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REPORT ON THE PUBLIC INTEGRITY COUNCIL AND THE RESULTS APPLIED BY THE HIGH QUALIFICATIONS COMMISSION OF JUDGES OF UKRAINE

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Nove Pravosuddya Justice Sector Reform Program (New Justice)

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

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This report was prepared by the expert on the basis of a review of the legislation and rules of procedure of the Public Integrity Council (PIC) and the qualification methodology applied by the High Qualification Commission (HQC) in combination with his observations made during a roundtable event organized by an NGO related to the Ukrainian Bar Association and observance of a closed meeting of the PIC (20 April 2017).

On the basis of the information received the following conclusions/observations can be made with regards the current functioning of the public integrity council.

1. *General functioning of PIC*

It must be noted that the members of PIC are functioning on a pro-bono basis in the commission. No remuneration is being received for their work reviewing the integrity and ethical behavior of candidate-judges for the position of a judge at the Supreme Court. Pro-bono work has the advantage that the integrity council can act fully independent from the government. However, this also has the consequence that the technical support of the members of the Integrity Council is very limited (only a few staff members are acting as a secretariat of the Council). Moreover, the PIC is not having its own premise, but is organizing their (internal) meetings in the office of the High Qualification Commission, who is willing to provide PIC office space and facilities.

Despite the fact that the members of PIC do not receive any remuneration for their work, the screening of the candidates is being done in a thorough manner. Members of the Council are trying to collect as much as possible (public) information about evident violations of integrity and ethical rules in order to prepare their opinion.

2. *Rules of procedure and methodology of PIC*

The PIC is composed of 4 chambers. Each chamber is responsible for reviewing of a number of candidate-judges. This is not done on the basis of specialization (applied by the HQC: civil, criminal, administrative and commercial court candidates), but on the basis of the list of names of the candidates.

One of the points of criticism received by the PIC is that there is no clear methodology applied for assessing the level of integrity and ethical behavior of candidate judges. Members of PIC though indicated that the main reference point for their work concerns the application of the UN Bangalore Principles of Judicial Conduct.

Based on the first observations of the PIC meeting and the discussion held in April with external partners is that there is a need for developing a clear methodology, containing a framework of criteria for determining the level of integrity and ethical behavior of candidate-judges. This framework should also outline which type of information must be used for the assessment of the candidate (mainly objective and verifiable information) and which type of information will *not* be considered to be included in the review of the candidates by PIC.

It is evident that this is not an easy job, since partly the work of PIC will overlap with the methodology applied by the HQC for the judicial qualification of candidate supreme court judges. Problems in this area are already to be found in the decisions made by PIC to include for certain candidates an examination of court decisions in the process to determine if a candidate-judge is qualified or not. Normally, it is the competence of a High Qualification Commission to examine the judicial knowledge and skills of a judge by analyzing a selective number of court decisions. This however, does not exclude the PIC to examine the content of certain court decisions of a candidate-judge. **Especially for high-impact cases and cases where there is a concern that the level of independence of the judge**

concerned, objectivity, fairness and integrity is questioned PIC must have the freedom to include this information in their considerations concerning the drafting of an opinion about conformity or non-conformity of a candidate-judges with regards integrity and ethics standards. It must be clear that the PIC should not examine if court-decisions are properly drafted in a technical-legal manner, but if a decision was made in a fair and independent manner without improper external influence or in situations where a judge was biased.

3. Mandate of PIC

According to the law on the status of judges PIC should limit themselves to the following: The Public Council of Integrity is established with the purpose of assisting 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 for the purposes of qualifications evaluation* (article 87).

As can be derived from point 2 the mandate and the boundaries for the scope of work of PIC is not always clearly defined. With regards reviewing the content of court decisions it must be evident that the PIC should not review and question the legal-technical content of a court decision, but must look into the societal impact of a court decision (in terms of integrity and ethical behavior).

Other areas where there might be interpretation problems about the mandate of PIC are related to two examples of concrete cases examined by the PIC. One case is related to plagiarism of an academic doctoral thesis and one case concerns the use of travel data of a judge travelling to Russia. In the first example, the members of the PIC discussed if – based on other sources – the thesis was poorly drafted and not contributing to the work of the judiciary and if there were many evidences found on plagiarism in the thesis. In general, the review of a thesis is outside the scope of competence of PIC and should be done in the academic world. Similar, with regards plagiarism. This has to be confirmed by an academic council and objective proof of plagiarism must be available, to be included in the decision making process if a candidate-judge must be rejected or not. In the second example, traveling to Russia, there is no rule described in the law on the status of judges that forbids (candidate-)judges to travel to Russia. However, if the travel is clearly related to contacting the Russian authorities or if for example a crime is committed in Russia, this might be included in the considerations of the PIC. **On the other side, the examination if a judge-candidate poses a security risk (e.g. due to unauthorized traveling to Russia), this must be concluded by the National Security Agencies of Ukraine and does not belong to the competence of PIC.**

On the basis of the two examples and the item discussed under point 1 (reviewing the content of a court decision) it is recommended that the scope of work of PIC should be limited to Article 87 of the law on the status of judges. This means in practice that PIC is allowed to use public sources or other information sources provided by the State to determine the level of conformity of a judge and may include court decisions. However, the court decisions should only be considered in the decision making process of PIC in terms of the societal impact or damage to the society. Members of PIC should not comment or analyze the content of court decisions in terms of the presences of technical-legal mistakes and a proper application of the law (this should be reserved to the judge-inspectors of the High Qualification Commission). **In addition to this it is important that the mandate of PIC is limited and should not exceed the competences of other State institutions (such as the Ministry of Education or a State Security Agency).**

4. Conflict of interest and behavior of members of PIC

In certain cases members of the PIC are involved in cases and judicial trials against a judge-candidate for the Supreme Court. It must be evident and included in the rules of procedure of PIC that when a member of PIC is involved in a case against a judge-candidate he or she should recuse themselves from the decision making process for determining if a judge-candidate should be rejected or not. This information must be clearly recorded in the meeting notes of the meetings of PIC.

One of the complicating factors for the members of PIC is that they have to work on a pro-bono basis, which means in practice that they have to combine their duties working as a (paid) lawyer, member of an NGO or journalist. In certain situations the combination of the role of member of PIC and another profession can create tensions and conflicts of interest. Especially when members of PIC are publicly criticizing the procedures applied by the High Qualification Commission (and post this information on the website of PIC) or having critics on the behavior of a specific judge-candidate. **To avoid conflict of interest of PIC members with their work for law firms, NGOs and media it is recommended that members of PIC abstain themselves from (professional) comments on the work of the HQC or the behavior of judge-candidates in public.** To maintain a high level of trust in the PIC no questions should arise about the level of objectivity of the work of PIC. Therefore, members of PIC should avoid to express negative information related to candidate-judges and the HQC in the (social) media. If critical information is published, this can only be done on behalf of the law firms, NGOs or media of the participating members of PIC (*and not as a member of PIC*).

5. Trust in the work of PIC, by the HQC and the judges

The work of PIC should support the HQC in making a thorough and well-reasoned decision for appointing a candidate-judge for the position of a judge of the Supreme Court. Therefore, it is important that there is a high level of mutual trust between the PIC and the HQC. As has been indicated in the previous paragraph, the publication of negative opinions about the work of the HQC by PIC does not contribute positively to the mutual trust to both institutions. If there are concerns about the work of PIC or the HQC this should be discussed internally between both institutions and not expressed in a public debate.

Another factor that can negatively influence the trust in the work of PIC is related to the members of the judiciary and the absence of a clear methodology. Since there is no methodology published by PIC how the integrity and the ethical behavior of candidate-judges are being examined, which information will be used and which procedural steps applied, this can raise concern from the side of the judiciary. Since the judiciary is keen on applying fair and transparent procedures, there is a chance that candidate-judges who receive a negative opinion from the PIC, they will challenge the decision of (and methodology applied by the) PIC. Especially, when similar cases of candidate-judges may result in a different opinion of the PIC or when the information used to draft the opinion is questionable and is lacking a high level of objectivity.

To avoid criticism and lack of trust of the members of the judiciary in the work of PIC it is recommended to involve the members of the judiciary and the High Qualification Commission in the development of a unified methodology for examining the level of integrity and ethical behavior of candidate-judges (or to request for an opinion of the judicial institutions/authorities about the methodology).

6. Information provision of the opinion of the PIC and the supporting information to the HQC

In point 6 of article 87 of the law on the status of judges it is stated that PIC should collect, check and analyze information about a candidate-judge, and to provide the HQC

information about the judge-candidate. As a part of the information provision justifiable reasons must be provided when a candidate-judge does not meet professional ethics and integrity criteria.

On the basis of the interpretation of this article it is recommended that when an opinion of PIC is delivered to the HQC, this opinion should not only contain the motivation when a judge-candidate is not meeting the requirements of ethics and integrity standards, but **this motivation should be supplemented with verifiable documentation containing objective information and references stating that a candidate-judge has violated certain standards related to ethics and integrity.**

Also, when a judge is meeting the minimum standards for ethics and integrity it is recommended that objective sources of information or references supporting the motivation of the PIC are included in the file to be submitted to the HQC. This will guarantee that a fair and objective procedure is applied by the members of PIC.

7. Provisions related to the protection of personal data of the candidate-judges

Since the members of PIC are making use of sensitive personal information of judge-candidates (e.g. information obtained from NABU or information about the income- and assets of candidate-judges) **it is necessary that a policy is developed for the protection of personal data of candidate-judges.** This must include specific regulations about the storage of the personal data, the level of authorization of access to certain information by members of PIC and the secretariat of PIC, security measures taken with regards the storage of the personal data of candidate-judges and procedures for erasing or deleting the personal data used for the purpose of reviewing a judge-candidate when the procedure of review have been completed by PIC.