

Selection and Evaluation of Judges in Ukraine

Assessment Report
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List of abbreviations

CEPEJ	European Commission for Efficiency of Justice
COE	Council of Europe
COJ	Council of Judges
CSOs	Civil Society Organisations
EC	European Commission
ECHR	European Court of (Convention on) Human Rights
EU	European Union
HACC	High Anti-corruption Court
HIPC	High Intellectual Property Court
HCJ	High Council of Justice
HQCJ	High Qualification Commission of Judges
JRC	Judicial Reform Council
JSRSAP	Justice Sector Reform Strategy and Action Plan 2015-2020
MOJ	Ministry of Justice
NSJ	National School of Judges
PIC	Public Integrity Council
SC	Supreme Court
SJA	State Judicial Administration
USAID	United States Agency for International Development

1. 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)**.
- 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 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 **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.
- 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 psychopathologic 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 HJC 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 HJC 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.

2. Scope and Methodology

2.1. Procedure

The current Report has been developed as part of the EU-funded Project Pravo-Justice dedicated **Expert Mission**. Three **International Experts** were involved in developing the Report:

1. **Georg Stawa**, Head of Department in the Austrian Ministry of Constitutional Affairs, Reforms, Deregulation and Justice;
2. **Wilma Van Benthem**, Judge at the Amsterdam District Court, the Netherlands;
3. **Reda Moliene**, Head of the National Courts Administration of Lithuania.

Additional contributions to the Report on the relevant domestic law and practice were made by two national experts, **Olha Lopushanska** and **Mykyta Nuralin**, members of the **Ukrainian Bar Association** (UBA).

The mission involved the following meetings with the respective counterparts:

1. 5-7 March 2018, Georg Stawa:

- Serhiy Kozyakov, HQCJ Chairman;
- Supreme Court Judges: Bohdan Lvov, Natalia Antoniuk, Natalia Marchuk, Oleksandr Prokopenko, Nadia Danylevych, Iryna Moncharova, Iryna Zheltabryuk, Oleg Bilous, Tetiana Antsupova, Hanna Vronska;
- High Council of Justice (HCJ): Ihor Benedysiuk, HCJ Chairman, Vadym Belianevych, Deputy Chairman;
- Oleksiy Filatov, the Deputy Head of the Presidential Administration, Coordinator of the Judicial Reform Council;
- Oleh Burlachuk, Anastasiya Dyomina, OS Ukraine;
- Mykhaylo Zhernakov, Andriy Savchuk, Public Integrity Council.

2. 14-16 March 2018, Wilma Van Benthem:

- Stanislav Schotka, HQCJ Deputy Chairman, Taras Lukash, HQC Member;
- Andrii Kavakin, Inna Liniova, Council of Europe Project;
- Kostyantyn Krasovsky, Chief of the Main Department on the Legal Policy of the Presidential Administration, Secretary of the Judicial Reform Council;
- Oleh Burlachuk, Anastasiya Dyomina, OS Ukraine;

- Mykhaylo Zhernakov, PIC Member, Director of the DEJURE Foundation, Member of the RPR Board, Roman Kuibida, PIC Member, member of the Judicial Reform Council, member of the board of the Centre of Policy and Legal Reforms, Denys Bugai, Ukrainian Bar Association, Tetyana Yushchenko, Ukrainian Institute for the Future, Vyacheslav Panasiuk, Law Development Centre.

3. 4-6 April 2018, Georg Stawa, Wilma Van Benthem:

- Serhiy Kozyakov, HQCJ Chairman;
- Mykhaylo Zhernakov, Halyna Chyzhyk, PIC Members;
- Fabian Loewenberg, Katrien Witteman, EUAM.

4. 8 June 2018, Georg Stawa:

- Serhiy Kozyakov, HQCJ Chairman;
- Roman Kuibida, PIC Member;
- Serhiy Verlanov, PIC Member.

5. 15 June 2018, Georg Stawa, Wilma Van Benthem:

- Serhiy Kozyakov, HQCJ Chairman;
- Stanislav Schotka, HQCJ Deputy Chairman;
- Andriy Kozlov, HQC Member;
- Roman Kuibida, PIC Member;
- Serhiy Verlanov, PIC Member.

6. 10 August 2018, Georg Stawa, Wilma Van Benthem:

- Serhiy Kozyakov, HQCJ Chairman;
- Taras Shepel, PIC Member.

7. 7 September 2018, Georg Stawa:

- Vitaliy Tytych, Roman Maselko, Roman Kuibida, Mykhailo Zhernakov, Halyna Chyzhyk, PIC Members;
- Serhiy Kozyakov, HQCJ Chairman;
- Oleksiy Filatov, the Deputy Head of the Presidential Administration, Coordinator of the Judicial Reform Council.

The Report also takes into consideration some follow-up activities in the aftermath of the above meetings, such as series of email exchanges with Roman Kuybida, Taras Shepel, Vitaliy Tytych and Mykhaylo Zhernakov - PIC Members.

2.2. Scope and Approach

The purpose of this Report is to help national and international justice sector stakeholders to obtain a succinct review of the **state of affairs and recommendations** with regard to the Ukraine's judiciary related reforms from the narrow angle of the assessment of **law and practice** in the **selection and evaluation of judges**. The Report is thus **not a comprehensive assessment** of the justice sector and its reform in the country, which has speeded up since 2014 after the adoption of the Justice Sector Reform Strategy and Action Plan 2015-2020 (JSRSAP). The **Ukrainian Government** has declared a significant and concerted reform of the

country's justice sector as a necessary precondition in order to consolidate the on-going European integration efforts as the general public **trust** in the core justice institutions, such as the judiciary, remains stable in the **low** teens of percentage points according to various external observers².

One of the reasons for that stalemate could be attributed to an **excessive focus on legislative and formalistic tools** rather than trying to **change behaviour** of sector institutions in a sector which, by way of its inherent characteristics (i.e. the ultimate power to decide to apply or not apply, and how to apply, any piece of legislation), is arguably more **immune** to legislative change than any other. This Report is thus just a **small contribution** to the significant institution and regulatory building efforts established under JSRSAP, going to the core of the questions on how to change the **approach, behaviour and capacity** of the relevant actors in a sector that cuts across different branches of power (judiciary, executive, legislature), and not only includes independent bodies, but also private corporations and professional associations. **Law and practice must be connected**, in order to guarantee clarity and foreseeability, which are essential prerequisites of the rule of law.

As to the approach for the **policy relevance benchmarks**, the Report goes into the **law and practice** in Ukraine in selection and evaluation of judges is being assessed by reference to the European standards and most notably *trends and practices* in certain European Union jurisdictions, primarily **Austria, Germany, the Netherlands, Lithuania and Scandinavian** countries. One of the key criteria for choosing these jurisdictions as the *benchmarks* for the assessment is the **highest degree of public trust (for example, the Netherlands) or the most significant change during the last decades in the positive way of public trust (for example, Lithuania)** in the national courts and **judiciaries**³ in these respective jurisdictions, both in absolute and relative (comparing post-communist countries and EU Member States) terms, as attested by reputed **public perception surveys** and opinions of informed observers.

The Report applies various **legal** (such as 'independence'), **socio-political** ('transparency'), and **practical** ('capacity', 'performance') **criteria (or "benchmarks")** in its institutional and functional evaluation of the current Ukrainian system. The Report uses them as long as those benchmarks may be assumed as applicable by reference to the above policy framework, or by reason of their being *a priori* standards of a **good system of administration of justice** in the eyes of an ordinary reasonable observer. To complement our understanding of well-functioning judiciary in particular, and the justice sector in general, we have also factored in an **adequate ratio of cost-benefit** in having well selected and performing judges and courts at a **reasonable price** to the taxpayer as a **desirable** policy relevance benchmark. Having said that, **absolute attributes** of a good system of administration of justice - such as **effectiveness, efficiency, fairness, equity, reasonableness, coherence, certainty (clarity and foreseeability) and stability** - have also served as the main guiding **principles** for the suggested policy options. All these aspects add up to the **'quality of justice' in a holistic way**, which we intend to promote by way of our recommendations.

² See, among many other authorities, a recent [Justice Needs in Ukraine](#) Survey by HIL, Dutch NGO, 2016, whereby the public perception of trust in the judiciary was assessed at 12%. The number has so far stayed within the margin of 10-12% in most public opinion surveys.

³ Which ranges, according to the last data from Eurobarometer (03/2018) from 47% in Lithuania to 81% in the Netherlands.

<http://ec.europa.eu/commfrontoffice/publicopinion/index.cfm/Chart/getChart/themeKy/18/groupKy/100>. Also see the attached Annex Compendium of EU MSs practices on Judicial Selection and Evaluation.

Against the background of the sectorial scope and policy relevance benchmarks, the report has been focused on establishing the **state of affairs** - notably **symptoms and causes** of the relevant problems, in turn allowing identification of priority areas of intervention by formulating **recommendations**. While this Report is **not a monitoring exercise** for establishing compliance by Ukraine with some specific EU support conditionalities, it nonetheless may serve as a *sui generis* **peer-review mechanism** and food for thought for policy makers in EU and its Member States that acknowledges the progress and focuses on the **remaining areas for reform** in Ukraine to promote the *rule of law* in general, and encourages more balanced approaches in the **highly-publicly discussed** area of selection and evaluation of judges in particular.

The Report also **avoids** going into **purely technical** and formalistic description of the domestic situation (including articles/sections of most relevant statutes etc.) in order to better serve a reader, who is assumed to have a certain degree of knowledge about the underlying socio-historical context in the country and is informed of the basic legal context as relates to Ukraine's justice sector reforms. The **Expert Team** assumes that the **reader** is either **knowledgeable in the country's law and practice** in particular, or is at least capable, as an ordinary reasonable observer, to apply analogies from a comparable (his/her own country's) constitutional set-up. Such an approach will help the **Expert Team** to save time and effort, while allowing it to focus its efforts on the **analytical and operational parts** of the Report. Having said that, both the domestic context and the applicable criteria/benchmarks for measuring it are specified in those cases, where no proper analogy or sufficient assumption can be applied by an informed reader without an additional explanation.

As to the **factual basis** and "**standard of proof**" for the Report's findings, it relied on some **statistical data** - provided by the Ukrainian authorities or compiled from CEPEJ or other analytical tools. In addition, the Report's findings are based on more than 30 oral and written **interviews** of more than **100 interlocutors**, representing most constituents in 1) the Ukrainian judiciary, 2) the Ukrainian justice chain, as well as 3) representing international partners working in the country. While no conclusion on a problem, its cause, or solution, warrants consensus in this delicate area, most of the findings and recommendations are also **corroborated** by views of various interlocutors, taken against the background of the **reports, aggregated statistics, assessments and evaluations** mentioned above. A single opinion expressed in any particular report, or by any one interlocutor, was not a sufficient basis for **Expert** conclusions. While references and footnotes are made to a specific source mainly to give the origin of the source used, **Experts** did not consider it necessary to link each of the findings and recommendations to a specific source or sources.

In sum, in order to come to our conclusions, we looked into the **preponderance of objective evidence and reasonable opinions of informed observers** about the state of the Ukrainian law and practice in the judiciary selection and evaluation, based on the policy benchmark of **comparative practices of advanced European jurisdictions**. The chosen approach, while not warranting an absolute certainty (we discussed a lot of **pros and cons** of the proposed solutions even within the **Expert Team**), seems appropriate in the context of a strategic paper such as this one, in order to establish problem areas and tackle them by suggested changes in policy and action.

3. Background

3.1. Judiciary Reform

The judiciary reset in Ukraine was foreseen as part of the **Justice Sector Reform Strategy and Action Plan 2015-2020 (JSRSAP)**, adopted in **2015** in the aftermath of the Maidan events. In **2016** the amendments to the **Constitution of Ukraine** and other statutes marked the beginning of action in changing the courts and the judiciary.

In **2017** the High Qualification Commission of Judges (HQCJ) held a selection process for 120 positions as a judge in the new **Supreme Court**. The **new approach and procedures** applied involved **two stages** – the assessment of **legal** professional skills and competences in Stage 1, and the assessment of **social and psychological** skills and competences with an additional assessment of legal professional skills in Stage 2. Stage 1 involved two distinct procedures - **multiple choice test questions** (MCTQs; anonymous testing) and **case studies**. Stage 2 included 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 the Public Integrity Council (PIC). Interviews were transmitted online, and later broadcasted in full or in part by various third parties. More than fifty candidates, who had received negative opinions of PIC, were excluded from the competition. As a result, **118** candidates were selected and appointed to the new Supreme Court out of the **initial 651** candidates that were allowed to take part in the competition.

In **2018** similar exercises are being held to select judges of the new specialised **Intellectual Property Court** and the new **Anti-Corruption Court**, new **first instance** judges.

The on-going **qualification re-assessment**⁴ of judges – which is supposed to act as a **one-off evaluation** of more than **5,500** existing judges to confirm their fitness to continue exercising their judicial duties - involves the **same two stages** described with regard to the Supreme Court competition above. Judges refusing to undergo the one-off evaluation or failing it are subject to **dismissal**. The positive outcome of this evaluation will also allow judges to receive a **higher pay** – notably almost **30 times** the living wage in Ukraine for **first instance** judges, some **50 times** for appellate judges.

In the meantime, the judiciary governance system was revamped with the **High Council of Justice** (HCJ) at its **pinnacle** to guide all judiciary policy, budget, performance and communication matters. In **2017** alone the HCJ **dismissed 172** judges for committing a significant disciplinary offence⁵. The decision to recommend a particular candidate or not by HQCJ (either with regard to selection or qualification re-assessment) is followed by a **final decision of HCJ**, with the **President** of Ukraine retaining a merely **ceremonial role** in the final appointment of new judges.

It remains a notable fact that since 2014 almost **3,000 judges** (at least 30%) **resigned** without waiting for the qualification re-assessment, as Ukraine had almost 9,000 judges at the start of the judiciary reset⁶. Most of them did it for other reasons than the expiration of the term of office, including introduction of the new judicial selection and evaluation processes, and putting in-place of the electronic assets and income **declarations** system. The Ukrainian judges are now

⁴ In respect of the **one-off evaluation** of all working judges in Ukraine, the term “**qualification re-assessment**” is used interchangeably with the simplified word “evaluation” throughout the text.

⁵ PIC comments, that “at least 108 of them were dismissed as judges which after the occupation of Donbas and Crimea started collaboration with the occupying authorities on occupied territory. That is why such amount is (creating an) anomaly in 2017.”

⁶ See at: <http://jurliga.ligazakon.ua/news/2018/6/1/170424.htm>

required to submit **three types of declarations: assets and income, family relationships** (in public sector), and **integrity**.

3.2. Relevant Domestic Law and Practice⁷

The following **legislative acts** regulate the competitions in the selection and qualification re-assessment of judges: the **Constitution** of Ukraine, the **Law of Ukraine "On the Judiciary and the Status of Judges"** (hereafter the "Law"), and the **Regulations on the Qualification Assessment Procedure and Methodology**, approved by the Resolution of the High Qualification Commission of Judges of Ukraine (hereafter: HQCJ) No. 143/зп-16 dated 03 November 2016 (hereafter the "Qualification Assessment Regulations").

The following **institutions** are engaged in the selection and evaluation procedures:

High Qualification Commission of Judges

HQCJ announces a competition, accepts documents from candidates, holds a special examination of candidates, conducts qualification re-assessment, **determines the results of the competition**, and passes a decision on the recommendation of a candidate to be appointed to the judicial position or re-assessed in terms of his or her fitness to continue to exercise the judicial duties.

High Council of Justice

HCJ considers the HQCJ recommendations on the appointment of candidates for a judicial position, forwarding its **submission** to the President of Ukraine on the appointment of a judge.

President of Ukraine

The President of Ukraine **appoints** a judge on the basis and within the scope of the HCJ submission. The President of Ukraine may not check the compliance with the statutory eligibility requirements of the candidates.

Public Integrity Council

PIC is an institution composed of representatives of **human-rights public associations, legal scholars, attorneys, journalists** who are **renowned professionals** in their area, have **solid reputation** and meet the **political impartiality and integrity** requirement. PIC was established with a view to assist the HQCJ in determining compliance of the candidate for a judicial position with the **professional ethics and integrity** criteria.

The PIC provides to HQCJ **information or opinions** in this respect. PIC is **not** authorised to check whether the (legal or other professional) **competence** criterion is met. Its opinions are **not binding** for the HQCJ. However, if the PIC in its opinion finds that the candidate does not meet the professional ethics and integrity criteria, the HQCJ may decide to **override the PIC**

⁷ This section of the Report contains no Expert analysis of the relevant domestic legislation, which is going to be assessed – together with the practice of its application - in Section 4 of the Report. Therefore, the Experts have tried to reduce this Section to the **very essentials of the relevant statutory framework**, in order to **avoid repletion and overlap**.

veto request by way of the qualified majority of **at least 11 votes** of HQCJ Members out of the total 16 Members.

a. Selection of New Judges

In order to apply for a judicial position, a candidate must submit a **written application, motivation** letter, copies of **identity** documents, documents proving the **education** level, **work experience**, declaration of the person authorised to perform the state or local government functions, his/her **family affiliations declaration** and other documents. The same information is collected regarding the judges passing the qualification re-assessment.

HQCJ **collects information on candidates** from the Prosecutor General's Office, the National Anti-Corruption Bureau, the National Police, the Ministry of Internal Affairs, the Ministry of Education and Science, the National Commission on Securities and Stock Market, and other authorities.

The **stages** which the candidates have to undergo include the assessment of **legal** professional competences and skills at **Stage 1**, and the assessment of **social and psychological** skills and competences with an additional assessment of legal professional characteristics at **Stage 2**. These stages and their constituent steps have been described in detail in **Section 4.2 below** as part of the Experts' assessment.

b. Qualification Re-Assessment of Existing Judges

The qualification re-assessment **procedure** is governed by the aforementioned **legislation**, and is conducted by the HQCJ in order to establish whether a judge (judicial candidate) is **fit** to continue to exercise **judicial duties**. The procedure and methodology for qualification re-assessment, indicators of the compliance with the qualification evaluation criteria and methods to establish them were approved by HQCJ by the aforementioned **Qualification Reassessment Regulations**. The same stages and steps in the **selection** of judges are also **applicable** to the qualification re-assessment. An additional purpose of this process is to examine the judge's professional **performance and efficiency** level, as well as to identify the needs to strengthen the professional capacities and raise the public trust.

c. New Supreme Court Competition in 2017

The selection process was conducted during **10 months** starting in February 2017, with the participation of **international donors**. One of the ways of ensuring the influx of 'experienced' lawyers at the Supreme Court (SC) level was the **cross-recognition** of qualifications of other legal professions (lawyers, academia etc.), allowing them to qualify as SC justices alongside the existing judges. In the beginning, **1,436 applications** for participation in the competition were submitted. **651** candidates were **allowed** to take part in the competition at **Stage 1**. **381** candidate took part in **Stage 2**, including the interview (see Section 4 below). **53** candidates were **removed** on the basis of the **PIC negative opinions** (out of 146 negative opinions in total). Some **dossiers** for a candidate involved more than **1,000 pages**.

As a result, **120 candidates** were recommended by the HJC to be appointed. out of which the HJC decided to appoint **115**. Later in 2018, 3 more candidates were appointed after some procedural delays.⁸

d. On-Going Selection and Evaluation Processes

Starting from 2018, the judiciary reset continues as more than **6,000 judges and candidate judges** are undergoing the following procedures, including: (a) **qualification re-assessment** of some 5,500 judges (of which some 1,500 have already been evaluated at the time of the production of the Report; see below), (2) selection of new **1st instance** courts judges, (3) competition for the **High Intellectual Property Court (HIPC)**; (4) competition for the **High Anticorruption Court (HACC)**; (5) the **second tranche** of the competition to the **Supreme Court**.

As of August 2018 **1,486** judges had completed the **qualification re-assessment**, of which **1,245** judges (84%) were found to meet the necessary requirements and were successful, while **241 judges** (16%) failed to pass the evaluation – namely, **83** judges did not pass Stage 1 (legal professional skills and competences assessment), while **47** judges did not pass Stage 2 (social and psychological skills and competences assessment), and **111** judges voluntarily **resigned** or their powers were suspended during the evaluation. Additionally, HJC postponed the consideration of matters in relation to **289** judges.

On 3 April 2017 HJC announced the selection of candidates for **600 positions of local court judges**. Out of **5,338 applications** from the candidates, **4,935** were admitted to the selection process. From 4,525 candidates who took the part, HJC determined **700** successful candidates, who are expected to graduate the National School of Judges at the end of 2018, and be **sworn in in early 2019**.

On 30 September 2017 HJC announced the **competition** to fill 21 positions of judges within the **High Court on Intellectual Property (HIPC)**. On 23 July 2018 HJC increased the number of the IP Court judges to **30 positions**, 9 of which will be the positions of the Court's Appeal Chamber. In total, 234 candidates applied, and **219** candidates were **admitted** to the competition.

From 24 July to 1 August 2018 HJC conducted **registration of intentions** to participate in the second tranche of the competition to the **Supreme Court** (78 vacancies), and the **competition to the High Anticorruption Court (HACC)**; 39 vacancies). **659** candidates applied for SC, and **342** to HACC. The competition to both courts started on 12 November 2018 with the anonymous testing / MCTQs, and continued with the practical exercises on 14 November 2018.

e. Dispute between PIC and HJC on Qualification Re-Assessment

At the end of March 2018 **PIC** announced that it would **suspend its participation** in the process of the **qualification re-assessment** of judges, because, according to the PIC members, the procedure of the assessment of judges was not transparent, HJC's amended rules of procedure and organisation of the process limited the activity of PIC, etc.⁹ On 27 March 2018 **HJC** decided to **continue** to conduct **interviews** with the judges undergoing the

⁸ See at: <https://www.president.gov.ua/documents/decrees>

⁹ Statement of the Public Integrity Council as of 28 March 2018, available at the website: <https://grd.gov.ua/news/152/the-public-integrity-council-suspends-its-participation-in-the-qualification-ass>

evaluation without PIC being present, while PIC appealed to the Supreme Court to challenge that decision..

On **18 September 2018** the Supreme Court (Cassation Administrative Court, CAC) upheld **3 out of 10** of the PIC demands with regard to the qualification re-assessment. In particular, the Court **stroke down** the following HQCJ rules:

- that the judge **must be informed** by PIC that he/she is incompatible with the professional ethics and integrity criteria;
- that PIC should have a certain pre-determined **structure** of its opinions;
- that the **credentials** of PIC representatives have to be confirmed by a **written decision** of PIC, and submitted to the HQCJ Secretariat before the consideration of the relevant issue.

At the same time, the SC **upheld** the following HQCJ rules:

- Information or opinion on a judge (candidate) **should be submitted** by PIC to HQCJ **not later than 10 working days before** the determined date for interviewing a judge or candidate; **transcripts** with the results of the **PIC voting** on each candidate should be submitted and attached to the PIC opinion; in case of the **PIC non-compliance** with this requirement, HQCJ may decide to continue without taking notice of the PIC opinion;
- HQCJ, when considering the PIC opinion, **assesses only those circumstances** that are **relevant** to the conformity of a judge (candidate) with the criteria of professional **ethics and integrity**;
- the circumstances set forth in the PIC opinion **are not subject to re-examination** by HQCJ during the future qualification evaluation of the relevant judge (candidate), where the PIC opinion has **once already been dismissed** as ungrounded.

The judgment of the Supreme Court's Cassation Administrative Court **was appealed** by HQCJ to the Supreme Court's Grand Chamber. The proceedings are still currently pending. While **PIC** have announced that they are **going to participate** in the on-going **selection** processes to **HIPC, HACC and SC** (second tranche), it remains unclear at the time of writing of the Report whether and to what extent PIC are going to continue to participate in the qualification re-assessment.

f. Amendments by HCQJ of 2 October 2018

On 2 October 2018, HQCJ amended its approach and procedures **in terms of the minimum admissible score** for the **legal professional skills and competences assessment** (Stage 1; for more details, see Section 4.2 below). In particular, the minimum passing score was set separately for each Stage 1 component – namely, anonymous testing / MCTQs and case studies - and for the **whole Stage 1 in its entirety**. The ranking of candidates at different steps of Stage 1 and the general rating after the overall results of the exam are formed according to the number of points scored by the participants (from greater to smaller).

The new **mixed approach** combines the passing score based on the minimum required **absolute score** from each candidate, balanced against the **expected minimum number** of candidates, depending on the number of vacancies. The **minimum passing score** is fixed

separately for both components of the professional legal testing stage (anonymous testing / MCTQs and case studies) at **60%**. Those who have received this **minimum passing score** - and received a higher result that is **three times higher than the number of vacancies** - are admitted to **Stage 2** (psychological testing, examination of the third party evidence and interview). If two or more participants have scored the same, all such participants are allowed to get to Stage 2.

The **overall minimum passing score** of the entire **selection process** is the sum of the minimum passing scores of the above stages, and is fixed at **60%**. At the same time, the Commission retains discretion to set a higher (but not lower) minimum passing score.

4. Experts' Assessment

4.1. Good Governance of Judiciary

A more thorough assessment of the judiciary selection and evaluation in Ukraine should start, primarily, with the review of the role, which the judiciary plays in the **overall justice sector reform coordination**, and the quality of the **judiciary governance system**. As mentioned in the methodology part above, an in-depth understanding of the peculiar nature of the justice sector (including the judiciary) and its reform process warrants a conclusion that a **change in a particular instrument** (be it policy, regulatory or institutional) does **not** bring a required change in the same way as it does in other sectors – mainly because the very stakeholders of the justice sector are the ones who interpret, apply and decide on whether and how to apply the new legislation. A real change in the system of administration of justice can only be achieved by a marked improvement in the sector actors' capacity - **including mentality, willingness and skills** - to accompany the statutory and/or institutional changes. Mindfulness of these specifics of the justice sector, including the judiciary, is essential in setting more adequate priorities, realistic and results-oriented indicators in the reform policy design and implementation. Furthermore, the justice sector is **neither 'owned' nor coordinated by the Ministry of Justice (MOJ)** or the Government (Cabinet of Ministers) in its daily performance – and indeed it is because of the competition of the independent or autonomous limbs of the sector that it is able to provide **'checks and balances'** against abuse and improper interference. At the same time, the **"independence"** or **"autonomy"** of the judiciary and other sector institutions results in **lack of its alignment** with the usual **4-year policy cycles** in representative democracies, and the **lack of direct accountability** to the electorate in the way that the parliamentary and executive powers are accountable to it. This, in turn, at times results in a **deficit of a sense of urgency** among the **judiciary** or any sector institutions to develop **strategies** and action plans akin to those usually presented to the electorate by each new Government. In view of these specifics, **coordination** of the justice sector reform (but not coordination of sector performance, which may at times need to remain fragmented and competitive among different institutions) is of paramount significance to make sure that the policy development and implementation process is sufficiently **inclusive and productive**.

In this respect, the Experts underline the importance of the involvement of the **judiciary** and its representatives at the policy-setting level of the wider **justice sector reform** driven by the **Judicial Reform Council (JRC)**, which has continued operating **regularly** ever since its inception by the Administration of President in 2014, meeting at least **once per quarter** to define strategic policy directions in the justice sector, while also acting as a filter for most of legislative initiatives pertaining to the judiciary and to wider sector reform. With the setting up of the JRC, it was for the first time in Ukrainian history that a practical attempt was made to move

from *ad hoc* initiatives to a more systemic approach to justice sector reforms. The JRC has a broad and mixed **representation, including** the heads of judiciary governance bodies (HCJ, HQCJ, SJA), the President of the Supreme Court, the Minister of Justice, alongside key government stakeholders (the MOF), civil society representatives and donors. Since the JRC has **no dedicated** support body at the **operational** level, it is usually provided with an *ad hoc* secretarial support and targeted expertise, among others, by the **HCJ Strategic Planning Department**. The **Experts** are, all in all, **satisfied** with the degree of the involvement of the **judiciary** and its **governance bodies** in the **overall justice sector reform**. At the same time, in order to seek more successful and sustainable implementation of the JSRSAP, **institutional** reform coordination mechanisms should be built in other **judiciary** institutions (HQCJ, SJA etc.) as well, by developing **dedicated strategic planning** capacities for the policy development and review, thus contributing to the complementary '**bottom-up**' reform planning process.

According to the standards established by the Consultative Council of European Judges (CCJE) and the Venice Commission, the constitutional place and the governance system of the country's judiciary appears to guarantee **structural independence** of the institution from other branches of power. The main judiciary governance body, the **High Council of Justice (HCJ)**, was established in 2016, consisting of **21 members**, the majority of which are judges, elected by their peers, alongside other representatives appointed by the President, Parliament, and other branches of power. The composition of the **High Qualification Commission of Judges (HQCJ)** has a similar structure, consisting of **16 members**, the majority of which are judges elected by their peers. The current composition of either the HCJ or the HQCJ **cannot** be subjected to **criticism** for either **under-representation** of the **judicial** limb, or excessive representation of judges or former judges in the judicial governance bodies, which has been frequently the focus of concern for the Venice Commission with regard to various COE jurisdictions.

The High Council of Justice (HCJ) has received a number of **new powers**, placing it at the pinnacle of the judiciary governance system, including the mandate to **appoint** and **remove judges**, to define judiciary policy undertaking **strategic planning**, to organise **budgets**, to measure **performance**, to **communicate** on behalf of the whole judiciary etc. Among these strategic roles, some more operational roles (such as the examination of **disciplinary** complaints) were also given to the HCJ. The Experts encourage comprehensive development of the **leadership** of the HCJ at the **top** of the judiciary governance system. At the same time, more **streamlining** between the roles of the **HCJ and the HQCJ**, in particular, is necessary to ensure complementarity in the judiciary selection and evaluation processes.

The statutory procedures before the HQCJ appear to establish a sufficiently **clear and foreseeable** manner of the relevant HQCJ **hearings**, public and **media access** to the sessions, flexible rules about the **recording** of meetings, complete **publication** of relevant decisions and judges' files. A gradual increase in the accessibility and transparency of the HQCJ proceedings in all matters of its competence is essential in order to strengthen the society's trust in the judiciary. HQCJ is supported by its **Secretariat**, consisting of 214 staff members, made up of the Head of Office ('Secretary General'), legal and secretarial personnel. The Secretariat is extremely valuable in all aspects of the policy development and implementation at the HQCJ, including in **HR management, budgeting and financial management**.

Judges and the Judicial Governance Bodies in Ukraine are assisted by the **State Judicial Administration (SJA)**, and judicial assistants having a **special status** of the so-called **patronage service employees**, which differs from the ordinary public service, due to the fact

that judicial assistants do not perform functions related to the state's activities but assist the work of a particular judge. This underlines the importance of their role in assisting the judiciary and serving to improve the standing of the country's judiciary as a separate branch of power. The **Council of Judges (COJ)**, which is a professional association of judges, involves current judges of all the instances, making up an additional element in the judiciary governance system. The new management of the COJ is particularly active in the development of new substantive and procedural statutes, ethical and efficiency (case management) rules, conduct of trainings, research and analysis, and the promotion of the greater enforcement of court decisions. Other judiciary governance bodies and institutions, such as the **Supreme Court** (which is in charge of its own budget, in contrast to the rest of the Ukrainian courts) and the **Congress of Judges** add up to the complex system of the Ukrainian judiciary governance. The system, regardless of the on-going reforms, can be said to possess the regulatory and institutional tools to guarantee **structural independence** of the country's judiciary from other branches of power.

The **functional independence** – otherwise referred to as an individual independence of a judge from undue pressure – is still an overriding objective, which is being gradually promoted through a variety of tools, including better **performance management, results-based budgeting**, quality supervision (for example, **peer pressure in a positive manner**, stepping forward for 'intervision' as it is called in the Netherlands¹⁰¹¹), disciplinary **and ethical** oversight and a judicial **training** system. It is important to note, in the opinion of the **Experts**, that all these efforts in building **better governance of the judiciary** should go **hand in hand** with the more **merits-based selection and evaluation** processes. **Selection** of highly competent individuals should merely be seen as a **first step** in the on-going judiciary reset – what happens **after the appointment** is arguably even **more important**, in order to make sure that Ukrainian judges are not only **independent**, but also **accountable, competent and efficient**. Finally, the gradual injection of **members of society** through **lay judges** and **juries** could be considered as a feasible **long-term policy option**, in order to help establish a well-selected and evaluated **professional judiciary**, while promoting greater **responsibilities and trust** of the society in matters relating to the administration of justice.

4.2. New Approaches to Selection and Evaluation

a. General Observations

In Ukraine, as in all countries in the World moving towards a true democracy, it is of paramount importance to have a **well-functioning judiciary**. Ukraine currently is in a **unique position to reorganise its judiciary**. Some factors are key in establishing a well-performing judiciary – namely, in the judiciary selection and evaluation matters, **the best candidates are not chosen**

¹⁰ In the Netherlands, intervision is even part of the key points which a regular (and also a senior) judge in a District Court is supposed to achieve: <https://www.werkenbijderechtspraak.nl/wp-content/uploads/2016/11/Senior-rechter.pdf> (in Dutch, but can be seen under point 3, G.).

¹¹ Meaning: judges are - during session, conducted as a single judge, i.e.: not in a panel - being observed by either 1) other judges, 2) by a psychologist (with camera recording of the session) or 3) by a senior justice of an Appeals Court. In all three forms of intervision issues which can arise are discussed with the judge in advance and also afterwards. The findings are reported confidentially. The senior counselor will return general points (of course, anonymously) to the departmental director. All forms of intervision are appreciated by the judges (although in the beginning all judges find it scary when – handling cases on their own and not in a panel) they are 'judged' by colleagues. After a while judges become used to this form of observation and starting to like it, as it really helps them to move forward in their daily work in a positive manner.

by an algorithm yet, and there is **no** space for a **mathematical or academic** selection exercise **only**. As computers cannot make the final decision who would be a good judge and who would not, the Experts believe that **discretion must remain within the human decision-makers**, such as gathered in the HQCJ, to choose the most appropriate candidates for the job. This 'human factor' **must be counter-balanced** with test results, proper analysis of other objective information, collegial decision-making, clear scoring rules, obligation to substantiate the decision with reasoning and other procedural safeguards.

The Ukrainian legislation provides that the qualification re-assessment and selection of judges are carried out based on the HQCJ recommendation, followed by the HCJ decision. "Qualification assessment" is a process relating to both the selected and evaluated judges. Article 83 of the Law defines the relevant candidate's qualification assessment criteria: **competency** (professional, personal, social), **professional ethics, integrity**. At the same time, the qualification assessment by the criterion of professional competence considers the court instance and specialization.

The aforementioned legislative provisions formally determine the stages of qualification assessment: **a) "examination" and b) "interview"**. In fact, these **two stages** involve a) first, the assessment of **legal** professional skills and competences ("exam"), and b) second, the assessment of **social and psychological** skills and competences with an additional assessment of legal professional skills ("interview"). The **first stage involves 2 distinct procedures - multiple choice test questions (MCTQs; anonymous testing) and case studies**. The **second stage includes 3 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 of HQCJ to recommend a particular candidate or not is followed by a final decision of the High Council of Justice (HCJ), with the President of Ukraine retaining a merely ceremonial role in the final appointment of new judges. The Experts consider that the explanation of the two stages and procedural steps above **could have been clearer** in law and practice. However, a comprehensive and non-formalistic view of the current law and practice taken together allows to consider that the two stages are organised exactly along the lines as described in this Section.

b. "Examination" - Stage 1

The purpose of **Stage 1** is to identify the level of **legal** knowledge, practical skills and abilities in applying the law, and the ability to administer justice in the relevant court. A candidate who has scored below the **minimum required score** at **Stage 1** (see Section 3.2(f) above) is not allowed to further participate in the competition Stage 2, which allows in further stages of the competition to give more focus on other competences (social, psychological) of the candidate.

This Stage includes **2 procedural steps** - namely **anonymous written tests by way of multiple-choice test questions (MCTQs) and case studies (practical exercises)** - to identify the level of knowledge, practical skills and qualifications to apply the law, depending on the candidate's specialisation. The Commission does not prepare any questions or practical exercises itself. The MCTQ database is run by the **National School of Judges (NSJ)**. At the same time, a large **group of external experts** has been formed for the purpose of developing multiple-choice test questions (MCTQs) and reviewing them, with the donor support. In the course of interviews and meetings with the candidates and judges passing the examination, **no particular remarks on the overall quality** of MCTQs were expressed, except for some rare comments on the validity of separate questions. NSJ should be encouraged to develop its **own capacities on MCTQs**, in order to regularly **review and update** the databases, without over-

reliance on donor support. It could further be discussed what kind of questions should be put in the tests (for example, **reducing** the number of those requiring **pure memorisation** of legislative provisions, numbers, etc.). But it should be a **gradual process of improvement** requiring no extra measures in the short-term perspective.

The MCTQs answers are **checked by the computer**, and the test **results are disclosed** to the candidates **on the day of the examination**, and are available to the **public**.

The second step of this stage is a **case study**. During the Supreme Court selection in 2017, a **group of external experts** was also engaged by the donors for the purpose of developing case studies and reviewing them. The case studies for the 2017 process were developed mostly on the basis of real-life scenarios – sometimes by way of one real past case, and at times by bundling together a few real past cases together in one case study. While some external observers found fault with that approach, the Experts underline that international testology standards **do not prevent real life case-study** scenarios.

What is key, is that the methodology of **what is expected** from the candidates is clearly explained to them **before the case study** is undertaken – for instance, whether the candidate should **benchmark** his answer against the **existing practice** of the Supreme Court, or rather the candidate should provide a more theoretical analysis of what the Supreme Court's **practice should be** on the particular legal issue. Second, **during the development** of the case study, an active **feedback** should be established between the **experts and HJCJ**, in order to make sure that the case studies strike a balance between the **legal complexity and practical nature of the task** (ability of the candidate to finish it on time). The permanent discussions between the experts and HJCJ is also necessary to provide the Commission with **methodological guidance** on what aspects of the case study are being scored and how (i.e. weights in the scoring with regard to the clarity of handwriting, solidity of *obiter dicta*, *ratio decidendi*, operative part and other elements of the case study). What is essential in the case study is that the candidate is established to be able to **raise and discuss complex legal questions** – including inconsistencies in the domestic jurisprudence – **rather than** merely to come to the **“right” conclusion** in the operative part.

The current practice of **collegial nature** of HJCJ checking the candidate answers to the case studies in panels of 4 HJCJ Members is an additional **procedural safeguard**, which should continue to exist. The case study works **have a dual code to prevent corruption** by way of interpersonal arrangements of the HJCJ Members checking the materials. Each case study work is checked by **at least three members of the Commission**. The computer automatically displays the average score. If the candidate gets at the first stage a score not lower than the one determined by the commission, then he goes further. The **coding** of each work is an important and satisfactory element to ensure confidentiality. **Automation** of the candidate's writing answers in the **case-studies** might be considered as a medium - term step, to improve both efficiency and confidentiality.

Any interested **observers** may attend **both steps in Stage 1**, which ensures greater transparency. The Experts recommend that HJCJ determines and publishes **the passing score as early as possible** before each step in the examination, in order to avoid the possibility of determining such scores *ex post* in view of the scores reached by certain candidates. In addition, the publication of the **interim** (MCTQ, case studies) and **overall results** of the examination stage is also essential to ensure the trust in the process. It appears, however, that the Commission has already made significant strides towards that end by way of the regulatory amendments of 2 October 2018 (see part 3.2 (f) above).

c. “Interview” - Stage 2

In contrast to Stage 1, which is intended to assess **legal** professional skills and competences **only**, this stage has as its **focus social and psychological skills and competences** of the candidate. The candidate’s **ethics and integrity** are key factors for assessment at this stage. This stage in fact **includes 3 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 the PIC.

At **Stage 2**, the HQCJ rules have established the following **1,000 points** for the composition of the **final ranking** of candidates based on the assessment of the following **substantive competences and skills**, comprised of the following components:

- **300 points for legal professional competences and skills**, of which 90 points for legal knowledge, 120 points – legal professional skills, 80 points – quality of performance (based on the professional experience as a judge, lawyer etc.), 10 points – development of professional competence (training, capacity building);
- **100 points for personal** competences;
- **100 points for social** competences;
- **250 points for professional ethics**, including **100 points** for “**moral-psychological**” characteristics, and 150 points for “**other relevant characteristics**”;
- **250 points for “conscientiousness, honesty, morality”**, of which 100 points for **integrity (“dobrochesnist”)**, and 150 points for “**other relevant characteristics**”..

First up is the question of the **linkage** between the **substantive characteristics** to be assessed for the purposes of the selection of judges (including, legal, social, psychological competences and skills), **indicators** to assess those substantive criteria, and the **means of collection of information**.

The Experts note first that legal **professional competences and skills** comprise **300 points** out of total **1,000 possible** points of assessment at Stage 2. This scoring approach **has to be viewed** in the context of the **entirety** of the candidate assessment, which includes **an initial “filter” in Stage 1** – namely, the candidates not collecting **the minimum score** as to their **legal professional competences and skills at Stage 1 are not allowed** to proceed further in the selection process. Only the candidates with a **sufficient level** of **legal professional knowledge and skills** proceed to Stage 2, where more “**soft**” **competences** – such as integrity and ethical characteristics - are being checked.

With regard to the “**soft**” - **social and psychological – competences and skills**, the Experts also observe the existence of **procedural safeguards** in the form of the regulatory provisions and HQCJ practice which describe **particular indicators** lying behind the relevant criteria, and specify the sources of **information and methods of determination** of these indicators. For example, the “**personal competences**” line of qualifications is assessed by following indicator: “**logical thinking, abstract thinking, verbal thinking, stress resistance, control of emotions** etc.”. These characteristics are evaluated in the course of **psychological testing** (see below). Therefore, the particular competence of a person is determined **on the basis of**

objective indicators, using **objective method of testing**, **limiting the discretion** of HQCJ in its interpretation of what are “**personal**” and what are “**social**” characteristics of the candidate.

The “**professional ethics**” block is assessed **both** on the basis of the results of **psychological testing** and the examination of the **dossier and interview**, whereby HQCJ examines such indicators as: **understanding and following the rules and norms**, **commitment** to the obligations, **discipline**, **respect** to others. Similarly, the **integrity / “dobrochesnist”** block is evaluated on the basis of the **psychological testing** indicators of “**dobrochesnist/integrity**”, and on the basis of the information of the **dossier and interview**. Thus the “**professional ethics**” and “**integrity / “dobrochesnist”**” blocks are evaluated on the basis of **psychological testing** results for up to 200 points. A further 300 points for both these criteria are allocated on the basis of other materials - including **PIC opinion** - which give a **substantial weight** to the “soft” characteristics of **professional ethics and integrity** in the overall scoring.

This confirms the Experts’ opinion that the **current mechanism** and **weights of legal / non-legal competences** and skills – and the **linkage** between the **substantive characteristics** to be assessed for the purposes of judicial selection (including, legal, social, psychological competences and skills), **indicators** to assess them and the **means of collection of information** - is **appropriate** in principle, **necessitating no** major changes in the **short-term** perspective.

At the same time, the Experts may find worth further discussing the **overall score** of **professional ethics and “dobrochesnist”** as a **total of 500 points** in the **medium-term** perspective. It is important to underline the **distinction**, first of all, between the **integrity** and other characteristics, comprising “**dobrochesnist**” (the Ukrainian word used in this respect is still open to interpretations, and can lead to some obscurity and misuse of the concept), and, secondly, the distinction between the **integrity / “dobrochesnist”** as a **block on the one hand**, and **professional ethics as a block** on the other hand (because the latter sometimes is understood and interpreted as being the element of “**dobrochesnist**”). In addition to **reducing the overall proportion** of these substantive criteria in the **medium-term**, a consideration could be given to further **clarifying** the “**dobrochesnist**” criterion to **delineate** it from **professional ethics**. At the same time, the Experts note that the **high weight** for the abovementioned characteristics was given most likely in the light of the special purpose of the selection and qualification re-assessment processes, aiming at “**cleansing**” the **judiciary**, first of all, from corrupted judges. This approach is thus acceptable and applicable in the **current situation**, necessitating **no changes** to the approach in the **short-term**.

The first procedural step in Stage 1 is the **testing of personal moral and psychological competences and general skills** (“**psychological testing**”). The psychological testing of candidates to the **SC** in 2017 and thereafter during the **evaluation of judges** in 2018 was conducted by OS Ukraine, an **independent HRM services provider**. The psychological tests were developed after a **validation** process to ensure their suitability for the Ukrainian socio-cultural context. Some psychological testing components - such as BFQ-2 or other “off-the-shelf” solutions - are **officially certified** by the Ukrainian Psycho-Diagnostics Association. The **partial basis** for the design of psychological tests was found in the so-called “**Professiogramme**” (Qualifications Framework) - a research document developed by Ukrainian psychologists for the use by HQCJ as a list of **desired socio-psychological skills and competences of a judge** (including integrity, etc.). The psychological testing in this case thus appears to have been tailored to the judiciary selection context, even though it must be underlined that such a **scope and extent** of psychological testing of judges **has not been**

undertaken anywhere else in European jurisdictions. Hence, the approach to **what is relevant and what is necessary** might be subject to further discussion.

During the psychological testing, the candidates undergo psycho-diagnostic tests, such as **BFQ-2** – the so-called “Big Five Questionnaire”; **HCS Integrity Check**; **MMPI-2** - clinical instrument for identification of patho-psychological risks; and **Psychometrics Test** – two separate blocks of items identifying the level of verbal and abstract-logical thinking. The candidate undergoes a **five-hour self-assessment**, and has a **thirty-minute interview** with a psychologist for validation purposes. The tests are **processed by the computer** online, making it a relatively quick process. The **interview** with a psychologist is used to clarify and **validate** the results, identify the levels of mentioned indicators in case of an invalid profile. After the interview, every expert **psychologist completes the final report** on each respondent, marking the levels of indicators according to the pre-determined normative profile, and **writes a narrative report** based on the results of the interview.

The narrative psychological testing report contains **three mandatory points**:

- **strong points** of a person (as a candidate to a certain position);
- **zones of development** (weak points of a candidate that do not state anything about disadvantages of a person, but mark personal features that do not suit a certain position or profession);
- **risks**.

As a result, the HQC receives a package with:

- **Final report** signed and stamped by the testing services provider;
- Consolidated final and **separate reports under each component** / tool used for the testing.

During the SC selection in 2017, a scheme was put in place whereby the psychological testing reports structure and content was adjusted to the parameters **directly relevant** for the HQCJ scoring of the candidate’s **socio-psychological** competences and skills assessed by way of psychological testing. HQCJ in turn developed a practice whereby up to **400 points** in the overall scoring range at **Stage 2** (out of the 1,000 points in total) were allocated for each candidate purely on the basis of the **psychological testing** report. The Commission would transfer, for instance, the **5-scale assessment** in the psychological testing report of the candidate’s “**integrity**” into an **equivalent range of 100 points** under the same parameter in the HQCJ scoring grid. Thus a “very low level” of integrity in the psychological testing report would mean from 0 to 20 points for the candidate; “low” - 20 to 40 points, “average” - 40 to 60 points, “high” - 60 to 80 points, and “very high” - 80 to 100 points.

This scoring transfer system places the **Commission’s discretion** under the **strict limit** (of merely **20%**) of discretionary choice within the 400 points range determined by **psychological testing**, depending almost entirely on the psychological testing reports produced by way of the **candidate self-assessment** and the **independent expert validation**, making it an additional **procedural safeguard** against unfettered exercise of the HQCJ discretion.

Overall, the **current method of psychological testing** of judges and candidates in Ukraine is a **step forward** in establishing comprehensive judicial corpus on the understanding that judges need **not only** have **merely legal professional qualifications**, but that they should also possess very important **social and personal competences**, including moral values. This

approach is certainly comparable to methods applied in some EU countries. Psychological tests are based on the mixture of **self-assessment** and professional expert **validation** by way of the interview, increasing **their reliability**. The process also teaches the decision-maker such as the HQCJ that a key tool in the modern human resources management is related to **risks about the future** - revealed by way of psychological testing, for instance – rather than merely by evidence about **past misdeeds**.

In the course of meetings with judges who participated in the selection procedures, civil society representatives, other experts, **certain doubts about some aspects** of the psychological testing were expressed, for example, as to whether or not the “**testing of loyalty**” was conducted, and whether or not it was warranted in view of the “independence” requirement for a judge according to the established standards. The Experts note that the use of the word “loyalty” here was explained in the public sphere - by both the company having conducted the testing and independent psychology and testing experts - as a means of establishing “**stable motivation required for effective work**”. This element of the testing helped to establish compliance of the person with the **rules and values of an organisation**, and **not one’s loyalty** to his or her superior. These concerns were thus rebutted as factually wrong, and expertly unsound.

Doubts were expressed also about whether the HQCJ and other decision makers fully understood and could interpret the psychological testing reports. These questions could be considered as absolutely normal and warranted, because Ukraine is among the first countries trying to adopt new technologies such as psychological testing to the judicial selection in such a **wide scope and extent**. **Proper adaptation** of the psychological tests to the judicial selection and evaluation **will improve with time**. In this respect, in view of a lack of any established benchmark or established comparative practice to measure **what is relevant or necessary** in psychological testing of judges, the Experts would not go as far as to say which component – or the method of its application - of the current approach to the psychological testing warrants improvement. It is commendable, however, that, with the interest of increasing the quality and effectiveness of the exercise, the first round of the psychological testing **monitoring** was conducted by Pravo-Justice in July - November 2018, involving representatives of the Faculty of the Psychology of Taras Shevchenko University and other renowned Ukrainian psychologists. Following this peer-review process, **general recommendations** would be formulated at some point with regard to the approach and the procedures applied, with a view to increasing the process **quality and the understanding** by the Commission of the final findings of the psychologists. This dialogue between the independent service providers, external experts, HRM specialists and the judiciary decision-makers should continue.

Donors should continue the capacity building efforts in the short-term, **training HQCJ members and staff** to help them cement the current practice of **transferring the psychological testing results into numerical scores**.

Taking into account the above, it can be said unequivocally that the **psychological testing** has already brought positive elements in the overall process by serving as an important **procedural safeguard** to **limit the discretion of the Commission** in an area of assessing **social and psychological characteristics** of a judicial candidate, which has historically been, and continues to be, to a certain extent, **highly susceptible to subjective interpretations**. It is important to make sure that HQCJ Members and staff continue to be **properly trained and guided** in the highly technical area of interpreting psychological tests, and that they are enabled to **compare risks revealed with regard to each candidate** based on his/her self-assessment by way of the psychological tests with **other evidence** in the judicial dossier about **past**

behaviour of the candidate. A decision of whether or not a candidate is suitable for the judicial office – including his compliance with such a delicate parameter as integrity – should be taken after a **cumulative assessment** of evidence in front of the decision-maker, including (but not limited) to psychological tests.

The Experts believe there is still work to be done to **improve the capacity** of the HCCJ Members, staff and other participants in the judiciary selection processes to better understand why psychological tests are important, and how they can bring more objective nature into an assessment of personal qualities such as integrity, to further reduce the susceptibility to subjective interpretations and speculations.

The next step in the stage is the analysis of the **dossier**, which is studied by a number of HCCJ members. Each HCCJ member also has three inspectors. Each dossier **is studied first by an inspector**, who then hands it over to a HCCJ Member for **verification of suggested conclusions**, especially on account of the materials from the **National Anticorruption Bureau (NABU) and the National Agency for the Prevention of Corruption (NACP)**.

The procedure of the ethics and **integrity check performed by PIC** impacts the whole process and methodology in a significant manner. As provided by Article 87 of the Law, the PIC **collects, checks, and analyses the information** about a judge (judicial candidate). It may provide HCCJ with the information about the candidate, or with justifiable reasons, **provide negative opinion** that the candidate does not meet **professional ethics and integrity criteria**. The PIC evidence is included in the dossier.

The role of **PIC** in the process is, however, very **different from any other third parties**, given that they have the right to **compel the Commission to veto** a candidate, unless a **Plenary Commission** reject's the PIC negative opinion by qualify majority (by at least **11 votes from 16**). If the PIC information is just submitted **information**, HCCJ takes it into consideration, but it has **no such impact** on the candidate's participation in the competition as the **negative opinion**¹². In fact, **50 candidates** were vetoed on the basis of the PIC negative opinions **out of 381** allowed to pass to the second stage of the Supreme Court selection in 2017, attesting an effective nature of the PIC participation.

The next and ultimate step in the qualification assessment is the **interview**, whereby both the **candidate's self-assessment** during the HCCJ **questioning** and the results of the candidate's **dossier review** are discussed. The interview takes place in the form of the HCCJ **open session**, whereby some key elements in the dossier are announced, while the candidate may **provide additional information, present explanations and answer questions** of the HCCJ members. Interviews are public and streamed online on the HCCJ official website. Besides, anyone can review and record it for further broadcasting. PIC Members sit alongside the Commission members during the interview.

The Expert Team believes that **what might be improved is the acceptance**: there is no need of distrust in the method and how the HCCJ is applying it to the entire process. The psychological tests provide a good base to receive a first, thorough assessment of the personality of a candidate; which might be counterbalanced by the other means of the testing procedure as a whole. The latest is also a **responsibility of the HCCJ in evaluating the candidates' overall profile**.

¹² Given the unique nature and importance of the PIC role, its duties and powers will be reviewed separately in subsequent chapters.

d. Cumulative Assessment of Both Stages

The Experts reiterate that the judicial **selection cannot be fully automated** based on mathematical algorithms. Moreover, the principle of **merits-based selection** does **not** mean an application of **academic-style grading** to each and every stage of the procedure. In order to strike a good balance between transparency and fairness, effectiveness and efficiency, qualitative and quantitative approach, the judicial selection has to be performed with some **discretion**, allowing to take proper account of all important aspects and information on a particular candidate. The use of **grading** at various stages of the procedure should serve as a **procedural safeguard** to place the decision maker's **discretion** at **reasonable limits** but should **not** be expected to **replace** that discretion. The **more procedural safeguards** exist, the **more discretion** can be duly accorded on "scoring methodologies", following the established ECHR approaches to good decision-making in judicial and relating matters.

On the analysis of the current situation in Ukraine, many **procedural safeguards are already in place** as a **sufficient** counter-balancing factor of the HCCJ discretion, including:

- a) existence of detailed **written statutory basis** and the **HCCJ rules and methodologies**;
- b) **computer-based testing at various** stages of the procedure;
- c) existence of interim and final **candidate ratings**;
- d) HCCJ **collegial decision-making** (panels and plenary Commission);
- e) existence of **PIC** with its procedural rights and compelling powers with regard to HCCJ regarding the veto;
- f) participation of various other **third parties** in the process, including NABU and security intelligence authorities;
- g) overall **publicity** and transparency of the process that will be reviewed below.

The Experts note that the description of the "**gold standard**" of qualities of a **best judge** should evolve with the **practice** of selection, evaluation and discipline, but it is **not susceptible to formal standardisation** in the legislation at any given point in time. The focus should be placed on the relevant objective criteria and the processes of the collection of evidence, which are **already** rather well-developed and **established** in Ukraine for the assessment of legal, social and psychological competences and skills of a judge.

Development of **practice guides** on various specific questions (such as on how to determine scoring of any of the various **blocks of legal, social, and psychological skills and competences** of candidates at Stage 2) could be suggested as an adequate and flexible form of both improving the capacities of HCCJ and other players, and the **clarity and foreseeability** of the regulatory framework in general.

Secondly, most of the suggestions by the Experts relate to the **development of practice of HCCJ evidence collection and decision-making**, necessitating **no changes** to the current **regulatory framework**. Among these an essential procedural safeguard would be the need for HCCJ to adopt a **reasoned decision**, especially where it "**contradicts**" the **PIC's negative opinion**. It should be noted that the principle of collegial decision-making does not prevent

establishing the practice of reasoning such decisions on the example of collegial decision-making approach in ordinary courts (also see Section 4.6 below for more specific recommendations in this respect).

In sum, the key features of the new approach to judiciary selection and evaluation are:

- 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 particular, notice should be given to full-scale **psychological testing** of judges and candidates, during which the general knowledge and skills (IQ), ethics and integrity, propensity for different psycho-pathologic risks, teamwork and other social and managerial abilities are tested. An elaborate, **academic-style**, system was also designed for testing **legal professional skills and competences**. At the same time, **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 the HQC in its decision-making.
- **Political influence** over judicial appointments has been **minimised**. Judges are now selected only by way of transparent process based on the established criteria. Appointments are taken by the HCJ upon recommendations of the HQCJ. The President is granted with more ceremonial role, limited to the issuing a decree based on the submission of the High Council for Justice within one month.
- Judges, defence lawyers and scholars from the legal field with a total professional experience of 10 years **can apply for a position of the SC judge** (*previously, only judges were eligible for the position of the SC judge, with at least a 15 years' professional experience or the judges from the Constitutional Court of Ukraine*).
- The candidates have to go through in-depth assessment of **legal professional skills and competences** by way of **anonymous tests and case studies**. All the stages are open to outside **observers** and are **broadcasted live**. The examination syllabus and lists of questions are published beforehand (*previously, judicial candidates did not have any examination on professional competence*).
- **Psychological testing** has already brought positive elements in the overall process by serving as an important **procedural safeguard to limit the discretion of the Commission** in an area of assessing social and psychological characteristics of a judicial candidate, which have historically been, and continue to be, to a certain extent, **highly susceptible to subjective interpretations**.
- **Public Integrity Council** has been enabled to participate in the procedure with powers **institutionalising its role beyond** that of any other **third party** (*previously, civil society had no influence on the judiciary selection or evaluation procedures in Ukraine*).

Recommendations:

- *Short-term*: **Communication** of the current HQCJ **rules and methodologies** of candidate assessment should improve, to make the (admittedly) complex processes clearer and more foreseeable for the parties involved and external observers. For instance, **better distinction** in the communication sphere should be made between the

substantive parameters of the assessment (specific “**legal**”, “**social**”, “**psychological**” skills and competences) on the one hand, from the **processes catering to collect evidence** to assess the aforementioned substantive characteristics of candidates on the other hand.

- *Short-term:* Development of **practice guides** on various specific questions (on how to determine scoring of any of the various **blocks of legal, social, and psychological skills and competences** of candidates at Stage 2) could be suggested as an adequate and flexible form of both improving the capacities of HQCJ and other players, and the **clarity and foreseeability** of the regulatory framework in general.
- *Short-term:* Methodology of **what is expected** from the candidates should be **clearly explained** to them **before the case study** is undertaken. **During the development** of the case study, an active **feedback** should be established between the **experts and HQCJ**, in order to make sure that the case studies strike a balance between the **legal complexity and practical nature of the task** (ability of the candidate to finish it on time). The **permanent discussions** between the experts (who develop the case studies) and HQCJ is also necessary to provide the Commission with **methodological guidance** on what aspects of the case study are being scored and how (i.e. weights in the scoring with regard to the clarity of handwriting, solidity of *obiter dicta*, *ratio decidendi*, operative part and other elements of the case study).
- *Short-term:* Build trust between the key-players **to increase understanding** on how the psychological testing is applied, in order to bust myths about it. Donors should continue the capacity building efforts, **training HQCJ Members and staff** to help them cement the current practice of **transferring the psychological testing results into numerical scores**. For higher transparency, scoring guidelines in psychological testing could be developed and published.
- *Short-term:* HQCJ should **reason in its decisions** in each and every case, especially those overriding the PIC negative opinion. The scope and extent of that obligation could be left to be established by the HQCJ practice (also see Section 4.6 below).
- *Medium-term:* Consider **reducing the overall proportion** of the substantive criteria of **professional ethics and integrity / “dobrochesnist”**, and further **clarify** the “**dobrochesnist**” criterion to **delineate** it from **professional ethics**.
- *Medium-term:* The **National School of Judges** to develop its own capacities on MCTQs and case studies, in order to regularly review and update the databases.
- *Medium-term:* Discussions should take place what kind of questions should be put in the MCTQs (for example, **reducing** the number of those requiring **pure memorisation** of legislative provisions, numbers, etc.).
- *Medium-term:* **Automation** of the candidate’s writing answers in **case-studies**.

4.3. Dealing with Lack of Trust: Participation of Civil Society and Public Integrity Council

One of the remaining features in Ukraine is a **low public trust in the judiciary**. According to the results of the **First Round of All-Ukrainian Surveys of Citizens, Judges and Lawyers on Judicial Reform and Corruption Perception** conducted by the **USAID "New Justice" Program** in 2017, the general public trust in the judiciary has **increased from 5% in 2015 to 16% 2018**.¹³ A similar rate of the public perception about the judiciary is also attested by the aforementioned HILL and the more recent GFK surveys¹⁴. However, the trust in the **newly set-up Supreme Court** is at **25%** according to GFK, showing a **positive trajectory** in comparison with the rest of the judicial corps.

The public opinion on the **process** is largely more favourable than that of the **result** of the judiciary reform. **85%** of respondents in the USAID Survey¹⁵ consider as **positive** the introduction of judges' **qualification re-assessment**, **80%** - the selection process to the Supreme Court, **64%** - establishing the three-tier appeals system, **60%** - lifting the powers of the President in judicial appointments, **62%** - limitation of judicial immunities, **50%** - extension of powers of the High Council of Justice.

The Experts consider the overall low level of public trust in Ukraine as a **serious issue** that needs to be tackled by many initiatives, possibly over a long-term period. The experience in some post-communist EU jurisdictions in increasing the public trust has been better than in others. While in some of them (Baltic States, Slovenia, Bulgaria etc.) the increase in the positive public perception has been gradual, some (Poland, Hungary) are now registering a decline. The judicial reforms happen in a wider socio-economic and cultural development context, which significantly affects what the people think about the sector. The Experts would again emphasise that the **selection and evaluation** of judges, on their own, are **not essential standalone factors** in the (possible) gradual increase of the positive public perception about the courts and judges. Instead, more pronounced impact can reasonably be expected from the changes in the judiciary governance, better management of budgets and human resources, visible increases in efficiency and performance, more emphasis on customer and user orientation in the services courts provide to the people and companies (also see Section 4.1 above).

As the current selection and evaluation of new members of judiciary are introduced in this context of the **low public trust**, extra publicity, **extra transparency** and more **public involvement** are required to accompany the regulatory and institutional changes. When assessing the procedures (publication of materials, broadcasting of interviews, etc.) on the basis of **comparative analysis of other systems** (e.g. the Netherlands and other advanced jurisdictions), the level of publicity of the on-going procedures in Ukraine could be considered as even **exceeding** the reasonable level. Admittedly, the Experts have taken into account the factor of the low public trust as a key background feature for setting certain higher standards of publicity necessitated by the country context.

While the "ordinary elements" of the new selection procedures in Ukraine (exams by way of testing and case studies, interviews, psychological testing) can be found in a variety of

¹³ See at: http://newjustice.org.ua/wp-content/uploads/2018/11/1_NJ_October_2018_SurveyPublic_Results_ENG.pdf

https://newjustice.org.ua/wp-content/uploads/2018/09/NJ_2017_Survey_Results_Oct2017_ROL_ENG.pdf

¹⁴ https://www.gfk.com/fileadmin/user_upload/dyna_content/UA/2018/2018-press-release/20181007gfk_QQ_rel_reform_court_ukr.pdf

¹⁵ https://newjustice.org.ua/wp-content/uploads/2018/09/NJ_2017_Survey_Results_Oct2017_ROL_ENG.pdf

European jurisdictions, the input of **the civil society** in the whole process has **not been witnesses at this level**. The engagement of the Public Integrity Council (PIC) **enables the civil society** is to deliver opinions about every candidate, and actively take part in the hearing in front of the HQCJ, question the candidate's integrity and related characteristics¹⁶.

This **right** of the civil society to **participate** in the process carries with it the **obligation** to use it properly and make **best effort** to take part in the procedure in an **active and responsible manner**. In other words, the power given to the civil society via PIC presupposes **the obligation to cooperate** (with HQCJ and other players) to a reasonable degree.

The Expert Team considers this a **unique opportunity for the civil society** to participate in creating a completely new judiciary. This is the most **notable example of institutionalisation of the civil society role** in the judiciary selection and evaluation by comparative standards. In other European societies, criticisms and assumptions about the qualification of judges are sometimes taking place in a more informal environment, rarely giving rise to official procedures, thus leaving room for distrust.

It should also be noted that the PIC members work **free of charge**. As the amount of time input is rather large, it should be considered relevant to discuss the issue of expert/ and secretarial **assistance to PIC**. It is questionable if any remuneration would be justified on legal (PIC is not part and not legally subordinate to the HQCJ) or practical grounds for the use of public funds. On the other hand, the **remuneration** for the civil society representatives provided by any **private organisation or donor funding** could increase the PIC capacity and reduce the public trust in the objectiveness of this body. Professional experts could also be employed for the collection, analysis of the materials and preparation of draft documents for the PIC members.

Recommendations:

- *Short-term:* Rebuilding trust of every stakeholder in the selection process requires the **collaborative** approach, and not the “**civil society vs. judiciary**”, taking into consideration that the goal of all parties involved coincides – to build more professional and honest judiciary.
- *Short-term:* PIC and the HQCJ should perceive each other as **partners** in a process actively working together in creating a professional judicial system. The principle of **cooperation** should be established as a matter of law and practice, as the key for success for all the parties involved. The members of PIC should consider themselves as **independent experts**, contributing to the judicial reset. HQCJ, on its own, should consider PIC as a partner who contributes to the higher public awareness of the judicial selection and evaluation processes.
- *Medium-term:* Further discuss the issue of expert and technical support, and **remuneration** of PIC members for facilitating the effectiveness and quality of ethics and integrity checks by PIC.
- *Long-term:* The **example of the Netherlands and Lithuania** (see *ANNEX*) could be followed to **incorporate more members** of the civil society into the HQC; this would

¹⁶ Interestingly enough, even the general public is asked to participate in the selection and evaluation: on its Facebook page, HQC addresses all Ukrainian citizens to assist it in carrying out the assessment and to provide verified facts on the integrity of judges from all regions of Ukraine.

make the logistics and organisation easier, as these civil society members could fully participate in the selection process, being paid and benefiting from the institutionalised support of inspectors and other HQCJ staff. The variety of professional backgrounds fit for the civil society role in the judiciary selection and evaluation should be expanded much beyond legal professionals – **managers, HR experts, psychologists, business and even art** community representatives should be considered, to promote a more **pluralist** view of who is the most suitable judge.

4.4. Publicity

The **opinions of PIC** are **published** on the Internet separately from the dossier of the judge/candidate under Article 85 paras 4-7 of the Law. The candidate dossier *inter alia* contains information on the compliance with the principle of judicial ethics and the criteria of integrity. Therefore, the PIC information and opinions have the legal status of “**relevant material in the dossier**”, which is published by HQCJ.

The Experts consider the **publication** of PIC opinions while the selection or evaluation **procedures are pending to be premature**. Even if the final decision of HQCJ is the opposite to the one by PIC, the fact remains that the opinion of PIC remains accessible online. As it is uncertain **if and when these files are deleted**, they can theoretically be around forever, thus **causing possible reputational damage** to the candidate, despite of the fact whether – and to what extent – the PIC opinion was justified.

The PIC opinions should be considered as no more and no less than **expert opinions**, and should be treated accordingly – by analogy, it could be observed that in no court procedure the court expert publishes her/his report while the case is still pending final resolution.

There is thus a significant **risk of violating the privacy and data protection rules**, increasing the chance of liability of the State, and even more so, the PIC itself.

For the sake of utmost transparency, the interviews in front of the HQCJ **are currently live streamed, recorded, broadcasted** online on YouTube and other platforms. The content of these interviews is focusing on the private lives of the candidates (premises, vehicles, private school of children, traveling habits, etc.). The Experts consider this as **a considerable threat**. People with criminal intent can use this information, which is easily accessible online, for their own purposes. It is also possible that, as a result, **some potentially excellent candidates are refraining** from entering the competition to avoid this kind of interference in their private lives.

Recommendations:

- *Short-term:* **PIC should refrain from publishing opinions** in the initial stages of the procedure, **before the HQCJ decision** on the candidate is made.
- *Short-term:* **Reconsider the concept of publishing the interviews:** while broadcasting / streaming is increasing transparency, the storage of interview on YouTube or the like might go too far and cause a security risk for candidates.
- *Medium-term:* **Storage of interview recordings** could instead take place at HQCJ. The all-time-online-availability is not increasing the quality and acceptance of the assessment of judges.

- *Medium-term:* Persons who are applying to become a judge in the new Ukrainian judiciary should be **confident that they will be treated fairly during the application and after it has passed**. Nobody should be able to take (parts of) interviews, broadcast them, either partly or whole, or use them against these applicants in a court procedure or otherwise. Better safeguards for privacy may encourage more right candidates to come forward.
- *Medium-term:* After the final decision by the HQC and the publication of the PIC opinion, **the relevant context in regard to the established facts and legal effects must be clarified in public**. It must clearly be visible and understood to all what is the result of the process, what is considered “truth” and what was a preliminary “assumption” only.

4.5. Handling of Burden and Standards of Proof

In deciding to create the **Public Integrity Council**, Ukrainian policy-makers had the intention that it would act as an **oversight** body providing an **outside** view, **not** being a constituent **part** of HQCJ or of any state body, to make sure it would help to build public trust in the overall judiciary reset. At the same time, the **unintended consequence** of this design was the **adversarial nature** in the HQCJ-PIC relationship. HQCJ resorted in some cases during the SC selection to the “**ordinary judicial proceedings**” approach. Moreover, this “judicial” approach was sometimes applied in the light of the presumption of innocence principle, applicable in criminal proceedings. It resulted in the distribution of burden of proof in a way, where decisions on candidates/judges were issued more on the basis on the “proven” facts, than on reasonable, substantiated doubts, assumptions, suspicions. This approach is inappropriate in respect of the idea and nature of the selection/qualification re-assessment of judges. This exercise is aimed at selecting of persons with a good reputation and complying with integrity requirements. This means, that if there are some assumptions or information challenging reputation, the candidate has to prove the opposite or comprehensively explain and answer all questions/allegations. Taking into account the situation in Ukraine with low public trust in courts and the aim of judicial reform of creating a new professional and white hand judiciary, this approach of shifting the burden of proof on the candidates is justified. It is essential to change HQCJ’s approach in relation to negative **assumptions** and the handling of **burden of proof**, especially (but not limited to) with regard to the questions of **unexplained wealth** and similar issues, which could cast doubts on the candidate’s **integrity**. Guidelines or summary of practice with some recommendations could be developed for assisting the HQCJ members to carry out the assessment of candidates in more predictable manner.

In the case *Zdanoka v. Latvia* [GC], no. 58278/00, 16.3.2006) the European Court of Human Rights had to assess the disqualification by the Latvian authorities from the country’s political process - namely the absence of a right to be elected as Member of Parliament - of an applicant, who was **presumed to hold anti-democratic views** by the mere fact of **her membership** of the Latvian Communist Party more than a **decade earlier**. ECHR held, in particular: “Criminal proceedings were never brought against the applicant. If this had been the case, she would have benefited from safeguards such as the presumption of innocence and the resolution of doubts in her favour in respect of such proceedings. The disqualification imposed [by the Latvian legislature] constitutes a **special public-law measure** regulating access to the political process at the highest level. In the context of such a procedure, **doubts could be interpreted against a person wishing to be a candidate, the burden of proof could be**

shifted onto him or her, and appearances could be considered of importance. As observed above, the Court is of the opinion that the **Latvian authorities were entitled**, within their margin of appreciation, to presume that a person in the applicant's position had held **opinions incompatible** with the need to ensure the **integrity of the democratic process**, and to declare that person **ineligible** to stand for election. The applicant **has not disproved** the validity of those **appearances** before the domestic courts; nor has she done so in the context of the instant proceedings ... It is clear that the applicant chose to support the anti-democratic stance [of the Latvian Communist Party], and **her silence in the face of the events** [in late 1980s and early 1990s] **was just as telling as any overt action** in support of the CPL's activities" (*loc. cit.*, paras 124 and 130 [N.B emphasis in bold by the Experts]). The Strasbourg Court further went on to say that the "anti-democratic views", which warrant exclusion from the political process in a young democracy such as Latvia, **need not be "fully individualised"** by way of the application of a **subjective test** or otherwise – namely, the **balance** between the public interest and individual rights and freedoms from the Convention standpoint can be **struck by the legislature** of a country in **clearly defining** the scope and extent of a statutory **category** to which the applicant was established to belong, and the balancing exercise **did not require "full individualisation"**, such as, for instance, allowing the applicant to present specific features of her case that would have entitled her to an exemption of any kind (*loc.cit.*, paras 124-131).

The Experts consider that the above principles, by analogy, can be applied with regard to the regulation of **access to high public office**, including the **judiciary** selection and evaluation procedures before HQC. It follows that, in the context of proceedings to **select or evaluate** judges:

- judicial candidates do **not** benefit from the **presumption of innocence**;
- judicial candidates do **not** benefit from the right not to incriminate oneself ("**right to silence**");
- **negative assumptions** can be formulated against judicial candidates;
- **objective** ("**appearances**") test can be applied to determine the validity of any assumption;
- all in all, the **standing** of a judicial candidate during the selection or evaluation should **not** be **equated** with that of a **party** to criminal or any other **court proceedings**¹⁷.

While the above framework clearly accords a certain **leeway for margin of appreciation** for the Ukrainian law and practice, the Experts recommend HQCJ to develop **clearer and more foreseeable system** of handling **burden and standards of proof**, in order to **increase the appearances of legitimacy** of its choice of a particular candidate – which is **especially** so in the case of a system **where prima facie cases** against certain candidates are brought by an independent third party (**PIC**), thereby facilitating the HQCJ job.

¹⁷ The required **approach may be different** only in the case of proceedings for **dismissal** of a working judge – which warrants application of the **Article 6 ECHR standards** akin to those given to court parties in **civil cases** - but even in those cases application of the **criminal process** guarantees under Article 6 are **not** required (see *Oleksandr Volkov v. Ukraine*, no. 21722/11, 9.1.2013, paras. 87-95).

Recommendations:

- *Short-term:* The **burden of proof for candidates** can be imposed to require them to provide explanation in case of any allegation by PIC or other evidence in the possession of HQCJ. The shifting of the burden of proof can more properly take place where an established system of formalised and foreseeable **standards of proof** exists to allow the candidate to dispel the negative assumptions. Which **standard** should apply should **depend** on the **nature** of the PIC criticisms or other **evidence** before HQCJ. In the case of the particularly important question of **unexplained wealth** of candidates - which goes to the core of the question of **integrity** at issue before HQCJ - the standard of **balance of probabilities** (“civil standard”) should apply to allow the candidate to disprove the allegations¹⁸.
- *Short-term:* HQCJ should develop more consistent practice – if necessary to be backed up by **practice guides** – to establish various **rebuttable assumptions** in distributing the burden of proof between the parties. If an assumption is raised, the candidate has the burden to overcome the assumption by the applicable standard of proof - i.e. ‘balance of probabilities’ in the case of the issues of **unexplained wealth**. **Failing** such an effort by the candidate, the **prima facie assumption** created by PIC or another piece of evidence before HQCJ is **converted to a proven fact**. Examples of such rebuttable assumptions with regard to the alleged unexplained wealth could include, by analogy to the aforementioned NCBC comparative practices and trends:
 - **unexplained accumulation** of wealth of a candidate who is a former **public official** is attributable to **corruption**;
 - **inconsistency** between **officially declared and actual assets/income** of a candidate attests **illicit** origin of assets¹⁹;
 - ‘**lifestyle**’ of a candidate **not commensurate** with previous business activities attests **illicit** origin of **earnings**²⁰;
- *Short-term:* Having established the *prima facie* case, the candidate must be permitted to offer a **reasonable and credible explanation** to rebut the assumption. A **reasoned decision** by HQCJ must be produced in each such case, whether or not it eventually sides with the candidate.

4.6. HQCJ Decision

The deliberations and decision-making process of HQCJ Members in making their recommendation to select or evaluate a candidate is **not public**. Some suggestions were made by certain observers to request the Commission to inform the public on how its different

¹⁸ For more details, see the World Bank Stolen Assets Recovery (“STAR”) Study of 2016. Also see Explanatory Note to Directive 2014/42/EU on Confiscation of Proceeds and Instrumentalities of Crime.

¹⁹ Following the examples of Bulgaria in the context of NCBC by way of “civil confiscation”. Following the example of this jurisdiction, a certain **minimum threshold** in discrepancy between the declared and actual assets / income may be established as part of the HQCJ practice, to allow it to focus only on **more significant discrepancy** cases.

²⁰ Following examples from Italy, U.K. in the context of NCBC (non-criminal) proceedings.

members voted individually on each and every candidate. There is no consensus on whether or not to publish individual votes of the decision-makers in the judiciary selection process in most of the European jurisdictions. The Experts consider that the question of **how** the Commission **discusses its decision** can be taken in **full discretion** of HQCJ, based *inter alia* on the analogy with the judicial decision-making process in a society respecting the fair trial standards, given the inferred fair trial principle that the court decision must be discussed and made *in camera*. Admittedly, some European jurisdictions practice the so-called institution of a **separate opinion** in case of collegial decision-making. However, the question whether and to what extent an **individual vote of a particular judge - deciding as part of a chamber** - has to be public or communicated **remains unresolved** as a matter of practice in most European jurisdictions, apart from the right of a particular judge to submit a separate (dissenting or concurring) opinion. There is thus **no sound expert basis**, by reference to European standards and comparative practices, to recommend any particular departure from the current practice of HQCJ in this respect. At the same time, since it is crucial to diminish the still existing distrust in the objectiveness and comprehensiveness of the decision-making process, it may be recommended for HQCJ in all cases – but especially **when it approves the candidate who received a negative opinion of PIC** – to take a reasoned decision that would be made public. The question “how” to reason can be left to the HQCJ practice, with the main focus on answering the issues raised by PIC when adopting its negative opinion, and less focus on the scope and extent of reasoning when the candidate raises no significant controversy. HQCJ should be enabled to implement the new practice with **sufficient flexibility**, to allow it to focus on efficiency and speed in view of the tremendous number of the on-going selection and evaluation processes.

Recommendations:

- *Short-term:* All decisions of HQCJ have to be **reasoned**, with the main focus on the scope and extent of the reasoning part where the HQCJ decision is overriding the PIC negative opinion. The **scope and extent** of that obligation should be left to be determined in the HQCJ **practice**.

4.7. “Ideal Judge” Profile

There is no such thing as an “ideal judge”. Judges are a species of a variety of jurists from many different backgrounds who have one thing in common: **dispensing justice in a fair and reasonable way**, and in accordance with the law of their jurisdiction, the jurisprudence in that country, and the relevant international provisions and case-law. The issue put forward by PIC for the description of the “**gold standard**” of **personal qualities of an ideal judge** cannot be dealt with²¹ as it is simply not possible. It is very commendable (and understandable) that some want to have the best judges in the world performing in Ukraine, but it cannot be expected by a reasonable observer. **Judges differ**, and that is a given. The law does not differ, that is also a given. The jurisprudence may differ, but there is always a higher instance court, or ultimately the European Court of Human Rights, to provide review of the lower decisions. Thus, the judiciary **corrects its mistakes** by having the **appeals system** and **good governance**, without expecting to have an ideal judge sitting in each and every case.

²¹ “Establishment of the new Supreme Court: key lessons”, January 2018, by the Centre of Policy and Legal Reform and DEJURE Foundation, hand out during the PIC press conference on April 4, 2018, pages not numbered, but found under point 32.

In addition, even a “less than ideal” (in someone’s opinion) judge is producing decisions and, in this way, is contributing **to diminishing the work loads**, backlogs and promoting faster resolution for the clients of courts. As mentioned above, judges should not refrain from ‘judging’ or assessing themselves, **peer pressure should be in place in a positive manner**, or judges can consider stepping forward for ‘intervision’ as it is called in the Netherlands²²²³.

Recommendations:

- *Medium-term:* For PIC: to have **realistic standards** of what is **possible to be achieved** in the given amount of time. There is not much time, as currently there are two sets of judges working in the courts: the ‘old’ one’s (i.e. the judges appointed under the old system) and the ‘new’ judges (i.e. appointed in the new system), with different salaries. This causes **friction between the judges**. The work needs to be done, cases need to be dealt with, and the sooner the new system of evaluated or newly selected judges is in place, the better.
- *Medium-term:* For HQCJ: to involve judges and to **introduce peer pressure** in a positive way.

4.8. Timelines, Effectiveness and Efficiency

Apart from the selection of the Supreme Court justices and the setting up of new courts (HACC and HIPC), the qualification **re-assessment of more than 5,500 judges** is on-going or pending. These procedures have to be **administered in due time** – namely because the lack of judges will result in huge backlogs, longer proceedings, but also because the extraordinary situation with the “two level” judges (evaluated and not) working at the same court is **unsustainable** from the decent management perspective. Those having passed the qualification re-assessment receive 2-3 times higher salary compared to other colleagues who have not passed the procedure.

It has to be noted, that the current plans create a huge, even **excessive, workload for PIC**, which has no institutionalised capacities similar to those of HQCJ, nor is remunerated for its work. The most important challenges, which have to be tackled in respect of **building the capacities of PIC**, may be summarised as follows:

- **Very tight schedule** for submitting the opinions/information to HQCJ. PIC expresses concerns over the schedule, which may be **indispensable and justified in the current situation**), still should be **discussed, negotiated and agreed** with PIC **beforehand**.
- **Complicated PIC procedures of analysis** of the materials and drafting the opinions, taking into account the communication with the candidate and providing the right to

²² In the Netherlands, “intervision” is even part of the key points which a regular (and also a senior) judge in a District Court is supposed to achieve: <https://www.werkenbijderechtspraak.nl/wp-content/uploads/2016/11/Senior-rechter.pdf> (in Dutch, but can be seen under point 3, G.).

²³ Meaning: judges are - during session, conducted as a single judge, i.e.: not in a panel - being observed by either 1) other judges, 2) by a psychologist (with camera recording of the session) or 3) by a senior justice of an Appeals Court. In all three forms of intervision issues which can arise are discussed with the judge in advance and also afterwards. The findings are reported confidentially. The senior counselor will return general points (of course, anonymously) to the departmental director. All forms of intervision are appreciated by the judges (although in the beginning all judges find it scary when – handling cases on their own and not in a panel) they are ‘judged’ by colleagues. After a while judges become used to this form of observation and starting to like it, as it really helps them to move forward in their daily work in a positive manner.

submit arguments and additional information. This procedure takes both time and additional resources of PIC. It is aimed to ensure the right of a person to a “fair trial”, which is an imperative if the opinion of PIC is regarded as separate, **having the decisive character and published before the decision** of HQCJ. This requirement could be further reconsidered in the context of PIC and its opinion role in the overall procedure.

- Huge number of persons to be assessed. Most of them, especially not having an extensive experience in the judiciary, **could be considered as presumably not raising any concerns** regarding their integrity and ethics, except for candidates on which any special information is provided. Having in mind the safeguard of objectively checking the candidate professional skills and competences, getting substantive materials (which can be regarded as the main signal for possible issues with integrity), it can be suggested that there is **no need to scrutinise all the data in all cases. More risk-based approach** may be suggested for PIC to screen only cases with a reasonable suggestion of a “bad apple”. PIC, which usually gets the signals about most “suspicious” cases from various third-party sources, could give focus only to those raising highest degree of suspicion. This risk-based filtering approach would **absolutely correspond** with the main purpose of the ongoing exercise (to “**clean up the judiciary**”), and would allow to reduce the PIC workload in respect of the cases and materials of low relevance.
- **Complicated decision-making by PIC**, when it acts in a whole (“Plenary”) composition, despite the provision of the Law for PIC to conduct its activities in four panels (Par. 5, Article 85).
- Procedure of **signing the opinions** of PIC. According to the members of PIC, who were met by Experts, it is **difficult to collect all the signatures of PIC Members** because they are not sitting together and meetings are held remotely. Here the abovementioned **provision of the Law about the organisation of activities in panels** could be one of the ways for facilitating the procedure, necessitating HQC to consider the possibility to agree on the practice that - when PIC opinions are accepted - if there is clear indication of PIC Members who voted on the decision and the signature of Coordinator of PIC, validating the origin of the decision.

Against this background, more notice has to be taken of the fact that, in the exercise of these significant **personnel reset** processes within the judiciary, the **justice needs to continue** to be administered by the Ukrainian courts – **fairly** and in a **reasonable time**. Trying to get better judges on board is no reason to **make parties** bear the brunt of **delays** in the examination of their pending 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 difficult.

Recommendations:

Short-term:

- Introducing “**filtering**” or **risk-based approach** – focusing on the identification and highlighting the most suspicious cases and by setting the priorities accordingly;

- Implementing **IT-solutions** (analysis of big data by algorithm²⁴, helping to sort out the most interesting cases);
- Improvements in the HQCJ **procedural rules** focusing on efficiency;
- Enabling **quick search** options for PIC and HQCJ to scan documents not only as PDFs, but as **OCR-searchable PDFs**. This would enable big-data-like searching tools to go through the files;
- Using possibility, provided by the Law, to conduct the PIC activities and issue opinions in panels;
- Setting up **technical consultations between** HQCJ and PIC in format 1+1 to sort out easy-to-be-solved problems and technical glitches.

4.9. Sustainable Integration of Civil Society and Longer Perspective

The ability of PIC to contribute valuable input in the field of assessment and selection of judges may qualify them for future participation as well.

Cleansing judiciary is also a well-noted change process in the society. This will not be done by the selection and evaluation at once. Judiciary and its selection of personnel may need an **independent outside look and support** as done by PIC in the future for additional legitimation. PIC has the opportunity of recommending themselves as the model – which is unique in its temporary way and design – for future participation in the judicial promotion procedures linked to the regular evaluation.

In the **medium-term to longer-term** perspective, incorporation of more **civil society members** into the HQCJ composition may be discussed, thereby doing **away with the PIC** altogether – but this process should go **hand in hand** with the increasing **trust** in the HQCJ or any other **state-controlled processes** for **access** to the judiciary in particular, and public office in general. As the matters stand, the **reasonable** nature of the **current HQCJ composition** and the PIC existence is **not called into question**.

An attempt should gradually be made to introduce more “**non-legal**” profession representatives in the judicial selection and evaluation processes, thereby both increasing the effectiveness of the judiciary governance institutions, while increasing the truly “**external view**” of the judiciary corporation in the eyes of the **civil society** and the public. The variety of professional backgrounds fit for the civil society role in the judiciary selection and evaluation should be expanded much beyond legal professionals – **managers, HR experts, psychologists, business and even art** community representatives should be considered, to promote a more **pluralist** view of who is the most suitable judge.

Finally, more demanding requirements in law and practice should be formulated for civil society representatives involved in the judicial selection and evaluation. For instance, an “**outstanding contribution to the development of the society**” or “**renowned reputation**” could be part of the relevant test of the desirable profile.

²⁴ The process of collecting background information of the candidate concerned through the Land Registry, the police files etc. could be digitalized.

Recommendation:

- *Medium-term:* PIC participation in the evaluation and selection procedures should be guaranteed by way of **closer dialogue** between HQCJ and PIC, and joint discussions of further improvements in respect of transparency of the procedures.
- *Long-term:* More civil society members, including **non-legal** profession representatives, could be an integral **part** of the existing bodies, particularly HQCJ.

5. Summary of Recommendations for Law and Practice

The following recommendations are listed to enable institutional reading:

5.1. Key Principles for Approach and Procedures before HQCJ

- The judicial **selection**²⁵ **cannot be fully automated** based on mathematical algorithms. Moreover, the principle of **merits-based selection** does **not** mean an application of **academic-style grading** to each and every stage of the procedure. In order to strike a good balance between transparency and fairness, effectiveness and efficiency, qualitative and quantitative approach, the judicial selection has to be performed with some **discretion**, allowing to take proper account of all relevant aspects and information on a particular candidate. The use of **grading** at various stages of the procedure should serve as a **procedural safeguard** to place the decision maker's **discretion** at **reasonable limits** but should **not** be expected to **replace** that discretion.
- **Communication** of the current HQCJ **rules and methodologies** of candidate assessment should improve, to make the (admittedly) complex processes clearer and more foreseeable for the parties involved and external observers. For instance, **better distinction** in the communication sphere should be made between the substantive parameters of the assessment (specific "**legal**", "**social**", "**psychological**" skills and competences) on the one hand, from the **processes catering to collect evidence** to assess the aforementioned substantive characteristics of candidates on the other hand.
- Development of **practice guides** on various specific questions (such as the burden and standards of proof, and the handling of the resultant presumptions) could be suggested as an adequate and flexible form of both improving the capacities of HQCJ and other players in particular, and the **clarity and foreseeability** of the regulatory framework in general.
- Certified methodologies, such as **psychological testing** followed by an expert opinion, serve as one of the safeguards to **limit** the decision-maker's **discretion**. HQCJ members and staff should continue to be **properly trained** in the area of interpreting psychological tests and transferring them into scores.
- Methodology of **what is expected** from the candidates should be **clearly explained** to them **before the case study** is undertaken. **During the development** of the case study, an active **feedback** should be exchanged between the **experts and HQCJ**, in order to make sure that the case studies strike a balance between the **legal complexity and**

²⁵ All the recommendations apply to both selection and evaluation of judges, unless the word "evaluation" is mentioned separately to define more specific additional approach with regard to that particular process.

practical nature of the task (ability of the candidate to finish it on time). The **permanent discussions** between the experts (who develop the case studies) and HQCJ are also necessary to provide HQCJ with **methodological guidance** on what aspects of the case study are being scored and how (i.e. weights in the scoring with regard to the clarity of handwriting, solidity of *obiter dicta*, *ratio decidendi*, operative part and other elements of the case study).

- Publish the **approach to the passing score as early as possible** before each step in the examination.
- Build trust between the key-players to **increase understanding** on how the psychological testing is applied, in order to bust myths about it. Donors should continue the capacity building efforts, **training HQCJ members and staff** to help them cement the current practice of **transferring the psychological testing results into numerical scores**. For higher transparency, scoring guidelines in psychological testing could be developed and published.
- Further discussions could take place in the **medium-term** on the appropriate **weighting** of the “**professional ethics**” and **integrity / “dobrochesnist”** criteria in the final ranking of candidates, and better **distinguishing** the underlying concepts in law and practice.
- The **National School of Judges** should develop its own capacities on MCTQs, case studies and other testing items, in order to regularly review and update the databases.
- Discussions should take place what kind of questions should be put in the MCTQs (for example, **reducing** the number of those requiring **pure memorisation** of legislative provisions, numbers, etc.).
- **Automation** of the candidate’s writing answers in **case-studies** should take place.
- Further improvement of the public trust into the judicial selection methodology and process cannot take place without constant **communication** on the various procedural steps and explanations of the **key concepts** and methods applied.
- The description of the “**gold standard**” of qualities of a **best judge** should evolve with the **practice** of selection, evaluation and discipline, but is **not susceptible to formal standardisation** in the legislation at any given point in time. The focus should be placed on the relevant objective criteria and the processes of the collection of evidence, which are **already** rather well-developed and **established** in Ukraine for the assessment of legal, social and psychological competences and skills of a judge. Moreover, good governance and management of the judiciary system is equally, if not more, important, as choosing the right individuals.
- While live **broadcasting / streaming** of candidate interviews contributes to the interest of **transparency**, the indefinite **storage** on YouTube or other social media might go **too far** against the interest of an individual and the **privacy protection**, discouraging certain right candidates from coming forward.
- Persons who are applying to become a **judge** should be **confident** that they will be treated **fairly** during the selection and after it is over. Safeguards should be put in place

to prevent abuse, such as enabling others to take (parts of) the selection interviews, broadcast them, either partly or wholly, or use them in court proceedings (involving those judges) or otherwise for purposes unrelated to the actual task of selection.

- HQCJ should issue **reasoned decisions** in each and every case, especially those nominating the candidate who has received a negative opinion of PIC. The scope and extent of that obligation could be left to be established by the HQCJ practice.
- PIC should have **realistic standards** of what is **possible to be achieved** in the given amount of time. The work needs to be done, cases need to be dealt with, and the sooner the new system of evaluated or newly selected judges is in place, the better.
- HQCJ should involve judges and introduce **peer pressure** in a positive way.

5.2. Cooperation between HQCJ and Civil Society

- Rebuilding trust of every stakeholder in the selection process requires the **collaborative** approach, and not the “**civil society vs. judiciary**”, taking into consideration that the goal of all parties involved coincides – to build more professional and honest judiciary.
- PIC should focus
- PIC and HQCJ should perceive each other as **partners** in a process actively working together in creating a professional judicial system. The principle of **cooperation** should be established as a matter of law and practice, as the key for success for all the parties involved. The members of PIC should consider themselves as **independent experts**, contributing to the judicial reset.
- Further discuss the issue of expert and technical support, and **remuneration** of PIC members for facilitating the effectiveness and quality of ethics and integrity checks by PIC.
- In the **long-term**, discuss the possibility to **incorporate more members** of the civil society into HQCJ. The variety of professional backgrounds fit for the civil society role in the judiciary selection and evaluation should be expanded much beyond legal professionals – **managers, HR experts, psychologists, business and even art** community representatives should be considered, to promote a more **pluralist** view of who is the most suitable judge.

5.3. Publicity

- **PIC should refrain from publishing opinions** in the initial stages of the procedure, **before the HQCJ decision** on the candidate is made.
- **Reconsider the concept of publishing the interviews**: while broadcasting / streaming is fully acceptable as it is increasing transparency, the storage of interview on YouTube or the like might go too far and cause a security risk for candidates.
- The **storage of interview recordings** could instead take place at HQCJ. The all-time-online-availability is not increasing the quality and acceptance of the assessment of judges.

- Persons who are applying to become a judge in the new Ukrainian judiciary should be **confident that they will be treated fairly during the application and after it has passed**. Nobody should be able to take (parts of) interviews, broadcast them, either partly or whole, or use them against these applicants in a court procedure or otherwise. Better safeguards for privacy may encourage more right candidates to come forward.
- After the final decision by HQCJ and the publication of the PIC opinion, **the relevant context in regard to the established facts and legal effects** must be **clarified in public**. It must clearly be visible and understood to all what is the result of the process, what is considered “truth” and what was a preliminary “assumption” only.

5.4. Burden and Standards of Proof

- The **burden of proof for candidates** can be established to require them to provide explanation in case of any allegation by PIC or other evidence in the possession of HQCJ. The shifting of the burden of proof can more properly take place where an established system of formalised and foreseeable **standards of proof** exists to allow the candidate to dispel the negative assumptions. Which **standard** should apply should **depend** on the **nature** of the PIC criticisms or other **evidence** before HQC. In the case of the particularly important question of **unexplained wealth** of candidates - which goes to the core of the question of **integrity** at issue before HQCJ - the standard of **balance of probabilities** (“civil standard”) should apply to allow the judicial candidate to disprove the allegations.
- At the same time, HQCJ should develop more consistent practice – if necessary to be backed up by **practice guides** – to establish various **rebuttable assumptions** in distributing the burden of proof between the parties. If an assumption is raised, the candidate has the burden to overcome the assumption by the applicable standard of proof - i.e. ‘balance of probabilities’ in the case of the issues of **unexplained wealth**. **Failing** such an effort by the candidate, the **prima facie assumption** created by PIC or another piece of evidence before HQCJ is **converted to a proven fact**. Examples of such rebuttable assumptions with regard to the alleged unexplained wealth could include:
 - **unexplained accumulation of wealth** of a candidate who is a former **public official** is attributable to **corruption**;
 - **inconsistency** between **officially declared and actual assets/income** of a judicial candidate attests **illicit** origin of assets;
 - **‘lifestyle’** of a judicial candidate **not commensurate** with previous business activities attests **illicit** origin of **earnings**;
- Having established the *prima facie* case, the candidate must be permitted to offer a **reasonable and credible explanation** to rebut the assumption. A **reasoned decision** by HQC must be produced in each such case, whether or not it eventually sides with the candidate.

5.5. Effectiveness and Efficiency

- Introducing “**filtering**” or **risk-based** approach – focusing on the identification and highlighting the most suspicious cases and setting the priorities accordingly.
- Implementing **IT-solutions** (analysis of big data by algorithm, helping to sort out the most interesting cases).
- Improvements in the HQC to procedural rules to focus on **efficiency**.
- Enabling **quick search** options for PIC and HQC scan documents not only as PDF, but as **OCR searchable PDFs**. This would enable big-data-like searching tools to go through the files.
- Conduct the PIC activities and issue its opinions in panels.
- Setting up **technical consultations between** HQC and PIC in format 1+1 to sort out easy-to-be-solved problems and technical glitches.

ANNEX

Compendium of EU MS's practices on Judicial Selection and Evaluation

1. The Netherlands

1.1. Selection of judges for District Courts and justices for Courts of Appeal (and participation of civil society representatives)

In the Netherlands, the selection procedure of judges is, as with many things in this country, not formally set in a law. Anyone who fulfils the formal qualifications (Dutch nationality²⁶, law degree, no criminal record, minimum of two years' work experience outside of the judiciary) can apply to become a judge. The only formal qualification required by law is: a law degree²⁷, with the stipulation that the graduate has the right to call her-/himself: Master of Law. The applicable law stipulates further that other requirements can be set by regulation. All conditions to apply for the position of a judge (which is a lifetime appointment) can be found on the website of the Dutch Council for the Judiciary. Through this open way of communication not only candidates, who want to apply for the position of a judge, can see what the requirements are, but also the general public receives insight in these requirements.

Further, on the website of the Dutch Council for the Judiciary, are the so-called 'job profiles' for judges in District Courts²⁸ and for justices in Courts of Appeal²⁹. These profiles include:

- purpose of the position of a judge: activities to be undertaken, context within, results to be achieved;
- position in the judiciary and within the court (court organization);
- specification of the to be achieved results, divided in: handling of cases during session, results regarding verdicts and judgments, presiding/directing the procedure during session/trial;
- communication with all parties during hearings and sessions involved;
- qualifications (such as: being up to date with jurisprudence, knowledge of the matter at hand);
- contributing to the court expertise (in legal matters/issues of questioning of the Supreme Court decisions, contributing to legal policies);
- intervision, self-reflection, training and coaching;
- competences and responsibilities;
- context in which the work is conducted (law, jurisprudence, other sources of the law, court policies agreements);
- contacts with internal colleagues, from low till high;
- essential qualities, such as: integrity, impartiality, clear reasoning, oriented towards the society in which we live, ability to produce verdicts/judgments under high time pressure,

²⁶ It is allowed to have a second citizenship in order to become a judge.

²⁷ Wet Rechtspositie Rechterlijke Ambtenaren, art. 5 lid 1 onder a, <http://wetten.overheid.nl/BWBR0008365/2017-01-01>; in English: Law on the legal position of judiciary civil servants, article 5, 1, a.

²⁸ <https://www.werkenbijderechtspraak.nl/wp-content/uploads/2016/08/Referentiefunctie-rechter-4-april-2012.pdf> -> job profile for a district court judge.

²⁹ <https://www.werkenbijderechtspraak.nl/wp-content/uploads/2016/08/Referentiefunctie-raadsheer-4-april-2012.pdf> -> job profile for a court of appeals justice.

quality of the work produced, analytical skills, listening skills, persuasiveness, ability to work in a team, self-confidence, authenticity, flexibility.

For persons wanting to become a district court judge, there are two possible roads:

1. For persons who have 2-6 years of legal work experience (and a law degree of course and who qualify as 'Master of Law'): if they complete the selection procedure successfully they will become trainee judges. These trainee judges receive an on-the-job training, which lasts for four years. The legal work experience should be outside the judiciary, but can be inside the judiciary for maximum two years;
2. For persons who at least five years of relevant work experience, of which two years outside the judicial organization: they will follow a training course that can last 15 months to a maximum of three years after successful completion of the selection procedure.

For both categories the training is as follows:

- on-the-job training at a District Court;
- training at the Netherlands Training Institute for Judges & Prosecutors
- internship in the Prosecution Service.

1.2. Selection procedure of District Court Judges

1. anyone with a law degree and the qualification 'Master of Law' can apply by clicking the link in the advertisement; an application form pops up and needs to be filled out. Two references from the current position must be provided as well. An automatically generated reply will follow.

Not required, but recommended is to contact the court, which is looking for candidate judges, itself, as in the early stages of the selection procedure this court will be involved in the selection of application forms (number 2 below). In addition, a would-be candidate can gain a better insight into the work of the judge and in the position itself;

2. selection of the application forms of the appropriate candidates by the National Selection Committee for Judges (NSCJ);

3. checking of the Dutch criminal record system (the candidate can be required to give information on her/his criminal record if questions arise; the Presidium of the NSCJ then decides if this candidate can continue with the selection procedure or must quit);

4. analytical test, consisting of three parts: verbal reasoning skills, abstract reasoning skills, language skills³⁰; candidates who fail on the analytical test are out; a retry is possible after three years;

5. first interview of the candidate; the hearing will be conducted by a member of the NSCJ, a representative of the court at which the candidate applied (or, if a candidate did not apply for a specific court, a court closest to the city in which the candidate is living), and a HRM-staff person; during this hearing, which is behind closed doors, the motivation of the candidate will be tested, the persuasiveness, verbal assets, and the idea that the candidate has about being a judge. Candidates who do not pass this interview cannot continue with the application procedure.

6. references check (in the application form the candidate must confirm that she/he allows the NSCJ to have a reference check; candidates who do not approve of this check will not be admitted to the selection procedure);

³⁰ A certain minimum score is required; a candidate whose score is just under the minimum will receive a retry; this retry must be done immediately after the test; the result of this second test is defining.

7. a so-called assessment of five hours in total: interview with a psychologist, personality test/check, other tests; the assessment is focused on: intelligence/IQ (including verbal and analytical abilities), ability to express, work method (including the ability to decide), social behavior (including emotional stability), integrity; after the assessment, the candidate will receive a report with the results of the assessment; the report will also focus on the area's/topics on which the candidate needs to focus when starting working as a judge; a candidate can refuse the handover of the report to the NSCJ; the application procedure will then be terminated.

8. final interview: three times an interview of 45 minutes, each interview will be held by two members of the NSCJ. Goal of the interviews: to receive an overview of the personal qualities of a candidate, for example the ability to work in a team and the ability to delegate. Also, if a candidate performs certain roles in society, such as volunteer work; important is also how the candidate is viewing what is happening in society and how she/he articulates about this.

The NSCJ-members who conduct this final interview have seen the assessment report; the content of this report is important but will not be the most important aspect if a candidate will successfully complete the selection procedure. The final result (yes or no) depends also on the content of the interviews and the information of the references;

9. selection procedure at a specific District Court: interview with the selection committee of this court; important aspects here are if a candidate will function well in the existing team and shows the ability to work with the judges who already work in this court.

1.3. Selection procedure of Court of Appeals Justices

Same as in the above for judges, but without the following:

- selection of the application form which must be filled out online; a recommendation letter of the president of the court to which the candidate applies is necessary;
- first interview;
- selection procedure at a specific court (as there is already a recommendation letter of the Court of Appeals to which the candidate applied).

To apply for the position of a justice at an Appeals Court, one must have at least ten years of high-quality work experience and must be nominated for the position by the president of this Appeals Court. The selection procedure as described in the above must be completed successfully. The candidate will then become a trainee justice. Trainee justices receive on the job training at the designated Court of Appeals and at the training institute for the Judiciary and the Public Prosecution Service. In general, vacancies for justice are filled internally.

Anyone who has any questions about the above-mentioned procedures can contact the Secretariat of the NSCJ, on work days, from 10-12.

1.4. Input of civil society in the selection process of judges and justices

The members of the NSCJ come from a variety of backgrounds and is composed of members of the judiciary and various other sectors, such as public administration, business, education and science, lawyers and the public prosecution service. The members are appointed by the Council for the Judiciary (Council), which has mandated its statutory tasks in the field of selection to the NSCJ. The members of the NSCJ are selected based on a job profile. They are trained within a permanent education program.

Members of the NSCJ preferably have experience with conducting selection interviews or affinity with recruitment and selection and / or with the training of judges. She/he has been

working for a long time within the judiciary or, as an external member, has a good overview of the judiciary and the judicial office. Competences must be: communication skills, ability to listen, sensitivity of judgment, integrity, firmness. The term of office of the member is three years. Members are required to submit, before they can be appointed, a so-called Declaration of Behavior (meaning: having no criminal record).

Current members of the NSCJ

- Presidium
- Chair: vacant
- Deputy Chair: President of a District Court
- Two members-secretaries: Senior District Court Judges

Members

18, of which:

- 9 District Court judges/justices in a Court of Appeals or special court
- 1 lawyer (advocate)
- 1 pastor-theologist from a Protestant Church
- 1 film consultant and free-lance filmmaker
- 1 advisor in tax and legal matters
- 1 prosecutor, District Court level
- 1 president of a conglomerate/cooperation of fire brigade/safety/emergency services
- 1 prosecutor, Appeals Court level
- 1 director/secretary of a provincial Bar Association
- 1 job coach.

1.5. Selection of members of the Supreme Court

Only the best lawyers (jurists) are eligible to become a member of the Supreme Court. In addition to having a large amount of knowledge, members also need to show a large professional experience, for example in the judiciary, as a member of the Bar (advocate), as an academician, or a jurist in the Tax Authorities office. One must have already made considerable progress in her/his career. For many Supreme Court justices, it is the last position in the career. The Supreme Court has drawn up profiles containing requirements that new members must meet.

2. Lithuania

2.1. Selection authority

In Lithuania, persons, seeking for the judicial office, and judges, seeking for the transfer to other court or for the promotion to higher court/to the position of chief justice, have to pass the selection procedure, conducted by the Selection Commission of Candidates to Judicial Office (hereafter – the Selection Commission) in accordance with provisions of Article 55¹ of the Law on Courts.

According to the Law on Courts, the Selection Commission is composed of seven persons and formed for a period of three years by the President of the Republic. Three members of the Selection Commission shall be judges and four members shall be the representatives of the society. The Chairman of the Selection Commission is appointed by the President of the Republic from among the members of the Commission. The decisions are adopted by the majority vote of all the Commission members.

Therefore, acting judges are not prevailing at the Commission, the representatives of other professions and civil society play a major role in decision-making. At the moment, the Commission is composed of:

- Supreme Court Justice,
- Judge of Appeal Court,
- President of Regional Administrative Court,
- Psychologist/HR Management Consultant (he is appointed as a Chairmen of the Commission),
- Professor of Mykolas Riomeris University (political sciences)
- Retired Judge, member of selection commission of prosecutors
- President of the Association of Internet Media (journalist).

This composition allows to effectively involve civil society representatives in decision-making with legally defined status (including remuneration), established clear mandate and responsibilities. Moreover, this system ensures the balance between pure legal approach and experiences of other professions as well as perception of civil society to judiciary's role and requirements for judges.

2.2. Selection procedure

During the selection the Selection Commission examines dossier of the candidates and conducts interview. The professional experience, knowledge and skills, the capacity to apply theoretical knowledge and skills in practice, other quantitative and qualitative indicators of legal activity, observance of ethical requirements in professional and other activities, personal competences, motivation are assessed (*bellow see example of criteria, indicators and sources of information for promotion of judges*).

Evaluation criteria	Performance indicators	Sources of information	Score
1. Professional competence	1.1. Legal and judicial experience ³¹	CV References	0,5 point/1 year, max. 10 points
	1.2. Type of legal experience (lawyer, legal assistant, prosecutor, judge, etc.)	CV References	up to 10 points
	1.3. Quality of judicial performance, including: - quality the decisions (clarity, logic, correct use of the legal terminology, etc.) - quality of managing the	Statistics provided by the National courts administration on: - stability of judge's decisions (number of quashed/changed decisions)	up to 40 points

³¹ The experience of administrative/managerial activities (leadership) is encountered for candidates to court president's position– up to 5 points

	<p>proceeding (e.g. perceptiveness, consideration, behavior with parties, attentiveness)</p> <ul style="list-style-type: none"> - unjustifiable delays of case hearings; - data on concluded peaceful agreements, number of cases submitted to judicial mediation and number of mediated cases. 	<ul style="list-style-type: none"> - average length of the proceedings and number of „prolonged“ cases. <p>Inspection reports.</p> <p>Analysis of reasons for quashing/changing decisions and other relevant information concerning professional competence, provided by the President of higher court.</p>	
2. Personal and social competence ³²	2.1. Organisational skills, ability to cope with workload	Reasoned opinion provided by the President of higher court*.	up to 15 points
	2.2. Openness to using new technologies	Reasoned opinion of the Court President.	
	2.3. Professional ethics	Analysis of audio records of court hearings.	
	2.4. Ability to show respect for parties	Interview with the judge conducted by the Selection Commission**	
	2.5. Communication abilities	Questionnaire*** Conclusion of psychologist****	
3. Improvement of professionalism.	3.1. Participation in trainings, seminars and conferences	Data provided by the National courts administration.	up to 10 points
	3.2. Information about judge's self-improvement	CV and interview, questionnaire (questions about candidate's interests concerning legal literature, other activities related to self-improvement)	
	3.3. Knowledge of foreign languages		
4. Motivation and other	Motivation, understanding of the role of judge, opinion	Interview, questionnaires***	up to 15 points

³² With regard to the candidates to court president's position these competences are evaluated focusing on management, communication and other leadership aspects – up to 20 points.

competences, important to judicial performance	on how to build public trust in judiciary, etc. ³³		
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* This opinion is based on examination of personal file (dossier), interview, conducted by judges of the respective court.

** The member of the Selection Commission, who is appointed to be a rapporteur for individual case, examines all materials provided and reports to other members. Thus, during the interview (approx. 30-45 min.) the questions are targeted on clarifying specific competences, needed for respective office, candidate's motivation and approach towards judicial system's development, communication activities, etc.

*** There are no formal requirements on questionnaires, some example templates are issued by the Selection Commission.

**** All candidates to judicial office and acting judges every five years have to pass medical examination, including the examination by the psychologist³⁴. For this examination special methodology of psychological testing and interview is used for assessing psychological condition, cognitive abilities, etc. The conclusion consists of 2 parts: firstly, there is a general conclusion, if the person's psychological health allows him/her to hold judicial office, and the second part is dedicated to description of personal characteristics.

The Selection Commission has quite a wide discretion on the assessment of particular criteria, relying on different sources of information. There is no strict and standardized scoring system inside particular range of scores (in some cases from 0 up to 40 points out of 100), acknowledging, that not only length of service/professional experience and pure statistics is important in judicial selection, but also personal, social competences of candidates, which are of more subjective character and cannot always be put in a strict formula to be evaluated, are not less important in deciding, which person is the most suitable to deliver justice.

3. Austria

3.1. Recruiting and requirements for becoming a judge

a. In general

The educational requirements for joining the profession of judge in Austria are in two stages. First it is necessary to complete a law degree - which lasts approximately five years on average - in one of five universities. Then would-be judges have to undertake practical training in courts, lawyers' or notaries' offices. The beginning of this practical training is the so-called "court-practice" ("Gerichtspraxis"), and functions as a bridge between university education and practicing the profession. The initial training for judges and prosecutors is the same, as the prosecutors are recruited from the body of judges.

b. Court-Practice

³³ With regard to the candidates to court president's position also the motivation of improving court's performance, participation in WGs for legislative initiatives, improvement of court performance, judiciary self-governance, etc. is emphasized.

³⁴ The requirements and procedure of health examination of candidates for judicial office and judges are established in the Resolution No V-196/1R-80 adopted by the Health Minister and Justice Minister on 19 March 2009.

Anyone who has graduated in law, can speak the German language and is able to follow a trial, has the right to do court practice, which lasts nine months. In these nine months the trainees are supervised by a judge, rotating every three months to another judge/court in order to receive training in different branches of the law and at different courts. The main goal of this practice is to enable trainees to become familiar with the daily business of the courts, doing preparative work for the judge they are assigned to, and attending trials, as well as participating as a typist of court in criminal matters. A period of time spent at a public prosecution office or a prison is also possible under some circumstances. There are also regular training-courses offered to court-trainees, especially in civil and criminal law.

Every supervising judge has to evaluate the trainees by giving a detailed report at the end of the three-month placement, detailing the abilities, activities and the personality of the trainee. This means that at least three different judges acting as supervisors during the nine months of court-practice draw a very accurate picture of each potential new judge. This training is mandatory for anyone wishing to join one of the classic legal professions (lawyer, notary, judge, public prosecutor). After this court-practice, qualifying for the professions of judge, lawyer and notary follows different routes.

c. How to become a Judge

The legal requirements for being appointed as a judge are laid out in a section of the Federal Constitution and in a law of its own, the “Judges’ and Prosecutors’ Office Law” (“Richter- und Staatsanwältedienstgesetz”) containing the regulations concerning the legal profession and the pay scales.

After the court-practice, candidates have to apply for “the Judge Preparation Service”. To be accepted in this service a candidate is appointed as a “Judge Office Candidate” (“Richteramtswärter”). Law graduates who wish to follow the judge preparation service -and ultimately to be appointed as a judge - have to apply for a post as a judge office candidate. Under the law, the President of the Court of Appeal³⁵ proposes the applicants to the Federal Ministry of Justice for an appointment as judge office candidates, after checking that the requirements are fulfilled. Successful applicants are those who are deemed to be most suitable for the profession of judge. There is no appeal against the decision of proposal, selection and appointment as a judge office candidate by the applicants: according to the practice of the Administrative Court, they cannot be a party to the selection process in a procedural way.

By law the Minister of Justice is not obliged to uphold the proposals of the president of the court of appeal. But in practice only those proposed by the president of the court of appeal are appointed as judge office candidates.

Because the President of the Court of Appeal is not able to check all the prerequisites of the candidates on his/her own, this task is delegated as follows: the judges, having been entrusted with the supervision of the applicants during the Court-practice, produce reports outlining the ability of each trained candidate to become a good judge (this is the most important criterion in evaluating the candidates, see above). Additional exams in civil and criminal matters, set by judges who examine the training courses offered, are also common practice. Moreover, the president has, personally or delegated to entrusted judges, an interview³⁶ with the applicant, to check the suitability of applicants and to get an impression of their personality. Last but not

³⁵ Thus the process of recruitment is organized within the territories of the four Courts of Appeal.

³⁶ These interviews offer an informal opportunity to the elected representatives of the judiciary (mostly representatives of the Association of Judges), who are invited to participate in these sessions, to comment on the applicants.

least, the candidates have to undergo a health-check. Although not explicitly required by law, it seems to be common practice to check whether the applicant has a criminal record. In addition (since 1986), each of the applicants has to undergo a psychological aptitude test, carried out by psychologists independent of the judiciary. The psychological aptitude test consists of establishing the personal characteristics, intelligence, performance in group discussion, decision-making ability, working speed, and the mode of expression etc of applicants, and its aim is to broaden the basis of decisions regarding who is accepted in the judge preparation service. It has to contain a personal interview with the applicant and is done on a standardised basis.

The methods used for selection seem to be very reliable, because it is unusual for a judge office candidate to be dismissed due to bad performance, and the incidence and results of the disciplinary proceedings are within the threshold of tolerance.

3.2. Training of the Judge Office Candidate

a. Initial training system

After being accepted as judge office candidate, the training continues. In principle it lasts four years. However, since court-practice is included as part of the whole training programme, from being appointed as judge office candidate there is another three years of training.

The judge office candidates are trained by judges. The “Judges’ and Prosecutors’ Office Law” stipulates that it is every judge’s duty to train judge office candidates (but in reality, usually only the most able and experienced judges are entrusted with the training of judge office candidates). The supervising judge changes every 3-5 months in a system of job-rotation. The judge office candidates are trained at district courts (limited jurisdiction) - in most cases at a court in country areas - at the courts of first instance and the courts of appeal, as well as some who are also trained at the Supreme Court. The training has to cover civil (contentious and non-contentious) and criminal matters. A training period covering commercial and labor and social matters is usually also included. Further training takes place at the department of public prosecution and at a lawyer’s office, to gain familiarity with all activities and perspectives of being a judge. The supervising judge has to evaluate the judge office candidates in the same way that the trainees were evaluated (see above) by giving the same detailed report at the end of the three months’ assignment, describing the abilities, activities and the personality of the assigned trainee. The aim of this is to guarantee the quality of training received and the performance of the candidates.

In addition, there are special training courses in several specific traditional areas. These specific items include the acquisition of relational capacities, forensic skills, the acquisition of knowledge of non-legal subjects and the use of information technologies. Their content is slightly different, depending on which of the four Courts of Appeal is involved. 33 % of the training is “off the job”.

At the end of the training period, there is the Judge Office Examination, which has a written and an oral component. The written examination consists in two decisions in civil and in criminal matters, on the basis of court documents. The main components of the oral exam cover all branches of procedural and substantive civil and criminal law, as well as constitutional and office law.

The exams are set by examining boards set up by each Court of Appeal. Members of the examining boards ex officio are the President, the Vice-president and the heads of the panels of the Court of Appeal (the chief senior public prosecutor and deputy). Additional members from the body of judges and lawyers are proposed by the president of the court of appeal to the

Ministry of Justice and are appointed for five years. University law professors can also be appointed.

The Judges' and Prosecutors' Office Law stipulates that the examination board should consist of five members, all judges or lawyers: At least two of them have to be judges, and one of them has to be a lawyer. At least one of the judges has to be appointed at a Court of Appeal.

In reality the board consists of the president of the court of appeal (or the Vice-president), three judges from the court of appeal and one lawyer. It should be pointed out that this exam is an overall opportunity for young would-be judges to brush up their knowledge and is not another round of selection in which some are failed.

b. Evaluation during the training

The above-mentioned evaluation carried out during the training periods is standardized. It consists of an evaluation of traditional knowledge, reliability, decision-making ability, working speed, the capacity to work under stress, the mode of expression (written or oral), the social and personal behavior and a general description of the candidate.

3.3. Applying for a post and appointment of judges

After having passed the Judge Office Examination, the judge office candidate may apply for any vacant post of judge. It should be pointed out that any judge in Austria may apply for any vacant post of a judge (there are no age limits). The vacant posts are advertised publicly by the president of the court of appeal. After the closing date for applications, the "Judicial Board" plays the main role in the selection procedure for appointments³⁷.

It is the judicial board of the court of first instance with the vacant post or in whose jurisdiction the vacant post is to be found that makes a first proposal for appointment. This is followed by a second proposal by the judicial board of the court of appeal. This proposal will, if there are enough applicants, contain at least three names. If there is more than one post vacant, the proposal will contain at least twice the number of people who are to be appointed. From various applicants those to be preferred are candidates who are most able for the vacant post (same criteria as for selecting judge office candidates under § 54 Judges' and Prosecutors' Office Law). This has to be argued in the proposal. In case of equal ability, the elder judge has precedence.

The appointment of judges is, according to the Federal Constitution, within the competence of the Federal President. But for most of the kinds of posts of judge this competence is delegated to the Federal Minister of Justice. Only the presidents and vice-presidents of the courts of first instance and the judges of the courts of appeal and of the Supreme Court are appointed by the Federal President, who is bound by the proposal of the Federal Government (which may delegate this authority to the Federal Minister of Justice).

³⁷ The "Judicial Boards" (In Austria called "Personnel Senates") are panels of judges at courts of first and second instance composed of ex officio members (the president and vice-president of the court) and of three members elected by the judges of these courts (and in the case of courts of first instance (general jurisdiction) also by judges of the lower level district courts (limited jurisdiction). Where there are more than 100 judges at one court, including the subordinated district courts, five members have to be elected. Thus the number of elected members is always higher than the number of members ex officio. In addition to their tasks regarding the allocation of cases within courts, they are also responsible for the appointment of judges, the assignment of 'flexible' judges attached to a Court of Appeal and its territory to a specific court, and the administration of justice and they have to select the members of disciplinary-courts³⁷. In this way the Judicial Boards guarantee judicial (personnel) independence. They are the result of separating justice from its "administration".

The appointment of a judge is for life-time.

The fact that any judge in Austria may apply for any vacant post³⁸ of a judge in another court without any limitations, and that the applicant who is the most able for the vacant post (or the elder judge in case of equal ability) has to be preferred leads to a knock-on effect: for example, if a judge of the Supreme Court retires, usually a judge appointed to the court of appeal would be appointed for the vacant post, causing another vacancy. A judge of one of the courts of first instance would then be appointed to that post, leaving a vacant post, and so on. As a result, posts at the district courts or posts of judges appointed for the whole area of a court of appeal are generally available to newly appointed young “first round” judges. At the same time, this means that the most attractive posts are accessible to the best-qualified and most experienced judges.

4. Germany’s 16 Länder³⁹

Germany is a federal state. Judicial authority in Germany is shared between the Federation (“Bund”) and the sixteen “Länder” (states, provinces).

4.1. Recruitment of judges and prosecutors

a. Competent body for appointment

Germany, as a rule, has career judges, which means that judges spend all or most of their working life in the judiciary. Their career usually begins at a court of first instance and therefore in the employment of one of the Länder. Consequently, it is the Länder administrations that have to organise the system of primary recruitment for the judiciary. Within the Länder the Ministry of Justice usually organises this process; in some of the Länder, appointments for the social and labour courts come within the scope of the Ministry of Labour and Social Affairs. In half of the 16 Länder judicial electoral committees (Richterwahlausschüsse) participate in the process of recruitment and appointment (for further details and the composition of these committees see below).

b. Prerequisites, preconditions, qualifications

The **general criteria** for appointment to any public office – and this includes any position in the civil service and any judicial office - are laid down in article 33 paragraph 2 Grundgesetz. According to this article all German citizens have equal access to public office according to their aptitude, qualifications and professional ability. This guarantees equal access to a judicial office for everyone. In addition, section 9 of the (federal) German Judiciary Act⁴⁰ prescribes that judicial tenure may only be given to a person who is

- a German national in terms of article 116 Grundgesetz,
- prepared to at all times uphold the free democratic basic order within the meaning of the Grundgesetz,

³⁸It should be noted in addition that a post could also become vacant because of pregnancy, a political mandate, assignment to an international institution etc. In this case a new post (“Ersatzplanstelle”) is created automatically and another judge (judge office candidate or public prosecutor) may be appointed.

³⁹ Johannes Riedel et al: " Recruitment, professional evaluation and career of judges and prosecutors in Europe: Austra, France, Germany, Italy and the Netherlands ", by CeSROG, University of Bologna, in partnership with IRSIG-CNR, Giuseppe Di Federico (Eds), 2005;

⁴⁰ Deutsches Richtergesetz (DRiG) of April 19, 1972, Bundesgesetzblatt 1972 I p. 713, as amended per June 7, 2004, Bundesgesetzblatt 2004 I p. 1054; the relevant amendment concerning legal education was by the act to reform legal education of July 11, 2002; the amendment introduced the requirement of “social competence”

- qualified to hold judicial office (according to sections 5 to 7 of the act),
- able to provide the social competence necessary for the office.

These criteria are binding on the bodies competent to decide on recruitment and appointment. Any alleged violation of equal access to public office is open to judicial review before the administrative courts.

In addition, the Länder have laws providing for preferential treatment of female applicants to public service. These have been enacted to implement the principle of equality of men and women - with regard to access to employment, vocational training and professional advancement. In cases where applicants of both sexes are equally eligible with regard to aptitude, qualifications and professional ability preference will be given to appointment or promotion of female applicants if in the office concerned fewer women than men are employed, unless grounds in the person of a male applicant are overriding.

The **professional qualification** to hold judicial office is regulated in section 5 of the (federal) German Judiciary Act. Section 5 states that in order to qualify to become a judge you have to study at university, pass a first exam, do an apprenticeship and pass a second state examination.

The course of study at university lasts (on average) four years.⁴¹ Subjects of study have to include central fields of civil law, criminal law, administrative law, constitutional law, procedural law plus legal theory and the historical, sociological and philosophical foundations of law, including the relevant aspects of European law. In addition to the compulsory subjects, students must also study further legal subjects of their choice (“Schwerpunktbereiche”, for example, international law, European law, insurance law, media law etc.).⁴² The course of study is concluded by passing a first examination which – following the reform of the year 2002 – will from 2006 onwards be held in two parts, an exam on compulsory subjects before a state exam board and an exam on subjects of choice before the law faculty. Students also have to carry out short periods of practical training while they are enrolled as university students, lasting altogether three months.

University education is largely theoretical. Studies concern the knowledge of important codes and acts and court decisions. Students rely mainly on textbooks. Casebooks are rare, because the emphasis of the courses lies more on principle than on precedent. Practical implications of legal principles are not covered in depth; procedural law is dealt with only briefly. In spite of this emphasis on theory, a decisive element of university education in law is training in the methods of „solving” a case, a legal problem. Strict logical thinking, exact interpretation of statutes, precise deduction from principles („Subsumtion“) lie at the centre of this methodical training. In addition, it is the aim of the recent reform to place more emphasis on practical aspects of the law, above all on the way a practising lawyer deals with legal problems, how he perceives the case and how he can act to influence the outcome of legal disputes. According to the law on legal education in the Land North-Rhine/Westphalia⁴³, essential fields of study include, for example,

⁴¹ s. 5a DRiG, cf. note 4, supra

⁴² Before the 2002 reform of legal education which will come into force only gradually after July 1, 2003, apart from compulsory subjects students had to study subjects of their choice which were then part of the exam set by a state exam office. The aim of the reform is to put more emphasis on profile building both for universities and for students and so the exam in subjects of one’s own choice will, in future, be held by the law faculties themselves (“universitäre Schwerpunktbereichsprüfung”, cf. s. 5, 5d DRiG, note 4, supra)

⁴³ s. 11, Gesetz über die juristischen Prüfungen und den juristischen Vorbereitungsdienst (Juristenausbildungsgesetz Nordrhein-Westfalen) of March 11, 2003, in force since July 1, 2003 (Gesetz-

- the law of contract, tort, chattels, real property, consumer credit,
- an overview of family law and the law of succession upon death,
- an overview of exemplary parts of mercantile law, of company law, of labour law,
- core subjects of criminal law,
- an overview of criminal procedure,
- constitutional law, general principles of administrative law including procedure, the law of local government,
- European law and an overview of private international law.

This covers a wide range of legal fields. In addition, what may belong to "principles" or "overview" in any given field is open to discussion. Universities or examination boards do not have strict or binding curricula. Students are free to choose the time when they want to enter the first state examination. It is understandable that given the wide scope of subjects of study, many students fear that they are not well prepared and hence delay entering the examination. Burdened by such doubts, almost all law students decide to attend a private tutorial, usually with a lawyer who specialises in offering additional courses to repeat the knowledge he thinks is essential for passing the examination. In spite of these problems, more than half of the students enter their first exam after about 4 years of study.⁴⁴ The reason for this is that students who enter their first examination after only four years at university are entitled to an extra attempt if they fail the examination.⁴⁵

The (first) state examination is held by a state-administered examination office which is usually attached to a higher regional court. Examiners are university professors, judges and - occasionally - other practising lawyers. In most of the Länder, examiners are appointed for a period of three to five years by the Ministry of Justice or by the president of the higher regional court, the appointment following a proposal of the director of the examination office. The examination consists of 6 or 7 written (supervised) tests and an oral examination.⁴⁶ Supervised written tests deal with cases or legal problems with (mostly) undisputed facts. The oral examination usually lasts four hours and covers various subjects, again discussing simple legal problems. A group of up to six students is examined by a panel of three examiners. The panels of examiners for the oral examination are arranged by the director of the examination office; as a rule, one of the three examiners is an expert in civil, one of them in criminal and the third an expert in administrative law. As regards the section of the first examination which, in future, will have to be held by the law faculties in their and their students' fields of specialisation ("Schwerpunktbereiche"), it will be open to the law faculties to decide on the details. As it appears at present, most faculties will require students to write some kind of thesis and at least one supervised test; in addition, there will be an oral exam.

und Verordnungsblatt - GVBI - für das Land Nordrhein-Westfalen 2003 p. 135), as amended per November 30, 2004 (GVBI 2004 p. 752); all the other Länder have passed similar legislation in order to regulate the details left open by the federal act of July 11, 2002, cf. note 4, supra

⁴⁴ This applies to the present system with a first and second state exam; exams under the new system will be held only after July, 2006, cf. notes 4, 6, supra, but it is to be expected that this will remain unchanged. Whether the introduction of the Bachelor-Master-system in Germany will also include legal education and whether it may eventually lead to yet another system with shorter courses of study will remain to be seen.

⁴⁵ s. 25 JAG, cf. note 7, supra; as a rule, the examination can be repeated once if the student fails; with the so-called „free shot“ attempt, students are offered a third try.

⁴⁶ s. 10 JAG, cf. note 7, supra

After the first exam there is a period of practical training, literally called preparatory service, followed by the second state examination. It is the rather unique concept of the German legal education system that it is essential for all future lawyers (i.e. judges, prosecutors, barristers / solicitors) to do this preparatory service and to pass the second state exam. The reason for this is that the professional qualification to hold the office of a judge as laid down in s. 5 of the German Judiciary Act, a qualification which is finally acquired by passing the second state exam, is at the same time the professional qualification necessary to be admitted to the Bar or to be employed as a lawyer in the civil service.⁴⁷

The duration of preparatory service is 2 years, and it entails various different stages of training. Students are employed by the state (the judicial administration) as civil servants in training and are paid a small monthly allowance while in preparatory service. They have to spend a few months each in a court for civil law suits, in a criminal court or a prosecutor's office, in a local or government administration, with a practising lawyer (barrister/solicitor) and at other places of their choice. In North-Rhine/Westphalia⁴⁸, trainees have to spend

- a) 5 months with a court for civil law suits at first instance,
- b) 3 months with a prosecutor or in a criminal court,
- c) 3 months with an administrative office (usually on the local level),
- d) 10 months with a practising lawyer (solicitor, barrister),
- e) 3 months at a place of choice - where training is offered in a special subject of his or her choice.

The aim of education in these various stages is to instruct trainees in the practical skills concerning the application of the law. Students are supposed to learn how to draft judgements, to weigh and evaluate evidence, to write indictments, to produce written pleadings. The idea also is that a trainee should accompany the lawyer who is instructing him during daily work as often as possible. He should work under the instructor's supervision and take over some of the workload so that he can, for example, learn how to examine witnesses (which under German procedural rules is mostly done by the judges), how to plead in court (an art which is rarely exercised) and how to meet clients.

Practical training in these stages is accompanied by courses⁴⁹ which are given by experienced practitioners (mostly judges but also prosecutors and other lawyers). These courses cover practical questions. Their purpose is to make students familiar with the methods of analysing and deciding court cases, especially teaching them to find the issues of fact which are relevant to the decision of the case. In future, courses will have to bring more emphasis on a lawyer's practical skills in private practice, in order to take account of the goals of the reform of 2002 / 2003. Courses also serve the purpose of preparing students for the final state examination and to ensure an equal standard of practical training because the quality of individual instruction during practical stages may differ a lot.

⁴⁷ "Befähigung zum Richteramt", cf. s. 4 Bundesrechtsanwaltsordnung (BRAO) of August 1, 1959, as amended per July 11, 2002 (Bundesgesetzblatt 2002 I p. 2592) by the act to reform legal education and later amended per May 5, 2004 (Bundesgesetzblatt 2004 I p. 718)

⁴⁸ under the new law after the reform of 2003, cf. s. 35 JAG, note 7, supra; the emphasis that the reform is putting on training for private practice is shown by the fact that, under previous regulations, the stage with a practising lawyer was only 4 months whereas in the future it will be 10 months; federal law prescribes at least 9 months, s. 5b para. 4 DRiG, cf. note 4, supra.

⁴⁹ s. 43 JAG, cf. note 7, supra

The second and final examination is again held before a state office that is usually attached to the Ministry of Justice of the Land. In contrast to the first examination, mostly practising lawyers and only few law professors serve as examiners, the overwhelming majority being judges of all courts (civil courts, administrative courts, labour courts, even tax courts), but increasingly members of the Bar are volunteering to sit as examiners. The importance which is attached to this examination may be shown by the fact that a large number of court presidents regularly serve as chairpersons of the panels of examiners. Again, examiners are usually appointed by the Ministry of Justice on the basis of a proposal of the director of the examination office.

The subjects of this examination are by and large identical with those of the first exam, they include however procedural law at a much deeper level. Papers and questions are usually set not from the abstract point of view of a legal scholar but almost invariably from the point of view of the court that has to give the decision in a case or of the practising lawyer who has to deal with a given situation for his client. Again, there are written (supervised) tests and an oral examination. Written tests usually require the drafting of a judgement, of an indictment and, to an increasing extent, of a pleading or application - given from the barrister's point of view. Oral examinations (five to six candidates being examined by a panel of three examiners, selected by the director of the examination office) begin with a short speech which the candidate has to give on a simple practical case, again mostly from a practising lawyer's point of view. The candidate is presented with the case on the morning of the examination and is allowed one hour of preparation; the speech should not last more than ten minutes and should end in a proposal for a practical decision.⁵⁰ After every candidate has given his speech, the following oral examination takes place in the form of a discussion covering everyday practical situations, for example, simulating the visit of a client to a solicitor, a procedural situation during a trial in court, a factual or legal problem that may arise in local administration. In short, in all phases of this examination, candidates do not only have to show their abstract knowledge of the law but also their ability to work with the law in a practical situation and to weigh and choose between a number of options which seem to be open to them.

At the end of all this, those who are successful are qualified to hold any position as a lawyer (i.e. judge, prosecutor, barrister). By that time, the average age of a student is about 28 to 30 years. Their chance of being appointed as a judge or employed as a lawyer in the civil service, however, depends not only on their passing these two law examinations but also on how well they have passed them. Only a better than "average" performance in the examinations, for example, may open the opportunity to becoming a judge; in spite of the meaning of the word "average", only about 15 % of all students receive marks that are called "above average". The rate of failure in the final exam lies around 15 % with an additional rate of failure of about 30 % in the first exam.⁵¹ The remaining 70 % "average" lawyers have to look for jobs in industry or go into private practice. With the number of successful law students rising steadily (in former West Germany from 4653 in 1981 to 7522 in 1991 and to about 10,800 in the whole of Germany in

⁵⁰ s. 51 paragraph 3 JAG, cf. note 7, supra; conditions vary a bit in detail among the Länder but are generally comparable

⁵¹ Statistics of 2003, cf. tables 3 and 4; numbers vary quite a lot from Land to Land. The reasons for this are manifold and open to discussion and further research. Likely explanations are the quality of school training, the quality of law faculties, standards and demands in law exams but also social and economic background in certain regions. Exam results are increasingly being challenged. In North-Rhine/Westphalia, about 5 percent are being challenged in a pre-trial administrative review proceeding (Widerspruchsverfahren) which requires examiners to reconsider their marks. About 1 percent of all exam results are eventually reviewed in court. Less than 0.1 percent are successful - success meaning that either the papers have to be marked again by the same or by other examiners or that the candidate has to be offered another chance to write an exam paper or to do the oral exam.

2002)⁵² there is an ever-increasing number of self-employed lawyers in private practice who have a hard time earning their living. At the end of 2004, nearly 130,000 lawyers were admitted to private practice in Germany.

c. Further prerequisites

Federal law does not provide for any further prerequisites. As far as can be seen, no further requirements are laid down by the laws of the Länder either. Apart from the professional qualification acquired by the two law exams (Befähigung zum Richteramt within the meaning of section 5 of the Judiciary Act) no further professional experience is necessary. There is no policy of recruiting judges from the ranks of other legal professions although, for the purposes of appointment for life, time spent in other legal professions may be taken into account.⁵³ There is no minimum or maximum age although, of course, when appointing future career judges, the duration of future working life until the compulsory retirement age of 65 may be taken into account. Likewise, applicants for the judiciary - like all applicants for the civil service - have to provide a health certificate in order to allow a prognosis whether the retirement age is likely to be reached in their case. On the other hand, the law requires preference to be given to handicapped persons in cases where they have met all other criteria at a level equal to that of other applicants. Finally, as is the case with all applicants to the civil service, they should be of good moral standing, i.e. they have to provide a report from the registry of criminal convictions and they have to make a declaration as to whether and in what way they are indebted. It can be assumed that if these matters give rise to objections they will not be appointed.

d. Procedure of recruitment and selection

As has been shown, the process of recruitment and appointment of career judges is in the hands of the Länder judicial administrations. In some of the Länder, this matter is dealt with in full by the Ministry of Justice whereas in other administrations the authority to decide on recruitment and on the (first) appointment has been transferred to the president of the higher regional courts (i.e. the Länder courts of appeal). In some administrations candidates can apply at any time, and selection proceedings are held continuously throughout the year as vacant positions have to be filled, whereas in other cases applicants for judicial office are sought by job advertisement (Ausschreibung – public tender). Job advertisements are intended to ensure that applicants have equal opportunities of access to public office and that at the same time the most suitable applicant can be selected from as large a group as possible. Where proceedings are commenced without prior advertisements it is assumed that those interested in the judiciary will try to acquaint themselves with the procedure that has been adopted and apply on their own initiative; it is expected that this is the group most interested and most suitable for judicial office.

In half of the 16 Länder, judicial electoral committees (Richterwahlausschüsse) also participate in recruitment. These committees are parliamentary committees. Their members are appointed for a parliamentary election period and, as a rule, chosen by a parliamentary vote, some times on the basis of nominations of relevant professional groups (e.g. the judiciary, the bar). The recruitment is only valid with the concurring votes of the competent minister and the electoral committee. There are some differences between the electoral committees of each Land in regard to composition. They consist mainly of members of the respective Land parliament or persons commissioned by them. Members of the judiciary and lawyers may be included.

Generally speaking, both in proceedings where only the Ministry of Justice or the higher regional court are involved as well as in those where electoral commissions have to decide

⁵² cf. table 5

⁵³ s. 10 paragraph 2 DRiG, cf. note 4, supra

together with the Ministry of Justice, some kind of evaluation of the credentials of candidates is taking place. Because of the different nature of these proceedings, the process of evaluation may vary. Invariably, the criteria listed above will have to be taken into account. These are:

General criteria (German citizen, health, moral standing)

Professional qualification (state exams, Befähigung zum Richteramt)

Social competence

The information available as to the extent to which professional qualifications and “soft criteria”, such as social competence are weighed in this process will be discussed below (1.2).

e. Details of the procedure of recruitment and selection

Recruitment proceedings invariably start with an application by the respective candidates. From then on, proceedings differ greatly in detail, and this irrespective of whether a judicial electoral committee is involved or not. In most of the Länder candidates have to appear before a recruitment commission and present their application, and it is on the basis of the vote of this commission that the competent authority (the ministry or the president of the higher regional court) decides on recruitment where no judicial electoral committee is involved. Recruitment commissions are set up on the administrative level, usually by the Ministry of Justice; in general, they are composed of high ranking civil servants of the Ministry of Justice and / or court presidents. Proceedings before these recruitment commissions vary greatly. In some of the Länder, such commissions have not been established and it is the respective authority itself that decides, mostly on the basis of the documents supplied and in the light of an interview with the candidate. In those cases where the Länder have electoral committees, recommendations as to which candidate should be selected are quite often given to the electoral committee. Such recommendations may be based on the vote of a recruitment commission, they may be given by the president of the higher regional court on his own account or there may have been a formal process involving another commission, in some cases consisting of judges. In addition, details of recruitment procedure may vary even within a Land - from judicial branch to judicial branch (i.e. ordinary courts, administrative courts etc.), from district to district and in relation to the courts vis-à-vis the prosecution office. The following list shows only the major aspects of respective procedures. Unfortunately, there has so far been no evaluation of the value of these various procedures. In all the Länder, regulations on equal opportunity for female applicants (gender mainstream rules) require the person who has to observe and control the application of these regulations (Gleichstellungsbeauftragte, such offices exist in all administrations) to take part in the proceedings at some stage.

Baden-Württemberg

The decision is reached on the basis of documents supplied by the candidate, the result of the final exam including all assessments during the two years' practical training and an interview with the head of the personnel department of the ministry. The idea of introducing more detailed procedures (assessment centres, cf. Nordrhein-Westfalen, below) has been rejected because results of the present scheme have been satisfactory, and the time consumed and costs produced by such procedures are considered higher than the expectation of achieving better results.

Bayern⁵⁴

The decision is reached on the basis of documents supplied by the candidate, the result of the final exam and an interview with the head of the respective personnel department of the court.

⁵⁴ cf. Meisenberg, Deutsche Richterzeitung 2003, p. 227

The idea of introducing more detailed procedures (assessment-centres, cf. Nordrhein-Westfalen, below) has been rejected because the efforts occasioned by such procedures were considered higher than the expectation of achieving better results.

Berlin

Extensive interviews are conducted by the president of the higher regional court and the court's head of the personnel department. The court then reports on the basis of these interviews and the relevant documents to the Ministry of Justice which then passes the proposal on to the judicial electoral committee. Before introducing more detailed procedures consideration would have to be given to the weight attached to the results of such procedures with respect to the vote of the judicial electoral committee.

Brandenburg

Extensive interviews are conducted by the president of the higher regional court and the court's head of the personnel department. The court then reports on the basis of these interviews and the relevant documents to the Ministry of Justice which then passes the proposal on to the judicial electoral committee.

Bremen

The decision is reached on the basis of documents supplied by the candidate, the result of the final exam and interviews. An electoral committee is, however, involved.

Hamburg

The decision is reached on the basis of documents supplied by the candidate, the result of the final exam and interviews. An electoral committee is, however, involved.

Hessen

The decision is reached on the basis of documents supplied by the candidate and the result of the final exam. An electoral committee is, however, involved.

Mecklenburg-Vorpommern

The decision is reached on the basis of documents supplied by the candidate and the result of the final exam.

Niedersachsen⁵⁵

The decision is reached on the basis of documents supplied by the candidate, the result of the final exam and an extensive interview in the Ministry of Justice.

Nordrhein-Westfalen

The higher regional courts in Nordrhein-Westfalen employ different systems. All of them have formed commissions which usually consist of the president of the higher regional court, the head of the personnel department, a president of a regional court (usually the court where the vacant position has to be filled) and the person responsible for equal opportunity matters (Gleichstellungsbeauftragte). Proceedings, however, differ:

- in the court in Düsseldorf, candidates have to go through
- a 10-minute interview on the role of a judge,
- a 5-minute role play concerning a situation at a court trial

⁵⁵ cf. Kramer, Deutsche Richterzeitung 2003, p. 226

- a 20-minute general interview designed to obtain an impression of the candidate's personality
- a 10-minute role play
- a 30-minute group discussion
- in the court in Cologne, candidates have to
 - give a 10-minute speech without referring to notes on a subject of their choice (which may have been prepared)
 - go through a 30-minute „working test“ where they are confronted with 10 different files or documents and they have to decide what to do with them next
 - go through a 45-minute standardised interview (presentation, structured and standardised questions)
- in the court in Hamm, the most elaborate system has been employed.⁵⁶ It takes a full working day and consists of
 - a 45-minute group discussion on a given - legal - topic; the participants (usually 6) are divided into two groups of three who have to present the differing views (pro and con); after about 20 minutes, the discussion is usually interrupted and guided in a different direction, the groups of three may then be dissolved
 - after this, candidates have to assess in writing their situation during the group discussion; meanwhile each member of the committee individually assesses the performance of the candidates
 - three of the candidates are given interviews in the morning while the other three candidates undergo a „working test“; in the afternoon, they then switch
 - the interview in its first part lasts about 30 minutes and is conducted by one member of the commission (but in the presence of all members) whereas in the second part all members may ask questions; the interview is standardised (structured and standardised questions); after the first part of the interview, there is a short break during which candidates are asked to give their written assessment of this part
 - the practical “working test” consists of 15 different files or documents with which the candidates are confronted and where they have to decide what to do with them next
 - after all this, the individual assessments given by the members of the commission are presented to the commission; the results of the “working test” are considered by a judge and presented to the commission; the commission decides in the light of the candidate's total performance throughout the day, and the candidate is then informed of this decision.

An evaluation of these different systems is planned but has yet to be conducted.

⁵⁶ For a detailed description of this system given by the president of the higher regional court in Hamm cf. Debusmann, Deutsche Richterzeitung 2003, p. 263. A system like this is, in German, labelled with the English word „assessment centre“. This technical term has come in use during the last decade, originating apparently from recruitment proceedings in commerce and industry and being increasingly used in staff recruitment in the administration. The general discussion on the value of „assessment centres“ cannot be reported here. Main points of debate are the expenditure of (human and financial) resources and expected results as well as whether specific training of applicants for the purpose of performing well in assessment centres might blur results.

Rheinland-Pfalz

The decision is reached on the basis of documents supplied by the candidate, the result of the final exam and extensive interviews with the presidents of the respective higher regional courts and the head of the personnel department of the Ministry of Justice. Results are considered satisfactory; therefore, more time-consuming procedures like assessment-centres are not being considered.

Saarland

The decision is reached on the basis of documents supplied by the candidate, the result of the final exam and an extensive interview with the secretary of state in the Ministry of Justice, the head of the personnel department of the ministry and representatives of the staff council.

Sachsen

The decision is reached on the basis of documents supplied by the candidate, the result of the final exam and extensive interviews.

Sachsen-Anhalt

The decision is reached on the basis of documents supplied by the candidate and the result of the final exam.

Schleswig-Holstein

The decision is reached on the basis of documents supplied by the candidate and the result of the final exam. An electoral committee is, however, involved.

Thüringen

The decision is reached on the basis of documents supplied by the candidate, the result of the final exam, including the assessments during practical training before the final exam, and an extensive interview.

f. Judicial review

Regardless of all these various systems of selection employed, all decisions by the competent authorities are - at least in theory - subject to judicial review. An unsuccessful applicant can challenge the decision to recruit somebody else on the basis that his right under article 33 of the constitution (Grundgesetz) has been violated. It is accepted that it follows from article 33 that authorities are under a duty to recruit the person who is best qualified for the vacant position. On the other hand, because strict criteria do not exist, it is equally accepted that there is a certain prerogative for the authorities to decide on which criteria they are going to place the most emphasis. Applicants have a right to be treated fairly and equally in the proceedings and also have a right to be informed of the intended decision on selection. This is to enable them to seek judicial review before the decision is implemented because, once another candidate is appointed and the vacant position has been filled, the recruitment procedure is closed. Damages could only be awarded in money but not in the form of another appointment because with respect to any other position, an open recruitment and selection procedure under article 33 would have to take place again.⁵⁷

⁵⁷ Details of this rather complex legal field of law suits of or among competitors for public appointment (mostly for higher appointments, i.e. promotions) cannot be fully described in this survey. As most of these cases concern promotions, the general principles and reference to some case-law are supplied below, 3.6. As far as recruitment and initial appointment are concerned, it seems that as yet no case has been brought before the courts; the most likely reason for this is that candidates who are not accepted

g. Federal Judges

The judges of the highest federal courts (Bundesrichter) are elected jointly by the electoral committee of the Federation and the Federal Minister competent for the court concerned, in general the Minister of Justice. The electoral committee of the Federation consists of the respective Länder ministers (16) and 16 members of the Federal Parliament (Bundestag) or persons commissioned by parliament (article 95 para 2 Grundgesetz). The Federal Minister competent for the type of court concerned chairs the sessions of the electoral committee but has no voting right. Each individual member of the electoral committee has a right to present candidates, and it follows from this that a strict recruitment procedure does not exist. There is, however, participation of the judiciary through a body representing the judges (presidential council or “Präsidualrat”, i.e. a council for judicial appointments at the respective federal court which represents the judges of the court).⁵⁸ This council gives an advisory opinion on the personality and the aptitude of the candidate and this opinion has to be presented to the electoral committee.⁵⁹

4.2. Evaluations made in the recruitment process

Invariably, it is the aim of the various recruitment and selection proceedings to ensure that the most suitable applicants are selected. In trying to reach a broader basis for their selection decisions some of the Länder have attempted to define further criteria in addition to the general criteria and the general professional qualifications as laid down by the law and explained above. Whereas in the past recruitment of judges has generally taken place on the basis of the results of the final state exams it is now increasingly accepted that further abilities and skills are necessary to make a good judge, and this has been underlined by inserting the requirement “social competence” in section 9 of the Judiciary Act.⁶⁰ Some Länder administrations have drawn up lists of further criteria which have to, or should be, fulfilled by candidates. In some cases, these lists (employee profiles, „Anforderungsprofile“) have been established only for higher judicial office (their fulfilment being prerequisite for a chance of promotion) whereas in other cases they include initial appointment.

Very elaborate profiles do exist in the Länder Bayern (Bavaria), Hessen (Hesse) and Niedersachsen (Lower Saxony).⁶¹ North-Rhine/Westphalia is in the process of establishing a list. These profiles cannot be presented here in all their detail, but it may suffice to describe their basic structure. Requirements are listed in various classes, and it is invariably the classes “professional competence” and “personal competence or ability” that can be found; in some cases “social competence” is listed separately and also “competence to lead” may be found. Within these classes, rather long lists of detailed requirements have been put together. The draft list of North-Rhine/Westphalia, for instance, contains, inter alia, the following elements many of which can also be found in the profiles of the other Länder:

seek employment elsewhere (e.g. in private practice) rather than to take the judicial administration to court over the refusal of initial appointment; see further below 1.2, at the end.

⁵⁸ cf. s. 54 et sequ. DRiG, note 4 supra

⁵⁹ The process of election and appointment to federal courts is closer to promotion than to initial recruitment. Vacant positions, however, will not be publicly advertised, applications are quite uncommon; instead prospective candidates have to rely on being presented by a member of the electoral committee. The electoral committee decides on the basis of written evaluations, cf. 3.3, below. Decisions are subject to judicial review, cf. 3.6, below. The electoral process is subject to some critical discussion because it is not considered sufficiently transparent.

⁶⁰ cf. note 4 supra

⁶¹ Anforderungsprofil für Richter und Staatsanwälte, published as internal regulations by the respective Ministry of Justice

I. Professional competence

Professional qualification

- Wide knowledge of the law
- Ability to apply the law in practice
- Ability to acquaint oneself with new legal fields
- Good judgement
- Ability to apply information technology

Understanding of judicial office

- Impartiality
- Prepared to actively uphold the values of the constitution
- Prepared to defend against undue influence
- Prepared to take responsibility for judicial decisions
- Awareness of the influence of private conduct on judicial office

Ability to present arguments and to convince

- Precise phrasing
- Ability to define issues in complex cases
- Giving reasons thoroughly, with respect to the individual case
- Openness

Ability to conduct hearings and interrogations

- Being thoroughly prepared
- Knowledge of the court files and documents
- Planning and structuring of trials
- Respect for the interests of the parties
- Understanding, sensitiveness and patience with parties
- Clear view of chances for settlements

Competence in teaching

- Prepared to instruct students in preparatory service
- Diligent correction of students' papers

II. Personal competence

General elements of personality

- Broad interests
- Natural authority
- Prepared to accept difficult duties
- Awareness of one's strengths and weaknesses
- Control of one's emotions

Sense of duty and responsibility

- Awareness of social responsibility
- Prepared to accept responsibility for the judicial administration
- Able to assess consequences of decisions
- Responsible handling of a large workload
- Openness towards lay judges and court staff

Ability to cope with the workload

- Physical and psychological fitness
- Prepared to accept additional duties
- Able to work fast under pressure and with concentration
- Maintaining standards even with a larger work load

Ability to manage and to organise work

- Set priorities
- Optimise work flow
- Able to motivate oneself and others

Delegate work reasonably
Take available resources into account

Ability to decide

Decide swiftly and responsibly
Prepared to face necessary disputes

Flexibility and preparedness for innovations

Openness towards new technologies
Openness towards modernisation of courts
Prepared to work in different court structures
Ability to develop new solutions

III. Social competence

Ability to work in a team

Ability to communicate

Ability to deal with conflicts and to mediate

Prepared for compromises
Fairness, positive approach in dealing with colleagues
Constructive criticism
Ability to mediate

Being accepted as an authority

Awareness of service aspects

Respect for interests and concerns of parties and witnesses
Politeness
Keeping to schedules
Taking the necessary amount of time

IV. Competence to lead

Clear instructions
Trust in staff and colleagues
Openness for concerns of staff

It is the aim of recruitment and selection proceedings described above to evaluate applicants with respect to elements like these and to reach a prognosis as precise as possible as to the performance of candidates in their future office. There are, however, at present no reliable data as to the weight, which the Länder are giving to all or any of these elements. But it is fair to say that the group of elements listed under “professional competence” is widely accounted for by referring to the results of the second and final state exams, sometimes including the result of the first exam and other professional qualifications. In fact, many of the Länder have set a mandatory limit for invitations to interviews or for other selection proceedings.

The reliability of the other criteria is subject to rather intensive discussion.⁶² Regardless of the list employed and the different selection procedures in the Länder persons in charge of selection tend to maintain that their respective systems provide satisfactory results and that the number of (junior) judges who leave (or will have to leave) office before they are appointed for life is significantly low. This is hardly surprising when the group of applicants from which successful candidates are selected is itself recruited from the top 15 % of those holding the professional qualification required by law, and there may be room for argument that, if those selected were rejected and another group out of the top 15 % were to be selected, the results might be equally satisfactory.

It is also an open question in what way the “profiles” and the elements listed in them may be subject to judicial review. In theory, as has been mentioned above, the decision on selection and recruitment can be challenged in court, and it could be envisaged that such a challenge

⁶² cf. e.g. notes 21 and 22, supra

might be based on grounds like, for instance, that a proper ranking order of these elements does not exist, that decisions are still arbitrary, that a competitor does not fulfil as many requirements as the applicant does et cetera. In practice, there are no known cases of court decisions on this subject - which is again understandable in view of the situation on the job market. An applicant who is rejected in one of the Länder may try to be appointed in another one, or he or she may decide no longer to seek judicial appointment but rather go into another branch of public service or into private practice. Because of the fact that applicants belong to the small group of highly qualified young lawyers, they will have no trouble finding a decent job and therefore have little incentive to challenge the decision on selection in court.