

Selection and Evaluation of Judges in Ukraine

Assessment Report

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EXECUTIVE SUMMARY

- Following the adoption of the Justice Sector Reform Strategy and Action Plan (JSRSAP) in 2015 and the subsequent constitutional amendments in 2016, the process of the systemic **judiciary** reset includes an obligatory one-off evaluation (“**qualification re-assessment**”) of the existing judges to confirm their fitness to continue to exercise their judicial duties. The fact that since 2014 – after the introduction of new procedures of qualification re-assessment – almost **3,000 judges resigned** (this amounts to at least 30%, as Ukraine had almost 9,000 judges at the start of the judiciary reset) without waiting for the qualification re-assessment, should be considered among key achievements of the reform. The judiciary reset also involves the selection of **new judges**, and the creation of **new courts**. In 2017, following constitutional amendments, Ukraine launched a completely new Supreme Court through open competition. The judiciary reset is being continued in 2018 as more than **6,000 judges and candidates** are passing through the selection and devaluation processes run by the **High Qualification Commission of Judges (HQCJ)**.
 - with the creation of the **Public Integrity Council (PIC)**, acting alongside other judiciary governance bodies in the judiciary selection and evaluation. This is an **important achievement** of the civil society in Ukraine. In most other European societies, criticisms and assumptions about the qualification of judges are mainly taking place in “the dark corners of the internet”, and as such are taken less seriously, not becoming part of official procedures, thus stimulating mistrust in the judiciary. The **right of active participation** of the **civil society** – which has been granted as a direct result of the political developments after the Revolution of Dignity – carries with it an **obligation** for the **civil society** to execute it by **actively taking part** and **cooperating with HQCJ** to a reasonable degree in the judiciary selection and evaluation.
- The Experts were requested by the Ukrainian authorities to establish **progress and problem areas** in the judiciary selection and evaluation based on European standards, and tackle them by suggested **changes in policy and action**.
- A starting point for understanding the reform of the judiciary in Ukraine is a widespread public **distrust in the judiciary**. The general assumption is that judges are not qualified, are prone to pressure or bribe-taking, and therefore do not serve the rule of law. This context warranted the creation of a **more transparent and technocratic system** of the selection and evaluation of judges. The **civil society** oversight was institutionalised
 - The **new approach and procedures** with regard to both the **selection** of new judges and **qualification re-assessment** of the existing judges involve **two stages** – the assessment of **legal** professional skills and competences (“exam”), and the assessment of **social and psychological** skills and competences with an additional assessment of legal professional skills and competences (“interview”). The first stage in fact involves two distinct procedures – **multiple choice test questions** (MCTQs; anonymous testing) and **case studies**. The second stage includes three distinct procedures – **psychological testing**, examination of evidence provided by various third parties (law enforcement authorities, civil society etc.) in the candidate’s **dossier**, and the **interview** with each candidate with the participation of PIC. The decision to recommend a particular candidate or not by HQCJ is followed by final decision of the High Council of Justice (HCJ), with the President of Ukraine retaining a ceremonial role in the final appointment of a new judge.



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- Such an approach, in its scope and extent, has **not yet been applied across the entire public sector**, not to mention the judiciary, in the majority of jurisdictions. In Ukraine, full-scale **psychological testing** of judges and candidates has been introduced, during which the general knowledge and skills (IQ), ethics and integrity, propensity for different psycho-pathologic risks, teamwork and other social and other abilities are tested. An elaborate, **academic-style**, system was also designed for testing **legal** professional skills and competences.
- The current selection and evaluation approaches and procedures in Ukraine are unique in their scope and extent by comprising very important specific features:
 - **Comprehensiveness and complexities** of procedures and **methodologies** of the candidate **assessment**;
 - Involvement of the **civil society**;
 - High level of **technocracy** in the candidate assessment, in which **not only** the **legal** knowledge and skills, but also their **social competences and psychological abilities** are assessed on the basis of the established criteria and procedures;
 - Substantial impact of the method of **psychological testing**, which is comparable to methods already applied, albeit to a lesser scope and extent, in some EU countries; the tests provide a good base to receive a thorough **expert assessment** of the **personality** of a candidate.
- **Some elements** of such more transparent and technocratic approaches are comparable to the methods **increasingly applied** in some European Union and other advanced jurisdictions. This indeed allows to gradually put in place **procedural safeguards to limit the discretion** of HQCJ in its **decision-making**. At the same time, the results of the selection process to the Supreme Court in 2017 and the subsequent developments highlighted the need for **further clarification** of the **existing rules** regulating the selection and evaluation approaches and procedures, including the improvement of clarity and foreseeability of scoring approaches, safeguards for the professional ethics and integrity assessment, the obligation to take a **reasoned decision** in each and every case etc.
- The **level of publicity** of the process is high. The **PIC opinions** are published before the decision of HQCJ is delivered. The interviews, the content of which frequently focuses on private lives of the candidates, are **live-streamed** and broadcasted by various third parties online. While understandable in the general Ukrainian context as a confidence-building measure, such a degree of publicity might also play a negative role in discouraging some good candidates from applying because of fear of unreasonable **reputation threats**.
- Apart from the completed and ongoing process of the **selection** of new judges, a particular consideration should be given to the **qualification re-assessment of over 5,500 existing judges**, a bulk of which is **still pending**. More notice has to be taken of the fact that, in the exercise of these significant **personnel reset** processes, **justice needs to continue** to be administered by the Ukrainian courts – **fairly** and in **reasonable time**. Trying to get better judges on board is not a reason to **make parties** bear the brunt of **delays** in the examination of their cases. Achieving the right balance between the greater **individual** competence and accountability of judges on the one hand, and the **systemic** goal of greater **effectiveness** and **efficiency**, remains a challenge.
- Against this background, the new selection and evaluation procedures should be **encouraged to continue**, taking into account the recommendations of this Report and **further discussions** on the improvement in the processes in line with European standards and best practices. The ultimate aim should be to improve the balance between the aforementioned **procedural safeguards** on the one hand, and the exercise of **discretion** by HQCJ and other decision makers on the other.
- It should be noted that the Experts' recommendations are **not exhaustive**. The **Report** should be considered a **basis for further discussion** and recommendations, which should go hand in hand with the **gradual increase in capacity** of the relevant stakeholders.

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