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BUDGETING POLICIES AND PRACTICES IN THE UKRAINIAN JUDICIARY AND THE UNITED STATES JUDICIARY

A COMPARATIVE REVIEW

Contract No. AID-121-C-11-00002

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January 15, 2012

The author's views expressed in this publication do not necessarily reflect the views of the United States Agency for International Development or the United States Government.

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1. BACKGROUND AND INTRODUCTION

The USAID Fair, Accountable, Independent and Responsible (FAIR) Judiciary Program in Ukraine began on October 1, 2011. The Project is designed to support legislative, regulatory, and institutional reform of judicial institutions in order to build a foundation for a more accountable and independent judiciary in Ukraine. Its main objectives are to support USAID/Ukraine's assistance efforts in rule of law and democracy and governance through: 1) development of a legislative and regulatory framework for judicial reform that is compliant with European and international norms and supports judicial accountability and independence; 2) strengthening the accountability and transparency of key judicial institutions and operations; 3) strengthening the professionalism and effectiveness of the Ukrainian judiciary; and 4) strengthening the role of civil society organizations as advocates for and monitors of judicial reform.

Pursuant to Expected Result 3.2, FAIR is working to strengthen the capacity of the State Judicial Administration of Ukraine (SJA) to justify and present budget requests of Ukraine's judiciary. In support of this goal, under Task 3.2.3 and 3.2.5, FAIR assists the SJA in the preparation of recommendations for improving the budgeting process and collecting the data the courts need to formulate and back up budget requests.

This paper provides a comparative summary of budgeting authority and procedures in the Ukrainian and the United States (U.S.) federal judicial systems. It was prepared at the request of the Ukrainian Council of Judges and the State Judicial Administration to inform their ongoing efforts to improve the administrative operations and efficiency of the Ukrainian court system and to strengthen the independence of the judicial power. The review does not extend to budgeting authority and procedures in the court systems of the individual U.S. states, each of which has its own authority and processes determined by its respective state government.

Judicial systems of sovereign states aspire to be independent and to shoulder the accountability that such independence entails. Topical discussions usually focus on the independence of individual judges in their decision-making. Although having independent judges to hear and adjudicate cases in the absence of outside influence and compulsion is critical to an effective court system, the institutional framework of the judicial system also must reflect independence. For example, politicians who disagree with key judicial decisions should be constrained from retaliating against courts by reducing funding for demonstrated operational and other needs or by seeking to intimidate or replace judges by reducing salaries and benefits. Judicial system institutional independence encompasses a variety of such elements. One of the most important elements is the mechanism and process whereby public revenues are allocated to judicial systems to fund their expenses for a variety of goods and services.

Ideally, the judicial system should have in place statutory and other provisions that constrain the authority and capacity of the executive and legislative powers, commonly referred to as the political powers, from arbitrarily manipulating court resource allocations because their officials at any given time may disagree with judicial decisions. This article explores how the U.S. and Ukrainian judicial systems obtain their resource allocations and what provisions each other has in place or, ideally, should have in place to ensure its institutional independence. It also includes discussions of how traditional court system budgeting processes might be modified to achieve greater efficiencies.

2. BUDGETING POLICIES AND PRACTICES IN THE UKRAINIAN JUDICIAL POWER AND THE UNITED STATES JUDICIAL POWER: A COMPARATIVE REVIEW

WHAT IS THE GENERAL GOVERNANCE AND ADMINISTRATIVE STRUCTURE OF THE JUDICIAL SYSTEM?

The U.S. judicial system is governed by the Judicial Conference of the United States (JCUS), a body chaired by the chief justice of the Supreme Court and comprising the chief judges of all circuit courts of intermediate appeals, the chief judge of the Court of International Trade, and a representative of the lower courts in each regional circuit. The JCUS is recognized as the official policy-making body of the federal judicial system and exercises independent authority relating to the federal courts except for the Supreme Court, which governs and manages itself. The JCUS is supported by two subordinate organizational structures. The first is a framework of permanent JCUS committees, each of which is delegated specific areas of jurisdiction. These committees conduct research and studies in their designated jurisdictions and propose new policies and emendations to existing policies. These committees provide invaluable background and research to the JCUS, and they relieve the chief justice from the burden of remaining current on the large number of issues and challenges that face the judiciary. Among these committees are the Executive Committee, which assists the chief justice in managing and directing the activity of the JCUS, and the Budget Committee that focuses exclusively on matters relating to the budgetary and financial operations of the judicial system. The second is the Administrative Office of the United States Courts (AOUSC), the judicial system support organization. The AOUSC Director reports to the Chief Justice and the activities of the AOUSC are supervised by the JCUS. Staff of the various divisions of the AOUSC provide technical, substantive, and administrative support to JCUS committees. For example, staff in the Budget Division provide such support to the Committee on the Budget.

The Ukrainian judicial system has several governance structures as specified in the July 2010 Law on the Judiciary and the Status of Judges (Law). These include the Congress of Judges of Ukraine (CJU), the highest governance body, comprising

- One judge from each oblast, the cities of Kyiv and Sevastopol, and the autonomous Republic of Crimea;
- Three judges from each of the three specialized high courts; and
- Three judges each from the Constitutional and Supreme Courts

All judges serving as delegates of the CJU are elected. The CJU meets every two years in regular session and may be convened by the Council of Judges of Ukraine in extraordinary session. Another structure is the Council of Judges of Ukraine (Council) that assumes the day-to-day leadership of the judicial system between sessions of the CJU. The Council comprises 11 members elected by the CJU. The Council is assisted in

its work by three subordinate councils for the general jurisdiction courts, the commercial courts, and the administrative courts.

Unlike the JCUS, the Council does not rely on a framework of limited jurisdiction committees or other special judicial support bodies to inform its thinking in critical areas that fall within its broad authority and responsibility. As a consequence, its leaders are compelled to stay abreast of all such areas largely on their own, without the benefit of the research and advisory functions of the committees that support the JCUS. In the view of the author, the Council should consider developing a committee-like framework to ease that burden. Like the U.S. Judicial System, the Ukrainian Judicial System has a management and administrative support organization known as the State Judicial Administration (SJA). The SJA has two primary components, the SJA Headquarters in Kyiv and the territorial SJA offices in each oblast, Kyiv and Sevastopol cities, and the Autonomous Republic of Crimea.

RECOMMENDATION: THAT THE CJU AND COUNCIL CREATE A FRAMEWORK OF PERMANENT JUDICIAL COMMITTEES SUPPORTED BY THE SJA WITH SPECIFIED JURISDICTIONS AND ROTATING TERMS OF MEMBERSHIP TO SERVE AS RESEARCH AND ADVISORY BODIES TO ASSIST THE CJU AND COUNCIL WITH THEIR NUMEROUS AND COMPLEX RESPONSIBILITIES.¹

WHAT IS THE ROLE OF THE JUDICIAL LEADERSHIP IN THE BUDGETING AND FINANCIAL MANAGEMENT PROCESSES? In the U.S., the AOUSC, pursuant to law, prepares the annual budget request for the judicial system by assembling the statistical data and budget requests received from each court. It then applies various work-measurement- and case-weighting-based formulae to prepare a consolidated recommended budget, which it forwards to the JCUS for approval.² Responsibility for approving the judicial system's annual budget request rests with the JCUS with the assistance of the Budget and Executive Committees. Once the budget request has been approved, it is submitted in October to the Office of Management and Budget (OMB), an executive power office which consolidates all budget requests from the judicial and executive power into the annual budget request. OMB then submits that request to the U.S. Congress, the legislative power for review, adjustment, and approval. *Although the OMB is an executive power office, by law and pursuant to the separation of powers, it is expressly prohibited*

¹¹ This committee framework should include a Budget Committee whose members should be judges with expertise and experience in budget and financial management.

² Factors that comprise the U.S. judicial system's annual request include:

- The number of judicial positions established by law
- The number of judges' personal staff authorized by the JCUS
- The rent charged by the General Services Administration for courthouses and related facilities
- Formulae that calculate employee salaries/benefits and staffing needs
- Formulae that determine court operational requirements such as equipment, utilities, supplies and travel
- Projected case filings
- Adjustments for inflation, vacancies, unanticipated changes, and technical matters
- The projected costs of new legislation and programs approved by the JCUS

from reducing or otherwise modifying the judicial system's annual budget request.³ The following February, the AOUSC submits the judicial system's budget request to the Congress whose appropriations subcommittees schedule hearings in March and April. The chair and an addition member of the JCUS Budget Committee along with the AOUSC Director appear before these subcommittees to present and defend the budget request and respond to questions. Members of Congress then make final modifications to all budget requests and prepare final versions of authorized budgets which then are submitted to the President for review and approval. Once the President approves them, the U.S. Treasury is authorized to dispense the funds. At that point, the JCUS Executive Committee prepares a National Financial Plan for the judicial system and divides the total appropriation into various allocations, which authorize various offices within the AOUSC to incur obligations for national programs and services. Those AOUSC offices then distribute the allocations in the form of allotments to the persons authorized to spend them. Funds for judges' salaries, for example, are retained by the AOUSC and centrally disbursed. Funds for court staff salaries and a variety of other expenditures for equipment, supplies, maintenance, etc., are allocated directly to individual courts, which are responsible for dispensing and accounting for them.

We turn now to the Ukrainian judicial system. Unlike the JCUS whose Executive and Budget Committees play key roles AOUSC in matters relating to court system budget and finance, in Ukraine judicial system the SJA plays the *primary* role in developing, negotiating, approving, and monitoring budgetary and financial management matters. The new *Law on the Judiciary and the Status of Judges (Law)* provides no specific authority for the Congress of Judges or the Councils of Judges to participate in the financial management and budgeting processes.⁴ The Law provides that the SJA shall "represent courts in relations with the Cabinet of Ministers and the Verkhovna Rada of Ukraine (VRU) during preparation of [annual] draft law on the State Budget of Ukraine for the respective year within its authority specified by this law."⁵ The Law also provides that the SJA shall report to the Congress of Judges and that the regulations on the SJA shall be approved by the Council of Judges. In the absence of any reference in the Law to the role of the CJU or the Council, effectively, the SJA rather than any judicial governance

³ See 31 United States Code § 1105(b).

⁴ The Law does provide in Article 122.6.1 that the councils of judges shall "exercise control over organizing the operation of the respective courts and hear reports by chief judges of these courts on the performance of court as well as the report by the Head of State Judicial Administration of Ukraine on issues related to financial and logistical support of respective courts. It also provides in Article 123.2.1 that the Congress of Judges shall "hear a report by the Council of Judges of Ukraine on fulfillment of tasks by bodies of judicial self-government regarding judicial independence and on the state of funding and organizational support of the operation of courts." It also provides in Article 127.5.8 that the Council of Judges shall, "while considering issues related to funding of courts the Minister of Finance of Ukraine shall be invited to the meeting of the Council of Judges of Ukraine.

⁵ See Art. 146.1.1.

body has come to function as the primary official liaison with the VRU's Committee on the Judiciary on matters relating to judicial system budget and finance.

The Law also provides that "The powers and operating procedures of the Council of Judges of Ukraine shall be determined by this Law and by Regulation on the Council of Judges of Ukraine to be approved by Congress of Judges of Ukraine."⁶Section III, "Powers of the Council of Judges of Ukraine," of that Regulation does not reference any role for the Council in matters pertaining to judicial power budget authority or responsibility.

Best practices among modern court systems provide for the active participation and leadership of judicial governance structures in their budgetary and financial management processes. The author has worked with court systems in some 30 countries worldwide, and in most of them, judicial governance bodies have a critical role in the budget development, management, and execution processes.

RECOMMENDATION:

- **THAT THE COUNCIL SEEK PASSAGE OF LANGUAGE AMENDING THE LAW TO PROVIDE FOR ITS LEADERSHIP OF AND ACTIVE PARTICIPATION WITH THE SJA IN THE PROCESS OF PREPARING AND APPROVING THE ANNUAL LAW ON THE STATE BUDGET REQUEST FOR THE UKRAINIAN COURTS**
- **THAT ONCE SUCH AMENDMENTS TO THE LAW HAVE BEEN APPROVED, THE COUNCIL ALSO AMEND THE REGULATION ON THE COUNCIL OF JUDGES OF UKRAINE SEEK APPROVAL FROM THE CJU TO PROVIDE FOR COUNCIL OVERSIGHT AND PARTICIPATION IN THE PROCESSES OF DEVELOPING, MANAGING, DEFENDING, JUSTIFYING, AND EXECUTING THE JUDICIAL POWER'S BUDGET**

WHAT IS THE ROLE OF EXECUTIVE POWER AGENCIES IN THE JUDICIAL POWER'S BUDGET REVIEW AND DETERMINATION PROCESSES: In the U.S., the judicial power and all agencies of the executive power submit their budget requests to OMB, an executive power office, which reviews, adjusts, and consolidates them into a single budget request that is submitted to the Congress or legislative power for review and approval. Although it has the authority to modify budget requests from agencies that fall under the executive power, it is by law prohibited from modifying the judicial system's budget request. In effect, then, the executive power in the U.S. has *no* authority under law or otherwise to modify or reduce the judicial system's budget request.

⁶ See Art. 127.4

In the Ukraine, the Ministry of Justice and the Cabinet of Ministers, both of which fall under the executive power, are authorized under law to review, modify, and reduce the annual budget requests of all executive power offices *and* the budget request of the judicial power. At the commencement of the annual budget preparation process, the Minister of Finance transmits letters to all executive power ministries and to the SJA. The letter to the SJA specifies a financial ceiling on the judicial system's budget requests for the coming year. Any amounts requested above and beyond that ceiling must be thoroughly justified, and there are no guarantees that they will be approved. Later in the budget process, after the central SJA has reviewed and consolidated all budget requests from the individual courts into a single judicial power budget request, the SJA transmits that budget request to the Ministry of Finance, which reviews and processes it, imposing reductions where it deems appropriate. It then transmits its revised judicial power's budget request to the Cabinet of Ministers (Cabinet) where, again, it is subject to review and revision. The Cabinet then submits a consolidated budget request for the executive and judicial powers to VRU where a final government-wide budget is prepared in the form of an annual Law on the State Budget.

In both the U.S. and the Ukraine, an executive power office consolidates all executive and judicial power budget requests into a single request that is transmitted to the legislative power for final review, modification, and approval. The difference between the two systems of government is that in the U.S., that executive power office, OMB, is prohibited under law from reducing or in any way modifying the judicial power's budget request; it must incorporate the judicial power's budget request without change into the consolidated budget request that it transmits to the legislative power. In Ukraine, by contrast, both the Ministry of Finance and the Cabinet of Ministers are authorized to modify and reduce the judicial power's annual budget request. In effect, the executive power exercises control over the budget of the judicial power even though the Ukrainian Constitution provides for the allocation of government resources through the legislative power.⁷

RECOMMENDATION: THAT THE CJU AND THE COUNCIL JOINTLY SEEK AMENDMENTS TO EXISTING LAW AND REGULATIONS THAT, PURSUANT TO THE SEPARATION OF POWERS PRINCIPLE,

⁷ Article 85 provides in 4) that the VRU is responsible for "approving the State Budget of Ukraine and introducing amendments to it; controlling the implementation of the State Budget of Ukraine and adopting decisions in regard to the report on its implementation."

- PROHIBIT THE MINISTRY OF FINANCE AND THE CABINET OF MINISTERS FROM MODIFYING THE BUDGET REQUEST SUBMITTED BY THE JUDICIAL POWER
- REQUIRE THE MINISTRY OF FINANCE AND THE CABINET OF MINISTERS TO INCORPORATE THE JUDICIAL POWER'S BUDGET REQUEST INTO ITS CONSOLIDATED BUDGET REQUEST FOR SUBMISSION TO THE VRU WITHOUT MODIFICATION OR REDUCTION IN THE AMOUNTS REQUESTED
- MODIFY THE AUTHORITY OF THE MINISTRY OF FINANCE TO TRANSMIT A LETTER TO THE JUDICIAL POWER AT THE COMMENCEMENT OF THE ANNUAL BUDGETARY PROCESS THAT IMPOSES MANDATORY COST CEILINGS AND, INSTEAD, RECOMMENDS PROPOSED COST CEILINGS

DOES THE BUDGET ALLOCATION FOR THE JUDICIAL POWER INCLUDE RESERVE FUNDS FOR UNANTICIPATED NEEDS AND EMERGENCY FUNDING REQUIREMENTS OR ARE THOSE RESERVE FUNDS HELD BY AN EXECUTIVE POWER AGENCY? In the U.S., the annual budget appropriation for the judicial power includes sufficient funds to enable the JCUS and the AOUSC to hold in reserve a certain percentage for unanticipated needs and emergencies. Such funds are retained centrally by the AOUSC and disbursed on the basis of justifiable requests received in the course of the fiscal year. U.S. government budget policies require that funds appropriated for a particular budget year must be expended during that year; they cannot be carried over into the following year. However, the judicial power has special limited authority from Congress to carry over unspent funds from one fiscal year to the next. If, near the end of fiscal year, the reserve account has not been exhausted, the AOUSC is authorized to retain those funds and to expend them in the new fiscal year. In addition, if individual courts have unspent surplus funds in their budgets near the end of the fiscal year, they can return them to the AOUSC where they can be retained for use the following fiscal year. This spending flexibility avoids the havoc of rushing to spend unused funds at the end of the fiscal year, often resulting in inefficiencies and occasionally in lost spending authority because there is insufficient time to comply with government competitive bidding requirements.

In the Ukraine, the Ministry of Finance habitually allocates to the judicial power funding levels that are substantially lower than those specified in the annual budget requests. As a consequence, courts must operate at funding levels that fall considerably short of their operational requirements for goods and services, and the SJA's capacity to centrally retain funds in reserve for unanticipated needs and emergencies is severely limited. Rather than allocating funds for emergency reserves to the SJA to help facilitate rational financial management, the Ministry of Finance holds funds in its central accounts for unanticipated needs and emergencies. When the judicial power

requires funds for emergencies or unanticipated needs, it must petition the Finance Ministry for an emergency funding allocation that the ministry may or may not grant. Near the end of the fiscal year, if the Ministry of Finance has funds remaining in its reserve accounts, it will release them to the judicial and executive powers, often in the last two weeks of the fiscal year. Because government procurement regulations require competitive bidding in nearly all categories of expenditure, the SJA and the courts are often unable to expend those last-minute funding allocations because the bidding process requires on average a month for the announcement, response, and negotiation processes. As a result of these bureaucratic requirements, portions of this last minute funding are often forfeited.

RECOMMENDATIONS:

- **THAT THE COUNCIL IN COORDINATION WITH THE SJA SEEK SPECIAL LIMITED AUTHORIZATION FROM THE VRU TO CARRY OVER FUNDS REMAINING AT THE END OF THE FISCAL YEAR TO THE NEXT FISCAL YEAR. SUCH FUNDS COULD BE RESTRICTED, FOR EXAMPLE, TO CETRAIN CATEGORIES OF EXPENDITURES SUCH AS IT EQUIPMENT TO FACILITATE GREATER EFFICIENCIES IN COURT OPERATIONS.**
- **THAT THE COUNCIL IN COORDINATION WITH THE SJA PURSUE AMENDMENTS TO THE LAWS AND REGULATIONS GOVERNING THE BUDGETING PROCESS. SUCH AMENDMENTS WOULD AUTHORIZE THE MINISTRY OF FINANCE TO ALLOCATE TO THE JUDICIAL POWER THE FUNDS IT NORMALLY RETAINS IN RESERVE TO FUND UNANTICIPATED NEEDS AND EMERGENCIES. PERMITTING THE JUDICIAL POWER TO RETAIN AND ALLOT SUCH FUNDS WILL INCREASE ITS ABILITY TO ENGAGE IN RATIONAL FINANCIAL PLANNING AND TO EXPEND SUCH FUNDS IN A MORE DELIBERATE AND RESPONSIBLE MANNER THAN IS NOW THE CASE.**

DOES THE JUDICIAL POWER HAVE THE FLEXIBILITY TO SHIFT FUNDS IN ONE SPENDING CATEGORY WHERE THERE ARE NO UNMET NEEDS TO ANOTHER SPENDING CATEGORY WHERE CONSIDERABLE NEED EXISTS? Government policy frameworks generally require that funds allocated to agencies be expended in the funding category in which they were allocated. For example, funds specified for IT equipment cannot be expended for salary bonuses; funds allotted for human resource benefits such as medical insurance cannot be diverted to pay for costly furniture for judges' offices. Such policies are designed to prevent misuse of public revenues. In the U.S., the judicial power is required to conform to such spending regulations. However, it also has limited special authority to re-program funds allotted for particular spending categories to other categories under strict guidelines. For example, funding for salaries is allocated on the basis of positions authorized, not positions filled. A court may have a number of vacant positions for which it receives salary allotments, yielding a surplus in the salaries funding account.

Where there are funding shortfalls in other categories, court administrators or chiefs of staff may submit carefully justified funds reprogramming requests to the AOUSC. For example, if the salaries allocation has a surplus of \$50,000 and the court needs to replace aging desktop computers in judges’ offices but has no funds in that spending category, a request can be submitted for authorization to reprogram the funds to purchase replacement computers. If the reprogramming conforms to the regulations, the AUOSC authorizes the reprogramming request. This reprogramming feature increases the flexibility of individual courts to respond to unanticipated needs and emergencies on their own without having to petition the AOUSC for special supplemental funds.

In the Ukraine, the judicial power has no authority to reprogram surplus funding allotments in one budget category to another. Although many courts have vacant positions whose salary funding they are able to accumulate as surplus funding, that surplus must be expended as salary bonuses. If the courts were able to reprogram such surplus funds, they could divert them to spending categories that are chronically underfunded, such as the procurement of IT equipment and infrastructure.

RECOMMENDATION: THAT THE COUNCIL WORKING JOINTLY WITH THE SJA SEEK LIMITED AUTHORIZATION FROM THE VRU TO REPROGRAM SURPLUS FUNDS IN ONE SPENDING CATEGORY TO OTHER SPENDING CATEGORIES FOR WHICH ALLOTTED FUNDING WAS INSUFFICIENT. THE REQUEST FOR SUCH AUTHORIZATION SHOULD ACKNOWLEDGE THAT SUCH REPROGRAMMING AUTHORITY WILL BE CAREFULLY CONTROLLED AND THAT REQUESTS WILL BE CAREFULLY SCRUTINIZED ACCORDING TO STANDARD CRITERIA.

WHAT IS THE JUDICIAL SALARY STRUCTURE BY WHICH JUDGES ARE COMPENSATED: In the U.S. federal system, judicial salaries are based on a simple tiered system by category of judicial office. Those categories and their respective ranks include:

SUPREME COURT CHIEF JUSTICE	SUPREME COURT ASSOCIATE JUSTICES	COURT OF APPEALS JUDGES	DISTRICT COURT JUDGES	BANKRUPTCY COURT JUDGES	DISTRICT COURT MAGISTRATE JUDGES
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The salary levels for the various ranks descend from the Supreme Court chief justice through each rank; bankruptcy and magistrate judges receive the same level of compensation. All judges within a particular rank receive the same compensation regardless of age, judicial tenure, types of cases adjudicated, etc. Thus, a court of appeals judge in his or her 70s with 30 years experience receives the same salary as a

court of appeals judge in his or her 40s with one year of experience. Moreover, there are no bonuses for judges. Their only source of income from the judicial power is their salary. In the court system budget, there is no line item for bonuses.

In the Ukrainian system, judges all receive a fixed official salary based on type and level of court not dissimilar to the system in effect in the U.S. However, the judicial compensation schedule is complicated by the addition of a variety of judicial bonus categories. For the 2013 Budget Request spreadsheet, these include *bonus payments* for:

QUALIFICATION CASES	LENGTH OF SERVICE RECORD	ESPECIALLY IMPORTANT WORK
SCIENTIFIC DEGREE OF DOCTOR OR CANDIDATE OF SCIENCES	HONORARY DEGREE OF "THE MERITED LAWYER OF UKRAINE"	WORK INVOLVING ACCESS TO STATE SECRETS
ADMINISTRATIVE OFFICES	REWARDS	AVERAGE INCOME FOR THE PREVIOUS 12 MONTHS

The ability of a senior-level judge in a higher-level court to accumulate multiple bonuses has the potential to result in substantial differences in compensation levels that may comprise multiples of the salaries and bonuses received by judges in lower-level courts. Interviews conducted by the author with some judges revealed resentment at the wide and deep chasms between the total compensation packages of trial-level and higher-court judges. Where the former may be having a difficult time making ends meet with their modest compensation, the latter are perceived as receiving extravagant compensation, an income gap that is not justified by equivalent differences in the substance and complexity of their work. Moreover, this system of multiple bonuses renders more difficult the challenge of developing systematic budget estimates because courts and the SJA need to take into account the type and level of bonuses to which each of Ukraine's nearly 9,000 judges is entitled. This is a significant burden for budget planners and analysts both in the courts and at the SJA.

RECOMMENDATION: THAT THE COUNCIL AND THE SJA CONSIDER UNDERTAKING A STUDY TO REVISE AND SIMPLIFY THE COMPLEX FRAMEWORK OF JUDICIAL COMPENSATION BONUSES FOR PURPOSES OF CREATING A MORE EQUITABLE SYSTEM FROM WHICH MORE CONSISTENT AND PREDICTABLE BUDGET PLANNING WILL FOLLOW

DOES THE JUDICIAL POWER HAVE THE AUTHORITY TO INITIATE LEGISLATION ON BEHALF OF THE JUDICIARY: In the U.S., the JCUS and the Supreme Court have both the authority and responsibility to initiate legislation. The most prominent example of such authority

rests with its rule-drafting function. The Rules Enabling Act, 28 U.S.C. §§ 2071–2077, authorizes the Supreme Court to prescribe general rules of practice and procedure and rules of evidence for the federal courts. The mechanism for doing so lies with the JCUS. The framework of committees supporting JCUS include a Committee on the Rules of Practice and Procedure (Committee) and five subordinate advisory committees on the Rules of Appellate Procedure, Rules of Bankruptcy Procedure, Rules of Civil Procedure, Rules of Criminal Procedure, and the Evidence Rules.⁸ Each of these advisory committees meets twice yearly on average to review the existing rules under its purview and to consider modifications and amendments to them to ensure their currency. Proposals for amendments are forwarded to the Committee for its review and approval. Where the Committee approves of proposed amendments, it submits them to the JCUS for review and approval. The JCUS, in turn, submits them to the Supreme Court for review and approval. The Supreme Court, in turn, submits them to the Congress for review and approval. If the Congress does not explicitly reject or modify the proposed amendments within a fixed period of time, they automatically become law.

The various ministries of the Ukrainian Government are authorized by law to initiate legislation on their behalf for consideration by the Verkhovna Rada. This is an important privilege that enables them to (i) draft laws and regulations relevant to their mission and responsibilities, and (ii) draft amendments to existing laws and regulations. By comparison, however, the judicial power of the government has no such authority and, notwithstanding its independence, is relegated to pursuing other secondary avenues for pursuing its legislative interests and needs. The Supreme Court used to exercise such authority but it was withdrawn on grounds that the exercise of such authority violated the separation of powers principles.

It is curious indeed that separation of powers principles would be invoked to prohibit the Supreme Court from initiating legislation but that invocation of those same principles permit the various ministries which are generally included within the executive power of the state to continue to exercise that function. It also is surprising that the judicial power has not filed a case in the Constitutional Court challenging that interpretation and the inconsistent application of the separation of powers principles.

⁸See 28 U.S.C. § 2073(a)(1).

RECOMMENDATION: THAT THE SUPREME COURT AND THE COUNCIL SEEK PASSAGE OF LANGUAGE GRANTING THE SUPREME COURT AUTHORITY TO INITIATE LEGISLATION ON BEHALF OF THE UKRAINIAN COURT SYSTEM

RECOMMENDATION: THAT IF THE VRU REFUSES TO GRANT SUCH AUTHORITY, THE SUPREME COURT AND THE COUNCIL FILE A CASE WITH THE CONSTITUTIONAL COURT OF UKRAINE SEEKING A DECISION THAT NEITHER THE CONSTITUTION NOR THE PRINCIPLES OF THE SEPARATION OF POWERS PROHIBIT THE JUDICIAL POWER FROM SEEKING LEGISLATION ON ITS BEHALF.

RECOMMENDATION: THAT ONCE SUCH AUTHORITY IS GRANTED, THE COUNCIL CONSIDER ESTABLISHING (I) A COMMITTEE ON THE RULES OF PRACTICE AND PROCEDURE TO REVIEW AND PROPOSE CHANGES TO UKRAINE’S PROCEDURAL CODES, AND (II) WITHIN THE SJA AN OFFICE OF LEGISLATIVE AFFAIRS⁹

DOES THE JUDICIAL POWER HAVE OPPORTUNITY TO REVIEW AND ANALYZE PROPOSED LAWS AND REGULATIONS THAT WILL AFFECT IT PRIOR TO THEIR BEING APPROVED? In the U.S., the JCUS and AOUSC negotiated a standing agreement years ago with the Congress. The agreement provides that when the parliament prepares new legislation that affects the federal courts, it will transmit drafts of the legislation for review and analysis by the AOUSC’s Office of Legislative Affairs (OLA). OLA is allocated time to (i) determine the legislation’s prospective impact on the operations of the court system, (ii) calculate what additional resources will be required to implement the legislation, (iii) assess how much time the judicial system will require to plan for, train judges and staff, and implement the legislation; and (iv) submit a *legislative impact statement* to the Congress for consideration when setting the effective date and appropriating the funding and other resources required to implement the new legislation.

The U.S. parliament honors the agreement, and the judicial power’s burden of implementing new legislation has been considerably diminished as a result. On occasion, the parliament has delayed the effective date to allow the judicial system additional time to prepare for the implementation, leading to a smoother transition.

Although the Ukrainian judicial power has not yet established such a formal agreement with the VRU, the Council leadership has discussed this need with members of VRU’s judicial system oversight committee.

⁹Such office would be staffed with a small number of experienced professionals such as former VRU staff with legislative drafting experience. Their primary function would be to assist the Council in preparing and shepherding proposed legislation through the process of having it considered and approved.

RECOMMENDATION: THAT THE COUNCIL AND SJA JOINTLY NEGOTIATE WITH THE VRU FOR A FORMAL AGREEMENT ENABLING THE JUDICIARY TO REVIEW PENDING LEGISLATION AND, WHERE APPROPRIATE, PREPARE *LEGISLATIVE IMPACT STATEMENTS* WHICH OUTLINE THE PREPARATION TIME, FUNDING AND OTHER RESOURCES REQUIRED FOR ITS IMPLEMENTATION

DO THE COURTS HAVE THE AUTHORITY TO COLLECT AND RECEIPT FEES PAYABLE TO THEM?

In the U.S., all general jurisdiction and specialized courts at the trial and appellate levels have the authority and responsibility to collect and account for fees payable to the courts. The fees are accounted for, then deposited with the branch offices of the federal treasury utilizing a rigorous system of internal controls and audit procedures to ensure the integrity of the process. Court customers or clients are able to transact their business in one convenient visit. This system has been in place for decades and continues to work well with virtually no losses or unaccounted funds.

By contrast, courts in the Ukraine do not have the authority to collect fees payable for various court services. Citizens in need of court services, once they have submitted their documents, are obliged to leave the courthouse and pay the prescribed fees at a local bank, post office, or other government-authorized location. They then return to the court a second time to submit the receipt as evidence of fees paid. Although this was once a common practice in court systems in many countries, it is gradually being abandoned because of (i) inconvenience to the bar and the public, (ii) errors in the computation of fees by inexperienced litigants,¹⁰ and (iii) presentation of fraudulent or counterfeit receipts. Such counterfeit receipts are prepared using sophisticated electronic publishing computer applications, and their frequency is likely to increase when the substantially higher court fees goes into effect in 2012, resulting in revenue losses for the courts. As an independent power, a judicial system should have the authority and be entrusted with the responsibility to collect and account for fees for its services. Where the government entrusts the courts with the administration of justice in all matters under law, including the most complex financial cases involving millions of Hryvna, it should also entrust the courts with collecting and accounting for their fees. Moreover, now that the court system is authorized to retain fees collected for various services it provides to fund court operations, the most efficient means for accounting for and processing those fees would be for the courts to collect them and deposit them in a special government account under its control rather than having all fees travel the cumbersome journey of being collected at a bank, transferred to a central Finance Ministry account, then transferred to an SJA-controlled account.

¹⁰ This points to an issue in service to the public. Ideally, court staff at the register desk should make themselves available to assist litigants with the fee-computation process to ensure against errors. This should be considered a basic public service that all courts should provide to all litigants who require it.

RECOMMENDATION: THAT THE COUNCIL AND THE SJA SEEKA DELEGATION OF AUTHORITY AND RESPONSIBILITY FROM THE VRU TO THE JUDICIAL SYSTEM FOR THE COLLECTION AND RECEIPTING OF COURT FEES

DO COURTS HAVE THE AUTHORITY TO ADMINISTER AND ACCOUNT FOR THEIR OWN BUDGETS:

In the federal courts of the U.S., each court receives an annual budget. Under the oversight of the chief judge, the chief of staff or administrator is authorized to expend funds for the procurement of goods and services required to facilitate court operations. Court budgets cover most categories of expenditures, including all staff salaries. The AOUSC retains control over certain categories such as judges' salaries and benefits, major building construction and renovation projects, etc. Chief judges and administrators are accountable for their budgets, and a rigorous set of regulations and procedures govern budget administration. Because individual courts control their own budgets, they have significant independence and flexibility to plan for and schedule the acquisition of goods and services required for their functions.

In the Ukraine, all commercial and administrative courts at the trial and appellate levels are authorized and staffed to manage their own budgets and to exercise procurement authority. This same authority extends to the Supreme Court, all high courts, and all intermediate appeals courts. The only segment of the court system to which this budget and financial management authority is not extended is the general jurisdiction district courts. Their budgets are managed for them by the regional SJA offices.

If, for example, the chief of staff in one of Kyiv's large metropolitan district courts experiences an unrecoverable error on the hard drive of his Dell computer, causing it to crash, he has no authority to dispatch a staff member to the nearest Dell component outlet to pick up a new hard drive. Instead, staff are required to prepare and submit to their court's assigned regional SJA office a written request with justification for a new hard drive. The local SJA office responds by preparing the purchase order for acquisition of the hard drive and transmitting it to the computer parts and services vendor. The time it takes the SJA and the vendor to respond to the court's request depends on the workload traffic from the other courts both serve. It may take a day; it may take a week.¹¹ The courts have no control over the response time, although the SJA office tries to respond promptly to requests.

This same sequence must be followed by all general jurisdiction district courts for the acquisition of virtually all goods and services. These courts have no discretionary funds or budgets of their own even for the acquisition of consumable supplies such as pencils,

¹¹ The head of the Budget Department of the Kyiv City SJA office noted that the computer parts and services vendor that handles the needs of all ten general jurisdiction district courts in Kyiv City has only two full-time employees. The vendor was selected through a competitive bidding process as the low bidder. With only two employees to handle the needs of ten busy urban trial courts, it is no surprise that this particular vendor was awarded the contract. Whether award of the contract entailed any conditions such as delivery of services or products within specified time frames is unclear.

paper clips, toner cartridges, and bathroom supplies. Everything, from the acquisition of blank CDs to the contracting of repair services for plumbing must be routed through the assigned regional SJA office, regardless of cost. In their business planning as well as in their responses to urgent and emergency matters, chief judges, judges, chiefs of staff and all other court staff must include as a factor the inevitable delay entailed by being required to procure products and services through and with the approval of their regional SJA office.

Chief judges and chiefs of staff agree that having independent financial management and budgeting authority and responsibility were highly desirable options that would increase their operating and planning efficiency. There may be small and remote courts in Ukraine's system whose budget and financial management workload do not suffice to justify the allocation of additional staff for whom the regional SJA offices could continue to provide such services. However, for the majority of general jurisdiction district courts, one or more additional finance/budgeting staff may be required. Transferring accounting positions at the regional SJA offices to the affected district courts could largely mitigate the expense of such positions. Those who remain at the regional SJA offices would service the small and remote courts.

RECOMMENDATION: THAT THE CENTRAL SJA INITIATE A PILOT PROGRAM TO DELEGATE FINANCIAL MANAGEMENT AND BUDGETING AUTHORITY FROM THE REGIONAL SJA OFFICES TO THE LARGER GENERAL JURISDICTION DISTRICT COURTS. KYIV CITY MAY BE AN IDEAL LOCATION FOR EMBARKING UPON SUCH A PILOT PROGRAM.

APPROXIMATELY WHAT PERCENTAGE OF COURT BUDGETS ARE EXPENDED ON ARE EXPENDED ON POSTAGE COSTS: In the U.S. federal courts, the percentage of court budgets that is expended for postage has fallen dramatically over the past 15 years as electronic communication and noticing protocols have replaced traditional paper-based protocols that required significant quantities of mail. In today's federal courts most documents, notices, judgments, and other official communications are transmitted electronically rather than by the postal service. As a consequence, postage costs comprise a very small proportion of court budgets.

Discussions with SJA officials indicate that the general jurisdiction district courts on average expend approximately 12% of their limited budgets for postage costs. Personnel compensation costs consume approximately 80%, leaving 8% to cover the costs for all other goods, services, and capital expenditures incurred during the year. If postal costs could be reduced even by two or three percentage points, the judicial power would be able to divert those funds to other underfunded areas of court operations.

Collectively, the general jurisdiction district courts generate substantial operating revenue for the Ukrainian postal service. They are among the postal services' most reliable and consistent customers with the enormous amount of mail they generate throughout the calendar year. Factoring in what the specialized district courts, the appeals courts, the high courts, and the Supreme Court expend for postage creates a

major customer base for the postal service; with growth in caseloads, that customer base continues to grow. That large business notwithstanding, courts are charged the same amount per item mailed, as are occasional individual users of postal services, which provide only a trickle of revenue for the court.

It is not clear whether the court system is required to utilize the national postal service for the distribution of notices, summons, and other official mail. If it is not required to do so under law, then the SJA might consider exploring whether the cost of services offered by competing private sector companies that specialize in the distribution of commercial-sector communication is competitive with or lower than the costs charged by the postal service. In the larger cities, for example, there may be mail distribution companies that serve the private sector at a competitive cost. In the Republic of Georgia, the judicial power is implementing criminal jury trials, which entails mailing large numbers of summons forms to prospective jurors throughout the country. Because the government postal service in Georgia is costly, inefficient, and not always reliable, the Georgian courts explored the option of using a private-sector courier service. They eventually contracted with the private sector company to distribute juror communications. Even though the per item cost was slightly higher than that charged by the government's postal service, the company guaranteed delivery to a high percentage of the intended recipients within a short time frame – much higher than the postal service was willing to guarantee. This is an option the SJA might pursue.

The SJA also should also explore negotiating discounts with the postal service for the enormous and consistent quantities of mail the courts generate. This is a standard procedure when private sector companies negotiate prices with each other; the greater the amount of reliable business the buyer can promise, the more willing the seller is to discount the cost of goods and/or services. In the U.S., the postal service offers large discounts to mass mailers. Several years ago while conducting a court administration assessment of the Serbian court system, the author recommended that the Serbian Ministry of Justice negotiate with the postal service on behalf of the courts for discounted services, given the millions of Euros they were paying every year for registered mailing costs. The postal service agreed to the negotiations because it was concerned that the Justice Ministry might contract with a private sector service, resulting in substantial revenue losses in the postal service. Eventually the postal services agreed to a discounted rate for the courts, resulting over time in significant savings.

RECOMMENDATION: THAT THE SJA

- **EXPLORE WHAT OTHER PRIVATE SECTOR COURIER SERVICES ARE AVAILABLE NATIONALLY, REGIONALLY, AND IN MAJOR METROPOLITAN AREAS AT PRICES THAT ARE COMPETITIVE WITH OR LOWER THAN THOSE OF THE POSTAL SERVICE, AND**
- **APPROACH POSTAL SERVICE OFFICIALS ABOUT NEGOTIATING DISCOUNTED COSTS BASED ON THE ENORMOUS QUANTITY OF BUSINESS THE COURTS GENERATE FOR THEM**

3. CONCLUSIONS

In spite of its limited scope, this paper has identified a huge number of critical budgeting factors impairing Ukraine's efficient court operations. Many of the changes suggested in this report have been designed as long-term goals for the judiciary, given the need to introduce changes to the legislation, and consideration should be given to them as part of any strategic planning efforts undertaken by the judiciary. However, there are several recommendations which the Council of Judges jointly with the State Judicial Administration may work to implement without any legislative changes. We recommend that FAIR jointly with the SJA and the COJ review these recommendations and if appropriate, explore the possibility to launch pilot programs in order to test their viability and efficiency.