MONITORING OF JUDICIAL INDEPENDENCE IN UKRAINE 2011

CONCLUSIONS
Monitoring of Judicial Independence in Ukraine - 2011

Conclusions

Foreword
Under Article 127 of the Law of Ukraine “On the Judiciary and Status of Judges” the Council of Judges of Ukraine is entitled to develop and organize measures ensuring independence of the courts and judges. In the framework of exercising such authority the Council of Judges initiated regular monitoring of the status of judicial independence, with participation of the Centre for Judicial Studies and assistance of the Ukrainian-Swiss Project “Support to Justice Reform in Ukraine”.

Monitoring included a polling of the Ukrainian judges. Its results are presented to the participants of the conference “Independence of Judges in Ukraine” for discussion. The questions that the judges were answering rested upon the international standards of judicial independence as set forth in Recommendation (2010) 12 of the Committee of Ministers of the Council of Europe for member states on judges: independence, efficiency and responsibilities and in other international instruments on enhancement of judicial independence.

The experts of the Ukrainian-Swiss Project drafted their preliminary conclusions on the basis of analysis of the judges’ responses, statements of the representatives of the judiciary in the mass media and professional assessments of the current status of judicial independence as imparted during conferences, seminars and other activities with the participation of judges.

General conclusion
Over the last two years the situation with implementation of the international standards of judicial independence has been developing in the positive direction; however, changes are taking place very slowly.

Pressure on the judicial arm from representatives of the legislature and executive is gradually decreasing, but introduction of amendments into the procedural legislation and the Law “On the Judiciary and Status of Judges” without coordination with representatives of the judicial power creates threats of the lowering of the level of independence of judges.

Financial and technical support of the judicial authorities is done according to the residual principle. Social safeguards of judicial independence are, in most parameters, at an insufficient level.

Further reform of the judicial system will inevitably require establishment of efficient communication between representatives of the legislative, executive and judicial powers, with involvement of domestic and international experts into such dialog. Recommendations, proposals and reservations motioned by the highest bodies of judicial self-government, Plenum of the Supreme Court of Ukraine (as per p. 4 of part 2 of Article 45 of the Law “On the Judiciary and Status of Judges”) and of other judicial bodies should be obligatorily considered and taken into account by the executive and legislative authorities in the making of new laws and other regulations that address the judicial system and operation of the Supreme Court of Ukraine.
I. Institutional independence of the judiciary

Conclusion

In spite of the recently taken positive action (the publicly expressed position of the President of Ukraine in support of the independence of the judiciary, increase of the number of judges in the High Council of Justice, lessening of public pressure upon judges on the part of some representatives of the legislative and executive powers, in court proceedings in specific cases) the institutional independence of the judiciary is still at an insufficient level.

Representatives of the legislative and executive branches still attempt at directing the judicial system. Financing of courts, as compared to other institutions, is done in accordance with the residual principle. The earlier commenced process of the reform in the judicial system is pursued chaotically and without proper attention to proposals from the judicial community.

International standards of judicial independence:

- State bodies, institutions and organizations, bodies of local government, individual citizens and their associations are to respect the independence of judges and not to interfere with it.
- Without any compromise to own independence the judges and the judicial system are to maintain constructive working relations with the bodies and institutions of public power.
- The executive and the legislative powers are to ensure judicial independence and to exclude any measures that may restrict it.
- When commenting on judges’ decisions the executive and the legislative branches are to avoid criticism that may undermine the independence of the judiciary and its credibility with the society.

Level of respect for judicial independence among representatives of the legislative authority

(according to the polling of judges – in per cent of the number of respondents)

<table>
<thead>
<tr>
<th>Year</th>
<th>Respect</th>
</tr>
</thead>
<tbody>
<tr>
<td>2007</td>
<td>37</td>
</tr>
<tr>
<td>2008</td>
<td>43</td>
</tr>
<tr>
<td>2009</td>
<td>43</td>
</tr>
<tr>
<td>2011</td>
<td>54</td>
</tr>
</tbody>
</table>

Level of respect for judicial independence among representatives of the executive authority

(according to the polling of judges – in per cent of the number of respondents)

<table>
<thead>
<tr>
<th>Year</th>
<th>Respect</th>
</tr>
</thead>
<tbody>
<tr>
<td>2007</td>
<td>47</td>
</tr>
<tr>
<td>2008</td>
<td>51</td>
</tr>
<tr>
<td>2009</td>
<td>54</td>
</tr>
<tr>
<td>2011</td>
<td>57</td>
</tr>
</tbody>
</table>
Efficiency of public authorities' and judicial self-government bodies' actions aimed at enhancement of the independence of judges

(activity according to the polling of judges – in per cent of the number of respondents)

### Level of promotion of judicial independence by the legislative authority

- State Court Administration: 31.5%
- Councils of judges of specialized courts: 60.7%
- Council of Judges of Ukraine: 63.6%
- High specialized courts: 58.1%
- Supreme Court of Ukraine: 55.1%
- Constitutional Court of Ukraine: 51.2%
- High Council of Justice: 37%
- General Prosecutor’s Office of Ukraine: 21.7%
- Cabinet of Ministers of Ukraine: 19.6%
- Parliament of Ukraine: 21.2%
- President of Ukraine: 30.8%

### Level of promotion of judicial independence by the executive authority

- 2007 year: 39%
- 2008 year: 39%
- 2009 year: 36%
- 2011 year: 20%
Level of constructiveness of the working relations of the judicial power with public bodies and legal institutions posing no threat to judicial independence (according to the polling of judges – in per cent of the number of respondents)

<table>
<thead>
<tr>
<th>Constructive relations</th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Research and expert institutions</td>
<td>89,7</td>
</tr>
<tr>
<td>Defense lawyers</td>
<td>69,8</td>
</tr>
<tr>
<td>Prosecutor’s offices</td>
<td>67,8</td>
</tr>
<tr>
<td>High Council of Justice</td>
<td>71,8</td>
</tr>
<tr>
<td>Bodies of local government</td>
<td>67,1</td>
</tr>
<tr>
<td>Ministry of Justice of Ukraine</td>
<td>73</td>
</tr>
<tr>
<td>Cabinet of Ministers of Ukraine</td>
<td>67,7</td>
</tr>
<tr>
<td>Parliament of Ukraine</td>
<td>67,6</td>
</tr>
<tr>
<td>Presidential Administration</td>
<td>56,6</td>
</tr>
</tbody>
</table>

Comments of judicial rulings with critique undermining judicial independence and credibility of the judiciary in the society (according to the polling of judges – in per cent of the number of respondents)

| Mass media              | 90,9    |
| Representatives of the public | 91,7    |
| Defense lawyers          | 85,1    |
| Prosecutors              | 75,2    |
| Representatives of the executive... | 81,5    |
| Representatives of the legislative... | 79,1    |

Comments of pending judicial proceedings with critique undermining judicial independence and credibility of the judiciary in the society (according to the polling of judges – in per cent of the number of respondents)
Comments:

- Relations of the judiciary with other branches of state power should be considered in several dimensions: public statements of representatives of the legislative and executive arms about the judicial system, courts and judges; decisions of the Parliament and of the Government that relate to the judicial system and judges; influence and pressure on courts and judges in the process of deliberations in specific case;

- In the recent time heads of public institutions follow the example set by the President of Ukraine and in their public statements show respect for the independence of courts and judges and demonstrate own willingness to promote impartial and independent justice in the nation;

- Lack of systemic and aim-driven attitude in the activities of the Verkhovna Rada of Ukraine in the legal reform realm negatively affects the pace and quality of the reform of the judicial system. In spite of proposals from the judicial community laws are amended in a manner creating considerable obstacles to efficient functioning of courts, complicating court proceedings and decreasing legislative safeguards of the independence of judges;

- Recently emerged more constructive relations between the legislative, executive and judicial powers require further development by concentration of joint effort to enhance the independence of courts and judges.

**International standards of judicial independence:**

- The body deciding on selection and career development of judges is to be independent from the executive and legislative branches. For this purpose at least one half of the members of such body should be judges elected by their peers.

- The judicial councils\(^1\) are independent bodies established in accordance with the law or constitution and striving to retain the independence of judges and of the judicial power as a whole in order to promote efficient operation of the judicial system.

\(^1\) In the context of international standards this assumption is to extend onto the Council of judges of Ukraine, councils of judges of specialized courts, High Council of Justice and the High Judicial Qualification Commission of Ukraine.
**Level of independence of the High Council of Justice**
*(according to the polling of judges – in per cent of the number of respondents)*

**Level of independence of the High Qualification Commission of Judges of Ukraine**
*(according to the polling of judges – in per cent of the number of respondents)*

**Level of independence of the Council of Judges of Ukraine**
*(according to the polling of judges – in per cent of the number of respondents)*

**Comments:**

- Judges’ perception of the level of independence of the High Council of Justice is improving as compared to the previous periods. At the same time it remains necessary to amend the Constitution of Ukraine as regards election by judges of at least one half of the membership of the High Council of Justice and its assignment with the task of enhancement of the independence of judges and of the judicial power;

- Judges vary in their perceptions of the new law’s provisions that considerably change the structure of the councils of judges and the system of their formation and operation. 65.7 % of the polled judges of general courts assess the new format as inefficient, as compared to the previous one, in terms of enhancement of the judicial independence. There are serious issues with regard to abidance by the democratic standards in the election of delegates of judicial conferences, especially as to judges of general courts;
Judges are unanimously positive in their assessment of the new system of formation of the High Qualification Commission of Judges of Ukraine.

**International standards of judicial independence:**

- Every state is to allocate to courts enough resources, premises and equipment for their functioning in accordance with the standards set forth in article 6 of ECHR and for effective performance of judges.
- Representatives of the judiciary are to take part in the budgeting of the judicial system and in control over the use of funds.

**Level of financial and technical resources provided to courts**

(according to the polling of judges – in per cent of the number of respondents)

<table>
<thead>
<tr>
<th>Year</th>
<th>Most Insufficient</th>
<th>Insufficient</th>
<th>Sufficient</th>
</tr>
</thead>
<tbody>
<tr>
<td>2011</td>
<td>71,3</td>
<td>27,7</td>
<td>1,0</td>
</tr>
<tr>
<td>2009</td>
<td>78,8</td>
<td>19,7</td>
<td>1,5</td>
</tr>
<tr>
<td>2008</td>
<td>77,8</td>
<td>20,8</td>
<td>1,4</td>
</tr>
<tr>
<td>2007</td>
<td>85,5</td>
<td>14,5</td>
<td>0</td>
</tr>
</tbody>
</table>

Comments:

- The low level of financial and technical support of the judicial authorities remains the principal threat to the independence of courts and judges.

**II. Functional independence of judges**

**Conclusion**

In conjunction with new procedural rules envisaging unjustifiably short time frames for case hearings against the background of cased overloads and ensuing possibilities of holding judges disciplinarily liable and even of their dismissals on grounds of breach of the judicial oath the level of functional independence of judges has noticeably decreased.

Another visible tendency is greater influence of representatives of the executive and legislative powers on judges of high and appeal courts during proceedings in specific cases. There is a threat of emergence of a new system of political influence on judges by means of extra-procedural pressure on them from representatives of higher courts.
Existence of influence on judges, pressure, intimidation and direct or indirect interference on the part of court presidents, during judicial proceedings in specific cases
(according to the polling of judges – in per cent of the number of respondents)

| Judges of the Supreme Court | 37.5 |
| Judges of the High Commercial Court | 13.3 |
| Judges of appellate commercial courts | 12.5 |
| Judges of local commercial courts | 7.0 |
| Judges of High Administrative Court | 14.3 |
| Judges of appellate administrative courts | 10.3 |
| Judges of local administrative courts | 6.7 |
| Judges of High Specialized Court for civil and... | 17.9 |
| Judges of general courts of appeal | 16.9 |
| Judges of local general courts | 8.5 |

Existence of influence on judges, pressure, intimidation and direct or indirect interference on the part of representatives of the legislative power, during judicial proceedings in specific cases
(according to the polling of judges – in per cent of the number of respondents)

| Judges of the Supreme Court | 56.3 |
| Judges of the High Commercial Court | 29.0 |
| Judges of appellate commercial courts | 25.0 |
| Judges of local commercial courts | 14.5 |
| Judges of High Administrative Court | 14.3 |
| Judges of appellate administrative courts | 14.3 |
| Judges of local administrative courts | 15.9 |
| Judges of High Specialized Court for civil and... | 17.9 |
| Judges of general courts of appeal | 19.0 |
| Judges of local general courts | 12.6 |
Existence of influence on judges, pressure, intimidation and direct or indirect interference on the part of representatives of the executive power, during judicial proceedings in specific cases

(according to the polling of judges – in per cent of the number of respondents)

| Judges of the Supreme Court | 47,1 |
| Judges of the High Commercial Court | 27,8 |
| Judges of appellate commercial courts | 25 |
| Judges of local commercial courts | 17,5 |
| Judges of High Administrative Court | 33,3 |
| Judges of appellate administrative courts | 17,9 |
| Judges of local administrative courts | 20,5 |
| Judges of High Specialized Court for civil and... | 14,3 |
| Judges of general courts of appeal | 25,9 |
| Judges of local general courts | 17,3 |

Judges’ assessment of the level of their caseload

(according to the polling of judges – in per cent of the number of respondents)

- Judges of the Supreme Court
  - >150%: 11,7%
  - 100-150%: 35,3%
  - 50-100%: 53%

- Judges of the High Commercial Court
  - >150%: 16,6%
  - 100-150%: 23,4%
  - 50-100%: 60%

- Judges of appellate commercial courts
  - >150%: 0%
  - 100-150%: 14,3%
  - 50-100%: 85,7%

- Judges of local commercial courts
  - >150%: 8,3%
  - 100-150%: 8,3%
  - 50-100%: 83,4%

- Judges of High Administrative Court
  - >150%: 6,7%
  - 100-150%: 26,7%
  - 50-100%: 66,6%

- Judges of appellate administrative courts
  - >150%: 7%
  - 100-150%: 17,2%
  - 50-100%: 75,8%

- Judges of local administrative courts
  - >150%: 6,5%
  - 100-150%: 30,5%
  - 50-100%: 63%

- Judges of High Specialized Court for civil and criminal cases
  - >150%: 24,7%
  - 100-150%: 27,5%
  - 50-100%: 48,3%

- Judges of general courts of appeal
  - >150%: 11,5%
  - 100-150%: 18,1%
  - 50-100%: 70,4%

- Judges of local general courts
  - >150%: 18,4%
  - 100-150%: 43,1%
  - 50-100%: 38,5%
Do new law-prescribed (shorter) time frames for deciding on court cases promote enhancement of judicial independence? 
(according to the polling of judges – in per cent of the number of respondents)

Are new law-prescribed (shorter) time frames for deciding on court cases conducive to better quality of judicial rulings? 
(according to the polling of judges – in per cent of the number of respondents)

Comments:

- Influence of court presidents on judges in the course of case deliberations increases at each level of court instance;

- Representatives of the legislative power exert large influence of judges of commercial courts during proceedings, especially with regard to judges of appellate commercial courts and of the High Commercial Court of Ukraine;

- Representatives of the executive power considerably influence judges who hear administrative and commercial cases, especially at appeal level;

- As compared to the previous period the representatives of the legislative and executive branches have re-directed their influencing from local courts to appellate and cassation court instances. Accordingly, the ensuing issue is the lower level of functional independence of the judges of appellate and high courts;

- Introduction of new, shorter mandatory time frames for deciding on court cases and the existing case overloads considerably affect the lowering of the level of functional
independence of judges and the quality of judicial decisions. Practically all judges risk being held disciplinarily liable and dismissed for breach of the judicial oath;

- Absence of real legal opportunities for judges to efficiently react to attempts at unlawful influence on court on the part of participants of the proceedings and other persons and to manifestations of their disrespect of court constitutes a threat to impartiality and independence of judges.

III. Independence of the judicial status

**Conclusion**

Independence of the judicial status remains doubtful.

In spite of positive changes in the procedures of judges’ selection and initial appointment the now effective legislation retains preconditions for protectionism in the judges’ career growth.

The unjustifiably complex system of holding judges disciplinarily liable does not meet the standards of judicial independence.

The lowering of the level of social protection of judges creates conditions for influence on judges and ruins their independent status.

**Judicial career**

*International standards of judicial independence:*

- Decisions related to selection of judges and their career growth are to rest upon objective criteria pre-established by law or competent authorities. Making of such decisions is to base on merits, with account of qualification, skills and potential necessary for ruling on cases applying the law and respecting human dignity.

**Objectivity of the criteria of selection of candidates for judicial positions and of their recommendation for appointment (election) to position of judge**

(according to the polling of judges – in per cent of the number of respondents)

<table>
<thead>
<tr>
<th>High Council of Justice</th>
<th>High Judicial Qualification Commission of Ukraine</th>
</tr>
</thead>
<tbody>
<tr>
<td>No 36,6</td>
<td>No 31,2</td>
</tr>
<tr>
<td>Yes 63,4</td>
<td>Yes 68,8</td>
</tr>
</tbody>
</table>
Presence of unlawful impact of public officials on the processes of candidates' selection and appointment to position of judge
(according to the polling of judges – in per cent of the number of respondents)

Representatives of the legislative and executive power

Yes 17,1
No 82,9

Presidents of courts

Yes 16
No 84

Presence of unlawful impact of public officials on the processes of lifetime election of judges
(according to the polling of judges – in per cent of the number of respondents)

Representatives of the legislative and executive power

Yes 22,2
No 77,8

Presidents of courts

Yes 13,7
No 86,3

Presence of unlawful impact of public officials on the processes of election to position of judge at a higher court
(according to the polling of judges – in per cent of the number of respondents)

Representatives of the legislative and executive power

Yes 12,8
No 87,2

Presidents of courts

Yes 9,9
No 90,1

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Comments:

- Introduction of the new system of competitive selection of candidates for judicial positions and of their first-time appointment to position of judge is a major step forward towards compliance with the standards of judicial independence;

- The lack of a similar competitive system with pre-established objective criteria for judicial promotion (election for lifetime tenure, election to position of judge at a higher court, appointment of a judge to administrative position in court) lay the basis for protectionist schemes, unlawful impacts on the part of representatives of the other branches of power and violation of the standards of judicial independence;

- Judges’ lack of any law-established opportunities to impact appointment of the president and vice-presidents of the court where they work considerably restricts their independence.

Liability of judges

International standards of judicial independence:

- Interpretation of law and assessment of facts and evidence for deciding on a case may not become grounds for civil or disciplinary liability of judges, with the exception of instances of criminal intent or gross neglect.

- Interpretation of law and assessment of facts and evidence for deciding on a case may not become grounds for criminal liability of judges, with the exception of instances of criminal intent.

- Disciplinary proceedings may be initiated if a judge failed to perform his duties efficiently and properly. Such proceedings should be held by an independent authority or court, with proper safeguards of fair hearing and the right to contest the decision and punishment. Disciplinary sanctions must be proportionate.

- Judges are not to be held personally liable in instances when their decisions were annulled or reviewed in the appeal process.

Conformity of the existing procedure and practice of disciplinary liability of judges with the standards of judicial independence

(according to the polling of judges – in per cent of the number of respondents)
Comments:

- The new Law of Ukraine “On the Judiciary and Status of Judges” failed to resolve the fundamental issues with abidance by the standards of disciplinary liability of judges and even created more complications with regard to its specific aspects;

- The absence of law-established criteria of violation of ethical rules, disciplinary breaches and breach of the judicial oath may in practice lead to non-objective hearing of disciplinary cases, application of non-proportionate disciplinary sanctions and of multiple sanctions for one violation;

- Unjustified overloading of the text of the judicial oath with multi-tier obligations may create, for each judge, the risk of being held disciplinarily liable and dismissed.

**Social protection of judges**

**International standards of judicial independence:**

- Judges’ remuneration is to correspond to their profession and performed duties and to be sufficient to protect them from any stimuli that may affect their decisions. The state should provide guarantees for retention of proper pay in instances of illness, child care leave as well as guarantees of payments related to retirement, in conformity with the earlier level of remuneration. Special legislative provisions should be passed in order to protect judges’ remuneration from reduction.

**Level of social safeguards for judges after adoption of the new Law of Ukraine “On the Judiciary and Status of Judges”**

(according to the polling of judges – in per cent of the number of respondents)

<table>
<thead>
<tr>
<th>Safeguards</th>
<th>No changes</th>
<th>Safeguards shrank</th>
</tr>
</thead>
<tbody>
<tr>
<td>became stronger</td>
<td>1,8</td>
<td>86,1</td>
</tr>
<tr>
<td>No changes</td>
<td>12,1</td>
<td></td>
</tr>
</tbody>
</table>

Comments:

- With the effect of the new Law of Ukraine “on the Judiciary and Status of Judges” the level of social protection of judges has practically decreased.