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ESTABLISHMENT OF THE NEW SUPREME COURT: KEY LESSONS

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I. INTRODUCTION

1. In 2016, a comprehensive judicial reform was initiated through amendments to the Constitution of Ukraine and adoption of the new Law of Ukraine “On the Judiciary and Status of Judges”. In particular, a single Supreme Court was established in place of the three higher courts and the former Supreme Court of Ukraine.
2. In November 2017, the formation of the new Supreme Court on a competitive basis was finalized, and in December, the Court began its activities in the area of justice.
3. Establishment of the new Supreme Court should have been the answer to the public demand for the renewal and lustration of the judicial ranks, which has not been met in two years that have passed since the Revolution of Dignity.

The prevalence of corruption among the judiciary and political dependence of judges were the main causes of dissatisfaction with courts and low trust in them.

4. Previous events did not bring the desired results. Thus, the Law of Ukraine “On Restoring Trust in the Judiciary” adopted in 2014 eliminated the leadership of former heads of courts and provided that chairpersons of the courts should be elected by judges of each court. As a result of the implementation of provisions of this law, judges in about 80% of the courts elected the same persons who held those positions earlier. Usually, the chairs of the courts were the main link through which political authorities interfered in the administration of justice.

The purpose of the Law of Ukraine “On Ensuring the Right to a Fair Trial” adopted in 2015 was to revive the disciplinary and appointment bodies – namely, the High Qualification Commission of Judges of Ukraine (hereinafter HQCJ) and the High Council of Justice (hereinafter HCJ). As a result, the majority of these bodies is comprised of judges who ultimately opposed judicial lustration, while the political authorities established effective cooperation with these bodies.

5. Amendments to the Constitution of Ukraine and the new Law of Ukraine “On the Judiciary and Status of Judges” laid a good legal foundation for lustration and renewal of the judicial ranks and strengthening of the independence of judges. At the same time, only the implementation of these laws could confirm the effectiveness of these measures. The first and most significant event was the formation of the new Supreme Court – the idea of the formation of new judicial bodies based on a competition [came](#) from the expert community.

6. The selection of judges to the Supreme Court lasted almost a year and included passing tests for knowledge of the law, drafting a court decision, psychological testing under four methods, and interviewing the candidates on the basis of a developed case file. Representatives of the Civic Council of Integrity (hereinafter CCI) also participated in the interviews. The CCI was formed by civil society organizations, mostly from lawyers (i.e., advocates, scholars, human rights activists), as well as investigative journalists.

7. The President of Ukraine [referred to](#) the competition to the new Supreme Court as open,

unique, and transparent, with a high level of competitiveness that was conducted under very vigilant supervision of the public and a thorough examination of candidates by all anti-corruption bodies.

8. Ambassadors of the G-7 [noted](#) that *“the process of selection of judges to the Supreme Court of Ukraine was much more transparent and competitive than during the previous years, which is a sign of progress in the implementation of judicial reform in Ukraine. This reform is critical for the promotion of the Ukrainian reform program and the fulfillment of the requirements of Ukrainian citizens, based on their clearly expressed aspirations to live in a modern and democratic country. New judges of the Supreme Court, appointed by the President Poroshenko, assume a huge responsibility. Ukrainian citizens and the international community will be vigilant about how these new judges behave during and out of their responsibilities.”* In this regard, the ambassadors called on all newly appointed judges *“to fulfill their obligations regarding transparency, independence, integrity and commitment to the principles of the rule of law. In the end, the reputation and credibility of the new Supreme Court will depend on how it will meet the expectations of Ukrainian citizens”*.

At the same time, the Ambassadors stressed that *“many of the lessons learned during the implementation of this first step can be applied to the appointments that remain to be made at the Supreme Court, as well as in appellate courts and courts of the first instance. The results of the selection process to the Supreme Court indicate the need for a more detailed analysis of procedures for further improvement, as well as continued cooperation with civil society in order to maintain a constructive dialogue with all stakeholders. By doing so, Ukraine will continue to build institutions of integrity that deserve the trust and respect of Ukrainian citizens”*.

9. Centre of Policy and Legal Reform [reported](#) that a number of facts undermine confidence in the integrity of the competition and called for an international audit of the selection process for judges of the new Supreme Court.

10. This analysis seeks to identify and systematize the problems and mistakes made during the formation of the new Supreme Court in order to prevent these problems from recurring in the future, when judges are selected to new courts, as well as during the qualification evaluation process for judges.

11. This analysis was conducted by lawyers Roman Kuibida, Borys Malyshev, Roman Marusenko, and Taras Shepel. Three of them (R. Kuibida, R., Marusenko, T. Shepel) had direct involvement in the competition as members of the CCI. Borys Malyshev conducted an analytical study to gauge the extent to which the judicial selection bodies take into account the findings of the CCI.

II. ESTABLISHMENT OF THE SUPREME COURT

II (a). Legal requirements regarding the formation of a new Supreme Court

12. Under clause 2 of Article 125 of the [Constitution of Ukraine](#) (as amended by Law No. [1401-VIII](#) of June 2, 2016), courts are established, reorganized, and liquidated by a law the

draft of which must be submitted to the Verkhovna Rada (Parliament) of Ukraine by the President of Ukraine after consultations with the HCJ.

But until December 31, 2017, the establishment, reorganization, and liquidation of the courts was done by the President of Ukraine, on the grounds and in the manner prescribed by law (subsection 6 of section 16-1 of Chapter XV of the Constitution of Ukraine, as amended by Law No. [1401-VIII](#) of June 2, 2016).

Under section 4 of the of the Final and Transitional Provisions of the Law of Ukraine “On the Judiciary and Status of Judges” of June 2, 2016, a new Supreme Court had to be **established**, and judges had to be **appointed** to positions on that court based on the results of a competition to be held **within six months** from the date of entry into force of this Law, i.e. by the end of March 2017.

Under Law No [2147-VIII](#) of October 3, 2017, this six-month period was extended to 12 months, i.e. until September 30, 2017 (the relevant changes came into force on November 29, 2017).

13. The law provides that, in order to carry out actions for registration of a newly established court as a legal entity and representation of such a court as a government entity in relations with other persons, the State Judicial Administration of Ukraine is to appoint a temporary acting chief of staff of the newly created court (claus 5 of Article 147 of the Law of Ukraine “On the Judiciary and Status of Judge” of June 2, 2016).

II (b). The process of establishment of the new Supreme Court

14. The President of Ukraine did not issue a decree on the establishment of this court, neither before the expiration of 12 months from the entry into force of the Law of Ukraine “On the Judiciary and Status of Judges”, nor thereafter.

15. On November 9, 2017, the Supreme Court was registered by V. Kapustynsky, who was temporarily acting as the Chief of Staff of the Supreme Court – a position he was [appointed](#) to by the State Judicial Administration of Ukraine the day before. There is no data on the administrative act that was the basis for the creation of a legal entity in the Unified State Register of Legal Entities, Individual Entrepreneurs, and Public Associations.

16. This situation was very different from the establishment of the High Court for Intellectual Property, where the President of Ukraine first issued a [decree](#) on the establishment of this court, after which the HCJ [announced](#) the start of competition for judicial positions on that court.

17. Failure to comply with the time limits for the creation of a new Supreme Court under the Law, along with the absence of a presidential decree on the establishment of this court are, unfortunately, a great challenge for the new Supreme Court, since its weak legal foundation can always give a split, especially in case of change of political elites.

II (c). Formation of the membership of the new Supreme Court

18. On October 28, 2016, the State Judicial Administration of Ukraine [determined](#) that the new Supreme Court should have 120 judges - 30 judges in each of its constituent cassation

courts (civil, criminal, administrative, and economic).

19. On November 7, 2016, the HQCJ [announced](#) the competition for 120 judicial positions on the new Supreme Court.

Competition was completed only on July 27, 2017, when the HQCJ approved [rankings](#) of the candidates and [submitted](#) recommendations for 120 candidates to the HCJ, so that the HCJ could submit to the President recommendations about their appointment as judges of new Supreme Court.

20. In October 2017, the HCJ submitted to the President of Ukraine recommendations for the appointment of 111 persons as judges of the new Supreme Court, and 5 additional recommendations were submitted in November.

21. On November 10, 2017, the President issued a [decree](#) appointing 113 judges of the Supreme Court and they swore an oath (one candidate [allegedly asked](#) not to appoint him until the review of legality of his actions regarding the release of a high-ranking Ministry of Interior officer, who then hid from the investigation and the court and was later convicted of murder of a journalist).

On December 14, 2017, a [decree](#) on appointment of 2 additional judges was issued.

22. Membership of the new Supreme Court was appointed in violation with the time frames established by law (even periods that were extended by subsequent legislative amendments were violated). The appointment of judges beyond these terms also calls into question the legitimacy of this court.

II (d). Appointment of the leadership of the new Supreme Court and formation of its chambers

23. On November 30, 2017, Plenum of the Supreme Court was held, which [elected](#) Valentyna Danyshevska (selected among three candidates) as the Court's chair, and Bohdan Lvov as [Deputy Chair](#) (he was the sole candidate running, i.e. with no alternative).

V. Danyshevska hails from the non-governmental sector. She has worked in the area of justice reforms, has an impeccable reputation, and has at some point been a judge.

At the same time, the Deputy Chair of the Supreme Court, B. Lvov, chaired the Higher Economic Court of Ukraine prior to his appointment to the Supreme Court. His former court ceased operating with the commencement of the new Supreme Court.

V. Danyshevska, unlike B. Lvov, did not run for the position of the Chair of the Supreme Court before the Plenum's session.

24. In early December 2017, judges of the cassation courts within the Supreme Court elected the chairs of those courts. These included:

B. Gulko (Civil Cassation Court), who previously chaired the Higher Specialized Court of Ukraine for Civil and Criminal Cases;

S. Kravchenko (Criminal Cassation Court), who was the Deputy Chair of the Higher

Specialized Court of Ukraine for Civil and Criminal Cases;

M. Smokovych (Administrative Cassation Court), who was the Deputy Chair and acting Chair of the Higher Administrative Court of Ukraine;

B. Lvov (Economic Cassation Court), who chaired the Higher Economic Court of Ukraine.

Thus, all four cassation courts within the new Supreme Court became chaired exclusively by previous chairs of the higher specialized courts that were liquidated with the commencement of the new Supreme Court.

It is interesting to note that, during the competition, all chairs of the cassation courts, except for one (B. Gulko), had received the CCI's [opinion](#) that they do not comply with the criteria of integrity and professional ethics – in particular, due to unlawful interference in case assignment, lifestyle inconsistent with declared income, assistance to judges who issued arbitrary decisions concerning Maidan participants, avoidance of responsibility, or failure to report in the integrity declarations of the fact of issuing a court decision that resulted in Ukraine's loss of a case in the European Court of Human Rights. Nevertheless, these opinions did not become an obstacle for appointing them to judicial positions and administrative positions on the Court.

25. Ambassadors of the G-7 [called](#) on newly appointed judges “*to build public trust by careful examination of the integrity of candidates during the election of the Head of the Supreme Court and the heads of its four chambers*”. However, with the exception of the Chair of the Supreme Court, other senior leadership positions on the new Supreme Court were taken by former leadership of the higher courts, whose integrity caused serious reservations on the part of PCI.

Moreover, according to the results of the [poll](#) conducted by the Centre of Policy and Legal Reform shortly before the new Supreme Court began working, 68 percent of the respondents ranked the impeccable reputation and the absence of a negative opinion of the CCI on a candidate as the first requirement for future chairs heads of the Supreme Court.

26. The appointment of the overwhelming majority of the leadership of the new Supreme Court from among the former leadership of higher specialized courts whose integrity created serious concerns for the CCI may indicate that their “advancement” during the competition occurred with the ultimate end goal that they would lead the cassation courts. This can also adversely affect the level of public confidence in the new Court.

27. Under the Law, each cassation court within the Supreme Court elects five judges to the Grand Chamber of the Supreme Court. The Grand Chamber of the Supreme Court also includes the Chair of the Supreme Court as an *ex officio* member (clause 4 of Article 45 of the Law of Ukraine “On the Judiciary and Status of Judges”).

The cassation courts have elected four judges to the Grand Chamber, so that more judges would remain on the cassation courts, which will have the highest caseloads.

At the same time, some judges of the Supreme Court expressed an opinion during discussions of this issue that such numerical composition of the Grand Chamber does not meet requirements of the law. This threatens the legitimacy of its future decisions, because

there are doubts as to whether such make-up of the Grand Chamber is in compliance with the requirements of Article 6 of the European Convention on Human Rights on “a court established by law”.

28. Thus, the formation of the Grand Chamber in the Supreme Court by the cassation courts in smaller numbers than required by the law may lead to doubts about the legitimacy of its decisions and possible applications to the European Court of Human Rights.

III. METHODOLOGY OF SELECTION OF JUDGES AND ADHERENCE TO IT

III (a). Legal requirements concerning the methodology

29. At the constitutional level, there are three criteria that must be met by a judge: competence, integrity and professional ethics (clause 3 of Article 127, sub-clause 4 of clause paragraph 16¹, Chapter XV of the Constitution of Ukraine). According to the law, judges of the new Supreme Court were elected on a competitive basis in accordance with the qualification evaluation procedure. The HQCJ has the authority to establish the procedure and methodology for qualification evaluation, the indicators of compliance with the qualification evaluation criteria and means of their establishment (clause 2 of Article 81, clause 5 of Article 83 of the Law of Ukraine “On the Judiciary and Status of Judges”). Thus, the HQCJ had a wide discretion in determining the procedures for evaluation of candidates.

30. On November 3, 2016, the HQCJ approved [Regulations](#) on the procedure and methodology of qualification evaluation, indicators of compliance with the qualification evaluation criteria, and means of their establishment (hereinafter Regulations).

III (b). Unproven quality of evaluation methodology

31. The HQCJ did not approve or disclose a judge’s professional profile, i.e. “the portrait of an ideal judge” with a list of qualities to be met by such a judge. This is the basis from which one should proceed to evaluate the candidates.

In addition, some of the measured qualities were simultaneously used to evaluate different criteria. For example, the points for “discipline” were simultaneously taken into account when evaluating both competence and professional ethics, while the points for “integrity and honesty”, “lack of counterproductive actions” were considered when evaluating both competence and integrity.

This indicates the lack of a sufficiently clear and understandable evaluation methodology. The suitability of the existing methodology for the selection of future judges is not confirmed by specialists.

Indeed, there is no information available on the HQCJ website about expert assessment of the [Regulations](#) by the evaluation experts. Official opinions on these Regulations also could not be found on the websites of international organizations and international technical assistance projects. Information about test-based analytical support both for the development of methodology and its implementation is not publicly available.

32. At the same time, the HQCJ's establishment of the evaluation results based on the Regulations during the competition has faced serious concerns.

Thus, President of the International Civic Organization "Universal Examination Network UENet", Sergiy Mudruk, [drew attention](#) to the fact that, in the absence of objective evidence on the validity, reliability and accuracy of the tests conducted, the results of the competition (rankings) cannot be considered reasonable and proven, since all international evaluation standards require the determination of the validity, reliability and error parameters of such tests. Only when they are identified and assessed should the test results be approved.

S.Mudruk emphasized: *"In high-stakes testing, especially of a level of social significance such as the competition to the Supreme Court, the assessment needs to be implemented by specialists external to both the Commission and its contractors. This is recommended by some standards, and is directly required by other standards in the area of competence evaluation"*.

Open sources contain no information about conducting such an expert assessment.

Also, according to the results of his observations, S.Mudruk made assumptions about the significance of the final evaluation margin of error, while some of the candidates competing in the rankings are separated by a point difference in single digits, and sometimes even by fractions of a point.

S. Mudruk also drew attention to the [problem](#) relating to the secrecy around the description of the "gold standard" of personal qualities of an ideal judge (so-called professional profile): *"I reject the notion that it is possible to give points in a public state competition for the degree of compliance with the standard without giving a description of such standard"*. Incidentally, the description of such a professional profile has been [developed](#) with the support of donors, but there is no information on its approval or being taken into account by the HQCJ during competition.

33. Thus, the HQCJ failed to provide evidences for both the quality of the qualification evaluation methodology, and the validity, reliability and accuracy of its results, which undermines the credibility of results of the competition to the new Supreme Court.

III (c). Inconsistency in the use of minimum passing scores

34. According to the Regulations, the HQCJ cannot make a decision confirming a judge's (or candidate's for judicial position) capacity to administer justice in a respective court if he or she receives less than the minimum passing score as a result of the examination and the evaluation of personal and social competence (section 4 of Chapter 6 of the Regulations).

The minimum passing score is the score received as a result of the assessment based on the qualification evaluation criteria, which enables a judge (or a candidate for judicial position) to continue participation in the qualification evaluation.

The minimum passing score must be set for:

- the anonymous written test;
- the practical assignment; and

- the tests for evaluating the personal and social competence (section 4 of Chapter 6 of the Regulations).

35. On February 16, 2017, the HQCJ [conducted](#) the anonymous test for 613 candidates who participated in the competition for positions of the Supreme Court judges, on the basis of which it [determined](#) the minimum passing score, followed by [personification](#) of the test results the next day.

The candidates who received less than the minimum passing score as a result of anonymous written tests were not admitted to the next stage – the performance of a practical assignment.

On February 21, 2017, 520 candidates [performed](#) their practical assignments. After reviewing the work products, the HQCJ [set](#) the minimum passing score for the practical assignment and [personified](#) the results on March 28, 2017.

These actions comply with the algorithm laid down in the Regulations.

36. On March 29, 2017, the HQCJ [set](#) the minimum passing score for the first stage of the qualification evaluation (“Examination”), defined as the sum of the minimum passing scores for the test and the practical assignment. Such a minimum passing score was not provided for by the Regulations and was set by the HQCJ [after the personification of results](#).

The CCI [called upon](#) the HQCJ to provide a public explanation for this deviation from the qualification evaluation rules, since [more than 40 candidates](#) who received a score below the minimum passing score for the practical assignment but scored high on the written tests were not eliminated from the competition but, instead, admitted to the next stage of the evaluation. Three of these candidates were subsequently appointed as judges of the Supreme Court, and one chaired the Administrative Cassation Court within the Supreme Court.

37. Interestingly, [there were](#) serious problems with the evaluation of the candidates’ practical assignments. The analysis of candidates’ assessments as a result of practical assignments demonstrates apparent deviations from the normal results distribution curve for the Administrative Cassation Court. This may indicate uneven approach to the evaluation for different cassation courts within the Supreme Court, as well as the dichotomy in the determination of accuracy-inaccuracy of the candidates’ decisions inconsistent with the evaluation of indicators determined by the [Regulations](#) (ability to systematize information, logically and consistently justify the reasoning, etc.).

38. During the first half of April 2017, candidates who received the minimum passing score as a result of the first stage of qualification evaluation (“Examination”) underwent [testing](#) of their personal moral and psychological qualities and general aptitudes.

At the same time, the HQCJ did not set the minimum passing scores for psychological tests used to evaluate personal and social competence criteria, even though setting of such scores is required by the Regulations.

Following the psychological testing, all candidates continued their participation in the competition, although some of them could have been eliminated had the minimum passing score been set.

39. Thus, the actions of the HQCJ did not fully comply with the methodology had been made public:

- the HQCJ's setting of the total minimum passing score as a result of the Examination stage (consisting of the anonymous test and practical assignment), which was not envisioned by the methodology, enabled several dozen candidates who did not receive the minimum passing score for the practical assignment to continue participating in the competition. In this case, the HQCJ personified the examination results prior to making the final determination of the total minimum passing score for the examination;

- the HQCJ did not set the minimum passing score for psychological tests, and all candidates, even those showing the worst results, were able to continue participating in the competition.

The HQCJ did not offer any official explanation on its website for its reasons for deviation from the methodology.

40. The only legally possible explanation for establishing the final minimum passing score for the examination may be drawn from the provisions of clauses 1 and 10 of Article 85 of the Law of Ukraine "On the Judiciary and Status of Judges", which provide that qualification evaluation includes two stages – 1) examination and 2) review of the case file and interview – and that admission to the second stage is determined based on the results of first stage.

Thus, when defining the total minimum passing score for the examination as the sum of the minimum passing scores for written test and the practical assignment, the HQCJ could rely on an interpretation of the law that there could be only one minimum passing score as a result of the examination. However, in case of such an interpretation, the HQCJ should not have eliminated some of the candidates immediately after the written test, since those candidates could have "compensated for" the shortage of points obtained as a result of the test by getting high scores on the practical assignment.

Moreover, if such interpretation of the law were to be accepted, one can argue that the HQCJ's methodology was not in compliance with the law, and neither were its prior actions when it separately set the minimum passing score for the written test and did not admit the candidates who scored below it to perform the practical assignment.

Thus, the actions of the HQCJ were inconsistent in terms of their compliance both with the law and with the evaluation methodology defined by it.

41. HQCJ's failure to comply with the methodology for determination of the qualification evaluation results that it previously made public certainly influenced the outcomes of the competition to the new Supreme Court. It is likely that deviations from the published methodology were made in order to favor certain candidates.

III (d). Problems with the use of certain psychological tests

42. In order to test the personal moral and psychological qualities and general aptitudes of candidates for the position of Supreme Court judges, the HQCJ [applied](#) four methodologies:

- 1) “General skills test”, which explored the level of the candidates’ logical, abstract and verbal thinking;
- 2) “HCS Integrity Check”, which reviewed a candidate’s integrity, stability of work motivations, etc.;
- 3) “BFQ-2”, which gauged a candidate’s emotional stability, decisiveness, and communication skills;
- 4) “MMPI-2”, which identified a candidate’s stress resistance and psychological risks associated with holding a particular position.

43. . The application of “HCS Integrity Check” methodology (developed by Bulgarian authors) in the context of selection of judges raised the most questions. In Bulgarian, it is called “Тест за лоялност” (“[Loyalty Test](#)”). On the website of the Ukrainian provider of psychological tests, “OS Ukraine” Ltd., the name of this test is given only in Russian as “[Оценка благонадежности](#)” (“Reliability Assessment”). The test is [intended](#) to measure attitude towards compliance with social and corporate standards.

According to the psychometric [passport](#) of “HCS Integrity Check” methodology, its name in Ukrainian is given as “Оцінка інтегративності” (English: “Integrativity Assessment”). This methodology is intended “*to measure (diagnose) the personal propensity to observe the social, moral, and organizational norms and rules. The methodology is an instrument for assessing the honesty, decency, and reliability (loyalty), both in the course of selection of candidates for employment and in further evaluations of employees in firms and organizations of any form of ownership*”.

After the [statement](#) by the Centre of Policy and Legal Reform as to the doubts in application of this test to the selection of judges without any adaptation, “OS Ukraine” Ltd. [explained](#):

“HCS_Integrity Check methodology measures the “integrativity” (integrity) as a set of indicators, in particular: honesty, correctness, fairness, propensity to counterproductive actions, theft, abuse of office, and stability of work motivations. Thus, methodologically, the questionnaire is specially designed to assess all risks associated with “integrity” of representatives of a particular profession in an organizational context”;

“OS Bulgaria” company, which along with “OS Ukraine” is part of the international group Giunti Psychometrics, applied the notion of “loyalty” in order to understand the “integrativity” construct, which is as close as possible to the HR sphere in organizations with a pronounced managerial vertical. It is important to note that even in this context, the “loyalty” means that the employee understands and shares the goals and values of the organization, rather than the manager’s personal interests”;

“in our survey, which was applied in special circumstances, “loyalty” has never been used as a fundamentally separate indicator”;

Following the international standards established by the International Test Commission, “OS Ukraine” Ltd. has carried out all proper procedures for scientific and cultural adaptation of the questionnaire. For this purpose, the respondents were sampled (about 1000 adults), and then the norms were statistically calculated, making it possible to use the questionnaire in Ukraine. Adaptation of the psycho-diagnostic methodologies for each particular profession is a procedure which is not mandatory in accordance with the norms of professional use of such methodologies”.

It is clear from the foregoing that “HCS Integrity Check” methodology is intended for HR purposes in “organizations with a pronounced managerial vertical”, and that it was not adapted for the needs of selection of judges.

44. The operators did not provide information on the standardization of the based on a sample, which would make it possible to state that the test has been adapted to working with judges and judicial candidates.

45. Testing experts have also [noted](#) that “*first of all it is necessary to receive and take into account the statistical test standards for such a special audience. Without this, the test results will be extremely inaccurate and possibly biased*”. Similarly, testing experts have confirmed the conclusion that “*quantitative findings (which are the ones referred to in the competition, as the points) on the basis of psychological tests should not be made without “calibration” or normalization of tests. Statistical norms of a psychological test collected based on a limited sampling of average Ukrainian citizens should not be used to formulate the QUANTITATIVE findings (i.e., points) based on the results of testing a rather specific audience of judges*”.

46. The website of “OS Ukraine” Ltd. lists the following as one of the parameters of substantive scale in the [description](#) of the “HCS Integrity Check” methodology (emphasis added):

“The propensity to conflicts with figures of authority enables us to study the propensity of the test subject to explicit or implicit confrontations with management. The test subject with low results on this factor manifest themselves as rebellious, freedom-loving, often having own opinions about things, hardly inclined to retreat or compromise. They constantly want to dominate in the interpersonal relationships and feel discomfort if they are not in leadership positions. When entering a hierarchically structured environment, they are prone to conflicts and explicit or implicit opposition to formal authorities”.

Consequently, it can be concluded that candidates to the Supreme Court who manifested themselves as “*rebellious, freedom-loving, often having their own opinion about things, hardly inclined to retreat or compromise* ” (all qualities that should, in fact, be required of judges) received low scores on the corresponding factor.

47. Moreover, the structure of the finding on the test results for personal moral and psychological qualities and general aptitudes did contain the indicator of “*loyalty*”, after all, with the optimal level set as “*very high*”. In other words, according to the developer of this structure, the best judge should demonstrate a very high level of loyalty.

In drawing up the conclusion on one of the candidates, a psychologist gave the following comment regarding loyalty: “*Low result on the “loyalty” scale may be due to the emphasized absence of bias in own position when making decisions*”.

Моральні ризики особистості		
Показники	Рівень прояву	Оптимальний рівень
Чесність		Дуже високий
Порядність		Дуже високий
Розуміння і дотримання правил та норм		Дуже високий
Відсутність контрпродуктивних дій		Дуже високий
Дисциплінованість		Дуже високий
Лояльність	Низький	Дуже високий
Загальний		низький
Висновок:		
цінність пр		
Низький показник за шкалою «лояльність» може бути пов'язаний з підкресленою незаангажованістю власної позиції при прийнятті рішень.		

In other words, very high level of loyalty (i.e., the opposite finding) was deemed optimal for the judge. The testing operator, consciously or in error, failed to take into account the basic value of a judge – [independence](#).

Similarly, the use of such test results by the HQCJ in evaluating potential judges with the indication of the desired level of loyalty as *very high* leaves open the issue on the competence of persons responsible for using this testing instrument in general.

Apparently, in case of such an approach to evaluating the candidate's loyalty, the results of psychological testing translated by the HQCJ into numerical scores may be inadequate for real needs of the selection of judges.

48. As noted, “OS Ukraine” Ltd. explained “loyalty” as “*employee’s understanding and sharing the goals and values of the organization*”. However, we could not find out which goals and values were used to measure a candidate’s attitude on the test.

For example, it is not clear how the facts that a person, for example, does not share the informal, but well-established in the judiciary traditions of mutual cover-up, tolerance of “requests” from the court chairs, other colleagues, and representatives of others branches of government, etc. affected the results of testing under “HCS Integrity Check” methodology. In other words, whether those candidates who could have become “agents of changes” and overcome these negative practices (norms) demonstrated low results.

It is also possible that the indicator of the substantive scale of “*propensity to conflicts with figures of authority*” (in other words, “*propensity to confrontations with management*”) could have had an effect on other parameters that were reflected in the psychologist’s opinion, for example, “*the absence of counterproductive actions*”, “*discipline*”, “*cooperative nature*”, etc.

The Centre of Policy and Legal Reform [contacted](#) “OS Ukraine” Ltd. with a request to clarify these and other outstanding issues, but did not receive any response.

49. The assessment of each of the 4 spheres (personal and social competence, professional ethics, and integrity) should have been carried out [on the scale of 0-100 points](#). The

evaluation of each sphere is an integrated set of indicators in terms of the levels of manifestation of several qualities that should have been selected based on the study of constructive validity.

The degree of validity remains unknown because the operator's representatives stated that the package of these 4 methodologies was used for the first time. It is noteworthy that some indicators of the spheres under investigation were accounted twice (for example, in the evaluation of both integrity and social competence).

In accordance with the methodology of qualification evaluation and explanations of the HQCJ representatives, when evaluating the number of points to be given for each of the 4 spheres, both the test results and the results of the interviews were taken into account. Thus, the HQCJ discretion was actually present in relation to the evaluation of those characteristics that should have been evaluated solely by psychology experts. Obviously, such a decision is dubious, because in order to fully understand the methodology and contents of such psychological constructs, members of the HQCJ would need to be specialists in psychological diagnostics.

It is also surprising to see the ratio of the maximum score for the level of knowledge in the field of law set at 90 points, which is below (i.e., less significant in assigning the rankings) than the maximum score for each of the four spheres (personal and social competence, professional ethics, and integrity) that is set at 100 points.

50. The HQCJ did not disclose the candidates' scores for psychological test results. Instead, it published only the [final rankings](#). This does not make it possible to understand why some candidates who were at the top of the rankings prior to this test appeared in the bottom positions, while others moved to the top. Similarly, it is impossible to carry out a correlation analysis and gauge the conformity of the scale of "honesty and decency" of candidates based on the test results compared with the honest completion of their integrity declarations.

Foreign psychologists, such as [Frank van Luijk](#), a member of the board of directors of the consulting company [LTP Business Psychologists](#), also raised questions about the criterial validity and possibility of measuring integrity by means of a psychological diagnostic tool, and in general he [questioned](#) the possibility of verifying the integrity by means of such test.

According to the psychometric [passport](#) of the methodology, the criterial validity was assessed with the participation of only 132 persons - employees of the organization with different lengths of service tenure. The data on their work misconduct were used as one of the criteria. It should be noted that, when it comes to selection of judges and judicial candidates, the rate of misconduct is not a determining factor in evaluating their integrity.

The HQJC applied a methodology for assessing the candidates for the new Supreme Court that, among others, measures a person's dedication to the rules of corporate community and loyalty, particularly to management. Such methodology may be and will be useful for selection to centralized administrative structures with high standards of staff conduct, but is obviously inadequate, and even detrimental, to the selection of judges, especially when there is a need for judges who would be able to change the system rather than to preserve all of its negative phenomena. It can be concluded that the psychological testing of candidates was aimed at the selection of candidates who would be potentially loyal to the system, and could have resulted in the elimination of candidates oriented

towards independence and change of the system.

IV. ENSURING EQUAL COMPETITION CONDITIONS

IV (a). Ability to use means of communication during the exam

51. The candidates positively [evaluated](#) the logistics, organization, and friendliness of the staff administering the exam (written tests and practical assignments). In addition, the HQCJ offered online broadcasting of the tests (cameras [1](#), [2](#), [3](#), [4](#)) and practical assignments (cameras [1](#), [2](#), [3](#), [4](#)).

52. At the same time, it is known that communication devices were not removed from the candidates. A lot of time was allocated to complete the tests, enabling the candidates to use these, for example, when leaving the examination room for a certain time. Moreover, candidates could communicate with each other.

Even the candidates themselves also [pointed](#) to this: *“Starting from hour two of the exam, participants began “migrating” out of the examination room accompanied by “overseers”, and by the final hour of the test, the examination room was not as silent as at the beginning. I’m used to working even with more noise. So this was not a problem. But some colleagues expressed slight annoyance aloud, because they could not concentrate”.*

Referring to the video-recording, journalists [told](#) that one of the candidates (who was later recommended by the HQCJ for appointment as the Supreme Court judge) left the exam auditorium during the test for at least 40 minutes.

53. Enabling the candidates to use mobile communication devices during examination undermines confidence in the belief that the HQCJ provided equal conditions for all candidates. After all, candidates who did not rely just on their own knowledge could use the help of others and thus receive an advantage over those who honestly completed the tests.

IV (b). Practical assignment identical to a court case heard by certain candidates

54. The fact patterns used for the practical assignment could provide advantages to certain participants in the competition.

Participants in the competition located and [gave examples](#) of cases that were used to come up with the fact patterns (real cases resulting in the following court decisions were used):

for Civil Cassation Court:

<http://www.reyestr.court.gov.ua/Review/45001334>,

<http://www.reyestr.court.gov.ua/Review/51889375>,

<http://www.reyestr.court.gov.ua/Review/56221883>,

<http://www.reyestr.court.gov.ua/Review/58496630>,

for Criminal Cassation Court:

<http://reyestr.court.gov.ua/Review/54439153>,

<http://reyestr.court.gov.ua/Review/56850869>,

<http://reyestr.court.gov.ua/Review/61905815>).

At least one of the [fact patterns](#) that was made public reproduced verbatim the facts of an actual case that was heard by the courts, including at the highest level. Only the names of the parties to the dispute were changed.

55. In connection therewith, the CCI [reported](#) that some of the candidates received unfair advantage over other candidates, since they were directly involved as judges in the consideration of cases that formed the basis for the assignments, which undermines the confidence in the results of competition in relation to such candidates.

56. The HQCJ responded to this report with a [statement](#) that none of the candidates get a competitive advantage over other candidates in this regard, because the purpose of this stage of the competition was to test the ability of participants to reasonably state their legal position as a future judge of the Supreme Court.

57. The evaluation expert, S. Mudruk, [listed](#) four circumstances that would make it impossible to talk about creating more favorable conditions for certain candidates:

- some of the factual circumstances presented in practical assignment task differ from the court case from which ideas were borrowed;
- the practical assignment raises a broader (or different) range of legal issues;
- the ideal decision (from the perspective of the practical assignment's author) differs from the decision made in the case similar to the practical assignment (the prototype case);
- evaluation scheme or template for the practical assignment involves the assignment of points for each competency demonstrated by a candidate.

58. According to the HQCJ, the factual foundations (model cases) were [developed](#) by experts engaged by the EU project "Support for Justice Sector Reforms in Ukraine" on the basis of real cases considered by the courts.

However, the description of the terms of reference for engaged experts (Terms of Reference for Support of High Qualification Commission of Judges in Selection of New Supreme Court Justices - Development of Practical Exercise for Professional Skills Testing) received by us refers to the development of "*hypothetical cases for a decision by the Supreme Court, together with the description of methodology and modalities of the evaluation of results*".

As can clearly be seen from the practical assignment for candidates to the Civil Cassation Court within the Supreme Court, the engaged experts who "developed" have opted for the easiest way to prepare their "hypothetical" case – i.e., they took a real court case and changed only the name of the parties (perhaps, other experts did the same).

Centre of Policy and Legal Reform [contacted](#) the EU project "Support for Justice Sector Reforms in Ukraine" with a recommendation to initiate an independent expert evaluation that would confirm or deny the suspicion that certain candidates received advantages by virtue of receiving as practical assignment the case which they had already previously heard. This request received no response.

59. The comparison of published judgments that formed the basis for practical assignments demonstrates that at least six of the candidates were assigned cases which they had heard earlier (including four who became winners of the competition). As such, they had an obvious advantage during the assignment: as they had already carried out legal analysis of

the case previously as a judge, they had at least a time advantage for constructing the logic of their response and finding the ways to resolve the case.

[According to](#) Valentyna Danishevskya, the current Chairm of the Supreme Court, “...it seems that most of the competition participants suffered not from the lack of experience, but rather from the lack of time. We had five hours for everything. I spent two of them reading the provided materials”.

[The announcement](#) by the HQCJ that it is reviewing the “ability of candidates for the position of the Supreme Court judge to conduct legal analysis, formulate legal arguments, and substantiate a legal position rather than a coincidence of candidates’ opinions with court decisions in cases which became the model prototypes” only confirms the opinion about the importance of time advantage for legal analysis and formulation of opinions by the corresponding candidate.

However, it seems that not all of the HQCJ’s examination panels followed this approach. For example, the [analysis](#) of the evaluation results for practical assignment by candidates to the Administrative Cassation Court revealed a large gap in scores (12.5 points out of the maximum of 120 points possible for this task) between those who demonstrated better result and the candidates with the lowest result. This does not correspond to the normal distribution curve (which assumes that the persons with median results will form the majority and not be absent completely), which is illogical and significantly different from the distribution of results for candidates to other cassation courts. Such outcome is only possible if the graders were more concerned with the accuracy / inaccuracy of the substance of the decision than with the persuasiveness of candidates’ arguments. This may, in turn, refute the previous statement by the HQCJ that it evaluated legal arguments and rationales.

60. The fact that certain candidates received as practical assignment a case that they had previously heard as judges has, with high degree of probability, resulted in the receipt of unreasonable advantage by them during the competition. The HQCJ did not provide convincing arguments and evidences to refute the presence of such advantages; in particular, it did not disclose the assignments, the work products, and scores given by each member with a reference to the evaluation criteria.

IV (c). Selective consideration of the opinions of CCI

61. The CCI [approved](#) 146 negative opinions on the candidates (12 of which were reversed after additional explanations by candidates). 62% of the opinions that have not been reversed were overcome by the HQCJ. 25% of the candidates recommended by the HQCJ for appointment to the new Supreme Court had negative opinions.

62. The analysis of the HQCJ’s decisions resulting from the consideration of the CCI’s opinions suggests that the HQCJ often reached opposite decisions under similar circumstances.

For example, failure to mention in the property declaration the vehicles registered to family members was sufficient for the HQCJ eliminate from competition judge [Andriy Butyrsky](#), while the same circumstance did not prevent the HQCJ from awarding of the first place in the ranking of candidates to the Administrative Cassation Court within the Supreme Court to [Larysa Moroz](#).

False information in the integrity declaration served as the basis for eliminating from the competition of [Oleksandr Kravets](#) and [Stepan Domuschi](#), but did not prevent [Oleksandr Zolotnikov](#), [Oleksandr Prokopenko](#), [Mykhaylo Hrytsiv](#), [Tetyana Shevchenko](#), [Tetyana Frantovska](#) and others from becoming winners of the competition. The HCJ refused to recommend only T.Frantovska for appointment as a Supreme Court judge, referring, among others, to false information in the integrity declaration.

63. *The selective consideration of the CCI's opinions both by HQCJ and HCJ, as well as adoption of opposite decisions under similar circumstances may indicate that the true motives for such decisions were subjective rather than objective circumstances.*

IV (d). Inadequate vetting of candidates by competent government authorities

64. During the selection of judges to the new Supreme Court, numerous instances of inadequate performance by government bodies of their functions concerning the verification of property status were discovered. The HQCJ relied on information from such bodies.

In many of its decisions, the HQCJ relied on certificates issued by the National Agency for Corruption Prevention (NACP).

For example, the [certificate](#) issued by the NACP with respect to the candidacy of Tetyana Frantovska for the position of a judge, states that “*according to the results of the special examination as of January 20, 2017, the NACP has not found any discrepancies between the information specified in sections 8 “Corporate rights” and 9 “Legal entities within ultimate beneficiary ownership (control) of the declaring individual or members of his/her family” and the information and databases available to the NACP*”.

At the same time, the husband of the mentioned candidate owned corporate rights in two business entities, which should have been, but was not, indicated in the declaration that was the object of the special inspection by the NACP.

Despite this, the HQCJ recommended the mentioned candidate for appointment as a judge to the Supreme Court. However, referring to the published [results](#) of civic investigation of the candidate’s failure to declare corporate rights owned by her husband, the HCJ [rejected](#) T. Frantovska’s candidacy from being recommended to the President of Ukraine for appointment to the position of the Supreme Court judge.

In motivating its decision, the HCJ stated that “*the information about the candidate's failure to declare corporate rights owned by her husband was not subject of the Commission’s examination*”. However, in reality, the HQCJ had information on the corporate rights of the candidate’s husband, since this was indicated in the certificate issued by another government body - the National Anti-Corruption Bureau of Ukraine. Moreover, the HQCJ could have independently verified or establish this information through the relevant state register.

All of this indicates that both the NACP and the HQCJ did not properly carry out their functions.

65. Moreover, there are grounds to state that the NACP deliberately provided inaccurate

information concerning certain candidates. Thus, a few months after the completion of the competition, the head of the NACP Financial Control Department, Ganna Solomatina, [publicly stated](#) that, despite the pro forma independence, the NACP had “[handlers](#)” in the Presidential Administration, which had to “approve” the results of property declarations inspections. In addition, the leadership of the NACP blocked her access to the results of the verification of declarations of candidates to the Supreme Court, which were held prior to her appointment.

Ganna Solomatina [reported](#) that “*e-declarations are used for cover-up of officials who are loyal to the authorities, for reprisals against undesirables, and personal enrichment of the head and members of the NACP. The results of verifications are falsified in a way as required by the leadership of the NACP*”. She transferred the documents on the facts of corruption in NACP to the General Prosecutor’s Office, but they were returned to the NACP without review.

66. Tetyana Shkrebko, deputy head of the NACP Department for Financial Control and Monitoring of Lifestyle, was responsible for the verification of electronic declarations in the city of Kyiv and the Kyiv region (which account for half of the candidates for the new Supreme Court who reached the interview stage with the HQCJ). It became known from journalist [investigations](#) that, at the time of inspections, she was convicted of a number of official crimes to 5 years of conditional imprisonment with a probation period of one year.

Her guilty verdict came into force and she should have been terminated (according to Article 84 of the Law of Ukraine "On Civil Service", she should have been terminated within 3 days of the announcement of the verdict). However, she was terminated only in July 2017, after the end of competition to the Supreme Court.

It is an extraordinary event when a person guilty of committing an official crime is responsible for verification of property declarations. This casts doubt on the results of all conducted verifications. It is likely that T. Shkrebko was specifically allowed to remain in office in exchange for falsifying the results of the verifications of declarations. This assumption is reinforced by the fact that the court’s verdict against her has never been made public in the Unified State Register of Court Decisions, in contradiction to the law.

67. Yet another example of inadequate performance of its function powers by the government authority charged with control functions: One of the arguments often mentioned by the PCI in its opinions was that a candidate gave false or incomplete information in the property declaration for 2013. A copy of this declaration was submitted by judges for verification in accordance with the Law of Ukraine “On Cleansing the Government”. In the case of false information on the existence of property (property rights) mentioned in such declaration, the prohibition to occupy certain offices for ten years, as established by the Law of Ukraine “On Cleansing the Government”, should have been applied to candidates who were judges.

When refuting such arguments by the CCI, the candidates formally referred to the opinions by relevant government bodies concerning the lack of grounds for the application of prohibitions set forth by the Law of Ukraine “On Cleansing the Government”.

However, the HQCJ, in some [decisions](#), recognized the submission of false data in the relevant property declarations, although in reality this should have been done by the state

fiscal service rather than a civic body.

68. *The recorded instances of improper performance by government bodies (in particular, the state fiscal service, the NACP, the HQCJ) of their functions concerning the vetting of the candidates suggest that not all candidates had equal competitive conditions during the competition. Moreover, there is information indicating the manipulation of information by government authorities in favor of certain candidates.*

V. TRANSPARENCY AND CLARITY OF EVALUATION RESULTS FOR THE PUBLIC AND THE CANDIDATES

V (a). Legal requirements on transparency

69. The law requires the HQCJ to ensure maximum transparency in conducting the competition carried out under the qualification evaluation procedure (emphasis added):

“Qualification evaluation is carried out transparently and publicly, in the presence of the judge (judicial candidate) being evaluated and any interested persons” (clause 4, Article 84 of the Law of Ukraine “On the Judiciary and Status of Judges”);

“The qualification evaluation includes the following stages:

1) passing the exam;

2) examination of the personnel file and conducting the interview.

...

The High Qualification Commission of Judges of Ukraine is required to ensure transparency of the exam. Any interested parties may be present during any stage and during the evaluation of results” (clauses 1-2 of Article 85 of the mentioned Law)

“A judge’s (judicial candidate’s) personnel file is open for general access on the official website of the High Qualification Commission of Judges of Ukraine, with the exception of:

1) information about the place of residence or stay, date of birth of individuals, their addresses, telephone numbers, or other means of communication, e-mail addresses, taxpayer identification numbers, series and numbers of passports, military service record cards, location of property object (except for the region, district, and locality where the object is located), registration numbers of vehicles;

2) information about the results of tests to review the personal moral and psychological qualities of a judge (judicial candidate), general aptitudes of a judge (judicial candidate), as well as medical information;

3) any information and data concerning minor children, other than information on property, property rights, assets, and other objects of declaration, which are in their ownership according to the declaration of a person authorized to perform state or local government functions, which is being submitted by a judge (judicial candidate);

4) information containing state secrets”.

V (b). Selected achievements in ensuring transparency

70. The HQCJ ensured online broadcasting of two parts of the examination (written test and practical assignment) on its [YouTube channel](#), as well as the participation of observers during the exams and the broadcasting of meetings with the participation of candidates and

members of the CCI.

Similarly, the HCJ [provided](#) live broadcasting of the High Council of Justice sessions to review the materials concerning submission of recommendations to the President of Ukraine for the appointment of candidates for the positions of the Supreme Court judges.

71. Online broadcasting of meetings is an important achievement in the selection process of judges to the new Supreme Court. But, it appears, that the numerous statements by representatives of the authorities about “unprecedented transparency of the competition” were based on this fact alone.

However, in reality, the transparency in the selection of judges cannot be limited only to video-broadcasts, which are not sufficient to make a convincing conclusion about the honesty of the selection process. In itself, the evaluation of candidates during the competition lacked transparency.

V (c). Problems with publication of personnel files and decisions of the HQCJ

72. Even before December 2016, the HQCJ should have automated the personnel file management process (sub-clause 3 of clause 41, section XII of the Law of Ukraine “On the Judiciary and Status of Judges”), but it failed to do so.

This term was extended until September 30, 2017 by Law No. [2147-VIII](#) of October 3, 2017, which entered into force on November 29, 2017. But even after this date, there is nothing to indicate that the automated system for personnel file compilation and management began functioning. Files are still maintained in paper format, with some materials scanned and partially [posted](#) on the Internet in a non-user-friendly viewing format.

73. For a long time, the files of candidates to the new Supreme Court were not made public on the website of the HQCJ, as required by law (clause 7, Article 85). This became the ground for [statements](#) by coalitions of civic organizations demanding the implementation of the law and ensuring transparency of the competition, in particular, through openness of the personnel files.

Only in late March 2017, about a month prior to the start of interviews and under the public pressure, the HQCJ started [disclosing](#) certain materials from the candidates’ files – but only for those candidates who were admitted to the interviews stage.

Even after completion of competition to the Supreme Court and announcement of its results, the HQCJ did not publish its decisions on the results of qualification evaluation of the candidates.

These decisions were not provided even upon requests for access to public information. The HQCJ either referred to these decisions as being classified as “[official information](#)”, or stated that access to such decisions is provided only through the website of the HQCJ and the relevant information is being “[prepared for posting](#)”.

As of October 24, 2017, the materials of the personnel files were [published](#) with respect to 58% of the candidates, while the decisions of the HQCJ confirming/rejecting the candidates’ ability to administer justice in a court of cassation were published for 32% of

candidates. At the same time, no motivated decision of the HQCJ following its review of the CCI opinions were published.

Only in November-December 2017, the decisions of the HQCJ were included into the published [materials](#) of the candidates' personnel files. At the same time, files that were published are still incomplete, since, contrary to the [rules](#) approved by HQCJ itself, they do not contain opinions of the CCI.

74. The prolonged failure to publish the candidates' personnel files cannot be justified due to technical reasons, as the HQCJ has sufficient logistical and technological support, as well as significant support from international technical assistance projects. It appears this was a conscious choice on the part of the HQCJ or its leadership.

Moreover, the lengthy (for more than four months) failure to publish the decisions of the HQCJ was either due to the lack of written-out decisions of the HQCJ or their dubious quality (and, accordingly, its unwillingness to make them public before the appointment of judges to the Supreme Court), or due to both of these reasons simultaneously.

V (d). Non-transparency of evaluation results

75. On July 27, 2017, the HQCJ [made public](#) the results of the qualification evaluation as part of the competition to the new Supreme Court. The results included the ranking position for the relevant cassation court within the Supreme Court and the overall score from each candidate's evaluation results.

The decisions of the HQCJ with numerical scores separated for: 1) anonymous written test, practical assignment, and the criteria of: 2) competence, 3) integrity, and 4) professional ethics appeared in published [candidates' personnel files](#) only in November 2017.

76. At the same time, in accordance with the [Regulations](#) on the procedure and methodology of qualification evaluation, the indicators of compliance with the criteria of qualification evaluation and means of their determination, the HQCJ should have evaluated each candidate under [70 indicators](#), and these scores are what should have been disclosed.

Representatives of the [professional community](#), [civil society sector](#) and [international organizations](#) called upon the HQCJ to make public the scores of all candidates for each indicator that was subject to scoring, as this would enable seeing how honestly the candidates were evaluated. For example, the Head of the EU Delegation to Ukraine, Hugues Mingarelli [believes](#) that: *“It is necessary to public the total score and indicators for each parameter for each selected candidate, in accordance with the evaluation methodology. It could also be possible to introduce a minimum passing score for each subcategory, or at least for the integrity parameter, which remains key to ensuring the confidence in the selection process”*.

However, the HQCJ did not respond to these calls.

77. Some candidates have publicly and justifiably accused the HQCJ of dishonesty in the competition. For example, scholar Maksym Selivanov [stated](#): *“as a participant of the competition, I can assert that the competition to the Supreme Court has been held openly,*

publicly, and DISHONESTLY". In his view, the HQCJ exercised its discretionary powers in a biased manner in favor of certain individuals, thereby distorting the results of the competition. In his [publication](#), he substantiates this statement by his observations based on the analysis of candidates' rankings, materials from their personnel files, and video-recordings of interviews with candidates.

In particular, M. Selivanov compared his results (as they were published) with those of another scholar, Ye. Krasnov, who was subsequently appointed to the new Supreme Court. The materials of their case files and interviews suggested that objective indicators of both candidates approximately equal, but the HQCJ's evaluation showed that the scores given to the second candidate were 24% higher than those of the first candidate.

It is difficult to explain such difference even by a possible discrepancy in the results of psychological testing, which the HQCJ decided not to disclose.

78. Special attention should be given to the problem of classifying of the evaluation results for psychological testing. The "closing for the public" of a significant portion of the score, which could have been, and was, a decisive factor in the placement of candidates in the rankings, leaves significant space for manipulations, and thus negatively affects the level of confidence in the announced results.

The HQCJ did not publish a methodology or approach according to which the qualitative information received in the course of testing (the level of manifestation of certain qualities and their aggregates) should have been, and was, translated into quantitative score (points). In accordance with the Regulations, the Commission was required to approve the methodology of testing for identifying the personal and social competence, but it is not known whether it, in fact, did so.

The results of evaluation of personal competence, social competence, professional ethics, and integrity, both as a whole and by components identified by the HQCJ, remain unknown. This does not make it possible to find out, for example, whether the correlation exists between the results of testing in terms of integrity and the reported facts of submission of false information by certain candidates in their integrity declarations.

The President of the International Civic Organization "Universal Examination Network UENet", S.Mudruk, [believes](#) that *"if any indicator or its component are directly determined by psychological testing and directly determines the score for this component (indicator), then the result of such testing should not be confidential. If the indicator or its component is determined by the results of several parameters assessed by the psychological testing, the Commission should report on a method for the assignment of score for such a component or indicator (i.e., on the basis of which measured psychological parameters and according to which scheme is the score determined), as well as the score determined by the commission"*.

79. At various stages of the competition, the public called upon the HQCJ to be more transparent in determining the interim results:

- to ensure expeditious publication of the competition assignments and work products of candidates upon their completion on the commission's website throughout the competition to the new Supreme Court, and after the evaluation – publication of this information with reference to specific candidates and the evaluation of their work products by each member

of the commission ([statement](#) by the Reanimation Package of Reforms coalition (hereinafter RPR) of March 1, 2017);

- after announcement of scores for practical assignments – publication of the assignments themselves, texts of candidates’ work products, and the scores assigned to them by each grader , in line with the relevant evaluation criteria ([statement](#) by CCI of March 28, 2017, [statement](#) by RPR of April 10, 2017);

- conducting public roll-call vote on the CCI opinions, both within the panels and at the plenary sessions of the HQCJ and publishing the results of voting by each member of the commission on this subject; publication of a methodology for evaluating the candidates and individual scoring by members of the HQCJ based on results of the interviews ([statement](#) by RPR of April 19, 2017);

- publication of scores (total and from each member of the HQCJ panel) as a result of interviews with candidates in relation to whom the CCI has issued no opinions, prior to the plenary sessions for the review of such opinions; conducting roll-call vote for overcoming the CCI’s opinions, and immediately publishing the minutes of such voting; providing in the Rules of Procedure of the HQCJ that the personal voting of the members of the Commission at its plenary session is open and broadcast online (statement by RPR of May 11, 2017; [statement](#) by CCI of May 30, 2017);

- publishing all decisions as a result of review of the opinions and information of the CCI, indicating the rationales for taking into account or not taking into account of the arguments set therein ([statement](#) by RPR of November 28, 2017)

These calls were aimed at preventing possible manipulations by the HQCJ during the competition and at making the evaluation results clear to the public.

The HQCJ ignored all of these appeals except the last one – it did publish its decisions as a result of review of the opinions of CCI more than four months after their adoption, after the end of the competition and the review of candidates by the HCJ.

80. Journalists also submitted requests for samples of written tests, practical assignments, and results of practical assignment grading, but the HQCJ [rejected](#) all of these requests, referring to this information official information with restricted access.

81. It seems that even for winners of the competition, the source of many components of their evaluation score remains unclear. A blogger who attended a meeting with four of the winners [described](#) this as follows: one of them “*honestly admitted that he does not understand many elements of the competition, who received specific scores and for what... Others silently agreed – nobody tried to prove that they understood the complex evaluation methodology*”.

82. *The lack of transparency in the evaluation of candidates as part of the competition to the new Supreme Court makes it impossible to verify the correlation between the scores assigned to candidates under the criteria defined by the law and the internal rules of the HQCJ in order to ensure that the selection was honest. The source of assigned scores is unclear both to the public and to the candidates themselves.*

The HQCJ's failure to respond to demands to ensure the transparency of the entire evaluation process may be an indirect confirmation of the manipulative nature of the scoring.

V (e). Unclearly of the grounds for the HQCJ's rejection of the findings of CCI

83. During the competition to the Supreme Court, the CCI approved 146 opinions on non-compliance of the candidates with the criteria of integrity and professional ethics (12 opinions were repealed by PCI upon receipt of explanations from the candidates).

59 candidates, who according to the CCI's opinions did not meet the criteria of integrity and professional ethics, were eliminated from the competition, including 8 candidates who withdrew on their own initiative.

During its plenary sessions, the HQCJ overcame the CCI's opinions for 76 candidates, including 30 candidates were subsequently recommended for appointment to the Supreme Court. These included those who issued politically motivated decisions; grossly violated the judgments of the European Court of Human Rights; failed to explain the source of their wealth; filed false information in declarations; or arbitrarily prohibited peaceful assemblies during the Revolution of Dignity.

84. The Head of the EU Delegation to Ukraine, Hugues Mingarelli, [stated](#): *“Although the process of selection to the new Supreme Court is unprecedented in terms of transparency, the HQCJ must take all necessary steps to dispel any doubts about the objectivity and impartiality of the final selection of judges. The integrity of future judges must be beyond all doubt. The appointment of even a few judges with a tarnished reputation could jeopardize the entire process”*.

85. Based on the results of the analysis of HQCJ's decisions concerning these 30 candidates, it can be concluded that there is no convincing repudiation of the facts stated in the opinions of the CCI. The reasonings of these decisions include arguments from the CCI's opinion and explanations by the candidate, while the assessment of candidates' explanations by the commission is usually absent. Only in some decisions is the position of the HQCJ in relation to each concern of the CCI is clearly emphasized.

It appears that, for the most part, the HQCJ considered it sufficient to give a candidate's explanations in order to reject the claims from the opinion of the CCI. Thus, the explanation of a candidate is afforded with a kind of “presumption of accuracy”, while claims from the opinion of CCI are afforded with “presumption of falsehood or unreasonableness”.

86. It is noteworthy that the HQCJ did not define its role in reviewing the negative opinions of the CCI in the competition procedure. Based on the analysis of the mentioned decisions, the HQCJ, on one hand, does not want to assume the role of fact-finder and appraiser of circumstances that, in the CCI's opinion, testify to a candidate's non-compliance with certain criteria of integrity and professional ethics; but on the other hand, it actively handles the claims from candidates' explanations as proven facts. The HQCJ also often used in its decisions the formulation that “The CCI did not provide sufficient evidence”.

87. In many cases, instead of assessing the negative factual circumstances about candidates stated in the opinions of the CCI, the HQCJ threw them away because they were not

confirmed by a decision of a government body on bringing a candidate to disciplinary, administrative, or criminal responsibility.

It is clear that in case of such an approach, the role of the CCI is reduced to nothing, because if such decisions by government authorities existed, they would have been known to the HQCJ even without the CCI. Unlike the HQCJ, the CCI did not reduce the notion of integrity and professional ethics to the ascertaining the illegal nature of one's actions. Indeed, the requirements of integrity and professional ethics are considerably wider in substance than the legal assessment of a candidate's actions, which could be made by government authorities.

88. In some of its opinions, the CCI referred to the candidate's participation in issuance of arbitrary court decisions, i.e. decisions issued with malicious intent or gross negligence – e.g., decisions concerning unjustified prohibition of peaceful assemblies, conviction on political grounds, or those expressly recognized as arbitrary by the European Court of Human Rights. Instead, the HQCJ quoted European recommendations that court decisions should be reviewed only through the statutory appeal procedure, and the appeal is the only way in which judges are accountable for their decisions, except when they act in bad faith. In addition, the HQCJ referred to Article 49 of the Law “On the Judiciary and Status of Judges”, according to which a judge cannot be brought to responsibility for a court decision issued by him or her, except for instances of committing a crime or a disciplinary offense.

At the same time, it is difficult to agree with the comparison of statements of the CCI with the measures of responsibility. The elimination of a candidate from the competition in case of non-confirmed capacity to administer justice in a cassation court is not a measure of legal responsibility, and the evaluation of a candidate is not a review of the court decision, since it does not entail its amendment or reversal.

89. The recommendations of the HQCJ concerning candidates for judges to the Supreme Court were reviewed by the HCJ, which made recommendations for appointment to the President of Ukraine based on the outcomes of these reviews.

The CCI had expressed its intent to defend its findings before the HCJ, but its representatives were not admitted to attend the meetings of the HCJ.

90. In the course of meeting with representatives of the diplomatic institutions of G-7 countries on September 20, 2017, Ihor Benedysiuk, the head of the HCJ, [assured that](#): “*All information provided by the CCI has been vetted by the HQCJ and is being re-examined by the HCJ*”. The head of the HCJ reported that the HCJ is making every effort to explain its decisions and its mode of operation to the public.

91. On October 4, 2017, Ukrainian Independent Information News Agency made public the excerpts from a [letter](#) of the Delegation of the European Union to Ukraine, which referred to the need for elimination of any doubts about the integrity of the candidates recommended by the HCJ for appointment: “*The proposed list of candidates includes several persons in relation to whom the CCI made negative opinions, particularly emphasizing the discrepancies between their assets and their legal income. ... According to the European standards, the HCJ must explain its decisions so that there are no reasonable doubts as to the integrity of the proposed candidates and, accordingly, and restore the trust of Ukrainian citizens in the independence and integrity of the Supreme Court*”.

92. Instead, the justification of each HCJ's recommendation on the appointment of as a Supreme Court judge was limited to one standard phrase: *"no reasonable doubts have been established as to whether a candidate complies with the criterion of integrity or professional ethics, or other circumstances that could adversely affect the public confidence in the judiciary due to a candidate's appointment as a judge"*.

93. *In the vast majority of cases, the decisions of HQCJ to overcome the negative opinions of CCI do not contain convincing rationales in favor of the integrity and ethical conduct of candidates. The decisions of the HCJ concerning candidates do not contain any such rationale at all. All of this further fails to promote the transparency of the competition results and confidence in them.*

VI. COMPLIANCE WITH IMPARTIALITY AND INDEPENDENCE IN THE COURSE OF SELECTION

VI (a). Legal requirements on impartiality and independence

94. The Law defines that:

"The High Qualification Commission of Judges of Ukraine is a state body of judiciary management" (part 1, Article 92 of the Law of Ukraine "On the Judiciary and Status of Judges");

"Members of the High Qualification Commission of Judges of Ukraine must adhere to the highest standards of ethical conduct in their activities and beyond, including the principles and rules of ethics applicable to judges" (part 12, Article 94 of the Law of Ukraine "On the Judiciary and Status of Judges");

"A member of the High Qualification Commission of Judges of Ukraine shall not have the right to participate in the consideration of the issue and approval of decision and shall be subject to withdrawal in case of any data on the conflict of interests or circumstances which raise doubts about his impartiality" (part 1, Article 100 of the Law of Ukraine "On the Judiciary and Status of Judges");

"The High Council of Justice is a collegial, independent constitutional body of state power and judiciary management" (part 1, Article 1 of the Law of Ukraine "On the High Council of Justice");

"A person elected (appointed) as a member of the High Council of Justice shall make an oath of the following content:

"I swear to exercise the powers of a member of the High Council of Justice honestly, honestly and impartially, to ensure the independence of the judiciary power, its functioning on the principles of responsibility, accountability to society, formation of a virtuous and highly professional judicature, observance of the norms of the Constitution of Ukraine and the laws of Ukraine, and also professional ethics in operation of judges and prosecutors" (part 1, Article 19 of the Law of Ukraine "On High Council of Justice");

"A member of the High Council of Justice shall refuse to participate in the consideration of

an issue if:

1) he/she is in a family or other personal relationship with a judge, a candidate for a position of judge or prosecutor in respect of whom the issue is considered, and also a person who has filed a claim to the High Council of Justice;

2) he/she is personally, directly or indirectly interested in a case considered by such judge;

3) in case of any other conflict of interests or circumstances which raise doubts about his/her impartiality” (part 5, Article 20 of the Law of Ukraine “On High Council of Justice”);

VI (b). Problems with impartiality and independence of the members of HQCJ

95. According to [data](#) of PROSUD website, there are facts about six members of the HQCJ (among 15 members) which are similar to the behavior that became the basis for the negative conclusions of the CCI on candidates.

In this regard, the CCI [called on](#) the HQCJ to make every effort to prevent a decision on the suitability of candidates for the position of a judge of the Supreme Court in case of any conflict of interest of any member of the HQCJ and not to cast doubt on the impartiality and legitimacy of the competition results.

There is no information available on the HQCJ website as to whether the members recused themselves in connection therewith and how the HQCJ solved these issues.

However, on the basis of an analysis of the HQCJ decisions contained in the files of the candidates, in many cases such members participated in overcoming the conclusions concerning the relevant candidates, and therefore objectively they did not seem to be impartial.

96. The participation of HQCJ members in relation to whom there are facts similar to the behavior of candidates which became the basis for the negative conclusions of the PCI, causes the objective doubts about the perception of the HQCJ as an impartial body in considering the issue of overcoming such findings.

VI (c). Problems with impartiality and independence of members of the HCJ

97. The issues of impartiality and independence are equally important for the current composition of the HCJ, which considered the issue of making proposals to the President concerning the appointment of candidates for the position of judge of the Supreme Court.

98. The DEJURE Foundation identified [71 situations](#) of probable conflict of interest, which did not, however, result in prevention of participation of HCJ members in the consideration of candidates to the Supreme Court. Among them, there are cases when the candidate identified a member of the HCJ as a person who could give a recommendation, and the corresponding member was a speaker at a meeting of HCJ concerning such a candidate; when the same remarks can be made towards a member of the HCJ on integrity as towards certain candidate (privatization of the corporate housing, deliberate distortion of the contents of the judgment of the European Court of Human Rights, which resulted in the repeated Ukraine’s loss of the case in the same court, etc.); participation of a member of the HCJ as a party to a case which is considered by the candidate as a judge; participation of a member of the HCJ and a candidate in a lawsuit on the side of the parties with opposing

interests, etc. This did not become an obstacle for the members of the HCJ to consider the issues about such candidates and even to be speakers on these issues.

During the consideration of issues concerning the candidates to the Supreme Court, the members of HCJ recused themselves in 61 cases, obviously because they didn't consider themselves as impartial regarding the consideration of certain candidates (most often due to joint work with the candidate). In 57 of these cases, the HCJ [did not accept](#) their recusal. This caused doubts about the legitimacy of the participation of such members in the consideration of issues where they did not consider themselves impartial. At the same time, the satisfaction of such recuse would not result in absence of a quorum for approval of the decisions of HCJ.

Moreover, [according to](#) professor Vasyl Nor and associate professor Oksana Kaluzhna, *“subject to joint work of judges (judges within the meaning given in Article 6 of the ECHR, and members of HCJ, members of HQCJ, etc.) with the parties to the proceedings (in our case, candidates to Supreme Court in the procedures of new Supreme Court formation) it would be well to withdraw”*, otherwise *“the third-party observer might have doubts about the impartiality of the judge”*. And such recuse should be satisfied, except when *“no other court can be appointed for the consideration of this case”*.

Implementation of actions and making decisions in the presence of conflict of interest bear real risks both for members of the HCJ which allowed this and for judges of the Supreme Court appointed to the office under stated circumstances.

99. Among 120 winners of the competition, two are current members of the HCJ - Alla Lesko and Alla Oliynyk, and two others - Andriy Ovsiyenko and Yaroslav Romanyuk - were participants in the competition, but withdrew on their own. The first two winners did not take part in HCJ's deciding on the issue on making recommendations for the appointment of judges of the Supreme Court.

The HCJ assesses the legality of the procedure and results of the competition, actions (inactivity) of the HQCJ. [According to](#) professor Vasyl Nor and associate professor Oksana Kaluzhna, *“it is quite logical and predictable that the members of the HCJ, who passed through a competitive procedure for the positions of judges of the Supreme Court, have no right to assess the legality of the competition procedure as arbitrator either to themselves or other participants of competition”*.

For this reason, one can conclude that both A. Ovsiyenko and Ya. Romanyuk should have avoided participation in the consideration of HCJ issues based on the results of the competition to the new Supreme Court in which they participated.

100. It is known that in the course of work in HCJ, at least three members of the HCJ received state awards from the President of Ukraine. Thus, the head of the HCJ, [Ihor Benedysiuk](#), who is also a judge, was awarded with award weapon, members of HCJ [Oleksiy Malovatsky](#) and [Tetyana Malashenkova](#) were awarded with the honorary title “Honored Lawyer of Ukraine”.

Having accepted the state award, the chairman of the HCJ, judge I. Benedysiuk, did not comply with the requirements of part 9 of Art. 56 of the Law of Ukraine “On the Judiciary and Status of Judges”: *“prior to dismissal or termination of authorities, the judge (s) may*

not be awarded with state awards, as well as any other awards, honors, certificates of appreciation. A judge can be awarded with state awards only for his personal courage and heroism in the conditions related to life-threatening risk". There is no publicly available information about cases when I. Benedysiuk demonstrated the personal courage and heroism in conditions related to life-threatening risk.

The acceptance of the state awards by members of the HCJ, O. Malovatsky and T. Malashenkova, also objectively raises doubts about their independence, although, unlike the judges, the law does not directly stop them from doing this. But in terms of the status, they are "judges of judges". The Venice Commission and the Directorate of Technical Cooperation of the Directorate General of Human Rights and Legal Affairs of the Council of Europe criticized the provisions of the law on the possibility of rewarding the judges, which could be considered as an opportunity to "thank" the right people (see paragraph 40 of the Draft Joint Opinion on the Law of Ukraine "On the Judiciary and Status of Judges" [CDL-AD \(2010\) 026](#)).

It may be noted that the state awards provide a number of privileges to the rewarded persons.

101. Doubts about independence and impartiality are also exacerbated by the fact that in the course of off-year elections of the President of Ukraine in 2014, O. Malovatsky held a position of the Deputy Head of Legal Department of P. Poroshenko and headed it during the off-year elections to the Verkhovna Rada of Ukraine. Then he and T. Malashenkova run for Parliament from "Petro Poroshenko Bloc". The latter also [provided](#) legal support to business of P. Poroshenko.

I. Benedysyuk and T. Malashenkova were appointed by the President of Ukraine to the High Council of Justice (now HCJ), and O. Malovatsky was appointed to the Parliament on the proposal of the parliamentary faction "Petro Poroshenko Bloc".

I. Benedysyuk heads this body for the second time. Although he was elected as chairman when the [law](#) prohibited holding this position for twice in succession, but the new Law of Ukraine "[On the High Council of Justice](#)", [draft](#) of which was submitted to the Parliament by the President of Ukraine, removed the restriction.

It is known that a disciplinary complaint was filed against I. Benediyuk due to receipt of the state award, but there is no information on the proceedings on the website of HCJ. It seems that the consideration is delayed so that the limitation period for bringing to disciplinary action expires.

102. The HCJ includes a member who has been [charged](#) with a crime - an attempt to commit fraud in particularly large amount (Pavlo Grechkivsky). Though P. Grechkivsky denies his guilt, he did not give his membership on the HCJ and did not stop his work in its activities. Moreover, he participated in hearings with submission of proposal for appointment of judges to the new Supreme Court.

At the same time, P. Grechkivsky is the secretary of the Council of Advocates of Ukraine. And although the Law of Ukraine "On the High Council of Justice" prohibits holding concurrently the position of member of the HCJ and participating in the professional self-government, the law allowed such a combination through transitional provisions.

103. *The above examples demonstrate the serious threats in the perception of active members of the HCJ as an impartial and independent body.*

VII. CONCLUSIONS AND RECOMMENDATIONS

1. For the first time, Ukraine has appointed its highest judicial body using a competitive procedure, in the course of which the candidates had to demonstrate their compliance with the criteria of competence, integrity, and professional ethics. The competition was much more transparent than previous procedures for the selection and professional promotion of judges that have been used in the judicial system.

In addition, the doors to participation in the competition were open not only to judges but also to scholars and advocates, which made it possible to bring, albeit in insignificant amount, some new blood into the judicial system.

At the same time, there are numerous facts which do not make it possible to state that the appointment of the new Supreme Court took place in a legitimate and honest way:

- the competition was held in a non-transparent way, especially in terms of setting the results; it is impossible to establish a correlation between the candidates' scores and the evaluation criteria;

- HQCJ's failure to respond to the appeals aimed at ensuring the transparency of the whole evaluation process can be an indirect confirmation of the manipulative nature of the establishment of results;

- the selection methodology is unclear, and its quality, as well as validity, reliability, and accuracy of the results were not verified by experts;

- HQCJ allowed deviations from a predetermined methodology, with a high degree of probability that this was done in favor of certain candidates;

- psychological testing of candidates was aimed, among others, at the selection of the candidates loyal to the system, and could have resulted in the elimination of candidates oriented towards independence and change of the system;

- HQCJ and HCJ did not act as independent and impartial bodies;

- HQCJ and HCJ ignored important facts that testified against the integrity of candidates. In the vast majority of cases, the decisions of the HQCJ on overcoming the negative findings of the PCI's opinion do not contain a convincing rationale in favor of the integrity and ethical conduct of the candidates. The HCJ's decisions on the candidates do not contain any such rationales at all;

- the appointment of the majority of the leaders of new Supreme Court from among the former heads of the higher specialized courts, as to whose integrity there were serious concerns on the part of PCI, is highly suggestive of the deliberate creation of preferences for such candidates in the course of the competition, precisely so that they could head the cassation courts;

- HQCJ failed to provide equal conditions for all participants in the competition, giving preference to candidates, including some that eventually took the positions of judges of the new Supreme Court;

- government bodies that were required to ensure the vetting of candidates, primarily the National Agency on Corruption Prevention, performed their duties inadequately;

2. Serious legal threats to the functioning of the new Supreme Court have been identified:

- the time frames for the creation of the new Supreme Court established by law were not complied with, and the act of the authorized body (the President) on the establishment of the Supreme Court is also absent;

- the members of the new Supreme Court were appointed in violation of time frames established by law;

- the membership of the Grand Chamber of the Supreme Court was formed in a smaller number than required by law, which may result in doubts as to the legitimacy of its decisions and further appeals to the European Court of Human Rights.

3. The above-mentioned conclusions create an opportunity to prevent these problems from recurring in future procedures of judicial selection and qualification evaluations. For this purpose, it is necessary:

- to assess the adequacy of the qualification evaluation methodologies with the participation of independent experts, including the methodologies for psychological testing for the needs of judicial selection, as well as the validity, reliability, and accuracy of the results of their application;

- to consider the possibility of reorganizing the bodies for selection of judges in order to ensure the highest representation of “agents of changes” rather than those who guard the established negative practices in the judicial system (mutual cover-up, political dependence, bribery, etc.);

- to make amendments to the laws that would make it possible: to verify the result of qualification evaluations and competitions, in particular, by providing that decisions of judicial selection bodies in the course of evaluations and competitions should be made by open vote; to unify and strengthen the approaches to managing the conflicts of interest in the judicial selection bodies; to strengthen the role of the CCI in the respective procedures;

- taking into account the reasonable doubts about the independence and impartiality of the judicial selection bodies, to provide for the participation of representatives of international donors as ad-hoc members of the HQCJ in the selection of judges who will decide the cases of high-level corruption – as a temporary measure to ensure impartiality and confidence in the selection of anti-corruption court judges.