

Endorsed by PCIE according to decision on December 28, 2018

**Guidelines for assessment of integrity, knowledge and practical skills
of judicial candidates for the High Anti-Corruption Court by the Public Council of
International Experts***

* These Guidelines are based on the draft assessment criteria prepared by Tilman Hoppe, Dmytro Kotlyar, and Aleš Zalar for the Anti-Corruption Initiative (EUACI); the original draft assessment criteria were peer-reviewed by José Igreja Matos.

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Acronyms

CCJE	Consultative Council of European Judges
CEPEJ	European Commission for the Efficiency of Justice
ECtHR	European Court of Human Rights
ENCJ	European Networks of Councils for the Judiciary
HACC	High Anti-Corruption Court
HQCJ	High Qualification Commission of Judges of Ukraine
LHACC	Law of Ukraine on the High Anti-Corruption Court
LJSJ	Law of Ukraine on the Judiciary and the Status of Judges
LPC	Law of Ukraine on Prevention of Corruption
NACP	National Agency for Corruption Prevention
PCIE	Public Council of International Experts

1 Introduction

According to Art. 8 LHACC, the mandate of the PCIE is to establish compliance of the judicial candidates for the High Anti-Corruption Court with the criteria of integrity, knowledge and practical skills. This document aims to guide and assist members and the secretariat of the PCIE during the collection, verification and analysis of information about the judicial candidates, evaluation of the candidates' compliance with the criteria set by the LHACC, and convocation of a special joint meeting of the PCIE and the HQCJ.

Art. 8 para. 4 LHACC defines the PCIE's competence:

"In order to assist the High Qualification Commission of Judges of Ukraine in the establishment of compliance of the candidates for the positions of judges of the High Anti-Corruption Court with the criteria of

- *integrity (moral, honesty, incorruptibility) for the purposes of qualification assessment, namely*
 - *in terms of lawfulness of the origin of sources of the candidate's property,*
 - *conformity of the standard of life of the candidate or his or her family members with the declared income,*
 - *conformity between the candidate's way of living and his/her status, [and]*
- *knowledge and practical skills that the candidate possesses for the consideration of cases within the jurisdiction of the High Anti-Corruption Court,*

the Public Council of International Experts shall be formed."[†]

One criterion relates exclusively to the **integrity** of candidates, the other criterion relates to the candidate's professional **qualification**, namely "knowledge and practical skills" for the consideration of cases within the jurisdiction of the HACC.

The role of the PCIE is to assist the HQCJ in the selection of judges for the HACC. It should not duplicate or replace the HQCJ.

[†] Bullet point format added.

It is not the PCIE's task to score and rank candidates – this is the task of the HQCJ (Art. 8 para 6 LHACC, Art. 79 para. 16 LJSJ). The PCIE's mandate is to question a candidate's compliance with the statutory criteria of “integrity” as well as “knowledge and practical skills”.

While the PCIE may submit to the HQCJ information about the candidates, including positive information, its main task is the external scrutiny of the judicial candidates to ensure that only worthy candidates advance in the competition and that candidates whose compliance with the criteria is questionable, are referred to the special joint meeting of the PCIE and the HQCJ.

2 Guidelines

Criterion 1 “Integrity (morals, honesty, incorruptibility)”

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|-------------|---|
| Indicator 1 | The origin of sources of the candidate’s property is lawful and the standard of life of the candidate or his/her family members conforms with the declared income. |
| Indicator 2 | The candidate complied with the applicable financial control requirements defined by the anti-corruption legislation, including but not limited to submitting asset declarations on time, notifying about significant changes in assets, notifying about the opening of foreign accounts, and providing complete and accurate information in the asset declarations. |
| Indicator 3 | The candidate’s past conduct does not indicate a lack of independence and impartiality as required for a judge of the HACC. |
| Indicator 4 | The candidate complied with the rules of judicial ethics (for candidates with judicial experience), with the rules of ethics for attorneys (for candidates with experience of attorney) or with the rules of ethics for academics (for candidates with academic experience). |
| Indicator 5 | The candidate did not commit corruption or corruption related offences, nor violate other anti-corruption restrictions and obligations, rules of ethics or professional conduct, notwithstanding whether the violation was sanctioned or not. |
| Indicator 6 | The candidate did not commit any other act that makes him/her unworthy of holding judicial office at the HACC or undermines the authority of the judiciary . |

Indicator 1 (material lifestyle)

The origin of sources of the candidate’s property is lawful and the standard of living of the candidate or his/her family members conforms with their declared and lawful income.

- a. A candidate fails this indicator where a reasonable observer would have a reasonable doubt that the origin of sources of the candidate’s property is lawful and the standard of living of the candidate or his or her family members conforms to the declared income during a period of time for which financial information is available.

- b. The term “family members” should apply broadly. The LHACC does not link this term only to its meaning stipulated in the Law on Prevention of Corruption. Therefore, it may include not only the spouse and persons cohabitating with the candidate in the same household as defined in Art. 1 of the Law on Prevention of Corruption but also other relatives and close persons regardless of the joint cohabitation.
- c. The term “standard of living” refers to all assets in ownership, possession or use of the candidate or his/her family members, as well as their expenditures and other outgoing financial flows, such as loans granted to third parties.
- d. Income, which was not declared to state authorities as necessary under applicable laws (such as on taxation or anti-corruption), or which was declared but appears to be, in particular, the instrument or result of illegal or undeclared activities, should not be considered lawful.
- e. If an item of lifestyle was received for free, the previous owner financing it must have financed it from legal income.
- f. Indicators for lack of lawfulness of the origin of income include but are not limited to means of financing coming from foreign income; gifts, inheritances, similar windfalls, or loans; questionable income from insufficiently documented and conclusive business or from selling of assets. The source is questionable if there is a reasonable doubt as to its legitimacy.
- g. Data from any credible and reliable source may be used for the assessment of compliance with this indicator, including but not limited to previous asset or tax declarations.
- h. Any assessment by the National Agency on Corruption Prevention or any other state body may be taken into account by PCIE but shall not be definitive for the PCIE assessment.

Indicator 2 (declaration obligations)

The candidate complied with the applicable financial control requirements defined by the anti-corruption legislation, including but not limited to submitting asset declarations on time, notifying about significant changes in assets, notifying about the opening of foreign accounts, and providing complete and accurate information in the asset declarations.

Indicator 3 (independence)

The candidate’s past conduct does not indicate a lack of independence and impartiality as required for a judge of the HACC.

- a. A candidate would fail to demonstrate independence and impartiality, where a reasonable observer would have a reasonable doubt that a candidate acted in his/her past professional capacity (e.g. as a judge, arbitrator, mediator, attorney, prosecutor, or academic, etc.) in compliance with procedural rules or rules of professional ethics regarding impartiality and/or independence.
- b. An appearance of a lack of independence or impartiality in the eyes of a reasonable observer should be given the appropriate consideration by the PCIE.

Indicator 4 (professional ethics)

The candidate complied with the rules of judicial ethics (for candidates with judicial experience), with the rules of ethics for attorneys (for candidates with experience of attorney) or with the rules of ethics for academics (for candidates with academic experience).

Indicator 5 (violation of other rules)

The candidate did not commit corruption or corruption related offences, nor violate other anti-corruption restrictions and requirements, other rules of ethics or professional conduct, notwithstanding whether the violation was sanctioned or not.

Indicator 6 (dignity of office)

The candidate did not commit any other act that makes him/her unworthy of holding judicial office at the HACC or undermines the authority of the judiciary or administration of justice

Criterion 2 “Knowledge and practical skills for consideration of cases within the jurisdiction of the HACC”

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|-------------|---|
| Indicator 7 | The candidate has demonstrated knowledge of the law required to adjudicate corruption cases. |
| Indicator 8 | The candidate has demonstrated the ability required to analyse and adjudicate complex legal problems. |
| Indicator 9 | The candidate has demonstrated the knowledge, skill and ability to perform the functions of the judicial office. |

Indicator 7 (anti-corruption knowledge)

The candidate has demonstrated knowledge of the law required to adjudicate corruption cases.

- a. The knowledge comprises national laws and regulations.
- b. The knowledge includes international treaties and documents on their implementation.
- c. The knowledge requires sufficient understanding of the financial logic underlying anti-corruption laws and regulations.
- d. Depth of candidate's knowledge in corruption-related cases may be acquired in a variety of ways, such as: legal training and study, professional practice, including but not limited to prosecuting or representing and defending against criminal charges, drafting expert assessments, scholarly legal writing, and/or through judicial decision-making.
- e. The PCIE may consider testing a candidate's legal knowledge further through an additional interview or written questions.

Indicator 8 (complex cases)

The candidate has demonstrated the ability required to analyse and adjudicate complex legal problems.

- a. The candidate has the ability to synthesize, distinguish, compare, and contrast a variety of legal sources; ability to understand the case history, analyze evidence, including complex financial documents, gather information efficiently, and to seek input from multiple stakeholders, including experts.
- b. The candidate has the capacity to formulate a sound decision, to draft it in an intelligible and clear language and to support that decision with reasons.
- c. The candidate has the ability to analyse and synthesize information effectively.
- d. A candidate for the appellate chamber has the ability to review lower court decisions.
- e. A candidate's ability required to analyse complex legal issues may occur in many different contexts, including administrative tribunals, arbitration bodies, trial, appellate courts, legal practice and academic work.
- f. Prior experience in adjudication is relevant but not essential (as stated in Art. 7 para. 2 of the LHACC).
- g. As the appellate chamber of the HACC is itself an appellate court, prior appellate judicial experience may be relevant but is not essential for appointment to the appellate chamber of the HACC.

- h. Should the PCIE obtain relevant information, including but not limited to, from past legal decisions, memorandums, pleadings, books, scholarly articles, reports and similar writings, which would raise serious doubt as to whether a candidate could analyse and adjudicate complex legal cases and express himself/herself in writing, the PCIE may consider inviting that candidate to present example(s) of his/her past legal text in writing or/and to explain it/them during interview. The PCIE may also review the results of the practical case (exercise) performed by the candidate as a part of the written examination within the qualification assessment conducted by the HQCJ.

Indicator 9 (judicial performance)

The candidate has demonstrated knowledge, skill and ability to perform the functions of the judicial office.

- a. The candidate complies with time limits and standards.
- b. The candidate has demonstrated high quality in his/her judicial or other professional performance.
- c. A judicial candidate may fail to demonstrate his/her ability of judicial performance in corruption-related cases, where there is sufficient evidence that a violation of the European Convention for the Protection of Human Rights and Fundamental Freedoms, established by a ECtHR's judgement, was caused by the court decision (co-)issued by that candidate, unless the violation is related to systemic problems by the State, such as, among other, judicial backlogs (e.g. as established in the pilot judgments of the ECtHR).

General rules for applying the indicators

Below are the general rules that may assist the PCIE in applying the assessment indicators. They explain the scope of assessment and the threshold for reaching a conclusion that the judicial candidate may not comply with the established criteria.

1. Non-compliance

A candidate does not meet an indicator where the non-compliance is proven or where reasonable doubts exist about the compliance.

- a. The task of PCIE is to assist the HQCJ in selecting candidates for the HACC who are worthy of the high office of the HACC. Therefore, the PCIE's task is not to prove a violation of law that took place but to determine whether there are reasonable doubts as to the integrity, knowledge and practical skills of candidates for the HACC

- b. The general threshold for questioning a judicial candidate shall be the standard of reasonable grounds to believe that the judicial candidate might not comply with the criteria of integrity, knowledge and practical skills. Such “reasonable grounds” may exist not only if there are proven facts of wrongdoing/breach of integrity rules but also if there is an “appearance” or “perception” as to the lack of the candidate’s integrity or other non-compliance with the assessment criteria that affects trust in the judiciary and the HACC.
- c. When there is a reasonable doubt as to the candidate’s compliance with the criteria, it is up to the candidate to disprove it. Unlike with the criminal proceedings, there is no presumption of innocence in the process of the candidate assessment. The PCIE does not have to prove beyond reasonable doubt the candidate’s non-compliance; if a reasonable doubt has been established and not refuted by the candidate or other information sources, it may be sufficient for the PCIE to challenge the candidate considering the gravity of the matter at stake

2. Personal scope

For the assessment of a candidate’s integrity, information on the candidate, the candidate’s family members and other persons related to the candidate will be examined where relevant.

3. Temporal and territorial scope

The assessment of compliance with the indicators is based on information without limit to time or territory.

4. Findings by other bodies

Any information, finding or assessment by any national or international body may be considered as relevant but will not be definitive for the PCIE.

5. Additional information

The PCIE may invite candidates to provide additional explanation or information, including documents, to assist PCIE in assessing the compliance with the criteria.

6. Gravity of misconduct

When determining compliance with the integrity criteria, the PCIE will consider the gravity of any misconduct.
