QUALIFICATION ASSESSMENT OF JUDGES:

SUMMARY OF INTERIM RESULTS (AS OF APRIL 1, 2019)

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AUTHORS OF THE SUMMARY:

Roman Kuibida	Deputy Chairman of the Centre of Political and Legal Reforms, PhD, member of the Public Integrity Council
Maksym Sereda	expert of the Centre of Political and Legal Reforms, member of the Public Integrity Council

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WHAT IS A QUALIFICATION ASSESSMENT OF JUDGES?

Qualification assessment is an extraordinary procedure for checking all judges for compliance with their office requirements on the basis of three criteria: competence, integrity, and professional ethics.

Ukrainian judges are qualified within three procedures: initial qualification assessment (before the introduction of amendments to the Constitution), qualification assessment for compliance with their office requirements and qualification assessment within competitions to the higher courts. Each of these procedures has its own specifics. Qualification assessment is carried out by the High Qualification Commission of Judges of Ukraine (hereinafter referred to as the HQCJ).

The assessment takes place in two stages: 1) exam, 2) dossier review and interview.

The qualification assessment procedure for the current judges began in 2016 and is still going on. More than a third of the judiciary has undergone assessment, which gives us an opportunity to sum up interim results.

WHAT ARE THE QUANTITATIVE RESULTS OF THE ASSESSMENT OF JUDGES?

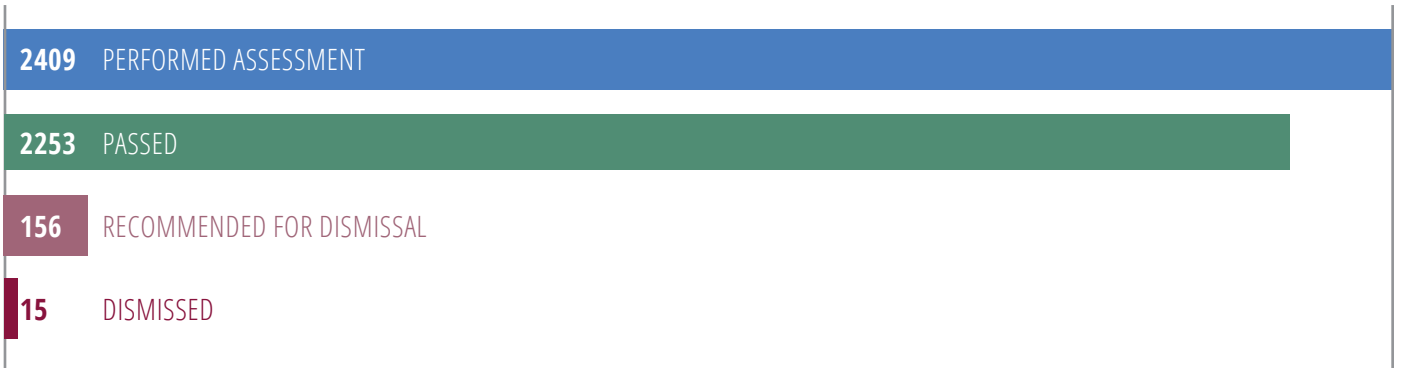
As of April 1, 2019, 2,253 current judges have successfully passed the qualification assessment based on various procedures, which is about 37% of the total judiciary in Ukraine. Of these, 293 judges have passed the initial qualification assessment (five judges used second chance to pass the exam), 1,660 judges have passed qualification assessment within the assessment for compliance with their office requirements, 300 judges have passed assessment during the first and second competitions to the Supreme Court, as well as the competition to the High Anti-Corruption Court.

156 judges failed to confirm compliance with their office requirements based on the qualification assessment results. Of these 5 — within the initial qualification assessment, 151 — within the qualification assessment for compliance with their office requirements. Of the judges who failed the qualification assessment, half (76 judges) failed the exam, the other half (75 judges) failed to get the minimum admissible score after the interview.

Thus, 3% of judges failed the qualification assessment due to insufficient professional level, another 3% due to a combination of indicators of competence, integrity and professional ethics.

As of April 1, 2019, due to the negative results of the qualification assessment, only 15 judges were dismissed by the High Council of Justice, or 0.6% of the judges for whom the procedures for qualification assessment have been completed. It should be noted that if the judge recommended for dismissal following the results of the qualification assessment resigns or applies for dismissal at their own discretion, then the High Council of Justice dismisses such a judge based on this application, i.e. avoids the application of negative grounds for dismissal.

JUDGE ASSESSMENT RESULTS AS OF APRIL 01, 2019



WHAT ARE THE KEY ASSESSMENT ISSUES?

Anonymous written testing does not show the true professional level of judges. Almost all judges pass it successfully.	The level of knowledge in the field of law is verified through anonymous written testing and rated at 90 points. The minimum admissible score is 45 points (50%). Of the 4,158 judges who took anonymous written tests, only 9 judges (0.2%) failed to get the minimum score. Most judges scored points close to the maximum, i.e. the test was too easy. The probable reason behind such results is the fact that the database of test tasks is small, has been open for a long time, and the answers are systematized on different websites and are publicly available.
Determination of results of practical tasks is not transparent.	The HQCJ has classified judges' practical tasks and assessments by each criterion for each member of the Commission who was checking the tasks. Although the assessment methodology contains a detailed breakdown of points that a judge can get for each of the criteria and sub-criteria of the assessment, the HQCJ only publishes the final score of judges. Such an approach of the HQCJ makes it impossible to exercise any external control over abuse at this stage.
The desired psychological portrait of a judge has not been made public.	All candidates who have passed the exam take psychological testing. To do this, the following techniques are used: General skills test, HCS Integrity Check, BFQ-2, MMPI-2. The psychological testing results should indicate how much the judge meets the professiogram — the most desirable requirements which the judge should meet. The Commission evaluates the judges for compliance with the portrait, which is hidden from both the judges and the public. Its documents contain only a set of indicators based on which the Commission carries out assessment, however, it is not indicated what level of display of this or that indicator is considered to be the best for the judge and why.
Certification of one of the methods of psychological testing was carried out by an organization that has a conflict of interest. There is no official certification information.	BFQ-2 was certified by NGO Ukrainian Psychodiagnostic Association on January 11, 2018, i.e., after it started to be used in the judges' assessment. Such certification is not considered official. The president of the Ukrainian Psychodiagnostic Association is L. Burlachuk, and his son O. Burlachuk is the executive secretary of this organization. At the same time, O. Burlachuk is the head of OS-Ukraine LLC which conducts testing of judges, and his father L. Burlachuk is the co-owner of this Company. Moreover, L. Burlachuk was a co-author of the Ukrainian adaptation of the BFQ-2 test. Thus, persons involved in the Ukrainian adaptation of the BFQ-2 test and the use of this methodology in the qualification assessment were simultaneously members of the management of the company that certified this methodology. There is no information on the certification of other methods.

Certain criteria for psychological testing are aimed at supporting judges loyal to the system and management.	Many questions were raised to using the HCS Integrity Check method, which is designed for HR purposes in "organizations with a pronounced management hierarchy". Judges who have shown themselves to be "disobedient, freedom-loving, those who have their own opinions about things that are hard to be inclined to deviations or compromises" (i.e., in fact, qualities that should be demanded from a judge) get a significant deviation from the optimal indicators determined by the HQCJ.
There is no external control over assessing the results of psychological testing.	The HQCJ gives 0 to 100 points for each of the psychological testing criteria (personal competence, social competence, integrity and professional ethics). Thus, the psychological assessment results affect 40% of the maximum possible score of a judge. The score received by a judge at psychological testing depends solely on the discretion of the HQCJ. Psychologists only provide the Commission with an opinion on the level of manifestation of certain indicators determined by the HQCJ, but they have nothing to do with translating these indicators into points. Assessment of the effects of psychological testing is most non-transparent, and there is no external control over possible abuse during the assessment.
Interviews during the qualification assessment look like a conveyor system.	On average, there were 320 interviews per month. Most interviews took place in April and July 2018 — more than 500. The chosen pace of qualification assessment shows that the assessment of the majority of judges is superficial and perfunctory. The HQCJ explains the haste in the qualification assessment of judges by the judges' dissatisfaction with the differences between the remuneration of judges who have passed the qualification assessment and the judges who did not. However, equal work conditions cannot be achieved through formal qualification assessment.
During the interviews, the HQCJ members are often prejudiced to certain judges, the verification is not carried out thoroughly.	Interviews with judges often show striking differences between the attitude of the HQCJ to the judges against whom there are similar claims. The facts of the Commission's actions under the real conflict of interests of the HQCJ members have been revealed. Commission members did not usually check the information provided by judges during the interview despite the wide powers of collecting and verifying the information. Interviews analysis shows that judges have enough information to falsify data in order to «refute» information about their unscrupulous behavior.
The same facts are evaluated differently based on the the same methodologie.	Several judges who had received "0" for integrity at the competitions to the Supreme Court or the High Anti-Corruption Court successfully passed the qualification assessment. That is, the assessment of the same factual circumstances based on the same methodology led to strikingly different results.
Judges who had failed to prove the legality of sources of origin of their wealth passed the assessment successfully.	In accordance with the Constitution, non-observance by a judge of the duty to confirm the legality of the source of the property serves as the reason for the judge's dismissal. The HQCJ should check this during the judge's qualification assessment. However, the assessment results indicate that the HQCJ often does not comply with the Constitutional requirement to verify the judges' lifestyle against the declared revenues.

The HQCJ does not substantiate its decisions, it only gives scores the reasoning behind which is unclear.	According to the law, HQCJ's decisions must be motivated. However, in practice, the decisions only specify the judge's score received by the three criteria determined under the law. The origin of more than 80% of the points received by a judge at the qualification assessment cannot be verified. As a rule, the HQCJ does not disclose the content of information regarding the failure of judges to meet the criteria of integrity and professional ethics, and does not indicate the reasons behind its failure to take it into account.
The HQCJ has created artificial obstacles to the participation of the Public Integrity Council in the assessment of judges.	The HQCJ and the Public Integrity Council (PIC) failed to establish partnership relations with each other demonstrating differences in values. In 2018, the PIC was forced to cease participating in the qualification assessment process due to: • Establishment of unrealistic requirements for the PIC activities by the HQCJ rules; • The fact that the so-called "Maidan judges" received an opportunity to participate in the assessment because the HQCJ decided not to take into consideration the decisions of these judges in the absence of an assessment by a disciplinary authority; • Presence of an apparent conflict of interest for some HQCJ members who themselves committed actions that could serve as grounds for dismissal; • Lack of transparency in the assessment procedures since it is not known what scores the judges receive from the HQCJ members and reasoning behind these scores. The termination of PIC's participation did not yield the desired result. After all, the HQCJ not only did not respond to these issues, but it also said that PIC's failure to participate in the assessment does not prevent its conduct. PIC members challenged the provisions of the HQCJ rules and won the case in the first instance, but the HQCJ filed an appeal. The HQCJ continued to conduct interviews even in the period when the powers of the PIC members were over, and the new composition was not yet elected. Formed in late 2018, the new composition of the PIC supported the previous requirements in full, but despite this, it began to send its opinions regarding judges to the HQCJ.
An automated system for access to judicial dossiers has not been created contrary to the law. The dossiers are published in abridged and inconvenient form.	In accordance with the law, the generation and maintenance of judicial dossiers must be carried out in an automated system. However, it has not yet been created; according to the law, it was supposed to be launched back in 2017. All dossiers are currently published using the usual Google Drive tools. Dossiers are saved in PDF format making it impossible to search for information in the text of the files, which complicates dossier processing and searches for both dossiers themselves and the information in them. Dossiers contain hidden information that should be disclosed in accordance with the law. The Commission did not usually update the judicial dossiers, but sometimes took steps to update them after receiving requests for public information. The Commission also refused to provide this data on request for public information explaining that judicial dossiers can only be accessed through an automated system, which, however, has not yet been established.

CONCLUSIONS

Qualification assessment of judges in the present form proved to be an ineffective mechanism for clearing the judiciary. An absolute majority of judges have successfully passed qualification assessment. Only 6% of judges of those for whom the assessment procedure has been completed are recommended for dismissal, and less than one percent is dismissed based on the results.

The High Qualification Commission of Judges conducts this assessment despite conflicts of interest, having excessive discretion powers, the correct use of which cannot be verified. The public is deprived of the opportunity to effectively participate in this procedure. Although the process may look transparent from the outside (interviews are transmitted online), the outcome of the judge's assessment cannot be verified since Commission's decisions are usually unmotivated.

Consequently, such costly procedures do not give the expected effect of the reform. In fact, they only confirm the result of the previous selection procedures for judges that were considered non-transparent and corrupt and do not create conditions for the qualitative renewal of the judiciary.

RECOMMENDATIONS

THE VERKHOVNA RADA OF UKRAINE SHOULD:

1. For the period of the reform, put more representatives of the public sector who the society trusts (human rights activists, journalists, representatives of relevant NGOs) rather than the judges themselves in the composition of the bodies for the selection and assessment of judges. Participation of the representatives of international organizations in such bodies will increase the transparency and credibility of the process on the part of the international community;
2. Provide for the re-assessment of judges who received negative opinions of the Public Integrity Council or in respect of whom the qualification assessment was conducted without its participation.

THE HIGH QUALIFICATION COMMISSION OF JUDGES OF UKRAINE SHOULD:

1. Reduce the pace of conducting qualification evaluation to the one that will allow fully and thoroughly collecting and processing all information about judges with the full involvement of the Public Integrity Council;
2. It should publish judicial dossiers in advance in the open data format and promptly update them;
3. Increase significantly the number of test questions bases for the purpose of anonymous written tests published or stop publishing them;
4. Ensure publication of judges' practical tasks and assessments of the Commission members;
5. Approve and make public the judge's professiogram, as well as indicators of judges' behavior which is not in accordance with the requirements of integrity and professional ethics;
6. Change the approach to taking into account the indicators that check loyalty of judges assessing them from the point of view of independence of judges at psychological testing;
7. Conduct proper certification of psychological testing techniques;
8. Carefully check the facts of the unscrupulous behavior of judges and refute them not only by using the words of the judge during the interview but other credible evidence;
9. Avoid conflicts of interest as far as possible during the qualification assessment;
10. Appropriately justify the decision based on the results of assessment and make them public;
11. Avoid different assessments of the same circumstances using the same methodology within various procedures; every case of deviation from previous practice should be carefully explained by the Commission.