USAID | UKRAINE
FROM THE AMERICAN PEOPLE

MANAGING CONFLICT OF INTEREST IN THE UKRAINIAN JUDICIARY

Contract No. AID-OAA-I-13-00032, **Task Order No.** AID-121-TO-16-00003

Nove Pravosuddya Justice Sector Reform Program (New Justice)

Contracting Officer's Representative: Oleksandr Piskun, Democracy Project Management Specialist, Office of Democracy and Governance

Development Objective 1: More Participatory, Transparent and Accountable Government Processes

Author: Dr. Tilman Hoppe, former judge, anti-corruption expert

Submitted by:
Chemonics International Inc.

March, 2017

DISCLAIMER

The author's views expressed in this publication do not necessarily reflect the views of the United States Agency for International Development (USAID) or the United States Government.

CONTENT

1. SUMMARY AND RECOMMENDATIONS

This Report reviews the **entire chain** of managing conflict of interest, starting with the definition of limits, procedures for managing conflict of interest, mechanisms of oversight (including complaints), and sanctions. It analyses the current framework from a regulatory perspective and by assessing the actual capacities of oversight bodies in preventing and detecting conflict of interest.

The Report is the result of a desk review of 13 laws and regulations, and of interviews and exchanges with stakeholders during a three-day mission to Kyiv in May 2017. The focus of this assessment is on **judges** and on their judicial **decisions**: Judicial decisions are the key function of the judiciary and only judges are responsible for them. In addition, this assessment also reviews conflict of interest of **lay** judges and **jurors**, and of judicial **secretaries**.

All in all, the legal framework is quite **comprehensive** and does **not** contain any **gross** loopholes or weaknesses. However, there are several points that would benefit from **further strengthening** in line with international good practices.

This aside, conflict of interest regulation for the Ukrainian judiciary is a very **complex, six-layered** construct. Even for lawyers it is very time-consuming to even only research and read through the various norms let alone to fully grasp their legal cross-effects. As a consequence, the different norms do not always fully align. Thus, one of the main recommendations is to **streamline** the current body of laws, ideally by eliminating any overlapping or disposable norm as well as any possibly superfluous regulatory layer, as for example the "Regulation by the Council of Judges on Conflict of Interest" – CoJReg (of 2016). In addition, one has to think of judges, other judicial officials, and of users of the judicial systems who need some short, easy to understand **guidance** illustrated with practical examples.

As for implementation of the legal framework, **statistical** data are missing, as well as **case-law** and citizen-friendly instructions on **reporting** violations. Capacities in oversight bodies on the methodology of pro-actively detecting conflict of interest could be enhanced through methodological guidance and interactive **trainings** using simulated conflict of interest audits.

The **recommendations** in detail are as follows (abbreviations of legal norms are defined below in chapter 3.1):

1. The **complexity** of the regulations should be broken down by consolidating rules as much as possible.
2. It should be reviewed to what extent the **CoJReg** is of added value and whether it is supported by a statutory basis. If at all, it should apply only to judicial decisions. Instead, a **didactical guidance** ("conflict of interest at a glance") would appear to be more relevant to make the complex legal framework accessible to users.
3. The definition in Article 2 LPC should be extended to **perceived** conflict of interest.
4. Consider clarifying the reference in **Article 35 LPC** to designate the LSJ also for defining conflict of interest.
5. The wordings of Article 75 para. 1 no. 3 **CrimProcCode** and of Article 21 para 1 no. 2 **CivProcCode** need to be aligned.
6. It should be clarified on some level, if only by a decision or explanation of the Council of Judges, that private interests do not constitute a conflict of interest, if **all other judges** in the country would have a similar conflict of interest.
7. The definition in **Article 2 CoJReg** of "subjects to conflict of interest" should be replaced by a neutral term, list, or reference to other laws including all stakeholders.
8. Notwithstanding recommendation 7, the definition in **Article 2 CoJReg** of conflict of interest should be erased. Instead of this definition, an instruction to the reader on existing definitions in statutes, and their applicability to judicial and non-judicial decisions would be more beneficial for the reader of this Regulation.

9. The definition in Article 2 CoJReg of "**closely connected** persons" should be erased.

10. It should be reviewed whether any of the definitions in Article 2 CoJReg is necessary, depending on whether an **updated CoJReg** will actually define obligations of judicial officials.

11. Consider amending the **post-employment** restrictions with regard to arguing cases at the former court.

12. Approve the Regulation on the Judges' Assistants, which should be in line with all statutory conflict of interest provisions.

13. **Article 16 CoJReg** should be reviewed regarding its alignment with the CivProcCode and the CrimProcCode.

14. It should be considered to amend procedural law to allow for recusal already at the pre-trial stage.

15. Article 15 CoJReg should be revised or replaced by recommendations illustrated with **practical examples**.

16. Judges should have to **disclose** any circumstances to the parties which might give grounds for complaint of conflict of interest.

17. The Council of Judges should define conditions and templates for transferring shares and similar rights into a **blind trust**.

18. **Article 9 para. 5** CoJReg should either be deleted (without the envisaged regulation being necessary), or the details mentioned in it should be regulated in the CoJReg itself.

19. The reference in **Art. 9 para. 1** and para. 6 CoJReg to the LSJ should be updated tallying the current version of the LSJ.

20. The NAPC should develop and apply a **methodology** for detecting and tracing conflicts of interest.

21. The Commission should verify a **sample** of declarations of sitting judges; in this regard, it should be considered to revise Art. 61 para. 5 LSJ as to foresee such verification.

22. The declaration of **family ties** should extend to judges' assistants.

23. Consider replacing the strict preclusion in Art. 107 para. 8 LSJ by a more flexible approach, such as the possibility of precursory review of **abusive complaints**.

24. Provide more guidance to the **public** on submitting complaints in line with European good practices.

25. Provide for **anonymous** reporting channels and follow up on anonymous complaints that are substantiated.

26. Align the **whistleblower** protection mechanism in the LPC with the Council of Europe Recommendation on whistleblower protection.

27. Consider upgrading the **user-friendliness** of the **Commentary** and providing more interpretative guidance, incorporating also existing cases and court decisions.

28. Consider introducing the possibility of **anonymous requests** for advice, which are published together with the advice and listed in an easy to use index.

29. Consider lowering the **threshold** in Art. 364 CC for "substantial damage".

30. Consider broadening the scope of Art. 366-1 CC to **non-financial** positions.

31. Provide **statistical** information on the website of the High Council of Judges, showing the full disciplinary chain from complaints to investigations to sanctions.

2. INTRODUCTION

2.1. Terms of Reference

This Report reviews the **entire chain** of managing conflict of interest starting with the definition of limits, procedures for managing conflict of interest, mechanisms of oversight (including complaints), and sanctions. It analyses the current framework from a regulatory perspective and by assessing the actual capacities of oversight bodies in preventing and detecting conflict of interest.

The focus of this assessment is on **judges** and on their judicial **decisions**. Judicial decisions are the key function of the judiciary and only judges are responsible for them. This assessment also reviews conflict of interest of **lay** judges and **jurors**, and of judicial **secretaries**. To some extent, **non-judicial** staff, such as back-office administrators could also be subject to conflict of interest (for example, in the area of procuring goods or services for the judiciary). However, this area of conflict of interest is of little relevance compared to judicial decisions. It is rather administrative action which falls under the general civil service framework. Examining the general civil service framework would go beyond the scope of this exercise and of the USAID New Justice Program.

The **Constitutional Court** is formally not part of the Judiciary in Ukraine and is thus not part of this assessment. Furthermore, rules on **gift-giving** are more related to bribery than to conflict of interest and are thus not subject of this report.

The Report is based on a **desk review** in particular of the following documents (English translations as available online or otherwise as provided by the Project):

- Laws
  - Constitution (as amended by Law No. 1401-VIII of 2 June 2016);
  - Law On Preventing Corruption (as amended by Law No. 1022-VIII of 15 March 2016);
  - Law On the National Anti-Corruption Bureau (as amended by Law No. 901-VIII dated 23 December 2015);
  - Law On the Judiciary and the Status of Judges (as of July 2016);
  - Civil Procedure Code (as amended by Law No. 4176-VI of 20 December 2011);
  - Criminal Procedure Code (as amended by Law No. 1798-VIII of 21 December 2016);
  - Civil Service Law (Law No. 889-VIII of 10 December 2015);
  - Regulation on Controlling Compliance with the Legislation with Regard to Conflict of Interests in Activities of Judges and Other Representatives of the Judicial System and Rationalizing such Legislation (Decision of the Council of Judges of Ukraine No. 2 of 4 February 2016);
  - Judicial Code of Ethics (as adopted by the XIth Congress of Judges on 22 February 2013);
  - Commentary on the Judicial Code of Ethics, 165 pages (as adopted by the Council of Judges on 4 February 2016 by Decision No. 1);
  - Law on the High Council of Justice (Law No. 1798-VIII of 21 December 2016);
  - Criminal Code (as amended by Law No. 1798-VIII of 21 December 2016);
  - Code of Administrative Offences (as amended by Law No. 1798-VIII of 21 December 2016).
- Reports
  - 3rd Round Monitoring Report of the Organisation for Economic Co-operation and Development Anti-Corruption Network – OECD/ACN (24 March 2015);

- Group of States against Corruption (GRECO), Fourth Round Evaluation Reports on judicial ethics, various country reports;
- Transparency International, National Integrity System Assessment Ukraine (2015);
- Venice Commission, Opinion no. 801/2015 (CDL-REF(2015)007), on the Law On the Judicial System and the Status of Judges;
- Organization for Security and Co-operation in Europe (OSCE), Office for Democratic Institutions and Human Rights, Opinion on the Qualification Assessment Procedure of Judges of Ukraine, JUD-UKR/278/2015;
- Council of Europe Parliamentary Assembly, Report of 19 May 2015, Judicial Corruption: urgent need to implement the Assembly's proposals.

A three-day field **mission** to Kyiv from 24 to 26 May 2017 served to discuss preliminary findings with stakeholders, to assess the capacities of oversight bodies, and to discuss key points at a public conference of the judiciary. The field mission included meetings with representatives of the following:

- Council of Judges;
- High Council of Justice;
- High Qualification Commission of Judges of Ukraine;
- Public Council of Integrity (including representatives of NGOs);
- National School of Judges.

Following the field mission, the draft report was slightly adapted and finalised on 30 May 2017.

2.2. Judicial conflict of interest: international standards

The "**Bangalore Principles** of Judicial Conduct"[1] and accompanying documents contain the most comprehensive guidance on conflict of interest. The Bangalore Principles define conflict of interest as follows:

> "*4.7 A judge shall inform himself or herself about the judge's personal and fiduciary financial interests and shall make reasonable efforts to be informed about the financial interests of members of the judge's family.*
>
> *4.8 A judge shall not allow the judge's family, social or other relationships improperly to influence the judge's judicial conduct and judgment as a judge.*
>
> *4.9 A judge shall not use or lend the prestige of the judicial office to advance the private interests of the judge, a member of the judge's family or of anyone else, nor shall a judge convey or permit others to convey the impression that anyone is in a special position improperly to influence the judge in the performance of judicial duties.*"

The Bangalore Principles also contain a provision on managing conflicts of interest:

> "*2.5 A judge shall disqualify himself or herself from participating in any proceedings in which the judge is unable to decide the matter impartially or in which it may appear to a reasonable observer that the judge is unable to decide the matter impartially. Such proceedings include, but are not limited to, instances where […]*
>
> *2.5.2 the judge previously served as a lawyer or was a material witness in the matter in controversy; or*
>
> *2.5.3 the judge, or a member of the judge's family, has an economic interest in the outcome of the matter in controversy:*

[1] Available on http://www.judicialintegritygroup.org/jig-principles .

> *Provided that disqualification of a judge shall not be required if no other tribunal can be constituted to deal with the case or, because of urgent circumstances, failure to act could lead to a serious miscarriage of justice.*"

The "Measures for the **Effective Implementation** of the Bangalore Principles of Judicial Conduct"[2] contain only the recommendation (No. 2) of providing ethical advice to judges. By contrast, the "**Commentary** on the Bangalore Principles of Judicial Conduct"[3] provides quite comprehensive guidance on the **definition** of conflicts of interest (No. 67-69) including **perceived** conflicts of interest (No. 52), **avoiding** conflicts (No. 66), and **post-judicial** employment (No. 91).

The "Implementation Guide and Evaluative Framework for Article 11 [of the United Nations Convention against Corruption – **UNCAC**][4] by the "United Nations Office on Drugs and Crime" (**UNODC**) focuses to a large extent on disclosure systems (pages 20-23). This aside, little further guidance exists on what above international standards mean in practice.

The guidance by the **Council of Europe** rather pales in comparison to above standards. There is not even a definition of conflict of interest or a standard on managing them during procedures.[5] The "Consultative Council of European Judges" (CCJE) has briefly addressed "impartiality and other professional activities of judges" in its Opinion no. 3 "on the principles and rules governing judges' professional conduct, in particular ethics, incompatible behaviour and impartiality" (at No. 37-39). Furthermore, Recommendation CM/Rec(2010)12 by the Committee of Ministers contains a brief, general statement on incompatibilities (at No. 21):

> "*Judges may engage in activities outside their official functions. To avoid actual or perceived conflicts of interest, their participation should be restricted to activities compatible with their impartiality and independence.*"

Similar is true for Decision no. 5/14 on "Prevention of corruption" by the Ministerial Council of the "Organization for Security and Co-operation in Europe" (**OSCE**) of 5 December 2014:

> "*Adopt, maintain and strengthen systems that prevent conflicts of interest in the public sector, including, for example, by addressing conflicts of interest through enforceable codes of conduct and by establishing and strengthening asset declaration systems applicable to public officials and politically exposed persons, in accordance with the fundamental principles of their domestic law […].*" [6]

The OSCE's "Opinion on the Qualification Assessment Procedure of Judges of Ukraine" (2012)[7] also does not mention conflicts of interest as an issue. This aside, it is interesting to note that the following international documents focus on general judicial integrity without addressing conflicts of interest at all:

- The **International Bar Association** Judicial Integrity Initiative: "Judicial Systems and Corruption" (May 2016);[8]
- The **UNDP**'s "Strengthening Judicial Integrity through Enhanced Access to Justice" paper (2013) does not address conflicts of interest;
- The **U4** Issue 2015:6 "Corruption risks in the criminal justice chain and tools for assessment"[9] explicitly excludes conflicts of interest from the scope of discussion.

---

[2] Of January 2010, http://www.judicialintegritygroup.org/jig-principles/jig-implementation .

[3] Judicial Integrity Group, March 2007, http://www.judicialintegritygroup.org/jig-principles/jig-commentary.

[4] Of 2015, www.unodc.org/documents/corruption/Publications/2014/Implementation_Guide_and_Evaluative_Framework_for_Article_11_-_English.pdf.

[5] The Council of Europe's Model Code of conduct for public officials does not apply to judges (Article 1 para. 4).

[6] Document MC.DEC/5/14, https://www.osce.org/cio/130411?download=true.

[7] Opinion-Nr.: JUD-UKR/278/2015, www.osce.org/odihr/200676?download=true.

[8] http://www.ibanet.org/Legal_Projects_Team/judicialintegrityinitiative.aspx.

[9] At page 5, http://www.u4.no/publications/corruption-risks-in-the-criminal-justice-chain-and-tools-for-assessment/.

2.3. Data on actual judicial conflict of interest in Ukraine

There are plenty of surveys on corruption in Ukraine, **none** of which addresses **conflicts of interest**, let alone specifically for the judiciary.

As for general **judicial integrity**, a comparative analysis[10] of surveys conducted between 2007 and 2015 ranks the judiciary as one of the top sectors: **66%** of respondents perceive it to be corrupt (at page 9). The percentage of respondents expressing **trust** in the judicial system appears having decreased from 7,6% to 3,1%, the lowest value of all sectors addressed in the survey (at. page 19). Similarly, the number of respondents perceiving the judiciary "willing to overcome corruption" dropped from 6.9% to 3.8% (2011 to 2015; at page 23). At the same time, the level of **bribery** as reported by respondents of the surveys **increased** from 26.3% to 32.9% (page 42).

This number tallies with the results of another survey published in 2016. 34% of respondents confirmed that during the last six months friends or relatives had to pay a **bribe** in court.[11] This makes the judiciary the second most affected sector after the Prosecutor's Office (41%). Respondents of the same survey list "**judicial reform**" as the fourth top priority (22% of respondents) after "Reform of healthcare system", "New faces in government", and "Anti-corruption reform" (at page 25).

According to another survey[12] conducted in 2016, the second biggest obstacle for investment in Ukraine is lack of **trust** in the judiciary (7.5 points). Among the most positive actions that the government of Ukraine has to take to attract foreign investment, businesspeople give the highest priority to **vetting** existing and hiring **new judges** (average score – 7.6 points out of 10 possible). Second ranks "**prosecuting** high-level officials and **judges** for corruption" (7.4 points).

As for the identification of corruption risks, it is interesting to note that the following do not mention judicial conflict of interest:

- Government of Ukraine Report on Diagnostic Study of Governance Issues Pertaining to Corruption, the Business Climate and the Effectiveness of the Judiciary, Prepared with the Assistance of the Legal Department of the **International Monetary Fund**, 11 July 2014;[13]
- **European Commission** Staff Working Document, Sixth Progress Report on Ukraine's implementation of the Action Plan on Visa Liberalisation (December 2015);[14]
- **European Commission** Staff Working Document, Association Implementation Report on Ukraine, (December 2016).[15]

The **GRECO** Fourth Evaluation Round Report on Ukraine is not yet available. GRECO's calendar foresees it to be adopted at its plenary session 19-23 June 2017.

[10] Kiev International Institute of Sociology (2016), Corruption in Ukraine, Comparative Analysis of National Surveys: 2007, 2009, 2011, and 2015, http://kiis.com.ua/materials/pr/20161602_corruption/Corruption in Ukraine 2015 ENG.pdf.

[11] Rating Group Ukraine/International Republican Institute (2016), Public Opinion Survey, Residents of Ukraine, page 9, http://www.iri.org/sites/default/files/wysiwyg/2016-07-08_ukraine_poll_shows_skepticism_glimmer_of_hope.pdf .

[12] Dragon Capital (Kyiv) and the European Business Association (2016), http://www.dragon-capital.com/files/uploads/2016_09_14_InvestorSurveyResults.pdf.

[13] https://www.imf.org/external/pubs/ft/scr/2014/cr14263-a.pdf.

[14] SWD(2015) 705 final, https://ec.europa.eu/home-affairs/sites/homeaffairs/files/e-library/documents/policies/international-affairs/general/docs/swd_sixth_report_on_the_implementation_by_ukraine_of_the_action_plan_on_visa_liberalisation_en.pdf.

[15] SWD(2016) 446 final.

3. REGULATORY FRAMEWORK

3.1. Interplay of norms

The following regulations are relevant in the context of conflict of interest:

- Constitution (Const);
- Statutory level:
  - Law On Preventing Corruption (LPC);
  - Law On the Judiciary and the Status of Judges (LSJ);
  - Civil Procedure Code (CivProcCode);
  - Criminal Procedure Code (CrimProcCode);
  - Civil Service Law (CivServL).
- Sub-statutory level:
  - Regulation by the Council of Judges on Controlling Compliance with the Legislation with Regard to Conflict of Interests in Activities of Judges and Other Representatives of the Judicial System and Rationalizing such Legislation (CoJReg);
  - Judicial Code of Ethics (JudCoEthics);
  - Commentary on the Judicial Code of Ethics.

The different stakeholders in the judiciary are affected by these provisions as follows:

Position	Relevant law	Key article(s)
Judge	Constitution LPC LSJ CivProcCode CrimProcCode CoJReg JudCoEthics	Art. 126 Art. 3 para. 1 No. 1 lit. e Art. 54 Art. 20-21 Art. 75-76 Art. 1-21 (all) Art. 2 and 18
Juror, lay judge	LPC CrimProcCode	Art. 3 para. 1 No. 1 lit. e Art. 75-76
	Note 1: The CoJReg is not applicable to jurors. The Regulation could only be based on Art. 133 para. 8 no. 6 LSJ, which solely refers to conflict of interest of judges. Note 2: While the LPC mentions “lay judges” (also sometimes translated as “people’s assessors”) in its Art. 3, they do not exist (yet) as part of the judiciary.	
Expert, scholar, interpreter	LPC CivProcCode CrimProcCode	Art. 3 para. 2 Art. 22 Art. 79
Secretary of judicial session	LPC CivProcCode CrimProcCode Civil Service Law	Art. 3 para. 2 Art. 22 Art. 79 Art. 8 para. 1 No. 10
CoJ (Members)	LPC	Art. 3 para. 1 No. 1 lit. e
HCJ (Members)	LPC	Art. 3 para. 1 No. 1 lit. e
Public Council of Integrity (Members)	LPC LSJ	Art. 3 para. 1 No. 1 lit. e Art. 87
High Qualification Commission (Members)	LPC LSJ	Art. 3 para. 1 No. 1 lit. e Art. 87
Other court employees	LPC CivServL	Art. 3 para. 2 Art. 8 para. 1 No. 10

The Law on Preventing Corruption is the main regulatory reference point, in particular for the definition of conflict of interest and for annual declaration of assets and interests. However, in the area of judicial procedures, the Civil and Criminal Procedure Codes precede the Law on Preventing Corruption. The LPC and the LSJ both contain further provisions, in particular on incompatibilities and oversight bodies. On a sub-statutory level, the CoJReg provides further details, in particular on voluntary annual disclosures. Thus, a **complex interplay** of laws regulates conflict of interest of **judges**:

TOPIC	JUDICIAL DECISIONS	NON-JUDICIAL DECISIONS
1. Defining the limits		
Conflict of interest	LPC, CivPC, CrimPC, CoJReg	LPC
Incompatibilities	Const, LPC, LSJ	Const, LPC, LSJ
Post-employment	LSJ, LPC	LSJ, LPC
2. Managing		
Disclosure	CivPC, CrimPC	LPC
Recusal	CivPC, CrimPC	LPC
Other	LSJ, CoJReg	LPC
3. Oversight		
Annual declarations	LPC, LSJ, CoJReg (voluntary)	LPC, LSJ, CoJReg
Commencement	not applicable	LSJ, LPC
Promotions	not applicable	LSJ, LPC
Audits etc.	CoJReg	LPC
Complaints		
External	LPC, LSJ, CoJReg	LPC, LSJ, CoJReg
Anonymous	LPC (yes); LSJ (no)	LPC (yes); LSJ (no)
Whistleblowers	LPC	LPC
4. Oversight bodies		
Council of Judges	Const, LSJ	Const, LSJ, LPC
High Council	Const	LSJ, LPC
National Agency	not applicable	LPC
5. Sanctions		
Criminal, administrative	Const	Const
Disciplinary	LSJ, CoJReg	LSJ, CoJReg
Civil liability	LPC	LPC
Contestability	CivProcCode, CrimProcCode	not applicable
Bans	LPC, LSJ	LPC, LSJ

3.2. Appraisal

The following observations can be made regarding the interplay of norms:

There are **six layers** of norms (counting civil and criminal procedural law as only one layer) regulating conflict of interest of judges. This creates a very complex mechanism. It took the author of this report one week to fully grasp only the interplay of norms. Article 9 para. 5 CoJReg even foresees a seventh layer, by delegating regulation to some sort of sub-regulatory level. All in all, this raises the question, whether the system is actually user-friendly to a judge, who faces a conflict of interest situation and does not have one week of time to research an answer. A high complexity of laws is also often a source of contradictions and legal uncertainty. In particular in the area of anti-corruption laws, one should avoid such risks.

Recommendation 1: *The complexity of the regulations should be broken down by consolidating rules as much as possible. Judges and other staff should receive an easily understandable instruction on conflict of interest and the applicable laws.*

The CoJReg creates new definitions, rights, and obligations of judges and other stakeholders. Thus, the Council of Judges needs a **statutory basis** for adopting such a rather far-reaching legal document. The LSJ defines the powers of the Council of Judges in its Article 133. Para. 8 no. 6 appears to be the only provision somewhat relevant in this regard:

> *"The Council of Judges of Ukraine shall: […] exercise control over the compliance with legislation on resolving the conflict of interests in the activity of the judges, […]; adopt decisions on resolving the actual or potential conflict of interest in the activity of the above persons (if such a conflict cannot be resolved in the manner prescribed by procedural law) […]."*

Obviously, the Council is free to define its own procedures of exercising above power of "controlling compliance" with conflict of interest legislation. It is also free, to issue recommendations, instructive guidance including case examples, or didactical explanations of existing laws. However, Article 133 para. 8 no. 6 LSJ does **not** seem to be a **sufficient** basis for the Council to adopt a "Regulation" that defines or redefines obligations of judges. In addition, the LSJ could only provide a basis for regulating judicial conflict

of interest (see below at no. 4.1.1 lit. a), while the CoJReg also addresses non-judicial decisions. This aside, it is questionable, whether a 13 pages legal document makes the application of and compliance with already existing provisions easier. Furthermore, the CoJReg applies to both, judicial and non-judicial decisions. However, for non-judicial decisions the LPC applies. The CoJReg cannot deviate from this statute. Thus, if at all, the CoJReg should apply only to judicial decisions.

Recommendation 2: *It should be reviewed to what extent the CoJReg is of added value and whether it is supported by a statutory basis. If at all, it should apply only to judicial decisions.*

4. DEFINING THE LIMITS

Sections 4 to 7 focus on conflict of interest in judicial decisions. In addition, all three sections address also non-judicial decisions (procurement and similar administrative decisions by judges and other court personnel) to some extent.

4.1. Judicial decisions

The following stakeholders can be in conflict of interest while contributing to a judicial decision:

- Judges;
- Jurors;

- Secretaries of judicial session;
- Experts;
- Scholars;
- Interpreters.

4.1.1. Conflict of interest

a. Interplay of norms

The Constitution mentions "conflict of interest" in Art. 126 para. 6 no. 2 without defining it:

> "*The grounds for dismissal of a judge are as follows: […] 2. violation of the conflict of interest requirements by the judge*".

The LSJ also mentions "conflict of interest", in particular in Art. 106 para. 7 (disciplinary liability), again without defining it. Thus, on a statutory level, the LPC is the only provision providing a definition of conflict of interest in Article 1:

> *"potential conflict of interest – presence of a person's private interest in the area in which he/she exercises his/her official or representative powers that could affect the objectivity or impartiality of his/her decisions or affect the commitment or non-commitment of actions in the exercise of mentioned activities;*
>
> *private interest - any tangible or intangible interest of a person including that which is caused by personal, familial, friendly, or other off-duty relationship with natural persons or legal entities, including those arising from membership or activity in social, political, religious or other organizations;*
>
> *real conflict of interest – contradiction between private interest of a person and his/her official or representative activities which affects the objectivity or impartiality of his/her decisions and commitment or non-commitment of actions in the exercise of mentioned activities;"*

The LPC is applicable to all judges according to its Article 3 para. 1:

> "*Subjects covered by this Law are: […] d) judges of the Constitutional Court of Ukraine, other professional judges, members, disciplinary inspectors of the High Qualifications Commission of Judges of Ukraine, officials of the Secretariat of this Commission, the Head, Deputy Head, secretaries of sections of the High Council of Justice and other members of the High Council of Justice, people's assessors and jurors (in the exercise of their functions*".

The LPC makes one exception – for **resolving** conflict of interest during **procedures**, Article 35 para. 1 LPC explicitly refers to the LSJ:

> "*Rules for resolving conflict of interest in the activities of […] judges of courts of general jurisdiction […] are determined by the laws governing the status of the respective persons and the basis of the organization of respective bodies.*"

However, the LSJ does not contain any "rules for resolving conflict of interest". It implicitly refers, though, to procedural law in this regard (Article 106 para. 7 – disciplinary liability for conflict of interest; Article 133 para. 8 no. 6 – power of the Council of Judges regarding conflict of interest).

The basic procedures for **resolving** conflict of interest are contained in Articles 23 to 25 CivProcCode and Articles 75-76 CrimProcCode. In addition, the CivProcCode and CrimProcCode contain both an autonomous definition of **procedural** conflict of interest. Article 20 to 21 CivProcCode contain the following categories of procedural conflict of interest:

- Previous involvement in the case;
- Family connections to the parties and other stakeholders of the procedure, including judges on the panel;

— Direct or indirect interest in the outcome of the case;

— Doubt on the objectivity and impartiality.

Article 75 CrimProcCode defines similar categories. Taken verbally, both definitions deviate from the definition contained in Article 1 of the **LPC**. In addition, The LPC (Article 35) designates the procedural laws only as special provisions regarding "resolving" conflict of interest, but not regarding "defining" conflict of interest. As a consequence, the **LSJ** and the LPC would conflict. However, the LPC's designation in Article 35 probably implicitly also includes "defining" conflict of interest for the purpose of procedural law.

For **jurors**, secretaries of judicial sessions, **experts**, scholars, and interpreters basically the same definition of conflict of interest applies as for judges (see Article 22 CivProcCode; Article 79 CrimProcCode).

The **JudCoEthics** also refers twice to conflict of interest:

> "*Article 2: A judge shall avoid any improper influence on his/her activities pertaining to the administration of justice and be independent of his/her colleagues in the process of making decisions. He/she is not entitled to use his/her judicial status to advance personal interests or interests of other persons or allow other persons to do this.*
>
> *Article 18: A judge shall be aware of his/her financial interests and take reasonable steps to be aware of the financial interests of his/her family members.*"

b. Appraisal

LPC

The definition in Article 1 LPC is by and large in line with international standards. This concerns in particular the Bangalore Principles. One should also mention in this context the Council of Europe Model code of conduct for public officials, which describes conflict of interest as follows:[16]

> "*Conflict of interest arises from a situation in which the public official has a private interest which is such as to influence, or **appear** to influence, the impartial and objective performance of his or her official duties.*"

The term "appear" refers to **perceived** conflict of interest. In such a situation, it appears that a public official's private interests could improperly influence the performance of their duties, but this is not in fact the case.[17] For example: A judge tries the case of somebody who had been his best friend in school. An outsider knowing both might perceive a private interest, whereas in reality, the judge is largely estranged from the friend. Another example: A judge used to own a company which he fully sold years ago. Outsiders might still associate the judge's name with the company and perceive a private interest, even though the public official might genuinely not care about it anymore at all.[18] For this reason, the Organisation for Economic Co-operation and Development (OECD) recommends:

> "*In general, the **appearance** of a conflict of interest is also to be avoided, to minimise the risk to the organisation's reputation (and officials' personal reputation) for integrity. As **perceived** conflict of interest could be similarly harmful to the trust in public decision making, managers should also consider perception when they decide on specific cases.*"[19]

Both, the OECD Toolkit as well as the Council of Europe Model code of conduct cover only executive public officials. However, the Bangalore Principles include perceived conflict of interest ("in which it may

[16] Article 13, https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016805e2e52 (emphasis by author); however, it should be noted that the Model Code does not apply to judges.

[17] OECD (2005), Managing Conflict of Interest in the Public Sector: A Toolkit, http://www.oecd.org/gov/ethics/49107986.pdf.

[18] Example taken from Council of Europe/Tilman Hoppe, Legislative Toolkit on Conflict of Interest (2015), http://www.coe.int/t/DGHL/cooperation/economiccrime/corruption/Projects/PCF%20Regional/PCF-Regional-TP_default.asp.

[19] OECD Toolkit (ibid), page 8 (emphasis by author).

appear to a reasonable observer"). Similarly, the Council of Europe Recommendation of 2010 on judges explicitly states the need to "avoid actual or **perceived** conflicts of interest" (at no. 21). The Commentary on the Bangalore Principles underlines the importance of addressing perceived conflict of interest (at No. 51):[20]

> "*The perception that a judge is not impartial may arise in a number of ways, for instance, by a **perceived** conflict of interest, by the judge's behaviour on the bench, or by the judge's out-of-court associations and activities.*"

Recommendation 3: *The definition in Article 2 LPC should be extended to perceived conflict of interest.*

The LPC (Article 35) designates the procedural laws only as special provisions regarding "resolving" conflict of interest, but not regarding "defining" conflict of interest. As a consequence, the LSJ and the LPC would conflict, since they both contain different definitions. One could probably argue that the LPC's designation in Article 35 implicitly also includes "defining" conflict of interest for the purpose of **procedural** law. However, this could be an issue for clarification.

Recommendation 4: *Consider clarifying the reference in Article 35 LPC to designate the LSJ also for defining conflict of interest.*

Procedural law

The provisions in Articles 21 to 22 CivProcCode define conflict of interest comprehensively. In particular the two open clauses in Article 20 para. 1 CivProcCode give the definition a wide and all-inclusive scope:

> "*A judge may not participate in the trial and be a subject to challenge (rejection of self) if: […]*
>
> *2) he/she directly or indirectly is interested in the result of the case; […]*
>
> *4) if there are other circumstances that raise a doubt on the objectivity and impartiality of judges.*"

This would probably even include **perceived** conflict of interest ("circumstances that raise a doubt"). This aside, Articles 21 to 22 CivProcCode align with the definition in Article 20 (on judges) of the Council of Europe's "Legislative Toolkit on Conflict of Interest".[21] However, it should be noted that Article 75 para. 1 no. 3 CrimProcCode differs from Article 20 para 1 no. 2 CivProcCode:

> *"A judge may not participate in the trial and be a subject to challenge (rejection of self) if: […]*
>
> *2) he/she ~~directly or indirectly~~ personally, his close relatives or family members, are interested in the result of the case; […]*"

This seems to be the clearer wording. In any case, it would seem preferable to align both provisions, as otherwise one could (mis-)construe the difference as being intended or meaningful.

Recommendation 5: *The wordings of Article 75 para. 1 no. 3 CrimProcCode and of Article 20 para 1 no. 2 CivProcCode need to be aligned.*

As a notable feature, jurors are covered as well by the conflict of interest provisions of the CrimProcCode in Article 75.

Neither the LPC nor the procedural law address the following case: A case before a judge could concern the general validity of a salary cut or raise in the judiciary. The judge would "directly or indirectly be interested in the result of the case" (Art. 20 para. 1 no. 2 CivProcCode). However, the case could not be transferred to any other judge, as **all judges** would share the same personal interest. Thus, Article 20 para. 2 of the Council of Europe Legislative Toolkit on Conflict of Interest makes the following exception: "Private interests do not constitute a conflict of interest, if all other judges in the country would have a similar conflict of interest."

[20] Emphasis by author.

[21] Footnote 18.

Recommendation 6: *It should be clarified on some level, if only by a decision or explanation of the Council of Judges, that private interests do not constitute a conflict of interest, if all other judges in the country would have a similar conflict of interest.*

CoJReg

Article 2 defines "subjects to conflict of interest" as "judges of general jurisdiction courts and other judicial system representatives". First, this definition is possibly offensive, as it presumes that all judges are per se in conflict of interest; a more fitting term could be "subjects to possible conflict of interest". Second, it is not a definition, but rather creating ambiguity itself, as it is not clear who "other judicial system representatives" are. For example, are jurors included?

Recommendation 7: *The definition in Article 2 CoJReg of "subjects to conflict of interest" should be replaced by a neutral term, list, or reference to other laws including all stakeholders.*

There is no need for the CoJReg to double the definitions contained in the LPC (private interest, potential/actual conflict of interest): sub-statutory regulations cannot narrow or extend the scope of statutory regulations. On the contrary, the duplication in Article 2 is confusing. First, any user of the Regulation would need to read not only one regulation but two, and check if the definition in the CoJReg deviates from the LPC (it does not, but the CoJReg does not explicitly state this to the reader). Second, if the LPC would be revised, the CoJReg would also need to be revised, which would only come with delay if at all. Third, the CoJReg appears to apply to both, judicial and non-judicial procedures (for example the procurement of books by the judiciary). Why does it only duplicate the definition by the LPC, but not that of the procedural laws? Regulations should be reader-friendly, concise, and only contain provisions that add something to existing regulations. Useless repetitions in legal drafting are a source of corruption in and of itself.[22] The long and legalistic title of the CoJReg in and of itself seems to be already rather deterring to potential users.

Recommendation 8: *Notwithstanding recommendation 7, the definition in Article 2 CoJReg of conflict of interest should be erased. Instead of this definition, an instruction of the reader of existing definitions in statutes, and their applicability to judicial and non-judicial decisions would be more beneficial for the reader of this Regulation.*

Article 2 also defines "related persons". However, the CoJReg uses this term only once, in Annex 8, and only by referencing the definition of the LPC.

Recommendation 9: *The definition in Article 2 CoJReg of "related persons" should be erased.*

In fact, most definitions in Article 2 are not necessary and only turn the document heavy on words. For example, the CoJReg defines in Article 2 "public interest". However, the term is not used once within the Regulation. Only Article 8 no. 5 refers to "public interest" – but in the sense of "interest in transparency and civil oversight", while Article 2 defines "public interest" in the sense of "impartiality and objectivity of the judiciary".

Recommendation 10: *It should be reviewed whether any of the definitions in Article 2 CoJReg is necessary, depending on whether an updated CoJReg will actually define obligations of judicial officials (see on this the following sections).*

JudCoEthics

The definitions in the JudCoEthics are rather value statements, than legalistic descriptions of exact boundaries. This is appropriate: First, there are sufficient definitions in other regulations. Second, Code of Ethics often are (and should be) positive value statements rather than legalistic documents. However, they can always be an additional legal reference, should a judge violate conflict of interest provisions.

[22] RCC/RAI, Tilman Hoppe, Anti-corruption assessment of legislation ("Corruption proofing"), Comparative Study and Methodology (2014), page 118 ("Wordiness") http://www.rai-see.org/doc/Comparative_Study-Methodology_on_Anti-corruption_Assessment_of_Laws.pdf.

4.1.2. Incompatibilities

Interplay of norms
The Constitution defines incompatibilities in Art. 127 para 2:

> "*A judge may not belong to any political parties, trade unions, engage in any political activity, hold a representative mandate, occupy any other paid positions, or perform other remunerated work except scholarly, teaching or creative activities.*"

Article 54 of LSJ further details and expands this list of incompatibilities, by prohibiting the following categories:

- Holding positions in other state bodies (except for secondment to judicial bodies);
- Being subject to lustration;
- Paid activities including entrepreneurial (with academic, teaching, and artistic activities excluded);
- Having a governing or supervisory function in a for-profit legal person;
- Holding shares;
- Being a member of political parties, trade unions, or candidacy for elections;
- Other as defined by the LPC.

The last option is not of practical relevance. The current version of the LPC does not foresee any other categories.

Article 27 para. 1 LPC contains additional "restrictions applying to the employment of close persons":

> "*[Judges] […] cannot have close persons directly subordinated thereto or directly report to close persons in exercising their duties.*"

Lay judges and **jurors** are exempt from this provision. For other court staff (secretaries etc.) the incompatibility provisions of the LPC apply (Article 25).

Appraisal
The Council of Europe's "Consultative Council of European Judges" (CCJE) rendered an Opinion in 2002 on **incompatible** behaviour and other questions. The Opinion states:

> "*[Judges] should therefore remain generally free to engage in the extra-professional activities of their choice. […] In the last analysis, the question must always be asked whether, in the particular social context and in the eyes of a reasonable, informed observer, the judge has engaged in an activity which could objectively compromise his or her independence or impartiality.*"[23]

Foreign laws have sometimes provided more specifications to this question, for example:

- **Germany**: In accordance with section 4(1) German Judiciary Act, judges may not take on judicial and legislative or executive duties simultaneously. However, in practice a number of judges are elected to bodies of local or regional self-government such as municipal councils. GRECO recently pointed out that this practice "raises questions with respect to the separation of powers, the risk of conflict of interest and the necessary independence and impartiality of the judiciary".[24]
- In **Spain**, judges are subject to a very strict regime of incompatibilities, much stricter than any other public servant. Judges cannot hold any paid jobs or professions (except teaching and legal research,

[23] Opinion no. 3 of the Consultative Council of European Judges (CCJE) "on the principles and rules governing judges' professional conduct, in particular ethics, incompatible behaviour and impartiality", at no. 27-28, https://wcd.coe.int/ViewDoc.jsp?id=1046405&Site=COE.

[24] GRECO, Fourth Evaluation Round, Evaluation Report, January 2015, at no. 152, http://www.coe.int/t/dghl/monitoring/greco/evaluations/round4/Eval%20IV/GrecoEval4(2014)1_Germany_EN.pdf. Examples taken from Bhutan Report; same with footnotes 11 and 13.

literary, scientific, artistic and technical papers), nor any position of popular election or political appointment or within the public administration (Article 389, Organic Law 6/1985 of the Judiciary).

— **Sweden**: Judges "may not appear as attorneys or public defence counsels, unless the Government (or the authority it designates) grants permission. Furthermore, judges are not allowed to be chief guardians or trustees. [...] [I]n practice, some judges engage in accessory activities such as writing, lecturing at university or during social gatherings for judges and lawyers, undertaking assignments as arbitrators, serving as members of Government commissions, etc. According to the established practice of the Judges Proposals Board, judges must not operate in profit-making companies or enterprises, except for family run businesses."[25]

— **Switzerland**: According to Section 19 of the Regulation for the Swiss Federal Court "(1) The following extra activities may be authorized: a. participation in arbitration, judicial bodies and expert commissions and mandates for mediation and expert opinions, as far as this is in the public interest. b. selective leturates, editing of commentaries, publication series and law journals; c. participation in organs of associations, foundations or other not-for-profit organizations. (2) No permit requires who writes books or articles, gives lectures or wants to participate in congresses and symposia."[26] The overly liberal application of this provision has been subject to criticism in the Swiss national press.[27]

One should also note the Explanatory Memorandum to the Council of Europe Recommendation CM/Rec(2010)12 on judges independence and other issues:

> "*Judges should be aware that their membership of certain non professional organisations may infringe their independence or impartiality. Each member state should determine which activities are incompatible with judges' independence and impartiality. For instance, incompatible activities have been identified, such as an* ***electoral mandate****, the profession of* ***lawyer****,* ***bailiff****,* ***notary****,* ***ecclesiastic*** *or* ***military*** *functions,* ***plurality*** *of judicial functions, etc. Having regard to the necessity of avoiding actual or perceived conflict of interest, member states may consider making information about additional activities* ***publicly available****, for instance in the form of registers of interests. Furthermore, in order to ensure that judges have the time to perform their primary function, that is to adjudicate, the* ***plurality*** *of mandates in various commissions should be* ***restricted*** *and cases in which the law prescribes for judges to sit on a commission, council, etc, should be limited.*"[28]

On compatibility of judge's office with **political** activity, the Commentary on the Bangalore Principles noted:

> "*The main [international] divergence, however, was in respect of political activity. In one European country, judges were elected on the basis of their party membership. In some other European countries, judges had the right to engage in politics and be elected as members of local councils (even while remaining as judges) or of parliament (their judicial status being in this case suspended). Civil law judges, therefore, argued that at present there was no general international consensus on whether judges should be free to participate in politics or not. They suggested that each country should strike its own balance between judges' freedom of opinion and expression on matters of social significance, and the requirement of neutrality. They conceded, however, that even though membership of a political party or participation in public debate on the major social problems might not be*

[25] GRECO, Fourth Evaluation Round, Evaluation Report, November 2013, at no. 115. www.coe.int/t/dghl/monitoring/greco/evaluations/round4/Eval%20IV/GrecoEval4(2013)1_Sweden_EN.pdf.

[26] Of 20 November 2006 (as of 17 March 2014), https://www.admin.ch/opc/de/classified-compilation/20063281/index.html (German; translation by author).

[27] Tagesanzeiger, 15 January 2014, „The additional source of income of the highest judges - Constitution and law prohibit secondary jobs for federal judges. Their own rules allow them, though - thanks to a legal finesse." [translation from German by author], http://www.tagesanzeiger.ch/schweiz/standard/Der-Zusatzverdienst-der-hoechsten-Richter/story/13572437?track.

[28] Explanatory Memorandum (CM(2010)147-add1) to the Recommendation CM/Rec(2010)12 of the Committee of Ministers to member states on judges: independence, efficiency and responsibilities, no. 29, https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=09000016805ce0df (emphasis by author).

prohibited, judges must at least refrain from any political activity liable to compromise their independence or jeopardize the appearance of impartiality."[29]

The Commentary also allows for the "acceptance of reasonable honoraria" (at no. 182):

"*A judge is not prohibited from accepting honoraria or speaking fees provided that the compensation is reasonable and commensurate with the task performed. A judge should ensure, however, that no conflicts are created by the arrangement. A judge must not appear to use his or her judicial position for personal advantage. Nor should a judge spend significant time away from court duties to meet speaking or writing commitments for compensation. In addition, the source of the payment must not raise any question of undue influence or the judge's ability or willingness to be impartial in matters coming before him or her as a judge.*"

The incompatibility provisions in the LPC and LSJ are comprehensive and by and large in line with these standards and country examples.

4.1.3. Post-employment restrictions

The Commentary on the Bangalore Principles states in this regard (at no. 91):

"*Offers of post-judicial employment may disqualify the judge. Related issues, requiring similar approaches, may arise in relation to overtures to the judge while still on the bench for post-judicial employment. Such overtures may come from law firms or prospective employers, from the private sector or the government. There is a risk that the judge's self-interest and duty may appear to conflict in the eyes of a reasonable, fair-minded and informed person considering the matter. A judge should examine such overtures in this light; particularly since the conduct of former judges often affects the public perception of the serving judiciary whom the judge has left behind in the judgment seat.*"

There are no post-employment restrictions in the Constitution or LSJ. Only the LPC contains provisions in this regard. **Judges** exercise no judicial functions after resigning office. Therefore the aforementioned exception in Article 35 para. 1 LPC does not apply:

"*Rules for resolving conflict of interest in the activities of […] judges of courts of general jurisdiction […] are determined by the laws governing the status of the respective persons and the basis of the organization of respective bodies.*"

Hence, the post-employment restrictions of Article 26 para. 1 LPC apply to judges and prohibit them:[30]

"*1) within a year from terminating appropriate activities to conclude labour agreements (contracts) or do transactions in the sphere of* ***business*** *activities with legal entities of private law or with physical persons – entrepreneurs, if the persons listed in Clause 1 of this Part for* ***a year*** *before the date of ceasing […] functions of preparing and taking appropriate decisions concerning activities of these legal entities or physical persons – entrepreneurs;*

2) to divulge or use it in other way in one's own interests the ***information*** *which they learnt due to performance of their duties, except for the cases established by the law;*

3) within ***a year*** *from terminating appropriate activities to* ***represent*** *the interests of any person in cases (including the cases which are tried in courts), in which the second party is represented by the body, enterprise, institution, organization where they had been working at the moment of termination of the above-mentioned activities.*"

No. 1 precludes judges from doing business with any party of a case they tried for one year after employment. No. 2 prohibits – without time limit – to use any information from case files for doing business (or other personal interests) after employment. No. 3 prohibits judges for one year from representing parties proceeding against the judiciary (e.g. a court employee suing the judiciary under labour law).

[29] UNODC, Commentary on the Bangalore Principles, page 16, http://www.unodc.org/unodc/en/corruption/publications.html.

[30] Emphasis by author.

The LPC is not a piece of legislation tailored to the situation of judges. Therefore, the following case would not be covered: A judge becomes a **lawyer** after retirement and argues a case at his/her former court. Acting as a lawyer before his former immediate colleagues grants him/her at least a perceived advantage. Thus, Article 20 para. 4 of the Council of Europe "Legislative Toolkit on Conflict of Interest" states: "Judges cannot provide legal services for a specified period of time after leaving office, […] at the courts at which they acted as judge during a specified past period of time."

Recommendation 11: *Consider amending the post-employment restrictions with regard to arguing cases at the former court.*

For other court staff (**secretaries** etc.) the post-employment restrictions of the LPC apply (Article 26).

4.2. Non-judicial decisions

4.2.1. Overview

For non-judicial decisions, the above conflict of interest definitions of the LPC apply (Articles 28 to 36) to judges and other court employees (secretaries etc.) equally. An example for such a decision is the registering of a case, scheduling a meeting with a judge, procuring books for the court library or tendering cleaning services for the court building.

4.2.2. Assistants

Highly relevant is the issue of "judge's assistants". They are neither civil servants nor public employees. Thus, they do not fall under the respective laws. Article 157 LSJ is the only regulation so far in this context:

> *1. Every judge shall have an assistant, whose status and conditions of work shall be determined by this Law and the Regulation on the Judges' Assistants approved by the Council of Judges of Ukraine.*
>
> *2. The judge's assistant shall be a citizen of Ukraine having a degree in Law and fluent in the official language. Assistants of justices of the Supreme Court should also have at least three years of professional activity in the field of law.*
>
> *3. Judges shall independently select assistants. The assistant of judge shall be appointed and dismissed by the chief of staff of the respective court based on the proposal of the judge.*
>
> *4. The judges' assistants involved in preparation of cases for consideration shall be accountable to the respective judge only.*

The "Regulation on the Judges' Assistants" (para. 1) has not been approved so far. The regulation would need to include incompatibilities, such as family members or persons of private interest, as there is a high risk of judges hiring members of their family to these positions.

Recommendation 12: *Approve the Regulation on the Judges' Assistants, which should be in line with all statutory conflict of interest provisions.*

For the inclusion of judges' assistants into the declaration of family ties, see below at no. 6.2.

5. MANAGING CONFLICT OF INTEREST

5.1. Judicial decisions

5.1.1. Ad-hoc conflict of interest

The procedural law foresees basically only one option for managing the conflict of interest: **recusal** (Art. 23 para. 1 CivProcCode; Art. 80 para. 1 CrimProcCode). This is by and large in line with international good practices (see Article 20 CoE Toolkit).

Articles 23 and 24 CivProcCode and Articles 80 and 81 CrimProcCode give "any of the stakeholders affected the possibility to bring the conflict of interest up. [It] also prevents court parties from abusing conflict of interest provisions by choosing to bring the issue up only at a **stage** when the evidence turns against them or it appears that the judge would decide the case against them."[31]

The **mandatory** recusal "is in principle an expression of judicial independence. However, there is a dilemma: if a judge is free to decide on his/her own on the recusal, a 'lazy' judge could easily get rid of cases. In addition, for one-bench-courts in small communities, this would require each time for another judge to travel to that court district. However, if a judge is not free to decide on his/her own recusal, but would for example need the consent of the court president or a Chief Justice (in Anglo-Saxon systems), this might affect the internal independence of a judge.

There seems to be no explicit guidance in the international standards as to whether a judge can be 'forced', for example by a **judicial council** of court president, to sit on a case he/she feels to be partial about.[32] […] [T]here appears to be no reason why a judge should not accept the decision by an independent judicial self-administration body. Therefore, it would be equally possible to have the judicial self-administration body advise or even bindingly decide on such matters.

However, it should be noted that international recommendations do expect that judges will take care to **reduce** the frequency of situations when recusal is needed. The UNODC Commentary on the Bangalore Principles of Judicial Conduct recommends that a judge 'organise his or her personal and business affairs in a way that minimizes the potential for conflict with judicial duties'.[33„34]

Still, procedural law is clear in that it **only** empowers the **judge** in question and his/her panel of judges to decide on the conflict of interest. It is thus at least questionable whether Article 16 CoJReg has any foundation in statutory law while it contradicts the provisions of the CivProcCode and the CrimProcCode.

Recommendation 13: *Article 16 CoJReg should be reviewed regarding its alignment with the CivProcCode and the CrimProcCode.*

The procedural law foresees recusal only at the **trial stage**. Ukrainian lawyers confirmed that it was not possible to construe the provisions *mutatis mutandis* to the pre-trial stage (checking the formalities of the case, setting a date, etc.).

---

[31] So in an international context: Council of Europe PCF-Project (2015)/Tilman Hoppe, Legislative Toolkit on Conflict of Interest (2015), commentary on Article 20.

[32] Council of Europe Recommendation CM/Rec(2010)12 of the Committee of Ministers to member states on judges: independence, efficiency and responsibilities, no. 29, https://wcd.coe.int/ViewDoc.jsp?id=1707137 (does not address the issue of recusal); Principle I 2 f, Council of Europe Recommendation (94)12 of the Committee of Ministers on the Independence, Efficiency and Role of judges, replaced by Rec(20109)12, https://wcd.coe.int/ViewDoc.jsp?Ref=Rec%2894%2912&Language=lanEnglish&Site=COE&BackColorInternet=DBDCF2&BackColorIntranet=FDC864&BackColorLogged=FDC864.

[33] UNODC commentary, ibid, p.63.

[34] Council of Europe PCF-Project (2015)/Tilman Hoppe, Legislative Toolkit on Conflict of Interest (2015), commentary on Article 20.

Recommendation 14: *It should be considered to amend procedural law to allow for recusal already at the pre-trial stage.*

The Ukrainian procedural law "also makes it clear that (non-)recusal of a judge is not at the **disposal** of the **parties**. There are two reasons for this: court parties should not be free to 'choose' their judge, even if they agree on this. More importantly, court parties are in a weak position when a judge in a possible conflict of interest asks them to consent to his/her sitting on the case: refusing the consent might offend the judge and possibly reflect back on the non-consenting court party."[35]

However, the **CoJReg** in its Art. 15 para. 1 no. 2 deviates from procedural law and suggests that disclosure to the parties in and of itself can resolve the conflict of interest: "For the purpose of resolving conflicts of interests on its own, the Conflict of Interests Entity will take one or several measures as listed below: […] Disclosure of information on the conflict of interests unless parties to the process or other stakeholder disqualify the entity after such disclosure". This provision has no ground in procedural law and is problematic as mentioned above.

Recommendation 15: *Article 15 CoJReg should be revised or replaced by recommendations illustrated with practical examples.*

The procedural law seems not to suggest that a judge has to **disclose** circumstances of possible private interest to the parties, even before having decided whether to recuse or not, or even after having decided that recusal is not necessary: "once a judge is assigned to a case, court parties have a right to know why the case was transferred to another judge; this rule avoids arbitrary reallocation of cases. Furthermore, a conflict of interest can be grounds for an appeal […]. The parties need to know about private interests in order to exercise their rights. Above all, though, the disclosure ensures that the issue is clarified at the earliest possible stage by all stakeholders affected, and that it will not come up only at the end of a lengthy trial, possibly rendering all efforts futile if the judge then recuses because of a conflict of interest."[36]

Recommendation 16: *Judges should have to disclose to the parties any circumstances which might give grounds for complaint of conflict of interest.*

5.1.2. Incompatibilities

As mentioned above (4.1.2), "persons who are owners of **shares** or own other corporate rights or have other proprietary rights or other proprietary interests in the operations of any legal entity the operations of which are aimed at getting income, shall be obligated to transfer such shares (corporate rights) or other relevant rights into the management of an independent third person (without a right of giving instructions to such person regarding disposition of such shares, corporate or other rights or regarding exercise of rights which arise therefrom) for the term of judicial office." (Article 54 para. 3 LSJ). While the CoJReg defines a lot of bureaucratic details without much need, the key question of how a judge could make such a transfer into a **blind trust** in a satisfactory manner, remains unanswered. An example can be found in model formulations of the U.S. Office of Government Ethics:

> *"The primary purpose of this Trust is to confer on the Trustee the sole responsibility to administer the trust and to manage trust assets without the participation by, or the knowledge of any interested party or any representative of an interested party. This includes the duty to decide when and to what extent the original assets are to be sold or disposed of and in what investments the proceeds of sale are to be reinvested."*[37]

Recommendation 17: *The Council of Judges should define conditions and templates for transferring shares and similar rights into a blind trust.*

---

[35] Ibid.

[36] Ibid.

[37] Model Qualified Blind Trust Provisions, OMB No. 3209-0007 (Revised 9/2013), http://www.oge.gov/Financial-Disclosure/Docs/Model-Qualified-Blind-Trust-Agreement/; for the detailed Canadian requirements, see Section 27 subsection 4 Conflict of Interest Act 2006.

5.2. Non-judicial decisions

For non-judicial decisions, the conflict of interest provisions of the LPC apply (Articles 28 to 36) to judges and other court employees (secretaries etc.) equally. For **judges**, the LSJ clarifies in Article 133 para. 10 that the Council of Judges is the "superior" of a judge:

> "*If a judge (except when the conflict of interest is governed by procedural law), the Chairperson or Deputy Chairperson of the High Qualifications Commission of Judges of Ukraine, Chairperson of the State Judicial Administration of Ukraine and his deputy has any real or potential conflict of interest, such person shall notify the Council of Judges of Ukraine of the same in writing not later than the next business day upon the emergence of such conflict of interest.*"

For other **court employees**, the Court Administrator as the chief of staff is the superior in the sense of the LPC. The Court Administrator in turn is subordinated to the Chief Judge of the respective court.[38]

Article 9 para. 5 of the CoJReg **delegates regulation** of "mandatory notices of conflict of interest" to "the Committee on Ethics, Resolution of Conflicts of Interests, and Professional Development of Judges of Ukraine", including "the form and procedures for submitting, accepting, registering, considering the mandatory notices of conflicts of interests, performing checks, and drafting decisions based on outcomes of consideration of such notices." This seems odd – a regulation (which itself is without a clear statutory basis) delegates further details to yet another regulation. In any case, it does not seem necessary to regulate all these details. This aside, this delegated regulation has not been drafted yet.

Recommendation 18: *Article 9 para. 5 CoJReg should either be deleted (without the envisaged regulation being necessary), or the details mentioned in it should be regulated in the CoJReg itself.*

It should be noted that the reference in Art. 9 para 1 and para. 6 to "Art. 131 part. 7" LSJ is wrong and should be instead Art. 133 para. 10 LSJ. The reason is the following: The CoJReg was adopted on 4 February 2016, while the LSJ was updated on 2 June 2016.

Recommendation 19: *The reference in Art. 9 para. 1 and para. 6 CoJReg to the LSJ should be updated tallying the current version of the LSJ.*

There is a special restriction regarding the employment of close persons in Article 27 LPC. It is an explicit expression of the general conflict of interest provision.

For the **management** of the conflict of interest, the Articles 28 and 29 LPC foresee a graded scale of responses. Article 28 LPC foresees the following basic three steps:

- prevention;
- disclosure to the superior;
- abstaining from decision making.

Article 29 LPC furthermore foresees the following **solutions** for conflict of interest situations that cannot be solved otherwise under Article 28:

- suspension;
- external control;
- restricting access to information;
- revising the scope of authority;
- transfer;

[38] As far as can be seen from the data available.

— dismissal.

This is by and large in line with international good practices (see Chapter II CoE Toolkit).

It should also be mentioned, that there are two more provisions on managing conflicts of interest. According to Article 87 para. 8 LSJ

> *"a member of the **Public Council of Integrity** shall be obliged to recuse himself/herself from considering the issue of the conclusion on the non-eligibility of a judge (a judicial candidate) in terms of the criteria of professional ethics and integrity in the following cases:*
>
> *1) if he/she is on friendly terms or in other personal relations with the judge or judicial candidate;*
>
> *2) if he/she has been involved in cases, considered or being considered by this judge;*
>
> *3) in case of any other conflict of interests or circumstances, which raise doubts about his/her being unbiased.*"

Art. 100 para. 1 LSJ contains a similar provision for the recusal of a Member of the **High Qualifications Commission** of Judges. It further foresees that "the recusal must be substantiated and submitted prior to the review of the issue in the form of a written application." A "majority vote" of the participating members decides on the recusal.

6. OVERSIGHT MECHANISMS

6.1. Annual asset declarations

Conflicts of interest are an important integrity risk in the judiciary, not only in transition countries, but also in countries of long-standing democracy. As a recent publication points out:

> "*Asset declarations can also play an important role in detecting conflicts of interests. In 2012, for example, the California Supreme Court declined to hear an appeal filed by a couple who had accused financial giant Wells Fargo of predatory lending. A review of asset declarations revealed that one justice participating in the decision owned as much as US$1 million of Wells Fargo stock. In other cases, California judges had ruled on cases even when they or their family members had received income or lavish gifts from one of the parties, including a US$50,000 trip from a lawyer*".[39]

Judges have to submit declarations when **applying** for office, **annually** during office, and after **leaving** office (Article 45 LPC). This is in line with international standards.[40]

In addition, Article 52 part 2 LPC obliges declarants to notify the Agency "in case of a **significant change** in the declarant's assets situation. Furthermore, a declarant is obliged to notify the Agency within 10 days if he/she "or his/her family member opens a **foreign currency** account in a non-resident bank" (Article 52 part 1 LPC). Both provisions are more relevant for the financial control of judges, than of their private interests. The submission in **electronic** form and to a **unified** register is good practice in Europe.[41]

The declaration form mainly covers **financial** data concerning income and expenditure. Primarily, this data is necessary for monitoring illicit enrichment. However, most financial data of the declaration relates also to aspects of conflict of interest (for example shares in a company – they indicate money spent as well as an interest in the company). In addition, there are two categories of data that relate only to non-financial interests: **employments** and **memberships** (Article 46 part 1 clauses 11 and 12). This covers the two main sources of non-financial interests[42] and follows international recommendations. The "Implementation Guide and Evaluative Framework for Article 11 [of the United Nations Convention against Corruption – UNCAC] by the UNODC states in this context (at no. 45):

> "*It has been increasingly recognized that in order for declaration systems to be a truly effective tool in relation to the identification of potential or actual conflicts of interest, judges should provide information in such declarations in relation to their outside affiliations and interests, in addition to financial interests. Types of information requested in this regard may include pre-tenure activities, affiliations with businesses such as board memberships, connections with non-governmental or lobbying organizations and any unpaid or volunteer activities.*"

The centralised **online** transparency of the declarations is highly commendable. As **GRECO** noted recently regarding Turkey:

> "*Moreover, the asset declarations are not subject to any form of public scrutiny as they will remain confidential documents in the personal files of each MP [Member of Parliament]. This weakens the system even more.*"[43]

---

[39] Tilman Hoppe, U4 Brief, The case for asset declarations in the judiciary, May 2014, page 2, http://www.u4.no/publications/the-case-for-asset-declarations-in-the-judiciary-identifying-illicit-enrichment-and-conflicts-of-interests/downloadasset/3474.

[40] Western Balkans Recommendation on Disclosure of Finances and Interests by Public Officials (2014), at D.1, www.respaweb.eu/download/doc/Asset+Standard+FIN+14+12+10.pdf/45571feb5cde81505de6e2e67b566b3b.pdf.

[41] Western Balkans Recommendation, ibid, D.2.

[42] World Bank (2013), Conflicts of Interest, A Background Primer, https://agidata.org/pam/Documents/COI Primer_30Sep2013.pdf.

[43] GRECO (2015), Fourth Evaluation Round, Evaluation Report on Turkey, at no. 76.

Article 47 part 1 paragraph 3 LPC is also in line with the advanced standard of public access set out in a legislative toolkit by the Council of Europe PCF Project:

> "*Declarations are published online and are freely accessible, with data in searchable, **machine-readable** format.*"[44]

The European Court of Human Rights (ECtHR) decided already in 2005, that the online publication of asset declarations of public officials is justified:[45]

> "*[T]he general public has a legitimate interest in ascertaining that local politics are transparent and **Internet access** to the declarations makes access to such information effective and easy. Without such access, the obligation would have no practical importance or genuine incidence on the degree to which the public is informed about the political process. […] [T]he Court considers that it is precisely this comprehensive character [of declared data] which makes it realistic to assume that the impugned provisions will meet their objective of giving the public a reasonably exhaustive picture of councillors' financial positions.*"

The decision did not specifically concern the complaint of a judge. However, the law against which the complaint was directed also covered judges. Furthermore, the Court made the following general observation regarding public officials in the same judgment:

> "*The Court further recalls that a decision to run for public office is an occasion when people knowingly or intentionally involve themselves in activities which are or may be recorded or reported in a public manner.*"

The legislative toolkit by the Council of Europe PCF Project states that some core personal data can be **redacted**. Article 47 part 1 paragraph 4 LPC serves this purpose.

Art. 50 para. 1 LPC allows for the complete **verification** of annual declarations by judges including "establishing the credibility of declared data, accuracy of assessment of declared assets, and checking the availability of a conflict of interest" any time during office or three years after. Art. 60 par. 1 LSJ mirrors Art. 50 para. 1 LPC. In addition, Art. 60 par. 2 LSJ calls for a "full verification of declarations" by judges "at least once every five years as well as upon a relevant request of the High Qualifications Commission of Judges of Ukraine or High Council of Justice". Art. 60 LSJ furthermore entrusts the National Agency for Prevention with this task.

The LPC provides the National Agency with the **powers** in principle necessary to conduct the verification. This concerns in particular:

- "direct access to the **databases** of state authorities […]" (Article 12 part 1 clause 2 LPC);
- right of **information** towards state authorities, business entities, citizens, associations (Article 12 part 1 clause 1 LPC);
- right of obtaining "written **explanations** […] about the authenticity of information specified in the declarations" (Article 12 part 1 clause 9 LPC);

The details of the **verification procedure** are subject to an internal regulation of the National Agency (Article 48 part 3 LPC). In terms of conflicts of interest, this concerns in particular a methodology for detecting conflicts of interest, including common patterns and red flags for conflicts of interest, and ways of tracing hidden private interests. The National Agency for Prevention of Corruption has not yet developed such a methodology.

<u>Recommendation 20:</u> *The NAPC should develop and apply a methodology for detecting and tracing conflicts of interest.*

Art. 3 para. 1 No. 1 lit. r LPC requires also "**jurors** (in the time of performance of these functions)" to submit annual asset declarations. The term of office for jurors is usually three years (listing as per Art. 64

[44] Council of Europe PCF-Project (2015)/Tilman Hoppe, Legislative Toolkit on Conflict of Interest, Article 15 para. 2.

[45] Wypych v. Poland (No. 2428/05), decision of 25 October 2005 (emphasis by author).

para. 4 LSJ). It remains unclear which total of jurors has declared their financial and non-financial interests to the National Agency of Prevention; the respective data could not be researched due to ongoing technical problems with the online registry.

6.2. Declaration of family ties

Regarding private interests resulting from **family ties**, Art. 61 LSJ requires **judges** to submit a declaration to the High Qualifications Commission. The declaration requires judges to declare the details of all family members in case they have worked in any significant positions of one of the three branches of power. Art. 61 para. 8 LSJ **defines** the term "family ties" widely, including "great grandsons", in-laws, and cousins.

The High Qualifications Commissions[46] is obliged to make the declarations public **online**. In case of any indication that the declarations are wrong, the High Qualifications Commission "shall **verify** the mentioned declaration" (Art. 61 para. 5 LSJ). Thus, the High Qualifications Commission does not verify declarations preventively based on a random **sample** of declarations. Untimely submission or submission of wrong data is subject to disciplinary liability (Art. 61 para. 6 LSJ).

The declarations are available online on the website of the Commission.[47] The High Qualifications Commission did not yet verify any declaration of a judge, but did so regarding judicial candidates. Data as to the number of declarations and detected irregularities was not yet available at the time of drafting this Report.

Recommendation 21: *The Commission should verify a sample of declarations of sitting judges; in this regard, it should be considered to revise Art. 61 para. 5 LSJ as to foresee such verification.*

Art. 61 LSJ does not include judges' assistants (Article 157 LSJ) into the declaration regime. While these positions are maybe not as "significant" as the other ones listed in Article 61, there is a high risk of judges hiring members of their family to these positions.

Recommendation 22: *The declaration of family ties should extend to judges' assistants.*

6.3. Commencement and promotions

Oversight of conflict of interest of candidates for job positions varies for judges and other court personnel. In principle, the National Agency for Prevention is competent for verification of conflicts of interest (Art. 11 para. 1 No. 8 LPC). For judges, Art. 57 para. 2 indent 2 LPC refers to the LSJ for the procedure ("Peculiarities of conducting a special inspection regarding candidates for positions of judges are stipulated by the Law of Ukraine 'On the Judicial System and Status of Judges'"). As a strange **reversal back**, Art. 75 LSJ foresees that the "full verification of declarations" by "judicial candidates" including "checking the existence of conflicts of interest" is done by the National Agency for Prevention.

[46] http://vkksu.gov.ua/en/.

[47] The link for 2017 is as follows: http://www.vkksu.gov.ua/ua/dieklaracii-rodinnich-zwiazkiw-suddi-ta-dobrotchiesnosti-suddi/dieklaracii-podani-w-2017-roci/ (in Ukrainian).

6.4. Internal audits

In principle, internal audits apparently take place in the judiciary. However, at the time of drafting of this Report, the data available was not fully conclusive as to who was in charge of conducting this internal audits in the courts, how often and following which triggers, whether this involved the review of case files, whether any standard procedure for detecting conflicts of interest existed, and whether the audits ever led to the detection of a (hidden/undeclared) conflicts of interest.

6.5. Complaints mechanisms

6.5.1. External stakeholders

According to Art. 21 para. 1 No. 1 LPC,

> "*civil society associations, their members or authorized representatives and individuals in their activity of preventing corruption have the right to: report discovered facts of […] potential conflict of interest to specially authorized subjects in the area of countering corruption, to the National Agency for Prevention of Corruption, management or other representatives of authority, institution or organization where these offenses have been committed or employees of which have conflict of interest, and also to the public*".

The provision is stating something obvious. However, it raises the question whether ordinary citizens **not organised** in a civil society organisation do not have this right? As for the judicial sector, there is no doubt that **anybody** involved in a judicial **procedure** can submit a complaint. This follows inter alia from Art. 107 para. 1 LSJ:

> "*Any person shall have the right to submit a complaint against disciplinary offence of a judge (disciplinary complaint). Citizens shall exercise this right in person or via a lawyer, and legal entities – via a lawyer, state bodies and local self-government bodies – via their Chairpersons or representatives. A lawyer shall be obligated to verify the facts which may result in disciplinary liability of a judge before submitting a relevant disciplinary complaint.*"

Complaints need to be "submitted in writing" and must contain "specific information about the signs of disciplinary offence in judge's conduct […] and reference to actual data (testimony, evidence)". In line with Art. 107 para. 4 LSJ, the High Council of Justice made available in February 2017 on its website a **template** of a disciplinary complaint and a template for reporting a violation of incompatibility requirements.[48] Both templates are quite detailed, offering multiple choice lists of violations and requesting complainants to provide concrete evidence. The templates appear rather bureaucratic and might deter some complainants. However, one could probably still justify the formalities with the necessity of receiving only sufficiently grounded complaints.

Art. 107 para. 5 to 8 LSJ contain provisions in case of **abusive** complaints. Para. 8 appears problematic: It precludes complaints which may contain valuable information, simply because the same complainant has submitted obviously unfounded complaints in the past. Furthermore, the terms "abusive" and "obviously unjustified" complaints are not fully clear and there is no complementary guidance by the High Council of Justice.

Recommendation 23: *Consider replacing the strict preclusion in Art. 107 para. 8 LSJ by a more flexible approach, such as the possibility of precursory review of abusive complaints.*

For a statistic of complaints see below at chapter 8.

The mandate of the High Council of Justice for **disciplinary complaints** implements No. 15.3 of the Bangalore Implementation Measures:

[48] http://www.vru.gov.ua/add_text/155 (in Ukrainian); templates as approved the decision of the High Council of Justice, 14 February 2017, No. 269/0/15-17.

"*A specific body or person should be established by law with responsibility for receiving complaints, for obtaining the response of the judge and for considering in the light of such response whether or not there is a sufficient case against the judge to call for the initiation of disciplinary action. In the event of such a conclusion, the body or person should refer the matter to the disciplinary authority.*"

However, one should note that the High Council could **reach out** to the public more proactively. In terms of disciplinary liability, it provides the templates as downloads. In addition, there is a list of judges suspended including the (disciplinary) grounds for suspension.[49] However, there is no instruction on where to send the filled out template to and what the further procedure is and usual timelines. The website provides names and pictures of the members of the three disciplinary chambers.[50] However, the fact that there are disciplinary chambers (three) at all is hidden behind the main menu under the selection "About the Council" ("Склад Ради"); this information is in a separate section disconnected from the disciplinary templates. Furthermore, there is no information which of the three chambers is competent in which cases. This could also be the result of the fact that the Council is currently undergoing structural changes dovetailing the adoption of the new law on the HCJ. Still, one should note as a good practice that all disciplinary decisions are available to the public online.[51]

If compared to practices of other European countries, this is a rather minimalistic approach. One could think inter alia of:

- The possibility of an online **reporting** interface;
- Electronic **confirmation** of a complaint via email;
- Electronic (and public) system for **tracing** complaints, including statistics;
- Didactical **guidance** for the public on the ethical principles and on the disciplinary procedure, including appealing decisions.

For example, the complaints page of the "Judicial Office for **Scotland**" starts with an instructive headline "What do I do if I have a complaint?"[52] The website contains numerous instructions, including

- *Complaints about the Judiciary (Scotland)* ***Rules*** *2017;*
- *Complaints* ***Guidance****;*
- *Complaints* ***Form****;*
- *Complaints* ***Process Map****;*
- ***Unacceptable*** *Actions Policy;*
- *"Frequently asked Questions" (****FAQ****).*

The "Complaints Guidance" contains instructive examples of what "We can investigate" and what "We cannot investigate". It also leaves readers with service-oriented answers to the question "What happens when I have complained?":

- "*We will acknowledge your complaint within 5 working days on receipt.*
- *If we are unable to accept your complaint we will clearly explain to you why this is.*
- *If your complaint is to be investigated we will clearly explain to you what is going to happen.*
- *We will provide you with a clear and reasoned explanation for the outcome of your complaint.*
- *If we are unable to help you we will try to direct you to other organisations that may be able to assist. Please see page 6 for useful websites.*"

[49] http://www.vru.gov.ua/add_text/157 (in Ukrainian).

[50] http://www.vru.gov.ua/section_mem (in Ukrainian).

[51] http://www.vru.gov.ua/act_list (in Ukrainian).

[52] http://www.scotland-judiciary.org.uk/15/0/Complaints-About-Court-Judiciary.

The "Judicial Conduct Investigations Office" for **England** and **Wales** maintains a similarly instructive webpage.[53] Under the selection "Making a complaint", the following points link to further information:

- *What can I complain about?*
- *Who can I complain about?*
- *What do we need from you?*
- *What you can expect from us*
- *Not satisfied with our service?*

Under the selection "Disciplinary Statements", all **statements** since 2012 are listed as well as a "**publication policy**". Furthermore, there is **contact** information for all advisory committees and Tribunal Presidents. **Annual reports** and information leaflets round up the internet presence.[54] Other European judiciaries provide similarly instructive guidance on their websites.[55]

Recommendation 24: *Provide more guidance to the public on submitting complaints in line with European good practices.*

6.5.2. Anonymous reports

Art. 107 para 6 LSJ precludes absolutely "anonymous applications and notifications" from leading to a disciplinary proceeding. This is highly problematic. First, Art. 107 para. 6 LSJ contradicts Art. 53 para. 5 LPC:[56]

> *"Reporting about violation of requirements of this Law may be done by an employee of a respective agency without attribution (**anonymous**). […] Anonymous report on violation of the requirements of this Law shall be considered if the information provided in the report is about a specific person, contains the actual data that can be verified. […] If the information contained in the report on violation of the requirements of this Law is confirmed, the head of the relevant agency […] brings the offenders to **disciplinary liability**".*

Second, Art. 107 para 6 LSJ contradicts the United Nations Convention against Corruption (**UNCAC**). Article 13 para. 2 UNCAC calls for anonymous hotlines being accessible to all relevant anti-corruption bodies referred to in the UNCAC, such as law enforcement or auditing agencies. For conflict of interests of judges, any oversight body including the High Council of Justice is an anti-corruption body in the sense of Art. 13 para. 2 UNCAC. Furthermore, the Western Balkan Recommendation calls for "anonymous complaints" to be a valid basis for audits of declarations (recommendation E.12).[57] A comparative study conducted in several countries found that many successful audits of asset declarations were triggered by informants.[58] It should also be mentioned that Transparency International recommends in its "Reference Guide for Good Practice" on "Complaint Mechanisms" that "anonymous reporting should be possible and accessible".[59] Art. 53 LPC and Art. 107 LSJ contain a sufficient precaution for avoiding abuse: the complaint needs to be substantiated. For example, an anonymous complaint disclosing that a judge decided a specific case in favour of the business of one of his/her family members should lead to a quick check, whether indeed, the business is owned by a family member. Oversight bodies lose credibility and nourish society's cynicism if they let such information rest in their drawers without consequence.

---

[53] http://judicialconduct.judiciary.gov.uk/.

[54] http://judicialconduct.judiciary.gov.uk/reports-publications/.

[55] https://www.rechtspraak.nl/Organisatie-en-contact/Contact/U-heeft-een-klacht (in Dutch; "klacht" meaning complaint).

[56] Emphasis by author.

[57] Ibid.

[58] ReSPA/Tilman Hoppe, "Asset declarations in practice – A regional study of Western Balkan countries", 2013, page 132, http://www.respaweb.eu/download/doc/Comparative+study+-+Income+and+asset+declarations+in+practice+-+web.pdf/485ce800f0a3f55719e51002d0f75b5e.pdf.

[59] Of 2016, at page 5.

Recommendation 25: *Provide for anonymous reporting channels and follow up on anonymous complaints that are substantiated.*

6.5.3. Whistleblowers

Art. 53 LPC contains some **rudimentary** provisions on whistleblower protection. Para. 1 defines whistleblowers:

> "*A person who provides assistance in preventing and combating corruption (whistle-blower) is a person who, having a justified conviction that information is credible, reports the violation of provisions of this Law by another person.*"

This is by and large in line with **Council of Europe** Recommendation CM/Rec(2014)7, Definition a. However, it is unclear to whom the whistleblower may report in order to obtain protection – the employer, law enforcement bodies, the media, NGOs?

Para. 2 concerns **witness protection**, not whistle-blowers. Para. 3 defines the basic protection mechanism for Ukraine:

> "*A person or his/her family member may not be dismissed or forced to leave, disciplined or subjected to other negative means of influence on the part of a manager or employer (transfer, certification, change of labor conditions, refusal to appoint to a higher position, reduction of salary, etc.) or threatened of such means of influence due to reporting a violation of provisions of this Law by another person.*"

This provision is **insufficient**. In particular it leaves the burden of prove fully on the whistle blower (contradicting Principle 25 of the Council of Europe Recommendation) and it does not contain any provisions on interim relief (contradicting Principle 26).

Para. 3 furthermore allows for confidential disclosure:

> "*Information about the whistle-blower may be revealed only upon his/her consent, unless otherwise stipulated by law.*"

This is in line with Principle 18 of the Council of Europe Recommendation. However, one needs to be a lawyer to know – if the law is clear at all – what "unless otherwise stipulated by law" means. The provision is thus rather **ambiguous** and discouraging.

A whistleblower protection system is useless, if the responsible leaders and the designated people dealing with whistleblowers do not know how to deal with a whistleblower in **practice** (see Chapter VIII of the Council of Europe Recommendation). To this end, para. 4 foresees only very rudimentary technical aspects:

> "*The National Agency and other state bodies, authorities of the Autonomous Republic of Crimea and local self-government bodies ensure conditions for their employees to report violations of provisions of this Law by another person, in particular, through special telephone lines, official websites and electronic communication means.*"

All in all, Art. 53 LPC is only a **rudimentary** indication of a whistleblower protection system, but falls short of any existing legislation in other European countries. The Irish Protected Disclosures Act of 2014 is one of the examples of good practice in this area. It consists of 24 sections, which take about 20 pages. Thus, it does not come as a surprise that Ukrainian legislators have drafted a separate law on whistleblower protection which is currently pending before Parliament.[60]

None of the judicial oversight bodies has established a **mechanism** which encourages whistleblowers to come forward and which allows for confidential reporting (in line with Art. 53 LPC). However, in rather corrupt environments, citizens usually hesitate anyways to come forward openly, even with whistleblower protection laws in place. Therefore, the availability of anonymous reporting channels is essential. This even more so, as often lawyers or court parties will fear retaliation should they openly report.

Recommendation 26: *Align the whistleblower protection mechanism in the LPC with the Council of Europe Recommendation.*

[60] http://www.pravda.com.ua/eng/news/2016/08/4/7116820/.

6.6. Advice

Many, if not all laws, that regulate incompatibilities and conflict of interest, require interpretation. In this context, one should note that the Consultative Council of European Judges

> "*encourages the establishment within the judiciary of one or more bodies or persons having a **consultative** and **advisory role** and available to judges whenever they have some uncertainty as to whether a given activity in the private sphere is compatible with their status of judge. The presence of such bodies or persons could encourage discussion within the judiciary on the content and significance of ethical rules. To take just two possibilities, such bodies or persons could be established under the aegis of the Supreme Court or judges' associations. They should in any event be separate from and pursue different objectives to existing bodies responsible for imposing disciplinary sanctions.*"[61]

Similarly, the Council of Europe Recommendation CM/Rec(2010)12 states in no. 74: "Judges should be able to seek **advice** on **ethics** from a body within the judiciary."[62] How such a body could work in practice, one could observe for example in Sweden:

> "*The Judges Proposals Board has [...] had one case which led to a dialogue between the board and the judge. The outcome of that dialogue was that the judge did not take up the incidental employment (position as a director of a company which was owned by the judge's brother).*"[63]

The "Bangalore Implementation Measures" recommend (at no. 2.1) inter alia:

> "*The judiciary should consider establishing a judicial ethics advisory committee of sitting and/or retired judges to advise its members on the propriety of their contemplated or proposed future conduct.*"

In this regard, Art. 133 para. 6 LSJ tasks the Council of Judges to "exercise control over the compliance with legislation on resolving conflict of interest" in the judiciary including adopting "decisions on resolving the actual or potential conflict of interest". This does not necessarily comprise advice. However, in Art. 7 para. 1 to 3 CoJReg the **Council of Judges** clarifies that providing advice is included in its functions:

> "*(1) Draft and disseminate comments, recommendations, explanations, and advisory opinions of the general nature concerning application and construction of regulations on conflicts of interests;*
>
> *(2) Provide explanations, recommendations, and advisory opinions at individual requests and notices of the Conflict of Interests Entities concerning existence of the actual or potential conflicts of interests and measures to prevent or resolve them;*
>
> *(3) Based on summaries of existing practices of preventing and resolving conflicts of interests – develop and update 'The Description of Possible Typical Conflict of Interest Situations in Activities of Judges and Other Judicial System Representatives' which contains practical guidelines on detection, prevention, and resolution of conflicts of interests in situations of certain categories and is subject to approval by the Council.*"

The Council of Judges has not yet developed the above mentioned "**Description** of Possible Typical Conflict of Interest Situations" and it is not yet clear in light of ongoing reforms, whether it intends to do so.

The COJ has so far adopted four **Advisory Opinions**. Two of these are available online.[64] There was no data available at the time of drafting this Report as to how many requests for clarification the Council received each year between 2014 and 2017.

---

[61] Opinion no. 3 of the Consultative Council of European Judges (see above note 23) at no. 29 (emphasis by author).

[62] Ibid.

[63] GRECO, Fourth Evaluation Round, Evaluation Report on Sweden, November 2013, at no. 115.

[64] Advisory Opinion on judges working with relatives, http://rsu.court.gov.ua/userfiles/4(8).pdf (Ukrainian); Advisory Opinion on anonymity of voting during the meeting of judges http://www.rsu.gov.ua/ua/events/risenna-no77-vid-04112016-sodo-naavnosti-konfliktu-interesiv-u-provedenni-taemnogo-golosuvanna (Ukrainian).

The "**Commentary** on the Judicial Code of Ethics" by the Council of Judges contains two examples of typical conflict of interest situations. These are obviously meant to illustrate the legal provisions. This aside, the Commentary mainly tries to shed light on the complex interplay of norms (pages 39-44). However, it mostly quotes legal norms instead of further clarifying the interpretation of terms requiring clarification. For example, does Article 364 Criminal Code (abuse of office) apply in cases of conflict of interest and if so under what circumstances? Article 364 Criminal Code is not even mentioned in the Commentary. Despite plenty of **case law** on disciplinary cases (from the disciplinary boards and from courts), the Commentary does not seem to quote even one such case. The absence of a **Table of Content** for a 165-pages document indicates that this document has not yet reached the necessary level of user-friendliness. One has to keep in mind, though, that the time span for developing the first edition of this document has not been very long.

Recommendation 27: *Consider upgrading the user-friendliness of the Commentary and providing more interpretative guidance, incorporating also existing cases and court decisions.*

Judges are often hesitant to expose themselves being in doubt on the application of ethical rules. An unfortunate result of this would be the judges not asking for advice. This can lead to violations. Maybe more importantly, each advice not asked for is a missed opportunity of sharing and discussing a practical case example among colleagues, and instead fortifying a culture of silence. Therefore, in the State of Washington (U.S.), judges can ask for ethical advice anonymously via a web interface. The requests and the advice are shared and listed on an indexed website. The collection of advisory opinions nourishes awareness and immersion of ethical rules in daily practice.

Recommendation 28: *Consider introducing the possibility of anonymous requests for advice, which are published together with the advice and listed in an easy to use index.*

7. SANCTIONS

All in all, the range of sanctions is wide and addresses all aspects of conflicts of interest violations:

7.1. Criminal offences

The main criminal offence in the area of conflicts of interest is **abuse of authority**. The Ukrainian Criminal Code foresees this offence in Art. 364 para. 1:

> "*The abuse of power or position, that is intentional and in order to obtain any unlawful benefit for himself or another person or entity using official authority or official position against the interests of service if it caused substantial harm to legally protected rights, freedoms and interests of individual citizens, or state and public interests, or the interests of legal entities […].*"

The term "official position" includes judges as per Note 1 to Art. 364. The **threshold** is set for a quite high value: Note 3 to Art. 364 defines "substantial damage" in financial terms as "100 tax-free minimum incomes" or more (UAH 80K or about 2,700 € as of date of the report). This is about three monthly basic salaries of a Ukrainian judge.[65] It is not clear, why a damage of "only" 1,000 € is not criminalised. Even a damage of 500 or 100 € can be very substantial to an ordinary citizen. A judge acting **wilfully** and causing such damage would seem to merit criminal liability.

Recommendation 29: Consider lowering the threshold in Art. 364 CC for "substantial damage".

Nonetheless, the offence will probably **rarely apply** to judges if at all: It will be hard to prove that a judge would have decided the case differently, had it not been for the conflict of interest. In other words, it is hard to prove the abuse of authority, i.e. the conflict of interest, "caused the substantial harm". The Commentary on the Judicial Code of Conduct remains silent on this question, and only references Article 376 Criminal Code (interference with judges).

Similar is the case for Article 367 CC "**Neglect** of official duty" ("failure to perform or improper performance, by an official, of his/her official duties due to negligence, where it caused any significant damage").

Furthermore, it is a criminal offence, to "knowingly" declare **false information** or to "wilfully" fail to declare (Article 366-1 CC). However, this provision does not apply in case of non-financial information. A note to Article 366-1 CC narrows its scope:

> "*Responsibility under this article for submission of knowingly false information in the declaration of person authorized to perform the functions of the State or local self-government regarding property or other objects to be declared that have value is imposed in case when such information differs from the true information by a sum of more than 250 minimum wages.*"

Thus, the provision will probably not apply in case it concerns an unpaid job or an unpaid position on a supervisory board

Recommendation 30: Consider broadening the scope of Art. 366-1 CC to non-financial positions.

7.2. Administrative offences

The Code of Administrative Offences (COA) foresees fines for the following offences:

- Article 172-4. Violation of restrictions on combining and combining with other activities [**incompatibilities**];
- Article 172-6. Violation of financial controls [late or false **declarations**];

[65] 24,000 UAH, https://voxukraine.org/2016/06/22/judges-salaries-voxcheck-of-victor-pynzenyk-en/.

— Article 172-7. Violation of requirements on prevention and settlement of conflict of interest [failure of managing a conflict of interest with the result of a **real conflict of interest**; actions or decisions in a real conflict of interest].

In aggravated cases (repeated offence), an additional **ban** on holding public office applies for the duration of one year.

7.3. Disciplinary liability

The **Constitution** contains a disciplinary sanction for "conflict of interest" in Art. 126 para. 6 no. 2:

> "*The grounds for dismissal of a judge are as follows: […] 2. violation of the conflict of interest requirements by the judge […].*"

This would probably be too harsh, in case the conflict of interest was minor or if only a minor formality was violated. Thus, the provision should probably be read as "possible ground for dismissal is conflict of interest".

The LSJ also states that conflict of interest is reason for **disciplinary** liability (Art. 106 part 1 para. 7):

> "*A judge may be brought to disciplinary liability […] on the following grounds: failure to inform or untimely informing of the Council of Judges of Ukraine about an actual or potential conflict of interests of a judge (except cases when the conflict of interests is regulated within the procedure stipulated by procedural law) […].*"

The exemption of all **procedural decisions** from disciplinary liability makes sense. In these cases, the judge recuses him/herself without necessarily informing the Council. Therefore, if he/she "violates the rules for recusal (self-recusal)" (Art. 106 para 1 lit. f LSJ), he/she is also disciplinarily liable.

As for the lack of compliance with the system of **asset declarations** or declarations of family ties, Art. 106 para. 9-10 and 16-19 LSJ define disciplinary liability. This includes incompatibilities.

Furthermore, all above mentioned criminal and administrative offences probably constitute "**corruption offences**". Thus, a judge "found guilty of committing a corruption offence or offence related to corruption in cases stipulated by law" (Art. 106 para. 15 LSJ) is also disciplinarily liable.

7.4. Civil liability

Art. 68 LPC foresees the "**restoration** of rights and lawful interests and compensation of losses, damage, caused to individuals and legal entities as a result of a corruption offense". Conflict of interest is a "corruption offence" as defined by Art. 1 para. 1 LPC: it is a key form of corruption addressed by the LPC and entails disciplinary consequences.

Furthermore, violations of **post-employment** restrictions are grounds for terminating post-employment contracts of judges or for respective contracts to be declared void (Art. 26 para. 2 LPC).

7.5. Contestability of judicial decisions

Art. 67 LPC foresees the possibility to "annul" legal acts and decisions "in violation of this law":

> "*Legal acts, decisions issued (approved) with violation of this Law, shall be annulled by the agency or official authorized to approve or annul relevant acts, decisions, or may be found unlawful in the course of court proceedings at the request of an interested individual, associations of citizens, legal entity, prosecutor, state authority, in particular the National Agency, local self-government authority.*"

This does probably not apply to judicial decisions. The procedural law are special provisions to the LPC and contain grounds for **appeal** and overturning a judicial decision rendered under conflict of interest.

7.6. Ban on office and promotions

Judges dismissed from office for conflict of interest are more or less **banned forever** from becoming a judge again. Art. 65 para. 4 LSJ states:

> "*An individual, who was earlier dismissed from a position of judge due to committing a substantial disciplinary offence […], who violated the incompatibility requirements, […] cannot be a candidate for a position of judge.*"

From the data available it appears as if the High Qualification Commission keeps a dossier on every candidate, acting judge, or on those dismissed/resigned. This would ensure that the ban of Art. 65 para. 4 LSJ is enforced in practice.

Furthermore, for all above mentioned administrative offences an additional ban on holding public office applies for the duration of one year in aggravated cases (repeated commission of offence).

7.7. Confiscation

Should a judicial (or non-judicial) decision been rendered in conflict of interest and cause enrichment, Art. 69 para. 1 LPC opens the possibility for "confiscating illegally obtained property":

> "*Funds and other property obtained in the result of the commission of a corruption offense are subject to confiscation or special confiscation upon the court's decision in accordance with the law.*"

8. TRANSPARENCY: COMPLAINTS AND SANCTIONS

There is only **little information** about statistics on complaints and sanctions on the website of the High Council of Justice (or any other body). Two reports for 2016[66] provide some information on the total number of disciplinary proceedings. The High Qualifications Commission of Judges was in charge of disciplinary proceedings before, and also provides some total figures on disciplinary proceedings.[67] This aside, the High Council's website only provides a list of judges suspended including the (disciplinary) grounds of the suspension.[68] It would be commendable if the High Council and the HQC? would make the following numbers available to the public:

PROCEDURES REGARDING CONFLICT OF INTEREST OF JUDGES	2014	2015	2016	2017
Anonymous complaints				
Open complaints				
Cases detected by the judiciary/oversight bodies				
Disciplinary procedures				
Disciplinary sanctions				
Warning				
Ban on promotion				
Fine or salary reduction				
Dismissal				
Other				
Criminal sanctions (abuse of office, etc.)				
Confiscations				
Civil liability: damages				
Civil liability: incompatible contracts annulled				

Recommendation 31: *Provide statistical information on the website of the High Council of Judges, showing the full disciplinary chain from complaints to investigations to sanctions.*

[66] http://www.vru.gov.ua/statistics (in Ukrainian): "ІНФОРМАЦІЯ про результати діяльності Вищої ради юстиції 2016" (MS Word file); "Результати діяльності Вищої ради юстиції за 2016 рік" (pdf-file).

[67] Report : 100 days of the High Qualification Commission of Judges of Ukraine in new composition, http://vkksu.gov.ua/en/commission-in-brief/100-days-of-the-high-qualification-commission-of-judges-of-ukraine/.

[68] http://www.vru.gov.ua/add_text/157 (in Ukrainian).

9. CAPACITY OF OVERSIGHT BODIES

9.1. High Council of Justice

In relation to conflicts of interest, the High Council of Justice is mainly in charge of **disciplinary** decisions. According to Art. 131 of the Constitution, the High Council of Justice shall:

> "*2. decide on the violation of incompatibility requirements by a judge or prosecutor;*
>
> *3. consider complaints against decisions of relevant authorities to discipline a judge or prosecutor;*
>
> *4. decide on the dismissal of judges;*"

According to Section XII para. 31 LSJ, the High Council takes over all disciplinary cases from the High Qualification Commission, which has been in charge of this task until then.[69]

At the time of drafting this Report, no data was available as to which number of staff (full- and part-time) the High Council tasked with working on the investigation and legal preparation of disciplinary cases.

Furthermore, no data was available as to what training on conflict of interest, on disciplinary proceedings, and on investigations (trainings being conducted by the National School of Judges – NSJ) the staff of the High Council has received and how many trainings for judges on managing conflict of interest the NSJ has conducted over which time-span.

It remains unclear, what average time it takes for handling a disciplinary case (from the time of complaint to the first decision adopted by the High Qualification Commission or the High Council.

9.2. Council of Judges

The main function of the Council of Judges is related to the **management** of conflicts of interest and to providing **advice** (see above sections 5 and 6).

As of the time of drafting the Report no data was available as to which number of staff for working on the investigation and legal preparation of disciplinary cases the Council has and which training they had received in this regard.

9.3. High Qualification Commission

Related to conflicts of interest, the High Qualifications Commission of Judges[70] reviews whether judicial **candidates** (or candidates for promotion) have conflicts of interest or incompatibilities. No data was available at the time of drafting this Report on how many candidates the Commission has reviewed regarding conflicts of interest and how many staff worked on this matter, based on what training.

[69] In new composition since 9 December 2014 – see Report: 100 days of the High Qualification Commission of Judges of Ukraine in new composition, http://vkksu.gov.ua/en/commission-in-brief/100-days-of-the-high-qualification-commission-of-judges-of-ukraine/.

[70] http://vkksu.gov.ua/en/.

9.4. Public Council of Integrity

The Public Council[71] consists of twenty members and "assists the High Qualification Commission of Judges of Ukraine in determining the **eligibility** of a judge (a judicial candidate) in terms of the criteria of professional ethics and integrity" (Art. 87 para. 1 LSJ). This includes issues of conflict of interest or incompatibility.

The Public Council has the "right to create an information portal to collect information about professional ethics and integrity of judges and judicial candidates" (Art. 87 para. 5 LSJ). The portal is available at https://grd.gov.ua. The portal was established through the solely *pro bono* engagement of the Council's members.

The Public Council also has "the right of free and complete access to open state registers" (Art. 87 para. 5 LSJ). This provision's rationale is somewhat opaque – why should the LSJ "empower" the Council to make use of state register, which any citizen could use anyways? It appears as if the Council is not granted free access to registers which charge a fee. This appears unacceptable

The Council has the no staff supporting the review of candidates. Ukraine is in a crucial stage of reforming its judiciary. It might not have another such opportunity soon, if ever. Thus, the Council's function in ensuring integrity of the hiring and promotion process by giving the people a voice and role is equally crucial. It should thus be clarified that the Public Council is a public body and its members are exercising a public mandate. Consequently, the Council should be supported by dedicated staff, by full access to databases (including non-open ones).

Recommendation 32: *a). It should be clarified that the Public Council is a public body and its members are exercising a public mandate.*

9.5. National Agency for Corruption Prevention

Related to the conflicts of interest of judges, the National Agency[72] mainly is tasked with reviewing the annual asset declarations of all public officials, including that of judges. The capacities of the National Agency are beyond the scope of this assessment,[73] reflecting also ongoing political barriers of cooperation between several state bodies in Ukraine, including to some extent the judiciary and the National Agency.

[71] http://vkksu.gov.ua/ua/gromadska-rada-dobrotchiesnosti/ (Ukrainian).

[72] https://nazk.gov.ua/ (Ukrainian).

[73] However, see in this regard the following: EUACI, The Business Process of Verifying E-Asset Declarations at the National Agency on Corruption Prevention (Tilman Hoppe/Valts Kalniņš, 2017).