

Integrity on Trial: Judicial reform in Georgia, Ukraine and Moldova

Steven Blockmans, Nadejda Hriptievschi, Viacheslav Panasiuk
and Ekaterine Zguladze

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Abstract

Under the terms of their Association Agreements with the EU, Georgia, Ukraine and Moldova are expected to strengthen the independence of the judiciary, establish zero tolerance of corruption in the legal profession, and reform legislation regarding prosecutors, judges and lawyers.

By taking a differentiated approach to improving relations with its neighbouring countries, the EU is keen to identify and build upon existing positive sources of resilience, as well as to track and respond to vulnerabilities with the mix of instruments and budgets at its disposal. In the case of Georgia, this raises the question of whether the radical overhaul of the Saakashvili-era reforms can withstand the corrosion of corruptive practices by narrow-minded political and economic operators. In Ukraine, the challenge is how to prolong and channel the positive reform dynamic to firmly anchor institutional and procedural change in the justice sector. In Moldova, the issue is rather to insulate the pockets of successful reform while supporting drivers of change in their fight against illiberal forces.

This study identifies innovations in the three associated states' justice sectors. It analyses changes to both the 'hardware' of the justice system, i.e. the constitutional and institutional frameworks, as well as the 'software', i.e. selection, appointment, promotion and disciplinary procedures and other means to fight corruption in the justice sector. It concludes with a review of the existing court practice with the AA/DCFTAs. By doing so, this paper not only gauges the awareness levels of national judges about the need to enforce their country's contractual obligations entered into with the EU, it also offers insights into the level of openness of domestic courts to use international/European law to end conflicting national rules and bad practices.

Steven Blockmans is Head of EU Foreign Policy at CEPS and Professor of EU External Relations Law and Governance at the University of Amsterdam. Nadejda Hriptievschi is Justice and Human Rights Programme Director at Legal Resources Centre from Moldova (LRCM) in Chisinau. Viacheslav Panasiuk is Chairman of the Law Development Centre in Kyiv. Ekaterine Zguladze was Minister of the Interior of Georgia (2006-2012) and First Deputy Minister of the Interior of Ukraine (2015-2016) before becoming a freelance consultant.

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1. Introduction

The EU Association Agreements with Georgia, Moldova and Ukraine, signed in 2014, are premised on a mutual commitment to liberal democratic values. They recognise that the rule of law lies at the heart of political association and economic integration; respect for the rule of law is declared an “essential element”, the violation of which may lead to a suspension of the agreements. The jointly agreed Association Agendas flesh out this essential element but remain rather vague, nonetheless. Priority matters for action in the justice sector include the impartiality of the judiciary, prosecution and law enforcement bodies, and their freedom from political interference and corruption. All three countries are expected to ensure the review of the appointment procedures of judges, strengthen the independence of the judiciary, establish zero tolerance of corruption for the legal profession, and reform legislation regarding prosecutors, judges and lawyers.¹

All three countries are expected to review the appointment procedures of judges, strengthen the independence of the judiciary, establish zero tolerance of corruption for the legal profession, and reform legislation regarding prosecutors, judges and lawyers.

On paper the commitments of Georgia, Moldova and Ukraine look more or less the same, yet the starting points for implementation are very different. This is the result of different historical trajectories and current-day political trends in the transition of the three associated states.

Georgia applied shock therapy to its constitutional, administrative and economic systems after the Rose Revolution in 2003. Reform in the justice sector was slower to take off and has been implemented in three increasingly sophisticated waves that have brought significant improvement in recent years. Judicial independence has been stymied by executive and legislative interests, however. A lack of transparency and professionalism surrounding proceedings also remains a problem. But even if Georgia has slipped a little in global rankings of late, it remains far ahead of its 3DCFTA fellows.

Ukraine is having a second stab at the radical reform of its governance structures but, unlike Georgia 15 years ago, is finding it much harder to wipe the slate clean. Although due process

¹ For a detailed analysis of the commitments entered into by each of the three countries, see the second editions of the handbooks produced by Emerson et al. in the context of the 3DCFTAs project and taken up in the list of references.

guarantees exist, in practice individuals with financial resources and political influence can escape prosecution for wrongdoing. The Ukrainian government has made little progress in meeting domestic and international demands to investigate and prosecute crimes committed during the final months of the Yanukovich administration in late 2013 and early 2014, which included shooting protesters. Despite the legislative boom overall and the introduction of far-reaching vetting processes, which have led to a quasi-automatic clean-up of parts of the judiciary, the authorities' failure to prosecute extensive high-level corruption has undermined the popularity of the government and altered the reform dynamic.

Moldova also struggles with endemic corruption among its public officials and within the judiciary. Oligarchic groups continue to hold sway over all state institutions and stand in the way of the country's fight against corruption. Reforms have mostly addressed the procedural and technical levels but have not been matched by improvements in the independence and integrity of judges. The latter was dealt several blows in 2016, as a result of the political fallout over a massive banking scandal that had rocked Moldova in 2014.² Numerous other controversies, such as the appointment of a judge to the Supreme Court, despite failing to meet requirements for financial disclosures, have completely eroded citizens' trust in the courts.

In spite of the differences between the three DCFTA countries, their judicial systems also have common features and challenges: progress (albeit varied) in modernising the legal framework for the organisation of the judiciaries; resistance in the implementation of innovations with regard to the functioning of the judiciary; political interference and corruption in appointment procedures of judges and the work of the courts; difficulties in creating an independent prosecutorial service – the bane of any corrupt political regime – and/or effective law enforcement bodies.

By taking a context-specific approach to improving relations with neighbouring countries on a differentiated basis, the EU is keen to identify and build upon existing positive sources of resilience, as well as to track and respond to vulnerabilities with the right mix of instruments and budgets at its disposal.

In its 2015 review of the European Neighbourhood Policy, the EU put 'resilience' front and centre. The services' adoption of this buzzword reflects a shift in the debate about the nature of EU engagement with neighbouring countries. It de-emphasises the goal of transformation that formed the bedrock of the 'old' ENP and replaces it with support for the ability to withstand systemic shocks and threats at both the state and societal level, mainly in the (hard) security sphere, but also in providing access to justice and building effective, accountable and inclusive institutions. By taking a context-specific approach to improving relations with neighbouring

² In June 2016, former Prime Minister Vlad Filat, who during his 2009-13 tenure had worked to bring Moldova closer to the EU, was convicted of corruption charges related to the 2014 banking scandal. Filat was sent to prison, thus paving the way for a competing oligarch – Vlad Plahotniuc – to find support from the leader of the pro-Russian socialists, Igor Dodon, to nominate him as the new prime minister. Dodon himself went on to win the first direct – and disputed – presidential elections in October, on the back of a controversial judgment from March that year in which the Constitutional Court struck down constitutional amendments mandating parliamentary selection of the president. The Court was criticised for having acted outside its jurisdiction.

countries on a differentiated basis, the EU is keen to identify and build upon existing positive sources of resilience, as well as to track and respond to vulnerabilities with the right mix of instruments and budgets at its disposal.³

In the case of Georgia, this raises the question of how resilient the Saakashvili-era reforms are. Can they withstand the corrosion of corruptive practices by narrow-minded political and economic operators. In Ukraine, however, the challenge is how to prolong and channel the positive reform dynamic to firmly anchor institutional and procedural change in the justice sector. In Moldova, the issue is rather to insulate the few pockets of successful reform while supporting drivers of change in their fight against illiberal forces.

This paper aims, firstly, to identify innovations in the three associated states' justice sectors. It will do so by analysing changes to both the 'hardware' of the justice system, i.e. the constitutional and institutional frameworks (section 2), as well as the 'software', i.e. selection, appointment, promotion and disciplinary procedures and other means to fight corruption in the justice sector (section 3).⁴ While recognising that the results of judicial reform will not always be visible right away and that, as a consequence of the specificities of each country's context, there may not be one preferred model of justice sector reform, it is nevertheless useful to identify landmark innovations in an area in which lasting change is so notoriously difficult to secure.

This paper identifies innovations in the three associated states' justice sectors. It analyses changes to both the 'hardware' of the justice system, i.e. the constitutional and institutional frameworks, as well as the 'software', i.e. selection, appointment, promotion and disciplinary procedures and other means to fight corruption in the justice sector.

By way of *obiter dictum*, this report will compile noteworthy judicial practice in Georgia, Moldova and Ukraine with the implementation of the Association Agreements (section 4). The

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AA/DCFTAs are destined to have a profound effect on the legal and judicial systems for several reasons. They have already triggered and are likely to trigger further constitutional amendments aimed at ensuring that these Eastern Partnership countries effectively share the EU's liberal democratic values and implement the AAs. To achieve this, the provisions of the

AAs and the decisions of the common institutions set up under the agreements must be effectively applied (i.e. in conformity with the relevant EU *acquis*) by the three countries' judiciaries, raising the issue of direct effect within the Georgian and Ukrainian legal systems. Setting precedents

It also offers insights into the level of openness of domestic courts to use international/European law in setting aside conflicting national rules and bad practices.

³ Joint Communication from the European Commission and the High Representative to the European Parliament and Council, "A Strategic Approach to Resilience in the EU's external Action", JOIN(2017) 21 final, 7 June 2017, Annex 10, in particular guiding consideration no. 4.

⁴ On the fight against corruption writ large, see the contribution by Emerson, Hriptievschi, Kalitenko, Kovziridze and Prohnitchi to this volume.

for implementation is key, as the landmark judgments of the Moldovan Constitutional and Supreme Courts show. Not only does a review of the existing court practice with the AA/DCFTAs serve to gauge the awareness levels of national judges about the need to enforce their country's contractual obligations entered into with the European Union. It also offers insights into the level of openness of domestic courts to use international/European law in setting aside conflicting national rules and bad practices. The focus will be on the deep and comprehensive free trade arrangements (DCFTAs) of the Association Agreements, thus linking up to the second edition of the Handbooks published under the umbrella of the '3DCFTA' research project.⁵

2. Constitutional and Institutional Reform

2.1 Georgia

Technically speaking, the adoption in 1997 of the 'Organic Law on Common Courts' was the first step in Georgia's judicial reform process,⁶ but the initiative failed due to lack of political will, despite strong backing from international partners. It was not until after the Rose Revolution in 2003 that the newly elected government put everything at stake to transform the country into a modern state. All sectors of the economy were targeted in a major anti-corruption drive.

One of the first changes concerned Georgia's criminal law, with the introduction in 2004 of a US-inspired plea bargain mechanism as an alternative and consensual means of criminal case resolution pending more comprehensive changes to the justice system.⁷ The government at the time believed that this out-of-court dispute settlement mechanism was a helpful tool for law enforcement agencies in the early stages of the state-building exercise. Georgia delivered such impressive results that the mechanism even became the object of criticism because of 'trigger-happy' prosecutors.⁸

⁵ See <http://www.3dcftas.eu>.

⁶ The period from 1997 to 1999 saw i) an Organic Law on Common Courts of Georgia; ii) an Organic Law on Supreme Court of Georgia; iii) a new system for appointment of judges; iv) judges appointed during the Soviet period left the system; v) the appointment of judges who passed the exams and went through the selection process.

⁷ An out-of-court settlement of cases whereby the defendant agrees to a guilty plea in exchange for a lesser charge or for a more lenient sentence and/or for dismissal of certain related charges. As in other countries, there were two basic forms of plea bargains in Georgia: the guilty plea (agreement on plea) and the 'no contest' plea (agreement on sentence without guilty plea). Under the system, the defendant has the right to appeal the judgment rendered consequent to the plea bargain. The court must then satisfy itself that the plea bargain was concluded with the free will of the defendant, that the defendant fully acknowledged the essence of the plea agreement and its consequences.

⁸ By 2010, around 80% of the cases were decided through the plea bargain mechanism, for which Georgia was often criticised by NGOs and European institutions alike. see 'Plea bargaining in Georgia', 23 February 2010, Transparency International Georgia, report available at <http://transparency.ge/en/post/report/plea-bargaining-georgia>.

One of the main reforms started in 2005 was the reorganisation of the judicial architecture to create a functionally balanced system ensuring the principle of sequential order. The reform modernised the trial courts, clarified their jurisdiction, and introduced the specialisation of judges. The structure of trial courts was set up in a new way, with 24 enlarged district (city) courts (with approx. 130 judges in each) reviewing cases in first instance. Under their authority, new magistrate courts (41 judges each) ensure the timely and simplified review and adjudication of less significant cases.

One of the main reforms started in 2005 was the reorganisation of the judicial architecture to create a functionally balanced system ensuring the principle of sequential order.

Two Appellate Courts were introduced, thereby changing the model of regional courts within the unified system of common courts. These courts adjudicate cases only by way of an appeals procedure and no longer in first instance. Appeals against decisions of trial courts (among them those of magistrate judges) from the west of Georgia are heard by the Kutaisi Court of Appeal, whereas the judgments of courts from the east Georgia are addressed by the Tbilisi Court of Appeal.

The Supreme Court of Georgia turned into a purely cassation instance court. The criminal cases panel of the Supreme Court, which used to review cases of particular gravity as a first instance court, was abolished. The Supreme Court considers the admissibility of cases in accordance with new criteria on the significance of claims for the development of the law and their contribution to the establishment of a common judicial practice.

Substantial amendments to the constitution were enacted on 27 December 2006 whereby the appointment and dismissal of judges were removed from the competence of the president of Georgia and transferred to the High Council of Justice (HCJ).

Until then, the HCJ had been an advisory body for the president, consisting of 12 members: four appointed by the president, four appointed by the parliament, one by the Supreme Court of Georgia; plus the presidents of the High Court of Abkhazia and High Court of Adjara, and the minister for justice as *ex officio* members. This system was changed by the law of 19 June 2007. The High Council of Justice was transformed into the highest authority for the administration of justice. For the first time, the HCJ mostly comprised judges (8 out of 15 members, elected by the Conference of Judges, a self-governing body of judges); the minister for justice and prosecutor general were removed as members. As part of the “new democratic reforms package within the Second Wave” announced in 2009, one member of the High Council of Justice was elected from the ranks of opposition MPs. Until the reforms undertaken by the new government of Georgia in 2013 (see below), the High Council of Justice was chaired by the chairman of the Supreme Court of Georgia and had full and exclusive authority to appoint, dismiss and take disciplinary measures against the judges.

In July 2007, the Criminal Code of Georgia was amended to de-criminalise the adoption of unlawful judgments or other decisions by a judge, and the Georgian parliament adopted the

Law on Rules of Communication with Judges of Common Courts to ensure adherence to the principles of independence and impartiality.⁹

In 2008, the position of the Prosecutor General was abolished and merged with the Ministry of Justice, drawing on both the French and US models. The government at the time claimed that it linked criminal justice policy with the politically responsible person but that the Prosecutor General kept operative independence because the minister had no power over criminal cases.

The position of the Prosecutor General was abolished and added to the Ministry of Justice as a quasi-autonomous branch, with the Chief Prosecutor appointed by the President of Georgia upon the nomination of the Minister of Justice and dismissed solely by the President.

The office of chief prosecutor became a quasi-autonomous branch of the ministry of justice, with the chief prosecutor appointed by the president of Georgia upon the nomination of the minister for justice and dismissed solely by the president. Changes to the 'Law on Prosecutor, CPC and Law on Structural Authority and Activity of Government' were adopted in 2015, according to which the office of prosecutor remained in the system of the ministry of justice, while a prosecutorial board was introduced, through which the minister executed general oversight. The rules on appointing the general prosecutor were also modified and delegated to

the board, government and parliament.¹⁰ Recently adopted changes to the constitution¹¹ stipulate that the prosecutor's office is independent in its activity. Yet, the general prosecutor is selected by parliament by majority vote (of full composition), contrary to the Venice Commission's recommendation for QMV, upon nomination of the prosecutorial board.¹²

The first decade of judicial reform saw other positive changes too, such as higher salaries and improved infrastructure. NGOs and the international community nevertheless criticised Georgia for the slow pace and indecisiveness of reform in this critical sector, especially in comparison to the progress made in other sectors.

A new 'First Wave' of justice reform was launched on May 1st, 2013 by the incoming government. Amendments were made to the 'Law on Common Courts', the 'Law on Disciplinary Responsibility and Disciplinary Prosecution of Judges' and the 'Law on the High School of Justice'. These changes were eagerly awaited by civil society organisations and very much derived from their recommendations. The rules for the selection of members of the High Council of Justice were also sharpened: politically neutral persons would hitherto be selected for a non-renewable mandate by way of an open competition, not by MPs selected by their peers. In addition, the right to nominate candidates was granted to higher education institutions, NGOs and the Georgian Bar Association. The role of the Conference of Judges was enhanced. Prior to the amendments, the Chairperson of the Supreme Court had the exclusive

⁹ On 26 February 2010 further amendments increased the fine for the violation of the rules of communication by public servant twofold; for state political officials the fine was increased threefold.

¹⁰ See [http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2015\)039-e](http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2015)039-e)

¹¹ See <http://www.parliament.ge/ge/ajax/downloadFile/75697/1324-rs>

¹² See [http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2017\)023-e](http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2017)023-e)

right to nominate candidates to be judges in the High Council of Justice to the Conference of Judges. With the amendments, each member of the Conference of Judges gained the right to nominate these candidates.¹³ All of these improvements strengthened the position of the HCJ and enhanced its freedom from political interference.

Prosecutors were thenceforth separated from the ministry of justice;¹⁴ the plea-bargaining system was abolished; trials were opened to the public and media scrutiny (conditions apply); an obligation was created to keep audio/video records of courts hearings and disclose them to involved parties upon request; access to trial by jury was expanded;¹⁵ and the rights of defendants and their legal counsel were increased, including the right to retrial.

The Venice Commission, the Council of Europe Parliamentary Assembly, EU special envoy Thomas Hammarberg and the European Commission supported the amendments and continue to monitor their implementation.

A ‘Second Wave’ of reform was launched on August 1st, 2014 but has generally been perceived as regressive.¹⁶ Although it introduced the appointment of judges for life (before reaching the age of 65 determined by law), it also set a mandatory three-year probation period – thus putting a strain on the independence of least 100 judges.

The ‘Third Wave’ of reforms was passed on 8th February 2017 when parliament voted down 26 objections and amendments proposed by President Margvelashvili and supported by the Venice Commission and civil society organisations.¹⁷ In particular, the legislative package did not envisage the election of court presidents by judges and contained regressive changes regarding the composition of the HCJ.¹⁸ One positive element of the new legislation is the introduction of an electronic case-assignment system. Unfortunately, the launch of this system

has been postponed several times.

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The greatest weakness of the Third Wave of legislative reform lies precisely in the opaque way in which it was introduced and in its delayed implementation. The latter has ‘allowed’ the HCJ – in a controversial process decided by

¹³ Similarly, the Chairperson of the Supreme Court would no longer serve as the Chairperson of the Independent Board of the High School of Justice. The latter chairperson was thenceforth elected by the Conference of Judges, while the remaining members of the Independent Board were elected by the HCJ instead of the Chairperson of the Supreme Court.

¹⁴ In November 2008, the position of prosecutor general was abolished and the prosecutorial office was merged with the ministry of justice.

¹⁵ First introduced in the 1917-21 years of independence.

¹⁶ Statement of the Coalition about Appointment of Judges for a Probationary Period, the Coalition for an Independent and Transparent Judiciary, available at: <<http://bit.ly/2btwUYy>>.

¹⁷ Joint Opinion N°773/2014 of the Venice Commission and the Directorate of Human Rights (DHR) of the Directorate General of Human Rights and Rule of Law (DGI) of the Council of Europe on the Draft Law on Amendments to the Organic Law on General Courts, Strasbourg, available at: <<http://bit.ly/2bKgOJQ>>.

¹⁸ See Coalition for Independent and Transparent Judiciary, https://www.scribd.com/document/348378290/The-Judicial-System-Past-Reforms-and-Future-Perspectives#fullscreen&from_embed

NGOs for its lack of transparency – to appoint 64 judges, five of whom (former judges of the Supreme Court and Constitutional Court) for life, without a probation period. Tensions grew, as the NGO community refused to present a report in protest at the developments in the judicial system. In June 2017 the Parliament of Georgia heard proposed amendments to the legislation regulating judicial probation, with a view to complying with the Constitutional Court decision of 15 February 2017 in the case of Omar Jorbenadze vs. Parliament of Georgia. The law should determine the circle of judges to be exempted from the probation period and set the procedure for their life-time appointment. Despite high public interest in the matter, amendments were prepared without engaging civil society. NGOs believe that the draft law still leaves ample room for arbitrariness since it does not establish in a clear and unequivocal manner the HCJ’s obligation to substantiate its decisions of appointing acting and former justices of the Supreme and Constitutional Courts for life.¹⁹

In general, the court system is more gender balanced than the administration of other branches of power in Georgia. Currently, the Supreme Court is chaired by a woman; one of her two deputies is also female, in addition to three female judges out of 10 in total. In the Constitutional Court four out of nine judges are women. According to 2012 data, 42% of judges of the Supreme Court were female; 33% in the Constitutional Court; 54% in Appeal Court and 47% in District Courts.²⁰

2.2 Ukraine

It took the violence of the Euromaidan to shift Ukraine’s real judicial reform into gear. Upon the proposal of the new President of Ukraine and the Constitutional Commission set up under his authority, the Verkhovna Rada has adopted a triptych of primary legislation aimed at improving the constitutional foundations and practical implementation of the rule of law.

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In June 2016, the Rada adopted the first two parts of the package. The ‘Law on Amendments to the Constitution’²¹ provides for:

- Restructuring the judicial architecture by: a) granting the Constitutional Court of Ukraine an independent status; b) introducing a complaint procedure under which a natural or legal person is given the right to appeal to the Constitutional Court on the constitutionality of the law which is applied in final instance in his/her case;²²

¹⁹ See <http://www.transparency.ge/en/post/coalition-addresses-hearing-legislative-amendments-lifetime-appointment-judges>

²⁰ Research by Natia Gorgadze – Gender Equality (2012), on file with the authors.

²¹ Law number 3524 “On Amendments to the Constitution of Ukraine” of 2 June 2016 had been approved by the Venice Commission on 26 October 2015. It entered into force on 30 September 2016.

²² Uncertainty still surrounds the retroactive effect of Constitutional Court decision in this respect.

- The composition of the High Council of Justice – the body responsible for the appointment, career development and responsibility of judges – in a manner in which the majority of its members will be judges elected by judges;
 - Depoliticisation of the judiciary through: a) the abolition of the five-year probation period for the appointment of judges and the implementation of a procedure according to which judges hold positions indefinitely; b) eliminating parliament from the process of appointment and dismissal of judges, a power which is formally exercised by the President of Ukraine, based on a binding submission by the HCJ; c) granting the HCJ (rather than the president and the parliament) the competence to dismiss judges, and transfer them from one court to another;
- In June 2016, the Rada adopted the first two parts of the package: Restructuring the judicial architecture and depoliticisation of the judiciary.*
- Limitation of judicial immunity from absolute to functional: a) without the consent of the HCJ a judge cannot be arrested or held in custody or detention until the sentence has been delivered by a court (except after the commission of a grave crime or a felony); b) a judge cannot be held liable for a court decision that s/he has made, except when this constitutes a crime or a disciplinary offence;
 - Financial independence of the courts and the activity of judges: in the state budget, the expenses for the maintenance of the courts are determined separately, taking into account the proposals of the HCJ, and the amount of the remuneration of the judge is established by law;
 - Raising professional requirements of judges by: a) increasing the age limit from 25 to 30 years; and b) raising the required professional experience in the sphere of law from 3 to 5 years;
 - Cancellation of unusual supervisory powers of the public prosecutor over the observance of: a) human/citizen rights and freedoms; b) laws on these issues by executive authorities, local governments and their officials and officers; c) laws in the execution of judgments in criminal cases, as well as the application of other measures of coercion related to the restraint of personal liberty of citizens.

In parallel to the above-mentioned constitutional amendments the Verkhovna Rada adopted a new version of the ‘Law on the Judicial System and Status of Judges’.²³ This law drew sharp criticism from the expert community because of the violation of the regulatory procedure for its adoption: the draft had only been submitted to Parliament on 30 May 2016, i.e. three days prior to its adoption. Important provisions of the law concern:

- Enhancing the integrity criteria for judges by: a) introducing an obligation for all (candidate) judges to file a Declaration of Kinship and a Declaration of Integrity; b) establishing a new ground for dismissing a judge for violation of the duty to confirm the

²³ Law number 4734 of 2 June 2016.

legality of the origin of property; c) establishing a Public Council for Integrity (PCI) at the High Qualifications Commission of Judges of Ukraine (HQCJ) with the aim of facilitating the latter in establishing criteria of professional ethics and integrity to test the suitability of (candidate) judges;

- Enhancing the independence of judges by: a) significantly increasing the salaries: €1,630/month for local courts (a rise of €570); €2,700 for appeal courts (a rise of €1,600); €4,000 for the Supreme Court (a rise of €2,765); b) introducing the possibility of entitlements for work that involves access to state secrets, seniority, holding an administrative position and/or an additional degree.

The law also restructured the four-level Ukrainian judicial system, which thenceforth consists of a Constitutional Court and a three-tiered system of courts of general jurisdiction:²⁴

- Courts of the first instance, consisting of circuit courts (criminal and civil jurisdiction), administrative circuit courts, and commercial circuit courts;
- Courts of appeals, consisting of appellate courts (criminal and civil jurisdiction), administrative appellate courts, and commercial appellate courts;
- A new Supreme Court, consisting of five internal bodies: the Great Chambers of Supreme Court, the Administrative Court of Cassation (divided in chambers for tax issues, social rights, and political rights), the Commercial Court of Cassation (with separate chambers for bankruptcy, intellectual property and antitrust, and corporate disputes), the Criminal Court of Cassation, and the Civil Court of Cassation.

Although the law does not explicitly refer to when the court system should be reorganised, the general activity of the authorities involved in judicial reform indicates that this will only be possible now that the composition of the new Supreme Court of Justice has been finalised. Completed in November 2017, the selection of judges to the Supreme Court only partly contributed to the judicial system's clean-up, with the PCI questioning the integrity, independence and professional records of about a quarter of newly appointed judges. Despite widespread criticism about the failure of the High Qualification Commission of Judges to select Supreme Court candidates fairly and through transparent processes, President Poroshenko formally appointed 113 judges, including a number of incumbent or retired judges who were considered to be flawed candidates.

²⁴ Higher specialised courts were taken out from in-between appellate courts (ruling upon judgments by local, first instance, courts) and the Supreme Court of Ukraine.

Another eye-catching change to the judicial architecture of Ukraine is the creation of two (first-instance) specialised courts: a ‘High Court on Intellectual Property’ and a ‘High Anti-Corruption Court’ (HAC). The necessity of their establishment, however, was a matter of intense debate. With regard to the former, critics said that the number of disputes related to intellectual property in Ukrainian courts is not that big. While litigants may benefit from narrowly specialised IP judges, the question is, indeed, whether significant budget allocations are needed for the creation of this court. As for the HAC, the scope of its horizontal jurisdiction was subject to a protracted on/off debate with the president of Ukraine, as well as amendments to Ukrainian procedural laws. In April 2018, the second and final reading of the draft legislation for the creation of the HAC was pushed back to allow for consultations with the Venice Commission. After much international pressure, the Rada finally approved the ‘Law on Establishment of the Anti-Corruption Court in Ukraine’ on 7 June 2018. The HAC will consider only the top-corruption cases which fall within the investigative jurisdiction of the National Anti-Corruption Bureau of Ukraine (NABU) and the Specialized Anti-Corruption Prosecutor’s Office (see section 3.2). A committee of international experts will play an important role in the selection of judges serving the HAC. Now that the law has been passed, implementation can start.

An eye-catching change to the judicial architecture of Ukraine is the creation of two (first-instance) specialised courts: a High Court on Intellectual Property and a High Anti-Corruption Court (HAC).

The third and final part of the 2016 legislative triptych concerned the adoption of the ‘Law on the High Council of Justice’.²⁵ This law fleshed out some of the elements of the constitutional changes introduced in June of that year and attributed a number of powers to the High Council

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of Justice, including: a) submitting to the President of Ukraine the appointment of a judge; b) ensuring the implementation of disciplinary proceedings against judges; c) taking decisions to dismiss judges; d) granting consent to the arrest or detention of a judge; e) deciding on transfers or secondment of judges from one court to another; f) deciding on the

temporary removal of a judge from the administration of justice; g) agreeing on the number of judges in courts; and h) participation in determining the expenditures of the state budget for the maintenance of courts, bodies and institutions of the justice system.

On the side of the prosecution, the ‘Law on the Prosecutor’s Office’ of October 2014 had already put an end to its general supervisory role. Since the adoption of the 2016 amendments to the constitution, the main functions of the Office are the maintenance of a public prosecution in court; the organisation and procedural guidance to the pre-trial investigation, supervision of the secret and other investigation activities and searches of law enforcement

²⁵ Law number 1798-VIII of 21 December 2016.

bodies;²⁶ and the representation of the interests of the state in court in exceptional cases and in the manner prescribed by the law.

A significant achievement of the law of 2014 was the introduction of the prosecutorial service's self-governing bodies (the 'All-Ukrainian Conference of Prosecutors' and the 'Council of Prosecutors of Ukraine') and the 'Qualification Commission of Prosecutors', whose main task is the selection, career development and accountability of prosecutors.²⁷

While these innovations look good on paper, reforming the prosecution has in practice been extremely slow and unable to meet the general needs of society. Political influence has remained: the Rada may express no confidence in the Attorney General, which results in his

While these innovations look good on paper, reforming the prosecution has in practice been extremely slow and unable to meet the general needs of society. Political influence has remained. 'Soviet' elements have also survived recent reforms

resignation. 'Soviet' elements have also survived recent reforms, such as the military prosecutor's office and the function of representing the interests of individuals and the state in court. There is a high degree of system preservation: according to the results of the competitions conducted for the positions in local prosecutor's offices, 76% of the seats were occupied by incumbents. This is due to: a) delay of entry into a force of the law; b) the period of the competition: July-August; c) the fact that competitions were conducted only for the positions of the heads of local public prosecutors; d) the

significant reduction of wages by the government during the second stage of the competition for these posts (by about €100; salaries now average at €300 per month).

Effective enforcement of judgments has been a longstanding concern for investors in Ukraine. The enforcement system currently faces substantial challenges since the percentage of actually enforced judgments is extremely low. Moreover, the officials responsible for the job are rather (financially) unmotivated and the cooperation between authorities in this area is problematic and complicated. The main novelty of the 'Law on Enforcement of Judgments' provides that, apart from the State Enforcement Service of Ukraine, the decisions of the courts and other authorities may now be enforced by 'private enforcers' listed in the Unified Registry. Such individuals have to meet certain age, educational and other requirements as well as pass a test to be allowed to enforce decisions. Another essential requirement is that such individuals are obliged to insure their professional liability. Private enforcers are not allowed to enforce judgments whose monetary value exceeds their insurance premium. Within these parameters,

²⁶ The transitional provisions of the Law stipulate that the Prosecutor's Office will continue to i) carry out pre-trial investigation prior to the commencement of the activities of the State Investigation Bureau, but not later than five years after the entry into force of the Criminal Procedure Code, i.e. 11 August 2018; and ii) supervise the observance of the law in the execution of court decisions in criminal cases, in the application of other measures of compulsory nature, related to the restrictions of the personal freedom of citizens, before the entry into a force the law on the establishment of a dual system of regular penitentiary inspections.

²⁷ Of the 11 members of the Commission 5 are prosecutors, while the other 6 are appointed by the legal community and the Ombudsman.

there is good ground to believe that one of the most persistent problems in Ukrainian litigation might be solved.

Technical support of the judiciary falls within the purview of the State Judicial Administration (SJA).²⁸ According to a recent report by the SJA, the judicial system (about 600 courts) was in 2016 equipped with 25,016 computers linked up to the court registration system. All courts have technical equipment for conducting court sessions in video communication mode, which is gaining popularity among the people. The Unified State Register of Judicial Decisions has been functioning since 2006, which currently includes more than 65 million copies of court decisions. Until recently, a 2013 pilot project on the exchange of electronic documents between the parties of the trial and the court operated in parallel to the sending of such documents in paper form, in accordance with the requirements of the law. Moreover, in accordance with the provisions of the 'Law on the Judiciary and the status of judges', an 'Institute of Electronic Justice' is envisaged, which will greatly improve the access to and administration of justice, reduce its cost and the risk of fraud.²⁹ It will take time to consistently and fully implement the truly progressive legislation underpinning the creation of a much-anticipated 'electronic court'.³⁰ But work has begun. In accordance with Order No. 367 of 23 March 2017, the State Judicial Administration of Ukraine has approved the procedure for the exchange of electronic documents in civil, administrative and economic cases between seven pilot courts.³¹ The first results of the operation of the E-Court subsystem give rise to hope in its future success.³²

²⁸ Until end of 2016, the EU-funded project "Support to Justice Sector Reforms in Ukraine" aimed to support sector-wide reforms (<http://www.justicereformukraine.eu>). The project was divided into six key legal components central to policy and institutional reforms: justice sector reform strategy; support to execution of court decisions; prosecution reform; access to justice and the right to defence; independence of the judiciary; prevention and fight against corruption.

²⁹ From 2015 onwards, measures have been taken to establish and connect information-payment terminals in courts to provide the payment of court fees.

³⁰ No less popular among the population is the institution of sms-message for the participants in the trial about the date and the time of the case. Unfortunately, the information is only about the previous years, but one can observe a positive trend in their use. Thus, in the first quarter of 2016, about 380,000 such text messages were sent by the local and appellate courts, up by 13% compared to the same period in 2015.

³¹ It is assumed that electronic documents can be filed to the court only after a registration in the subsystem 'E-Court' posted on the website of 'Judiciary Ukraine' at: e.court.gov.ua. Registration in the subsystem 'E-Court' includes: creating an account with the postal system 'mail.gov.ua'; Registration of personal electronic cabinet's tied to his electronic signature. Once registered, participants of the trial may sue electronically all procedural documents to the court, stipulated by the procedural law of Ukraine, but only when submitting to the court the relevant legal documents at the next hearing in writing form.

³² Preliminary results indicate that interaction between courts, lawyers, free legal aid centres, banking institutions, the prosecutor's office and one institute conducting forensic research (in Odessa) has been established and that there is a reduction in the average length of the trial in court (20-30 days), while the average time for processing one document (registration, automatic distribution, transfer to a judge) is five minutes. In addition, with the help of the 'E-Court' subsystem, it is possible to create and send an executive document (issued for enforcement in accordance with a court decision) electronically. Consequently, unlike the current order, according to which the average length of receipt of documents to the executive service is 5-7 days, the receipt of such a document using the subsystem 'E-Court' occurs instantaneously. The cost of sending documents is 0 UAH (today 10 UAH).

2.3 Moldova

Since its independence from the Soviet Union in 1991, Moldova has been held back by a string of constitutional crises. The constitution of July 1994 introduced the institutional framework of Moldova's current political system, with a unicameral parliament, a directly elected president, and substantial autonomy to the regions of Transnistria and Gagauzia. In 2000, a constitutional amendment endowed parliament with the power to elect the president. In light of parliament's failure to fulfil this duty, a referendum in 2010 tried to reintroduce direct presidential elections to the country, but failed as the turnout requirements were not met. An indirect electoral system was maintained.

Unlike Georgia and Ukraine, widespread popular dissatisfaction with the government, the economy and lack of reforms has each time been channelled and temporarily defused through a vast number of elections marred by irregularities. Even the 2009 'Twitter Revolution' did not manage to change the broken system. Each time a new clan of inept and corrupt politicians took over.

Moldova inherited a legacy of weak justice sector institutions that continue to undermine public trust in law enforcement and the court system, even as it aspires to meet European standards. The judicial system consists of the Supreme Court of Justice, the Court of Appeal,

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Tribunals and the Courts of Law. The structure and jurisdiction of the courts are established by an organic law. Judges are nominated by the legislature, the government and the superior council of magistrates, each of those bodies selecting two candidates. Judges are appointed at first for a five-year term, followed by ten years, and subsequently judges are appointed until the age of retirement. The Constitutional Court is deemed to be independent of any

other public authority. Its nine judges guard the implementation of the notion of the separation of state powers. Once appointed, judges of the Constitutional Court cannot be removed. Corruption in the judicial system remains a significant challenge.

The 2011-16 Justice Sector Reform Strategy (JSRS) focused on several reforms pertaining to the Constitutional Court: its composition, the criteria and procedures for selecting its judges,³³ their term of office, and the group of subjects enjoying legal standing before it. No significant legislative reform was carried out until mid-2016, when the ministry of justice initiated consultations on a draft law amending the composition and competencies of the constitutional court. The draft law, adopted by the government and positively reviewed by the constitutional court, was taken up by parliament on 22 December 2016 but suffered delays thereafter. The draft law provides for an increase in the number of judges from six to seven, with a seventh to be appointed by the president. It also provides for the extension of the mandate of judges from

³³ The constitutional court is composed of six judges, appointed for a term of six year as follows: two by the parliament, two by the government and two by SCM.

six to nine years, non-renewable. The adoption of the law by parliament would also codify the constitutional court's own decision to widen *locus standi* to all courts.³⁴

The judicial activism of the constitutional court has earned many plaudits for its independent stance in a hotly contested political environment. Yet, some of its decisions have raised serious questions among independent observers about the constitutional court's impartiality and place in the *trias politica*. In March 2016, the court declared the changes introduced to the electoral law in 2000 as unconstitutional. It thus established direct presidential elections through the back door. Without holding a public hearing, without hearing the parties and against recommendations by the OSCE and the Venice Commission, the court in September 2016 dismissed a claim against the prohibition on foreign financing of political parties, thus favouring the ruling party in making use of the administrative apparatus. The elections of autumn 2016 nevertheless resulted in the victory of a populist and openly pro-Russian candidate. This sparked tensions with the pro-EU oriented government and parliamentary majority. In October 2017 the constitutional court ruled in favour of the "temporary suspension" of the president, when he refused to fulfil his constitutional obligations, in particular the promulgation of laws. The same ruling entitled the prime minister and the speaker of the parliament to temporarily exercise presidential prerogative on specific issues. The parliamentary majority seized the opportunity to reshuffle the government and to enact anti-propaganda legislation. The constitutional court's rulings have thus indirectly reshaped the political environment, in many respects disadvantaging the opposition. The court has not yet taken any decision that would run directly counter to the interests of the Democratic Party of Moldova (DPM).

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³⁴ This provision was already in force due to the decision of the constitutional court of 9 February 2016, which concluded that the role of the supreme court in addressing constitutionality exceptions raised by courts is a formal one and that hence any court can directly address the constitutional court. By this decision the constitutional court *de facto* allowed citizens to directly address it on constitutionality issues in ongoing trials. More details are provided below.

The reorganisation of the judiciary was among the priorities of the JSRS 2011-16. Maintaining a multitude of courts with a small number of judges was deemed too expensive, a hurdle to both judges' professional growth and the random assignment of cases, which are important anti-corruption tools. The reform was carried out in several steps. The economic courts were

The reform of 1 April 2017 has great potential to improve the quality and efficiency of justice, but its success depends on good will and thorough implementation. The ten-year period of implementation carries the risks of delays and unplanned changes along the way.

abolished first. In 2014, the Court of Appeal in Bender was eliminated. But it took until April 2016 for parliament to adopt law no. 76 providing for the merger of 44 first instance courts into 15, over a 10-year period (1 January 2017 – 31 December 2027). The specialised – commercial and military – courts were abolished first, on 1 April 2017. This is one of the biggest reforms in judiciary since Moldova's independence. The reform has great potential for improving the quality and efficiency of justice, but the success depends largely on good will and thorough implementation. The ten-year period of implementation carries the risks of delays and

unplanned changes along the way.

Since 2007, the National Institute of Justice (NIJ) has been in charge of initial and continuous training for judges, prosecutors and certain court staff. The focus is on candidate judges and prosecutors, as well as continuous on-the-job training of judges. The NIJ has long suffered from allegations of corruption at entry and graduation exams, as well as the poor quality of training. In need of reform, amendments to its legal framework were passed in 2012. Although considered insufficient, there has been resistance until 2016 in the adoption of additional amendments intended to improve the modus operandi of the NIJ.³⁵ The NIJ has now developed a new type of entry examination and included a representative of the US Embassy in the admissions commission. This is thought to be an improvement. At the time of writing, the NIJ was updating its teaching curricula. A worrying recent development is the decision of the SCM requiring that any legal training of judges be coordinated with the NIJ. This means a rather closed system of access for judges to formal and informal education. It remains to be seen how exactly the decision will be implemented (see further, section 3.3).

³⁵ The NIJ has benefited from direct technical and financial assistance of several important development partners such as USAID, UNDP and the Council of Europe.

Reform of the prosecution has also been long anticipated. As recently as 2011, Moldova still had one of the most unreformed prosecutorial services in the region, with a strong Soviet legacy: dangerously wide competencies going well beyond criminal justice, largely at the service of the minister for justice. Although reform of the prosecution was a key condition for budget support, failure by the parliament to act led the EU to withhold €1.8 million of the envisaged €60 million. The draft law was ultimately adopted on 25 February 2016 and has been in force since 1 August 2016. It narrows the powers of prosecution and of the prosecutor general, increases the powers of the Superior Council of Prosecutors, reduces political involvement in the appointment of the prosecutor general. It also strengthens the specialised (anti-corruption and organised crime) offices, reduces the hierarchical subordination of prosecutors and provides for merging of several prosecution offices. While the law and by-laws (also amended in 2016) look good on paper, political will has been in short supply to adequately implement the reform measures. The reform of the Anti-Corruption Prosecution Office, for instance, has lagged behind, thus leaving the National Anticorruption Centre swamped with cases.³⁶ Another example is the recycling of incumbents in key positions. A noteworthy case is that of the Prosecutor General Mr. Harunjen, who was selected by the Superior Council of Prosecutors in a public contest and within 24 hours approved by the previous president (i.e. days before Dodon took office), despite publicised materials about his excessive personal wealth and indicating that he gave the order to close a criminal investigation involving the death of a person in the civil unrest of 2009.³⁷ It should be noted that Harunjen worked in the Anti-Corruption Prosecution Office between August 2013 and July 2015 (including the period of bank fraud) before being successively promoted to the position of first-deputy of the Prosecutor General, Interim Prosecutor General and then Prosecutor General. The 2010 secret annexes of the then ruling tripartite coalition mentioned explicitly that the leaders of the Prosecutor General's Office and the National Anti-Corruption Centre were appointees of the DPM.³⁸ The slew of high-level corruption cases initiated since then and examined behind closed doors smacks of selective prosecution of persons affiliated with the other two coalition parties, namely the Liberal-Democratic Party of Moldova (LDPM) and Liberal Party (LP). Likewise, it is noteworthy that the Supreme Court has in the past few years not take any decisions contrary to the interests of the Democratic Party.

Reform of the prosecution has also been long anticipated. As recently as 2011, Moldova still had one of the most unreformed prosecutorial services in the region, with a strong Soviet legacy: dangerously wide competencies going well beyond criminal justice, largely at the service of the minister for justice.

³⁶ For details see the chapters on anticorruption and prosecution reform in the Monitoring report on the implementation of the Priority Reform Action Roadmap (March-August 2016), prepared by the Association for Participatory Democracy (ADEPT), "Expert-Grup" Independent Think-Tank and Legal Resources Centre from Moldova (LRCM), available at http://crjm.org/wp-content/uploads/2016/09/2016-09-Rep-Roadmap_fin-en-1.pdf.

³⁷ See <https://www.zdg.md/stiri/stiri-justitie/foto-casa-si-cv-ul-procurorului-general-interimar-eduard-harunjen>.

³⁸ See Agreement for the creation of the European Integration Alliance 2 (EIA 2), 30 December 2010, <http://www.e-democracy.md/files/parties/acord-constituire-aie-2010.pdf>. For details, see <http://unimedia.info/stiri/doc-acordul-aie2--mina-care-a-desfiintat-alianta-cum-s-au-partajat-functiile-57321.html>.

3. Fighting Corruption in the Justice Sector

3.1 Georgia

The eradication of corruption in the justice sector has been a top priority for successive governments since the 2003 Rose Revolution. Measures have included the manifold increase in salaries and the modernisation of infrastructure.

Before the start of judicial reforms in 2005, court premises were in a deplorable condition, as were all other public institutions. Today, court premises have been rebuilt and/or refurbished. Courtrooms are equipped with proper furniture and computers, that allows the production of verbatim reports and minutes of hearings electronically and the viewing of physical evidence using electronic displays. Key support has been provided throughout the years by a host of international donor organisations.³⁹ The World Bank financially supported the process initially, but today the renovations are financed from the state budget, with around 75% of financing spent on salaries.

Budget increase for courts /GEL Mio.

2003	2004	2005	2006	2007	2008	2009	2010	2011	2012	2013	2014	2015
11,153	17,877	16,838	33,612	36,113	41,622	44,358	39,855	38,978	43,378	45,202	57,022	59,315

Source: Supreme Court of Georgia.

The first dramatic rise in salaries occurred during the initial stage of reforms in 2005-06 and has been growing since. The most recent rise concerns the head of the supreme court (from GEL 5650 to GEL 7000); appeals court judges (from GEL 2500 to GEL 5000); district court judges (from GEL 2500 to GEL 4600).⁴⁰ These salaries are high when compared to average figures in the public sector but they are not sufficient to deter corruption.

Other areas of concern include the selection and appointment process of judges, merit-based promotion, and other. To establish more effective criteria for the recruitment of judges, the Georgian parliament on 28 December 2005 adopted a Law on the High School of Justice. The function of the School is the professional training of candidate and incumbent judges and court clerks. Later waves of reforms provided for a higher level of independence of the School. The year 2015 marked a watershed in terms of developing quality trainings and standardised methodologies.⁴¹ In June of that year, the Independent Council of the High School of Justice approved an upgraded training programme for the 12th group of candidate judges.⁴² Another

³⁹ World Bank, USAID, UNDP, Council of Europe, NORLAG, GIZ, IRZ, EU, OSCE, ABA.

⁴⁰ Law on Amendments in the Law on Remuneration of Judges, 26 December 2013. 1000 GEL = 380 EUR.

⁴¹ See <http://www.hsoj.ge/uploads/Uploads/ActivitiesReport2015Year-edited.pdf>

⁴² The High School of Justice has prepared the draft amendments concerning the extension of judicial training period. In particular, the initial 10-month period stipulated by law is to be extended to 24 months and a 6-month training period for persons of certain categories is to be extended to 14 months.

interesting step forward was the introduction of a quality evaluation framework – ‘Kirkpatrick's 4-Level Evaluation Model’. The School also provides vocational trainings.⁴³

The specialisation of judges is one of the positive achievements of the Georgia's reform. In practice, however, the number of judges appointed to chambers/boards not matching their specialisation is still quite high, especially in Tbilisi City Court. While the High Council of Justice claims that its selection criteria for judges (i.e. education, professional experience, personal traits, moral and ethical features) are in line with international norms⁴⁴ and have been codified in the Organic Law of 2017, watchdogs argue that they are vague⁴⁵ and that the recruitment process generally lacks transparency, thus leaving opportunities for corruption and nepotism.⁴⁶ The quick dismissal of the president of the Tbilisi City Court Mamuka Akhvlediani, who reported an alleged leak of a judge's examination, raises serious concerns about the objectivity and impartiality in the selection and appointment of judges.⁴⁷

The distribution of cases represents another risk of corruption. Concerns have been voiced recently about the allegedly political motivation behind the distribution of some high profile cases, such as against former ruling party members and the Rustavi 2 TV Channel.⁴⁸ On paper, the rule of random electronic case distribution introduced with the third wave of reforms is an important improvement. Yet, contrary to recommendations by the Venice Commission, the law leaves open a range of critical issues, including exceptional cases, regulation for which falls under the High Council of Justice.

The distribution of cases represents another risk of corruption.

Despite many concerns about the independence of the judiciary and prosecutorial dominance in the period from 2005 to 2012 and the emergence of a new set of challenges in the period

⁴³ In 2015, conducting 85 professional trainings, wherein a total of 1,298 participants took part (gender balance: 38% – male 62% – female).

⁴⁴ See <http://hcoj.gov.ge/en/reforms/judicial-reform>

⁴⁵ The nature of the work that judges perform differs across different levels of the judiciary and requires different skills and qualifications. This is not taken into account in the evaluation of candidates. Requirements for judges of first instance courts and higher courts are identical. An individual without any experience as a judge can still be appointed to the appellate court.

⁴⁶ In the period from 2011 to 2015, the HCJ actively used the legal mechanisms for re-appointing (i.e. transferring/promoting) judges to other courts, without, however, any substantiation of the decisions, let alone any form of competition. Unsurprisingly, this raised serious suspicions about a deliberate, strategic distribution of judges in different courts, by-passing pending recruitment procedures and affecting judicial independence and impartiality. Watchdog NGOs have observed a declining trend, partly due to legislative amendments. Controversy flared up after the rushed appointment of judges prior to the enactment of new amendments to the law. See <http://www.transparency.ge/en/post/general-announcement/statement-regarding-possible-lifetime-appointment-judges-murusidze-and-sul>.

⁴⁷ See <https://idfi.ge/en/the-high-council-of-justice-dismissed-mamuka-akhvlediani-in-violation-of-the-law> and the chronology of events from the first statement of Mamuka Akhvlediani to his dismissal - <http://bit.ly/2b7iK05>.

⁴⁸ See, e.g., the judges assigned to three criminal cases brought against one of the most important former officials were simultaneously relocated to the Tbilisi City Court just before the hearing. See <https://goo.gl/19xSR>; and Transparency International Georgia, ‘The second trial monitoring report of high-profile criminal cases’, 2014, available at <http://www.gdi.ge/uploads/other/0/241.pdf>.

from 2013 to 2017 (incl. alleged selective justice), corruption-related allegations have not resurfaced for over a decade. It is therefore especially worrisome to note the recent news of possible corruption cases in courts, as voiced by the International Chamber of Commerce, foreign diplomats, businesses and local NGOs.⁴⁹ A general increase in corruption perception has also been noted by Transparency International, which reported in 2016 that:

“approximately 40 percent of the citizens believe that abuse of authority in civil servants for private profit is widespread. As a result, the percentage showing the issue increased by 15 units when compared to the outcome of 2015 and by 28 units when compared to 2013”.⁵⁰

This is a sad trend for a country which had achieved so much in terms of countering corruption.

The introduction in 2017 of an asset declaration system for officials, which covers the judiciary as well, was a welcome development. Pursuant to the commitments entered into under the Association Agreement with the EU, an Independent Committee has been created to conduct spot checks of the declarations. This audit tool is critical, since law enforcement has so far failed to respond to questions raised by the media regarding assets held by certain officials and judges.

3.2 Ukraine

According to various international and domestic opinion polls conducted over the last five years, the level of trust in Ukrainian courts is one of the lowest in the world (below 10%).⁵¹ With the adoption of the ‘Law on the Judiciary and the Status of Judges’ in June 2016, a series of

According to various international and domestic opinion polls conducted over the last five years, the level of trust in Ukrainian courts is one of the lowest in the world (below 10%).

unprecedented anti-corruption measures has been introduced in the justice sector.⁵² They concern every sphere of professional activity of (candidate) judges and include: checking the declarations of assets and kinship; transparent and competitive selection procedures; periodic qualification assessment; the establishment of a Public Council for Integrity in the HQCJ (see section 2.2); and the widening the list of grounds for prosecution.⁵³

⁴⁹ See <https://www.finchannel.com/~finchannel/business/65323-icc-georgia-urges-government-to-reform-bias-unreliable-and-corrupt-court-system>.

⁵⁰ See <http://www.transparency.ge/en/blog/results-public-opinion-poll-indicates-deterioration-field-corruption>.

⁵¹ See, e.g., 2016 polls by the Democratic Initiatives Foundation at <http://dif.org.ua/>.

⁵² In this context, it is also worth pointing to the creation in September 2015 of a Specialised Anti-Corruption Prosecution Office, whose authority includes the supervision of observance of the law during the conduct of (pre-trial) investigative activities by the National Anti-Corruption Bureau of Ukraine (NABU). The head of this prosecutor’s office is appointed as the result of an open competition.

⁵³ Wages have also been raised. It is also worth observing that the law allows certified lawyers and academics who have no judicial experience to compete for positions in the Supreme Court and appellate courts. The aim of this relaxation of selection criteria was to allow for a speedy update and clean up the judiciary.

Among the new measures, the vetting process of candidate and incumbent judges has been hailed as key to the effort to clean the judicial system from the inside out. It consists of an asset declaration (all income, assets, including corporate rights and securities, financial obligations and expenses) of the person authorised to perform functions of the state, as well as his/her family members; a declaration of integrity; and a declaration of kinship: family ties, positions related to public service.

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Vetting the livelihood of a (candidate) judge is carried out by the National Agency for the Prevention of Corruption (NAPC). The full review comprises the determination of the authenticity of the declared information; the accuracy of the assessment of the declared assets; the verification of the existence of a conflict of interest and signs of illicit enrichment. Full verification of the declaration is carried out for each judge at least once every five years, as well as at the request of the HCJ or the HQCJ. The information obtained is included in a dossier and can also be used to assess the adherence to the rules of professional ethics.

Criteria for professional ethics and integrity have been established by the PCI. This body consists of twenty members, including representatives of human rights organisations, lawyers, and journalists of good repute. Among the main functions of the PCI are collecting, verifying and analysing information about a candidate judge; assessing criteria of professional ethics and integrity and advising the HQCJ. In the selection process, candidate judges should pass a special check by the HQCJ in accordance with the submitted documents, a qualifying exam, an interview and special training. Based on the results of the qualification assessment, the HQCJ adopts a motivated decision to confirm or not confirm the ability of a (candidate) judge to administer justice in a relevant court. In the case of non-confirmation, a sitting judge shall be suspended for up to six months, with simultaneous referral to the National School of Judges (see below) for the completion of the refresher course, followed by a re-qualification assessment. In case of repeated refusal for a judge to administer justice in a relevant court, he or she must be dismissed from the position.

Finally, the number of grounds for disciplinary action against (candidate) judges has been increased to 19. These include: the failure or late submission of declarations, as well as the submission of knowingly false information; the admission by a judge of unfair behaviour, including the incurrance by a judge or members of his family of expenses exceeding the income of such a judge and the income of his family members; failure to inform or untimely communication with the HCJ about an actual or potential conflict of interests of the judge; failure to inform the HCJ of a case of interference with activities in the administration of justice.

Full-scale application of the above-mentioned measures has not yet taken place, which contributes to the continuation of unfair practices in selection procedures, illegal enrichment and the adoption of customised decisions. At the same time, it should be noted that the mass voluntary retirement of judges (about 1,600 in 2016) was largely driven by the adoption of the

'Law on ensuring the right to a fair trial' of 2 February 2015, which introduced the qualification evaluation of judges. This, in itself, constituted a major clean-up operation.

Despite the generally positive nature of the above-mentioned reforms, their success is not guaranteed. This is primarily due to the dearth of qualified human resources.

Despite the generally positive nature of the above-mentioned reforms, their success is not guaranteed. This is primarily due to the dearth of qualified human resources. For the first time since independence, Ukraine is facing a situation in which only 4,824 of nearly 8,000 judge positions (and less than half at cadre level) have been filled, with dozens of local courts relying on one or two judges, while 12 courts have been forced to close. As a result, citizens do not have proper access to justice.⁵⁴

The body responsible for training highly qualified personnel for the justice system is the National School of Judges of Ukraine (NSJU), a state institution with special status in the justice system. The NSJU is formed under the High Qualification Council of Judges and carries out its activities in accordance with the Law and the Charter approved by the HQCJ. The tasks of the NSJU include special training for candidate judges; training of judges, including those who are elected to administrative positions in courts; periodic training of judges in order to improve their qualifications; conducting training courses determined by a qualification or disciplinary authority to improve the qualifications of judges temporarily suspended from the administration of justice; and training of court staff and improving their qualifications.⁵⁵

A major pending change to Ukrainian litigation concerns the representation of parties in court. Currently, Ukrainian lawyers willing to represent the interests of clients in court do not need to pass (the equivalent of) the bar exam. Even a law diploma is not required. The only limitation in this respect applies to practising criminal law where lawyers need to have a legal education, two years of working experience with an attorney, and to pass the exam for an attorney's licence. Ukraine's legal community is divided on the question whether the introduction of a 'monopoly' for attorneys at law is a positive development. On the one hand, it is argued that the exclusive right of attorneys to represent clients in court is not a privilege but about increasing their responsibility, which should be subsequently envisaged in procedural law. On the other hand, the introduction of the monopoly is viewed as a limitation of the right of access to court, as there is a risk that attorneys' fees may rise disproportionately.

⁵⁴ This situation is compounded by a lack in security of court buildings after the special unit 'Griffin' was abolished during the 2015 reform of the state's law enforcement bodies.

⁵⁵ According to the latest report of the NSJU in 2016, 155 specialised training sessions were held for local court judges. They included topics such as: judicial ethics; anti-corruption legislation; time management in the judiciary; application of the ECHR in the administration of justice. Overall, in 2016 NSJU conducted 257 training activities for judges of local and appellate courts; 3,461 judges were trained to maintain qualification (average annual number of judges passing this training is about 4,000 people). The financing of these measures was carried out both at the expense of the state budget and donor organisations. In 2016 an additional 6,000 court staff were trained in NSJU and enhanced their skills. On the whole, in 2016, 414 judges, 207 lawyers and practitioners were involved in teaching activities.

3.3 Moldova

Moldova is a typical example of over-regulation with no discernible practical impact. As noted earlier, several important legislative amendments have been implemented either partially or contrary to the stated goals (see section 2.3).

Moldova is a typical example of over-regulation with no discernible practical impact. Several important legislative amendments have been implemented either partially or contrary to the stated goals.

A case in point concerns the selection and promotion of judges. In 2012, the Moldovan Parliament passed a package of legislative amendments that introduced, inter alia, the Judges' Selection and Career Board; criteria for the selection, transfer and promotion of judges;⁵⁶ a mandatory three-yearly performance evaluation; and a limited discretion of the Superior Council of Magistracy (SCM) on the career of judges. These novelties should have led to the selection and promotion of the most competent and correct candidates. Yet the practice of 2013-17 shows a different picture. For instance, in the period 2013-16 several cases were noted when judges with outstanding integrity issues were appointed or promoted by the SCM, including after the president's unsubstantiated refusal to appoint other candidates.⁵⁷ Credible mass-media have disclosed integrity problems regarding several candidates. Civil society organisations have requested adequate procedures from the SCM, however, no reasoning was ever provided by the SCM for appointing or promoting judges with integrity issues.⁵⁸ Instead of using questionable tools such as polygraph tests, a proper implementation of the rules on asset declaration would have a much bigger impact.

Another example of a failed reform is the 2014 'Law on disciplinary responsibility of judges',⁵⁹ which introduced a raft of improvements such as the appointment procedure for members of the Disciplinary Board, an extended list of disciplinary offences and a longer period (from 1 to 2 years) to hold judges accountable. At the same time, however, the law provided for a cumbersome mechanism that allows too much discretion to the Judicial Inspection to declare inadmissible disciplinary complaints, and a long mechanism of five bodies able to examine complaints and quash the decision of the previous body. Although the new law has increased

⁵⁶ There are two types of candidate judges: graduates of the National Institute of Justice and legal specialists with work experience. They have to go through the same procedure: graduation of the National Institute of Justice or exam before the Graduation Committee (for candidates with work experience); review by the Judges' Selection and Career Board; proposal by the SCM; and appointment by the President/Parliament (the latter for Supreme Court). Promotion of judges includes the following stages: performance review by Judges' Performance Evaluation Board; review by Judges' Selection and Career Board; proposal by the SCM; and promotion by the President/Parliament.

⁵⁷ The president of the country appoints judges of the first and second instance courts (the Parliament for the Supreme Court) at the proposal of the SCM. The president can refuse only once the appointment of a candidate judge, by reasoned decree. The SCM may propose the same candidate by a vote of two thirds of its members and the president is obliged to promote the respective candidate.

⁵⁸ See, e.g., <http://crjm.org/ong-uri-solicita-presedintele-rm-verifice-informatii-candidati-judecatori-si-admita-pe-cei-cu-reputatie-ireprosabila/>.

⁵⁹ Law no. 178 on disciplinary responsibility of judges, of 27 July 2014, in force since 1 January 2015.

the categories of persons that can submit disciplinary complaints about judges,⁶⁰ the number of disciplinary sanctions in 2015 and 2016 decreased when compared to 2011-14.⁶¹

In the case of disciplinary sanctions for certain offences, a judge may lose the right to a so-called 'exit allowance'. Arguably, this system undermines judicial independence. The same applies to judges benefiting from below market prices for apartments in blocks built at the request of the Judges' Association or under the authority of the SCM, on plots of land transferred by the Chisinau municipality at preferential conditions. Judges have been found to own several apartments, including some registered under the names of relatives and others sold at market prices.⁶² Rather than providing perks that compromise the independence and integrity of judges, existing benefits should be significantly reduced and regular salaries further increased.

Corruption in the Moldovan judiciary sparked peak public indignation in September 2016, when 16 judges were criminally charged for money-laundering activities in a \$20 billion 'Russian Laundromat' scheme.⁶³ Although the SCM had been aware since 2012 of the involvement of judges in these cases,⁶⁴ it took no action until the autumn of 2016. In the meantime, several of the incriminated judges were positively evaluated,⁶⁵ promoted to administrative positions in district courts or to Courts of Appeal.⁶⁶ The majority of judges that issued court orders for the transfer of

⁶⁰ Prior to the 2014 law, only members of the Superior Council of Magistracy (SCM) could initiate a disciplinary procedure. Since January 2015, any person can submit a complaint to the Judicial Inspection, including members of the Superior Council of Magistracy, which can proceed with the case or dismiss the complaint.

⁶¹ Judicial Inspection dismissed as manifestly ill-founded 72% of all disciplinary complaints in 2015 and 81% in 2016. The rate of dismissals by the admissibility panels is even higher: 97% in 2015. For more details and analysis, see P. Grecu, N. Hriptievski, *Analysis of the legislation and practice concerning disciplinary liability of judges 2015-2016*, Legal Resources Centre from Moldova, 2016, <http://crjm.org/wp-content/uploads/2016/11/2016-11-Analiza-Disc-CRJM-final-ENG.pdf> and, by the same authors, *Assessment of needs to improve the legal framework on disciplinary liability of judges*, Legal Resources Centre from Moldova, 2016, <http://crjm.org/wp-content/uploads/2016/02/CRJM-Politici-8-Disciplinar-ENG.pdf>.

⁶² See <https://anticoruptie.md/ro/investigatii/justitie/chilipiruri-imobiliare-pentru-judecatori-pe-terenurile-statului>.

⁶³ See, e.g., <https://www.theguardian.com/world/2017/mar/20/british-banks-handled-vast-sums-of-laundered-russian-money> and Transparency International-Moldova, ADEPT, LRCM and IDIS-Viitorul, *State Capture: The case of the Republic of Moldova*, available at http://www.transparency.md/wp-content/uploads/2017/06/TI_Moldova_State_Capture.pdf.

⁶⁴ The SCM knew about the 'Russian Laundromat' back in 2012 when the Security and Intelligence Service (SIS) was notified of the actions of Judge Iurie HîrBU at Telenești Court. At the time, the SCM took note of the information provided by the Judicial Inspection that the judge certified the debt of USD 30 million on the basis of unauthenticated copies of documents. The SCM also noted the intention of a member of the SCM to initiate disciplinary proceedings against that judge and forwarded the materials to the General Prosecutor's Office. See SCM decision no. 812/38 of 8 December 2012 in Romanian, <http://csm.md/files/Hotaririle/2012/38/812-38.pdf>. In 2014, the SCJ analysed court practice on this issue and found several instances of misconduct by judges. The findings were brought to the attention of prosecutors, NAC and SCM. In May 2014, SCM took note of this information but did not order any further investigation or disciplinary proceedings. See SCM decision no. 470/16 of 27 May 2014 in Romanian, <http://csm.md/files/Hotaririle/2014/16/470-16.pdf>.

⁶⁵ See Performance Evaluation Board, decision no. 18/2 of 13 February 2015, available at <http://csm.md/files/Hotaririle%20CEvalutare/2015/02/18-2.pdf>.

⁶⁶ See SCM, decision no. 769/30 of 20 October 2015, available at <http://csm.md/files/Hotaririle/2015/30/769-30.pdf>; and decision no. 8/2 of 26 January 2016, available at <http://csm.md/files/Hotaririle/2016/02/8-2.pdf>.

funds came from the Rîșcani District Court. The then president of this court is now the president of the SCM. The Moldovan think tank IDIS Viitorul has concluded that judges were aware of the illicit nature of the transactions and adopted decisions in favour of criminal networks because they were assured of high political support.⁶⁷ The cases against the judges have been pending since August 2017.

Several other negative trends have eroded public trust in the (independence of the) judiciary.⁶⁸ One is the phenomenon of closed hearings in high-profile cases such as that of Moldova's ex-Prime Minister Filat, sentenced to nine years in prison for, inter alia, passive corruption. The first instance and appeals courts heard the case in closed proceedings.⁶⁹ On 22 February 2017, the supreme court rejected Filat's appeal in a written procedure. Only the decision of the supreme court was published. Two other notorious cases concerned the 'billion-dollar theft' from the Moldovan banking sector.⁷⁰ Examining such cases behind closed doors fuels the perception of abuse among the public.

Other threats to the (perception of) independence of the Moldovan judiciary concern the initiation of criminal proceedings against judges for the merits of their decisions; an increase in the interference of the executive and legislative branches with judiciary; and dismissals of judges based on information from intelligence services. The most telling example that combines these systemic trends is the pending case of ex-judge Domnica Manole.⁷¹ On 14 April 2016 Judge Manole of the Chisinau Court of Appeals annulled the decision of the Central Electoral Commission (CEC), by which the latter had rejected the initiation of a constitutional referendum. The Supreme Court annulled her decision, ruling in favour of CEC. Based on this ruling, the Interim General Prosecutor on 26 May 2016 submitted a request to the SCM to approve the initiation of criminal investigation of Judge Manole for her interpretation of the law in a context when the constitution contains contradictory provisions and there is no judicial precedent on this issue. Five days later the SCM approved the request in a closed meeting,

⁶⁷ IDIS Viitorul, *Operațiunea Laundromat: Analiza actorilor și a acțiunilor întreprinse* (Laundromat Operation: Analysis of the actors and actions taken), Chișinău, 2017, pages 15-16, http://www.viitorul.org/files/library/Puterea%20hibrida_site.pdf.

⁶⁸ According to polls 74.5% of the population did not trust the judiciary in November 2011. In October 2016, this figure has dropped to 89.6%. Institute for Public Policies, *Public Opinion Barometer*, October 2016: <http://www.bop.ipp.md/result?type=bar>.

⁶⁹ On 21 June 2016, just six days before the sentence in Mr. Filat's case was issued by the first instance court, the SCM adopted a new 'Regulation on publishing court decisions', according to which decisions of cases examined behind closed doors are not to be published on its website. The previous regulation from 2008 did not provide such a limitation and all court decisions were published.

⁷⁰ Reference is made here to the cases of Veaceslav Platon, a businessman sentenced to 18 years in prison, and Ilan Shor, the mayor of Orhei and former President of the Board of Economy Bank of Moldova. This episode concerned the disappearance of around 1 billion USD from Moldovan banking sector, representing nearly a third of the National Bank's reserves, or the equivalent of 15% of Moldovan GDP. For a detailed explanation, see <http://www.transparency.md/2016/12/20/radiography-of-a-bank-fraud-in-moldova-from-money-laundering-to-billion-fraud-and-state-debt/>.

⁷¹ In another case in which a judge was dismissed based on secret intelligence, a complaint was lodged before the European Court of Human Rights for alleged breach of due process guarantees required by Article 6 ECHR.

ignoring the judge's request to examine it in a public hearing. In a parallel development, the Anti-corruption Prosecution Office reopened an investigation against Judge Manole in a case of alleged failure to declare properties. This case was quashed in February 2015 after the National Anti-corruption Centre (NAC) found that the judge had committed no such breach. The reopening of the case smacked of an orchestrated (ab)use of prosecutorial powers to harass the judge. On 5 July 2017, i.e. before she could submit her publicly announced candidature for SCM membership, the SCM decided to dismiss Judge Manole on the basis of a non-legally binding opinion of the Information and Security Services which was examined behind closed doors, although Manole had asked for a public hearing. Manole appealed the dismissal by the SCM before the supreme court. Although the case was still pending, the president on 21 July 2017 signed the decree dismissing the judge. Given the personalities involved in this case one would be forgiven for wondering whether this kind of prosecution serves the judicial hierarchy in setting an example for other judges that would dare to go against the grain.⁷²

4. Judicial Implementation of the DCFTA

Having discussed the judicial reform efforts undertaken in Georgia, Moldova and Ukraine as a result of these countries' shared desire to associate themselves more closely with the EU, the analysis now turns to court practice with the implementation of the AA/DCFTAs. Not only does such an exercise serve to gauge the awareness levels of national judges about the need to enforce their country's contractual obligations entered into with the European Union, it also offers insights into the level of openness of domestic courts to use international and EU law in setting conflicting national rules and bad practices aside.

In the case of Georgia, according to the 'Law on Normative Acts' and the 'Law on International Treaties of Georgia', international agreements such as the Association Agreement with the EU are an integral part of the country's legislation. Their hierarchical position is below that of the Constitution and above (organic) laws of Georgia. Georgian courts may therefore refer to AA/DCFTA provisions. This was also the case for rights and obligations derived from the Partnership and Cooperation Agreement (PCA), but Georgian case law reveals no traces of the PCA.⁷³ At the time of writing, only one explicit reference had been made to the AA/DCFTA. In its Decision of 31 July 2015, the Constitutional Court concluded that there is a right for employees to receive damages in the event of unlawful termination of an employment contract. The Court based its reasoning, *inter alia*, on Articles 228 and 229 of the AA but was

⁷² At the General Assembly of Judges of March 2016, Judge Manole had criticised several proposals of the judiciary's leadership, launched in 2015. She had appealed the SCM decision of 26 January 2016 for lack of reasoning for the promotion of judges to the Supreme Court and publicly criticised the SCM for selective approaches on promotions. She was the judge rapporteur in two disciplinary cases that sanctioned several judges of the Supreme Court of Justice.

⁷³ See G. Gabrichidze, 'Legislative Approximation and Application of EU Law in Georgia', in: P. Van Elsuwege and R. Petrov (eds.), *Legislative Approximation and Application of EU Law in the Eastern Neighbourhood of the European Union: Towards a Common Regulatory Space?* London: Routledge, 2014, 188.

careful to add that these provisions codify standards established by the International Labour Organisation.⁷⁴

The near absence of direct references to the AA/DCFTA in Georgian jurisprudence might be explained by the fact that the agreement – in contrast to the ECHR – contains hardly any provisions which could qualify for direct applicability. Yet a review of the Unified State register of Judgments reveals that domestic courts have used EU (legal) acts in order to reinforce their own legal positions.⁷⁵ A more likely explanation is therefore that it is simply too soon after the entry into force of the AA/DCFTA for Georgian litigators and judges to have woken up to the idea that the agreement could provide them with an autonomous source of legal backup, especially after the lukewarm reception by the Constitutional Court of Articles 228 and 229. But as the Georgian Parliament proceeds with the approximation of large parts of national law to the EU *acquis*, the likelihood grows of domestic courts choosing to interpret the former in conformity with the latter.

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The reason for this sense of optimism is gleaned from court practice in Ukraine. Even if the Constitutional Court has not yet expressed itself on the direct applicability of the AA/DCFTA in the legal order of Ukraine, it could well be asked to rule on the binding nature of decisions adopted by the EU-Ukraine Association Council or on the obligation of the EU-Ukraine joint arbitration panel to abide by rulings of the ECJ on the interpretation of the relevant EU *acquis*.

There are dozens of judgments rendered since 2014, where general, specialised and high courts have referred to the AA/DCFTA and EU acquis (fundamental principles, secondary legislation and ECJ case law) in order to reinforce their legal argumentation.

In the past, the High Commercial Court of Ukraine has recognised the precedence of the PCA over conflicting provisions of national law.⁷⁶ The reform wave which is currently sweeping across the justice sector has awakened the activism of judges to seek inspiration in Ukraine's international treaty obligations and rulings by the European Court of Human Rights.⁷⁷ Administrative courts have already used EU *acquis* and ECJ case law, not as a source of law in and of itself, but as a “persuasive source of reference” for the “harmonious interpretation of national legislation of Ukraine

⁷⁴ Decision of the Constitutional Court of Georgia, N 2/3/630, 31 July 2015.

⁷⁵ See G. Gabrichidze, ‘The Constitutional Order of Georgia and its Adaptability to the EU- Georgia Association Agreement’, in R. Petrov and P. Van Elsuwege (eds.), *Post-Soviet Constitutions and Challenges of Regional Integration. Adapting to European and Eurasian Integration Projects*, London: Routledge, 2018, 105-117.

⁷⁶ See judgments of the High Commercial Court of Ukraine on 2 February 2005, No. 12/267; of 22 February 2005 (*‘Odek’ LTD v Ryvne Custom Office*) No. 18/303; and of 25 March 2005 (*Closed Stock Company ‘Chumak’ v Kherson Custom Office*), No. 7/299.

⁷⁷ See R. Petrov, *The Constitutional order of Ukraine and its Adaptability to the Process of European Integration*, in R. Petrov and P. Van Elsuwege (eds.), *Post-Soviet Constitutions and Challenges of Regional Integration. Adapting to European and Eurasian Integration Projects*, London: Routledge, 2018, 91-104.

with established standards of the EU”.⁷⁸ According to the High Administrative Court this practice is justified by the need for effective implementation the EU-Ukraine Association Agreement.⁷⁹ In his research, Roman Petrov has uncovered dozens of judgments rendered since 2014, where general, specialised and high courts have referred to the AA/DCFTA and EU *acquis* (fundamental principles, secondary legislation and ECJ case law) in order to reinforce their legal argumentation in cases concerning customs duties,⁸⁰ the supply and trade of natural gas,⁸¹ the definition of origin of goods (honey),⁸² and even the legality of legislative drafts by the President of Ukraine.⁸³ Some judges have even gone so far as to consider the entry into force of the AA/DCFTA as an obligation to apply EU common values in Ukraine.⁸⁴ The latter may find expression in future (general or Constitutional) court practice in cases where new domestic legislation rubs up against such “essential elements” of the AA as the freedom of expression.⁸⁵

The Moldovan Constitutional Court has adopted the legal canons that define the relationship between the supranational EU and its member states and set the scene for lower courts to use the AA/DCFTA as a source of inspiration and directly applicable law.

Moldova has produced an uneven court practice with the application and enforcement of its AA. State bodies and lower courts have based some of their decisions on provisions of the AA/DCFTA, albeit often in a partial way not in conformity with best practice. Fortunately, wrong interpretations have been corrected at last instance when proceedings ran their full course. The Constitutional Court addressed the correlation between national constitutional principles and the ‘Law on the ratification of the EU-Moldova Association Agreement’ for the first time in October 2014.⁸⁶

⁷⁸ See R. Petrov, ‘Regulatory Convergence and Application of EU Law in Ukraine’, in P. Van Elswege and R. Petrov (eds.), *Legal Approximation of EU Law in the Eastern Neighbourhood of the EU: Towards a Common Regulatory Space?*, London: Routledge Press, 2014, 137-158.

⁷⁹ Information Letter of the High Administrative Court of Ukraine, No. 1601/11/10/14-14, 18 November 2014.

⁸⁰ See, e.g., Judgment of the Appellate Court of the region of Lviv on 06 April 2016, No. 33/783/241/16.

⁸¹ See, e.g., Judgment of the District Administrative Court of the city of Kiev on 13 April 2016, No. 826/594/16.

⁸² See, e.g., Judgment of the District Court of the city of Tsyrypinsk on 29 April 2016, No. 664/906/16-c.

⁸³ See, e.g., Judgment of the High Administrative Court of Ukraine on 26 April 2016, No. 800/251/16.

⁸⁴ Petrov, loc. cit, who refers to the judgment of the Inter-district Court of Kolomya of 7 July 2016, No. 346/3499/16-c, which contains a rather emotional passage: “The Court notes that after the signing of the Association Agreement with the European Union by the President of our country, and after the ratification by the supreme legislative body (the Verkhovna Rada Ukraine), Ukraine, as a state aspiring the full membership in the EU, must respect private property rights of every person as a basic tenet and a cornerstone of European values and inviolable foundation of the EU, which must be complied by all Member States and by associated countries.”

⁸⁵ See, e.g., Executive Order (Ukaz) of the President of Ukraine No. 133/2017 of 15 May 2017 banning Russian social networks; and the commentary by P. Van Elswege, ‘Ukraine’s Ban on Russian Social Media: On The Edge Between National Security and Freedom of Expression’, *VerfBlog*, 2017/6/02, <http://verfassungsblog.de/ukraines-ban-on-russian-social-media-on-the-edge-between-national-security-and-freedom-of-expression>. In a similar vein, see the ‘Law Amending the Administrative Code regarding the ban on production and propaganda of the St. George (Guards’) Ribbon’ of 16 May 2017.

⁸⁶ Judgment of the Moldovan Constitutional Court on 9 October 2014, available at: <http://www.constcourt.md/ccdocview.php?tip=hotariri&docid=511&l=ro>. The said law was adopted on 2 July 2014.

The Court argued that the right of the state to assume international commitments is an inherent element of state sovereignty, which can be manifested externally by establishing collaborative relationships with other countries and international entities on the basis of international agreements. Strikingly, the Constitutional Court also concluded that, when doing so, the attribution of competences to designated international institutions does not imply the simultaneous transfer of national sovereignty per se, but merely the exercise thereof. As such, the Moldovan Constitutional Court has adopted the legal canons that define the relationship between the supranational EU and its member states and set the scene for lower courts to use the AA/DCFTA as a source of inspiration and directly applicable law. Two landmark cases stand out in this respect, both related to the protection of the geographical indication an international trade mark 'Prosecco'.

The first case, *Bulgari Winery SRL v. State Agency for Intellectual Property (AGEPI)*, concerns an action for annulment of AGEPI's refusal of 27 March 2015 to allow the claimant's use of the name 'Pronto Prosecco' for marking its sparkling wine while accepting the use of the international trade mark Prosecco DOC and PDO on the territory of Moldova for champagne-like sparkling wines. The first instance court of Riscani, district of Chisinau, rejected AGEPI's arguments, including breaches of provisions of the EU-Moldova Association Agreement that allow exceptions only to marks / names that had been in use by local companies long before the agreement entered into force, as well as a violation of the already protected trade mark DOP Champagne (country of origin: France). On 23 February 2017, the Chisinau Court of Appeal upheld the ruling by the first instance court without, however, going into the merits of the case. In fact, both court rulings lacked adequate reasoning and appeared to be verging on the arbitrary. The Appeals Court limited itself to stating that AGEPI had acted like the defender of the private company owning the rights over the combined mark Prosecco DOC/PDO, contrary to its statutory competencies. It also referred to its sister court in Comrat, which had ruled that Bulgari Winery had the right to use the name Prosecco. From this point on, proceedings converged with the second case (below), which led to a decision by the Supreme Court.

The parallel case, *Tomai-Vinex SA and Bulgari Winery SRL v. State Inspection for Alcohol Production and the Ministry of Agriculture*, concerned the decision of the State Inspection of 25 January 2016 prohibiting the production and placement on the market of the two companies' sparkling wine products with the trademarks 'Prosecco'.⁸⁷ When challenged, the Head of the State inspection amended the decision, thereby prohibiting only the placing on the market, not its production. The Ministry of Agriculture, however, upheld the decision of 25 January 2016 and also prohibited Tomai-Vinex SA from using the trade mark 'Prosecco Pronto' (for exports to Russia) and Bulgari Winery SRL from using the mark 'Prosecco Cassara' (for exports to the US). On 24 June 2016, the first instance court of Comrat ruled in favour of the two companies. On 20 October 2016, the Court of Appeal of Comrat upheld that judgment by ruling that the state authorities had overstepped their competences, because these were limited to the territory of Moldova, whereas both companies had stopped their production and

⁸⁷ AGEPI joined the state authorities in the proceedings.

exports to Russia and the US prior to the decision of January 2016. The Court stated that according to Article 302 of the AA, the Republic of Moldova benefited from a transitional period of five years (starting 1 April 2013) to put in place all (customs border) measures necessary to stop any unlawful use of protected geographical indications. Hence, it seems that the first instance and appellate courts concluded that the state authorities were barred from taking any measures to impede the production activity of economic operators, including the use of the geographical indication ‘Prosecco’ by the two companies, until the end of the five-year transition period. On 20 September 2017, the Supreme Court of Justice quashed this reading of the AA and upheld the orders of the State Inspection and the Ministry of Agriculture.⁸⁸

The Supreme Court ruled that Articles 297-301 and Annexes XXX-C/D of the Association Agreement⁸⁹ obliged the Government of Moldova to protect the geographic indications according to the level provided by the AA and by way of adequate administrative and judicial procedures (including on customs). The Court also held that the Moldovan authorities had to ensure the respect of the protections at the request of EU.⁹⁰ The Supreme Court found that the lower courts had wrongly interpreted the regime of exceptions whereby a limited number of traditional wines produced prior to the entry into force of the AA could indeed – until the end of the transition period – continue to be marked under such names as *Champagne*, *Cognac*, *Cahors* for exports to CIS countries, but not products under new names that belong to companies from the EU, such as ‘Prosecco’.

Building on the Constitutional Court’s ruling of October 2014, this judgment of the Supreme Court of Justice represents a positive example that Moldova’s highest judicial bodies are on the right track in faithfully implementing the letter and the spirit of the EU-Moldova Association Agreement. At the same time, the two Prosecco cases reveal the urgent need to shield the judiciary from inappropriate (corporate) interferences and to properly train lawyers and lower court judges on the complexities of the Association Agreement.

5. Conclusions

Going by the provisions of the Association Agreements and the texts of the ensuing Association Agendas, the commitments of Georgia, Moldova and Ukraine to reform their judicial systems look more or less the same, yet the starting points for implementation are very different. This

⁸⁸ See Decision no. 3ra-426/17, Supreme Court of Justice, 20 September 2017, available in Romanian at http://jurisprudenta.csj.md/search_col_civil.php?id=38959. The ruling of the Court is only reviewed insofar as it relates to the AA.

⁸⁹ Ratified by Law no. 112 of 2 July 2014.

⁹⁰ The European Commission brought a complaint of an Italian company that had the right to use the protected geographic indication ‘Prosecco’ to the attention of the first meeting of the subcommittee for protection of geographic indications that took place on 15 December 2015. The issues had been raised again at the EU-Moldova dialogue of 31 March 2017 and a subsequent meeting between Prime Minister Pavel Filip and EU Commissioner for Trade Cecilia Malmström. See an article published on 24 April 2017, available in Romanian at <http://agora.md/stiri/31348/spumantul-prosecco-poate-declansa-un-scandal-diplomatic-intre-r--moldova-si-ue>.

is the result of different historical trajectories and current-day political tendencies in the transition of the three associated states.

Reform in Georgia's justice sector has been implemented in several phases. Building on a major overhaul during the second half of the 2000s, the current government, which took office in 2012, initiated three waves of reforms. The objectives have become more and more sophisticated. Technically, Georgia has done more than any other country in the region. This is reflected in, for instance, the World Justice Project's "Rule of Law Index 2017-8", where Georgia ranked 1st in Eastern Europe and Central Asia, and 38th globally out of 113 countries – down from 29th out of 102 in 2015 but still ahead of EU member states Greece, Bulgaria and Hungary. Yet, with significant progress made in a relatively short period of time and many achievements to be proud of to this day, the judicial reform has still not

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With many good practices in place, the ultimate test for Georgia is that of the 'resilience' (i.e. quality, ethics and principles) of the judiciary to undue political interference. In this context, it is dispiriting to note that oligarchic power has reasserted itself in influencing political choices.

addressed principal issues such as the ambiguity of disciplinary liability of judges, the lack of norms regulating the High Council of Justice, and the flawed procedures for the election of court presidents and candidates for the European Court of Human Rights. While previous governments had succeeded in substantially reducing corruption and in establishing institutional effectiveness, the lack of political independence of the judicial system, including the Prosecutor's Office, remains to be addressed. Local and international watchdogs have pointed to instances of selective justice and attempts whereby making

legal/institutional progress has been overshadowed by a lack of political will (or too much will, but misplaced). With many good practices in place, the ultimate test is that of the 'resilience' (i.e. quality, ethics and principles) of the judiciary against undue political interference. In this context, it is dispiriting to note that oligarchic power has reasserted itself in influencing political choices.⁹¹

In spite of the Euromaidan revolution of 2013, Ukraine is still suffering from its post-Soviet legacy of a weak rule of law and high levels of fraud. The judiciary, in particular, has traditionally been perceived as one of the most corrupt institutions in the country. In June 2016 the authorities kick-started a process of multiannual reform of the justice sector, with amendments to the Constitution and the adoption of new legislation aimed at reorganising

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⁹¹ See also the chapter by Konończuk, Cenuşa and Kakachia in this book.

the judicial architecture of the country (by creating a new Supreme Court and reducing the judicial tiers from four to three), strengthening judicial independence (e.g. by subjecting sitting judges to examinations and mandatory electronic asset declarations), and abolishing the state's monopoly on the enforcement of court decisions (i.e. through the introduction of private bailiffs). Details of many of these reforms will need to be regulated in implementing acts but, overall, they represent a major overhaul of Ukraine's judicial system and a revolutionary attempt to eradicate widespread corruption in the judiciary (cf. the vetting process).

Despite these attempts at subjecting the justice sector to Georgia-style shock therapy, law enforcement remains biased, with groups of top officials and wealthy businessmen seemingly enjoying low levels of accountability and high levels of illicit privileges, while others cannot have their rights protected. The situation has improved a little under the previous and current governments but Ukraine still performs below average according to indicators of the World Justice Project's "Rule of Law Index 2017-8", where the country ranks 77th. The selection of judges to the new Supreme Court (completed in November 2017) only partly contributed to the judicial system's clean-up as the Public Council of Integrity questioned the integrity, independence and professional records of about a quarter of newly appointed judges. Efforts to modernise the General Prosecutor's Office are still ongoing and the authorities have dithered over the creation of a much-anticipated High Anti-Corruption Court. The adoption of the necessary legislation to establish the HAC was pushed back well into 2018. Now that it has been passed, attention turns to implementation.

The changes to the justice sector are planned for gradual introduction over the next few years, so until 2020 the jury is still out, as it were. The emerging practice of administrative and commercial courts with the implementation of the EU-Ukraine Association Agreement gives reason for hope. Unfortunately though, the general impression is that the judicial reform dynamic has hit the buffers, due to a ruling elite that is unwilling to undermine its own wealth and power in the name of progress towards an independent judiciary. At the time of writing, justice sector reform in Ukraine is like the pace of the procession of Echternach: three steps forward, two steps back.⁹²

⁹² Echternach is a locality in Luxembourg which has an ancient tradition of dances conforming to this model.

Moldova's direction of travel has been backwards in recent years and its Justice Sector Reform Strategy (JSRS, 2011-2016) has fallen flat: changes were made mostly at the procedural and technical levels but have not been matched by improvements in the independence and integrity of judges. Moldova is facing unprecedented attacks on judicial independence and increasing instances of selective justice. These are attested mostly via the selection and promotion of judges with questionable integrity; ungrounded prosecution of outspoken judges; questionable dismissals; reduced transparency and corporatism at the level of the Superior Council of Magistracy (SCM); increased use of closed hearings in high profile cases and reduced transparency of courts in general. The alleged involvement of 16 judges in a \$20 billion money laundering scheme from Russia to various European states between 2010 and 2014 is but the tip of the iceberg of a highly dysfunctional judicial system. Implementation of the 2016 Law on Prosecution remains suspended. As a result

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of high levels of corruption and selective justice, citizens' trust in the judiciary remains below 10%, one of the lowest figures globally. The World Justice Project's "Rule of Law Index 2017-8" ranks Moldova 78th out of 113 countries. Citing insufficient progress in reforming the justice sector, the EU in 2017 took the unprecedented step of annulling the remaining half (i.e. €28 million) of budget support for justice sector reform. Recognising the need for urgent measures,

the current Minister of Justice has embarked on implementing a new JSRS 2018-21. It remains to be seen whether this will be enough to thoroughly reform the judiciary. Given the fragile state of its judiciary, it is remarkable that Moldova has witnessed the first cases of application of AA/DCFTA provisions, with laudable precedent-setting judgments rendered by both the Constitutional Court and the Supreme Court of Justice.

In spite of the differences between the three DCFTA countries, our research has helped to bring some common features into sharper focus. Firstly, each of the countries faces daunting geostrategic and economic challenges which go beyond the focus of this report. Under the banner of EU-inspired modernisation, socio-economic change is fast-tracked, but some justice reforms are being delayed or

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derailed. The latter has heightened tensions between rights groups and those defending vested interests. Secondly, populist promises of 'draining the swamp', i.e. eviscerating corruption, have turned out to be half-true (Georgia and Ukraine), if not completely false (Moldova). This is vividly illustrated in the justice sector, where the appointment

procedures of judges and the distribution of cases, to name just two examples, are tainted by political interference.

This ultimately poses challenges for the European Union in the ways it can confront illiberalism and remove obstacles to an independent and impartial judiciary in the three associated states.

This ultimately poses challenges for the European Union in the ways it can confront illiberalism and remove obstacles to an independent and impartial judiciary in the three associated states. All three countries have come under intensified scrutiny from the EU. Their performance in the early stages of implementation of the Association Agreements has been evaluated in reports published by the European Commission.⁹³ Yet, pre- and post-accession

experiences with countries from central (e.g. Hungary and Poland) and southeast Europe (e.g. Bulgaria, Croatia and Romania) show that judicial transformation processes are not just long and arduous, but – in the absence of proper enforcement tools in the hands of the guardians of the EU treaties – also subject to potential reversal. This downward trend of the rule of law within the EU creates a negative feedback loop to corrupt elites outside of the Union and undermines the position of the European Commission in enforcing commitments made in the context

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of the European Neighbourhood Policy. There is precious little leverage beyond withholding financial support ('less for less'), an act that may in itself contribute to further delays in or escapes from the implementation of judicial reforms. Rethinking the EU's approach to creating and maintaining resilience in the rule of law and justice sector is a topic that should exercise minds across the internal/external policy divide of the European Union.

⁹³ See Joint Staff Working Documents, Association Implementation Report on Georgia, Brussels, 9 November 2017, SWD(2017) 371 final; Association Implementation Report on Ukraine, Brussels, 14 November 2017 SWD(2017) 376 final; Association Implementation Report on Moldova, 3 April 2018 SWD(2018) 94 final.

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