benchmarks on requirements that a candidate country must meet to advance in the negotiation process, that is, the adoption of relevant legislation, the set-up or strengthening of rule-of-law related institutions, training activity or international cooperation; and*

3 *closing benchmarks based on a solid track record of reform implementation in fields ranging from the prevention and suppression of corruption to the handling of war crimes, the protection of fundamental rights and the fight against organised crime.*

Furthermore, the European Commission introduced the so-called imbalance clause in the negotiations in 2012, which means that if an accession country is progressing within other chapters, but not in the rule of law, negotiations on all chapters can be stopped. In practice, the interim benchmarks are very broad and represent a long-term goal, which makes their assessment rather superficial. In addition, the benchmarks are not tailored to the specific circumstances of the countries they target, as seen from the example of the identical benchmarks developed for the two accession frontrunners — Serbia and Montenegro.

4 Methodology

This paper deliberately chooses not to deal with the effect of the EU policies in the sector covered by Chapter 24, focusing instead on the normative and empirical analysis of the judiciary in Ukraine. As it has been observed above with regard to EU monitoring activities, the performance of the judicial system remains difficult to measure mostly due to the lack of coherent European standards. For this reason, this paper borrows a comprehensive set of judicial **independence**, accountability, efficiency and effectiveness 'benchmarks' already elaborated on behalf of EuroAid by Marko, Palermo and Woelk (2004) – namely, political, economic challenges to judicial independence stemming from the establishment of such institutions as High Judicial Council whose members are appointed by the parliament and/or the executive, the low level of salaries in the judiciary, which raises challenges to the notion of 'fair trail', etc. This text primarily focuses on its formal manifestations – such as the key organizational issues of the judiciary, namely the selection, promotion and dismissal of judges. Secondly, independence must be balanced with **accountability** against the danger of 'gouvernement des juges'. Besides 'hard accountability', such as mechanisms of selection, promotion and disciplinary control, judicial actors are also subject to 'soft' mechanisms of accountability comprised of social accountability exercised by civil society organisations as well as professional accountability implemented by peer judges. Thirdly, independence and accountability are of no effect if judges and prosecutors are not efficient and effective. **Efficiency** benchmarks provide normative and empirical analysis of the indicators including the court structure with particular focus on specialized institutions of justice, length of court procedures, the clearance rate, the number of pending cases, and the availability of information and communication technology tools for courts. Finally, **effectiveness** is understood as the ability of a judge to make sound judgment, to be equipped with professional erudition, which becomes even more important given that in the foreseeable future judges will need to take into account not only the acquis communitaire, but also texts of European directives, their reasoning and rationale, jurisprudence of the European Court of Justice, as well as the case law of Member States. In an attempt to address these issues, the paper will examine the possibilities and variations of initial and continuous training of judges as well as the work of the judicial academy.

The preparation of this study should be divided into two full-fledged stages: the normative and empirical analysis and the development of policy recommendations.

The normative and empirical analysis is aimed at analysing the state of the judicial system reform by key components, as well as identifying gaps in legal regulation, law enforcement practice, and other problematic aspects that need to be addressed. The next step is to develop recommendations on how to address these gaps and problems in order to reform the judicial system and fulfil Ukraine's obligations in the context of European integration.

Also, at the stage of developing policy recommendations, the authors of the study propose to divide them into three categories that correspond to different stages of the negotiation process: **opening, interim, and closing.**

Normative and Empirical Analysis

5

In this chapter, the authors aim to analyse both legislation and practical application in order to form a broad picture of the state of the judicial system in Ukraine. According to the research methodology, the analysis is a tool for identifying gaps and formulating policy recommendations to address them. The conclusions for each component will form the basis for the development of policy recommendations.

This chapter, provides an **in-depth understanding** of the state of judicial reform in Ukraine (including European Commission assessment) and helps to form an understanding of the main challenges and needs for reform in the process of Ukraine's European integration and approximation of legislation to EU acquis.

The European Commission, in its Report dated 8 November 2023[1], indicated that Ukraine has "some level of preparation" in terms of the functioning of the judiciary, noting "good progress" with the implementation of the 2021 reform of the judicial governance bodies. That is, the preparedness of the Ukrainian judiciary for European integration was rated below average, at the same time acknowledging the good pace of judicial reform, which Ukraine continues to carry out despite the war.

The comprehensive judicial reform, which was launched in 2016 and relaunched in 2021, made it possible to resolve some problems of the judiciary and strengthen its independence and accountability, reducing the influence of political bodies on justice and expanding the powers of judicial governance bodies. At the same time, as a result of mistakes in the design of judicial reform, lack of political will, and problems with the integrity and independence of the institutions in charge of implementing legislative changes, Ukraine has failed to achieve most of the declared goals of the reform and complete individual projects. As a result, rather than subsiding, the relevance of judicial reform has increased significantly.

1) Unless otherwise specified, the paper cites the conclusions of the European Commission as described in the commission staff working document 'Ukraine 2023 Report' (08.11.2023 SWD(2023) 699 final).

INDEPENDENCE OF JUDICIARY

In 2016, justice-related amendments were introduced to the Constitution of Ukraine. Political bodies were almost completely deprived of the influence on the judicial system but retained the authority to participate in the formation of the HCJ. As a result of these changes the main role in the judicial system is now played by judicial authorities – the HCJ and the HQCJ, which assumed the key powers related to the judicial career advancement – i.e., the selection of judges, their assessment, transfer, bringing to disciplinary liability and dismissal. It is these bodies that make up the foundation of an independent, integral and effective judiciary in Ukraine. It is no coincidence that one of the seven recommendations that were provided by the European Commission in June 2022 as a condition for Ukraine's acquisition of the status of a candidate for EU membership concerned the completion of the reform of the HCJ and the HQCJ. The Commission indicated that the reform of the HCJ and the HQCJ: "have the potential not only to build an independent and accountable judiciary, but also to reduce the influence of vested interests who used the current judicial governance system to undermine the rule of law in Ukraine".

According to the European Commission's report: "The constitutional and legal framework guarantees the independence of the judiciary from the legislative and executive branches". Despite legal and institutional guarantees, there are still risks of unlawful interference in the activities of the judiciary, which requires further action.

Judicial (self-)governance bodies: guarantee of and main threat to judicial independence

One of the key guarantees of judicial independence in Ukraine is the activity of judicial (self-)governance bodies. At the same time, due to the scope of powers vested in these bodies, the inclusion of members lacking integrity and independence in these bodies might lead to their turning into the main threat to judicial independence.

The HCJ is a constitutional body of judicial government, whose powers include: nomination of judges; considering complaints against decisions to take disciplinary action against a judge or prosecutor; making a decision on the dismissal of a judge from office; consenting to the detention of judges or keeping them in custody; making a decision on the temporary suspension of judges; taking measures to ensure the independence of judges; and transfering judges from one court to another. In addition, the HCJ appoints the members of the HQCJ, the Head of the State Judicial Administration and his/her deputies, considers disciplinary complaints against judges, determines the number of judges in courts, provides mandatory advisory opinions on draft laws concerning the judiciary and the status of judges, participates in establishing the government spending on courts, bodies and institutions of the justice system. That is, the HCJ is the body designed to protect the institutional independence of the judiciary and the individual independence of judges.

The Council consists of twenty-one members, of which ten are elected

by the Congress of Judges of Ukraine from among judges or retired judges, and two are appointed (elected) by the President of Ukraine, the Verkhovna Rada of Ukraine, the Congress of Advocates of Ukraine, the All-Ukrainian Conference of Public Prosecutors, the Congress of Representatives of Law Schools and Law Academic Institutions each. The Chairman of the Supreme Court is a member of the HCJ ex officio. Thus, the majority of the Council members are representatives of the judiciary. The key problem about the activities of the HCJ, which existed till 2021, was the procedure for the formation of this body, which fails to provide for any mechanisms for independent vetting of future HCJ members, making it possible for those who nominate (elect) HCJ members to appoint persons loyal to them at their own discretion.

The gravity of the problems with the integrity of HCJ members was recognized by Ukraine even at the international level in its commitments to the International Monetary Fund (2020) and the European Union (2020). The Venice Commission in 2021 noted that a judicial reform that does not solve problems related to the functioning of the HCJ and the integrity of its members is doomed to failure.

In 2021, only by second attempt the launch of the HCJ reform was made, involving mandatory vetting of candidates for the Council by an independent Ethics Council. It was determined that the appointing (electing) actors can appoint only candidates recommended by the Ethics Council. For the transitional period, the Ethics Council included three representatives from the judiciary (delegated by the Council of Judges) and three international experts who have the decisive vote (in the future, their quota should be transferred to representatives of the bar, prosecutorial and academic communities). The Venice Commission generally approved of the proposed mechanism.

As of January 2024, the HCJ consists of 17 members, of which 14 were selected using the new mechanism with the participation of the Ethics Council. The introduction of a new stage of selection made it possible to somewhat improve the integrity and independence of HCJ members from the appointing actors, not necessarily guaranteeing it though. The final decision concerning the appointment is made by the actors provided for in the Constitution of Ukraine, which are not obliged to appoint candidates recommended by the Ethics Council or provide any reasons for rejecting the recommendations. The appointing actor may delay the consideration of the recommendation or even announcement of a competition for vacant positions[2]. The President of Ukraine[3] went as far as to ignore the recommendation of the Ethics Council and announce a new competition. The law does not provide any safeguards against such abuses, which effectively politicises the procedure

2) For example, bar self-government bodies have not announced a competition for two vacant positions of HCJ members to be filled by their quota since January 2022.

3) The remaining appointing entities are collegial bodies that cannot simply ignore the recommendation without putting it to a vote.

for the formation of the key body in the justice system. In addition, the procedure for the election (appointment) of HCJ members by collegial bodies – congresses of judges, lawyers, academics and a conference of prosecutors, where voting is performed by elected delegates rather than directly by members of the relevant professional community, – increases the risk of backroom arrangements, and, therefore, requires further improvement.

The composition and purpose of activity of the Ethics Council requires further improvement. The involvement of international experts in the selection of HCJ members has proved overall effective but has failed to ensure the appointment of the best candidates for the HCJ. According to experts, the Ethics Council chose to limit itself to trying to prevent candidates who clearly lack integrity from further participation in the competition rather than to help select the best candidates, which is manifested in the results of the competitions. Furthermore, the Ethics Council decided to halt the broadcast of interviews with HCJ candidates, keeping them closed for nearly two years. Consequently, the public was deprived of the opportunity to verify whether candidates with integrity issues underwent rigorous scrutiny by the Ethics Council and if those concerns were appropriately addressed during that prolonged period. In addition, given the existing need for cleaning up the judiciary and the low level of trust in the judiciary on the part of society, the direct involvement of representatives of the judiciary in the Ethics Council seems to be a questionable decision. Simultaneously, this remark does not advocate for the total and indefinite exclusion of judges from the selection process for judicial (self-)governance bodies. Rather, it emphasises the necessity to enhance the involvement of international experts while diminishing the influence of judges in the selection process until the system is cleansed of individuals of low integrity within the judiciary.

The term of office of the HCJ members is four years. The same person may not hold the position of a council member for two consecutive terms.

The law establishes guarantees of the independence of HCJ members from the appointing (electing) entities – a member of the Council may be dismissed due to improper performance of duties, allowing behaviour that undermines the authority of the judiciary, and on other grounds provided for in the law, by the appointing (electing) entity solely on the proposal of the HCJ itself. It should be noted that since the constitutional amendments of 2016, this exemption procedure has not been applied once.

The HQCJ is a body of judicial government, whose powers include conducting competitive selection of candidates for the position of judge and conducting a qualification assessment of judges.

In 2021, the quota principle for the formation of the HQCJ, which gave rise to the same problems that exist when appointing HCJ members, was replaced with competitive selection. The selection is carried out by a specially created Selection Commission, which for the duration of the transitional period includes three representatives from the judiciary (delegated by the Council of Judges) and three international experts who have the right to cast a

decisive vote (in the future, their quota should be filled by representatives of the bar, prosecutorial and academic communities). Based on the results of the competition, the Commission recommends the HCJ at least two candidates for one vacant position of the HQCJ member.

The HQCJ consists of sixteen members, eight of whom are appointed from among judges or retired judges. The new HQCJ was formed in June 2023. The NGOs that monitored the competition rate its results as mostly positive or neutral[4].

Even though the members of the HQCJ are appointed by the HCJ, the law establishes some guarantees of the Commission's independence. In particular, a member of the HQCJ may be dismissed for violations only on the initiative of the HQCJ itself. In addition, the Commission independently approves its own rules and regulations, which are necessary for the selection or evaluation of judges.

The mandate of international experts as part of the HQCJ Selection Commission is to come to an end in June 2025 (for comparison, international experts will work in the Ethics Council until November 2027). That is, the next HQCJ will most likely be formed by the Selection Commission consisting only of judges, lawyers, prosecutors and academics. There are fears that within such a short period it will be impossible to establish standards of integrity and independence in the activities of the HQCJ.

Considering the mixed efficacy observed in the competitions for the HCJ and HQCJ, primarily attributed to concerns surrounding the integrity of Ukrainian judges within the selection commissions, it is prudent to increase the utilisation of the Public Council of International Experts (PCIE) model in future endeavors. The PCIE, established for the High Anti-Corruption Court selection, comprised six esteemed international experts who executed a commendable selection process, ensuring the appointment of judges without significant integrity concerns. This recommendation particularly applies to forthcoming competitions for the Supreme Court and the High Administrative Court.

To resolve issues of internal activity of the judicial branch in Ukraine, there is judicial self-government, a system consisting of an assembly of judges of the relevant court, the Council of Judges and the Congress of Judges. Among other things, the assembly of judges determines the specialization of judges in considering specific categories of cases, elects the president of the court and his/her deputies, as well as investigating judges, that is, in fact, settles internal organizational issues of the court. Despite the fact that the president of the court has only administrative powers and cannot interfere in any way or influence the consideration of cases by judges, the practice of corrupt influence on judges through the presidents of the relevant courts has existed in Ukraine for a long time and continues to exist.

4) DEJURE Foundation, 15.03.2023 // Automaidan, 15.03.2023 // Anti-Corruption Action Centre, 15.03.2023

The Congress of Judges is the highest body of judicial self-government, which, among other things, appoints judges of the Constitutional Court, members of the HCJ, elects the Council of Judges and can make proposals to public authorities and relevant officials concerning the resolution of issues related to the activities of courts.

The Council of Judges is the executive body of the Congress of Judges. In recent years, the Council of Judges has played a rather destructive role in the implementation of judicial reform. For example, the Council arbitrarily delayed the delegation of its members to the Ethics Council, thereby blocking the launch of HCJ clean-up. According to NGO's experts, the Council of Judges remains an instrument of pressure on judges aimed at preserving the mutual cover-up in the judicial system, which has even led to a legislative initiative to eliminate it.

Legal status of judges

One of the important components of ensuring the institutional independence of the judiciary is the guarantees of personal independence of judges. The law establishes a number of guarantees designed to ensure both the internal and external independence of judges. As noted above, any issues related to the career of a judge fall within the competence of judicial governance bodies (HCJ and HQCJ), which should serve as a safeguard against the dependence of judges on political entities.

After 2016, Ukraine dropped the first term-limited system of appointment of judges[5], constitutionally establishing the tenure for an indefinite period for judges. The judge is also guaranteed permanency of position, which includes both the guarantee of tenure until the age of sixty-five (except in cases of dismissal or removal), and the impossibility of transfer without the judge's consent, except in the event of reorganization, liquidation or termination of the court or by way of disciplinary action[6]. Without consent, during a state of emergency or martial law and subject to a change in the territorial jurisdiction of court cases considered in the relevant court, a judge of such court may be temporarily seconded to another court to which the territorial jurisdiction of such court cases is assigned.

The Constitution of Ukraine also establishes guarantees of immunity for judges, in particular, without the consent of the HCJ, a judge may not be detained or held in custody or under arrest before being convicted by a court, except for the detention of a judge during or immediately after committing a grave or especially grave crime. In addition, a judge cannot be held accountable for a court decision they made, except for cases when a crime or disciplinary

5) Until 2016, judges were appointed for the first time by the Decree of the President of Ukraine for a period of five years, and after the expiration of this period, he/she could be appointed indefinitely by the Verkhovna Rada of Ukraine.

6) As a disciplinary sanction, such secondment may only be made to a lower tier court.

offense is committed. The law provides for a temporary suspension of a judge in connection with criminal prosecution, which is carried out by the decision of the HCJ on the basis of a petition from the Prosecutor General or his/her deputy.

The judge must notify the HCJ and the Prosecutor General within five days after he/she became aware of such interference with his activities related to the administration of justice. Failure to submit such a notice serves as grounds for disciplinary action against the judge. Despite the fact that more than seven years have passed since the introduction of this tool, its effectiveness remains low. In the vast majority of cases, the HCJ either decides that there are no grounds for taking measures to ensure the independence of judges or, if it recognizes the fact of interference, appeals to the prosecutor's office to provide information on the state of pre-trial investigation of criminal proceedings against a judge[7]. Such monitoring-focused measures can hardly serve as an effective way to respond to cases of interference with the independence of judges.

Another important criterion for judicial independence is a separate procedure for financing and organizational support for the activities of courts. The amount of judicial remuneration and the procedure for its calculation (including fringe benefits) is regulated exclusively by the Law of Ukraine "On the Judiciary and the Status of Judges" and cannot be determined by other regulatory legal acts.

Any attempts to reduce or limit the amount of judicial remuneration (for example, in 2020 due to covid restrictions), as a rule, resulted in the recognition of such changes to be unconstitutional by the Constitutional Court of Ukraine, which considers the restriction of judicial remuneration an encroachment on the guarantees of the independence of judges.

Thus, sufficient guarantees of judicial independence are established at the regulatory level, but the problem of ineffectiveness of existing mechanisms to ensure their independence remains serious.

Judicial career

In Ukraine, the selection of judges of all levels is carried out only on a competitive basis. The law provides for different procedures for the selection of judges to local courts, as well as appellate courts, higher specialized courts and the Supreme Court. In both cases, the HQCJ is responsible for organizing and conducting the competition.

Regarding the selection of judges of local courts, the European Commission noted that the existing procedure needs to be improved and optimized, given its duration and complexity. Commission recommended that Ukraine should relaunch the selection of ordinary judges on the basis of an improved legal framework, including clear integrity and professionalism criteria and the strong role of the PIC.

7) For example, in 2021, out of 96 decisions on measures to ensure the independence of judges and the authority of justice, 71 provided for such an appeal.

Currently, the necessary regulations have been partially adopted. In December 2023, the Parliament adopted Law No 3511-IX, which provides for the optimization of the procedure for selecting judges to local courts, in particular, by reducing the number of examinations from two to one, conducting special training after the appointment of a person to the position of judge, as well as conducting an interview of the HQCJ with the winners of the competition, during which the candidate's compliance with the criteria of integrity and professional ethics can be examined. At the same time, the involvement of the PIC in checking the integrity of candidates for the position of judge is not stipulated, which necessitates further legislative amendments to fully implement the recommendations of the European Commission.

As for the selection of judges of appellate courts, higher specialized courts and the Supreme Court, it takes place according to the qualification assessment procedure, and the PIC and the Public Council of International Experts (only regarding the selection of judges of the High Anti-Corruption Court) are involved in the verification of the candidates' integrity.

The qualification assessment includes conducting a qualifying exam and interviewing candidates. Its results largely depend on the professionalism, independence and integrity of the HQCJ members, who have wide discretion in assessing candidates. The two competitions to the Supreme Court organized by the previous HQCJ panel allowed ample opportunities for manipulation with their results[8], and the panel members often ignored the PIC's conclusions regarding the lack of integrity by the participants in the competition and overcame 62% of such conclusions, which produced doubts concerning the integrity of a quarter of the appointed candidates. Concerning another roughly 50% of the appointed judges, the PIC provided information that could indicate low integrity, yet this was disregarded by the HQCJ. Even the European Commission draws attention to the fact that the HQCJ should refine the judicial selection and qualification evaluation rules, including by developing and publishing clear integrity assessment criteria and a scoring methodology.

In both cases, based on the results of the competitive selection, the HQCJ makes recommendations to the HCJ concerning the appointment of the winners of the competition to the relevant positions. The HCJ considers such recommendations and, if there is no doubt about the candidate's compliance with the criterion of integrity or professional ethics or other consideration that may adversely affect public confidence in the judiciary or violation of the procedure for appointing a judge established by law, submits a proposal to the President of Ukraine to appoint the person to the post. The President of Ukraine makes appointments solely on the basis and within the framework of the proposal of the HCJ, without vetting the recommended candidates. The President of Ukraine should issue a decree on the

8) R. Kuybida, B. Malyshev, T. Shepel, R. Marusenko Establishment of the new Supreme Court: key lessons(January 2018) // R. Smaliuk, M. Sereda, R. Kuybida The Second Selection of Judges to the New Supreme Court: Old and New Problems

appointment of a person to the position of judge within thirty days from the date of receipt of the relevant proposal from the HCJ. In practice, this deadline has been repeatedly violated. However, the law does not provide for any alternative mechanisms if the President of Ukraine violates this deadline. This problem cannot be solved without amending the Constitution of Ukraine.

The further course of the judicial career depends entirely on the HQCJ and the HCJ. The law does not provide for the possibility of transfer of judges to a higher-level or the same tier court outside competitive procedures (with certain exceptions). Dismissal of a judge is within the exclusive authority of the HCJ, and an exhaustive list of grounds for dismissal is specified in the Constitution of Ukraine.

Judicial resources

An important guarantee of the independence of the judiciary is the availability of sufficient resources to ensure smooth operation. To ensure organizational and financial support for the activities of the judiciary in Ukraine, there is the State Judicial Administration, which is accountable to the HCJ.

Despite the fact that the HCJ is involved in allocating public funds for the maintenance of courts, bodies and institutions of the justice system, the amount of budget expenditures does not cover the needs of the judicial system. According to the State Judicial Administration, in 2022, funding for courts and bodies in the justice system covered only 71% of the needed amount, and in March-April it was reduced by 11%. At the same time, 90% of budget allocations for courts are salaries. Before the full-scale invasion, the situation was not much better and the expenditures from the state budget did not cover all the needs of the judicial system[9].

The shortage of funding is particularly acute when it comes to the remuneration of court staff, whose average salary in 2022 was about UAH 14K (≈ EUR 400), while the average amount of judge's remuneration was more than ten times higher – UAH 152.5K (≈ EUR 4.5K).

According to experts' estimates, in 2020, only EUR 13 per capita was spent on the judicial system in Ukraine, which is more than seven times lower than the average of the EU countries. At the same time, the share of court costs as a percentage of GDP in Ukraine, on the contrary, was one of the highest among the EU states and amounted to 0.42%.

At the same time, the problem of financing the judicial system does not come down only to the adequacy of budget allocations, it also has to do with the efficiency and transparency of the distribution and spending of allocated funds. For example, the financial audit of the State Judicial Administration in 2021 revealed a multimillion-dollar inefficient use of budget funds, and

9) According to the State Judicial Administration, in 2021, the amount of funding for the judicial system covered 42.5% of the needed costs (the lowest since 2017). In 2017, this figure was 79.1%, in 2018 – 77.9%, in 2019 – 72.4%, and in 2020 – 64.9%).

the anti-corruption strategy for 2021–2025 stipulates the need to introduce regulations for transparent planning and allocation of budget resources in the judicial system.

As for human resources, as the European Commission notes, at the end of 2022, there were only 11 judges per 100,000 inhabitants in Ukraine, while the average European figure is twice as high (22.2 judges). Currently, there are vacant positions of more than 2.2 thousand judges (out of 6.6 thousand), while in appellate courts the number of vacant positions generally exceeds the number of sitting judges.

The above indicates that the Ukrainian judicial system is experiencing an acute shortage of both financial and human resources, which impairs access to justice.

ACCOUNTABILITY OF JUDICIARY

Accountability of the judiciary is an integral part of building a fair, effective and independent judiciary with integrity. When modelling the judicial reform of 2016, a strategic mistake was made – the unreformed judicial branch was endowed with broad guarantees of independence and the judicial governance bodies, which were mostly composed of judges, were made in charge of renewing (cleaning up and recruiting new judges) the judiciary. This created a significant imbalance between the accountability and independence of judges, in favour of the latter, and led to the complete failure to clean up the judiciary of crooked judges and to further corporatization of the judiciary.

Granting broad independence to the judiciary was strongly advocated by Western partners citing Council of Europe standards on judicial independence, which advocate for judges to be elected by their peers. This implies that applying identical standards to all countries aspiring to join the EU can sometimes be impractical. This lesson holds significance for the future of Ukrainian European integration, as well as for other countries.

As a result, a few years after the start of the reform, there arose an urgent need for a complete reboot of the judicial governance bodies – the HCJ and the HQCJ with the involvement of independent international experts.

Qualification assessment of judges

One of the key measures designed to clean up the judiciary of unprofessional or unscrupulous judges was the qualification assessment, which was entrusted to the HQCJ and which almost all judges appointed before the constitutional amendments of 2016 had to pass.

As part of the assessment, the level of competence and integrity of the judge, as well as his compliance with the requirements of professional ethics, is checked. To do this, judges pass a qualifying exam, undergo psychological testing and an interview with members of the HQCJ. The assessment examines not only the appropriateness of performance of duties by judges and their compliance with ethical standards, but also their property status and compliance with the requirements of anti-corruption legislation. Failure to confirm the judge's ability to administer justice based on the results of the qualification assessment serves as grounds for their dismissal from office.

The law provides for the involvement of the public in the qualification assessment of judges through the PIC, which consists of twenty members elected by the assembly of representatives of non-governmental organizations for a period of two years. In the event that the PIC finds out about circumstances that may indicate that the judge does not meet the criterion of integrity or professional ethics, it may submit the relevant conclusion. The PIC's conclusion can be "overcome" by the votes of 2/3 of the appointed members of the HQCJ, but not less than nine (before law No 3511-IX (December 2023) - by votes of at least eleven members of the HQCJ out of sixteen).

As of the time of early termination of the powers of the previous HQCJ (November 2019), the assessment was not completed for more than 2 thousand judges. The key problem here is not the number of judges for whom it has not yet been completed, but primarily the number of judges who have successfully passed it – according to the results of the assessment, less than 1% of judges were dismissed. The assessment procedure organized by the HQCJ contained numerous flaws, which, coupled with the lack of clear criteria and evaluation methodology, allowed the members of the HQCJ to manipulate its results. For example, more than 80% of the points that judges received as part of the assessment had a generally unclear origin and completely depended on the discretion of the HQCJ members. In addition, the previous HQCJ panel tried in every possible way to "oust" the PIC from the assessment procedure – ignoring most of the conclusions of the Council, keeping a pace of work that made it impossible to properly vet judges, as well as creating technical obstacles to the work of the PIC, which even led to the appeal of the members of the council to the court, which confirmed the illegitimacy of the HQCJ's behaviour.

The qualification assessment had been suspended in November 2019 due to the early termination of the powers of all members of the HQCJ and resumed upon the formation of a new authorized commission – in November 2023. So far, the legislative basis for the assessment has not undergone significant changes, only Law No. 3511-IX proposes to determine that at the stage of studying the dossier and conducting an interview, the total number of points that a judge can receive should not exceed 50% of the maximum number of points for the assessment. This change is intended to slightly reduce the scope of discretion of the HQCJ members in determining the results of the assessment, but cannot a guarantee of the effectiveness of the assessment.

Positive steps include the agreement reached in November 2023 by the HQCJ and the PIC concerning common indicators that indicate the non-compliance of a judge or a candidate for the position of judge with the criteria of integrity and professional ethics, as well as the principles of their application, which helps somewhat specify the mechanism for assessing judges.

However, the evaluation procedure requires further improvement, in particular in terms of ensuring the effective participation of the PIC, as mentioned by the European Commission. At the legislative level, it is possible to provide for certain measures to

strengthen the institutional capacity of the PIC, namely, to provide for the possibility of involving the PIC in checking the integrity of candidates for the positions of judges in courts of first instance, to give the PIC the right to initiate disciplinary proceedings against judges, to provide for the creation of the Council staff establishing the sources of its financing, as well as to change the legislative mechanism for overcoming the PIC's conclusion.

Given that the PIC is a fully independent body comprised solely of civil society representatives, experts reported attempts by political authorities to exert control over it or excessively regulate it in order to curtail its functions. Specifically, draft law 10140-d (law 3511-IX), after its first reading, contained provisions that jeopardised public oversight over the selection and assessment of judges in its current state. Ultimately, through the collaborative efforts of international partners and NGOs, the flaws of the draft law were rectified before its second reading.

Disciplinary liability of judges

According to the law, the decision to bring a judge to disciplinary responsibility is within the competence of the HCJ. Disciplinary chambers have been established to consider disciplinary complaints. This chambers consist of members of the HCJ. Complaints against decisions of the disciplinary chambers are considered by the HCJ itself. The decision of the HCJ based on the results of consideration of the complaint may be appealed only to the Grand Chamber of the Supreme Court.

However, the performance of the HCJ disciplinary function in practice revealed a number of problems. The practice of the previous HCJ panel was often inconsistent, which allowed some judges to avoid responsibility. In addition, the public documented cases of the HCJ tolerating lack on integrity on the part of some judges and, conversely, persecution of other judges.

There is also a serious problem regarding the possibilities of appealing the decision of the disciplinary chamber based on the results of consideration of the disciplinary complaint. The judge in respect of whom such a decision was made has an unconditional right to appeal to the HCJ, whereas the complainant needs the permission of the disciplinary chamber. The complainant cannot appeal the Chamber's decision in any other way, including directly to the court.

In addition, there is still a legislative gap that allows judges to avoid disciplinary responsibility for violations through honourable discharge.

The problem is that the HCJ has the right, but not the obligation, to suspend the consideration of the application for resignation while the disciplinary complaint against the judge is being considered. At least the previous HCJ never really resorted to this right.

Problems with the institution of disciplinary responsibility led to a search for new ways to improve it. In particular, in July 2021, legislative changes were adopted to provide for the creation of the Service of Disciplinary Inspectors as part of the HCJ. Disciplinary inspectors are supposed to take over the powers of a member of the HCJ who acts as the

rapporteur in a disciplinary case, namely, to conduct a preliminary examination of a disciplinary complaint, prepare an opinion on whether there is prima facie case, prepare the case for consideration by the Disciplinary Chamber of the HCJ and draft decisions. In fact, it is on the basis of the materials prepared by the disciplinary inspector that the disciplinary case against the judge is considered.

Under the aforementioned law, it was not possible to form the Service of Disciplinary Inspectors. After that, long legislative work began aimed to develop a new model of the competitive selection of disciplinary inspectors, which helped produce laws No. 3304-IX and No. 3378-IX, which provide for the competitive selection of disciplinary inspectors involving international experts. However, the relevant competition was announced as late as on 19.12.2023. The European Commission points to the urgent need to establish a Service of Disciplinary Inspectors to ensure effective and impartial handling of disciplinary complaints.

At the same time, measures were taken to unblock the disciplinary function of the HCJ. Since August 2021, the Council has not considered disciplinary complaints against judges because the Service of Disciplinary Inspectors has not been created. As a result, there has accumulated a backlog of more than 11 thousand complaints against judges, and their consideration resumed only in November 2023.

This scope of pending complaints makes it necessary to introduce criteria for prioritizing them, so that judges who committed gross violations could not avoid responsibility. In November 2023, the HCJ, by amending its own regulations, established such criteria, but compliance with them on the part of the Council requires further monitoring.

Given that the institution of disciplinary responsibility is currently at the initial stage of reform, it is too early to assess the effectiveness of the measures taken.

Transparency of the justice system

An important element of accountability and responsibility to society is the publicity and transparency of the justice system. In Ukraine, the transparency of the justice system has always been subject to special public attention, given the low level of trust in the judiciary. This has led to the emergence of a significant number of the relevant tools, such as:

- *online broadcasting and open access to the sessions of the HCJ (including those of its Disciplinary Chambers) and the HQCJ, preliminary publication of the agendas of the relevant sessions, and posting information about their results afterwards;*
- *an open and rollcall-based decision-making by HCJ members, except as provided by law;*
- *online access to HCJ and HQCJ decisions;*
- *open access to court hearings;*

- *Unified State Register of Court Decisions, which provides unhindered and round-the-clock access to the decisions of courts of various instances (both final and intermediate);*

- *the official web portal 'Judiciary of Ukraine' (https://court.gov.ua), which is one of the key resources providing centralized access to information about the judicial system. The portal helps people get information about the status of consideration of any case, about cases in which he/she or someone else is involved, as well as reports on automatic assignment of cases for judges to consider;*

- *open access to declarations submitted by judges in compliance with the requirements of anti-corruption legislation. It also provides open access to declarations of integrity[10] and family ties[11], which are submitted annually by judges (due to martial law, access is temporarily restricted);*

- *open access to judges' dossiers (dossiers of candidates for the position of judge), which contain almost all information related to the judicial career and the effectiveness of the administration of justice (due to martial law, access is temporarily restricted).*

At the same time, previous experience shows that the justice system can try to limit the transparency at the first opportunity, which makes it necessary to legislatively enshrine clearcut guarantees of publicity and transparency in the justice system. Furthermore, the PIC is currently urging disclosure of judges' dossiers, yet the HQCJ rejects such disclosure, citing martial law as justification. The PIC argues that since personal data in judges' dossiers is concealed, they should be made accessible, drawing parallels with the electronic declarations of civil servants, which were made public in December 2023.

EFFICIENCY OF JUDICIARY

Network of courts

The judicial system in Ukraine is based on the principles of territoriality and specialization. The court system consists of:

- *local courts (general courts that hear civil, criminal, certain categories of administrative cases and cases of administrative offenses; commercial courts; and district administrative courts);*

- *appellate courts (general, administrative, commercial);*

10) The Declaration of Integrity consists of a list of statements regarding the compliance of the judge's standard of living with the declared income, non-committing corruption-related offenses, conscientious performance of duties by the judge, etc., which the judge must confirm.

11) In the Declaration of Family Ties, the judge must declare relatives who hold certain positions (such as a judge, prosecutor or law enforcement officer, MP, etc.)

- *The Supreme Court, which consists of four courts of cassation (administrative, civil, commercial and criminal) and the Grand Chamber.*

As part of the judicial reform, which began in 2016, the intention was to optimize the system of local and appellate courts by consolidating them. Most of all, the reform should have affected local general courts, the number of which was to be reduced by more than half (from 663 to 282). The rest of the courts were hardly affected by the optimization. However, new local courts were created only on paper, and the optimization of appellate courts largely consisted in renaming them. Only the appellate courts of Kyiv and Kyiv region were merged into one court. That is why the problem of forming a new "judicial map" still remains relevant, including in view of the consolidation of districts carried out within the framework of the administrative-territorial reform.

Higher specialized courts are meant to consider certain categories of cases. Currently, only the High Anti-Corruption Court has been established (it began its work in 2019), whose main task is to consider high-level corruption cases. The law also provides for the creation of the High Court on Intellectual Property, but the competition for the selection of judges to this court, launched in 2017, has not been completed. The feasibility of creating such a court is questioned.

In addition, there was a particularly acute need to create a separate specialized court to consider administrative cases of national importance, which was also mentioned by the European Commission. The emergence of this problem is due to the activities of the KDAC, which by its status was an ordinary local court but endowed with "exclusive" jurisdiction to handle disputes concerning decisions of central executive bodies, other key state bodies whose powers extend to the entire territory of Ukraine (with certain exceptions).

Mired in corruption scandals, this court became "famous" far beyond Ukraine, and its president was even sanctioned by the United States in December 2022. According to the investigation, the President of the KDAC probably headed a crime ring involving some judges of this court that interfered with the activities of other authorities (the Constitutional Court of Ukraine, the Supreme Court, other courts, the National Agency for the Prevention of Corruption) and, inter alia, aimed to establish control over the HQCJ and the HCJ.

At the end of 2022, the law abolished the KDAC and provided for the formation of the Kyiv City Administrative Court instead. Temporarily, KDAC cases are considered by the Kyiv Region Administrative Court, which does not solve the existing problem and only worsens access to justice.

Presently, the establishment of a separate specialized court to consider administrative cases of national importance stands as a structural benchmark set by the IMF. Ukrainian government is currently in the process of drafting the relevant legislation, which is slated for adoption by the end of July 2024.

Thus, in the course of the judicial reform, the network of courts, especially local courts, has not undergone significant changes (with certain exceptions).

At the same time, the existing network of courts needs to be optimized due to changes in the administrative-territorial structure of Ukraine, the need to ensure efficient use of limited justice resources and the need to guarantee access to justice for citizens.

Quantitative indicators of the effectiveness of the administration of justice

The European Commission noted that in 2022 most courts in Ukraine maintained 100% or even higher clearance rates[12]. According to experts, before the full-scale invasion, on average in 2020, the courts of first instance in Ukraine considered 94% of non-criminal cases that were submitted to them for consideration (for civil and commercial cases involving a dispute between parties, this figure amounted to 99%, and for administrative cases, it was only 81%). Compared to the EU Member States[13], this indicator is not bad, since in 63% of the countries the level of clearance for non-criminal cases at first instance was less than 100%.

Based on the data provided in the report of the European Commission dated 08.11.2023, as of the end of 2022, almost 600 thousand cases remained pending in Ukrainian courts, of which more than a third were civil cases not considered by local courts. As of the end of 2020, there was around one non-criminal case not considered by the courts of first instance per 100 inhabitants in Ukraine, which in general was a relatively good result, since the median indicator among the EU countries was 2.7 cases.

Regarding the disposition time, the European Commission provides the latest CEPEJ data for 2021, according to which it took 165 days to resolve a civil and commercial case (129 days in 2018, 122 days in 2020) and 52 days for a criminal case (271 days in 2018, 298 days in 2020). If we take into account the data of the "pre-war" 2020, then the Ukrainian courts of first instance needed only 170 days to deal with unresolved civil and commercial cases in which there was a dispute between parties (for 13 EU countries this figure was more than 200 days); as for administrative cases, the figure is 203 days (for 18 EU countries this figure was more than 220 days).

As experts noted in 2022, the indicators of the disposition time, clearance, and the number of unresolved pending cases showed a trend towards a decrease in the effectiveness of Ukrainian justice. In particular, compared to 2012, the estimated disposition time has almost tripled, the clearance has fallen by 20%,

12) "At first instance, the clearance rate was 105.5% in civil cases, 97.6% in commercial cases, 111.7% in administrative cases and 99.5% in criminal cases. At the appeal level, similar clearance rates are reported: 101% in civil cases, 103% in commercial cases, 99% in administrative cases, 98.9% in criminal cases. The general clearance rate of the Supreme Court was 107.9% in 2022."

13) Hereinafter, in this section, for comparison with EU Member States, the data provided in the EU Justice Scoreboard 2022 were used: https://ec.europa.eu/commission/presscorner/detail/en/ip_22_3146.

and the number of pending cases has almost doubled. One of the key reasons for this drop in efficiency is the growing understaffing in the judicial system, which has been increasing for some years now.

Availability of information and communication technology tools for courts

According to CEPEJ, as of 2020, the ICT index[14] of Ukraine was 5.03 points out of 10 possible, which is a low indicator compared to the EU countries.

The new legislation on the judiciary provided for the creation of the UJITS. According to the law, the UJITS is to ensure: electronic record keeping; centralized storage of procedural and other documents in a single database; secure storage, automated analytical and statistical processing of information; keeping of cases in an electronic archive; exchange of documents and information in electronic form between courts, other bodies of the justice system, participants in the trial, as well as real-time videoconferencing; automation of the work of courts, HCJ, HQCJ, and State Judicial Administration; appointment of judges to consider specific cases and other functions. The full deployment of the UJITS was supposed to bring the digitalization of the Ukrainian justice system to a new level, but its development has been taking a long time and has not yet been completed.

An internal audit of the state of development of the system conducted in 2019 showed that only 4 of the 13 modules that were to be launched in March 2019 were ready, and the funds allocated for the system had not been used effectively.

Currently, only some UJITS modules have been launched, such as the "Electronic Court". As the European Commission points out, the system is largely outdated and underfunded. Its hardware, software and network infrastructure, along with the ICT management system, are in need of a thorough overhaul. The audit of the system was launched in the spring of 2023 and further improvement is expected based on its results.

The new procedural legislation adopted in 2017 expanded the possibilities of using digital technologies in courts, regulating the concept of electronic evidence and providing for the possibility of appealing to the court in electronic form. Even earlier, in order to minimize corruption risks, a system of automatic (random) allocation of cases to judges was introduced in Ukraine. The introduction of quarantine restrictions in 2020 encouraged further digitalization of the justice system, in particular, participants in non-criminal cases were given the opportunity to participate in the court session via videoconferencing using their own equipment.

Special attention should be given to the fact that courts are not provided with all the necessary means of digitalization.

14) ICT index measuring the degree of information and communication technologies in judiciary development in three categories: deployment rate, communication with courts, courts and case management and decision support.

According to the State Judicial Administration, as of the end of 2022, this figure amounted to 77% of the needed resources. The most acute is the lack of equipment for audio, video recording and video conferencing (58% of the needed resources), which often complicates the conduct of court hearings via videoconferencing.

Despite the significant progress made with the digitalization of justice, the main way of "communication" between the parties to the case and the court remains paperwork and personal visits to the court. In addition, there are still no technical means that could ensure secure remote work of judges and staff, which is especially relevant in current conditions.

EFFECTIVENESS OF JUDICIARY

Evaluation of the competence of judges and candidates for the position of judge

Regulations

The procedural aspects and features of the selection of judges have already been discussed above. This subsection focuses on the effectiveness of the selection of judges in terms of assessing professional competence.

According to Article 72 of the Law of Ukraine "On the Judiciary and the Status of Judges," the selection of candidates for the position of judge involves the passage of a selection examination by eligible persons. Also, the selection includes special training and a qualifying exam.

According to Article 73 of the Law of Ukraine "On the Judiciary and the Status of Judges," the HQCJ conducts a qualifying examination in the form of anonymous testing to check the level of general theoretical knowledge of candidates for the position of judge in the field of law, their command of the state language and personal moral and psychological qualities.

Immediately after the completion of the qualifying examination, the HQCJ, in the presence of the candidates, checks the works and determines the passing score. This score shall not be less than 75 percent of the maximum possible score of the relevant qualifying examination, taking into account the projected number of vacant positions.

In accordance with Part 1 of Article 83 of the Law of Ukraine "On the Judiciary and the Status of Judges," the HQCJ conducts a qualification assessment to determine the ability of a judge (or a candidate for the position of judge) to administer justice in a particular court in accordance with the criteria established by law. Part two of Article 83 requires that one of the criteria for qualification assessment is competence, in particular professional, personal, social, etc.

In 2016, the HQCJ approved the Regulation on the Procedure and Methodology of Qualification Assessment, Indicators of Compliance with Qualification Assessment Criteria and Means of their Establishment (hereinafter referred to as the Regulation)[15]. In 2018, the HQCJ somewhat

15) https://old.vkksu.gov.ua/userfiles/doc/poriadok_ta_metod.pdf

supplemented the methodology in terms of determining the minimum passing scores. On 7 December 2023, the HQCJ amended the Regulation, but the changes do not seem to be systemic, they only cancel one clause.

In accordance with the provisions of Article 85 of the Law of Ukraine "On the Judiciary and the Status of Judges", the qualification assessment includes two stages, namely the examination and the interview.

According to the law, the examination is the main tool for determining the compliance of a judge (or a candidate for the position of a judge) with the criterion of professional competence. This exam includes anonymous written testing and a practical assignment aimed to assess the level of knowledge, practical skills and abilities in the application of law. Its purpose is to reveal the ability to administer justice in a particular court, taking into account the relevant specialization.

The determining of professional competence also includes two stages, namely anonymous written testing and practical assignment.

According to the Regulation, the maximum score that can be obtained during the assessment is 1000 points, 300 of which focus on the criterion of professional competence.

In order to determine professional competence, the HQCJ put the National School of Judges in charge of developing examination programs, taking into account the instance and specialization of courts. At each stage and when determining professional competence in general, the HQCJ sets the minimum admissible scores. In the event that the judge fails to score the required minimum on the anonymous written test, he/she is not allowed to perform the practical task. However, if the judge fails to score the minimum for the practical task, he/she is admitted to the next stage of the assessment, provided that he/she scored the necessary minimum for the entire stage.

According to Part 3 of Article 85 of the Law of Ukraine "On the Judiciary and the Status of Judges," the HQCJ may decide to introduce and conduct other types of tests to check personal moral and psychological qualities, general skills, as well as use other methods to determine the compliance of a judge (or a candidate for the position of judge) with the qualification criteria.

By the decision of the HQCJ in 2016, the Procedure for the Examination and the Methodology for Establishing the Results in the Qualification Assessment Procedure was approved[16]. Some minor adjustments were introduced to this regulation after the Procedure was relaunched in November 2023. In general, the changes concerned the clarification of terminology and components of the exam.

It should be noted that after the entry into force of draft law No. 3511-IX[17], the regulatory framework for the procedure

16) https://vkksu.gov.ua/sites/default/files/poriadok.pdf

17) https://itd.rada.gov.ua/billInfo/Bills/Card/43233

for selecting new judges and, in part, the qualification assessment procedure should almost completely change. In particular, the number of examinations for the selection of judges in local courts will be reduced to one, and the significance of exam results within the qualification assessment procedure will probably increase. In turn, this will lead to amendments to the internal regulations of the HQCJ.

In addition, the draft law provides for the introduction of a number of new articles. In particular, Article 79-4 of the Law of Ukraine "On the Judiciary and the Status of Judges" provides for the rules for determining the winners of the competition for the vacant position of a judge. Thus, should candidates have the same ranking, preference is given to those who have demonstrated a higher level of professional competence, namely, have a higher score for the exam, and if the scores are the same – greater seniority in the field of law.

Changes to anonymous testing are also to be introduced. Thus, amendments to Article 85 of the Law of Ukraine "On the Judiciary and the Status of Judges" require that testing, which is carried out anonymously, should include assessment of cognitive abilities, knowledge of the history of Ukrainian statehood, general knowledge of the law and specialization of the relevant court, taking into account its instance-related features. The practical task is also assessed taking into account the specifics of the relevant court and its role in the justice system. However, the provisions on anonymous testing on the history of Ukrainian statehood will come into force one year after the publication of this Law.

Practical application

As noted above, the qualification assessment procedure was resumed in November 2023. Thus, as of this writing (December 2023), there is not enough objective data to analyse the general procedure of qualification assessment after its resumption. However, given the lack of significant changes in the constituent documents on the procedures for conducting and assessing the results, the authors believe that the analysis of the practice of qualification assessment applied in previous years seems to be of practical importance for this study.

In 2019, experts from three civil society organizations, including the Centre for Policy and Legal Reforms, analysed the results of the qualification assessment of judges for the period 2016–2018[18].

One of the criteria of professional competence in accordance with the Regulation is the level of knowledge in the relevant field of law, which is assessed through anonymous written testing. The maximum one can score is 90 points, and the passing score that was set by the HQCJ is 45 (50%).

The open data collected and analysed by experts demonstrated the following. Anonymous written testing as part of the qualification assessment covered a total of 4,158 people. Of these, 4,149 people successfully passed the test, which

18) https://pravo.org.ua/books/qualification-assessment-of-judges-summary-of-interim-results-as-of-april-1-2019/

is 99.8% of all people who took it. The analysis also showed that more than 62% of judges who passed the anonymous written test scored 90%. In addition, 91% of judges gave more than 80% of correct answers, which means that their score was close to the maximum level.

After analysing the standard normal distribution curve, the experts came to the conclusion that the anonymous written testing was too easy for most judges and did not help to identify judges with different levels of professional competence.

After analysing the difference between this testing and the testing for the positions of judges in the Supreme Court, experts found significant differences in the results. Thus, according to the results of the anonymous written testing of candidates for the position of a judge of the Cassation Administrative Court within the Supreme Court, only 7% of candidates indicated that they had scored more than 90%. And only 51% of judges scored more than 80%.

This is primarily due to different approaches to the formation and publication of the list of test questions. During the competition to the Supreme Court, the number of test questions was much larger, and the period from the moment of their publication to the moment of testing was much shorter. It can be concluded that the longer the database of test questions is publicly available, the more likely it is that the persons undergoing assessment will be able to memorize the questions and answers to the questions. This situation makes it impossible to effectively assess the professional level of a judge or candidate.

As of December 2023, there are no updated lists of test questions to be used for the qualification assessment on the HQCJ website. However, given the resumption of the procedure for updating the database of test questions, it is necessary both due to the need for updates because of changes in legislation and in order to ensure a high-quality and effective process for assessing the professional level of judges and candidates for judicial positions.

The second stage of the assessment of professional competence involves a practical task. The practical assignment is carried out by judges and candidates for judicial positions by drafting a court decision and/or continuing the presentation of the proposed decision based on the materials of a court case considered.

The main drawback of the qualification assessment at this stage in 2016–2018 was the lack of publication of the results of the assignment performed by judges and candidates for the position of judge. The HQCJ did not make the results public, nor the methodology for their assessment, or even the score given by each member of the committee separately.

Thus, it was impossible to conduct an external evaluation and/or an independent analysis of the results. Although the law requires complete openness of the entire process in this case, this principle was violated. This approach also affects judges or candidates themselves, because they do not know the criteria based on which they received this or that result.

The Regulation also contains additional criteria of the judge's competence, namely cognitive, emotional, and virtue-based qualities of the individual, and social competence. In accordance with the Regulation, these qualities are assessed using the relevant tests of personal moral and psychological qualities and general abilities and are rated on the basis of the results of such tests and the information contained in the judge's dossier and interviews.

In 2016–2018, within the qualification assessment and selection of judges to the Supreme Court, judges and candidates with a passing score were admitted to testing personal moral and psychological qualities and general skills. The methodology included the following tests:

- *"General skills test" – aims to assess the level of logical, abstract and verbal thinking of judges.*
- *"HCS Integrity Check" – checks the integrity of the judge, the firmness of work motivation, etc.*
- *"BFQ-2" – determines the emotional stability of the judge, his/her determination and amicability.*
- *"MMPI-2" – helps find out the judge's stress resistance and psychological risks in connection with his/her job.*

According to the results of all these personality tests, judges and candidates had to undergo an interview with a professional psychologist, who, based on the results of the tests and the interview, drew up a final opinion and submitted it to the HQCJ. This stage is designed to demonstrate how each person undergoing the assessment corresponds to the judge's job profile diagram. However, it is difficult to come to a conclusion about the success of the applied method, because the job profile diagram based on which the testing was carried out was never made public. In addition, the relevant scores were not made public as separate indicators, but only as part of the overall score.

The experts also found that some of the testing systems used for additional criteria were either uncertified or not adapted in any way to determine the exact competencies required for judges. For instance, one of the evaluation criteria was "Propensity towards authority conflicts". This criterion was designed to determine the disobedience and the use of own judgement in hierarchical structures where points were scored for absence of conflicts with people in positions of authority. This indicator actually contributes to electing less independent judges and is unacceptable for use in assessing judges or candidates, because ensuring the independence of judges is an important component of judicial reform.

In addition, assessment through psychological testing demonstrated the need to improve approaches, since their recurrent application to the same person is rather questionable.

Another problem has to do with a lack of control and monitoring over the results of the assessment of additional criteria, even though the points that can be scored for moral and psychological qualities amount to 40%, which significantly affects the result of the entire score.

Thus, it can be concluded that there are major shortcomings in the system of competency evaluation of judicial candidates. These can be divided into procedural and substantive ones according to their nature. The procedural ones primarily include the non-transparency of the evaluation system. These factors, as already mentioned, include the weight of evaluation of each individual stage and the impossibility of third-party and independent evaluation of some stages. The substantive shortcomings include the use of technically different approaches to evaluating the competence of judges within different competitive procedures. In particular, it can be concluded that the evaluation of judges' professional competence within different competitive procedures demonstrates different levels of efficiency. Thus, the approaches used in some cases do not allow to identify candidates with a low level of professional competence.

Training and continuing professional development of judges

According to Article 104 of the Law of Ukraine "On the Judiciary and the Status of Judges," the National School of Judges of Ukraine is a state institution with a special status in the justice system, which provides training of highly qualified personnel for the justice system and carries out research activities. The National School of Judges of Ukraine is not subject to the legislation on higher education. It operates under the High Qualification Commission of Judges of Ukraine in accordance with the above law and the statute approved by the HQCJ.

The tasks of the National School of Judges of Ukraine include, in particular, the following:

1. *special training of candidates for the position of judge;*
2. *training of judges, including those elected to administrative positions in courts;*
3. *periodic training of judges in order to improve their skills;*
4. *conducting training courses required by the qualification or disciplinary body to improve the skills of judges who are temporarily suspended from office.*

The National School of Judges provides training and advanced training for judges in four cities of Ukraine. Also, training is provided remotely.

Special training of candidates for the position of judge

According to Article 77 of the Law of Ukraine "On the Judiciary and the Status of Judges," special training of candidates for the position of judge includes theoretical and practical training at the National School of Judges of Ukraine.

The program, curriculum and procedure for the special training for candidates for the position of judge are approved by the High Qualification Commission of Judges of Ukraine on the recommendation of the National School of Judges of Ukraine.

Special training for the position of judge takes 12 months, unless another period is specified by the HQCJ. The training is government-funded. Based on the results of the training, a certificate of the

appropriate type is issued to the person on condition that they have coped with the approved program.

Upon completion of special training, the National School of Judges sends information to the HQCJ on candidates who have successfully completed training for admission to the qualifying exam.

In accordance with part two of Article 70 of the Law of Ukraine "On the Judiciary and the Status of Judges," the selection of candidates for the position of judge who have at least three years of experience as an assistant judge is carried out according to the procedure established by the decision of the High Qualification Commission of Judges of Ukraine.

The procedure for special training for the position of a judge was approved by the HQCJ in 2018[19] (hereinafter referred to as the Procedure).

The purpose of the special training is to assist candidates for the position of judge in the development of personal qualities and acquisition of professional skills necessary for the proper performance of the duties of a judge, respect for the participants in the trial, ensuring the guarantee of individual rights and fundamental freedoms, compliance with ethical standards and awareness of the high importance of the court in a democratic society, ensuring impartiality and fair public consideration of cases within a reasonable time.

In accordance with the Procedure, the special training program includes theoretical and practical components; internships in local courts, study visits to the prosecutor's office, bodies conducting pre-trial investigation, corrections service and enforcement service agencies, law firms; and control measures.

The program should contain the following training units:

- *I. Fundamentals of the organization of the court and the activities of the judge*
- *II. Civil proceedings*
- *III. Commercial proceedings*
- *IV. Criminal proceedings and proceedings in cases of administrative offenses*
- *V. Administrative proceedings*
- *VI. Judicial competencies*

Candidates for the position of judge undergo internship within the framework of special training in accordance with the Regulation on Internship and Coaching of Candidates for the Position of Judge of the National School of Judges of Ukraine[20]. In accordance with paragraph 1.1., internship is a mandatory component of the special training of candidates for the position of judge, it is carried out in the form of the practical training of candidates in local courts and aims to help the candidates learn to convincingly and independently apply the knowledge and skills gained during the theoretical and practical training to practical

19) https://nsj.gov.ua/files/1532499392poryadok_prohodjennya.pdf

20) https://nsj.gov.ua/files/1539941898pol_ocin.pdf

activities for the administration of justice, taking into account further gradual integration in the European Union.

The internship of a candidate for the position of judge is supervised by a coach judge, who is subject to the requirements of the Regulation. In particular, such a judge must be in office for at least five years and undergo coaching training at the National School of Judges.

Evaluation of the program completion level is carried out in accordance with the Regulation on the Procedure for Determining the Success of the Special Training Program for Judges of the National School of Judges of Ukraine. The evaluation is carried out according to the cumulative point system and involves three key components, namely formative and summative assessment, and internship results.

Within formative assessment the candidate receives points for each practical lesson. The maximum scores are determined by the above-mentioned Regulation of the National School of Judges.

Summative assessment is carried out based on the results of the completion of the first unit of the curriculum separately and all other units together.

From the content of the Regulation, it can be concluded that the assessment of a unit involves two stages, namely the performance of a task using an automated system (possibly testing) and a practical task. When performing a task using an automated system, the assessment is also generated automatically. The assessment of the practical task is carried out by the members of the expert group with subsequent entry into the automated system to round the score.

In addition, it should be noted that after the entry into force of draft law No. 3511-IX, the initial training should be carried out after the appointment of a person to the position of judge, covering not more than 350 academic hours and lasting not longer than two months.

Continuing professional development (CPD)

Article 89 of the Law of Ukraine "On the Judiciary and the Status of Judges" requires that a judge, in order to maintain his professional level, undergo training at the National School of Judges at least once every three years. Per three years of the judge's tenure, the professional development training may not exceed 40 academic hours.

The National School of Judges of Ukraine trains judges in order to maintain and improve their skills in accordance with the need to improve their knowledge, skills and expertise. The training is adapted to the professional experience of judges, the level and specialization of the court where they work, as well as their individual needs.

To achieve this goal, the National School of Judges of Ukraine organizes mandatory trainings within the framework of CPD, as well as provides judges with the opportunity to choose trainings according to their individual needs.

In accordance with Article 90 of the Law of Ukraine "On the Judiciary and the Status of Judges," regular assessments are carried out during the tenure of a judge. Regular assessment of a judge

during their service is designed to identify the judge's personal needs for improvement, encourage them to maintain a proper professional level and develop professionally. The regular assessment includes questionnaires from instructors of the National School of Judges, other judges of the relevant court, self-assessment of the judge and independent assessment by public associations during court hearings. After each training, instructors fill out an assessment questionnaire, including an assessment of the judge's knowledge, skills, and recommendations for self-improvement. The judge gets acquainted with the questionnaire no later than five days after the training and may submit objections to the results of the assessment. The objection is considered and the instructor can complete a new assessment questionnaire. The results are included in the judge's dossier.

Public associations can organize an independent assessment of the work of a judge during open court hearings. The results of this assessment are recorded in a questionnaire containing information on the duration of the case, the judge's compliance with the rules of legal proceedings and the rights of participants in the process, the culture of communication, the level of impartiality of the judge, the satisfaction of participants in the process with the behaviour of the judge, as well as comments on the conduct of proceedings and other details. The completed questionnaire may be included in the judge's dossier.

The results of the regular assessment may be taken into account when considering the issue of holding a competition for a position in the relevant court.

In its report of 8 November 2023, the European Commission paid special attention to the matters of training and qualification of judges. The European Commission noted that despite the current challenges, the National School of Judges continued to provide training to judges of all instances and in 2022 provided training to 10,158 people in areas ranging from EU law to court management and IT skills.

In addition, the European Commission pointed to areas that need improvement such as: strengthening the managerial and operational capacities of the National School of Judges, introducing comprehensive training needs assessment and training evaluation, modernising the training curricula and teaching methods, including trainings on judgecraft, ethics and integrity.

In addition, it is necessary to improve international cooperation and connections with judicial training networks. The European Commission emphasized the need for continued cooperation between the National School of Judges and EU organizations.

Regarding the CPD of judges and the training of candidates to learn more about EU law, the following should be noted. Individual plans for the training and CPD of judges are not publicly available. Thus, the lack of access to these data makes it impossible to assess whether the trainings and/or courses in EU law are included at the systemic level. The analysis of the calendar plans of the National School of Judges shows that there are no separate courses aimed at a systematic study of EU law, its directives, as well as the principles of interaction of the national courts of the Member States with the European Court of Justice.

Regarding the financing of training activities, it can be concluded that there are actually three sources from which the activities are financed – the state budget, projects of international organizations or international technical assistance projects or through non-governmental organizations (within the projects implemented by them).

Assessment of the quality of court decisions

No systemic regulation mandating a periodic analysis of the quality of court decisions has been adopted in Ukraine. Thus, there is no systematic work on monitoring the quality of justice and further publication of the results by the relevant authorities.

The only document as of the time of this writing is the System for Assessing the Work of the Court: Standards, Criteria, Indicators and Methods[21] developed and recommended by the working group on the development of a system for assessing the quality of court work and approved by the Council of Judges of Ukraine. This document was approved by the Council of Judges of Ukraine in 2015 and contained criteria for assessing the quality of court decisions.

Analysis of data from open sources allows us to conclude that even this system is not used by courts to assess their work or the quality of court decisions.

In general, some sporadic data on the use of this system can be found online. Some courts, after its publication, conducted a survey of court visitors. However, even in this case, this approach has not become systemic.

Currently, a significant array of statistical data on the functioning of the judicial system is collected in Ukraine. Their initial processing and generalized data are further published on the web resources of the responsible authorities (in particular, the State Judicial Administration). However, it is worth noting that this analysis tends to focus on baseline indicators and shows simple data aggregation, even though these indicators can be used for in-depth analysis of the judicial system and its further improvement. In 2021, the European Parliament recommended that Ukraine use the EU Justice Scoreboard methodology to assess the functioning of the judicial system.

In 2022, experts from the Centre for Policy and Legal Reforms conducted a study using this methodology, which helped identify certain problematic aspects as well as compare the indicators with those of the EU Member States[22]. In some cases, the Ukrainian judicial system has shown a higher level of efficiency compared to those of other countries.

21) https://rsu.gov.ua/uploads/article/sors-221bdd8a9b.pdf

22) Ukrainian Justice Matrix: Assessment of the Ukrainian Justice System under the EU Justice Scoreboard 2022 Methodology https://pravo.org.ua/en/books/ukrainian-justice-matrix-assessment-of-the-ukrainian-justice-system-under-the-eu-justice-scoreboard-2022-methodology/

Some assessments of the effectiveness of the judicial system are conducted by business associations. Thus, for example, the European Business Association[23], based on the results of a survey of representatives of the Association's member companies, analyses the status of implementation of judicial reform. This study also includes a criterion for the quality of justice.

Also, some indicators of the effectiveness of the judicial system can be found in international systems for assessing the judicial system, such as the assessment conducted by the CEPEJ.

However, there is no systematic analysis of the effectiveness of the judicial system (including assessment of the quality of court decisions) within the judicial system of Ukraine.

Currently, the mechanism for processing judicial statistics tends to focus on the current state of affairs in courts rather than on studying the reasons behind it. It is necessary to improve the system of statistics collection and their processing according to the EU Justice Scoreboard methodology. This step will both bring Ukraine closer to the EU in terms of assessing the effectiveness of the judicial system and make it possible to use the findings to identify problems and find ways to improve the functioning of the judicial system. Regular analyses of judicial activity indicators conducted by the authorized bodies of the justice system should be used as a tool for shaping state policies and decision-making in reforming the judicial system.

Higher legal education

Higher legal education is certainly one of the key factors in the training of qualified personnel, who, upon completion of training, can contribute to work within the judicial system as well as the legislative and executive branches of government.

Starting from 2008, Ukraine began to introduce testing systems in order to improve admission to universities and ensure transparency during the selection process. This approach helped reduce the level of corruption during admission to higher education establishments.

The next stage was the introduction in 2017 of the experimental Unified Professional Introductory Test for Legal Professionals, which involved assessing knowledge in the field of law and the critical, analytical and logical thinking of entrants, as well as their level of English proficiency.

The procedure for admission is based on the Order of the Ministry of Education and Science of Ukraine. During the martial law period, the rules for admission to higher education establishments for obtaining a Bachelor's degree (including for legal professionals) slightly changed, but the assessment is still performed as testing – the NMT. The entry procedure for obtaining a Master's degree has also changed somewhat during martial law, in particular, the MCT was introduced. The NMT and MCT are somewhat simplified tools compared to the previous approaches.

23) https://eba.com.ua/wp-content/uploads/2023/12/EBA-Court-Index_UA_2023-1.pdf

Thus, the MCT in 2022 included two components – assessment of the foreign language proficiency and knowledge in the field of law.

In 2016, Ukraine started drafting the Concept for the Development of Legal Education. Over the years, the concept has been improved, including with the involvement of representatives of civil society. In March 2021, the Verkhovna Rada Committee on Education, Science and Innovation approved the draft Concept and sent it for consideration by the working group responsible for the development of legal education within the Commission on Legal Reform under the President of Ukraine. However, as of December 2023, the Concept has not been adopted.

Resolution No. 497 of the Cabinet of Ministers of Ukraine provides for the certification of prospective students seeking vocational education and degrees in higher education at the first (bachelor's) and second (master's) levels, which is to take place as the USQE. This method of assessment was also introduced for law degrees.

On 28 September 2023, an approbation USQE for law degrees was conducted, and on 30 November 2023, a full-fledged one. Persons who failed to come to the USQE or failed to pass it could resit it on 20 December 2023. The exam was held as an online test in Ukrainian and consisted of 120 questions. The participants had 180 minutes to complete it.

The introduction of testing systems significantly reduces corruption in higher legal education.

One of the main problems of higher legal education is the structure of the system of institutions that can provide study. In particular, two most problematic aspects should be noted:

- *providing a legal education in specialised higher education institutions, the main purpose of which is to preparation of personnel for the system of law enforcement agencies;*
- *a large number of higher education institutions of various forms of ownership that can provide legal education.*

The main problem of legal education in specialised institutions is the conditions in which the educational process is implemented, and such conditions can be partially attributed to the so-called "military", which in turn imply special conditions of both routine and discipline. In such conditions of legal education, it is difficult to guarantee the academic freedoms of participants in the educational process, including freedom of thought, speech, association and teaching, as well as academic mobility.

According to experts, in 2021 and 2022, a significant portion — exceeding 60% — of the state funding designated for law bachelor's degree programs was directed to educational institutions under the Ministry of Internal Affairs, the Security Service of Ukraine, and the Ministry of Justice. Universities under the purview of the Ministry of Education received less than 40% of the state funds.

Furthermore, unlike the Ministry of Education, where state funding for legal education is distributed through competitive processes among educational institutions, the allocation process within the Ministry of Internal Affairs, the Ministry of Justice, and the Security Service of Ukraine is different. In these cases, universities receive a predetermined number of state-funded seats without open competition among applicants. This practice raises concerns as it may not ensure that the most deserving applicants gain admission to legal education.

Thus, there is a need for a clear distinction between education of lawyers and law enforcement officials. Specialised higher education institutions should provide education exclusively for the law enforcement system, which will not fall under the higher education in law.

Furthermore, 32.8% (32,852 out of 100,060) of students studying law are enrolled in distance learning programs, a mode of study often associated with lower quality compared to traditional full-time programs. It is reported, that law schools often utilise outdated programs which do not adequately meet current market demands.

Another problem with higher legal education is the large number of licences provided for various higher education institutions. Experts highlight, that there are 168 higher education institutions and their divisions that provide bachelor's degree programs. Additionally, 121 of these institutions provide master's degree programs. Apart from that, more than 40 educational institutions focus on providing bachelor's and master's programs in international law.

As of October 2023, there are a total of 100,060 law students.

This situation leads to the fact that the quality of education in such a large number of institutions is quite different, and the number of graduates is not based on the real needs of the market. Under this approach, a large number of graduates do not continue their professional careers. Research examining employer perspectives on the quality of legal education indicates that nearly 80% are dissatisfied with the knowledge and skills of law graduates. Additionally, roughly 80% of law students view the educational programs provided by law schools as outdated.

These were confirmed by the European Commission in its report of 8 November 2023. However, the EC also pointed to the areas in which reform is needed, such as:

- *creating a clear institutional delineation of legal education and law enforcement training;*
- *strengthening the law school admission and licencing standards;*
- *ensuring a transparent and merit-based allocation of public funds for training future legal professionals;*
- *modernising curricula with a focus on ethics, practical training, EU law and international exchanges;*
- *implementing a unified state qualifications exam; and*
- *consistent fighting against corruption and plagiarism.*

Experts keep discussing the need to reform higher legal education all the time in Ukraine. According to the authors, this reform should be systematic and based on an objective analysis of the state of affairs.

It is especially important to thoroughly examine how many universities of various forms of ownership train lawyers and what quality of services they provide.

In addition, in the light of the opening of the negotiation process on Ukraine's accession to the EU, it is extremely important to educate lawyers with regard to EU law. According to the authors of the study, the current curricula in various universities fail to give proper attention to this aspect, and if the relevant training is conducted, it is not as systematic as that in national sectoral legislation.

Conclusions

6

Based on the results of the study, the authors understand the need to formulate **two conclusions**, namely, a conclusion on the state of judicial reform in Ukraine and a conclusion on methodological approaches to assessing and planning judicial reform within the framework of European integration measures.

STATE OF JUDICIAL REFORM IN UKRAINE

Since the Revolution of Dignity in 2014, Ukraine has come a long and difficult way to build a justice system in accordance with European standards. The depoliticization of the judicial system, the introduction of the competitive selection of new judges and qualification assessment of existing ones, the creation of new judicial institutions, the involvement of the public and international experts – these and many other measures were designed to build a new judicial system based on the principles of independence, professionalism, integrity and accountability. Despite the generally good regulatory foundation, due to the lack of political will and the assignment of judicial reform to the unreformed judiciary, Ukraine has not managed to achieve all the declared goals yet.

Currently, the judicial reform is at a transitional stage, as in 2023, with the participation of international experts, we finally managed to reboot the activities of two key bodies in the justice system – the HCJ and the HQCJ. It is these bodies that set professional and ethical standards in the judicial system and serve as key tools for ensuring the accountability of the judiciary. However, given the relatively short period of time, it is too early to assess the effectiveness of the reform of these bodies.

At the same time, the reform of the HCJ and the HQCJ is, albeit important, an integral element of a more comprehensive judicial reform, especially in the context of Ukraine's European integration. The previous presidential strategy for judicial reform expires in 2023, but the plan for its implementation has not been approved. The Ukraine Recovery Plan presented in 2022 in Lugano exists only as a project, and its political and legal status is not fully clear. In fact, there is currently no official strategy for conducting judicial reform, with clearcut goals and means to achieve them. The measures currently in place seem to be chaotic attempts to correct previous mistakes rather than components of a grand plan with ambitious goals. That is why, one of the priority measures that Ukraine should take in close cooperation with the EU is the development of a new strategic document on judicial reform, which would take into account both EU requirements and the current situation in Ukraine, as well as previous mistakes.

METHODOLOGICAL APPROACHES

As already mentioned in the introductory part of the study, the authors propose to consider the possibility of improving the process of assessing the state of reform and planning in the context of European integration.

The proposed methodology allowed to identify the main gaps in legislative regulation, practical implementation, as well as organisational and technical shortcomings of the reform components.

In developing the policy recommendations, the authors came to the following conclusions. The development of the policy recommendations should be based on a problem-oriented approach, i.e. each recommendation should be aimed at solving a specific problem and be clearly formulated. Clearly dividing the policy recommendations into stages is possible only at the first two - opening and interim. The closing policy recommendations on the time of the study drafting can be formulated as goals that Ukraine should achieve at the end of the accession negotiation process. Further, the closing policy recommendations can be clarified as subtasks in the process of analysing the state of implementation of the opening and interim recommendations.

However, the authors underline that in this process it is extremely important to achieve the necessary balance of clarity and flexibility. The clarity of policy recommendations is a necessary tool for achieving the effectiveness of reform measures, while flexibility is a tool aimed at implementing reform and responding to new challenges. Such an approach will allow for prompt adjustment of tasks in case the assessment of the implementation status demonstrates its inefficiency or partial effectiveness.

All policy recommendations with a division by stages of the negotiation process are presented in **Annex I "Logic Matrix - Judicial Reform in Ukraine in the Context of Ukraine's Negotiated Accession to the EU"**. This annex not only provides policy recommendations, but can also serve as an effective tool for monitoring the progress of reform and approximation of Ukrainian legislation to EU law.

ANNEX I

Logic Matrix — Judicial Reform in Ukraine in the Context of Ukraine's Negotiated Accession to the EU

Benchmarks	Opening *in cooperation with the EU, civil society and with the broad involvement of stakeholders, developing a new strategy for judicial reform and a plan for its implementation with clearcut measures, deadlines for their implementation, persons/bodies responsible for the implementation and indicators of success*	Interim	Closing *the justice system enjoys a high level of trust on the part of citizens and businesses*
Independence **Identified gaps:** • *unclear criteria for selection and evaluation of judges;* • *significant shortage of judges;* • *insufficient and inefficient spending of funds allocated to the judiciary;* • *necessity to further improvement of procedures for selecting members of judicial governance bodies (HCJ, HQCJ) to guarantee the integrity and independence of elected/ appointed members;*	**1.** Introducing an objective method of scoring by the members of the HQCJ within the framework of the selection and evaluation procedures of judges, making it possible to establish the correlation between the scores given to the candidates and the evaluation criteria **2.** Starting the selection of new judges to local courts under the updated procedure	**1.** Filling vacant positions in the judiciary (at least 2 thousand judges), with further analysis of sufficiency of the existing number of judges to ensure effective access to justice for citizens	**1.** The judicial system is provided with the necessary amount of resources and a mechanism for monitoring the effectiveness of their use
	3. To audit the activities of the State Judicial Administration and enterprises under its management, based on the results of which to develop recommendations to ensure fairness in the distribution of budget funds allocated to the justice system and the efficiency of their spending	**2.** Introduce regulations for transparent planning and allocation of budget resources in the judicial system)	
	4. Ensuring further improvement of the selection procedure for members of the HCJ and the HQCJ, taking into account the identified shortcomings, in particular by involving the public in the evaluation of candidates; introduction of a mechanism for the direct election of HCJ members by professional communities	**3.** New competitions to the HQCJ and HCJ were held based on an updated procedure with significant public participation	**2.** Members of judicial governance bodies (HCJ, HQCJ) fully meet the criteria of independence, integrity and professionalism and exercise their powers effectively and in the interests of justice
Accountability **Identified gaps:** • *necessity to increase the influence and institutional capacity of the PIC;* • *the formation of the HCJ Service of Disciplinary Inspectors has not been completed and all positions in the service are vacant;* • *Ineffective mechanisms to ensure accountability of judges (legislative gaps in regulation; inconsistency of HCJ disciplinary practice; lack of a mechanism to monitor the lifestyle of judges);* • *more than 10 thousand pending disciplinary complaints against judges;* • *problems with the integrity of the Supreme Court judges;*	**1.** Strengthening the institutional capacities of the PIC by creating a staff (secretariat) of the Council, with the possibility of financing it from the state budget or from international technical assistance. Providing for the involvement of the PIC in the procedures for selecting new judges to local courts. Increasing the importance of the PIC's conclusion concerning the non-compliance of a judge (candidate for the position of a judge) with the criteria of integrity and professional ethics in the procedures for the selection and qualification assessment of judges **2.** Introducing an objective method of scoring by the members of the HQCJ within the framework of the selection and evaluation procedures of judges, making it possible to establish the correlation between the scores given to the candidates and the evaluation criteria	**1.** Completion of the procedure of qualification assessment of the sitting judges	**1.** Personnel procedures in the judicial system make it impossible for a person who does not meet the statutory requirements to be a judge **2.** The facts of behaviour lacking integrity on the part of representatives of the judiciary or interference with the independence of judges receive a proper and prompt response from the competent authorities
	3. Creating a service of disciplinary inspectors based on the results of a transparent competition with the effective participation of international experts **4.** By introducing legislative amendments, improve the mechanism of disciplinary liability of judges, in particular, to expand the possibilities of appealing decisions of the Disciplinary Chambers and the HCJ, clarify the elements of disciplinary offenses, and eliminate the possibility of judges avoiding liability by resigning	**2.** After the launch of the Service of Disciplinary Inspectors, ensuring the regular monitoring of disciplinary practice and, if necessary, continuing to improve the mechanism of disciplinary responsibility of judges, including by introducing mechanisms to ensure the sustainability and predictability of disciplinary practice	
	5. Taking measures to eliminate corruption risks in the Supreme Court, including use the mechanism of verification of the authenticity of the statements of judges in their declarations of integrity **6.** Adoption of the legislation on the introducing a mechanism for monitoring the lifestyle of a judge, which will be carried out by the HQCJ (regarding compliance with judicial duties) and the National Agency for the Prevention of Corruption (in terms of compliance with the requirements of anti-corruption legislation and investigation of the legality of the sources of property)	**3.** Mechanism for monitoring the lifestyle of judges is functioning	

Efficiency **Identified gaps:** • *the inconsistency of the local courts network with the current situation, in particular, with the administrative structure;* • *the necessity to ensure effective consideration of administrative cases of national significance;* • *outdated and incomplete IT systems used by the courts;* • *lack of resources for the digitalization of justice;*	**1.** Conduct a comprehensive analysis of the network of courts (primarily local ones), based on the results of which develop clear criteria for the formation of a new judicial map	**1.** Review of the network of local courts taking into account the existing workload, economic feasibility, administrative-territorial reform and ensuring unhindered access to justice for citizens and businesses	**1.** The court network is consistent with the existing administrative-territorial structure, is economically feasible and provides equal opportunities for access to justice
	2. Adopting regulations on the establishment of a higher specialized court for the consideration of administrative cases of national importance, determination of its jurisdiction and a special mechanism for the selection of judges with the involvement of international experts (following the example of the selection of judges of the High Anti-Corruption Court)	**2.** Establishing of a higher specialized court for considering administrative cases of national importance	
	3. Complete the audit of IT systems used in the justice system and organizational processes, based on the results of which develop a roadmap for modernization of such systems and optimization of processes	**3.** Fully implement the measures envisaged in the roadmap for the modernization of justice IT systems	**2.** Unified Judicial Information Telecommunications System is fully operational
Effectiveness **Identified gaps:** • *shortcomings and incomplete transparency of the procedures for assessing the professional competence of judges/ candidates for the position of judge;* • *the use of uncertified and/or controversial testing systems to assess moral, psychological, personal and general skills, as well as the lack of a proper system of control and evaluation of such testing;* • *the need to improve the functioning of the National School of Judges;* • *the need to improve the system of statistical data collection and processing, as well as the need to conduct a systematic assessment of the quality of court decisions;* • *provision of legal education in specialized higher education institutions whose main purpose is to train personnel for the law enforcement system;* • *a large number of higher education institutions of various forms of ownership that can provide legal education (licensing issues);* • *lack of a systematic and comprehensive policy document aimed at reforming higher legal education.*	**1.** Ensuring transparency of the evaluation of professional abilities of judges and judicial candidates, namely, guaranteeing access to the results of all forms of assessment for interested parties and improvement of the procedure for determining the proportion of points for each stage of the evaluation	**1.** Analysing the effectiveness of the professional competence assessment system in order to determine its quality and further improvement	**1.** Professional competence assessment and selection help to ensure that the judicial system has qualified staff
	2. Improvement and unification of the system of professional competence assessment in order to prevent persons with inadequate competence from holding positions throughout the judicial system (all instances and courts)		
	3. Providing analyses of the efficiency of the functioning and operational management of the National School of Judges of Ukraine and to formulate recommendations for improvement	**2.** Ensure the implementation of recommendations to improve the functioning of the National School of Judges, including introduction of comprehensive training needs assessment and training evaluation, modernisation of the training curricula and teaching methods in the National School of Judges, including trainings on judgecraft, ethics and integrity	**2.** The National School of Judges operates as an effective training and professional development institution whose management and training methods are modern and meet the needs of the judiciary
	4. The curricula and courses of the National School of Judges should place a clear emphasis on the study of EU law and the principles of interaction between the national courts of the Member States and the ECJ		
	5. Updating and approving the Concept of legal education reform as a systemic document and further development of an implementation plan. In particular, introduction of a systematic approach to expanding the capacity of the legal education system in terms of deepening the training in EU law	**3.** Improvement of the system of admission to legal schools, resumption of the full-fledged EIT (External Independent Testing) and UPEE (Unified Professional Entrance Exam) **4.** Introduction of an assessment of the proficiency of future master program students and, within the framework of the Unified State Qualification Exam (USQE), the assessment of the proficiency in EU law **5.** Creation of a clear institutional delineation of legal education and law enforcement training **6.** Strengthening the law school admission and licencing standards - creating transparent and quality-based licensing condition **7.** Auditing the network of law schools, in particular, in terms of the observance of integrity, ensuring the high quality of training; ensuring a transparent and merit-based allocation of public funds for training future legal professionals **8.** Systematic conduct of the USQE, regular assessment of the effectiveness of testing and its improvement in accordance with the assessment conducted **9.** Introduction of an assessment of training programs in legal education with a focus on legal ethics, practical training, and EU law **10.** Strengthening of the capacity of HEIs for international student exchanges **11.** Improvement of the system of ensuring integrity and combating plagiarism, in particular introduction of automated tools within universities	**3.** The system of legal education operates on the basis of integrity and ensures that students achieve a high professional level

UKRAINIAN CENTRE FOR EUROPEAN POLICY

The Ukrainian Center for European Policy (UCEP) is an independent think tank for policy analysis and development, established in 2015.

Our mission is to promote reforms in Ukraine for sustainable economic growth and to build an open society in partnership with institutions at all levels.

Priority activity areas:

- development of expert-analytical materials to promote European integration reforms in Ukraine;
- promotion of European values among Ukrainian society;
- informing the public on opportunities and benefits of close cooperation with the EU;
- promoting enhanced economic, political, and trade cooperation between Ukraine and the European Union;
- informing the international community about the challenges and achievements of Ukraine's reform process under the EU-Ukraine Association Agreement.

www.ucep.org.ua
press@ucep.org.ua
facebook.com/UCEP.org.ua

CPLR Centre of Policy and Legal Reform

The Centre of Policy and Legal Reform (CPLR) is not a classic human rights organization, but it is the value of human rights that determines the nature and purpose of the organization.

The Constitution of Ukraine, adopted in 1996, established high standards of human rights, the primacy of international law over national law, and established democratic institutions. However, it was clear that the adoption of the Constitution is only the first step, and its implementation requires a number of reforms in the political and legal sphere.

Since its inception and until now, the CPLR has focused on developing and facilitating reforms that will ensure democracy and the rule of law in Ukraine and lead our country to EU membership in the future.

According to the Copenhagen criteria, a state that aspires to be part of the European political community must ensure the stability of institutions that guarantee democracy, the rule of law, respect for human rights and the protection of minority rights.

www.pravo.org.ua
centre@pravo.org.ua
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