Strasbourg, 9 October 2023 **CDL-AD(2023)027**

Or. Engl.

**EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW**

**(VENICE COMMISSION)**

# UKRAINE

# JOINT FOLLOW-UP OPINION OF THE VENICE COMMISSION AND THE DIRECTORATE GENERAL OF HUMAN RIGHTS AND RULE OF LAW (DGI) OF THE COUNCIL OF EUROPE

# TO THE JOINT OPINION ON THE DRAFT AMENDMENTS TO THE LAW "ON THE JUDICIARY AND THE STATUS OF JUDGES" AND CERTAIN LAWS ON THE ACTIVITIES OF THE SUPREME COURT AND JUDICIAL AUTHORITIES (CDL-AD(2020)022)

**Adopted by the Venice Commission**
**at its 136th Plenary Session**
**(Venice, 6-7 October 2023)**

**on the basis of comments by**

**Mr Martin KUIJER (Substitute Member, the Netherlands)**
**Ms Hanna SUCHOCKA (Honorary President of the Venice Commission)**
**Mr Gerhard REISSNER (Expert DGI, Former President of the CCJE)**

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## I. Introduction

1. By letter of 4 August 2023, Mr Hryhorii Usyk, Chairman of the High Council of Justice ("the HCJ"), requested a joint opinion of the Venice Commission and the Directorate General of Human Rights and Rule of Law (DGI) on the draft law "on amending the Law of Ukraine "on the judiciary and the status of judges" as regards the introduction of additional procedures to enhance public trust in the judiciary", a draft law affecting the powers of the HCJ itself ("the draft law", CDL-REF(2023)041). In his letter, the Chairman of the HCJ asked the Commission and DGI to assess the draft law regarding its compatibility with the standards of the Council of Europe on the independence of the judiciary.

2. Mr Kuijer and Ms Suchocka acted as rapporteurs on behalf of the Venice Commission. Mr Reissner acted as a rapporteur on behalf of DGI.

3. On 4 September 2023, a delegation of the Commission and DGI had online meetings with the HCJ, the Parliamentary Committee on Legal Policy of the Verkhovna Rada, the Supreme Court, the High Qualification Commission of Judges ("the HQCJ"), the Chairman of the Council of Judges, representatives of the international community and civil society organisations. The Commission and DGI are grateful to the Council of Europe Office in Ukraine for the excellent organisation of the meetings and to the interlocutors for their availability.

4. The Commission and DGI have already produced opinions on recent sets of amendments to the Ukrainian legislation on judiciary. In their Joint Opinion on the draft amendments to the Law "on the judiciary and the Status of Judges" and certain Laws on the activities of the Supreme Court and Judicial Authorities (draft Law no. 3711) ("the 2020 Opinion"),[1] the Commission and DGI provided recommendations in the broader context of the judicial reforms in Ukraine (see paragraph 8 below). Thus, it was appropriate to assess the present draft law in the context of the previous recommendations, as a follow-up to the above-mentioned Opinion, ensuring the continuity of a constructive dialogue with the Ukrainian authorities.

5. This follow-up Opinion was prepared in reliance on the English translation of the draft Law. The translation may not accurately reflect the original version on all points. The HCJ and the parliamentary committee on legal policy provided their written comments on this draft Opinion.

6. This follow-up Opinion was drafted on the basis of comments by the rapporteurs and the results of the online meetings on 4 September 2023. It was adopted by the Venice Commission at its 136th Plenary Session (Venice, 6-7 October 2023).

## II. Background

### A. Previous reforms of the judiciary

7. For many years, the Ukrainian authorities have been taking measures to reform the judiciary. The Venice Commission and the DGI have been assisting them in the implementation of these measures. In 2020, the Commission and DGI, provided recommendations on the relaunching of the HQCJ, assessed the appropriateness of attributing additional competence to the HCJ, advised on the issues of disciplinary proceedings, and offered a broader view on the reform of the judiciary and the role of the HCJ.[2] The 2020 Opinion underlined the importance of the stability

[1] Venice Commission, CDL-AD(2020)022, Joint Opinion on the draft amendments to the Law 'on the judiciary and the status of judges' and certain Laws on the activities of the Supreme Court and judicial authorities (draft Law no. 3711), adopted by the Venice Commission at its 124th online Plenary Session (8-9 October 2020).
[2] See the 2020 Opinion, Chapter IV (paras. 68-72).

of the judicial system and the necessity to refrain from frequent fragmentary judicial reforms,[3] ensure the appropriate sequencing of changes in the judicial reform,[4] and prioritise the effective enforcement of the existing legal framework.[5] The Commission and DGI also noted that the problems of the integrity of candidates to the HCJ could be resolved by the use of mixed national/international bodies involved in the selection procedures.[6]

8. In July 2021, the Commission and DGI welcomed the draft law by which the HCJ was put under a vetting procedure with the participation of international partners,[7] following which Parliament adopted the relevant Law. In February 2022, the majority of the HCJ members resigned even before their vetting, depriving the HCJ of a quorum. Later in 2022, the Commission welcomed the relevant Law and reiterated its support for the reform, specifying that the assistance of international partners in vetting of the HCJ had been a necessary guarantee for ensuring the fairness of the integrity check.[8]

### B. Developments in 2023

9. In January 2023, the HCJ started working with a new composition of vetted members. On 1 June 2023, the HCJ appointed the members of the HQCJ, a body which had not been operational since late 2019 and was tasked with selecting candidate judges for more than two thousand vacant posts. However, the new composition of the HCJ could not start dealing with disciplinary complaints because the Disciplinary Inspectorate Service had not been established.[9] Given the backlog of disciplinary cases (about 11,000 complaints) and the considerable time necessary to establish the Inspectorate, especially during the martial law in Ukraine, Parliament decided to temporarily transfer the powers of the Inspectorate to the HCJ.[10]

10. In May 2023, a high-profile corruption case in the Supreme Court was reported.[11] In June 2023, the National Security and Defence Council of Ukraine decided to enhance the fight against corruption in the judiciary. In response to that decision, the Parliamentary Committee on Legal Policy prepared the present draft law.

### C. Brief overview of the draft law

11. The draft law (i) broadens the grounds for checking the integrity and discipline of judges by introducing a new type of "court monitoring" by the HCJ; and (ii) introduces the use of lie-detector

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[3] See the 2020 Opinion, para. 35.
[4] See the 2020 Opinion, para. 80.
[5] See the 2020 Opinion, para. 8.
[6] See the 2020 Opinion, para. 71.
[7] See Venice Commission, CDL-AD(2021)018, Urgent Joint Opinion on the draft law on amendments to certain legislative acts concerning the procedure for electing (appointing) members of the High Council of Justice (HCJ) and the activities of disciplinary inspectors of the HCJ (Draft law no. 5068) , 5 July 2021, para. 73.
[8] See Venice Commission, CDL-AD(2022)023, Ukraine - Joint amicus curiae brief on certain questions related to the election and discipline of the members of the High Council of Justice, adopted by the Venice Commission at its 132nd Plenary Session (Venice, 21-22 October 2022), para. 58.
[9] Regarding the Disciplinary Inspectorate Service, see CDL-AD(2021)018, Urgent joint opinion of the Venice Commission and the Directorate on the draft law on amendments to certain legislative acts concerning the procedure for electing (appointing) members of the High Council of Justice (HCJ) and the activities of disciplinary inspectors of the HCJ (Draft law no. 5068), issued pursuant to Article 14a of the Venice Commission's Rules of Procedure on 5 May 2021, endorsed by the Venice Commission at its 127th Plenary Session (Venice and online, 2-3 July 2021), paras. 67-71.
[10] See the Law of Ukraine, № 3304-IX, "On amendments to certain Laws of Ukraine concerning the immediate resumption of cases concerning disciplinary liability of judges" of 9 August 2023 (the Law has not yet entered into force).
[11] See, inter alia, BBC, Ukraine Supreme Court head held in corruption probe, 16 May 2023.

(polygraph) in various contexts of judicial career (recruitment, competitive transfers, the court monitoring, and the disciplinary proceedings).

12. According to the explanatory note to the draft law, the *necessity* of the proposed amendments stems from the continuing trend of low public trust, confirmed by sociological surveys in recent years and the regular media reports on examples of reproachable behaviour of judges, including high-ranking ones. The explanatory note states that the existing legal tools are insufficient to address these problems.

13. During the meetings, the rapporteurs were informed that the current version of the draft law was a preliminary one, and that the Parliamentary Committee on Legal Policy intended to continue the elaboration of the draft law. The Venice Commission and DGI appreciate the possibility of assisting the authorities at the early stage on this draft law and the openness of the authorities to this assistance.

### 1. Court monitoring

14. The *grounds* for the court monitoring are linked to the pending criminal proceedings: if a notice of suspicion of committing a corruption-related criminal offence has been served on a judge and the HCJ has authorised his/her arrest, pre-trial detention or suspension from office, the HCJ may decide to monitor the court in which such a judge administers justice.[12] The monitoring shall be carried out in respect of *all* the judges of the targeted court to establish whether there are grounds to open a disciplinary case against them.[13]

15. The HCJ is provided with "*gathering powers"*: it may request information from any person, summon judges and court staff to obtain explanations on the issues under monitoring; moreover, the HCJ may use a lie detector when interviewing judges of the targeted court.[14]

16. The draft law provides for the following *priorities*: if, at the time of commencement of disciplinary proceedings initiated as a result of court monitoring, there are other pending disciplinary proceedings against one judge, the HCJ will prioritise those disciplinary cases.[15]

17. The draft law further provides that the HCJ should immediately, but not later than fourteen days after these amendments take effect, begin the monitoring of all the Supreme Court judges.

### 2. The use of lie detector (polygraph)

18. The draft law introduces the use of a lie detector (polygraph) when interviewing judicial candidates and judges. It provides that this technique may be used by the HCJ in four cases: (a) screening of judicial candidates,[16] (b) competitive transfer of a judge,[17] (c) court monitoring,[18] and (d) disciplinary proceedings.[19]

19. According to the draft law, the "psycho-physiological interview by means of a lie detector" will consist of the questioning of a judge (or candidate judge) with the use of a lie detector - a multi-channel device designed to register and record in real time indicators of emotional stress of a person arising as a reaction to information in the form of words, images, etc. The purpose of this

[12] See Article 59-1, para. 2 of the draft law.
[13] See Article 59-1, paras. 3 and 8 of the draft law.
[14] See Article 59-1, para. 6 of the draft law.
[15] See Article 42, para. 4 of the draft Law.
[16] See Article 79, paras. 18 and 19 of the draft law.
[17] See Article 82, para.2 of the draft law.
[18] See Article 59-1, para. 6(2), Article 62-1, para.5 (1) of the draft law.
[19] See Article 62-1, para. 5(2) of the draft law.

interview is to obtain information on the probable reliability of the person's answers to questions related to possible offences, his/her integrity, compliance with the rules of judicial ethics, legality of property origin, circumstances that may be or are grounds for disciplinary action, or other circumstances that may adversely affect public confidence in the judiciary.[20]

20. The results of the use of a lie detector are confidential and may not be disclosed,[21] may be used together with other sources of information and evaluated among other information. These results may not be used as grounds for imposing a measure of legal liability on a judge, nor as grounds for refusing a judicial candidate for appointment.[22]

21. A judge must consent to the use of the lie detector. Refusal of a judge to undergo the test shall not constitute a ground for their liability.[23] However, the HCJ may refuse to nominate a candidate for appointment or competitive transfer in the event the candidate refuses to undergo the lie detector test.[24] Under certain medical conditions, as determined by the central healthcare authority, the lie detector test may not be applied.

## III. Analysis

### A. General remarks on the necessity of the draft Law

22. It follows from the title of the draft law and its explanatory note that the main goal of the draft law is to enhance public trust in the judiciary and the institutions of justice and to improve judges' reputation in Ukraine in response to the behaviour of individual judges seriously undermining the reputation of the judiciary.

23. This general aim as such does not raise doubts. In the 2020 Opinion, the Venice Commission and DGI acknowledged the extraordinary urgency of judicial reform in Ukraine.[25] According to the explanatory note, the present draft law has been elaborated in the context of the aforementioned high-profile corruption case in the Supreme Court, the continuing trend of low public trust, and the regular media reports on outrageous examples of the negative behaviour of judges. During the meetings with the rapporteurs, some interlocutors referred to the situation in the Ukrainian judiciary as another crisis which needed to be resolved as soon as possible with application of new measures. Other interlocutors maintained, however, that the reported investigations of alleged public corruption, including high-profile criminal cases in the judiciary, were indications of the willingness of the competent institutions to address the current problems by existing means.

#### 1. Judicial reforms and the need for a stable judicial system

24. It is not the first time that the Ukrainian authorities have prepared legislation to enhance public trust in the judiciary. In its 2020 Opinion, the Venice Commission and DGI observed that *"[t]he judicial system of Ukraine has been subject to numerous changes in recent years. Following presidential elections, the new political power would often start new changes to the judicial system. In the absence of a holistic approach, various pieces of legislation were adopted that did not have the character of a comprehensive reform."*[26] In this regard, the Opinion also underlined

[20] See Article 62-1, para. 3 of the draft law.
[21] See Article 62-1, para. 6 of the draft law.
[22] See Article 62-1, para. 6 of the draft law.
[23] See Article 62-1, para. 7 of the draft law.
[24] See Article 79, para. 19 (3) of the draft law.
[25] See the 2020 Opinion, para. 9.
[26] See the 2020 Opinion, para. 6.

the importance of the stability of the judicial system, and the necessity to refrain from frequent fragmentary judicial reforms and ensure a comprehensive and coherent approach.[27]

25. The Commission and DGI wish, first of all, to reiterate the abovementioned general recommendation from the 2020 Opinion that the authorities should have due regard to the considerations of stability of the legislation on the judiciary and ensure a comprehensive and coherent approach. Accountability of the judiciary cannot be achieved through legislative measures alone. Additional steps should be taken ensuring the transparency and lawfulness of the procedures concerning the appointment and the career of judges. Moreover, effective criminal and disciplinary provisions should be put in place and there should be continuous interaction between the judiciary, the other branches of government and society at large.[28] The combination of all these measures together will secure public trust in the judiciary.

26. Accordingly, when making changes to the judiciary framework, the authorities must adopt a comprehensive and coherent approach, conducting a thorough analysis of the situation in order to identify and address effectively the root causes of the problems, engaging also in a transparent and inclusive dialogue with all stakeholders.

### 2. Sequencing of changes in the judicial reforms

27. As was emphasised in the 2020 Opinion, the sequencing of changes is important.[29] The Venice Commission and DGI welcome that the HCJ is now reformed and ready to commence its important work as the highest body of judicial governance in Ukraine. It is commendable that the HCJ has promptly appointed new members of HQCJ and that the latter has resumed its work on the selection of candidates for the numerous vacant judicial posts in the country (see paragraph 9 above).

28. However, the new composition of the HCJ has only recently begun to operate, and it has not even started to exercise its disciplinary function (see paragraph 9 above). Moreover, given the workload of the HCJ and the considerable backlog of disciplinary complaints (about 11,000 pending cases), adding new tasks as proposed by the draft Law to the HCJ may undermine its capacity to act efficiently and effectively.

29. Following up on the earlier recommendation on respecting the sequencing of changes, it might be more appropriate to allow some time for the “new” HCJ to fully resume its work, continuously monitor which shortcomings in the existing procedures hamper the effectiveness of the work of the HCJ, and only then consider introducing further measures, such as those contained in the draft law. It may eventually turn out that additional budgetary and staff measures would be more effective than producing more legislative tools. Thus, as a general consideration, it would seem to be premature to implement a new reform in the judiciary before the completion of the recent one and the production of tangible effects.

### 3. Effective enforcement of existing laws

30. In the 2020 Opinion, the Commission and DGI stated that another problem concerning judicial reforms in Ukraine was the poor implementation of the adopted laws, possibly due to a continued problem of corruption and a lack of integrity in parts of the judiciary. However, continuous institutional reforms cannot be the answer to resolve problems that have arisen on account of the personal conduct of certain members of these institutions.[30]

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[27] See the 2020 Opinion, paras. 34 and 35.
[28] See also CCJE, Opinion No. 21 (2018), Preventing corruption among judges, esp. para. 22 ff.
[29] See the 2020 Opinion, para. 80.
[30] See the 2020 Opinion, para. 8.

31. These considerations are equally pertinent to the present draft law which provides for extraordinary measures targeting the whole judicial institution in response to the individual conduct of some of its members. The main question arises whether the proposed broad solution and instruments are in line with the European principles concerning the independence of the judiciary and the relevant standards of the European Convention of Human Rights. The Venice Commission and DGI will examine this question with regard to the two main novelties proposed by the draft Law: the court monitoring and the use of lie detector.

### 4. Tools of judicial accountability

32. An independent judiciary must necessarily be an accountable one. This implies that, on the one hand, independence cannot be an argument to block any means of accountability, and, on the other hand, the means of accountability may not infringe independence, especially by creating threats and undue pressure.

33. The explanatory note argues that there are extraordinary circumstances, which call for additional means to secure judicial accountability. However, to investigate judges of a court without a concrete suspicion against them (see paragraph 14 above) and to do it with the use of a lie detector (see paragraph 19 above) amounts to exceptional and extraordinary means which carry a serious risk of abusive interference with judicial independence. The proposed court monitoring is *de facto* a vetting of all judges of a targeted court and requires careful justification. The position of the CCJE is relevant here: *"the CCJE wishes to draw attention to the negative effects of lustration as a means to combat corruption. The process where all judges are screened for corruption, and those who do not pass the review are dismissed and possibly prosecuted, can be instrumentalised and thus misused to eliminate politically "undesirable" judges. The mere fact of being a judge in a member State where the judiciary is compromised at a systemic level is, by democratic standards, not sufficient to establish responsibility on the part of individual judges.*"[31]

34. As regards in particular measures interfering with the right to respect for judges' private or family life it is noted that they will be in breach of Article 8 of the ECHR unless it can be justified under paragraph 2 of Article 8 as being "in accordance with the law", pursuing one or more of the legitimate aims listed therein, and being "necessary in a democratic society" in order to achieve the aim or aims concerned.[32] Under the European Court's case-law in these cases *"domestic law must be sufficiently foreseeable in its terms to give individuals an adequate indication as to the circumstances in which and the conditions on which the authorities are entitled to resort to measures affecting their rights under the Convention… The law must, moreover, afford a degree of legal protection against arbitrary interference by the authorities. The existence of specific procedural safeguards is material in this context. What is required by way of safeguard will depend, to some extent at least, on the nature and extent of the interference in question*".[33]

35. It is therefore important that at the subsequent stages of the legislative process, the drafters of the amendments delve deeply into the reasons for proposing such extraordinary tools in the judiciary which should be the means of last resort and ensure their full compliance with the ECHR and the case-law of the ECtHR.

### B. Court monitoring

36. First of all, the term "court monitoring" contained in the draft law may be misleading. The monitoring of a court usually implies a general risk analysis and the examination of structural and procedural elements that could foster the risk of offences and misconduct within a court.

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[31] See CCJE, Opinion No. 21 (2018), Preventing corruption among judges, para 28.
[32] See e.g. ECtHR, *Ovcharenko and Kolos v. Ukraine*, nos. 27276/15 and 33692/15, 12 January 2023, para.91 ff.
[33] Ibid. para. 94.

However, what is at stake here (and the major aim of the draft law) is the assessment of the individual judges for their integrity and compliance with disciplinary standards.

### 1. The need for the new type of monitoring

37. The new type of court monitoring applies to *any* court in which one of its members has been suspected of a corruption-related crime, and his/her arrest or pre-trial detention or suspension from office has been authorised by the HCJ (see paragraph 14 above). Under the draft law, *all* judges of the targeted court will undergo an assessment of their integrity and compliance with disciplinary standards. The scope of assessment is not limited to certain events: *all* possible disciplinary offences should be investigated. In this regard, even if the monitoring can be triggered on account of a corruption-related offence, any other possible misconduct outside the corruption-related area (such as excessive delay of the court proceedings, gross negligence in the administration of justice) will fall within the scope of the monitoring. This search for possible misconduct is further accompanied by the possibility of using a lie detector (see below). The assessment should be done even if there is not any hint that the judge concerned is involved in any offence. For the Commission and DGI, it is difficult to see how such broad grounds of assessment could be justified.

38. It should not be excluded that there may be circumstances in which the enhanced supervision of a particular court *en bloc* may be admissible. For example, if a *pattern* of unprofessional or unethical behaviour within a particular court has been established because judges of that court have been disciplined, it may be appropriate for the bodies of judicial governance to focus their attention on other judges working for the same court.

39. However, even such cases would hardly warrant this new type of monitoring. The systematic and prioritised use of the existing mechanisms should suffice. In this regard, it is relevant to note that Ukrainian law provides such tools as: asset declarations,[34] family ties declarations,[35] integrity declarations,[36] incompatibility proceedings[37], disciplinary proceedings, dismissal proceedings, and criminal proceedings. A further option is to carry out a monitoring of the lifestyle of a judge.[38] Moreover, members of certain judicial bodies - the Constitutional Court, the Supreme Court, the high specialised courts, and the HCJ itself[39] - are subjected to systematic and enhanced financial supervision in view of their high positions in the judicial hierarchy. If there is a lack of clarity, precision or effectiveness in certain existing mechanisms, it is important first to work on improving them rather than proposing new ones.

40. Apart from that, it is evident that the new mechanism will increase the workload of the HCJ which is already an overburdened body (see paragraph 9 above). The addition of a new mechanism may thus decrease the efficiency of the HCJ that is already stretched to its limits.

41. Therefore, the need for such an additional mechanism has not yet been established. It remains unclear why the aggregate of existing mechanisms to deal with potential cases of lack of integrity and compliance with disciplinary standards within the judiciary would not suffice and why it is necessary to introduce new mechanisms.

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[34] Under the Law of Ukraine “On preventing the corruption”.
[35] See Article 61 of the Law of Ukraine “On judiciary and status of judges”.
[36] See Article 62 of the Law of Ukraine “On judiciary and status of judges”.
[37] See Article 39 of the Law of Ukraine “On High Council of Justice”.
[38] See Article 59 of the Law of Ukraine “On judiciary and status of judges”. However, there are concerns regarding the lack of clarity of the procedure for monitoring the lifestyle of judges (see below).
[39] See in this regard the Law of Ukraine “On prevention and counteraction to legalisation (laundering) of proceeds of crime, financing of terrorism and financing of proliferation of weapons of mass destruction”.

## 2. Specific issues

*a. Internal dimension of judicial independence*

42. Judicial independence is an integral part of the fundamental democratic principles of the separation of powers and the rule of law,[40] and is guaranteed, *inter alia*, by Article 6 of the European Convention on Human Rights (ECHR) and Article 126 of the Constitution of Ukraine.

43. At the same time, the authority of the judiciary can only be maintained if (a) the legal system puts in place adequate mechanisms to ensure that candidates are not appointed as a judge if they do not have the required competencies or do not meet the highest standards of integrity; and (b) the judiciary is cleansed of those who are found to be incompetent, corrupt or linked to organised crime. This is not only essential in view of the role a judiciary plays in a state governed by the rule of law, but also because a judge – once appointed for life – will in principle be irremovable except for limited grounds for dismissal. [41]

44. The proposed monitoring will be carried out by a self-governing body of the judiciary itself, which is preferable from the viewpoint of judicial independence.[42] However, judges should be protected not only from external influence but also from pressure within the judiciary.[43] Accordingly, the jurisdiction of the HCJ should be compliant with the requirement of internal judicial independence.

45. The means proposed by the draft law would put pressure on the judges, which can only be permitted if there are grounds to believe that these means are necessary to establish judicial accountability. However, if there is no indication that an individual judge has committed an offence, such measures should not be allowed.

46. Furthermore, the monitoring proposed by the draft law must not affect a judge's independence by interfering with the cases pending before a judge. However, the draft law does not contain any provision to protect ongoing court proceedings from such interference.

*b. Clarity of the law concerning the powers and procedures before the HCJ*

47. The Venice Commission recalls that under its Rule of Law Checklist, a law has to be, *inter alia*, clear and predictable[44] (or "foreseeable as to its effects" in the words of the European Court of Human Rights).[45]

48. The draft law provides a very general regulation on *gathering powers* of the HCJ.[46] In the proposed monitoring, the HCJ would be empowered to request explanations, records or information from different entities as well as natural persons in order to check due performance of duties by the judges of the targeted court. This raises concerns that need to be addressed: firstly, the power to request the information implies the requested party's duty to comply with the

[40] See e.g. Recommendation Rec (2010) 12 of the Committee of Ministers on judges: independence, efficiency and responsibilities; Venice Commission, Rule of Law Checklist, CDL-AD(2016)007, para. 74; Venice Commission, Report on European Standards as regards the Independence of the Judicial System: Part I – the Independence of Judges, CDL-AD(2010)004.
[41] See Venice Commission, CDL-AD(2022)005, Croatia - Opinion on the introduction of the procedure of renewal of security vetting through amendments to the Courts Act, para. 14., with further references.
[42] See Venice Commission, CDL-AD(2022)005 (Croatia), cited above, para. 22.
[43] See Venice Commission, Report on European Standards as regards the Independence of the Judicial System: Part I – the Independence of Judges, CDL-AD(2010)004, chapter 10.
[44] See Venice Commission, CDL-AD(2016)007, Rule of Law Checklist, §36.
[45] See e.g. ECtHR [GC], *Sanchez v. France*, no. 45581/15, 15 May 2023, para. 124.
[46] See Article 59-1, para. 6 of the draft law.

request.[47] Such a regulation means that the HCJ is allocated near to unlimited access to any possible material when performing this new monitoring procedure, a power that may be considered excessively broad. Secondly, the draft law does not clarify who are the entities or natural persons that the HCJ will be able to address. Moreover, Article 59-1, para. 7 of the draft law allows for any person to submit any information to the HCJ which may be used in the court monitoring. This could open the door to abuse potentially based on one's dissatisfaction with a court judgment. Lastly, these gathering powers would not be limited to the corruption-related material because the draft law empowers the HCJ to collect material related to *any* possible misconduct of judges.

49. The draft law provides that it will be for the HCJ to establish the procedure for monitoring.[48] Accordingly, the HCJ is empowered both to establish the procedure and to execute it. This appears to be an excessive concentration of power even when it is in the hands of the judiciary's self-governing body. The procedural framework is particularly important because, as discussed above, the proposed tools are extraordinary, and they carry serious risks for judicial independence. For these reasons, the procedural rules, including legal protection and remedies, should be precisely regulated on the statutory level.

50. There are several different and conflicting roles of the HCJ. Most notably, the body which will conduct the monitoring, will also later determine the disciplinary case on its merits. The separation of investigating and decision-making roles was the guiding principle of the previous amendments to the legislation on judiciary in Ukraine.[49] These considerations remain pertinent to the present draft law.

51. The draft law employs the concept of "monitoring the lifestyle of a judge". It can be assumed that this notion refers to Article 59 of the Law "On the judiciary and the status of judges". This measure would be used *"to establish whether the standard of living of a judge is in line with the property owned by him/her and members of his/her family and the income received by them"*. This has to be clarified in the draft law. It is notable that Article 52-2 of the Law "On prevention of corruption" provides that the procedure for monitoring the lifestyle of judges shall be determined by the National Agency on Corruption Prevention with the approval of the HCJ.[50] However, without further clarification on the statutory level, these discretionary powers raise concerns. The wording of the draft law is dangerously broad and might include all kinds of intimate – and irrelevant – aspects of the judge's private or family life protected by Article 8 ECHR.

52. The draft law contains no provisions as to the storage of the information obtained as a result of monitoring. Storage, however, may be necessary only for a limited period, when the monitoring and the relevant proceedings are pending. The draft law, moreover, does not deal with such questions as who may access the information and whether there is any avenue to request the deletion of certain information.[51]

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[47] See in this regard Article 31, para. 3 of the Law of Ukraine "on High Council of Justice" providing that a person who has received a request from the HCJ must provide the necessary information and/or relevant documents (copies thereof) within ten calendar days from the date of receipt.

[48] See Article 59-1, para.1 of the draft law.

[49] See Venice Commission, CDL-AD(2021)018, Ukraine - Urgent joint opinion on the draft law on amendments to certain legislative acts concerning the procedure for electing (appointing) members of the High Council of Justice (HCJ) and the activities of disciplinary inspectors of the HCJ (Draft law no. 5068), paras. 67-71; see also CDL-AD(2022)022, Opinion on the draft amendments to the Judicial System Act concerning the Inspectorate to the Supreme Judicial Council of Bulgaria, para. 29.

[50] However, no special procedure has been elaborated yet and, as explained by the interlocutors, the general procedures developed by the National Agency on Corruption Prevention apply.

[51] See ECtHR [GC], *L.B. v. Hungary*, no. 36345/16, 9 March 2023, para. 123: when assessing the processing of personal data under Article 8 of the ECHR, the Court has frequently had regard to the principles contained in data protection law including those on purpose limitation, data minimisation, data accuracy, and storage limitation.

53. Likewise, the draft law remains silent on any temporal limitation of the monitoring to be carried out by the HCJ (i.e. how long a court is monitored and which periods can be under investigation). This creates a risk that the monitoring may remain an open-ended exercise, exerting a long-term pressure on the judicial institution.

54. On the other hand, the draft law envisages that the new type of monitoring will be used in respect of the Supreme Court no later than in fourteen days after the entry in force of those amendments. Since the HCJ will first have to establish the procedure for the new monitoring procedure and the procedure for using a lie detector, this deadline seems unrealistic. Drawing on the explanatory note to the draft law, it may be assumed that this provision is inspired by the high-profile corruption case in the Supreme Court. Nevertheless, all objections expressed in this Opinion regarding court monitoring apply also for a court monitoring of the Supreme Court.

### C. Use of a lie detector

#### 1. General observations

55. The draft law provides for broad grounds for using lie detectors in the context of judicial career: (i) when screening a candidate who wishes to join the judiciary, (ii) within the context of a competition in respect of a sitting judge to be transferred to another court, (iii) when monitoring the court operation – in respect of every judge of the targeted court, (iv) during the disciplinary proceedings against any judge. This is an unprecedented approach. The Venice Commission has been cautious towards the use of lie detectors. It expressed its view in the opinion on Kazakhstan in 2018 as follows: *"As to the use of the "lie detector", even if the results of this test are not binding, it is a major source of concern for the Venice Commission, since the reliability of this method is open to discussion, and it is unclear how the answers received from the candidate in the course of this test may be used. There is a risk that this test will involve irrelevant questions (for example, questions about political preferences of the candidate). Moreover, a lie detector may at most establish whether a statement was accurate but is not useful to evaluate skills of a candidate. The Venice Commission calls on the authorities of Kazakhstan to be extremely cautious with this method; if there is no other way, the results of the "lie detector" test may only be used to trigger additional security checks in respect of the candidate and should not become a part of the candidate's file accessible to the HJC. But a better solution would be to avoid the "lie detector" test altogether."*[52]

56. These reservations remain valid and should be taken into account with regard to the present draft law. Indeed, the reliability of the emotion recognition technologies remains a largely controversial matter. In this regard, it is notable that the draft law provides that the findings of the lie detector shall not be the sole basis for the decision.[53]

57. The Commission and DGI would therefore repeat its earlier approach mentioned above and suggest avoiding the "lie detector" in the context of judicial career. The use of lie detector appears even more problematic in the light of the provisions of the draft law, as discussed below.

#### 2. Broad purposes

58. The purpose of the use of lie detector is formulated broadly: *"to obtain information on probable reliability of the person's answers to the questions associated with possible offences, his/her integrity, adherence to the rules of judicial ethics, legality of assets origin, circumstances that may be or are a basis for disciplinary liability, or other circumstances that may affect public trust in the*

[52] See Venice Commission, CDL-AD(2018)032, Kazakhstan - Opinion on the Concept Paper on the reform of the High Judicial Council, para. 50.
[53] See Article 62-1, para. 6 of the draft law.

*judiciary"*.[54] This provision includes too general expressions which allow putting any possible questions during the interview. And on top of that, there is last open-ended clause ("other circumstances that may affect public trust in the judiciary"). The provision therefore lacks clarity and foreseeability and creates a risk of abuse.

### 3. Effective remedies and procedural safeguards

59. The Venice Commission and DGI recall that under the case-law of the European Court of Human Rights, there should exist procedural safeguards and the possibility of appeal against decisions affecting the career, including the status, of a judge. In the Court's words, *"In matters concerning their career…there should be weighty reasons exceptionally justifying the absence of a judicial review"*.[55]

60. The draft law does not contain core procedural safeguards and there is no special law on the use of lie detectors in Ukraine. This means that many essential features of this mechanism remain unclear. It is unclear, for example, if there is any effective remedy against the application of a lie detector and the decisions based on its use.

61. The draft law stipulates that the procedure for using a lie detector shall be established by the HCJ.[56] As discussed above with regard to the new type of court monitoring (see paragraph 49 et seq.), it would be inappropriate to leave essential procedural elements outside the statutory regulation, especially in view of the highly intrusive nature of the procedure (affecting, *inter alia*, the private life of the judge concerned) and the broad purposes and scope of situations in which the procedure may be applied. Moreover, while there may be regulations on using lie detectors in certain contexts, it would not be possible to use the same regulations in the context of judicial career without taking into account the principle of judicial independence and the special status of judges.

### 4. Scope of interview

62. It is positive that the draft law stipulates that certain questions may *not* be asked. Article 62-1, para. 4 provides: *"questions that are not directly associated with a judge and his/her administration of justice or questions of intimate or discriminatory nature (about health, religious or political beliefs, national or ethnic origin) may not be asked"*. However, it fails to specify that the examples mentioned (i.e. health, religious or political beliefs, national or ethnic origin) are not exhaustive.

63. Moreover, the draft law does not provide any safeguard protecting the interviewed person from self-incrimination. Additionally and importantly, Article 59-1, para. 4 of the draft law provides that *"the questions that are not directly associated with a judge and his/her administration of justice … may not be asked"*. This has to be clarified. The draft law needs to specify that no questions may be asked in relation to court deliberations on specific cases.

### 5. Confidentiality

64. It is positive that the draft law establishes that the findings of the interview with the use of lie detector shall be confidential. However, the draft law should elaborate the exact scope of the declared principle of confidentiality. On the one hand, it should be clarified that the results of the test are shared with the judge concerned. Likewise, the draft law should stipulate who within the HCJ has access to the results (and whether – and in what manner – the results may be used in disciplinary proceedings in respect of that judge initiated as a consequence of the test results).

[54] See Article 62-1, para. 3 of the draft law.
[55] See ECtHR, *Bilgen v. Turkey*, no. 1571/07, 9 March 2021, para. 96.
[56] See Article 62-1, para. 1 of the draft law.

On the other hand, the draft law should clarify that the data is processed and stored in accordance with relevant Council of Europe standards (see the above consideration with regard to the new type of monitoring, paragraph 52 above).

### 6. Discretion of the HCJ

65. The draft law stipulates that the HCJ *may* use a lie detector within procedures for judicial appointments and transfers, as well as during court monitoring and disciplinary proceedings.[57] The draft law remains silent as to the criteria for using that discretion. This creates a risk for a discriminating and arbitrary use of lie detectors.

### 7. Voluntary nature

66. The principle of voluntary application of lie detector is proclaimed in Article 62-1, para. 7 of the draft law which provides that *"a judge shall be interviewed [with the use of lie detector] by his/her consent. Refusal from an interview shall not be a basis for the judge's liability."* However, with regard to the appointments and transfers, the voluntary nature of the interview is effectively annulled by the fact that consent for the use of lie detector is one of the documents that must be submitted to the HQCJ when applying for a vacant judicial post,[58] and the HCJ may refuse (using again its wide discretion) to propose the person for an appointment or transfer if the candidate refused to undergo a lie detector test.[59]

67. In addition, the draft law provides that under certain medical conditions, as determined by the central healthcare authority, the lie detector test will not apply.[60] However, if the medical reasons are loosely determined and then interpreted, this may create another source of abuse.

## IV. Conclusion

68. The Venice Commission and the Directorate General of Human Rights and Rule of Law (DGI) were requested to provide a joint opinion on the draft law "On amending the Law of Ukraine "on the judiciary and the status of judges" as regards introduction of additional procedures to enhance public trust in the judiciary". The draft law (i) broadens the grounds for checking the integrity and discipline of judges by introducing a new type of "court monitoring"; and (ii) introduces the use of lie-detector (polygraph) in various contexts of judicial career.

69. The draft law was prepared with the aim of providing additional tools to enhance the fight against corruption and eventually secure public trust in the judiciary. The Commission and DGI are aware of the current challenges in the fight against corruption, including within the judiciary. The general goal of the draft law is legitimate and raises no doubts.

70. However, the solutions proposed in the draft Law raise concerns. The Commission and the Directorate are not convinced that these measures are appropriate. The Commission and DGI would like to recall their general recommendations contained in the abovementioned 2020 Opinion: when making such substantial changes to the framework governing the judiciary, the authorities must take a comprehensive and coherent approach with due regard to the considerations of stability of the judicial system; it is essential to respect the sequence of changes in the judicial reforms and give priority to the effective enforcement of the existing ordinary tools of judicial accountability.

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[57] See Article 59-1, para. 6(2); Article 62-1, para.5, Article 79, para. 18, Article 82, para.2 of the draft law.
[58] See Article 71, para. 11-1 and Article 82, para. 2 of the draft law.
[59] See Article 79, para. 19 of the draft law.
[60] See Article 59-1, para. 7 of the draft law.

71. Given that the HCJ has only recently begun to operate in its new composition with vetted members and has not yet started to examine its considerable backlog of disciplinary cases, the addition of new powers and tasks to the HCJ appears premature and unjustified.

72. The necessity of introducing the new type of “court monitoring” has not been established. It remains unclear why the aggregate of existing mechanisms aiming to safeguard integrity within the judiciary are not adequate and sufficient and why it is essential to introduce extraordinary new mechanisms. Furthermore, the scope of application of the new tool is remarkably broad: the proposed monitoring can apply to any court, it may be triggered based on the facts related to only one judge of that court; however, it will involve all the judges of the targeted court and will lead to their assessment of integrity and compliance with disciplinary standards, even though there may be no evidence indicating to their misconduct.

73. In addition to that, the procedure for court monitoring is not clarified; the gathering powers of the monitoring authority lack precision and may lead to abuse; there are no time-limits for the monitoring exercise; the legal remedies and procedural safeguards are not duly stipulated. The monitoring therefore carries serious risks of abuse and interferes excessively with the principle of judicial independence. If the authorities find cogent reasons for pursuing the idea of new type of court monitoring, it is recommended that the draft law – which is still at the early stage of elaboration – be amended to remove the above shortcomings.

74. The draft law further introduces the use of a lie detector in four scenarios: in the recruitment of judges, in the competitive transfer of judges, during the court monitoring, and in the disciplinary proceedings against judges. The Venice Commission has earlier expressed its serious concerns regarding the use of lie detectors in the context of judicial career. This technology remains a largely controversial matter and should be avoided in the context of judicial career. This is even more so where such an intrusive tool may be used on broad grounds, in an arbitrary manner (as there are no criteria for the use of discretion by the HCJ), and when it is not accompanied by effective remedies and procedural safeguards. The authorities are invited to take due note of these reservations and the identified shortcomings and avoid the use of lie detector in this context.

75. The Venice Commission remains at the disposal of the Ukrainian authorities for further assistance in this matter.