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MISSION REPORT

By
Reda Moliene
(International Expert)

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The mission was held by Reda Moliene[1], short-term international expert of the EU Project "Support to Justice Sector Reforms in Ukraine" on 6-8 September, 2017, in Kyiv and Odessa, and was dedicated to the analysis of the situation regarding the selection procedure to the Supreme Court (hereinafter referred as to the SC), the interaction of the institutions and bodies, participating in the process.

On the 6th of September expert met the representatives of the:

High Qualification Commission of Judges (hereinafter referred as to the HQCJ): Mr. Serhiy Kozyakov, the Head of the HQCJ, Mr. Stanislav Schotka, the Secretary of the HQCJ, and the staff members.

Public Council of Integrity (hereinafter referred as to the PCI): Mr. Mykhailo Zhernakov, Mr. Roman Maselko, Mrs. Maryna Solovyova, Mr. Roman Marusenko and Mrs. Halyna Chyzhyk.

The procedure of the selection of the SC's judges and the cooperation of the HQCJ and the PCI were discussed with representatives of both of these bodies. The special focus to the management of conflicts of interests of the Members of PCI was given in both meetings. Also the issues of the role of the PCI, the legal status of their opinions and the consequences of their publications on the candidates, who have passed the procedure, though according to PCI their integrity is not appropriate.

On the 7th of September in Odessa expert together with the Project Leader Dovydas Vitkauskas gave the interview at the local TV "7 kanal" on the issues of the challenges faced by the Ukrainian judicial system and the recent developments and the formation of the SC.

In the afternoon expert participated as the speaker at the round table on the topic of the results of the selection procedures to the SC and the future perspectives of the newly formed SC. At the event the HQCJ was represented by Taras Lukash, the Member of the HQCJ, who explained procedures of the competition to the SC, elaborated on some challenges and practical aspects.

Opinions and remarks about the competition were also expressed by judges, participating at the competition.

Expert made parallels of this procedure to the procedure of the selection and appointment of judges in EU countries, focusing on Lithuanian experience. Expert emphasized, that the Ukrainian experience is unique because in most European countries the procedure of the appointment of the SC's judges is more of political nature. Even if the formal selection procedure is established in some countries, neither such scrutiny of regulation, nor that precisely prescribed criteria, nor such

[1] Reda Moliene, Acting Director of the National Courts Administration of the Republic of Lithuania.

strict procedure, nor involvement of civil society with such a level of influence and powerful role can be found. Expert also elaborated on the importance of the evaluation of the personal and social competences of the candidates to judicial offices. The experience of Ukraine in this regard is very progressive and meets the most recent trends in Europe.

On the 8th of September expert participated as the speaker at the II Odesa Regional Judicial forum, the panel session on the issues of the reform of judicial system. At the panel the HQCJ was represented by Mr. S. Shchotka. Some remarks about the procedure of selection, the role of the PCI and the cooperation between PCI and HQCJ were submitted by Andrij Savchuk, lawyer, member of the PCI, and Sergej Chvankin, the Chairman of Kyiv district court of Odesa.

Some observations and remarks, regarding general situation in judiciary (number of vacant judicial offices, procedures of the selection, regulation issues, powers and interaction between different judicial, self-governance and executive institutions) were presented in the previous Expert's report from the mission of 12-14 June.

Therefore, in this Report emphasis will be given to some particular aspects of the role of the PCI in the selection procedure and to possible developments in regulation and process of the evaluation of candidates in order to ensure effective representation of civil society at the same time ensuring the principle of independence of the judiciary and fair procedure.

Further observations and recommendations will be based on the analysis of the legal acts, opinions of the international organizations and experts [2], remarks and opinions of the abovementioned officials of the HQCJ and PCI.

Status of the PCI and its role in the procedure of the selection of the candidates to the SC

While analysing the competence of the PCI and its *de jure* and *de facto* role in the selection procedures, the reference should be, first of all, made to the recent process of the selection of the candidates to the judicial positions of the SC. The procedure of the competition to the SC is coming to the final stage. The materials of candidates with the conclusions and suggestions were submitted by the HQCJ to the High Council of Justice for the decision on the appointment of the judges.

[2] 1. Opinion On the Law of Ukraine on the Judiciary and the Status of Judges, OSCE Office for Democratic Institutions and Human Rights; 30 June, 2017, Warsaw.
2. Opinion On the Rules of Procedure of the Public Council of Integrity of Ukraine, assoc. prof. Diana Kovatcheva, the international expert of the Council of Europe, April 2017.
3. GRECO Evaluation Report of the Fourth Evaluation Round On Corruption Prevention in respect of Members of Parlament, Judges and Prosecutors, published 8 August, 2017.

This unique process should be treated as a very important pilot, allowing not only to analyse legal regulation of particular procedures and competence of participating bodies, but also to evaluate important aspects of interpretation and application of the regulation as well as practical issues, such as organization of the testing and interview, publication of the results, etc.

It has to be noted, that both HQCJ and PCI show the intention to discuss and improve the process and are interested in creating practice of application of the legal regulation of assessment/selection of judges in the best possible way and to cooperate more effectively. The particular progress throughout the whole SC's formation procedure in respect of the process of more effective discussions and intentions for improvement can be observed.

1. Status and composition of the PCI

According to the Law on the Judiciary and the Status of Judges of Ukraine (hereinafter referred as to the Law), the PCI is the body, assisting the HQCJ in the process of examining the ethics and professional integrity of a judge or a judicial candidate for the purpose of the qualification assessment (Art. 87 of the Law).

The rules of the organization and the activity of the PCI are established in the Regulation of the Public Council of Integrity, adopted by the PCI on 23 of November, 2016 (hereinafter referred as to the Regulation).

The important issue is the mandate and the status of this body. According to the abovementioned provision of the Law, the main task of the PCI is "to assist the HQC", which is usually interpreted as an advisory function of non-administrative nature. Though, taking into account the powers of this body and legal outcomes of its activities/decisions (for more see Chapter 2 "Decisions of the PCI" of this Report), the imperative character of legal regulation of PCI's mandate and composition, established at the Law, the presence of public interest in the area of its activity (composition of judiciary), the PCI could be reasonably regarded as administrative body.

This body was established for the purpose of ensuring the public control over the qualification evaluation/selection proceedings. The idea of involvement of civil society to the procedures of the formation of judiciary is regarded as one of the essential tools for ensuring the judiciary's accountability to the public in democratic states.

Mostly, in composition of the bodies, which perform the evaluation of judicial activities and/or selection of judicial candidates/judges the representatives of other branches of power and/or civil society are involved. This interaction of judicial self-governance with other entities (state

bodies and/or civil society organisations or representatives) is widespread in European countries[3], especially in respect of councils for the judiciary, which often have certain powers in selection and appointment procedures. There are also other forms of civil society involvement. For example, in Lithuania the Permanent Commission for the Assessment of Judges' Activities is formed for the term of office of the Judicial Council from seven members: three of them must be not judges. Four members of the Commission are elected from the judges by the Judicial Council, three are appointed by the President of the Republic. The Selection Commission of Candidates to Judicial Office, the aim of which is to help the President of the Republic in selecting the candidates for judicial office, is composed of seven persons and formed for a period of three years by the President of the Republic. Three members of the Selection Commission are judges and four members are the representatives of the society[4].

Such a concept, as one of the safeguards of the accountability of judiciary, contributes in "avoiding the perception of self-interest, self-protection and cronyism and reflecting the different viewpoints within society"[5].

Therefore, the idea of the participation of people outside the judiciary in the selection procedure should be considered positively.

At the same time, it should be noted, that the Ukrainian example of creating a separate external body instead of giving a mandate and benefiting from non-judicial members in already existing institutions (HQC, High Council of Justice) is quite unusual and carrying the risk of diminishing the legal clarity and effectiveness of the procedure, though probably could be explained and justified only temporarily by exceptional circumstances and situation in Ukrainian judiciary.

The issue of the composition of the PCI is a very important, when taking into account previous remarks about the mandate/administrative nature of it. The legitimacy of the execution of the mandate depends, first of all, on the validity of the composition of the body.

According to the Art. 87 Par. 2 of the Law, the PCI is composed of the representatives of human rights civic groups, law scholars, attorneys, journalists who are respected specialists in their professional activities, having high professional reputation and matching the criteria of political neutrality and integrity.

These general requirements meet basic principles (recognized by European judicial systems) of appointment of external representatives to the judicial self-governance institutions[6]. These basic

[3] Absolute majority of judicial councils of European Union have members from outside judiciary (Belgium, Bulgaria, the Netherlands, Spain, Portugal, Malta, Italy, etc.). https://www.encj.eu/index.php?option=com_content&view=article&id=51%3Aencj-members&catid=2&Itemid=220&lang=en.
[4] Art. $55^{1}$and 91^{3} of the Law on Courts of the Republic of Lithuania.
[5] Par. B.a),CCJE Opinion No.17.

principles, if in practice interpreted and followed carefully, could be sufficient for the legitimate composition of impartial and competent body.

2. Decisions of the PCI

According to the Art. 87 Par. 6 of the Law and Art. 18-19 of the Regulation, after the analysis of the material on a judge, the PCI can:

- submit the information to the HQCJ about the positive reputation of a judge/judicial candidate and credibility of his/her activities;
- submit the information to the HQCJ on presumable non-conformity of a judge/judicial candidate to the criteria of professional ethics and/or integrity, if there is a lack of verification;
- adopt and submit to the HQCJ a motivated conclusion on non-conformity of a judge/judicial candidate to the criteria of professional ethics and/or integrity (such a conclusion can be adopted on the grounds of an accurate and sufficient information and the conviction that such doubts about the non-conformity can adversely affect the public trust in judiciary).

A "negative" conclusion of the PCI can be overruled by the qualified majority (11 votes) of the HQCJ after the interview with the candidate with the presence of the representatives of the PCI. If the HQCJ does not achieve the qualified majority, the judge/judicial candidate can not obtain positive evaluation. Therefore, the legal consequences of the PCI's decisions are very serious (decisive) for the candidate's possibility to obtain the judicial office or to the judicial career.

Taking into consideration this aspect (in conjunction with the abovementioned remarks on the institutional framework of the PCI), a few important issues should be further discussed:

a) payment for members of the PCI. Institutional framework and accountability should be proportionate to the guarantees, including payment, for the members for their duties. *Pro bono* services mainly are used in the advisory bodies;
b) to determine rules of the accountability and responsibility for misconduct. This is very important, because the activities of the PCI affect the human rights issues (personal data protection, the right to fair procedures, protection of professional reputation, etc.);
c) to establish the practice of the precise procedures of assessment of information (see Chapter 3 of this Report), safeguarding the impartiality of members of the PCI (see

[6] „prospective members [of the councils for the judiciary], wether judges or not, shall be appointed on the basis of their competence, experience, understanding of judicial life and culture of independence. Also, they should not be active politicians or members of the executive or the legislature" Par. B.a),CCJE Opinion No.17.

Chapter 4 of this Report), appropriate analysis of the candidate's/judge's personal material and justification/motivation of the conclusions, publication of the information.

Otherwise, some alternatives could be also considered, for example, the mandate of the PCI could be employed in a way, that this body would be empowered to execute a public control through the advisory role to the HQCJ. Then the conclusions of the PCI (both "positive" and "negative") should be treated as a substantial material for HQCJ in evaluation process without having autonomous role (impact) on the evaluation process and legal consequences. It should be mentioned, that such a system (with a PCI playing and advisory role) would more appropriately match the principle of the independence of judicial self-governance.

3. Assessment of information

In the evaluation process of judge's activities as well as in the selection/promotion procedures, the relevance and sufficiency of the material, on the basis of which the procedure is performed and conclusions drawn, are widespread recognized[7] as one of the key conditions of the validity of the whole procedure.

Therefore, not only the access to the sufficient information sources in order to analyse all the relevant material and make truly grounded conclusions is an issue. Even more important are the rules of assessment of this information.

In this respect the provision of the Art. 21 Par. 1 of the Regulation raises some doubts: "The verification of the information about a judge/judicial candidate is conducted to assess its reliability. Such verification is carried out according to the inner conviction of a Council member". Having in mind legal force of the conclusions of the PCI, the reliance solely on the inner conviction is not sufficient with regard to the protection of the fundamental rights.

Special focus in this regard should be given to the negative information of evaluative character (views, opinions, notions, etc.)[8]. Such information could be examined and evaluated not autonomously, but only in the context of other reliable information. Furthermore, it would be inappropriate to draw negative conclusions (even public) solely from the information of the abovementioned character.

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[7] „Evaluators should have sufficient time and recources to permit a comprehensive assessment of every judge's individual skills and performance". „Sources of information used in the evaluation process must be reliable. This is especially so in respect of information on which an unfavourable evaluation is to be based. Also, it is essential that such evaluation is based on sufficient evidence.", Par. 36&39,CCJE Opinion No.17.

[8] In the view of the CCJE, the individual evaluation process for career or promotion purposes should not take account of public views on a judge. They may not always be the result of complete or fully understood information or such views may possibly even be based on a misunderstanding of the judge's work overall." Par. 48,CCJE Opinion No.17.

Therefore, the improvement of the regulation/practice of collection, analysis and evaluation of the material could be considered, taking into account abovementioned aspects in order to ensure more precise and objective procedure as the ground for reliable conclusions.

4. Management of conflict of interests

Among all bodies and persons, participating in the selection procedures, including the members of the PCI, special attention is paid to the issue of the management of interests of the members of the PCI, especially taking into consideration the fact, that the members can be (and some of them are) lawyers, practicing in courts.

In the Art. 23 Par. 3 it is stated that "A member of the Council shall avoid conflict of interest in his/her activities and report to the Council in case of such, and ask for recusal. A member of the Council shall report on the conflict of interest of another Council member and ask for recusal if there is an evidence to that."

Also imperative provision is established at the Art. 87, Par. 8.2 of the Law: "A member of the Council shall be obliged to recuse himself/herself from considering the issue of non-eligibility of a judge/judicial candidate in terms of the criteria of judicial ethics and integrity if he/she has been involved in cases, considered or being considered by this judge".

Identical provision is established at Art. 23 Par. 5.3 of the Regulation.

Therefore, the regulation, ensuring the procedure of managing the conflict of interest, could be treated as being appropriate in respect of the guarantee of the impartiality of the members of the PCI.

Though during the discussions it has been noted, that in practice there were some situations, when active lawyers (practicing in courts) had not recused themselves from consideration of the issues of ethics and integrity of a judge, who was involved in hearings, where particular lawyer (member of the PCI) presented the interests of the party.

Another issue was also raised – when there was a recusal, not in all cases particular ground and circumstances, which are important, where pointed at the protocol or other procedural document of the PCI.

On another hand, there is a question, raised by members of the PCI – is there always an objective need for recusal in cases, where acting lawyer evaluates the judge, in whose case hearings he/she was previously present? Here, in expert's opinion, the general principles of court procedure should be also applied.

Following the abovementioned principles, situations of different character could be solved not necessarily always by way of recusal. In modern understanding of procedural principles, the form of declaration of situation, which may be treated as possible conflict of interest, is also considered as appropriate procedural behaviour. Two conditions are very important in this procedure:

1) the declaration of the interest must be made in such a manner (explaining the important circumstances and probable grounds for recusal), that other members of the respected body and/or parties can understand and evaluate the need of the recusal properly;
2) the party (in this specific situation – candidate/judge, whose assessment procedure is being performed) has an effective right to express his/her opinion on this declaration and/or ask for member's recusal.

On the other side, there are situations, when judges, who take part at the competition to the SC, recuse themselves from hearings, because of the fact, that in particular case the party is represented by the lawyer, who is the member of the PCI. Of course, these cases are still rare, because the number of judges participating in the competition to the SC, is comparably small. Though, having in mind, that the procedure of the qualification assessment will be carried out, where all judges will take part, and the PCI will play a particular role, the situation may get more complicated with regard to the effective proceedings.

5. Other important procedural issues

The publicity of the procedure also raises some doubts. The publication of conclusions (according to the Art. 30 Par. 3 of the Regulation) has some very important aspects, especially taking into account the content of these conclusions, which encounter details of candidate's personal life and some aspects of judicial decisions on merits.

Basically, in European countries, which perform any kind of formal evaluation of judge's activities, the results are usually not published. This principle is also expressed by the CCJE, emphasizing that „the process and results of individual evaluations must, in principle, remain confidential and must not be made public" [9].

Particular doubts arise concerning the publication of all the material, not necessarily verified and taken from reliable sources. This is even more important, when it appears, that there is no final decision on the eligibility of the candidate to judicial office yet, but the PCI's information about the candidate's "failure" to pass the assessment of integrity, carried out by the PCI, has

[9] Par. 48, CCJE Opinion No 17.

already been published[10]. The special attention should be given to all kinds of information-opinions/conclusions, related to the jurisdictional activities of the judge, i.e. evaluation of judicial decisions on merits[11].

This issue could be solved by way of creating a common practice, where all participating bodies would at least refrain from publishing of information, which could be treated as the interference to the judicial activities (especially in cases, which are still under consideration and the final decision has not yet come into force), while it is not verified and the position of respective judge was not yet heard.

The participation of the judge/judicial candidate is also an issue. The candidate is not present at the hearings (Art. 15 par. 4 of the Regulation) and does not have possibility to submit explanations directly at the PCI meetings. The right to be heard is one of the main principles of fair process, which, having in mind the nature, objectives, consequences of the process of the evaluation of judicial candidates/judges, should be applicable here as well.

Therefore, considering the need for effective process, this procedural right could be ensured by the way of presenting the material to the judicial candidate/judge and suggesting submit explanations, comments, etc. before the PCI's meeting.

Conclusions, remarks and recommendations

1. The participation of people outside the judiciary (representatives of civil society) in the selection procedure as the form of public control over the procedure is regarded as one of the essential tools for ensuring the judiciary's accountability and facilitating public trust in judiciary. This control has to be carried out according to the precise grounds and procedures and with respect to fundamental rights and principles.

2. HQCJ and PCI show the intention to discuss and improve the process and are interested in creating practice of application of the legal regulation of assessment/selection of judges in the best possible way and to cooperate more effectively. The particular progress throughout the whole SC's formation procedure in respect of the process of more effective discussions and intentions for improvement can be observed.

3. The PCI could be reasonably regarded as administrative body, taking into account the powers of this body and legal power of its activities/decisions, the imperative character of legal

[10] For example, in the website of the PCI, the published list of 30 judges, who in opinion of PCI, do not meet the integrity criteria („Nedobrochesna tridsiatka").
[11] For example, PCI's OPinion about the incompliance of the candidate justice for the SC Larysa I. Rohach with integrity and professional ethics; 8 May 2017.

regulation of PCI's mandate and composition, established at the Law and the presence of public interest.

4. The mandate of the PCI could be employed in a way, that this body would be empowered to execute a public control through the advisory role to the HQCJ.

5. If the mandate of the PCI is further interpreted in the same way as at present, the payment for members of the PCI should be considered. *Pro bono* services mainly are used in the advisory bodies.

6. The adoption of rules of the accountability and responsibility for misconduct, which can affect human rights issues (personal data protection, the right to fair procedures, protection of professional reputation, etc.), could be also considered.

7. The improvement of the regulation/practice of collection, analysis and evaluation of the material could be considered, taking into account some important aspects, such as the evaluation of negative information, which has not been verified (views, opinions, notions, etc.). Such information could be examined and evaluated not autonomously, but only in the context of other reliable information.

8. The conflicts of interests could be managed, following the modern more flexible understanding of procedural principles. In some cases the form of declaration of situation, which may be treated as possible conflict of interest, is also considered as appropriate procedural behaviour, if at least 2 conditions are fulfilled: 1) the declaration of the interest must be made in such a manner, that other members of the respected body and/or parties can understand and evaluate the need of the recusal properly; 2) the candidate/judge, whose assessment procedure is being performed, has an effective right to express his/her opinion on this declaration and/or ask for member's recusal.

9. The publicity of the procedure also raises some doubts. It should be discussed the possibility to for the practice, where all participating bodies would at least refrain from publishing of information, which could be treated as the interference to the judicial activities (especially in cases, which are still under consideration and the final decision has not yet come into force), while it is not verified and the position of respective judge was not yet heard.

10. The procedural right to be heard, as one of the principles of fair procedure, could be ensured by the way of presenting the material to the judicial candidate/judge and suggesting submit explanations, comments, etc. before the PCI's meeting.

Reda MOLIENE