

Monitoring of Implementation of the Civil and Commercial Procedural Codes

Final Report

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TABLE OF CONTENTS

Abbreviations	4
Summary	5
I. Introduction	5
II. Work Performed	6
III. Data.....	10
IV. Monitoring	28
V. Plan-Do-Check-Act Cycle.....	30
VI. Observations	31
A. Human Resources	31
B. Legislation.....	33
C. Soft Law and Judicial Culture.....	34
D. Organisation.....	36
E. Working Conditions and Facilities	36
F. The Bar	37
VII. Recommendations	39
VIII. Conclusions and Key Recommendations	47



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ABBREVIATIONS

ADR	Alternative Dispute Resolution
CPC	Civil Procedural Code of Ukraine
MoJ	Ministry of Justice of Ukraine
PCM	Procedural Codes Monitoring
PDCA	Plan-Do-Check-Act



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SUMMARY

This report is aimed at presenting a methodology for monitoring the implementation of the new Ukrainian Civil and Commercial Procedural Codes. Monitoring was conducted by way of a specifically developed questionnaire with closed answers (Questionnaire A; multiple choice) and an instrument for conducting in-depth interviews (Questionnaire B; open-ended questions). The methodology is not only meant for monitoring the implementation of procedural codes, but also for similar monitoring exercises in the future. The proposed methodology allows the identification of problematic areas in procedure and court organization (i.e. where the new legislation is not implemented correctly or where it has negative consequence as regards efficiency and quality), collection and statistical elaboration of data on codes implementation, as well as the identification of measures to improve court practice and organization and, consequently, enhance trust in the judicial system. Monitoring of the procedural codes should be effectuated on a regular basis, ideally by an organisational unit of the MoJ and by using the tools described in this report. Assessment of the results of monitoring, as well as developing proposals to counter identified shortcomings, could be the main task of the mentioned unit and should be exercised in close cooperation with other stakeholders (Parliament of Ukraine, the Supreme Court, the High Council of Justice, Office of the President of Ukraine and its advisory bodies, law-enforcement authorities, professional and civil society organisations etc).

For the purposes of the present report, the above monitoring tools were complemented by court visits, bi-lateral interviews and round-tables that have taken place in different regions of Ukraine. These additional sources of information enabled experts to develop informed observations on specifics of the codes and on the framework of their implementation. These observations, plus the answers to the questionnaires, have resulted in a set of recommendations of structural and practical nature.



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INTRODUCTION

Authorities in Ukraine attach high importance to the new Civil and Commercial Procedural Codes and their proper implementation, aiming at the improvement of the functioning of the judiciary in civil and commercial cases and increasing trust in the judicial system. Objectives of the procedural law reform in Ukraine are similar to objectives of procedural law reform in other jurisdictions: improving quality of the legislation (including access to justice and effectiveness of proceedings) and increasing efficiency of proceedings (including cost-effectiveness, reasonable costs and reducing the length of court proceedings). Instilling trust in the judicial system may be another aim.

Within the context of the EU Project Pravo-Justice, a Procedural Codes Monitoring (PCM) mission was launched to analyse the implementation of the new Civil and Commercial Procedural Codes (new versions of these codes were adopted in October 2017 and entered into force in December 2017). In view of the objectives of the mission, the experts have developed a methodology for monitoring the implementation of the new codes. The outcomes of the monitoring are presented in this Final Report, which can be used as a starting point for the introduction of necessary practical measures to improve the implementation of the codes and the identification of the actors which should be involved in such measures. The methodology can also be used for future monitoring exercises in order to check whether measures have been effective and whether additional measures are necessary.

The experts have taken note of the outcomes of two other projects:

- The EU Twinning Project 'Strengthening the Institutional Capacity of the Supreme Court in the Field of Human Rights Protection at the National Level' executed by consultants from Germany, Austria, Latvia and the Netherlands.
- A bilateral project between Ukraine and the Netherlands aimed at developing guidelines for court practice (see below).

Findings and ideas from these projects have been incorporated in the present report. Additionally, the experts have collected some statistics (see Annex 6).



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WORK PERFORMED AND FUTURE ACTIVITIES

Two questionnaires were developed.

Questionnaire A

Questionnaire A aims at measuring opinions of the various legal practitioners that work with the new procedural codes, especially judges and practicing lawyers, and at obtaining a picture of court practice through these opinions. Questionnaire A was developed based on the observation by the experts of court proceedings at various courts in several parts of Ukraine (see Appendix 5 for a list of courts visited) and discussions with stakeholders such as judges, lawyers and policy makers, individually and at round-tables and conferences (see Appendix 4 for a list of round tables and conferences). During these observations and discussions, the experts aimed at the initial identification of those aspects of the procedural codes implementation that need specific attention, taking into consideration the issues that were brought to their attention by the various stakeholders, as well as a thorough examination of the codes. The resulting Questionnaire A contains five main chapters devoted to the key topics that were identified, plus an introductory part. The answers to the questionnaires have been combined and transferred to an excel-sheet, allowing the experts to extract information based on different criteria.

The introductory part of Questionnaire A contains questions about respondents: their sex, professional capacity (judge, advocate, corporate lawyer or other), the level in the court hierarchy at which they practice (first instance, appellate or cassation), their age, and the period during which they have practiced. These introductory questions allow the experts to group their findings based on the specific features of the respondents. It may, for example, be possible that more experienced lawyers have a different opinion on the implementation of the new codes than less experienced lawyers, whereas differences may, for example, also exist between the opinions of first-instance judges when compared to cassation court judges.

The 5 main chapters that follow the introductory part are devoted to key topics relevant for the implementation of the procedural codes. These topics are:

1. Quality of the codes
2. The role of the parties and their lawyers
3. The role of the court
4. Procedure
5. Settlement and alternative dispute resolution (ADR)

Chapter 1: Quality covers those aspects of procedure that are central to civil justice reform in Ukraine and internationally:

- access to justice;
- proportionality between the complexity of the case and the applicable procedural rules;
- efficiency (avoidance of wasting energy and efforts);
- cost-effectiveness;
- fairness of the decision-making process and the final judgment.

Quality also covers:

- the capability of judges and lawyers to use and apply the rules in the right manner;
- additional training;
- stability in the procedural framework without the need for frequent amendments;
- balancing written and oral elements in the hearing of a case;



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- the role and usefulness of the case law of the Supreme Court;
- the results of the use of this case law by stakeholders;
- differentiation in how different types of cases are handled procedurally by the relevant courts (procedural tracks).

Chapter 2: The role of the parties and their lawyers covers the manner in which parties and lawyers are expected to act in a lawsuit in order to limit litigation or to allow the court to reach a fair decision in the case at hand in an efficient manner. Within an international context, more and more emphasis is being laid on a cooperative role of the parties and their lawyers, stressing their mutual responsibilities, moving away from the adversarial model of litigation that was present in many Western European jurisdictions until well into the twentieth century. Cooperation of parties and their lawyers means that the actors in the civil lawsuit take the responsibility for allowing and facilitating the court to reach a fair decision without obstructing the procedure and the decision-making process. In that sense, cooperation is part of quality enhancement. It does not mean that the procedure becomes inquisitorial, but it means that the right balance is sought between the individual interests of the parties and the societal repercussions of taking part in a dispute resolution mechanism created and financed by the state. Obviously, the required attitude of the parties and their lawyers should be promoted and therefore the questionnaire also addresses sanctions in case of procedural misbehaviour and the effectiveness of such sanctions. Furthermore, the effects of mandatory representation by a lawyer (which, however, might be abolished in the near future), the legal aid system, the preparation of the case in the initial phases of the lawsuit, the need for rules on the behaviour of the parties and their lawyers before going to court (pre-action stage), and rules on the joinder of interested third parties are being addressed.

Chapter 3: The role of the court focuses primarily on the role of the judge in the lawsuit (so not on matters related to court organization, even though this issue was partially discussed during the in-depth interviews based on Questionnaire B; the issue will be addressed later in this report). Theoretically a distinction can be made between an adversarial and an inquisitorial role (the latter role is also dealt with under the heading of 'judicial case management' in international legal literature). In practice most systems of litigation display a mix of both roles. Adversarial elements are needed in order to make sure that the courts are not used for political purposes, aiming at the implementation of political policies through court decisions, something that is part of the Socialist heritage and that should not be allowed in liberal societies (it seems that this is one of the reasons why the current Ukrainian procedural codes put an emphasis on adversarial elements in litigation). Adversarial elements are also needed to empower the parties to assist in finding a solution to their private law disputes themselves (empowering parties to solve their problems as much as possible themselves within the limits of the law is also an important aspect of societies that favour a relatively limited role of the state). Finally, adversarial elements guarantee that the parties decide about the content of the case that is brought before the court; the judge has to decide this case and no other. Inquisitorial elements (or maybe better case-management tools) are needed where the judge has to take the lead in guiding the dispute through the procedural machinery of the court, first in order to protect litigants in other cases who are prevented from access to court if the limited means available for the administration of justice are used inefficiently; secondly, in order to protect weaker parties who cannot hire expensive, top-notch lawyers, instilling, where necessary, the right balance between the procedural position of the two opposing sides in the dispute; and thirdly, in order to protect the tax payer who cannot afford a court system that is used inefficiently.

The questions of this chapter thus focus on:

- the system of case allocation in court (also relevant for avoiding corruption);
- independence and impartiality of the judiciary;
- the need for discretionary powers in the implementation of the procedural rules and in the organization



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- of court hearings;
- setting the procedural calendar and discussing this calendar with the parties and their lawyers;
- the extent to which the adversarial nature of the new procedure influences fairness, efficiency and the time needed for deciding cases;
- a different manner of pronouncing judgments (directly after closure of the hearing in simple cases).

Chapter 4: Procedure deals mainly with matters that for reasons of clarity the experts wanted to bring under a separate heading:

- evidence and the disclosure of relevant documents;
- the position of the judge in preventing incorrect application of procedural rules by the parties;
- instruments to prevent delay;
- the role of first-instance proceedings within the context of appeal and cassation;
- the specific role of appeal courts and of the cassation court;
- court fees;
- flexibility in the application of the procedural rules;
- early oral hearings;
- automatic referral of cases by courts that do not have jurisdiction to the competent courts.

Chapter 5: Settlement and alternative dispute resolution (ADR), finally, addresses questions related to early settlement of cases and its frequency, as well as the use of ADR within the context of court proceedings. The chapter is relatively short since the main emphasis of the module is on monitoring court proceedings and not on dispute resolution out of court.

Questionnaire B

Apart from Questionnaire A, the experts have developed Questionnaire B with open-ended questions that can be used during in-depth interviews. In order to allow the necessary flexibility, it is not necessary to discuss all questions in Questionnaire B exhaustively during the interviews, but they may be used as a source of inspiration while the discussion develops. Obviously, those interviewed should be able to put issues on the agenda themselves as well. The topics covered by the open-ended questions are general matters such as how the new rules are perceived, the role of case law, the role of parties and their lawyers (including legal aid), the role of the court, evidence, appeal and cassation, court fees, settlement & ADR, and enforcement.

Activities during visits to different regions of Ukraine

During various round tables and conferences participants were asked to fill out Questionnaire A (for a list of round tables and conferences, see Annex 4). Questionnaire A was also disseminated through the Internet.

On the basis of the Questionnaire B (open-ended questions) the experts conducted interviews during court visits and meetings with lawyers. The experts also made their own observations during court visits and court hearings. Additionally, court registries were visited and registrars and staff were interviewed about their experiences with the new codes. See Annex 3 for a list of courts and law firms that were visited by the experts.



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The experts also participated in meetings with representatives of the Ministry of Justice of Ukraine, the State Judicial Administration, the Supreme Court and the All-Ukrainian Non-governmental organisation “Ukrainian Bar Association”.



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DATA

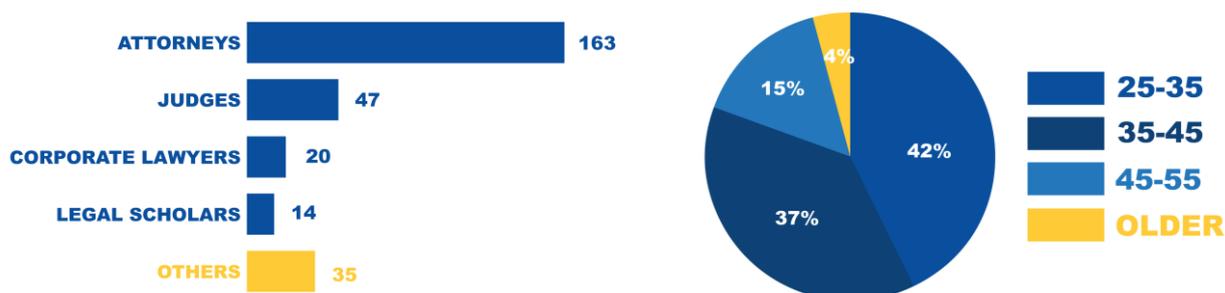
Data collection has taken place from November 2018 until July 2019.

Questionnaire A

Questionnaire A was filled out by 278 participants. For an overview of final results see Annex 5. The experts established that the collective results based on the first 200 questionnaires does not differ much from the collective results of 278 questionnaires, so a respondent group of between 200 and 300 members may be sufficient for future monitoring through Questionnaire A.

The group of 278 respondents can be divided in the following sub-groups:

Attorneys	163
Judges	47
Corporate lawyers	20
Legal scholars	14
Judicial assistants	1
Mediators	1
Court Secretaries	1
Others	31



It is possible to retrieve the data obtained from each individual group of respondents by using the tab 'Quantity' in the excel-sheet (Annex 5).

The results are more or less equal to those mentioned in the interim report. The numbers of the questions correspond to the original Questionnaire A (see Annex 1), which has been amended since (see below).

Chapter 1: Quality

Question 1: Aims

1. The aims of the new procedural codes are enabling better access to court, proportionality, efficiency, low costs and fairness. Do judges have these aims in mind when interpreting the procedural rules?

The number of respondents that answered this question positively without reservation is low (18,98%). The largest number of respondents think it to be 'most likely' that judges have the aims of the procedural codes in mind when interpreting the new rules. Ca. 26% of respondents think that judges do (probably) not have the relevant aims in mind.

Questions 2, 3 and 13: Training

2. Is additional training of judges needed in order to foster a better understanding of the procedural rules?
3. Is additional training of lawyers needed in order to foster a better understanding of the procedural rules?
13. Are the judges sufficiently trained in order to achieve the aims of the rules of procedure that are foreseen by the legislature?

The overwhelming majority of respondents (more than 85%) is of the opinion that additional training is needed or most likely needed (even though ca. 67% of respondents are also of the opinion that judges are (most likely) sufficiently trained to achieve the aims of the procedural rules as foreseen by the legislature). This is not surprising given the fact that many respondents feel that sufficient training was not offered to them. Moreover, it seems that initial drafts were shared with the courts ca. 6 months before the introduction of the new legislation, but practicing lawyers only obtained knowledge of the new legislation at the moment it was being introduced. Obviously, this is not effective and does not allow for preparation to ensure proper application. Those with an overly legalistic attitude to matters often forget that rules themselves do not change reality. It is the behaviour of those who apply the rules that needs to be addressed. In many jurisdictions, important reforms in procedural legislation are often accompanied by training and other mechanisms to bring the reforms to the attention of those who need to implement these reforms in practice (judges and lawyers in our case), a very good example being England & Wales at the time of the important Woolf reforms of 1998.

However, anything of the kind seems to have been absent in Ukraine and this is unfortunate given the extent of the procedural reforms and their complexity. According to those interviewed by the experts, the Ukrainian process of legislation poses problems, also because in the Parliament large numbers of amendments are proposed that do often not support the coherence and clarity of the legislation. One should reconsider the role of an individual member of the Parliament in drafting very technical legislation (in the majority of European jurisdictions, Parliament plays a far less dominant role regarding such matters than in Ukraine; often such work is done by specialized parliamentary commissions; in England & Wales the 1998 Rules of Procedure were drafted by judges and other lawyers, a task that had been delegated to them by Parliament).

Question 4: Amending the rules

4. Will it be helpful to ensure that procedural rules are NOT frequently amended in order to allow judges and lawyers to find ways to improve legal proceedings in practice?

Ca. 88% of respondents provided a positive answer to this question. Obviously, a stable procedural regulatory framework does not mean that improvements and changes cannot be introduced. Changes and improvements are also possible without changing the rules, for example based on the case law of the Supreme Court, or through agreements on the application of the rules within the judiciary, preferably after consultation with the bar (judicial guidelines, practice directions, etc.). In most Western European jurisdictions, it has become clear that the procedural rules can only provide a framework for procedure and cannot regulate all aspects and practical details of it (this was already noted as regards codifications in general more than 200 years ago by no one less than Jean-Étienne Marie Portalis, the father of the French 1804 Code civil). In addition, rules, especially rules which come into being through the legislature, should not try to regulate every aspect of procedure since this prevents flexibility and the capability of judges to cope with the everyday problems in the administration of justice. The rules should set the framework within which the judiciary has to operate, allowing the judiciary itself to do the necessary fine-tuning. An overly legislative approach to matters should be avoided at all means, since it labours under the erroneous believe that the rules themselves can change society, whereas in actual practice change is an intricate interplay between the rules and those who apply them.



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It has been observed by the experts that in Ukraine judges often perceive that they are not trusted by the authorities and the public at large. This results in a situation in which they are often not willing to direct court hearings in an efficient and effective way (using case management powers and skills) since they fear to be criticized. In order to change this, one may consider to give the judges instruments to direct court hearings in a more efficient and effective way and allow courts to provide explanations of the way the procedure is conducted. This calls for additional training of judges in order to further their forensic skills.

Question 5: Orality

5. Orality may increase the efficiency of the handling of cases in court. Is the level of orality sufficient in the procedural rules?

Ca.70% of respondents feel that the level of orality is sufficient in the new procedural model. Ca. 27 % of respondents feel that the level of orality is not sufficient. The latter number of ca. 27% may seem surprising given the high level of oral elements in the new procedural codes, but on second thoughts this may be explained by the fact that oral elements are not always used in an effective and efficient manner. An appearance of the parties and their lawyers before the judge should enable the judge to get a proper understanding of the dispute by asking relevant questions and by inviting parties to give their view on the matter that keeps them divided. Orality should, however, not be used where it is not effective and efficient, and where writing – e.g. where it concerns statements of case, requests for interim decisions and documentary evidence - from the point of view of quality and consistency is to be preferred as a superior alternative. While attending court hearings in Ukraine, the experts noted that much court time is being used to go through court files, having judges dictate summaries of the materials for an audio registration in the presence of the parties and their lawyers without any oral interaction between a judge and parties/lawyers taking place. Obviously, such exercises can better be done in writing, for example in the final judgment where the judge has to give reasons for his/her judgment. Another option to avoid these time-consuming activities without added value could be disseminating a list of documents in the file to attorneys and agreeing that these are supposed to have been read out in court (legal fiction) although obviously in that case no audio-recording can be made (but one should ask whether such a recording is really needed; who will consult the recording anyway?).

Also, the oral reading of full judgments should, in the opinion of the experts, be abolished as having no added value. Reading judgments in court is most likely a Soviet inheritance and it is utterly superfluous in times where everyone uses modern means of communication. An electronic message allowing those interested to read the judgment suffices. Such an approach to matters also guarantees publicity, and doing away with the reading of judgments in court allows the court to devote time to matters that really deserve attention.

It should be mentioned that some respondents argue that they prefer hearing the judgment being read straight after the hearing so that they know the outcome of the dispute right away. According to the experts, this apparently means that the written judgment that is read in court is not made available to the parties timely. It is suggested that this situation is changed in the sense that a written text is made available as soon as possible, making the reading of the judgment superfluous in order to get timely notice of it (i.e. replace the reading of the judgment by providing the written text that is available at the moment originally set aside for reading).

Questions 6, 7 and 8: Role of the case law

6. Does the system of case reporting (i.e. publishing case law) influence the behaviour of the parties when making decisions about taking cases to court?

7. Does the system of case reporting influence the parties when making decisions about the manner how to litigate cases?

8. Does the system of case reporting influence the judges?



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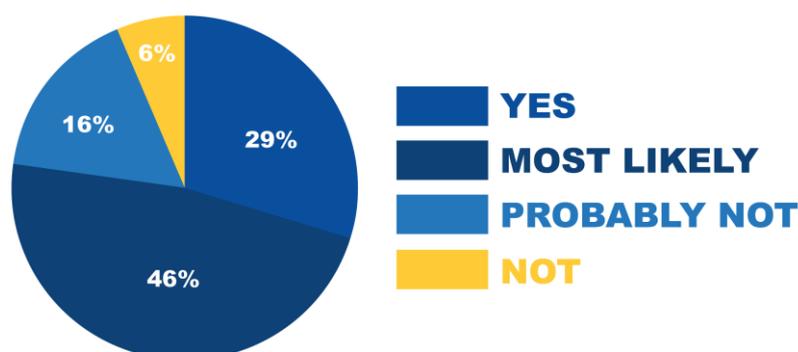


Ca. 90% of respondents answer the above questions positively. This means that Ukraine has evolved tremendously since the times when case law did not play any role whatsoever, just like in many Central and Eastern European states. It may indicate that lawyers inform their clients effectively about the relevant case law and that based on this information clients decide whether or not to go to court (although during the interviews it appeared that sometimes doubts exist as to the information the lawyers provide to their clients). It may also indicate that lawyers carefully consult case law in deciding how to litigate cases when brought to court. It furthermore indicates that judges take case law seriously. It should be mentioned here that the system of case reporting is still under development: the experts were shown a new database developed by the Supreme Court allowing interested actors to access it. Such initiatives are, obviously, very important. In present-day society case law must be available to the public at large and free of charge.

Question 9: Case law and uniformity

Does the system of case reporting result in a more uniform application of the law throughout the country?

Ca. 75% of respondents feel that the system of case reporting has a positive effect on the uniform application of the law throughout Ukraine. Again this shows that judges consult case law, that it influences their decisions, and that, in general, case law is taken seriously. This is a tremendous change when compared to previous practices and it shows that the new procedural rules are having a very positive effect according to those who apply and work with the rules. However, still more than 20% of the respondents finds that there is no unifying effect of case law.



Questions 10 and 11: Case law and guidance to judges

10. Are the judges sufficiently aware of the case law of the cassation court?

11. Do the judgments of the cassation court provide sufficient guidance on how the highest court applies and interprets the law?

Ca. 78% of respondents are positive about the guiding effect of the judgments of the Supreme Court, whereas ca. 20% do not have a positive opinion. Ca. 73% of respondents believe that the judges are sufficiently aware of the case law of the Supreme Court. Ca. 18% of respondents believe this is not the case. This is probably due to the fact that one is still experimenting to make the case law of the cassation court available through online platforms. Some of the judges interviewed by the experts indicated that they needed to consult commercial publications in order to become aware of the relevant case law since the information provided by the cassation court itself was hard to navigate. Commercial publications would group relevant judgments together and would provide the necessary tools for a better understanding of the case law, whereas the online platform of the Supreme Court itself apparently only provides the case law without such tools. Some judges informed the experts that they did not have access or were not aware of the online platform of the cassation court, and that they had to pay prescriptions to commercial publications privately. The cassation court might



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consider developing better and systematic access to its case law.

This situation calls for developing a system to make case law available, not only for the judiciary but for the entirety of the legal community. Such a system should be searchable based on relevancy of case law given the large number of cases that can be made available through electronic means.

Question 12: Binding precedents?

12. What is the status of judgments of the cassation court?

Surprisingly, there is no agreement as regards the status of the judgments of the cassation court between respondents. Ca. 35% feel that the judgments are binding and need to be followed by lower judges, whereas ca. 48% regard these judgments as persuasive only. This means that the latter respondents are of the opinion that the situation in Ukraine is similar to that in many other civil law jurisdictions where a system of binding precedent does not exist. The ca. 35% of respondents who feel that the judgments of the cassation court are binding seem to labour under the influence of common law jurisdictions, where indeed case law is binding and where elaborate systems of distinguishing exist when it is felt that in a particular case the relevant ruling of the Supreme Court should not be followed. Since Ukraine is a civil law jurisdiction and since systems of distinguishing are very labour-intensive, the experts would suggest that, like elsewhere in the civil law world, case law should be persuasive only, allowing judges to disagree with the rulings of the cassation court without distinguishing. This approach lays the burden of providing reasons why in a particular dispute case law should be or should not be followed on the cassation court and not on the lower judges (who should nevertheless, for reasons of transparency, explain why they chose not to follow case law that is apparently applicable to the case at hand). The cassation court will have to provide clear reasons when it feels that its case law is relevant for the case submitted to it when quashing the decision of the lower court.

Question 14: Procedural tracks

14. Does the differentiation between specific procedures for specific types of cases (civil, administrative, etc.) function well?

Ca. 48% of respondents believe procedural differentiation works well, whereas ca. 36% is of the opinion that this is not the case. The experts agree with the minority opinion that the new codes are still somewhat static as regards the procedural tracks that are available. Especially the track for 'minor cases' (art. 274 CPC) is not being used frequently even though a large number of cases do in principle qualify for this track. It appears to be relatively easy to have 'minor cases' heard according to the track for regular cases. The problem seems to be that the track for 'minor cases' provides a completely written procedure, whereas judges feel that in many instances hearings are needed. For the experts this does not come as a surprise, since a single hearing in a small and uncomplicated case may allow the judge to get a good grasp of the matter within a relatively short period of time, whereas purely written proceedings as foreseen by the Ukrainian track for minor cases have proven to be less effective. In actual practice, in many jurisdictions the purely written procedure is often prescribed for more complicated, technical matters in which hearings may not be very useful, whereas oral proceedings are often prescribed for uncomplicated matters. Whatever may be true, the experts believe that more flexibility in the rules, allowing judge and parties to decide what is the best procedural framework for the case at hand, may be the best approach to matters. This would mean that the judge and the parties discuss in an early stage of the procedure what is needed from a procedural perspective, that they agree on a procedural calendar, and that that calendar is used as guidance throughout the lawsuit. This approach is advocated in some West European jurisdictions, notably in Sweden.

It should also be mentioned here that many of those interviewed by the experts stated that the distinction



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between civil and administrative cases poses difficulties and results in interim judgments deciding on how to classify these cases.

Chapter 2: The role of parties and their lawyers

Questions 15 and 16: Abuse of the rules

15. Are the sanctions provided by the procedural rules against procedural misbehaviour effective?

16. Are changes needed in the rules against procedural misbehaviour?

Ca. 45% of respondents feel that the sanctions against procedural misbehaviour are (most likely) effective, and ca. 45% believe that this is (probably) not the case. Ca. 10% of respondents do not know whether or not this is the case. It seems, therefore, that a close look into this matter is needed because procedural misbehaviour is an old and persistent problem in litigation. Legal systems should provide sufficient means to stop such practice. Attention is especially needed since ca. 63% of respondents feel that changes in the rules against procedural misbehaviour are needed.

Question 17: Mandatory representation and quality

17. Mandatory representation by a lawyer increases the quality of the court decision.

Ca. 64% of respondents feel this statement is true. Still, ca. 28% believe this statement is not true. This means that there is a need for research into this matter. Lawyers may obviously improve the quality of court decisions as one may expect them to filter out futile cases or cases that do not offer any prospects of success. Moreover, lawyers will know which documents are relevant for the file and will be able to produce them on time. An extremely adversarial attitude may not be very helpful in this respect. Since the new Ukrainian codes advocate as a starting point an adversarial approach, one should pay close attention to the role of lawyers within this model. If the presence of lawyers does not increase the quality of court decisions, additional measures are needed (e.g. by introducing a more cooperative model of litigation). Additional rules on training and education as well as for admission to the bar may prove to be necessary. Citizens must be able to rely on lawyers (and on their ability to give proper counsel) that have passed professional tests and that are able to instil confidence in clients that hire them to safeguard their, often vital interests. It should be noted that currently legislative measures pending before Parliament are aiming at abolishing mandatory legal representation in Ukraine.

Questions 18, 19 and 20: Effects of mandatory representation

18. Mandatory representation influences access to court.

19. Mandatory representation influences the efficiency of court proceedings.

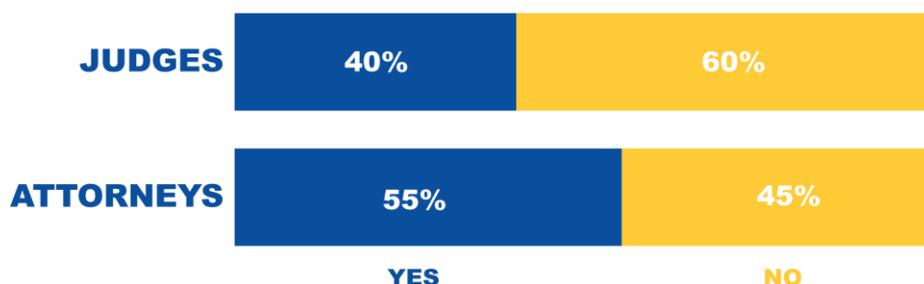
20. Mandatory representation influences fairness.

Ca. 70% of respondents believe that mandatory representation increases access to court. This is surprising, since mandatory representation obviously increases the costs of access to court, unless the legal aid system functions effectively or there are other means for people without the necessary financial means to engage a lawyer. It is suggested that research is conducted into the effects of mandatory representation on access to justice, especially from the perspective of costs and the legal aid system. Ca. 70% of respondents is also of the opinion that mandatory representation influences the efficiency of court proceedings, most likely in a positive manner since the judge can rely on trained lawyers when dealing with the case instead of on the parties themselves who obviously need a lot of judicial guidance when litigating on their own behalf. It would be relevant to know how the general public, the clients of the attorneys, assess the work of their lawyers. A close look at the results learns that there is a conspicuous different opinion between judges and attorneys. For instance, 37% of judges answer question 20 with yes, while 55% of attorneys answer this question positively.



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Given the beneficial aspects of mandatory representation, it is surprising that only ca. 43% of respondents believe that it influences fairness: ca. 47% of respondents believe that this is not the case. When it comes to efficiency (question 19), 80% of judges and attorneys think that mandatory representation is positive.

Questions 21 and 22: Legal aid

21. Is there a relation between the legal aid system and mandatory representation?

22. Does the legal aid system guarantee sufficient access to court to underprivileged parties?

Ca. 51% of respondents believe that there is a relation between the legal aid system and mandatory representation, whereas ca. 20% do not believe that this is the case and ca. 28% does not know. This shows that many respondents do not have a clear view on the relationship between mandatory representation and access to justice. If access to justice is indeed an element of the right to a fair trial as appears from the Golder judgment of the European Court of Human Rights (Golder v. United Kingdom, 21 February 1975), all of the respondents who are lawyers should have responded in the affirmative. In a situation where representation is mandatory, the legal system should provide means for indigent litigants to avail themselves of the help of a lawyer, either by way of a pro bono system, by way of paid legal aid, or by way of instruments like contingency fees (see also ECtHR Airey vs Ireland 9 October 1979). Obviously, ca. 51% of respondents have noted the strong relationship between mandatory legal representation and legal aid, but it is alarming that ca. 20% have the opposite opinion whereas a staggering ca. 28% does not know. Raising awareness about this matter among lawyers is obviously needed. This is also the case because ca. 27% of respondents feel that the legal aid system in Ukraine is not sufficient in that it does not guarantee access to justice for underprivileged parties, and nearly 17% does not know whether this is the case. Once again, what was said above about the need for training, education and admission to the profession shows the relevance of this matter.

Question 23: Access to justice

23. Can access to court for underprivileged parties be guaranteed by other means than legal aid (e.g. self-representation and assistance of the party that does not have a lawyer by the court)?

Ca. 50% of respondents feel that legal aid is the only means to guarantee access to justice to underprivileged parties. Ca. 43% feel that other means can (probably) also be used to guarantee access to justice to underprivileged parties. Again, this shows that a considerable number of respondents are not aware of the possibilities to provide access to justice without financial help of the state.

Questions 24, 25 and 26: Preparation of cases

24. Are cases sufficiently prepared by the parties when they submit the case to the court?

25. Are cases sufficiently prepared by lawyers when they submit the case to the court?

26. Are rules guiding the behaviour of the litigants and their lawyers before they go to court needed?

Only ca. 3% of respondents answer 'yes' without any reservations as regards the sufficient preparation by the parties before going to court. Ca. 50% answer that cases are 'probably' sufficiently prepared by the parties.



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Ca. 40% of respondents feel that this is (probably) not the case. At the same time, the overwhelming majority of respondents feel that lawyers (probably) prepare cases well before going to court (ca. 85%). This is unusual, since it is hard to see how a lawyer can be well-prepared while the client is not prepared, unless the questions were interpreted by the respondents in such a manner that preparation by litigants is only deemed relevant in cases where they are not represented by a lawyer. Due to this uncertainty, the relevant questions will be rephrased and simplified in Questionnaire A for future use in the sense that it will be made clear that they concern situations in which legal representation is mandatory.

The experts also feel that further research into the issue of preparation is needed since an effective and efficient justice system is only feasible when parties and lawyers prepare their cases well before addressing the court. This is a joint responsibility. If problems exist (ca. 71% of respondents feel that problems exist, because they advocate rules guiding the behaviour of judges and lawyers before they go to court), the English pre-action protocols may serve as an example; instruments such as these may be worthwhile for consideration in Ukraine. A positive feature of these protocols is that before cases are brought to court, the parties and their lawyers investigate whether settlement is possible, and if this is not possible the case is prepared well when it is submitted to court. Obviously, also less stringent measures may be contemplated, such as a cards on the table approach in the early stages of procedure including the presentation of evidence (Ukraine knows a cards on the table approach, but it seems that this system is suffering from existing court practise, allowing evidence to be presented late without justification). Below, this matter will be further investigated.

Questions 27 and 28: Third parties

27. How does the system of admitting interested third parties to a pending procedure function?

28. How frequently are interested third parties admitted to a pending procedure?

Ca. 73% of respondents feel that the system of admitting interested third parties to a pending procedure works well. Ca. 63% of respondents are of the opinion that such parties are often admitted to pending procedures, whereas ca. 31% think that this happens sometimes.

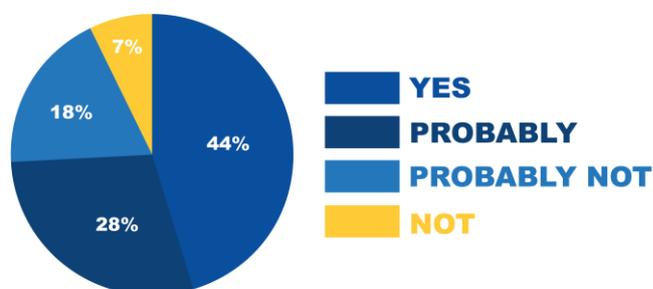
The experts feel that in Ukraine third party interventions (interventions of others than the original parties to the suit) occur frequently. In other countries this is rarely the case. Any intervention by a third party results in complications and more lengthy lawsuits, and therefore this matter should be evaluated critically. If necessary, the reasons and complications that may cause third party interventions must be removed.

Chapter 3: The role of the court

Question 29: Case allocation

29. Is the current system of allocation of cases to particular judges sufficient?

Ca. 75% of respondents feel that the current system of case allocation is (probably) sufficient. Ca. 18% have doubts. According to the experts, the system of case allocation may be improved by allocating in a late stage, just before the first hearing is scheduled in order to prevent parties from contacting the judge. Obviously, judges should never convene privately with one of the parties outside the court room, but in order to make such encounters harder, a system of allocation which does not allow the parties to know who 'their' judge is well in advance, may be beneficial. The experts also wonder how a system with at random allocation



can be combined with the wish to have specialised judges hear cases dealing with the subject-matter in which they specialise.

During court visits and meetings with lawyers, it became clear that the manner of allocation in daily practice allows interventions that go against the professed ideal of at random allocation (which aims at preventing all kinds of improper influence). This makes a system of random allocation problematic. In addition to late allocation (see above), it would be preferable to develop clear criteria for the allocation of cases (workload, illness, absence, other judicial/administrative duties, specialisation, work experience) and make these public. This would allow to develop an informed and sophisticated system of case allocation instead of a system of random allocation with the help of a computer, a system which obviously causes all kinds of problems in practice and which is unknown in many European jurisdictions (Germany being an exception).

Questions 30 and 32: Independence

30. Do the new rules foster independence of judges (undue external influence in decision-making is prevented)?

32. Are additional measures needed to foster independence of judges?

Ca. 57% of respondents are of the opinion that the new Ukrainian rules foster the independence of judges. Ca. 34% do (probably) not think that independence is being fostered by the new rules. This high number of ca. 34% is alarming according to the experts, also because more than ca. 80% of respondents are of the opinion that new measures fostering independence are (probably) needed. In addition, it seems that the trust of the public in the judiciary in Ukraine is rather low in comparison with European standards, so there is still work to do, also in terms of providing the general public with reliable information.

Questions 31 and 33: Impartiality

31. Do the new rules foster impartiality of judges (undue external influence in decision-making is prevented)?

33. Are additional measures needed to foster impartiality of judges?

Ca. 57% of respondents answer the first question positively. Ca. 34% is of the opinion that the new rules do not foster impartiality. The high number of ca. 34% is alarming according to the experts and the topic therefore urgently needs close attention, also because ca. 75% of respondents state that new measures fostering independence are (probably) needed.

Questions 34 and 35: Trust and discretion

34. Should the judge be given more trust to implement the rules loyally?

35. Should the judge have discretion in organising court hearings?

Respondents seem equally divided as regards the trust to be given to judges when implementing the rules of procedure loyally: ca. 45% answer positively to this question, and ca. 51% negatively. Also as regards the second question the picture is divided. Ca. 62% of respondents is in favour of discretion for the judge in organizing court hearings and apparently consider judges capable of discretionary decisions in this respect. Nevertheless, ca. 35% of respondents express doubts or are not in favour of such liberty. This may imply that a considerable part of the respondents does not have enough trust in the professional capacities of the judges. It would be advisable to investigate whether this is true and to what extent, and to uncover the reasons for this possible lack of trust.



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Question 36: Hints

36. Should the court be allowed to give an analysis of the possible manners in which the case may progress in court?

Allowing the judge to give an analysis on how the case may progress in court, especially if done in the early stages of the proceedings such as during an initial hearing, when the parties become aware of all aspects of their case, provides litigants with a tool to measure their chances of success, also while taking into account the additional information received during the hearing. This tool may induce them to reassess their procedural position and to make the choice to settle their cases early in order to avoid the risks, costs and efforts related to court proceedings. Ca. 70% of respondents are in favour of allowing the court to give an analysis and, since the rules of procedure do not prohibit the judge to do so, this might be an interesting case management instrument for the judge. In a conversation with parties and their lawyers also aspects dealing with obligations to produce evidence and the evidential risk (which party bears the risk if no sufficient evidence is brought forward) may lead parties to have a fresh look at threats and opportunities. Obviously, judges need training in this respect, e.g. in order to avoid giving the impression of partiality, and such training can be offered in cooperation with judges from jurisdictions where similar tools are being used. Moreover, this might require a change of procedural culture from the side of the attorneys as well; it even impacts on the relation between attorney and client.

Question 37: Unrepresented parties

37. Are the answers to question 36 the same if a party is NOT represented by a lawyer?

Ca. 67% of respondents answer this question positively. In the opinion of the experts it is, however, not self-evident that the parties themselves, without the assistance of a lawyer, will be able to understand the analysis provided by the judge. If one wants to increase the likelihood of such understanding, it means that the judge should communicate with the parties in a non-technical manner, allowing parties to understand the implications of the information provided by the judge. The judge will have to be aware of the fact that he/she is not communicating with trained lawyers and must be able to express him- or herself in the appropriate manner. The experts feel that appropriate and focused training of judges is needed in this respect, although currently the relevance of this training may be limited due to mandatory representation by lawyers in civil and commercial disputes.

Question 38: Passive judge and fairness

38. The new rules assign to the judge a relatively passive role. Does this result in a fair determination of the case?

The procedural system in Ukraine can be described as follows: a system in which the scope of the procedure is determined by the parties, where the parties have the primary responsibility to put forward what is relevant and to produce the relevant documents (evidence as well as other documents), and in which the judge is expected to ensure efficient and expedient litigation. The answers to the above question have to be evaluated from this perspective.

Ca. 50% of respondents answer this question positively, whereas ca. 44% answer the question negatively. This implies that a large minority of respondents are not convinced that the approach of the Ukrainian legislature which favours the adversarial system is correct, especially where many other European jurisdictions – particularly where it concerns the role of the court as regards efficiency and speediness of proceedings – have turned away from adversarialism, introducing more cooperative models of litigation. As is shown throughout history, adversarialism in its extreme form does not favour efficiency, effectiveness and decisions



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that are based on facts that come near to the truth ('fair decisions'). Adversarial systems often allow the party with the most extensive financial means to win the case since the judge is passive and the lawyers do most of the work. Obviously, in such a situation the party with the best (usually most expensive) lawyers is likely to win the case. It is not without reason that in the US, with its extremely adversarial approach to litigation, the advice is to hire the best possible lawyer (i.e. the most expensive lawyer that one can afford) because then one's chances to win the case often increase significantly. This approach may not always result in fair decisions, i.e. decisions based on the true facts in which the party that is right indeed wins his or her case.

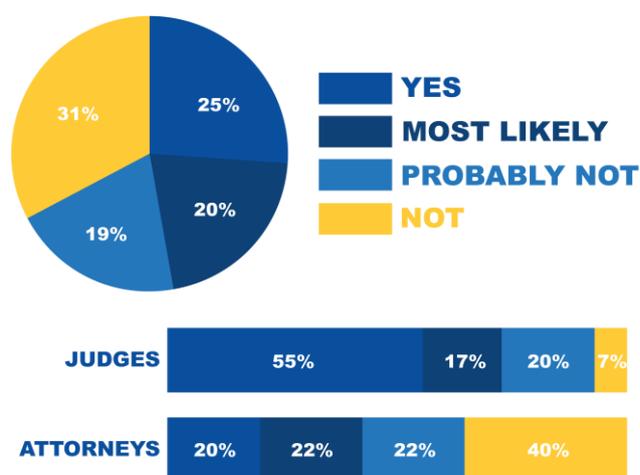
Questions 39 and 40: Passive judge and efficiency/reasonable time

39. The new rules assign to the judge a relatively passive role. Does this result in an efficient determination of the case?

40. The new rules assign to the judge a relatively passive role. Does this impact on the requirement of a hearing within a reasonable time?

Ca. 43% of respondents answer positively to the first question and ca. 50% answer negatively. So, there is no majority in favour of the idea that a passive judge increases efficiency. In the international debate on litigation, it is common wisdom that passive judges do not increase efficiency. Most modern legal systems have therefore introduced so-called case-management tools which allow the judge to guard over the time taken for litigation and, in some jurisdictions, even provide the judge with instruments to assist the parties in the evidentiary stage of proceedings. Judicial case management guarantees that scarce resources are used in a careful manner and that litigation is not dependent on the whims of the parties. This approach guarantees that other cases that are waiting to be heard also get their day in court within a reasonable time. This belongs to the requirements of a fair trial under Article 6 ECHR (Capuano v. Italy, 25 June 1987). Passivity of the judge is considered to create backlogs and sluggish litigation. It would be interesting to investigate whether the

emphasis on passivity is also problematic in Ukraine. Maybe this is not the case since ca. 56% of respondents are of the opinion that the passive role of the judge does not impact on the requirement of a hearing within a reasonable time. If this is indeed true, this is so surprising that the matter definitely deserves further attention.



Question 41: Direct oral judgments

41. Would a system allowing judges to pronounce judgment orally directly at the closure of the hearing, if properly recorded, be advisable in relatively uncomplicated cases?

A minority of respondents is against such an innovation (ca. 45%), whereas a majority of ca. 50% is in favour (73% of judges are in favour and only 41% of attorneys). Research in the Netherlands has shown that the approach suggested in the question increases efficiency and does not influence the quality of judgments since judges will only use this approach in relatively uncomplicated, small cases which do not need lengthy investigation (and after an oral hearing) and where the reasoning can be dictated immediately by the judge and recorded by the clerk. Such an approach also requires determined and skilled judges who aim at handling cases according to their complexity and merits. Moreover, this is only the case as long as indeed this practice is limited to simple and straightforward cases; one should avoid pressure to act likewise in more complicated cases as experience shows that in such situations mistakes are made. It might be advisable to show Ukrainian judges the implications of the Dutch approach in training sessions, allowing them to discuss it in an informed



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manner to allow them to determine whether this approach would suit Ukrainian legal culture.

Chapter 4: Procedure

Questions 42 and 43: Taking evidence

42. What effect do the new obligations of the parties in the taking of evidence have as regards the determination of the case?

43. Is it necessary to further specify the obligations of the court in the taking of evidence?

Ca. 71% of respondents noted a positive effect of the new obligations of the parties in the taking of evidence, the majority of them being judges. This may not be surprising because the new rules shift much of the work in the evidentiary stage from the judge to the parties. This will indeed save time for judges, allowing them to pay attention to other matters and to reduce the backlog of cases. Ca. 63% of respondents also feel that the obligations of the courts in the taking of evidence need to be further specified. This most likely means that courts have different opinions on their role in the evidentiary stage of litigation and that rules are needed for uniformity. Drafting and introducing procedural guidelines, describing what the participants in civil procedure may expect from each other, can provide useful guidance. In this respect the Dutch project, initiated in the courts in Odessa and implemented by judge Esther de Rooij (Amsterdam) deserves support and close attention.

Question 44: Disclosure of evidence

44. Disclosure obliges the parties to produce documents that meet a certain standard of relevance spontaneously, even if not asked for by the opponent party and even if these documents are detrimental for their own case. Does the new obligation of disclosure of evidence have a positive effect?

Disclosure is a tool from Anglo-American jurisdictions and is meant to compensate for the traditionally passive role of the judge in these jurisdictions. It is up till now to a large extent unknown in the civil law world. Where it concerns documentary discovery, it forces the parties to submit all relevant documents (including e-documents) to the court even if these documents are not beneficial for or even detrimental to their case. Ca. 54% of respondents believe that the new obligation has a positive effect, whereas ca. 32% do not believe there is a positive effect. Since discovery is a new tool that does not belong to the Ukrainian civil law tradition, it may be worthwhile to investigate how it works in practice in Ukraine. Often, lawyers who are unfamiliar with discovery, wrongfully think that it only forces the parties to provide relevant documents in an early stage of litigation, stimulating a cards-on-the-table approach. It is often forgotten that discovery also means producing documents that may be detrimental for one's own case and being sanctioned if this does not happen spontaneously. It furthermore means that the opponent party does not have to identify documents it wants to see that are in the possession of the other party and to ask the judge for their production (after all, these documents should have been produced spontaneously by the other party).

Question 45: Is disclosure rightly understood?

45. Disclosure obliges the parties to produce documents that meet a certain standard of relevance spontaneously, even if not asked for by the opponent party and even if these documents are detrimental for their own case. Is disclosure understood rightly by the courts?

Ca. 48% of respondents answer this question positively, and ca. 39% negatively. Opinions are, therefore, divided and this may be a reason to have a further look into the way this new procedural instrument works in practice in Ukraine.

Question 46: Procedural abuse

46 Are the judges in a position to prevent parties and their attorneys to apply the rules in the wrong manner?



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Ca. 78% of respondents answer this question positively. It seems, therefore, that a large majority of respondents are of the opinion that the new codes have given the judge the necessary tools to guard against procedural abuse. This is obviously very positive.

Question 47: Delay

47. Which instruments are used to prevent delay?

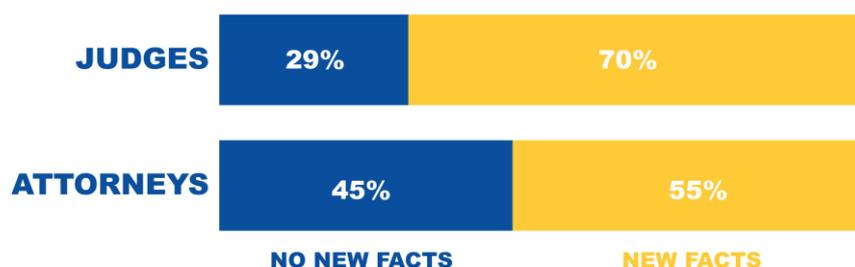
According to 56% of respondents, case calendars and hearings for directions are most often used in order to prevent delay. The respondents show that tools like consultations with the parties are not very often used. In light of the adversarial approach to litigation under the new rules, which do not put an emphasis on cooperation, this outcome is not a surprise since especially consultations belong to a more cooperative model and not to an adversarial model like the Ukrainian. In international literature on civil procedure, consultations are however considered to be positive since they foster a cooperative model of litigation. The fact that Ukraine has introduced a model of litigation with many adversarial elements may hinder the use of consultations. This is not in line with international best practices.

Question 48: Omitted since it was interpreted in different ways by the respondents.

Question 49: Facts on appeal

49. How does the appellate court deal with the facts of the case?

The situation does not seem straightforward since ca. 43% of respondents are of the opinion that only the facts as provided at first instance are taken into consideration, whereas ca. 50% feel that new facts are also be taken into consideration. It is interesting to break down the results: 29% of judges answer that only facts presented at first instance may be taken into consideration, and 70 % of judges believe that courts of appeal accept facts beyond those presented in the first instance. The situation of attorneys is that 45% thinks the first option is correct, while 55% answers that the court appeal considers new facts. Since the new rules are straightforward on this matter, the answers to this question may indicate that not all courts of appeal apply the new rules correctly. This is a matter of concern since the powers of the court of appeal as regards the facts directly impact on the functioning of the justice system and the first instance courts in particular, and even on the procedural attitude of the parties.



One must bear in mind that if the courts of appeal accept new facts this potentially interferes with the clear intentions of the legislator: the approach should be to focus on the assessment of the case at first instance and not to allow litigation on new matters. If courts of appeal easily accept new facts, this will encourage attorneys to litigate strategically, not putting all their cards on the table at first instance. It goes without saying that such an approach leads to frequent appeals and an extended length of proceedings.



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Questions 50 and 51: Access to the cassation court

50. Does limited access to the cassation court influence the capacity of this court to guarantee the uniform application of the law?

51. Would the introduction of access filters at the cassation court reduce the workload of this court, allowing it to concentrate on the uniform application of the law and the development of the law?

Ca. 56% of respondents answer the first question positively and ca. 40% negatively. This division of opinions is surprising, since it is generally recognized that unlimited access to the cassation court will result in an overburdened court that cannot execute its main task in the area of uniformity of practice and development of the law. A good example of such a dysfunctional, overburdened cassation court can be found in Italy (where access to the cassation court is a constitutional right, wrongly so in the opinion of the experts). Consequently, most jurisdictions have introduced access filters to their superior court in order to keep the case load within limits, allowing the judges to investigate relevant cases seriously. It would therefore be important to study why a significant part of the respondents do not believe that limited access to the Supreme Court influences the capacity of the court to guarantee a uniform application of the law. This is especially true in light of the answers to the second question above. This question is answered positively by ca. 75% of respondents and negatively by ca. 20%.

Question 52: Court fees and access to court

52. Do court fees influence access to court?

Ca. 77% of respondents answer this question positively, as could be expected. In order to guarantee access to court, help needs to be provided to parties of limited means. This help should, however, only be provided in real cases, which means that a test as regards the merits of the case needs to be performed before legal aid is being granted or court fees are reduced or suspended. It should be remembered that court fees are also a means to make litigants think about the merits of their case before going to court and incurring expenses. Given the huge case load of the Ukrainian courts, one needs to ask whether the system of helping indigent parties to litigate contains sufficient safeguards against unmeritorious cases arriving at the court.

Question 53: Flexibility in procedure

53. Do the present rules allow sufficient flexibility in allowing the judge to handle cases according to their specific features (i.e. in allowing the judge to choose case-management techniques and mechanisms that do justice to the case at hand)?

Ca. 48% of respondents answer this question positively and ca. 40% negatively. This means that a serious number of respondents feel that flexibility is lacking. A lack of flexibility was also the impression of the experts when consulting the codes and when discussing matters with judges and lawyers. It seems that the rules prescribe a relatively rigid framework for handling cases, leaving the judges little discretion in this respect. The codes provide a rather legalistic approach to matters without taking into consideration that cases may differ considerably, also from a procedural perspective. A one-size-fits-all (or three-sizes-fit-all) is often not the right solution to matters. The fact that ca. 40% of respondents feel that sufficient flexibility is absent justifies further attention. In the end, flexibility in handling cases in court is an important tool for effective, efficient and high-quality litigation (and in the end also for access to justice).

For such an approach basic trust in the skills and abilities of judges is required. As stated above, such trust is low or even absent in Ukraine. It is essential that measures are taken to enhance trust in the judiciary. By creating an environment where judges are willing to use their skills and knowledge in an effective manner and by limiting the possibility to submit complaints against judges who do their work in a faithful manner, one might



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create a common understanding of how civil lawsuits are conducted in court which will be beneficial for all concerned.

Question 54: Early oral hearing

54. Can an oral hearing be scheduled in an early stage under the present rules?

Ca. 53% of respondents answer this question positively and ca. 35% negatively. This is surprising since the codes should be clear in this respect. A closer look into this matter is needed, also since an early oral hearing appears to be a good instrument for increasing efficiency and quality.

Question 55: Referral in case of lack of jurisdiction

55. To what extent will courts that not have jurisdiction automatically refer cases to the competent court?

Ca. 50% of respondents answer that such referrals occur always or mostly and ca. 27% that they occur rarely or never. Automatic referrals are important in light of access to justice, but also in light of efficiency and quality. Courts (and the procedural rules) should avoid or remedy jurisdictional problems as much as possible themselves. Jurisdictional complications should not or very rarely occur in a well-working justice system: they are systemic irritants. In addition, the experts feel that the rules on jurisdiction should not be so strict as to disallow the litigants a choice of court.

Settlement and ADR

Questions 56, 57 and 58: Settlement

56. Should measures be taken to enhance early settlement?

57. To what extent does early settlement occur in practice?

58. In which stage of the proceedings does early settlement occur in practice?

Ca. 88% of respondents answer the first question positively. Settlements are instruments to avoid costs for the parties and alleviate the burden on the state judicial system. Many jurisdictions, therefore, stimulate settlement, especially in the early stages of the lawsuit. The experts learned that there are tools available in the Ukrainian legal system aimed at promoting settlement, but that these tools are not often used. An example of a tool that is rarely used is in-court settlement. The limited use of settlement techniques also appears from the answers to the second question above, where respondents indicate that early settlement does not occur often in practice. If settlement occurs, often it occurs only after the hearing or even in the final stages of the case. It is therefore not a surprise that the respondents feel that measures should be taken to enhance early settlement.

One of the areas in which early settlements prove to be of great value are divorce and family law cases. From a legal perspective these are often relatively simple cases, but at the same time they are factually and emotionally complicated cases. Early settlement (wholly or in part) in these cases is clearly in the interest of the parties and their family. The way settlement is regulated in divorce and family cases in Ukraine may not be the most effective way. Ukrainian judges are allowed to mediate between the parties to reach a settlement. However, this means that if mediation is unsuccessful, the case needs to be transferred to another judge for reasons of impartiality (Art. 205(4) CPC). This may not be very efficient and one could therefore ask whether judges should not use other techniques to reach a settlement, techniques that do not require the transfer of the case to another judge in case of failure. Experience in other jurisdictions shows that the judge can make an attempt to have parties reach a friendly settlement without using mediation techniques disqualifying him from hearing the case in case of no-settlement due to a possible violation of impartiality principles. Judges may for example order a hearing in which they discuss the case with the parties and their lawyers, sketching the



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various possible scenarios and giving the parties some time to discuss matters amongst themselves to see whether on the basis of the information provided by the judge a settlement is possible. Judges may also ask the parties whether they would be willing to make use of out-of-court mediation before a private mediator since a mediated settlement is often better for the future relationship of the parties than a court decision. The introduction of court-annexed mediation could also be considered. In that case, parties could be referred to a court-approved external mediator while the court adjourns the hearing. In case mediation is successful, the court will close the case, if necessary by incorporating the agreement reached in a judgment. If mediation is unsuccessful, the case will be continued before the same judge.

Questions 59 and 60: ADR

59. Are ADR mechanisms often used?

60. Does the use of ADR mechanisms influence access to court?

The final questions in the questionnaire concern the use of ADR (alternative dispute resolution), which can be defined as mechanisms to solve disputes without the help of the state judiciary. According to ca. 77% of respondents, they are not often used in Ukraine, even though ca. 41% of respondents feel that these mechanisms influence access to court (ca. 52% of respondents believe that these mechanisms do not influence access to court). The experts feel that access to court is at stake in relation to ADR if one considers access to court from the perspective of the judicial system as a whole. Large numbers of litigants making use of the state judicial system influences access to court in a negative way since the means to finance the system are by definition limited. It is therefore important that litigants are empowered to solve their disputes as much as possible without the help of the state, and ADR provides a very useful instrument for this.

It should be noted that some of the respondents did not have a clear idea about the definition of ADR. Alternative dispute resolution by its very definition is a means of resolving disputes without the use of the state court system. Examples are:

- Arbitration (litigation before a private judge appointed by the parties);
- Mediation (settlement attempts before a neutral third party who does not decide but who facilitates settlement negotiations);
- Resolution of claims by consumer complaints boards;
- Submission of a case to a neutral third party who issues a binding decision to which the parties have agreed to abide beforehand in a contract (this is called 'binding advice' in the Netherlands).

Questionnaire A has allowed the experts to identify and define many issues in the application of the civil and commercial procedural codes. Part of these issues were problems in the application of the codes. Furthermore, training seems to be problematic: the overwhelming majority of respondents is of the opinion that additional training is needed. Such training should, according to the respondents, take place within a stable procedural framework in the sense that the codes should not be changed too often. Respondents are generally satisfied with the level of orality of the procedure according to the new procedural codes. They are also satisfied with the role of case law, and they feel that the system of case reporting has a positive effect on the uniform application of the law throughout Ukraine. The majority of respondents is positive about the quality of the judgments of the Supreme Court as well, although there is no agreement as regards the status of these judgments in the Ukrainian legal system. Procedural differentiation in the sense of tailoring the procedure to the type of case at hand works well according to the majority of respondents. Respondents are divided as regard the question whether sanctions against procedural misbehaviour are effective. The statement that mandatory representation by a lawyer increases the quality of the court decision is supported by a large number of respondents, whereas there is strong support for the statement that mandatory representation increases access to court. Mandatory representation also means, according to the respondents, that cases are



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prepared well before they go to court. Respondents are divided about whether the new rules foster independence and impartiality of judges. Respondents seem equally divided as regards the trust to be given to judges when implementing the new rules of procedure loyally. They, nevertheless, seem to favour a more active judge, since the majority of respondents think it to be a good idea to allow the court to give an analysis of the case to the parties and in this manner influence the way the case is litigated. The respondents are divided about the question whether a passive role of the judge results in fair decisions, while there is also no clear majority in favour of the idea that a passive judge increases efficiency. A majority of respondents, and then especially the judges, noted a positive effect of the new obligations of the parties in the taking of evidence. The respondents are divided about the question whether documentary discovery has positive effects. They are also divided about the way the appellate courts deal with the facts of the case. This difference of opinion is surprising since the new rules are straightforward on this matter. Respondents are even divided about the effects of unlimited access to the Supreme Court. This division of opinions is surprising as well, since it is generally recognised that unlimited access to the Supreme Court will result in an overburdened court that cannot execute its main tasks in the area of uniformity of practice and development of the law. Finally, according to the majority of respondents, in-court settlement and alternative dispute resolution (ADR) are not often used in Ukraine, even though a large proportion of respondents feel that settlement may lead to fast and positive results of procedures while ADR influences access to court.

Questionnaire B

The in-depth-interviews with stake-holders on the basis of Questionnaire B, conducted to provide the necessary background information, helped to identify additional areas in need of attention. The areas so identified concern, amongst other things, the work conditions at the courts, the remuneration of judges, the staffing and size of the courts, judicial specialization, the fact that judges perform many tasks unrelated to deciding disputes on the merits, judicial discretion, the introduction and implementation of new procedural rules, practice directions, allocation of cases and the service of the summons (notification).



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IV MONITORING

It is essential to know how the users of the new legislation (the procedural codes), in particular those participating in civil and commercial cases, experience the legislation in practice and to what extent the codes are fit for serving the aims and purposes defined by the legislature. The results of PCM executed so far show that even with a relatively low number of participants (278) a rather reliable image of the way the codes are perceived can be obtained. In practice it appeared that Questionnaires A and B are well constructed, but that the number of questions can be reduced without reducing the accuracy of the results. This will allow future monitoring exercises being conducted in a more efficient manner while still allowing a comparison with the results obtained so far.

The amended Questionnaires A and B are attached to this report (Annex 1 and 2). It is suggested by the experts that future monitoring will be conducted according to the methodology and with the aims as expressed in this report and on the basis of the amended questionnaires. It is essential to know how the users of the new legislation (i.e. the codes), in particular those participating in civil and commercial litigation, experience the legislation in practice and to what extent the codes are fit for serving the aims and purposes of the legislator. Respondents should be selected, preferably at random, questionnaires should be distributed, if necessary reminders should be communicated to fill in the questionnaires, responses to the questionnaires should be collected and the data so obtained should be analysed. This should preferably be done on a regular basis and with short intervals, for example on a yearly basis.

The steps to be taken for future monitoring as regards Questionnaire A can be summarised as follows:

- Selection of respondents (judges, attorneys and other relevant respondents), preferably at random;
- Invitation of respondents;
- Distribution of Questionnaire A amongst respondents;
- Monitoring whether Questionnaire A is being answered by respondents;
- Processing data obtained by way of Questionnaire A, e.g. by using an excel sheet for further analysis.

The steps to be taken as regards Questionnaire B can be summarized as follows:

- Selection of respondents (judges, attorneys and other relevant respondents), preferably at random;
- Invitation of respondents;
- Interview by expert interviewers who make a summary of the issues that are brought to their attention (the combination of an experienced judge and an experienced academic as interviewers has yielded promising results);
- Classification of answers under a selection of relevant headings;
- Summary of results in accessible format.

The experts also recommend that additional data are collected on relevant issues like the number of cases pending before the various courts, the time between submission of the case and the final judgment, and the numbers of hearings per case. These data could be used to supplement the information obtained by way of Questionnaires A and B and are most likely available from the relevant state bodies in Ukraine.

Monitoring should be the responsibility of a dedicated unit within, for example, the Ministry of Justice of Ukraine, or alternatively the High Council of Justice or the Supreme Court (or the Legal Reform Commission recently established by the President of Ukraine). Experts should be appointed to execute the tasks related to monitoring under the responsibility of the relevant unit. The dedicated organisation should be supported by a



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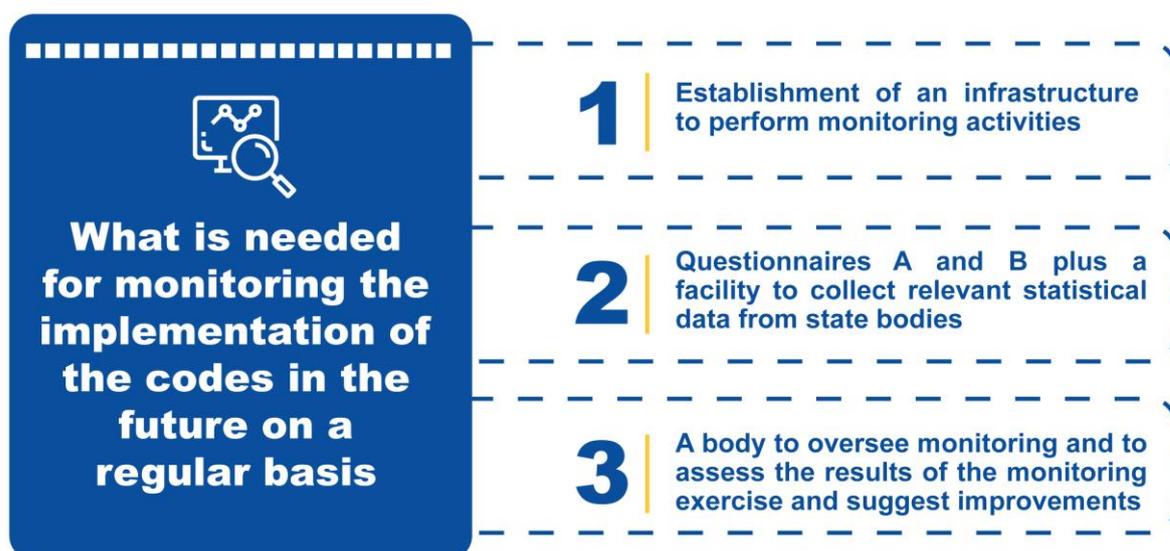


board of supervisors. This board should provide feedback and give advice on the data obtained by way of monitoring and on any new questions and topics that need to be addressed during future monitoring exercises. The board should oversee the interpretation of the findings and formulate recommendations. The board should consist of representatives of the judiciary, lawyers, the Parliament, the Ministry of Justice and the Presidential Administration as well as scholars.

A report should be drafted on the basis of every monitoring cycle. It should present the final results and conclusions, indicating and identifying areas of improvement. Improvement may be introduced by way of legislation, but preferably other types of improvement will be chosen, e.g. practice directions or other instruments that do not presuppose new legislation.

To sum up: what is needed for monitoring the implementation of the codes in the future on a regular basis:

- Establishment of an infrastructure to perform monitoring activities;
- Questionnaires A and B plus a facility/tools to collect relevant statistical data from state bodies;
- A body to oversee monitoring and to assess the results of the monitoring exercise and suggest improvements.



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V PLAN-DO-CHECK-ACT CYCLE

The experts believe that PCM could give rise to a new policy cycle, leading to improvement in the application of the codes. Although PCM should take place on a regular basis, this does not suffice to guarantee a real cycle. What is needed are clear guidelines as regards the manner in which the results of PCM should give rise to changes in practice. Obviously, for this the identification of the person or institution that should take the necessary initiatives is needed. Our proposal would be that a dedicated structural unit is created, which can, for example, be part of the MoJ or the High Council of Justice or the Supreme Court.

The dedicated unit should create a platform where findings and recommendations can be discussed and where proposals for improvement can be made. On the basis of a discussion, agreement should be reached on the steps that need to be taken (PLAN). These steps can be of various natures: changing habits by way of training, introducing guidelines or practice directions, and improving court facilities, working conditions and courthouses. Proposals for legal amendments can also be made where practice has shown that some provisions do not work well, are superfluous or require additional legislation. Results should be disseminated among stakeholders, who will implement the agreed actions (DO). The dedicated unit will supervise the actions undertaken by the stakeholders, ensuring correct implementation (CHECK). Stakeholders convene on a regular basis in order to discuss implementation and encourage relevant stakeholders to fulfil their commitments (ACT). A new cycle of PCM will be initiated on a regular basis, e.g. every year.

It is important that all stakeholders are committed and that the dedicated unit in charge of this exercise reports activities undertaken to all stakeholders.



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VI OBSERVATIONS

Observations have been grouped under the following headings:

- A. Human Resources
- B. Legislation
- C. Soft Law and Judicial Culture
- D. Organisation
- E. Working Conditions and Facilities
- F. The Bar

A. Human Resources

Training for new judges

In Ukraine, those who want to become a judge are being trained for a period of one year. It is questionable whether such a short training period is sufficient, especially for recently graduated candidates. In the Netherlands, it takes ca. 7 years between graduation and appointment as a judge. In France, the training of future magistrates takes almost 4 years after a severe selection process, whereas in England & Wales judges are mainly recruited from among experienced (usually 20 years or more) barristers. A longer training period than currently extant in Ukraine would allow judges to acquire the necessary skills to administer justice, for example where it concerns conducting hearings, attempts to settle cases and presenting a proper analysis of the case to the parties. Improvement of skills will also foster more trust in the judiciary with the public at large.

Continuous Training

In Ukraine, continuous training is provided to judges on a tri-annual basis by the National School of Judges (10-day courses). Such training is without doubt useful, but for PCM purposes the way training is organised should be amended.

Before the introduction of the new codes, it would have been useful to organise focused and targeted training for all judges in order to ensure that they would understand the new approach advocated by these codes (more adversarial, less inquisitorial). Also, the new rules on disclosure would have required proper preparation. Unfortunately, no targeted, introductory courses were offered and consequently the introduction of the codes suffered considerably. Since the codes have already entered into force, it is currently too late for introductory courses. However, there remains an urgent need for training.

Short (e.g. 2 days) and frequent (every 4 months) training sessions would be advisable, allowing judges to focus on issues that prove to be problematic under the new legislation. Short training sessions at relatively short intervals allow judges to become familiar with the new rules and allow them to directly implement in practice what they have learned. Training sessions should preferably be organised at the local and/or regional level and they should also be open for attorneys, allowing interaction between attorneys and judges. Initially this may not be appreciated by Ukrainian judges, but experience in other advanced jurisdictions that have embraced the idea that litigation is the joint responsibility of all actors involved, has proven that interaction between judges and attorneys is beneficial. It creates common expectations and mutual understanding which is very beneficial for the efficient administration of justice. It also creates trust in the justice system.



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Position and remuneration of judges

The (system of) remuneration of judges should reflect the role the judiciary has to play within society. The new codes aim at a thorough preparation of cases at first instance. On appeal, only facts established at first instance should be taken into consideration; new facts cannot be introduced. This means that litigation at first instance is central in the life of a lawsuit. Obviously, such an approach requires experienced and motivated first-instance judges. This can only be achieved if the career prospects and remuneration of judges are in line with their responsibilities. In this respect, the observation in the Twinning Report that a better quality of the first instance courts will lead to a lower number of appeals should be underlined.

It is a matter of serious concern that the present position of a judge is not very attractive at many courts and in various regions of Ukraine: working conditions, the constant threat of disciplinary proceedings, modest remuneration, understaffed courts, high workload and a negative image with the public at large are just a few circumstances that may not be attractive to many professionals.

Staffing and size of courts

The experts noted that the number of judges in the courts was frequently below the required number to execute all the necessary tasks (which is different from the number set on the basis of antiquated or irrelevant criteria). The Twinning report (p. 25) contains some statistics: the number of judges in the first instance courts is about 60% of the number that is needed; on appeal only 50% of the judges required to handle civil cases is present; and in the commercial appellate courts the relevant percentage is 71.

Introducing new codes of procedure when courts are severely understaffed is not a good idea, to put it mildly. Understaffing is especially problematic when courts are relatively small, which is the case with many of the first instance courts in Ukraine. This makes these courts vulnerable in case of vacancies or illness, facilitates improper influencing of judges, does not allow for specialisation and makes organising court work in a systematic way very difficult. Therefore, the merging of courts according to clear criteria would be helpful. The creation of general courts of first instance would be advisable, as is happening in many European jurisdictions, especially the more efficient ones. In the Netherlands such courts serve a population of ca. 1.5 million. The territorial jurisdiction of appellate courts in the Netherlands covers a population of ca. 5 million.

During interviews it appeared that one of the (many) objections against larger courts concerns access to court and the visibility of the court system. This objection may be countered by creating central courthouses in the larger cities with trial centres in the region at a driving distance of, for example, about one hour from the central courthouse. On set days a selection of judges from the central courthouse would travel to the trial centres for hearings, and the local front office of the registry would facilitate their work. The suggested changes are of course major, but if Ukraine aims at a modern and well organised court system, such changes cannot be omitted (examples of jurisdictions where this approach has been chosen are the Netherlands, Sweden and England & Wales).

Disciplinary proceedings.

Judges fear disciplinary proceedings being brought against them. In Ukraine, litigants bring disciplinary complaints frequently – often as part of procedural tactics – also if they only disagree with the conclusions of the judge in their case. The fear for disciplinary proceedings makes judges feel restrained in the way they handle cases. As a result, they are not willing to use their discretionary powers to improve the way cases are litigated. The experts are surprised that in cases like this disciplinary proceedings can be brought at all. They know that disciplinary proceedings are often abused in this way in Socialist systems where the Executive tries to control the Judiciary. This should not happen in democratic, liberal societies.



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It seems that the use of disciplinary complaints is rather widespread in Ukraine. In liberal societies, disciplinary proceedings should only aim at unacceptable behaviour of judges, e.g. where judges accept bribes or treat the litigants in a disrespectful manner. Such disciplinary proceedings are not meant to target the professional decisions of the judge in litigating cases. These decisions should only be subject to appeal and cassation. And where disciplinary proceedings are justified, one could consider measures to prevent abuse as much as possible. In the first place one could prescribe that an attorney, before he submits a disciplinary complaint against any judge, must have consulted the local Dean of the Bar and must state in his complaint that he has done so, mentioning the point of view of the Dean. In this way, the body in charge of overseeing the ethical behaviour of attorneys is informed about developments. Secondly, it would be advisable to have the president of the court handle small complaints and complaints that are clearly inadmissible (a complaint against the reasoning of the judge or against the decision itself) in order to deal with them within a short time-frame. Finally, requiring payment of a court fee for such complaints might be useful to prevent unmeritorious complaints. This fee should only be paid back when the complaint is wholly or partly successful. In this way the fee would serve as a kind of fine for unmeritorious complaints.

B. Legislation

International developments

One of the issues discussed at round tables and during interviews was that the new Ukrainian legislation is sometimes not in line with international developments in the area of civil and commercial procedure. During the last few decades, many European jurisdictions have introduced far-reaching reforms in the area of civil procedure. These reforms have several features in common. They have put an emphasis on the obligations of the parties and their attorneys in preparing their case well before it is brought to court, they have reduced the number of motions that may be submitted in individual cases, they have provided the judge with the necessary case-management powers in conducting the lawsuit and they have aimed at avoiding procedural complications. In Ukrainian legislation traces of these aims can also be found, but the experts feel that this is not always reflected in actual court practice.

Preparation of the implementation of new legislation

As to the introduction and implementation of the new rules, experts firstly find it remarkable that many respondents are not aware of an official document explaining the aims and purposes as well as the underlying principles of the new legislation. Secondly, the number of amendments to the draft legislation proposed by Parliament (apparently some 5.000 in total) is surprising. Such amendments, especially if introduced in great numbers, harm the consistency of the law as well its clarity and structure. Parliament should concentrate on the great outlines of technical legislation and not on details. Details should be left to specialists in drafting new legislation, as is the case in the majority of European jurisdictions. Thirdly, the time between the adoption of the codes by Parliament and their entry into force was very short (too short). This meant that those who have to work with the new legislation could not prepare themselves for the far-reaching changes that were introduced. It appeared to the experts that no or almost no training was offered to prepare for the implementation of the new codes. It is, therefore, no surprise that first experiences were difficult and sometimes confusing. The experts doubt whether the new rules can be applied faithfully in practice. According to some respondents, the new rules are even ignored and judges continue hearing cases in the familiar manner from before the introduction of the new legislation (at several law schools it was also stated that teaching had not been adapted to the new legal reality).

Notification.

There are frequent problems with notification, which is surprising in an age of electronic instant communication. The most fundamental solution to these problems would be transferring the responsibility for



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proper notification in civil and commercial litigation from the court to the parties. The parties should make use of the services of enforcement officers or other specialized officials for locating the opponent party and subsequent notification. The costs for notification should be borne by the parties and not by the court. This may be an incentive for parties involved in litigation to ensure notification in a cost-efficient manner by accepting documents and/or motions from the other party without formalities. Costs of notification are part of litigation costs and should in the end be borne by the losing party. Such costs should not be borne by the courts and this would result in a reduction of expenses incurred by the state.

Another more practical approach to solve notification problems could be the following: notification is done as much as possible through electronic means, if possible through the lawyer of the party that needs to be notified (lawyers should have a valid e-mail address for notification). If a party or his/her lawyer is not notified in the correct manner but nevertheless makes an appearance in court, the right to claim that notification was defective is precluded. It is surprising that nothing of the kind has been considered when drafting the new procedural codes.

Citizens should in the opinion of the experts not be able to avoid notification. They should have an official address for notification, and notification should be valid if the citizen has been served on the correct address. This could be either a physical address or an electronic address.

Experts have the impression that often Ukrainian citizens are over-protected against rightful claims of creditors and that they have many possibilities to avoid being notified. This debtor-friendly approach is harmful for the economy. Debtors in need of protection should be protected by the state or society at large (social security measures), and not to the detriment of individual creditors who rightfully claim payment for services provided.

Related to this is the need to oblige courts to include the default interest rate (either starting from the submission of the claim or the date of the judgment) in judgements ordering the debtor to pay a certain amount of money.

C. Soft law and Judicial Culture

Practice directions

Not everything can be regulated by law. Additional rules and regulations will be necessary. Experience in other European jurisdictions shows that flexible, practical guidelines drafted by those who have to apply the rules (judges and attorneys) are often very successful. It appears that on this topic currently a project is being executed in Odessa, led by judge Esther de Rooij, member of the board of the First Instance Court of Amsterdam. Three courts are participating in this project (Court of Appeal of Odessa and the first instance courts of Malinovsky and Izmaiel regions). Participants have agreed to draft two sets of guidelines/practice directions. One of these concern civil cases, while the other covers criminal litigation. The Ukrainian High Council of Judges has approved of the project and the Supreme Court has agreed to cooperate. It is expected that the project will continue for the next two years on the basis a Matra-funded bilateral project (Ukraine and the Netherlands). The project deserves attention and support.

Guidelines may be the result of meetings of the leadership of the courts with the heads of the local or regional bar associations. At these meetings, the implementation of the rules of the codes can be evaluated and solutions to manifest problems can be agreed upon. These solutions should then become part of the guidelines. Of course, there should be transparency in organising meetings and drafting guidelines in the sense that interested persons have to be informed about the meetings, the agenda and the participants beforehand. In such a way the idea of a judicial network (consisting of representatives of clients, attorneys,



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court registries, courts, enforcement agents etc.) can be realised.

Meetings and guidelines as mentioned above are absent in Ukraine. This is problematic, for example because it results in an inflexible system and practices that may differ from one court to another.

Disregarding the new rules

It seems that in Ukraine the idea that new rules are capable of changing practice and behaviour is firmly believed in. Experience shows, however, that just changing the rules does not lead to a change in practice and behaviour. In order to introduce changes, the new rules need to be accompanied by measures facilitating their implementation.

An example of a change in the rules which has not resulted in a change in practice is the new track for so-called 'minor cases' (Art. 278 and following CPC). It is not often used since litigants prefer hearings, which are absent in this track. The many detailed rules on the minor cases track do not help to change this situation. A more straightforward approach would have been to lay down that cases under a certain value must be heard in summary proceedings unless the court decides otherwise (obviously, no appeal should be allowed against such a procedural decision). In addition to this rule, the legislature should create working circumstances for judges facilitating them to apply this rule strictly.

Another rule that is often ignored lays down that new facts cannot be introduced on appeal. There does not seem to be a consistent approach regarding this matter by the appellate courts. Some judges and lawyers stated that even the Supreme Court is too lenient regarding this matter. This results in a situation that first instance litigation is not taken seriously since the case can be litigated again on appeal. Parties not only have rights, but also (procedural) obligations and commitments; if they fail to comply with these, the court should draw the proper procedural consequences. The credibility of the system requires that the appellate courts maintain the rules strictly. They should make clear in the reasoning of their judgements that according to the applicable legislation new facts cannot be introduced on appeal. It goes without saying that the Supreme Court has an important supervisory role in this respect.

Here attention may also be paid to the order for payment procedure, which in its current form is not very successful. This may be due to the fact that there are incentives for debtors in the current system to file opposition against orders for payment (which opposition then transforms the procedure in an ordinary lawsuit). Such incentives may be delays in the ordinary procedure and enforcement that allow them to postpone paying their debts.

Judicial discretion

The experts have the impression that the new rules are sometimes very detailed, preventing judges from using discretion and dealing with cases according to their specific features. In a well-working justice system, one should give the professional judge sufficient trust to handle cases in the appropriate manner, using his or her expertise. Experts find support in the Twining report (p. 73) and argue that it is the role of the judge to understand the purpose of law in society and to help the law to achieve its purpose, bridging the gap between law and society.

In general, the experts note that in Ukraine much court time is being used for observing formalistic rules. An example is the rule that documents need to be summarized orally in a court hearing. The experts noted that the lawyers attending these hearings were not in a position to add much to the court proceedings apart from listening to the summary of the judge. Such wasteful use of court time should be prevented, if necessary by the fiction that documents have been read aloud in court when they are listed in an inventory signed by the



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parties and the judge.

Early oral hearing

An early oral hearing where the case is discussed between the judge and the parties/attorneys is beneficial for efficiency. Such a hearing could be scheduled after the statement of defence has been submitted. During this hearing the judge and the parties/attorneys could discuss whether the case can be settled and, if not, determine the further procedural steps that need to be taken. The judge could even decide that after this hearing he has obtained enough information to decide the matter. The minutes of the hearing should detail what has been agreed upon. Hearings of this kind will also enhance trust in the judiciary. They are absent in Ukraine even though they would be possible under the current rules.

D. Organisation

Specialisation

The relatively small size of the courts in Ukraine does not allow for much specialisation. This is not in line with current developments in other European jurisdictions, where specialisation is on the rise since it promotes efficiency and quality. This is not only true for family law, but also for other areas such as insolvency law. During interviews it appeared that the absence of specialisation is problematic since civil judges often have to act as investigating judges in criminal cases. It appears that this hinders the daily work of civil judges, forcing them to postpone hearings in order to perform urgent tasks in the area of criminal law. In larger courts, it would not be necessary to hinder civil judges with the tasks of investigating judges and, as a result, their work in the civil section would move forward more smoothly without sudden interventions from other branches of the law. The experts do not feel that creating separate criminal courts would be beneficial since this would increase the costs of maintaining the courts and it would hinder relevant interactions between the judges of the civil and criminal divisions.

Allocation of cases

Allocation of cases through a computer-programme aims at ensuring and enhancing the impartiality of Ukrainian judges. This is however only true in theory, also since the system can be manipulated for various legitimate reasons by the person in charge of the system. It seems that parties are able to use the system in such a way as to ensure that their case is being heard by their preferred judge (e.g. by submitting the same case several times and withdrawing those cases that do not end up before the preferred judge, or by way of recusing the judge that is not preferred by a party). To improve this situation, it may be wise to allocate cases in a late stage of the proceedings, just before the first hearing, and to have the allocation of cases performed under the supervision of a senior judge on the basis of objective criteria, like the experience of the judge, his or her case load and specialisation. Recusal should only be allowed on a limited number of grounds; also, here the introduction of a court fee for each motion to recuse should be considered, only to be returned when the recusal is successful.

E. Working Conditions and Facilities

Working conditions at the courts

Working conditions are often problematic at Ukrainian courts, at the civil courts more often than at the commercial courts. Facilities are insufficient (e.g. the experts were informed of judges having to pay for their own air-conditioning and electricity, buildings being decrepit without enough lightening, and offices being occupied by too many civil servants). Investments in the infrastructure of the courts is very much needed.



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Courthouses

Courthouses need to show the ambition for courts to be institutions of authority that function independently and impartially. Courthouses should be well-located and divided in three sections: (1) proper waiting areas for the public, front offices, information desks and courtrooms; (2) secure areas for detainees and investigating judges; (3) restricted areas with offices for the registry, supporting staff and judges. After a security check, the public and lawyers should only have access to public areas. In this way judges and supporting staff will not be disturbed by members of the public entering their work spaces. At the same time the public is shown that judges are not accessible outside the court room and do only communicate with parties and lawyers in the court room in the presence of the opponent party. Court houses in Ukraine do often not exhibit these features. Here we may refer to the Model Court Project executed within the ambit of Pravo-Justice.

Case law

The availability and accessibility of case law, mostly from the Supreme Court, belongs to the working conditions in court. Currently the Ukrainian Supreme Court plans to improve the availability of its case law. The Twining Report states: 'To get more legal unity and to make judgments more predictable it should help to provide the Supreme Court and the legal practice with a second public database. In this second database the Supreme Court can publish a subset of its judgments; only its guiding judgments or judgments in which the Supreme Court briefly provides the legal practice with an overview of its jurisprudence' (p. 78). Access to case law not only implies the technical possibility to consult court rulings, but also the possibility to identify relevant case law, something which may require editorial activity (as suggested in the Twining Report) or sophisticated software. Moreover, case law and other relevant materials must be available free of charge, directly at the desk of the judge and his judicial assistants.

F. The Bar

Organisation

The professional capacities and skills of attorneys as well as their mutual relationships are a matter of great concern. A well-functioning judiciary should, for example, be able to interact well with its most important partner, the Bar. Regular meetings should take place between the courts and the Bar in which practical issues can be discussed and resolved. This can lead to a more efficient procedure, but also to a better understanding by the various actors in lawsuits and prevent abuse of procedural tools. Moreover, practice directions/guidelines should be drafted with the input of the Bar. However, in the eyes of an important, well-educated group of attorneys (many of those consulted have also studied abroad and possess foreign law degrees), the position of the Ukrainian Bar is problematic. Considering the present situation in Ukraine, where the National Bar Association seems not to have the support and trust of a considerable number of lawyers, measures should be taken to ensure a representative Bar which can be a credible discussion partner for the judiciary.

The Twining Report (p. 79) contains important information on the relationship of the various professional groups involved in the administration of justice:

'Judges, prosecutors and lawyers essentially contribute to justice in different roles. The interests of these professional groups are, naturally, different. Their work should be characterised by mutual professional respect. ... discussions with the various professional groups showed that their mutual relationships are very tense and complicated. While representatives of different legal professions deal with each other more objectively in most European countries, the interaction in Ukraine is marked by great mutual mistrust. This is detrimental to a case-oriented factual completion of the individual proceedings and should be countered by trust-building joint events and other measures.'



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Training

Experts got the impression that training for attorneys is not well-organised by the Bar. Some law firms (usually the better ones) organize training themselves due to the questionable training offered by the Bar. Mandatory and focused training for attorneys, particularly where it concerns representing the interests of their clients in court, is very much needed. This would ensure that attorneys are also aware of the latest developments in legislation and case law.

Fee system

When discussing improvements of civil and commercial procedure, often fees are being mentioned by attorneys. It appears that attorneys have a financial interest in the number of motions and hearings. This can easily lead to proceedings which are not efficient. Measures are needed to take away incentives for inefficient litigation, which are not in the interest of the clients and which create a burden on the courts. Only necessary activities of the attorney should be remunerated. The court should evaluate whether or not activities have been in the interest of the client and clients should be informed about the strategy of the attorney and the related costs.

Respondents often discuss the relationship between court rulings on costs and the remuneration as agreed upon between attorney and client. It should be mentioned here that for example in the Netherlands, cost rulings are only meant to calculate what the loser should pay the winner in compensation for costs incurred, but this calculation does not have to coincide with what the winner and his attorney have agreed upon as regards remuneration. In the Netherlands, the costs awarded by the court to the winner are usually less than the costs actually incurred by the winner. This is done on purpose because full compensation of costs may induce litigants to start litigation too easily. After all, at the start of a case litigants often think that their case is much stronger than it appears to be in court when the opponent has also provided his arguments. The fact that the winner may have to pay part of the costs even if successful may make him more careful when considering the start of litigation.

In the Netherlands, the National Bar Association publishes guidelines for costs to be agreed upon between client and attorney based on the type of case, the instance at which the case is being litigated (first instance, appeal or cassation), and the number of relevant motions and hearings. The court does take these guidelines into consideration when determining the amount of costs to be paid by the loser.



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VII RECOMMENDATIONS

A. Rules and case-law

Legislation

When introducing new rules, time needs to be allowed between establishing the legal text and the moment when it enters into force. This will facilitate proper preparation of those involved in the application of the new rules. Additionally, a document explaining the aims, purposes and innovations of the new legislation needs not only to be made available, but also needs to be brought to the attention of all those involved in its application. Legislation should provide a framework and should not regulate matters in such detail as to limit the discretion of judges too much in the application of the rules in practice. The legislature cannot foresee all possible practical questions that may arise. Such matters can be left to judicial discretion, practice directions and case law.

Comparative law

Bodies responsible for law reform should become aware of procedural developments in other parts of Europe in order to consider whether these developments are relevant for Ukraine, also in light of closer cooperation between Ukraine and the EU. This presupposes a basic knowledge of the major foreign languages within these bodies as well as the presence of the necessary academic skills. A designated body should be responsible for studying foreign developments and experiences.

Practice directions

Next to procedural legislation, protocols, guidelines and practice directions need to be developed to foster uniformity of the application of the law amongst the courts and a proper understanding of the legislation by judges and attorneys.

Availability of case law

In order to facilitate and improve the work of judges and attorneys, case law needs to be made available to all those interested, free of charge and in an accessible and searchable format. Case law needs to be made available in such a manner that relevant cases can be identified in a straightforward manner. This may be accomplished by way of publishing relevant cases only and organizing these relevant cases into specific categories, or by sophisticated software allowing intelligently searching the case law database. Also, the status of case law should be made clear. In civil law jurisdictions, case law has a persuasive character only and does not serve as binding precedent.

B. Policy Making for Justice Sector

Competent bodies

In Ukraine, many bodies are responsible for governance and policy-making with regard to the judiciary. The following bodies can be mentioned as the key players that have been involved in the process more actively thus far:

- The High Council of Justice
- The High Qualification Commission of Judges of Ukraine
- The Council of Judges

- The State Judicial Administration
- Other judiciary governance bodies
- The Supreme Court
- The Ministry of Justice of Ukraine
- The Office of the President of Ukraine (and the Legal Reform Commission)

The focus of the justice sector-related policies, such as the procedural codes, is primarily on “how the rules are applied” in all the sectors – as this should be done, first and foremost, in a clear and foreseeable manner. For this purpose, the justice sector has its own, sector-specific, regulations, such as the procedural codes, the institutional rules relating to the courts’ organisation etc. Because of the existence of European standards on how the justice sector should be organised – the most notable of these being the principle of independence of the judiciary, among others - strictly justice-sector related policy-making is difficult and challenging. In other words, those who are involved in creating the rules to regulate the justice sector are frequently excluded from the process of applying them – by reason of a lack of formal statutory mandate or actual experience and capacities – and vice versa. A fine-tuned policy steering process requires therefor many steps and stages, and a good coordination mechanism.

It should also be borne in mind that a better quality of law and practice in any area of life is in fact the service that the justice sector in general, and the judiciary in particular, provides to the public. Hence, all justice sector bodies, including the judiciary, are involved in “policy making” for other sectors, doing it at different stages in the policy making cycle. For instance, the role of courts in this respect is to: a) extend the legislative provisions by uniform practice of their application; b) monitor and show by way of judicial practice whether or not the legislative purpose (as originally contemplated in Parliament) was achieved. Hence, the judiciary plays an important role in the policy-making for all the other sectors, not only the justice-sector itself.

The Legal Reform Commission (LRC) under the Office of the President approach is a welcome step by the Ukrainian authorities to set out a more top-down consultative approach with regard to any justice sector policy questions. At the same time, the many remaining questions in this evolving coordination mechanism will include: a) operational support to LRC; b) the role of MOJ and its Strategic Planning and Rule of Law Directorates; c) the role of the different judiciary governance bodies; d) budgetary process in the proper justification and formulation of justice sector policies (program and results-based budgeting approaches); e) institutionalisation of monitoring and evaluation (M&E), review of implementation of systemic legislation, such as the procedural codes, as the intrinsic part of the proper policy-making process; f) decentralisation of policy-making to receive constant systemised feedback on the quality of new or monitored policies back to the central level.



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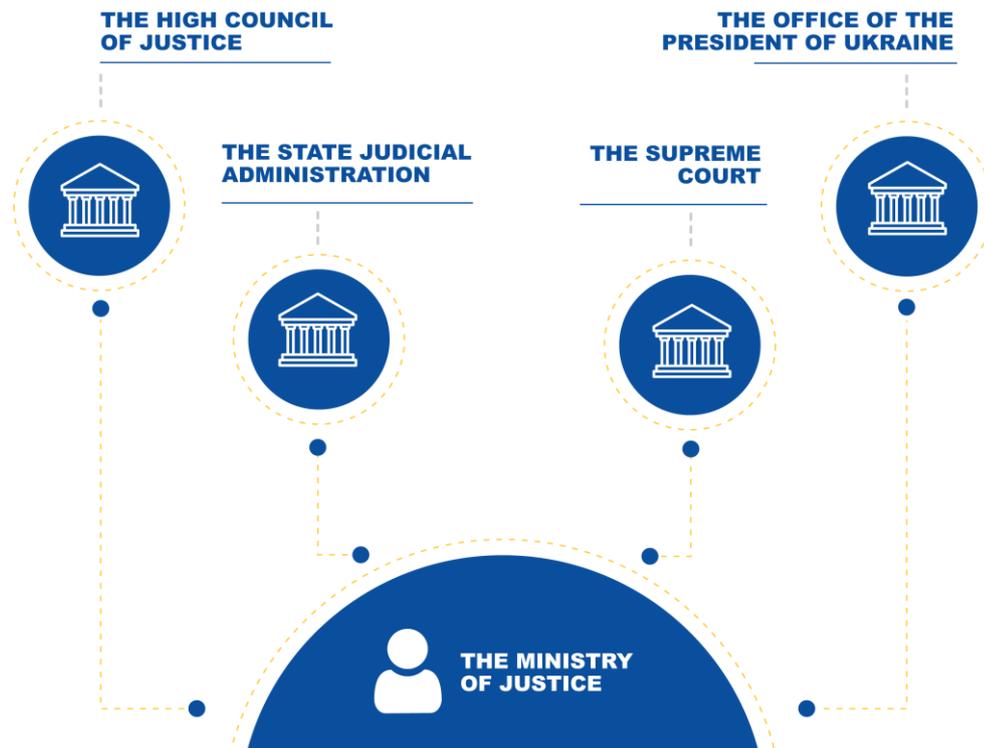
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C. Judges and Attorneys

Career perspectives and remuneration of judges

The new codes aim at first instance litigation being taken seriously (no new facts on appeal). This means that the judges at first instance should also be taken seriously, something which needs to be reflected by their salary and career perspectives. Appointment at a court of appeal should not necessarily be viewed as a promotion. Measures should be taken to reflect the importance of the first instance judges.

Training

Training for those who want to become judges should be extended. A training period of a year is too short to learn all the skills a modern judge should have.

Continuous training of judges who have been appointed should be organised on a regular basis (e.g. every four months) for a limited amount of time (e.g. two or three days). Targeted training activities need to be organised aimed at new developments in the law. Training should include skills training, for example where it concerns the production of evidence and the promotion of settlements. When introducing comprehensive new legislation, training should follow the entry of the legislation into force. Training of judges should preferably take place in combination with training for attorneys. Joint training may foster a better understanding between the professionals involved in the administration of justice and has proven to be very effective in other European jurisdictions. It fosters a more cooperative attitude of those involved in the administration of justice, and attitude aimed at solving the case at hand in a fair manner.

Judicial tasks

Judges should hear and decide cases. Tasks that interfere with this main task should be reduced or abolished.



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Trust in judges

Trust in judges should be fostered by way of transparency. This means first of all that the manner in which courts and judges deal with cases should be communicated by way of instruments like guidelines and practice directions. These should be available on the Internet. Also, a media judge should be present at all courts in order to inform and explain to the media in every day, non-legal language, usually after communication with the responsible judges. Trust in judges may result in a situation where judges will not hesitate to use the case-management powers that have been accorded to them in the codes. Trust may also give rise to a situation where judges can exercise discretion in handling cases in order to allow a tailor-made procedure for individual cases. Trust in judges may also allow judges to give an analysis of the case during hearings, allowing the parties to reassess their procedural position and maybe even resulting in a settlement of the case.

Independence and impartiality

It is necessary to examine why a large number of respondents feel that the new codes foster independence and impartiality, while nevertheless 75% of respondents feel that additional measures to improve independence and impartiality are needed. The next step would be to identify the additional measures that are needed.

Mandatory representation

Mandatory representation by an attorney increases access to justice due to the presence of a professional lawyer, but it may also be harmful for access to justice due to the costs involved. Mandatory representation needs to be accompanied by a solid legal aid system for those who cannot afford a lawyer. The Ukrainian legal aid system seems to be satisfactory at the moment, but it should also be robust in the sense that a future increase in the need for legal aid can be countered. In various jurisdictions, the legal aid system has become too expensive and therefore measures have been taken to allow for legal aid other than a lawyer paid by the state. The current Ukrainian legal proposal aiming at abolishing mandatory legal representation may result in a decrease of the costs of the legal aid system (parties may represent themselves), although it must be realized that the need to be assisted by a lawyer will remain, for example in relatively complicated cases. Measures should be taken to allow for other forms of legal aid than a lawyer paid by the state budget.

D. Court fees

Straightforward system of court fees

Court fees should NOT be refunded when cases are withdrawn.

In case of monetary claims, court fees should be a percentage of the claim. In other cases, the relevant fee should be established based on the type of case (classification) and its importance.

Court fees should be introduced:

- for challenging the impartiality or the independence of the judge (only to be refunded when successful);
- for disciplinary complaints against judges (only to be refunded when successful)

Court fees should, on the basis of transparent and reliable criteria, be suspended or reduced in cases of indigent litigants. In those cases, it needs to be tested whether the litigant has a real case and not one that is evidently unmeritorious.

E. Courts and jurisdiction

Judicial organisation



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A merger of smaller courts is recommended, particularly of smaller first instance courts, while creating local trial centres where hearings may be held in the vicinity (access to justice and visibility). Furthermore, the introduction of specialization of judges and additional specialized divisions in courts (e.g. family divisions) are being recommended. It is also mandatory that understaffing of courts is being tackled as soon as possible.

Territorial jurisdiction

Parties should be able to agree on the territorially competent court. Referral to another court at the same level of the judicial hierarchy should not take place if parties do not object to the court where the case is submitted. Referrals should only take place if a party objects to the territorial competence of the court. Where it concerns subject-matter jurisdiction, automatic referral is the optimal solution.

Civil and administrative cases

The distinction between civil and administrative cases poses problems in practice. Clear criteria should be developed to distinguish civil from administrative cases.

F. Courthouses and courtrooms

Courthouses

Many of the courthouses visited by the experts were inadequate. Investment is needed in order to make courthouses in Ukraine fit for the modern administration of justice. The lay-out of courthouses should be reconsidered, making sure that public areas and areas for offices of judges and staff are strictly separated. Proper waiting areas for the public need to be available. Judges and staff should not be forced to pay for facilities from their own pocket. The fusion of courts (creating larger courts) may result in efficiency savings that may be reinvested in order to create modern and adequate courthouses.

Rearrangement of the lay-out of the courtroom

Parties and attorneys should face the court, not the opponent party. Facing the opponent party leads to confrontation, whereas facing the judge will contribute to a more cooperative and constructive attitude. The lay-out of courtrooms in Ukraine needs to be reconsidered.

G. Case-flow and case allocation

Case-flow analysis

Case-flow analysis in the different Ukrainian courts would be beneficial to organise matters more efficiently. Measures are needed to optimise the way caseload is being handled by the courts and to improve the case-flow in daily practice. The analysis should be done by specialists in organisation and not necessarily by lawyers. Obviously, the input of those involved in organising the case-flow at the courts would be beneficial.

Case allocation

It is recommended to re-evaluate the system of case allocation. In order to prevent improper influence, cases should be allocated to a particular judge or judges relatively late in the procedure on the basis of published, objective criteria by a senior judge.

H. Procedure

Adversarial or cooperative approach

The purely adversarial model of litigation is slowly disappearing from the European judicial landscape. More cooperative models of litigation are being promoted due to their efficiency, reasonable costs and fairness.



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Judges and parties/attorneys should work together in order to arrive at a fair decision of the case (litigation is not a battle). This presupposes a cards-on-the-table approach of the parties and an active attitude of the judge aimed at efficiency and at getting parties, as much as possible, to agree with the manner the case is being litigated. Such an approach would obviously be beneficial for Ukraine. This approach presupposes skills training, preferably joint skills training of judges and attorneys. A change of legislation is most likely not needed.

Pre-action stage (before going to court)

Measures should be introduced to force litigants to prepare their case well before going to court and to exchange their points of view (and if possible attempt a settlement). In England & Wales pre-action protocols have been introduced to achieve this aim. These protocols prescribe the behaviour of the parties before going to court and judges check whether the protocols have been followed when the parties are in court. If the protocols have not been followed, costs sanctions apply. A similar instrument may also be useful for Ukraine in order to make sure that well-prepared cases are submitted to court and that settlement is attempted at an early stage.

Settlement and ADR

Develop a system of court-annexed mediation with external, court-approved mediators. Reconsider the role of the judge in settlement. The judge should not act as a mediator but should only refer to mediation. Obviously, the judge himself may use techniques to effectuate settlements which do not harm his impartiality (so NOT mediation techniques). Tailored training should be offered to judges in this respect. Judges should be given the necessary authority to make parties seriously attempt a settlement, and negative consequence should apply if settlement attempts appear not to be serious.

Generally speaking, awareness needs to be raised as regards ADR. ADR is a tool for the self-empowerment of the parties and it may result in lessening the burden on the state court system. ADR should be stimulated by the state, for example facilitating ADR by way of lower costs than the costs associated by litigation before the state courts.

Notification

Measures should be introduced in order to stop litigants from evading proper notification and to hinder the progress of litigation against them as a result of it. One should consider a different approach as to notification by introducing a system in which parties in civil and commercial litigation are charged with the task to notify parties and possible others involved in the lawsuit. Such notification could be performed by enforcement officers or other specialized officials.

Citizens should have a standard address for proper notification (either physical or electronic) and proper notification should be deemed to have taken place if service occurred at this address (there is no need to actually ensure that the person addressed has actually read the documents served if these documents have been served at the correct address). A pro-debtor approach, allowing the debtor to hide, may be politically interesting for parties that want to obtain votes from debtors, but this approach is harmful for the economy and absolutely unacceptable from the perspective of a well-functioning judiciary. In addition,

Hearings

The number of hearing should be limited. Hearings should only be scheduled when the judge needs to discuss matters with the parties. The judge should set the time available for a hearing in advance and communicate this time to the parties and their lawyers in order to make sure that they are sufficiently brief in their presentation. The reading out of documents should be avoided. Court hearings need to be used in an effective



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and efficient manner. Hearings are not meant to allow the parties to check whether the judge has fully studied and understood their case. That should appear from the reasoning in the judgment.

Early oral hearing

An early oral hearing in the presence of the parties and their attorneys should occur after submission of the statement of defence. This hearing may be used to settle the matter or to obtain a clearer picture of what keeps the parties divided. If the judge considers he has obtained enough information after this hearing, he may decide the case or set a procedural calendar for future steps in the procedure in cooperation and, if possible, with the approval of the parties. Such an approach is allowed under the existent rules and needs to be advocated by way of training. It is a good instrument for preventing delay and enhancing efficiency.

Minor cases

The minor cases track should be reinforced. Clear criteria should be set by law which cases are minor. Subjective criteria to avoid the minor cases track such as the importance of the case for the parties should be abolished since they lead to too much uncertainty. Rules that allow the parties to avoid the minor cases track should also be abolished. Decisions in minor cases should not be subject to appeal and only in a very limited number of cases to cassation (only if an important point of law has to be decided which has not been decided in previous cassation cases). The Supreme Court should develop clear and coherent case law in these matters, which means that it provides ample reasons in a limited number of individual cases, providing criteria that can be used in future cases without burdening the Supreme Court. One may consider introducing a system of preparation, allowing for early identification of cases in which the procedure will not be commenced/opened. Such measures make it possible to refuse unmeritorious minor cases without using precious court time (filtering cases at the door step with the use of legal support staff for initial screening).

Procedural tracks

Procedural tracks for different types of cases should be available, but their application should be left to the discretion of the judge, based on the specific features of the case at hand. The judge preferably decides about the applicable track in cooperation with the parties.

Evidence

Not all judges and attorneys have a clear understanding of the instrument of disclosure that was introduced in Ukrainian law by the new legislation. Since it is a crucial part of the card-on-the-table approach, training is needed in this respect. More generally, the obligations of the court and the parties in the evidentiary stage need to be the subject of training since the situation is different from the previous procedural regime.

Third parties

Reconsider third-party intervention in civil and commercial proceedings. In Ukraine, such interventions occur much more often than in other European jurisdictions. This results in inefficient proceedings. The number of such interventions should be reduced according to objective criteria.

No reading of the judgment in court

Judgments should be made available in writing at the earliest possible moment (the moment now reserved for reading the judgment) and be posted on a dedicated website. The reading of the judgment in court is a waste of precious court time and should be abolished. In some types of cases (for example, minor or other small/simple cases) judgments might be made available directly after the closure of the case. In such cases an oral pronouncement may be useful, but only if this oral pronouncement is directly rendered in a written and enforceable format by the court clerk (judge dictates the judgment). Obviously, training of judges is needed in order to facilitate this approach.



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Costs of litigation

The manner in which costs are calculated should be simplified. The costs established by the court according to the relevant criteria does not need to coincide with the real costs incurred by the parties.

Appeal and cassation

Access filters need to be introduced on appeal and in cassation. These filters should function based on objective criteria for admissibility. Value may be a criterion, but importance for the development of the law or any other objective criterion may also serve this purpose. Access filters at the cassation court should be aimed at cases that are relevant for the development of the law and for legal uniformity. These filters should stop cases from entering the court that are only relevant for the parties. If cases would be able to enter the court without filters, the cassation court would be unable to exercise its important tasks in the area of legal development and uniformity of the law. That the Ukrainian cassation court has difficulties in this respect is shown by the fact that there is a terrible overload and that there is a need for a Grand Chamber to coordinate work. In a well-working cassation court (an example is the cassation court of the Netherlands) the number of cases is sufficiently limited and coordination is not needed at such high level. Less functional cassation courts, like the ones in France and Italy, are in need of a Grand Chamber, but everyone agrees that this is the result of a heavy caseload that should be avoided at the highest level (the UK Supreme Court is another example of a success story in avoiding case overload; this is due to the fact that this court may select its own cases).

Role of the court of appeal

New facts cannot be introduced on appeal unless in very exceptional circumstances stated in the judgment (facts that have only come to light after the first instance court has rendered its decision). This rule should be maintained by the courts of appeal and the Supreme Court.

Abuse of procedure

The rules against procedural abuse should be re-evaluated. Although the sanctions against such behaviour are usually effective, more guidance is needed in practice.

Disciplinary complaints

A summary procedure for dismissing clearly unfounded disciplinary complaints should be introduced. Attorneys should be obliged to consult the Dean of the local Bar before filing disciplinary complaints. In general, the use of disciplinary complaints to target the professional decisions of judges should be addressed and discouraged.



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VIII CONCLUSION AND SELECTION OF KEY RECOMMENDATIONS

The implementation of the new Civil and Commercial Procedural Codes in Ukraine meets various challenges. The present report has tried to map these challenges (Chapter 6) by developing and applying a monitoring instrument aimed at identifying problematic areas (Chapters 3-5). This instrument is reusable, in the sense that it can also be applied in future monitoring exercises aimed at establishing whether measures taken to counter shortcomings have been effective.

As regards such measures, the present report contains many recommendations (Chapter 7). The measures suggested are often NOT aimed at new legislation. It should be remembered that rules as such do not change practice. Changing practice is the result of interpreting and applying existing rules in the right manner, i.e. according to the aims the Legislature had in mind when introducing the rules. In Ukraine, just like anywhere else, these aims include efficiency, effectiveness and high quality in the administration of justice. It is the task of the Supreme Court to show the lower courts the way ahead by providing interpretations in its case law that are uniform, clear and well-reasoned. This presupposes a Supreme Court that has the time and facilities to execute this task and that is not overburdened with cases that are irrelevant for its main task. Filters to reduce the number of cases that reach the Supreme Cassation Court are in the opinion of the experts urgently needed.

We conclude with a selection of some of our main recommendations (as stated, a full list can be found in Chapter 7), divided in structural and practical:

A. Structural

- 1) Experts on organisational matters (not necessarily lawyers) should analyse the work processes in the Ukrainian courts. They should advise on how to optimise and standardize the work processes in court, from the moment a case is filed with the court until judgment and enforcement. This advice should be implemented in all courts, making work processes more uniform and efficient throughout Ukraine.
- 2) Too many bodies are responsible for the Judiciary. There should be a coordinator (a single person or a body of persons) for judicial affairs who oversees and coordinates measures and policies aimed at the courts. This coordinator could be the MoJ or the High Council for the Judiciary, the Supreme Court.
- 3) There are too many small courts in Ukraine. This hampers efficiency, uniformity and specialization. A merger of courts is advisable, creating general courts for civil, commercial, administrative and criminal matters with sections devoted to each of these areas of the law. A court serving a population of at least one million citizens would be advisable. Where needed, trial centres can be created where judges can sit for a limited number of days per month in order to guarantee that the administration of justice is sufficiently near the citizens in sparsely populated areas.
- 4) When legislating on procedure and court organisation, judges and lawyers as well as court users should be involved, e.g. by way of internet consultations. In addition, the legislation should not be introduced without sufficient preparation and training. This presupposes a sufficient period of time between adoption of the legislation and its actual entry into force.
- 5) The allocation of cases to particular judges or panels of judges should be such that it cannot



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be influenced by litigants nor court staff. At the same time, the allocation system should be such that specialization of judges in certain areas is being utilized. The allocation system should be such that the burden of cases is shared equally between the judges.

- 6) Measures should be taken to make sure that the case law of the Supreme Court is readily available to all citizens. The case law should be presented in such a manner that it is searchable and that relevant case law can be identified easily. This also guarantees that the Supreme Court itself can guarantee the uniformity of its case law.
- 7) Clear filters on the basis of objective (monetary) criteria for the admissibility of appeal and cassation should be introduced.
- 8) Courts of appeal should NOT allow new facts on appeal.
- 9) Measures should be taken to reduce the number of third-party interventions in civil and commercial proceedings.
- 10) Parties should be allowed to agree on the territorially competent court; no referral to other court in such cases.
- 11) Further measures should be introduced to guarantee independence and impartiality of judges.
- 12) Make sure that the number of experienced judges in the first instance courts is sufficient; reconsider remuneration and other working conditions.
- 13) Develop the system of court-annexed mediation. Courts should refer to external, qualified mediators. Mediation should not take place in court. Judges should limit themselves to settlement attempts.
- 14) Soft law (practice directions) should be used to guide the participants in the procedure. Judges should be involved in developing this soft law in order to make clear what the court expects from the litigants in areas not specifically regulated by law. Ideally, these practice directions are uniform throughout the country.
- 15) Where possible, European best practices should be studied, made available and used as an example in law reform.

B. Practical

- 1) An early oral hearing is beneficial for efficiency if used for settlement or setting a procedural calendar (discussing what is needed in the case). This requires an exchange of information between judge and parties (cards on the table) and shared responsibilities. A cooperative attitude should be reflected by the lay-out of the court room: parties should not face each other but the judge.
- 2) Precious court time should not be wasted by reading judgments. Judgments should be made available at the earliest possible moment in writing.
- 3) Hearings should be used for exchanging information. The time available for the hearings should be communicated in advance (e.g. 20 mins per party). Hearings where no exchange of information takes place are superfluous and a waste of time and money. Judges ask questions during a hearing; no monologues.
- 4) Court fees should be levied in all cases (including challenges of independence and impartiality and for filing disciplinary complaints) and should only be returned in exceptional situations. The amount of court fees should be such that they make parties consider the seriousness of their claim. When a service is free of charge, it is overused and abused.
- 5) Develop a quick and efficient procedure for dismissing unmeritorious claims.
- 6) Clear-cut criteria should be developed in order to determine whether a case should be classified as minor (minor cases). Subjective criteria like the importance of the case for the litigants should be abolished. Appeal and cassation in minor cases should not be possible.



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Ways to avoid the minor cases track after a case has been classified as minor should not be available.

- 7) Judges should only be involved in real cases (judges should decide cases). Administrative work and clearly unfounded and vexatious claims should as much as possible be handled by legal support staff.
- 8) Lawyer's fees are part of the contract between lawyer and client. The court establishes these costs independently and not in relation to the agreement between lawyer and client. The court follows set criteria. Obviously, when concluding their contract, lawyer and client may take into consideration earlier court practice in similar cases.



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ANNEXES

1. Questionnaire A
2. Questionnaire B
3. List of courts and law firms/attorneys visited
4. List of Round Tables and Conferences
5. Statistical data received from the questionnaire A
6. Statistical data



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