

APPROVED
Minutes No. 2 of the meeting of the Advisory Group of Experts
of December 04, 2023

With amendments
approved by Minutes No. 10 of the meeting of the Advisory Group of Experts
of May 30, 2024,
and amendments
approved by Minutes No. 18 of the meeting of the Advisory Group of Experts
of September 15, 2025

Methodology for Assessing Moral Qualities and the Level of Competence in the Field of Law

of the Advisory Group of Experts

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Preamble

This Methodology is adopted according to Article 10² part 25 item 2 of the Law of Ukraine “On the Constitutional Court of Ukraine” (hereinafter “the Law”).

Article 1. Definitions

Terms in this Methodology should be understood as defined in Article 1 of the Regulations of the Advisory Group.

Article 2. Criteria

1. The criterion of “high moral qualities” as per Article 10⁸ of the Law is determined by the Advisory Group during the Assessment by the components listed below under this para. lit. a and b:
 - a. “Integrity”: the Advisory Group deems a Candidate to meet the integrity component if s/he is independent, honest, impartial, incorruptible, diligent, adheres to ethical standards, and demonstrates impeccable behavior in professional activities and private life. The Advisory Group understands these terms/indicators as follows:
 - i. Independence means independence in decision-making, ability to make independent decisions under pressure that may be exerted in different forms;
 - ii. Honesty means truthfulness in professional activities and in everyday life;
 - iii. Impartiality means absence of negative or positive subjective opinion, attitude towards someone or something which have been formed in advance, ability to take impartial, fair, objective decisions regardless of any sympathies, antipathies, or public opinion;
 - iv. Diligence means industrious, thorough, and responsible fulfillment of one’s duties, which is a sign of the person’s professional integrity;
 - v. A Candidate fails to comply with the indicators of independence, honesty, impartiality, diligence, in particular, when there are reasonable doubts as to whether such Candidate, in his/her present or any past professional capacity, has acted in line with requirements of the legislation, professional ethical rules (academic integrity requirements), other ethical norms regarding independence, honesty, impartiality, diligence;
 - vi. Incorruptibility means the ability to be resistant and selfless to material and other forms of influence in the process of decision-

making. A Candidate fails to comply with the indicator of incorruptibility in case

s/he has committed corruption or corruption-related offences, violated other anticorruption restrictions and commitments;

- vii. Compliance with ethical norms and demonstration of impeccable behavior in professional activities and personal life means persistent compliance of the person with professional ethical and generally acknowledged moral norms both in professional activities and beyond them, which forms trust of the society in such person. A Candidate fails to comply with the indicator of compliance with ethical norms in case there are reasonable doubts as to whether such Candidate, in his/her present or any past professional capacity, has acted in line with the rules of professional ethics, integrity and other ethical norms;
 - viii. The Candidate fails to comply with the indicator of impeccable behavior in professional activities and personal life in case s/he has committed any inappropriate actions or undertakes a lifestyle that makes him unworthy of being a judge of the Constitutional Court of Ukraine, would undermine the authority of the Constitutional Court of Ukraine, or raises reasonable doubts as to whether such Candidate will comply (complies) with ethical standards, including refraining from any manifestations of discrimination as defined in Article 14 of the Convention for the Protection of Human Rights and Fundamental Freedoms and Article 1 of the Law of Ukraine “On the Principles of Preventing and Combating Discrimination in Ukraine”;
 - ix. Not only the existence, but also the appearance or perception by an objective observer of the Candidate’s integrity are relevant under international standards during the Assessment.
- b. “Legality of the sources of property origin”, “compliance of the standard of living of the candidate or his/her family members with the declared income”, and “compliance of the candidate’s lifestyle with his/her status”:
- i. Sources of origin of the Candidate’s property are legal, the Candidate’s level of life or that of his/her family members corresponds to their declared and legal incomes, and the Candidate’s lifestyle corresponds to his/her status in case there are no reasonable doubts to the contrary;
 - ii. The term “family member” should be understood as defined by the Law of Ukraine “On Prevention of Corruption”;

- iii. The Advisory Group may take into account the wealth of “close persons” as defined by the Law of Ukraine “On Prevention of Corruption”, if there are indications that it relates to the Candidate’s or his/her family’s income, property, or lifestyle;
 - iv. Income that has not been declared with public authorities in line with requirements of the legislation or that has been declared, yet with respect to which there are reasonable doubts that it has been, in particular, a tool or result of legal or declared activity, should not be considered as legal;
 - v. If a Candidate has received property free-of-charge into ownership, possession, or use, its previous owner (and current owner in case of transferring property into ownership or use) who has provided such property must do that from legal income, including but not limited to cases where such previous owner is a close person;
 - vi. In assessing the compliance of level of life with the declared and legal income, the Advisory Group may, inter alia, use the method for calculating unjustified wealth defined in the Annex.
2. In Assessing compliance with high moral qualities criterion, the Advisory Group may take into consideration the gravity or severity, the totality of the circumstances, and the wilfulness of any integrity incident, and as to minor incidents, whether there has been a sufficient passage of time without further reoccurrences. While determining the gravity, the Advisory Group will take into account all circumstances, including but not limited to:
- a. whether the incident was a singular case;
 - b. whether the incident caused no or only insignificant damage to private or public interests (including public trust);
 - c. whether the incident would be perceived by an objective observer as an attitude of disrespect for the social order arising from disregard for rules and regulations.
3. For applying the term “reasonable doubts” (Article 10⁸ para. 3 of the Law), the Advisory Group takes guidance from the terms “legitimate reason to fear”, or, concluding “ascertainable facts which may raise doubts” (European Court of Human Rights (hereinafter “the ECtHR”), Grand Chamber, judgment of 15 December 2005, Kyprianou v. Cyprus, 73797/01, at § 118, in the context of assessing the independence or impartiality of a court). Doubts are not reasonable if they are not supported by ascertainable facts.
4. The criterion of the “recognized level of competence in the field of law” as per Article 10⁸ of the Law is determined by the Advisory Group by assessing

the necessary knowledge of the Candidate to exercise the powers of a judge of the Constitutional Court in the areas of:

- a. Constitutional Law: Constitution of Ukraine, Constitutional Court of Ukraine's judgments and opinions, basics of comparative constitutional Law and constitutional principles and values;
- b. Procedural Law: Law on the Constitutional Court of Ukraine, Rules of Procedure of the Constitutional Court of Ukraine, the procedure for executing the decisions of the Constitutional Court of Ukraine, including following the consideration of a constitutional complaint;
- c. International Human Rights Law: relevant international treaties, including but not limited to the Convention for the Protection of Human Rights and Fundamental Freedoms, the case law of the ECtHR;
- d. Status of a judge of the Constitutional Court of Ukraine:
 - i. Rights and obligations of the Judge of the Constitutional Court of Ukraine;
 - ii. Integrity (incompatibilities, ethics, etc.): general principles of judicial ethics, Rules of professional ethics of a judge of the Constitutional Court of Ukraine, Law on Prevention of Corruption;
- e. Legal analysis and adjudication for the purposes of exercising the power of a judge of the Constitutional Court of Ukraine:
 - i. The Candidate knows how to identify, distinguish, compare, synthesize and apply a variety of legal sources; understand the case history, analyze evidence; collect, analyze, and synthesize information effectively;
 - ii. The Candidate knows how to formulate a sound decision, to draft it in an intelligible and clear language; iii. The Candidate knows how to analyze complex legal issues;
 - iv. The Advisory Group may include all the relevant information in its Assessment, including but not limited to from past court decisions and other legal documents, scientific and similar works, reports and similar documents, which could raise doubt as to whether a Candidate knows how to analyze and adjudicate complex legal cases and formulate written conclusions;
- f. Knowledge reflected in performance:

- i. The Candidate knows how to comply with time limits;
 - ii. The Candidate knows how to produce high quality in his/her legal work.
- 5. The Advisory Group may consider a Candidate's cooperation or lack of cooperation during the Assessment process in determining whether the Candidate has mitigated reasonable doubts about his/her compliance with the criteria of high moral qualities or recognized level of competence in the field of law.

Article 3. Steps for Assessment of high moral qualities criterion

1. For Assessing compliance with high moral qualities criterion as per Article 10⁸ parts 1 to 4 of the Law, the Advisory Group:
 - a. studies all information received;
 - b. collects additional data on its own from all sources as per "Article 6. Sources of information";
 - c. if necessary, requests written clarifications from Candidates;
 - d. conducts interviews as per "Article 7. Interviews", in particular, to clarify any doubts about their high moral qualities;
 - e. adopts and prepares a reasoned decision on Assessment of the high moral qualities of each Candidate.
2. The Advisory Group starts the Assessment of high moral qualities criterion by requesting the Candidate to provide the following information and documents:
 - a. his/her email address and telephone number;
 - b. his/her last submitted declaration of a person authorized to perform the functions of state or local self-government in the form specified by the Law of Ukraine "On Prevention of Corruption" if not already provided;
 - c. written confirmation that s/he has read the Advisory Group Regulations and the Methodology;
 - d. copies of all notarial powers of attorney (or entries from the Unified Register of Powers of Attorney regarding all notarial powers of attorney) to which the Candidate or a member of his/her family is a party to or a recipient of powers, being powers of attorney, which are currently in force or have been in force in the last ten years till the day of receiving the request.

3. A reasoned decision on the results of the Assessment of the Candidate's high moral qualities will be prepared by the Advisory Group within 15 days from the date of its adoption.

Article 4. Steps for Assessment of the criterion of the recognized level of competence in the field of law

1. For Assessing the criterion of the recognized level of competence in the field of law as per Article 10⁸ parts 3, 5 and 6 of the Law, the Advisory Group:
 - a. studies the information of Candidates who received a "compliant" rating as per Article 10⁸ part 4 of the Law;
 - b. collects additional data on its own from all sources as per "Article 6. Sources of information";
 - c. if necessary, requests written clarifications from the Candidates;
 - d. approves the terms for the written assessment of Candidates, the composition of the external group of international experts and guidances for the preparation of written questions and questions for additional interviews to determine the level of competence in the field of law;
 - e. conducts the written assessment of Candidates;
 - f. decides on the need for additional interviews following the results of the written assessment;
 - g. adopts and prepares a reasoned decision regarding the Assessment of the recognized level of competence in the field of law of each Candidate.
2. For guarding its actual and perceived confidentiality, the written assessment as per para. 1 lit. e of this Article will be developed and conducted as follows:
 - a. An external group of international experts (hereinafter the "External Group-1"), with the support of at least one Ukrainian lawyer, is nominated by the international and foreign organizations and/or the European Commission for Democracy through Law as per item 5 of Section IV "Transitional Provisions" of the Law, and approved by the Advisory Group;
 - b. The External Group-1 will develop a written questions taking into account terms and guidances by the Advisory Group as per para. 1 lit. d of this Article, and submits them to the Advisory Group on the day of the written assessment;

- c. No earlier than one hour before the start of the written assessment, the Advisory Group randomly selects one written question from the questions the External Group-1 has developed for all Candidates to be answered and submits it to the Secretariat;
 - d. Candidates participate in the written assessment in person by providing a written answer to a written question selected randomly in accordance with para. 2 lit. c of this Article at a place determined by the Advisory Group. The Secretariat provides organizational and technical support for that Assessment.
3. For guarding the actual and perceived confidentiality of the questions asked in case adoption of the decision on conducting the additional interviews as per para. 1 lit. f of this Article, the questions will be developed and distributed as follows:
- a. An external group of international experts (hereinafter the “External Group-2”), with the support of at least one Ukrainian lawyer, is nominated by the international and foreign organizations and/or the European Commission for Democracy through Law as per item 5 of Section IV “Transitional Provisions” of the Law, and approved by the Advisory Group. This may be the same External Group-1 as per para. 2 of this Article;
 - b. The External Group-2 will develop a set of two questions per each Candidate covering in its entirety all aspects of “Article 2. Criteria” para. 4 of this Methodology, and taking into account all terms and guidance by the Advisory Group as per para. 1 lit. d of this Article;
 - c. The External Group-2 will select a set of questions per each Candidate and submit it to the Secretariat on the day of the respective additional interview, and the Secretariat will share the questions 30 minutes before the interview of each Candidate with the Advisory Group. The Membersrapporteurs will distribute the questions among each other and each will ask one. Members of the Advisory Group may can ask follow-up and/or additional questions.
4. The Advisory Group decides on the need for additional interviews no later than 15 days after the written assessment of all Candidates has been completed. If additional interviews are scheduled, the Advisory Group adopts a reasoned decision on the Assessment of the recognized level of competence in the field of law within 15 days from the date of the additional interview with all Candidates. If additional interviews are not scheduled by the Advisory Group, the reasoned decision on the the Assessment of the recognized level of competence in the field of law will be adopted no later than 15 days after the Advisory Group decides that no additional interviews are necessary.

5. The reasoned decision on the results of the Assessment of the recognized level of competence in the field of law of the Candidate will be prepared by the Advisory Group within 15 days from the date of its adoption.

Article 5. Ranking list of assessed Candidates

1. To form the ranking list, the Advisory Group compiles a general list of Candidates who have been assessed as “compliant” in terms of the criteria of high moral qualities and the recognized level of competence in the field of law.
The Candidates on this list will be placed in an alphabetical order.
2. After the ranking voting for all Candidates is completed, they are placed on the list based on the number of votes received by the Members of the Advisory Group: from the highest (6 votes “for”) to the lowest result (0 votes “for”).
3. The Advisory Group compiles ranking lists of evaluated Candidates separately for each group of Candidates for the respective appointment body of a judge of the Constitutional Court of Ukraine within the respective competition.

Article 6. Sources of information

1. To collect and analyze information about the Candidates, the Advisory Group and its Members may, in particular:
 - a. search information in the available open sources, including the Internet;
 - b. access and search information in registers and databases that are held (administered) by the state authorities;
 - c. use information received by the Advisory Group, its Members or Secretariat as correspondence or in other forms, including information submitted by Candidates at their own initiative, answers of the Candidates to the questions of the Advisory Group;
 - d. use information received by the Advisory Group and its Members from non-governmental organisations, media, public authorities, municipal bodies and other organisations and individuals;
 - e. request from individuals or legal entities any clarifications, documents, or information required for purposes of Assessment of the Candidates;
 - f. seek expert advice from persons who have expertise in a certain fields;
 - g. receive oral explanations from other persons.

2. The Advisory Group determines the deadline for the Candidate to provide information and/or original documents upon its request. The Candidate must confirm receipt of the request as soon as possible. The Advisory Group may extend the established deadline if requested by the Candidate for justified reasons.
3. The Candidates has the right to request access to information collected about them, except for information with restricted access that may not be disclosed to the Candidate according to the legislation. Access will be provided within 3 days of the request. The Candidate exercises his/her right of access to information no later than 5 days before and/or no earlier than 5 days after the day of the interviews with all Candidates. The Advisory Group may grant an exception to this rule upon a justified request from the Candidate.
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4. If citizens provide information at their own initiative and wish that their identity remains confidential, information provided by them will not be used for the Assessment, and the subject and the identity of the source will not be revealed to the Candidate. If the Advisory Group obtained the same information from one or more other sources, which are non-confidential, the information may be used in the Assessment and the information is subject to access by the Candidate.

Article 7. Interviews

1. The schedule of interviews as per “Article 3. Steps for Assessment of high moral qualities criterion” are scheduled at the discretion of the Advisory Group.
2. The schedule of additional interviews as per “Article 4. Steps for Assessment of the criterion of the recognized level of competence in the field of law” is formed based on the results of the drawing of lots, which is conducted in the manner determined by the Advisory Group.
3. The Candidate must confirm participation in an interview within two calendar days.
4. The interview begins with an opening by the Chair, followed by questions from the Members. At the end of the interview, a Candidate may make a brief final statement.
5. Candidates and other persons who are present at the interview must follow proper order of the proceedings. If a person violates this rule after a warning, the Chair may exclude the person from the interview.

6. The presence of a Candidate at the interview is obligatory. The interview may be postponed due to the non-attendance of a Candidate for a good cause.

The existence of the good cause is determined by the Advisory Group.

Failure of a Candidate to attend an interview, regardless of the causes, does not prevent the Advisory Group from Assessing and determination of his/her compliance with the criteria of high moral qualities and/or the recognized level of competence in the field of law.

7. A Candidate may not provide information, documents or other materials during the interview if the Advisory Group had requested these earlier and the Candidate had not provided them within the time specified, or if the Candidate could have provided them at his/her own initiative earlier. If considered justified, the Advisory Group may allow for exceptions.
8. If the Candidate refuses to attend the interview and/or withdraws from the competition at any other stage of the competitive selection process, the Advisory Group completes the review, verification, and analysis of the Candidate's documents available to it at that time and terminates the Candidate's participation in the competitive selection process.

Article 8. Archiving

After the Advisory Group has submitted the lists of evaluated Candidates and reasoned decisions regarding each Candidate as per Article 10⁸ part 7 of the Law, minutes, copies of all documents and personal data related to a Candidate and third persons are stored in the secretariat of the Constitutional Court of Ukraine for three years, after which they will be destroyed.

Article 9. Amendments

The Advisory Group may amend this Methodology anytime by a decision taken in line with "Article 10. Voting" of the Regulations of the Advisory Group.

Annex: Unjustified Wealth

1. Background

In its judgement *Xhoxhaj v. Albania*, the ECtHR calculated unjustified wealth as follows:

"For the purpose of this judgment, 'liquid assets' means (A) the balance of cash savings at the end of a given calendar year, as determined by the vetting bodies, which should be equal to (B) the

carryover cash balance of the applicant and her partner from the previous calendar year, plus (C) the annual income of the applicant and her partner generated during the reporting calendar year as substantiated by legal/official documents, less (D) any expenses (including, but not limited to, living expenses, travel expenses, mortgage repayments). Any discrepancies where (A) is higher than (B + C – D) would give rise to unjustifiable liquid assets that are not supported by the cash flow determined from the documents in the case file.”¹

Dividing the mentioned financial items as in- and outgoing cash-flows into two separate columns, this formula looks as follows:

Calendar year (or any other period)	
Incoming cash flows	Outgoing cash flows
“(B) the carryover cash balance of the applicant and his/her partner from the previous calendar year”	“(D) any expenses (including, but not limited to, living expenses, travel expenses, mortgage repayments)”
“(C) the annual income of the applicant and her partner generated during the reporting calendar year as substantiated by legal/official documents”	“(A) the balance of cash savings at the end of a given calendar year”

Thus, there is unjustified wealth if: $A > B + C - D$. When rearranging the equation by adding D on both sides: $A + D > B + C$ (or: $B + C < A + D$). Expressed verbally in short, this formula calculates whether the outgoing cash flows (“lifestyle” (A + D)) are larger than the legitimate income (B + C).

2. Terminology

2.1. “**Incoming** cash flows” are income plus other cash flows (loans received, cash leftover from previous periods, etc.) that increase the financial means (liquidity), which the declarant can dispose of during the current period.

2.2. “**Outgoing** cash flows” are expenditures plus other ways in which the declarant spends/invests his/her financial means (liquidity), such as loans to others, savings at the end of the current period, etc.

3. Application

The formula is applied in accordance with the following rules:

¹ Of 9 February 2021, application 15227/19, para. 31, footnote 1.

- 3.1. A **period** is defined first for each calculation. The fiscal year is the default period. However, the period may be shortened in case of potential irregularities during the calendar year.
- 3.2. Only **actual cash flows** are relevant for the formula (for example, whereas the actual purchase price paid is a cash flow, representations on transactional documents or non-monetary gifts are not).
- 3.3. Only cash flows that occurred **during** the respective declaration **period** are inserted.
- 3.4. As stated by the ECtHR, **savings** (including cash) have a double nature: at the beginning of the period, they count as incoming cash-flow (“coming into the period”); at the end of the period, they count as outgoing cash-flow. The outgoing cash-flow of savings at the end of the period equals the incoming cash-flow of savings at the beginning of the next period.
- 3.5. In line with principles approved by the ECtHR in its judgement *Thanza v. Albania*,² the **Consumption Money Expenditure (CME)** are determined and published on annual basis by the State Statistics Committee of Ukraine. These expenditures include the following categories: food products (including catering outside home, alcoholic beverages and tobacco), manufactured goods and services. The exact amount per each Candidate is calculated by the Secretariat of the Advisory Group using data by the State Statistics Committee of Ukraine, taking into account the number of family members, residence area (rural or urban). CME is part of “**expenses**” (or **outgoing cash-flows**).

Practical Note: CME refers to the fact that the declarant has to spend a certain amount on essential (non-declared) expenditures such as rent/property utilities, clothing, transportation, food, medication, household appliances, gadgets, etc.

- 3.6. If the subtotal outgoing is higher than the subtotal income, then there is a **financial misbalance** regarding the declarant.
- 3.7. The formula is applied for the entire household together, but if appropriate may be applied separately for the declarant, and each family member.
- 3.8. Thus, in a more detailed layout, the formula looks as follows:

Cash flows during period [as defined]	
Incoming cash flows	Outgoing cash flows
Bank and cash savings at beginning of the period	

² 2 Of 4 July 2023, application 41047/19, para. 102.

Income such as salary, fees, revenue, money gifts received, windfalls received, money inheritance, etc	Expenses on assets such as real estate, vehicles, precious movables, stocks, etc., or on immaterial items such as vacations, weddings, school fees, etc
All other incoming cash flows such as loans received from creditors or loans repaid by debtors	Other outgoing cash flows such as loans granted to a debtor or loans repaid to a creditor
	Consumption Money Expenditure (as defined)
	Bank and cash savings at end of the period
= Subtotal incoming	= Subtotal outgoing
If subtotal outgoing > subtotal income, then there is unexplained wealth	
