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# EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW (VENICE COMMISSION)

# COMPILATION OF VENICE COMMISSION OPINIONS AND REPORTS RELATING TO QUALIFIED MAJORITIES AND ANTI-DEADLOCK MECHANISMS

# IN RELATION TO THE ELECTION BY PARLIAMENT OF CONSTITUTIONAL COURT JUDGES, PROSECUTORS GENERAL, MEMBERS OF SUPREME PROSECUTORIAL AND JUDICIAL COUNCILS AND THE OMBUDSMAN

*This document will be updated regularly. This version covers opinions and reports/studies adopted up to and including the Venice Commission's 136th Plenary Session (6-7 October 2023).*

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## I. INTRODUCTION

The present document is a compilation of extracts taken from opinions and reports/studies adopted by the Venice Commission on issues concerning qualified majorities and anti-deadlock mechanisms. Its aim is to give an overview of the doctrine of the Venice Commission in this field.

This compilation is intended to serve as a source of reference primarily for drafters of constitutions and of legislation relating to its subject-matter, researchers as well as the Venice Commission's members, who are requested to prepare opinions and reports on such texts. When referring to elements contained in this compilation, please cite the original document but not the compilation as such.

This compilation is structured in a thematic manner in order to facilitate access to the topics dealt with by the Venice Commission over the years in this area. It should not, however, prevent members of the Venice Commission from introducing new points of view or diverge from earlier ones, if there is a good reason for doing so. The compilation should be considered as merely a frame of reference.

The Venice Commission's reports and studies quoted in this compilation seek to present general standards for all member and observer states of the Venice Commission. Recommendations made in the reports and studies will therefore be of a more general application, although the specificity of national/local situations is an important factor and should be taken into account adequately.

Both the brief extracts from opinions and reports/studies presented here must be seen in the context of the original text adopted by the Venice Commission from which it has been taken. Each citation therefore has a reference that sets out its exact position in the opinion or report/study (paragraph number, page number for older opinions), which allows the reader to find it in the corresponding opinion or report/study.

The compilation is not a static document and will be regularly updated with extracts of recently adopted opinions and reports/studies by the Venice Commission. The Secretariat will be grateful for suggestions on how to improve this draft compilation (venice@coe.int).

## II. GENERAL

47. "The Venice Commission wishes to emphasize once more the importance of the principle of loyal cooperation among state institutions in resolving the present political and constitutional crisis […]. The crisis cannot be resolved through constitutionally problematic amendments to an ordinary law. Not all the details in the procedure of forming the government can be legally regulated, but much must be left to constitutional conventions. However, these can only develop through observance of the principle of loyal cooperation. If additional legal provisions are needed, they should not be adopted by a simple parliamentary majority, but by a qualified majority, and through an inclusive process that gives room for a public debate. Yet, again, reaching a qualified majority requires adherence to the principle of loyal cooperation. If on the one hand, these provisions of the Law may be considered a pragmatic attempt to complement the lacunae in the Constitution in a manner that would facilitate the formation of a government, on the other hand, the procedural boundaries for constitutional revision must be respected."

53. "While the Commission acknowledges that the Constitution would benefit from additional regulation on the formation of government, in particular to prevent deadlocks, and understands that the law under consideration represents a pragmatic attempt to solve the institutional impasse, it reiterates that any complementary provisions which affect the system of checks and

balances foreseen by the Constitution should be added by means of constitutional revision, following the procedure described in Art. 156 which requires a qualified majority."

CDL-AD(2022)053 Montenegro – Urgent Opinion on the law on amendments to the Law on the President

34. […] Only the constituent power, often Parliament with a qualified majority or other reinforced procedure, can establish a new framework that will be binding also on the Constitutional Court, through the constitutionally-established procedures for enacting constitutional amendments.

CDL-AD(2020)039 Ukraine - Urgent opinion on the Reform of the Constitutional Court

67. For the Commission, substantive judicial review of constitutional amendments should only be exercised in those countries where it already follows from clear and established doctrine, and even there with care, allowing a margin of appreciation for the constitutional legislator. As long as the special requirements for constitutional amendment, such as qualified majority of the elected representatives in parliament, as well as other procedural requirements are followed and respected these are and should be a sufficient guarantee against abuse. Amendments adopted following such procedures will in general enjoy a very high degree of democratic legitimacy, which a court should be extremely reluctant to overrule.

CDL-AD(2020)016 Armenia - Opinion on three legal questions in the context of draft constitutional amendments concerning the mandate of the judges of the Constitutional Court

11. "Institutions that cannot function do not fulfil their constitutional purpose and give bad name to democracy. So it is crucial to have anti-deadlock mechanisms.

12. Thus, the Commission stressed the importance of providing for qualified majorities, but warned about the risk of stalemates and recommended to devise effective and solid anti-deadlock mechanisms, giving some examples of possible options.

13. The Commission has previously underlined that qualified majorities strengthen the position of the parliamentary minority, by giving them the negative power to block decisions: "Parliamentary rules on qualified majority […] constitute an instrument that may effectively and legitimately protect opposition and minority interests, both when it comes to procedural participation, powers of supervision and certain particularly important decisions. At the same time, this is an instrument that restricts the power of the democratically elected majority, and which should therefore be used with care, and tailored specifically to the national constitutional and political context."

14. The Commission also found that "the more formal rights and competences the opposition (minority) is given within a constitutional and parliamentary system, the greater the responsibility of the same opposition not to misuse these powers, but to conduct their opposition in a way loyal to the basic system and the idea of legitimate and efficient democratic majority rule. This, however, is not an issue that can be legally regulated, or perceived as any form of formal "responsibility", but is rather to be seen as a political and moral obligation."

15. Anti-deadlock mechanisms have to discourage the opposition from behaving irresponsibly but should not create opportunities for the majority by impossible proposals to lead to the necessity for the application of such mechanisms. This is why they should be limited in time and, while avoiding permanent blockages they should not aim at avoiding any blockage at all, which can be an expression of the need for political change."

17. “It is true that boycott of parliament by the opposition may frustrate the very intention to provide protection to the opposition itself and lead to the paralysis or dysfunction of the state institutions. The Venice Commission has previously expressed the view that “In principle, the opposition should express its views in the parliament and a boycott is justified only exceptionally.” The Commission nevertheless considered that for processes such as the amendment of the Constitution which require the broadest political support, “even if the ruling coalition has the necessary number of votes in the Parliament to pass the amendments, it does not absolve the Government from conducting a genuine all-inclusive debate”.

18. One thing is ruling the country in government – which is the job of the majority elected by the people – another thing is changing the fundamental principles of the Constitution which requires the broadest support of a wide number of social and political actors from the majority and the opposition alike. The same can be said in relation to all safeguards procedures and institutions, included the Judicial Council. In a Constitutional state, democracy cannot be reduced to the rule of the majority, but encompasses as well guarantee measures for the opposition.

19. The Venice Commission is of the view that difficulty of reaching a qualified majority and the ensuing risk of paralysis of dysfunction of an institution – in particular “safeguard institutions” - should not lead to abandon the requirement of a qualified majority but rather to devise tailor-made, effective deadlock-breaking mechanisms. A balance needs to be found between the superior state interest of the preservation of the functioning of the institutions and the democratic exigency that these institutions should be balanced and should not be merely dominated by the ruling majority. In other words, the supreme state interest lies in the preservation of the institutions of the democratic state.”

> CDL-AD(2018)015 Montenegro - Opinion on the draft law on amendments to the Lax on the Judicial Council and Judges of Montenegro

## III. CONSTITUTIONAL COURT JUDGES

58. “Considering the mandate of the AGE [the Advisory Group of Experts], the general rule for decision should be “by consensus”. The draft law “On the Constitutional Court” provides that decisions are taken by four votes. It does not envisage a solution in cases where the AGE cannot reach a decision. If the AGE fails to identify at least three candidates to submit to the appointing bodies, the whole procedure is to be repeated (Article 107- 4 of the draft law “On the Constitutional Court”).

59. In the Commission’s view, given the importance of filling the CCU vacancies in a timely manner, the draft amendments should contain an anti-deadlock mechanism. The Venice Commission is aware of the difficulty of designing appropriate and effective anti-deadlock mechanisms for which there is no single model. Each state has to devise its own formula. However, it is essential to provide for one.”

67. “The Venice Commission recalls that a qualified majority aims to ensure that a broad agreement is found in Parliament, as it requires the majority to seek a compromise with the minority. For this reason, a qualified majority is normally required in the most sensitive areas, notably in the elections of office holders in state institutions. In its 2015 Opinion on the Proposed Amendments to the Constitution of Ukraine, the Venice Commission also recommended introducing a qualified majority for the election of the CCU judges by Parliament. That recommendation, however, was not taken up. The Commission wishes to underline and reiterate the importance of such a constitutional amendment, even though it

is aware of the difficulties that achieving such a majority could raise in the current exceptional situation."

> CDL-AD(2022)054 Opinion on the draft law "on amending some legislative acts of Ukraine regarding improving procedure for selecting candidate judges of the Constitutional Court of Ukraine on a competitive basis"

73. "The amended Constitution changes the method of election of judges of the Constitutional Court. Previously, six judges were appointed by the President of the Republic and six were elected by the Council of the Republic .Pursuant to the revised Article 116 § 3, all the judges of the Constitutional Court will be elected and dismissed by the ABPA [All-Belarusian People's Assembly] based on the proposal of the President of the Republic preliminarily agreed with the Presidium of the ABPA; the same procedure applies to the election and dismissal of the President and the Vice-President of the Constitutional Court (Article $89_3$ (9)). In the light of the misgivings about the composition and the legitimacy of the ABPA and the leading role which is likely to be played by the President in this institution (see above), it is doubtful that such a manner of electing the judges of the Constitutional Court and its leadership will ensure their independence. Even in countries where the judges of the Constitutional Court are elected by Parliament, the Venice Commission recommended that their election should be made by a qualified majority with a mechanism against deadlocks. The Commission has also stated that while the "parliament-only" model provides for high democratic legitimacy, appointment of the constitutional judges by different state institutions has the advantage of shielding the appointment of a part of the members from political actors […].

> CDL-AD(2022)035 Belarus - Final Opinion on the Constitutional Reform

49. "The revised text has failed to take into account the Commission's 'regret' that this opportunity for constitutional revision has not been seized to introduce: (a) the need for a qualified majority vote in the National Assembly for the election of constitutional court judges, and (b) an adequate anti-deadlock mechanism (see para. 96). The Venice Commission wishes to reiterate the importance of such changes."

> CDL-AD(2021)048 Serbia - Urgent opinion on the revised draft constitutional amendments on the judiciary

96. "With regard to those members of the Constitutional Court who are appointed by the National Assembly, it is regrettable that this opportunity for constitutional revision has not been seized to introduce: (a) the need for a qualified majority vote in the National Assembly, and (b) an adequate anti-deadlock mechanism. The Venice Commission has previously indicated that a qualified majority should be required in all rounds of voting. Similarly, the Venice Commission has repeatedly stressed the importance of providing for anti-deadlock mechanisms in order to ensure the functioning of state institutions. From a comparative perspective, the Venice Commission recommends the introduction of a qualified majority for the election of the candidates for the position of Constitutional Court judges together with appropriate anti-deadlock mechanisms."

> CDL-AD(2021)032 Serbia - Opinion on the draft constitutional amendments on the judiciary and draft Constitutional Law for the implementation of the constitutional amendments

97. "Article 70(4) read together with Article 80(3) provide that upon nomination of the Judicial Council the President of the Republic proposes the candidates to the Jogorku Kenesh, which elects them by at least half of the total number of deputies. It would be advisable for the Draft Constitution to ensure the inclusion of a broad political spectrum in this procedure and provide for a vote by a qualified majority, with a suitable anti-deadlock mechanism. […] As

to the dismissal of Constitutional Court judges, Article 70(4)(2) provides that upon nomination by the Judicial Council, the President submits to the Jogorku Kenesh the names of the Constitutional Court judges (and Supreme Court judges) for dismissal, which may occur by reason of lack of "irreproachability" (Article 96(2)). As mentioned above, this vague and broad ground for dismissal raises serious concerns and could potentially be abused in order to remove individual Constitutional Court judges. Indeed, as stated by the Venice Commission, "unless grounds for early dismissal are clearly and strictly defined in other legislation, the respective provisions may jeopardize judges' security of tenure, and the independence of the judiciary in general". **It is recommended to review the modalities for the dismissal of Constitutional Court judges to limit the potential influence of political considerations or abuse by the President and/or the Jogorku Kenesh, for instance by considering other modalities such as the decision of at least two-thirds of the total number of judges of the Constitutional Court itself**.[…]."

> CDL-AD(2021)007 Joint Opinion of the OSCE/ODIHR and the Venice Commission on the Draft Constitution of the Kyrgyz Republic

72. "In its opinion on the draft constitution in 2015, the Venice Commission had also recommended to introduce an election of the judges on the parliamentary quota with a qualified majority. That recommendation has not been taken up. The Commission repeats it, hoping that it can be considered in the framework of a future constitutional amendment."

105. "In order to depoliticise the composition of the Constitutional Court, the judges on the parliamentary quota should be elected with a qualified majority. For this, a constitutional amendment would be required at a later stage."

> CDL-AD(2020)039 Ukraine - Urgent opinion on the Reform of the Constitutional Court

116. "The Venice Commission indeed regularly recommends establishing mechanisms which help to ensure a balanced composition of constitutional courts. In its 1997 Report, the Commission explained what it means by pluralism: "Constitutional justice must, by its composition, guarantee independence with regard to different interest groups and contribute towards the establishment of a body of jurisprudence which is mindful of this pluralism." Here, the emphasis is on the independence of the judges and their respect for pluralism, not their "representation" of party interests."

9. "In its 2015 Second Opinion on the draft amendments to the Constitution of the Republic of Armenia, the Venice Commission considered that the introduction of the new requirement of a qualified majority of at least three-fifths of the total number of votes of the parliamentarians for the election of Constitutional Court judges was highly welcome. This amendment indeed followed a previous recommendation of the Commission in its first opinion on the draft constitutional amendments. The Commission considered that with the requirement of qualified majority for the appointment of constitutional court judges, both the majority and the opposition will propose highly qualified candidates which are acceptable for the other side."

34. "Regarding specifically the judges of the Constitutional Court, the introduction of the new requirement of a qualified majority of three-fifths of the total number of votes for their election by parliament is aimed at ensuring that the ruling majority is not in a position to control the appointments. It thus shields the constitutional judges from the influence of the political majority. […]."

45. "The Venice Commission reiterates that Chapter 7 of the Constitution introduced by the 2015 amendments is aimed at establishing the highest level of independence and impartiality possible in a democratic system governed by the rule of law, concerning particularly the status and procedure for election of constitutional judges. The requirement of a qualified majority of

three-fifths in parliament for their election, and the exclusion of the possibility of their re-election, are undoubtedly important safeguards that guarantee the independence of constitutional judges. In particular, those safeguards are aimed at ensuring that the ruling majority of the day is not in a position to control the appointments and as a result, has not the ultimate authority on the composition of the Constitutional Court."

> CDL-AD(2020)016 Armenia - Opinion on three legal questions in the context of draft constitutional amendments concerning the mandate of the judges of the Constitutional Court

9. "The competence to select the candidates is given to the Justice Appointments Council (JAC).

10. Election by the Assembly is by a qualified majority of three-fifths, and an anti-deadlock mechanism is provided at the constitutional level: if the Assembly fails to choose between the three candidates ranked highest by the JAC within 30 days of the submission of the list, the first ranked candidate is deemed appointed.

11. An anti-deadlock mechanism for appointments by the President and by the High Court was introduced by the amendments to the Law on the Constitutional Court in October 2016: Article 7.b/4 provides in respect of the appointment by the President that: "4. The President shall, within 30 days of receiving the list from the Justice Appointments Council, appoint the member of the Constitutional Court from the candidates ranked on the three first positions of the list. The appointment decree shall be announced, associated with the reasons of selection of the candidate. Where the President does not appoint a judge within 30 days of submission of the list by the Justice Appointments Council, the candidate ranked first shall be considered as appointed."

12. Article 7/ç provides in respect of election by the High Court: "For each vacancy, it shall be voted for each of the candidates ranked in the top three places of the list. The candidate obtaining 3/5 of the votes of the present judges shall be declared elected. Where no necessary majority is attained, the candidate ranked first by the Justice Appointments Council shall be considered elected."

95. "The Venice Commission is now called to give its own interpretation of this procedural incident, which resulted in two judges being arguably appointed – one by the President, the other by default on the President's quota – to the same vacancy. This interpretation has to be seen within the context of the constitutional mechanism of appointment of constitutional justices as a whole. The Commission will thus provide its interpretation of the relevant constitutional provisions in force so that the current situation of deadlock may be overcome, but it will also formulate some recommendations on how to avoid similar incidents in the long term. In the Commission's view, as already explained before, in theory the model of appointment of Constitutional Court judges set up by the Constitution and the Law on the Constitutional Court entails the application of the sequence only at the moment of the allocation of the vacancies, upon the opening of each round of appointments. In a given 'round' it depends which vacancy happens to come up first when deciding whether it should be allocated to the President, the Assembly or the High Court. The Chairman of the Constitutional Court allocates the vacancies in the chronological order and in the order of the sequence. Once the vacancies have been allocated, the sequence does not require activation until the next round, that is until the year of expiry of the next three mandates. The ensuing appointing procedures may be carried out autonomously by each appointing authority. There should be three procedures every three years, one per appointing authority. There is no clear regulation on the application of the sequencing rule in case there were, on account of early termination of mandates, more than three procedures and two rounds of appointments would overlap. But if there is no interconnection among these procedures, in principle the JAC could send as many lists as there

exist to each appointing authority, on different dates, and both the President and the Assembly (and the High Court, for that matter) could proceed to as many appointments as necessary.

96. However, the above model is based on the assumption that each procedure is autonomous: each appointing authority opens the vacancy and receives its own candidatures, which the JAC subsequently selects and ranks; as a result, each vacancy list should be autonomous from the others, and count at least three candidates (different from the three candidates of the lists of the other appointing authority). In the case in point, instead, as a result of a shortage of candidates (for all the reasons identified above), the lists for the President's appointments and those for the Assembly's appointments were made up largely of the same candidates. This amounted de facto to a pool of 6 candidates for four positions. In these conditions, as well as in view of the fact that overlapping procedures have not been explicitly regulated, it does not seem unreasonable for the President to deem to have to respect the order of the sequence also for the actual choice of the candidate: if the sequence exists, it must have a bearing on the order of appointment from a single list. Furthermore, in such a situation the appointment by one authority has a direct bearing on the appointments of the other authority as it changes the composition of the list of candidates at the disposal of the respective appointing body. Furthermore, had the President chosen two candidates, the Assembly would have disposed of a list of less than the minimum three candidates required by the Constitution. Reservations on account of this perspective do not seem unjustified. The President's conduct in this respect does not therefore appear to justify his impeachment. Finally, the candidate chosen by the President had become one of the first three on the JAC list, following the election by the Assembly of candidate number 3 on the list."

> CDL-AD(2020)010 Albania - Opinion on the appointment of judges to the Constitutional Court

74. "Three judges of the Constitutional Court (9 judges in total) shall be elected by a majority of the total members of Parliament. It would be advisable if the draft would provide for the inclusion of a broad political spectrum in the nominating procedure. It is recommended to provide for a qualified majority for the appointment of the three judges elected by Parliament. A suitable dead-lock breaking mechanism could also be introduced in the appointment procedure of constitutional judges by the Parliament. The procedure before the election has to be as transparent as possible in order to ensure a high professional level of the constitutional judges"

> CDL-AD(2017)013 Opinion on the draft revised Constitution of Georgia

57. "Another issue in comparative terms is the majority required for the election of the judges. While in the Slovak Republic and some other countries the judges are elected by a simple majority in Parliament, an election of constitutional judges by qualified majority allows depoliticisation of the process of the judges' election, because it requires that the opposition also has a significant position in the selection process. It is true that a qualified majority can lead to a stalemate between majority and opposition but this can be overcome through specific anti-deadlock mechanisms.

58. From a comparative perspective, the Venice Commission recommends considering the introduction of a qualified majority for the election of the candidates for the position of Constitutional Court judges in the Slovak Republic together with appropriate anti-deadlock mechanisms."

> CDL-AD(2017)001 Opinion on Questions Relating to the Appointment of Judges of the Constitutional Court of Slovak Republic

37. "…, the election of three constitutional judges by the Parliament with the ordinary majority (compare Article 125 with Article 78 p. 1 of the Constitution) deserves attention. In the European constitutional experience, the election by parliament of constitutional judges is often supported by the requirement of a qualified majority in view of ensuring a choice shared by a pluralistic support of political parties, and not by the majority only. This is particularly important when the President and the Parliament are of the same political color and may appoint 2/3rds of judges synchronically. In normal circumstances this risk is not very high, given the transitional provisions on the gradual replacement of the sitting CC judges (see Article 179 p. 1)…"

> CDL-AD(2016)009 Final Opinion on the Revised Draft Constitutional Amendments on the Judiciary of Albania

140. "While it is obviously not a good moment, under the present circumstances, to discuss reform of the Constitution and possible amendments, the Venice Commission nonetheless recommends that the Constitution be amended in the long run to introduce a qualified majority for the election of the Constitutional Tribunal judges by the Sejm, combined with an effective anti-deadlock mechanism.

141. A valid alternative would be to introduce a system by which a third of the judges of the Constitutional Tribunal are each appointed / elected by three State powers – the President of Poland, Parliament and the Judiciary. Of course, even in such a system, it would be important for the parliamentary component to be elected by a qualified majority."

> CDL-AD(2016)001 Opinion on amendments to the Act of 25 June 2015 on the Constitutional Tribunal of Poland

162. "However, it has to be ensured that the governmental majority cannot alone elect the judges. Various means are available in order to ensure this. The most frequent is a high qualified majority, e.g. two thirds. The idea is that both majority and opposition will propose highly qualified candidates which are acceptable for the other side. Admittedly, this can lead to a trade-off, both side accepting also less qualified candidates in exchange for acceptance of their own less qualified candidates. In some countries, the political culture is not developed enough to allow for compromise between majority and opposition and it is very hard to reach a two thirds majority. Anti-blocking measures can be introduced, like nominations of new candidates by neutral bodies, following several unsuccessful votes in Parliament."

> CDL-AD(2015)037 First Opinion on the Draft Amendments to the Constitution (Chapters 1 to 7 and 10) of the Republic of Armenia

25. "Article 148 does not provide that the 6 members appointed by the Verkhovna Rada are elected with a qualified majority. This possibility should be taken into consideration by the Ukrainian Constitutional Commission, as in Ukraine the President is not a politically neutral institution, and there could therefore arise a situation in which twelve judges are chosen by the same political majority, with no say of the opposition. The Venice Commission is nonetheless conscious of the difficulty of obtaining a qualified majority in the current political context in Ukraine."

> CDL-AD(2015)027 Opinion on the proposed amendments to the Constitution of Ukraine regarding the judiciary as approved by the Constitutional Commission on 4 September 2015

21. "Admittedly, it can be difficult to reach a qualified two-thirds majority and this may on occasion lead to deadlock, particularly where there is no culture of sufficient democratic compromise among the political forces. In order to avoid such situations, "anti-deadlock mechanisms", should be introduced, such as, for example, a lowering of the required majority

to three-fifths following the third unsuccessful vote, and/or the nomination of candidates by other neutral bodies after several unsuccessful votes."

CDL-AD(2015)024 Opinion on the Draft Institutional Law on the Constitutional Court of Tunisia

12-13. "Article 6 puts into effect the new constitutional rules dealing with the selection and election of constitutional judges. The President of Montenegro and the "responsible working body of the Parliament" (together referred to as "the proposers") issue a public call for the selection of candidates. […] The same person may be elected President or judge of the Constitutional Court only once. In the first voting in the Parliament, a Constitutional Court judge is elected by a two-thirds majority vote, and in the second voting by a three-fifths majority vote of all deputies. The President of the Constitutional Court is elected by the judges of the Constitutional Court from among their own number.

14-15. This mechanism guarantees good transparency and enhances public trust in the Constitutional Court but it could be further improved. The objective of the 2013 constitutional amendments was to ensure a balanced composition of the Constitutional Court. Therefore it is recommended that the Law on the Constitutional Court explicitly regulate the composition of the "competent working body of the Parliament" such that the representatives of all political parties are represented therein."

CDL-AD(2014)033 Opinion on the Draft Law on the Constitutional Court of Montenegro

20. "Pursuant to Article 10.3 of the draft Law, the Constitutional Court shall notify the proposer that nominated a judge for election six months before the expiry of the term of office of the judge or before the fulfilment of the conditions for receiving an old-age pension. In accordance with Article 154 of the Constitution, the draft Law regulates the reasons and procedure for the termination of judicial office (Articles 10-12), however, it does not regulate what the consequences are if a nominated candidate is not elected even in a repeated vote. In order to avoid a situation in which judicial positions are vacant due to the fact that new judges have not been elected, the law should explicitly provide that upon the expiry of the term for which a Constitutional Court judge has been elected, s/he continues to perform his/her office until the new judge takes up office."

CDL-AD(2014)033 Opinion on the Draft Law on the Constitutional Court of Montenegro

21. "Under the present Constitution, the judges of the Constitutional Court are elected and dismissed by parliament on the proposal of the President of the Republic, without any qualified majority, for a renewable term. In this respect, the Venice Commission had previously stated that this manner of election seriously undermined the independence of the constitutional court in that it did not secure a balanced composition of the court, and was not in line with international standards. The Venice Commission had therefore recommended that, if constitutional judges were to be elected by parliament, their election should be made by a two- third majority with a mechanism against deadlocks, and that the mandate of the constitutional judges should be non-renewable (CDL-AD(2007)047, §§ 122,123; CDL-AD(2012)024, § 35). The Commission had also stated that while the "parliament-only" model provides for high democratic legitimacy, appointment of the constitutional judges by different state institutions has the advantage of shielding the appointment of a part of the members from political actors (CDL-AD(2012)009, § 8).

22. Draft Article 153 provides for appointment and dismissal of constitutional judges by parliament on the proposal of the President of Montenegro (two candidates) and of the relevant committee of parliament (five candidates) by a two-thirds majority. The qualified majority requirement is welcome, as it has been strongly recommended by the Venice Commission.

23. As an anti-deadlock mechanism, a second-round of voting is proposed with two options: either a) by the majority of all MPs or b) by a three-fifths majority. The Venice Commission finds that the second option is clearly preferable, as the first option would provide no incentive for the majority to reach a compromise with the minority and would therefore leave room for the election of five members all belonging to the ruling parties."

> CDL-AD(2013)028 Opinion on the draft amendments to three constitutional provisions relating to the Constitutional Court, the Supreme State Prosecutor and the Judicial Council of Montenegro

24. "A qualified majority should be required in all rounds of voting in the election of members of the Court."

> CDL-AD(2011)040 Opinion on the law on the establishment and rules of procedure of the Constitutional Court of Turkey

27. "A system in which all judges of the Court are elected by parliament on the proposal of the President "does not secure a balanced composition of the Court". In particular, "if the President is coming from one of the majority parties, it is therefore likely that all judges of the Court will be favourable to the majority. An election of all judges of the Court by parliament would at least require a qualified majority". The Venice Commission has also pointed out that it would be preferable to leave the election of the President to the Court itself."

> CDL-AD(2011)010 Opinion on the draft amendments to the Constitution of Montenegro, as well as on the draft amendments to the law on Courts, the law on State's Prosecutor Office and the law on the Judicial Council of Montenegro

19. Especially due to the fact that Parliament elects the judges with a simple majority, the procedure before the election has to be as transparent as possible in order to ensure a high professional level of the judges."

> CDL-AD(2008)030 Opinion on the Draft Law on the Constitutional Court of Montenegro

18. "The changing of the composition of a Constitutional Court and the procedure for appointing judges to the Constitutional Court are among the most important and sensitive questions of constitutional adjudication and for the preservation of a credible system of the rule of constitutional law. It is necessary to ensure both the independence of the judges of the Constitutional Court and to involve different state organs and political forces into the appointment process so that the judges are seen as being more than the instrument of one or the other political force. This is the reason why, for example, the German Law on the Constitutional Court (the *Bundesverfassungsgerichtsgesetz)* provides for a procedure of electing the judges by a two-third majority in Parliament. This requirement is designed to ensure the agreement of the opposition party to any candidate for the position of a judge at the Constitutional Court. The German experience with this rule is very satisfactory. Much of the general respect which the German Constitutional Court enjoys is due to the broad-based appointment procedure for judges.

19. It would be advisable if the draft would provide for the inclusion of a broad political spectrum in the nominating procedure. So far, neither the Constitution nor the Law on the Constitutional Court provide for a qualified majority for the appointment of the two judges elected by Parliament."

> CDL-AD(2004)043 Opinion on the Proposal to Amend the Constitution of the Republic of Moldova (introduction of the individual complaint to the constitutional court)

## IV. PROSECUTOR GENERAL

115. “Article 105 para 3 of the Constitution provides that the National Assembly elects the PG and decides on the termination of his office by a three-fifths majority. There is a possibility that the National Assembly, for political reasons, decides not to approve the proposal of the HPC to dismiss the PG. [..].”

117. “The HPC’s proposal to dismiss the PG is made by a majority of seven votes (see Article 20, para. 2 of the draft Law on HPC). If such a vote is called for, the PG is excluded from the decision-making process (Article 56 para. 5 of the draft law on HPC). This means that the PG would not be dismissed unless all lay members, and at least three or more elective prosecutorial members of the HPC vote for it.

118. Experience in other countries has shown that it is not illusory for prosecutorial members to align their voting behaviour to that of the PG. The likelihood that they will in future become subordinated to the PG at the least gives rise to a concern that they may not be fully independent on such issues. A possible solution, as recommended above, is that to design appropriate rules and procedures which would reduce the potential abuse of influence of any one individual on other members, thus reducing the likelihood that all prosecutors act as a block.

119. One possible solution would be to reduce the decision-making majority in some situations. The Venice Commission recalls that under Article 163 of the Constitution, para. 2, the Minister of Justice should not vote in a procedure for determining disciplinary responsibility of a public prosecutor. This also arguably applies to the voting on the proposal to remove the PG on disciplinary grounds. The PG should also be excluded from voting on those matters, due to an evident conflict of interest. This leaves nine members of the HPC, which could then take a decision on bringing the PG to liability by a simple majority of five votes out of nine.”

> CDL-AD(2022)042 Serbia - Opinion on two draft Laws implementing the constitutional amendments on the prosecution service

15. “Article 12 of the revised draft (amending Article 15 2a of the existing law and establishing a “special majority” requirement) calls for another important remark. While it does not allow the prosecutorial members to govern alone (which is positive), at the same time, the mechanism of a “special majority” contains an inherent risk of blockages, if the Assembly-appointed members vote together and block certain decisions, including the decision to select a new Prosecutor General. Thus, it would be advisable to provide for an anti-deadlock mechanism for such cases, which would permit the KPC to take such decisions if the prosecutorial and lay members cannot find a compromise. The specific parameters of such an anti-deadlock mechanism could be identified by the legislator in dialogue with the international partners and main stakeholders.”

33. “The powers of the Prosecutor General in the disciplinary field are counter-balanced by the qualified majority requirement for the decision-making in disciplinary matters within the KPC, which is a useful addition.

> CDL-AD(2022)006 Kosovo - Opinion on the revised draft amendments to the Law on the Prosecutorial Council

83. “The Supreme Public Prosecutor shall be elected by the National Assembly (see draft Amendment II referring to Article 99 and draft Amendment XX referring to Article 158 of the Constitution) upon the proposal of the HPC following a public competition by a majority vote of three-fifths of all deputies. The draft Amendments should set out the possibility for the HPC to

nominate just one candidate for the post of Supreme Public Prosecutor to the National Assembly for validation/confirmation in order to depoliticise the appointment process as much as possible."

> CDL-AD(2021)032 Serbia - Opinion on the draft Constitutional Amendments on the Judiciary and draft Constitutional Law for the Implementation of the Constitutional Amendments

50. "Under the Constitution of Montenegro, the PG is elected by a qualified majority in Parliament, on the proposal of the PC. In 2019, when the term of mandate of the outgoing PG came to an end, the Parliament failed to elect a new one. The Constitution of Montenegro does not provide for an anti-deadlock mechanism for such cases. As a result, the outgoing PG has been performing his functions *ad interim*, on the basis of a decision of the PC, since 2019."

53. "It was reported that in May 2021 the outgoing (interim) PG would reach the retirement age and would have to vacate his position definitely. If no political agreement on the election of the new PG (or on a constitutional amendment introducing an anti-deadlock mechanism or another method of appointment of the PG), is reached by this time, the prosecution service will remain without leadership. This is a constitutional impasse, and while any solution to this problem proposed in a law adopted by a simple majority would be constitutionally questionable, a constitutionally compatible solution needs to be found, even if it is based on the Law of Necessity.*"*

55. "The Commission wishes to stress that these transitional arrangements do not represent a solution to the serious issue of the need to find a broad political agreement on the next Prosecutor General. It is a sign of maturity and responsibility on the part of the political class, both in government and in opposition, to be able to find consensus or agreements, including and in particular as to appointments of independent institutions and top political appointees. Broad political agreements are necessary in order for the state institutions to function in a democratic manner. The Venice Commission reiterates that the Constitution should contain an anti-deadlock mechanism which would motivate parliament to reach the qualified majority for the appointment of the Prosecutor General."

> CDL-AD(2021)030 Montenegro - Urgent Opinion on the revised draft amendments to the Law on the State Prosecution Service

10. "The prosecution service is headed by the PG. The status of the PG is regulated partly by the Constitution and partly by the Law on the SPS. Under the Constitution, the PG is elected by Parliament at the proposal of the Prosecutorial Council, by 2/3 majority of votes, for a five-years term. If the 2/3 majority cannot be reached on the candidate proposed by the Prosecutorial Council, Parliament may elect any candidate of appropriate qualifications by a 3/5 majority (Article 91). The Constitution is silent on what happens if this majority is not reached."

49. "The Venice Commission has previously recommended a qualified majority for the election of the PG, as a mechanism to achieve consensus on such appointments, and also recommended for the introduction of an anti-deadlock mechanism. Unfortunately, a political consensus about the next PG has not been achieved, and the Constitution of Montenegro does not provide for an anti-deadlock mechanism, so the outgoing PG has been performing this function *ad interim*, on the basis of the decision of the Prosecutorial Council, since 2019."

51. "It follows that it is unacceptable that a non-elected prosecutor should perform interim functions indefinitely. In the absence of an appropriate anti-deadlock mechanism provided for in the Constitution, the interim functions should be carried out by the outgoing PG until

the election of a new one. This solution is also likely to motivate Parliament to find a compromise as to the choice of the new PG.

52. Once an effective anti-deadlock mechanism is provided, an *ad interim* PG could be nominated. However, the duration of such interim appointment would have to be necessarily limited to the operation of the anti-deadlock mechanism. Two consecutive six-months terms, as currently foreseen in the draft law, is definitely too long, and would amount to circumventing the qualified majority requirement of the constitution, which is unacceptable.

53. In conclusion: pending the introduction in the Constitution of an appropriate anti-deadlock mechanism for the appointment of the PG, the law should be amended to provide that the outgoing PG will continue to exercise his functions *ad interim*. Once the anti-deadlock mechanism is introduced, the law may provide that an interim prosecutor be appointed, with the duration of his/her interim functions limited to the operation of the anti-deadlock mechanism."

> CDL-AD(2021)012 Montenegro - Opinion on the draft amendments to the Law on the State Prosecution Service and the draft law on the Prosecutor's Office for organised crime and corruption

39. "Article 65(2) of the new Constitution provides that the *"Prosecutor's Office shall be led by the Prosecutor General, who is elected for a six-year term upon nomination of the Prosecutorial Council".* But, Article 16(3) of the draft Law only provides that the Prosecutor General is elected by Parliament, without providing expressly that the election must be made upon nomination of the Prosecutorial Council. There is no such provision in any other Article of the draft Law. Even if there is an express provision in the new Constitution and some provisions in the draft Law that can also be interpreted in a way that Parliament may elect the Prosecutor General only upon nomination by the Prosecutorial Council – in order to avoid any misunderstanding, this should be provided expressly in Article 16(3).

40. Even if the choice is made to provide that the Prosecutorial Council shall nominate the candidate who has received the support of two-thirds of the full composition of the Prosecutorial Council, such an ambitious decision may lead to a deadlock and, therefore, consideration should be given to introducing an anti-deadlock mechanism. It may be necessary to gradually reduce the threshold for this vote following several unsuccessful voting rounds.

41. The rapporteurs were informed that in the latest amendments to this draft Law, Article 16(6) on the procedure and criteria for appointment to office of the Prosecutor General was amended as follows *"6. The Prosecutorial Council with appropriate justification shall present the selected candidate to the Parliament of Georgia. If the nominated candidate fails to obtain the required number of votes of the members of the Parliament of Georgia, the Prosecutor's Council will select other candidates by the procedure prescribed by paragraph 4 of this Article"* (changes in bold). These changes are welcome and for the Council to send an explanation with the recommendation of the candidate brings clarity to the process. Having the Council make another recommendation if the candidate does not get elected by Parliament goes some way to avoiding a deadlock and provides transparency on the manner in which the various bodies are expected to proceed."

> CDL-AD(2018)029 Georgia - Opinion on the provisions on the Prosecutorial Council in the draft Organic Law on the Prosecutor's Office and on the provisions on the High Council of Justice in the existing Organic Law on General Courts

83. "According to Article 65(2) of the draft revised Constitution, the Prosecutor General is elected for a six years term by a majority of the total members of the Parliament. The

requirement of a qualified majority in Parliament for the election of the Prosecutor General is recommended."

CDL-AD(2017)013 Opinion on the draft revised Constitution of Georgia

21. "The revised Draft Amendments provide for the positions of the High Justice Inspector (HJI) and Prosecutor General (PG). These office-holders cannot be elected through a proportionate system. There is no single model for their election; at the same time, it seems desirable that such important appointments should attract a high degree of consensus, and (if this is attainable) without compromising on the qualities of the successful candidate. However, it is difficult to see a principled argument for requiring a 2/3rds majority rather than a 3/5ths – again, this is more a political than a legal question."

CDL-AD(2016)009 Final Opinion on the revised draft constitutional amendments on the Judiciary (15 January 2016) of Albania

55. "Under Section 22.2.a ASPGPOPEPC the Prosecutor General will, after the expiry of his or her mandate, continue to exercise his powers until the beginning of the mandate of the new Prosecutor General."

57. "There is, however, a transition problem when the mandate of the Prosecutor General expires. Section 22.2.a ASPGPOPEPC means that 1/3 plus one member of Parliament can effectively keep him or her in office by blocking the election of a new Prosecutor General and they could thus extend his or her mandate indefinitely. It is not clear to what extent this question was considered in detail when the Fundamental Law and the ASPGPOPEPC were passed. However, the Fundamental Law lays down a long mandate of nine years of service for the Prosecutor General and it would seem unacceptable that a minority of the members of Parliament can in fact keep him or her in office indefinitely by creating a deadlock in the election of a successor."

59. "There may be various solutions. One possibility may be to prescribe a deadline - in the Fundamental Law or the ASPGPOPEPC - within which Parliament must have elected a new Prosecutor General. Another solution might be simply to repeal Section 22.2.a ASPGPOPEPC, so that the mandate of the Prosecutor General automatically expires after the termination of his or her mandate. Both solutions of course create the problem that there may be a period without a formally elected Prosecutor General but this may put the necessary pressure on Parliament to elect the successor. What needs to be avoided as well is that the same blocking 1/3 minority can indefinitely extend an interim period under the Deputy Prosecutor General, who was appointed by the outgoing Prosecutor General."

CDL-AD(2012)008 Opinion on Act CLXIII of 2011 on the Prosecution Service and Act CLXIV of 2011 on the Status of the Prosecutor General, Prosecutors and other Prosecution Employees and the Prosecution Career of Hungary

35. "No single, categorical principle can be formulated as to who - the president or Parliament - should appoint the Prosecutor General in a situation when he is not subordinated to the Government.[…] Advice on the professional qualification of candidates should be taken from relevant persons such as representatives of the legal community (including prosecutors) and of civil society.

36. In countries where the prosecutor general is elected by Parliament, the obvious danger of a politicisation of the appointment process could also be reduced by providing for the preparation of the election by a parliamentary committee, which should take into account the advice of experts. The use of a qualified majority for the election of a Prosecutor General could be seen as a mechanism to achieve consensus on such appointments. […]"

CDL-AD(2010)040 Report on European Standards as regards the Independence of the Judicial System: Part II - the Prosecution Service

108-109. "[…] [T]he system of subjecting the prosecution to political control is not in contrast with European standards. […] [T]he appointment of the Supreme State Prosecutor by parliament can be deemed acceptable, but it would have been necessary to require a qualified majority. […]

CDL-AD(2007)047 Opinion on the Constitution of Montenegro

## V. MEMBERS OF THE PROSECUTORIAL COUNCIL

17. "[…] As the composition of the HPC is fixed in the Constitution, and the PG will be elected by a qualified majority only in the future, it is extremely important that the rules on the election of the prosecutorial council, its powers as well as the nature of the hierarchical relations within the prosecution service are such as to allow to counter the risk of subordination to the prosecutorial component of the HPC to the PG. […]."

28. "The election of the lay members of the Council is regulated in Articles 43 et seq. The draft Law – in line with the constitutional amendments – contains certain key features: [..] (3) qualified majority voting in the National Assembly in order to reinforce the depoliticisation (Article 50), and (4) having in place an anti-deadlock mechanism to avoid stalemates (Article 51)."

36. "The Ministry of Justice proposed to modify the voting procedure in the JC. Thus, according to revised Article 49 new para. 2, each member of the JC will propose one candidate. The revised draft Law will make some further improvements as regards the transparency of the procedure before the National Assembly and in the procedure before the five-member Commission (which serves as an anti-deadlock mechanism if the National Assembly fails to elect the four members). The Ministry states that these additions are intended to give the opposition more say in the election of the lay members of the HPC. This is positive.

37. Most importantly, in the discussion with the rapporteurs the Ministry proposed providing that the JC should decide on the short-list of eight candidates with a majority of two thirds of votes of the JC members, so as to ensure the broadest political support of the candidates. If this majority is not reached in the first round, a second round will be held in which the list of eight candidates will have to be approved by a simple majority of votes.

38. The Venice Commission gives a cautious welcome to this initiative of the Serbian authorities. The JC is composed on a proportional basis of representatives of different political parties. Therefore, the requirement of a qualified majority will normally ensure that the candidates will have a significant cross-party support. This reduces the risk of a politically homogeneous lay component, which was the main concern for the Venice Commission in respect of both the HPC and the HJC.

40. "In sum, the Venice Commission welcomes the proposal by the Serbian authorities to (i) require a qualified majority in the JC, and to (ii) strengthen the (in)eligibility criteria, provided they are further elaborated in the Law as recommended by the Commission. This would address the concern about the dangers related to a politically homogenous lay component.

41. For the Venice Commission, the institutional design of the HPC should be such as to avoid two dangers: corporatism and politicisation. Heightened majorities in the decision-making of the Council ensure that neither prosecutors nor lay members can govern alone. However, the

same heightened majorities carry with them the risk of the inability of the Council to take any decision, if lay members always vote together, as a block, and the prosecutorial members do always the same, and the two components disagree amongst themselves. Therefore, it is necessary to increase pluralism within both components. Certain steps, described above, may help achieving this result and therefore avoid blockages. In particular, the legislator should increase the independence of prosecutorial members from the PG and ensure that the lay members represent different political currents."

66. "Decisions by the Council are ordinarily adopted "by a majority of eight votes" (Article 20, para 1). It is understood that this Article speaks of the majority, and not of the quorum. Such a heightened majority guarantees that decisions may only be adopted with support from both prosecutorial members as well as lay members. This ensures that neither of the two big groups can single-handedly control the Council. However, it also raises the risk of blockages in the work of the HPC, either because some members fail to attend the meeting of the Council or because the necessary majority for taking decisions is too high.

67. A way to combat absenteeism is to amend Article 54: the repeated absence of a member in the Council meetings without valid reasons should be a ground for the termination of his or her mandate, and this should be decided by a simple majority of members of the HPC. […]."

> CDL-AD(2022)042 Serbia - Opinion on two draft Laws implementing the constitutional amendments on the prosecution service, paragraphs 17, 28, 36-41 and 66-67; See also CDL-AD(2013)028 Opinion on the draft amendments to three constitutional provisions relating to the Constitutional Court, the Supreme State Prosecutor and the Judicial Council of Montenegro, § 8.

28. "[..] There are several models which may help avoiding politicisation of the KPC, summarised in a recent opinion on Montenegro.

29. The first model is to require that some (or all) lay members are elected by a qualified majority of votes. In theory, it might guarantee political neutrality of those lay members, assuming however that the ruling majority does not already have the required number of votes. Furthermore, an anti-deadlock mechanism would be needed to ensure that the members could be elected even if the necessary majority cannot be reached in the Parliament.

30. However, the Constitution of Kosovo sets out the limited number of cases in which the Assembly may vote by qualified majority. It follows that a constitutional amendment would be necessary to introduce the requirement of the election of the lay members by qualified majority."

> CDL-AD(2021)051 Kosovo - Opinion on the draft amendments to the Law on the prosecutorial Council of Kosovo

40. "[…] Where all lay members are elected by the Parliament, the Venice Commission recommended their election by a qualified majority or on the basis of a proportional system, in order to prevent political control of this body by the parliamentary majority."

46. "As regards the Ombudsperson, it is quite unusual for a defender of rights to participate in the governance of the prosecution system. It is questionable whether the functions of a member of the SCP are compatible with the Ombudsperson's mandate. Reportedly, in the Moldovan context, the Ombudsperson himself refused to participate in the work of the SCP. That being said, the Ombudsperson, as a politically neutral figure, may serve as an arbiter between the prosecutorial members and lay members affiliated with the Government, so his or her participation in a prosecutorial council may help avoiding deadlocks."

CDL-AD(2021)047 Republic of Moldova - Opinion on the amendments of 24 August 2021 to the law on the prosecution service

86. "The Venice Commission has previously stated that *"there is no European standard to the effect that members of a prosecutorial council cannot be elected by parliament"*. If members of such a council are elected by Parliament, this should preferably be done by a qualified majority. The Serbian proposals meet those parameters. […]."

CDL-AD(2021)032 Serbia - Opinion on the draft Constitutional Amendments on the Judiciary and draft Constitutional Law for the Implementation of the Constitutional Amendments

40. "In conclusion, as concerns the method of election of the lay members, the Venice Commission reiterates that it is necessary to ensure that the Prosecutorial Council should not be politicised. The Commission does not consider that election by parliament by simple majority is conducive to political neutrality or at least pluralism. While qualified majority or proportional voting systems do not appear as an acceptable final solution, as a transitional solution simple majority may be accepted only if it is coupled with additional solid guarantees."

44. "It would be worth considering that Parliament choose *all five candidates* from a list composed on the basis of the nominations made by the NGOs. But in this case, as recommended by the Venice Commission in an opinion on Georgia, [ …] and, (b) the election in Parliament should be done with a qualified majority of votes or on the basis of a proportional system.

45. The Venice Commission welcomes the efforts of the Montenegrin authorities to find a solution in line with European Standards. It encourages them to pursue the reflection. It reiterates that only when solid additional guarantees and safeguards are provided may a system of election by simple majority be acceptable, at least as a transitional solution."

CDL-AD(2021)030 Montenegro - Urgent Opinion on the revised draft amendments to the Law on the State Prosecution Service

37. "There are several possible ways to avert or at least reduce the risk of politicisation. In a previous opinion on Montenegro the Venice Commission advocated the requirement of a qualified majority to elect the lay members of the Prosecutorial Council. In theory, the qualified majority requirement should help to elect a candidate who enjoys the trust of different political forces and is therefore politically neutral. However, the qualified majority solution may present disadvantages. First of all, it may lead to political *quid pro quo*, when the votes given by the opposition in support of a majority candidate can be exchanged against some other concessions. If this is so, the qualified majority requirement will not necessarily reach its objective to ensure the election of a politically neutral figure. In addition, as the experience of Montenegro shows, it may be practically difficult to reach a political agreement. Thus, a qualified majority requirement should be associated with an effective anti-deadlock mechanism.

38. The Venice Commission has previously examined several such mechanisms. The Commission has expressed preference for a system where if no political agreement on a neutral figure can be reached (possibly in more than one round of voting), the right to appoint a candidate should pass to a neutral body outside Parliament. The Venice Commission recalls its recommendation in the two previous opinions on Montenegro that in the absence of a consensual figure elected by Parliament with a qualified majority, the right to appoint a member (or several members) of the Prosecutorial Council may pass to "University faculties

and lawyers" representatives (or, rather, to their representative bodies). The main problem with this solution is to find such an independent outside body, especially in a small country like Montenegro."

42. "As previously stressed by the Venice Commission, in respect of the anti-deadlock mechanism , "each state has to devise its own formula" which should lead to the creation of a pluralistic Prosecutorial Council were politically affiliated members have no clear majority."

> CDL-AD(2021)012 Montenegro - Opinion on the draft amendments to the Law on the State Prosecution Service and the draft law on the Prosecutor's Office for organised crime and corruption

56. "What should be mentioned in the constitutional text is what to do if the 2/3 majority in the NA required to elect lay members is not reached. Without an anti-deadlock mechanism this rule entrenched in the Constitution may become an obstacle to the proper operation of the two councils. To address this, the Constitution might provide, for example, that the power to choose a certain minimal number of lay members in this case is temporarily transferred to the President or another independent officeholder (like the Ombudsman, for example), if Parliament is uncapable on agreeing on the candidates and reaching the necessary majority. Other antideadlock mechanisms can be considered as well."

> CDL-AD(2020)035 Bulgaria - Urgent Interim Opinion on the draft new Constitution

13. "The text submitted to the Venice Commission is in line with the recommendation made and follows the same solution that was adopted for the HJC i.e. it increased the majority from 3/5th to 2/3rd in the first round of elections of members of the HPC by the Assembly. The second round has been taken out, but the text kept the commission as an anti-deadlock mechanism. It is in line with the recommendations made by the Venice Commission."

> CDL-AD(2018)023 Serbia Secretariat memorandum Compatibility of the draft amendments to the Constitutional Provisions on the Judiciary of Serbia

45. "[…] [U]nder the Draft Law the politicisation of the Council is somehow reduced by the fact that two out of the four members elected by the Parliament come from civil society and not from the ranks of MPs. However, these candidates still have to obtain the approval of the governing majority (see Article 81 par 2 (d)) which may predetermine their position for the entire period of their service. In order to make those persons less dependent on the will of the ruling majority, it is necessary to put in place additional guarantees, applied both at the stages of nomination and of election of candidates.

46. First of all, the nomination of members of civil society and academia (Article 81 par 2 (d)) should be done in a transparent manner, with the selection process following clear rules and criteria, which should be set out in the Draft Law. A range of options could be considered here. One possibility (the simplest option) is for certain office holders to gain membership of the Council automatically, e.g. the head of a law faculty, or the President of the Bar Association may become ex officio members of the Prosecutorial Council without being elected by Parliament.

47. Additionally, a possible option would be to appoint one or more members of the judiciary to the Prosecutorial Council. Judges could bring their own practical expertise in the criminal justice system to the work of the Council, and would also help enhance the independence of this body, and thereby the public's trust in the Council's work. A range of possible judges could be considered for this position, including chairpersons of certain courts (e.g. the Supreme Court, the Tbilisi city court and/or regional courts).

48. An alternative solution, which is closer to the scheme proposed by the Draft Law, would be to give the nominating power to one or several independent bodies outside of the Ministry of Justice or the Prosecutorial Council, such as the High Council of Justice, the Bar Association, or a body representing law universities and academic institutions. In this process, consideration should be given to the need to achieve proper gender balance amongst the candidates. The nominating power may also be given to certain well-established NGOs, which will increase transparency of the Prosecutorial Council and public trust in its autonomy. In cases where the power to nominate candidate would belong to external actors, the Parliament should still retain the power to approve or not approve them.

49. At the same time, if there are too many nominating bodies, and, as a result, too many candidates, it might be useful to establish a parliamentary committee composed of an equal number of representatives of all parties represented in Parliament. The role of such committee would be to pre-select a certain number of candidates and propose them to the Parliament for elections. It is important to ensure the plurality of candidates at this stage: the Parliament should have at least two or ideally three candidates for each vacant position to choose from.

50. At the stage of elections by the Parliament it is important to ensure that the resulting composition of the four Council members elected by the Parliament is not politically monolithic. To achieve this, two alternative solutions may be considered: election by a qualified majority or the introduction of quotas for the opposition.

51. The most radical solution would be to require that at least two out of the four members elected by Parliament are elected by qualified majority (one member representing the Parliament, and one member representing civil society). This would ensure that at least two members of the Council are elected as the result of a compromise, which would somehow counterbalance those two members whose election depends more on the support of the ruling majority, and the fact that the Minister of Justice sits on the Council ex officio.

52. Since such a qualified majority may be hard to achieve in the current political context in Georgia, an alternative solution is also possible: the Draft Law might introduce quotas for members appointed by opposition parties. This means that opposition parties should have the right to appoint at least one member of the Council, regardless of their number of seats in Parliament. Given the current relative strength of the opposition in the Georgian Parliament, the opposition might even be given two seats out of four: one for an MP and one for a representative of civil society whom the opposition wishes to nominate. Whichever solution is chosen, the parliamentary majority would still control more seats in the Prosecutorial Council, due to the participation of the Minister of Justice, but its decisive influence within the Council would be reduced and the Council would become more politically balanced; in order to pass important decisions or to block them, candidates chosen by the parliamentary majority would need to obtain support of those elected by qualified majority or appointed by the opposition, or those members which are elected by the Conference of Prosecutors."

> CDL-AD(2015)039 Joint Opinion of the Venice Commission, the Consultative Council of European Prosecutors (CCPE) and OSCE Office for Democratic Institutions and Human Rights (OSCE/ODIHR), on the draft Amendments to the Law on the Prosecutor's Office of Georgia

23. "In addition, an anti-deadlock mechanism should be foreseen for the election of the eminent lawyers, e.g. a three-fifth majority for subsequent voting, as provided for in Article 91 of the Constitution for the election of the lay members of the Judicial Council, or the proposal of a higher number of candidates and the election with the absolute majority of the components of the Parliament, or the election by Parliament using a proportional system, or to transfer of the power to elect to university faculties and lawyers' representatives."

CDL-AD(2014)042 Interim Opinion on the Draft Law on the State Prosecution Office of Montenegro; See also CDL-AD(2015)003, Final Opinion on the revised draft Law on the public Prosecution Office of Montenegro

66. "Where it exists, the composition of a Prosecutorial Council should include prosecutors from all levels but also other actors like lawyers or legal academics. If members of such a council were elected by Parliament, preferably this should be done by qualified majority. If prosecutorial and judicial councils are a single body, it should be ensured that judges and prosecutors cannot outvote the other group in each other's' appointment and disciplinary proceedings […]. […]"

CDL-AD(2010)040 Report on European Standards as regards the Independence of the Judicial System: Part II - the Prosecution Service

110-111. "[…] [A]ll members of the prosecutorial council [are] elected and dismissed by the parliament. No qualified majority is required. This […] leaves the Council in the hands of the parliament majority; this, coupled with the appointment and dismissal of all prosecutors by parliament with no qualified majority, makes the prosecutorial system […] too vulnerable to political pressure and jeopardises the possibility for the prosecutorial functions to be carried out in an independent manner according to the principle of legality."

CDL-AD(2007)047 Opinion on the Constitution of Montenegro

## VI. MEMBERS OF THE JUDICIAL COUNCIL

18. "The Venice Commission also notes with concern that for a long time, the lay members of the HCoJ have not been appointed. Under Article 64 para. 2 of the Constitution, the 3/5th majority is required for the Parliament to elect the HCoJ lay members; however, this majority has never been reached and no anti-deadlock mechanism has been envisaged even though the Venice Commission has earlier emphasised to the Georgian authorities on the importance of such a mechanism in the appointment of lay members to the HCoJ. The current practice is not compatible with the idea of pluralism in the composition of the HCoJ embedded in constitutional norm. This problem may be addressed either by way of a constitutional amendment providing for an anti-deadlock mechanism or by reaching a political compromise over the candidates."

CDL-AD(2023)006 Georgia - Follow-up Opinion to four previous opinion concerning the Organic Law on Common Courts

24. "The proposal put forward in the Law is now that the anti-deadlock mechanism lasts for a period of maximum two years.

25. The Venice Commission reiterates what it has affirmed in 2018, i.e. that the difficulty of reaching a qualified majority and the ensuing risk of paralysis of dysfunction of an institution – in particular "safeguard institutions" - should not lead to the abandonment of the requirement of a qualified majority. In this regard, limiting the operativity of the anti-deadlock mechanism to two years can be, in principle, welcomed insofar as it would put pressure on the parliament to elect the remaining lay members. However, the Venice Commission finds that the supreme state interest lies in the preservation of the institutions of the democratic state. The respect for the principle of separation of powers requires that no branch of power/constitutional institution should be permitted by way of deliberate inaction or mere incapability of acting to block the functioning of another branch of power/constitutional institution.

26. Recalling that within the current constitutional framework it is not in the power of anybody else but the parliament to elect the lay members of the Judicial Council, the two-year deadline introduced in Article 16(d) should not lead, in case of inaction of the Parliament, to the institution's paralysis. The Venice Commission recalls that the due functioning of the Judicial Council, in those legal systems where it exists, is an essential guarantee for judicial independence.

27. The purpose of the anti-deadlock mechanism devised in 2018 was to serve as an exceptional and temporary solution to an institutional crisis; it does not represent a solution to the serious issue of lack of political will to find a broad political agreement on the lay members of the Judicial Council. The Venice Commission reiterates that it is a sign of maturity and responsibility on the part of the political class, both in government and in opposition, to be able to find consensus or agreements, including and in particular as to appointments of independent institutions and top political appointees. Broad political agreement is necessary in order for the state institutions to function in a democratic manner. Having said this, the Montenegrin authorities shall therefore reflect on whether a constitutional reform introducing a further or alternative anti-deadlock mechanism would be the best way to address this seemingly systemic problem. Granting the competence to nominate the candidates to another state institution, a neutral one, following several unsuccessful votes in Parliament, has been chosen as an anti-deadlock mechanism in some countries. This might motivate parliamentarians to reach the qualified majority for the appointment of the lay members of the Judicial Council. The Venice Commission stands ready to provide its assistance in case of need."

41. "Article 36a of the Law provides that: "*After the expiration of the term of office for which he was elected and the termination of the office of the president of the Supreme Court, as well as in the case of resignation or dismissal, the Judicial Council appoints the acting president of the Supreme Court.*"

43. "The provision seems reasonable insofar as it limits the mandate of the acting president to six months. However, the Venice Commission notes that the election of an acting President is by every standard an exceptional procedure that only serves the need to avoid the impasse stemming from an equally exceptional event, such the death, the resignation or the dismissal of the President of the Supreme Court. As it is currently drafted, Article 36a gives the impression that even after the simple expiration of the term of office of the President, an acting President should be elected. […] In the written observations submitted on 9 December 2022, the Ministry of Justice submitted that the proposed solution should be kept, also having regard to the recent difficulties in electing the President of the Supreme Court. Nevertheless, the Venice Commission considers that the activation of such an anti-deadlock measure should be limited to situations of real emergency. The Law should not transform the exception into a rule. […] ."

> CDL-AD(2022)050 Montenegro - Opinion on the draft amendments to the Law on the Judicial Council and Judges

60. "The Ministry of Justice proposed to modify the voting procedure in the JC. Thus, according to revised Article 49 new para. 2, each member of the JC will propose one candidate. The revised draft Law will make some further improvements as regards the transparency of the procedure before the National Assembly and in the procedure before the five-member Commission (which serves as an anti-deadlock mechanism if the National Assembly fails to elect the four members). These additions are intended to give the opposition more say in the election of the lay members of the HJC, which is positive.

61. Most importantly, the Ministry proposed to provide in Article 49 that the JC should decide on the short-list of eight candidates with a majority of two thirds of votes of the JC members so as to ensure the broadest political support of the candidates. If this majority is not reached

in the first round, a second round will be held in which the list of eight candidates will have to be approved by a simple majority of votes.

62. The Venice Commission gives a cautious welcome to this initiative of the Serbian authorities. The JC is composed on a proportional basis of representatives of different political parties. Therefore, the requirement of a qualified majority will normally ensure that the candidates will have a significant cross-party support. This reduces the risk of a politically homogeneous lay component, which was the main concern for the Venice Commission in the October 2022 Opinion."

64. "In sum, the Venice Commission welcomes the proposal by the Serbian authorities to (i) require a qualified majority in the JC, and (ii) strengthen the ineligibility criteria, provided that these criteria are further elaborated in the draft Law as recommended by the Commission. This would address the concern expressed by the Venice Commission in its October 2022 Opinion about dangers related to a politically homogenous lay component."

> CDL-AD(2022)043 Serbia - Follow-up Opinion on three revised draft Laws implementing the constitutional amendments on the Judiciary of Serbia; See also CDL-AD(2020)007 Republic of Moldova, Joint Opinion on the revised draft provisions on amending and supplementing the Constitution, with respect to the Superior Council of Magistracy, §30.

74. "The election of lay members is regulated in Articles 43 et seq. This process was already elaborately discussed in the Venice Commission's previous opinions on the constitutional amendments. The draft Law – in line with the constitutional amendments – contains certain key features: […] (3) qualified majority voting in the National Assembly in order to reinforce depoliticisation (Article 50), and (4) having in place an adequate anti-deadlock mechanism to avoid stalemates (Article 51)."

89. "As explained to the rapporteurs, the rationale behind the special majority of eight votes is to avoid corporatism. Indeed, there is a risk that all decisions in the HJC might be taken only with the votes of the judicial members and that the lay members would not have their say. A heightened majority guarantees that for certain decisions the votes of both the judicial and lay members will be necessary. On the other hand, this high quorum and the super-majority raise the risk of blockages in the work of the HJC."

> CDL-AD(2022)030 Serbia - Opinion on three draft laws implementing the constitutional amendments on Judiciary

23. "[…] The draft Law gives to the reformed SCM important powers in this area, but a governmental decree seems to be still needed to validate a decision of the SCM. Article 77 of the draft Law provides that the SCM, by a qualified majority, may overrule the objections of the Minister in the matters of appointments and transfers, and such decision of the SCM would be directly enforceable. […]

60. "A high proportion of judicial members in the SCM may potentially lead to corporatism in the governance of the judiciary. To counter this risk, the Venice Commission recommended counterbalancing judicial members with non-judicial (lay) members, representing other "users" of the judicial system (e.g. attorneys, notaries, academics), or a wider civil society. To ensure the democratic legitimacy of the SCM, lay members may be elected by Parliament (preferably by a qualified majority or through a proportional system, in order to avoid politicisation), or, alternatively, appointed by the Government under the parliamentary control, but a certain number of lay members may also be delegated to the SCM by external independent institutions."

80. “The draft Law entrusts to the SCM the power to decide on transfers and on the attribution of specific posts to specific judges within the court system. This is one of the most important powers of the SCM; however, under the draft Law, the SCM will share this power with the Minister of Justice who has to approve the organisational chart of the Lebanese judiciary. If the Minister disagrees with the attribution of posts proposed by the SCM, the matter should be returned to be decided at a joint session of the SCM together with the Minister. If no agreement is reached, the SCM will vote again by a qualified majority of seven members, and the decision of the SCM is submitted to the Minister again for approval.

81. It is understood – although the text of the draft Law, or at least its translation, is not entirely clear on that – that the decision of the SCM taken by seven votes is binding on the Minister, and even if the Minister disagrees, he or she will be obliged to issue a decree approving the nominations. Thus, the SCM may overrule the objections of the Minister by a qualified majority of votes.”

> CDL-AD(2022)020 Lebanon - Opinion on the draft law on the independence of judicial courts

26. “Pursuant to the proposed amendments, if Parliament fails to elect a lay member of the SCM by three-fifths of all elected members of Parliament, consultations should take place between the parliamentary fractions, following which, within 15 working days, Parliament will hold another round of voting. The same majority of three-fifths of elected MPs shall be necessary to elect a member at this point (draft Article 3(3-1) of the Law “on the Superior Council of Magistracy). In case of another failure to elect a lay member of the SCM, Parliament shall hold one more round of voting in which the majority of all elected members of Parliament shall be sufficient to elect a lay member (draft Article 3 (3-2) of the same Law). Finally, if the candidate has not been elected again, the Committee shall, within a maximum period of two months, hold a new public competition, based on the same procedure, in which candidates rejected by the Parliament may not participate (Article 3 (3-3) of the same Law).

27. As it has been noted in the June 2020 Opinion, the primary function of the anti-deadlock mechanism is that of making the original procedure work, by pushing both the majority and the minority to find a compromise. Qualified majorities strengthen the position of the parliamentary minority, while anti-deadlock mechanisms correct the balance back. Obviously, such mechanisms should not act as a disincentive to reaching agreement in the first instance. It may assist the process of encouraging agreement if the anti-deadlock mechanism is one which is unattractive both to the majority and the minority. As previously stated by the Venice Commission, reduced majority in subsequent rounds of voting undermines the very purpose of the qualified majority rule which is to incite political parties across the political spectrum to find a compromise on the candidates. The CCJE also advises against lowering the necessary majority as this may reduce any incentive for the majority to reach a compromise. Rather, such a mechanism must ensure an independent selection and might involve the opposition or call for the selection by other institutions from a list of shortlisted candidates.

28. The anti-deadlock mechanism proposed in the draft Law amounts to decreasing the threshold for parliamentary approval of candidate. Knowing that it can achieve a decreased majority or eliminate an undesirable candidate, the majority may be discouraged from seeking a compromise with the minority. Consequently, it is difficult to expect the majority and the minority to find a compromise in consultations within a 15-day period.

> CDL-AD(2022)019 Republic of Moldova - Opinion on the draft law on amending some normative acts (Judiciary)

"• *the election by high quorums needed in the National Assembly for the election of prominent lawyers to the HJC (five members) and to the HPC (four members) may lead to deadlocks in the future. There is a danger that the anti-deadlock mechanism that is meant to be an exception will become the rule and allow politicized appointments. In order to encourage consensus and move away from the anti-deadlock mechanism of a five-member commission, the composition of the latter should be reconsidered;*

14. The background for this key recommendation is the current political situation, where the National Assembly is dominated by a single political party. The Speaker of the National Assembly has informed the Commission that the Serbian authorities have reconsidered the composition of the HJC but have decided not to alter it.

15. The authorities argue that as this anti-deadlock commission should act as a substitute for the competence of the National Assembly, it should be composed of the highest public officials with constitutional legitimacy. Furthermore, the commission is composed of prominent lawyers, together with the Speaker of the National Assembly, who is an institutional figure in addition to representing parliament.

16. The Venice Commission acknowledges the members' explicit requirements of high competence in the legal field and finds that it is positive that the "prominent lawyers" in the HJC should be appointed by key figures in the Serbian judiciary, such as the President of the Constitutional Court, the President of the Supreme Court and the Supreme Public Prosecutor. It has no objection to the participation of the Ombudsman either; the participation of the Speaker of the National Assembly appears equally understandable, given the fact that the anti-deadlock mechanism supersedes a power of the National Assembly.

17. However, as four out of the five members of this commission are currently elected by the National Assembly (and not all with a qualified majority), for the Commission it is not impossible that the proposed antideadlock mechanism might "lead to politicized appointments", at least until such time as these constitutional amendments enter into force and produce their effects (for example, the President of the Supreme Court will no longer be elected by parliament, and the Prosecutor General will be elected with a qualified majority and will enjoy other guarantees of independence - see para 33 of the October opinion) and the composition of parliament will be more pluralistic.

18. The Commission acknowledges that there is no prescriptive or detailed standard as to the composition of such an antideadlock mechanism, and therefore cannot conclude that the proposed mechanism is not in line with international standards and must be changed.

19. Nonetheless, the Commission encourages the Serbian authorities to explore the possibilities for an alternative antideadlock mechanism which may alleviate the concern that it may not be, or may be perceived not to be, politically neutral."

> CDL-AD(2021)048 Serbia - Urgent opinion on the revised draft constitutional amendments on the judiciary

67. "The procedure concerning the candidates elected by the National Assembly is regulated in this provision. After having conducted a public competition, ten candidates will be shortlisted by the responsible parliamentary committee taking into account the principle of 'broadest representation'. The (plenary) National Assembly will then proceed to elect five persons from the shortlist presented to it by the parliamentary committee. A candidate is elected if he or she receives two-thirds of the votes of *all* deputies. If the National Assembly fails to (timely) elect all five members, the *remaining* members will be elected by a special commission, comprised of the President of the National Assembly, the President of the

Constitutional Court, the President of the Supreme Court, the Supreme Public Prosecutor and the Ombudsman, by a simple majority vote.

68. In general, the proposal of a qualified majority is needed in the parliamentary vote and the provision envisages an adequate anti-deadlock mechanism. The Venice Commission does *not* object to a qualified majority vote of two-thirds, on the contrary, as it objected to the 3/5th majority in its 2018 Opinion of the Venice Commission (paragraph 61). However, the Venice Commission is aware of the factual backdrop against which these theoretical proposals will operate in practice. As the current National Assembly is dominated by one political party, obtaining a qualified majority vote is not a problem. In order to reinforce depoliticization, while the two-thirds majority requirement should be kept, the Venice Commission recommends that (in)eligibility requirements be added. These could create a certain distance between the members elected by the National Assembly (the "prominent lawyers") and party politics, which could make the HJC (and the HPC) more politically neutral and avoid conflict of interest, even if it may be difficult to completely insulate these members from any political influence. […]

70. The Commission however notes that – where the high quorums are not reached (i.e. once the situation in Serbia changes and the opposition returns to the National Assembly – the coming into play of the anti-deadlock mechanism (a five-member commission consisting of the Speaker of the National Assembly, the President of the Constitutional Court, the President of the Supreme Court, the Supreme Public Prosecutor and the Ombudsman – deciding by simple majority) might then become the rule rather than the exception. Although foreseeing an anti-deadlock mechanism to avoid stalemates is a positive step, and the Commission had welcomed it in its 2018 Opinion of the Venice Commission, the danger is that in the end, it will be up to a small five-person commission to decide the composition of the HJC and the HPC, and as a consequence, the composition of the judiciary. In this respect, discussions with the stakeholders during online meetings with the Venice Commission delegation suggested that this issue might be partially resolved by altering the composition of this commission – and thereby making the pursuit of a consensus more appealing."

72. "Draft Amendment XV summarily describes the working methods and decision-making process of the HJC.

73. Paragraph 1 stipulates that decisions of the HJC are taken if at least eight members (out of 11) vote in favour of the decision. In the Venice Commission's view, that is a rather high threshold which could easily lead to a situation in which a decision is *not* adopted. That might be welcome with regard to decisions on the dismissal of a judge, but perhaps less so with regard to other decisions, such as the appointment of new judges."

> CDL-AD(2021)032 Serbia - Opinion on the draft Constitutional Amendments on the Judiciary and draft Constitutional Law for the Implementation of the Constitutional Amendments

56. "What should be mentioned in the constitutional text is what to do if the 2/3 majority in the NA required to elect lay members is not reached. Without an anti-deadlock mechanism this rule entrenched in the Constitution may become an obstacle to the proper operation of the two councils. To address this, the Constitution might provide, for example, that the power to choose a certain minimal number of lay members in this case is temporarily transferred to the President or another independent officeholder (like the Ombudsman, for example), if Parliament is uncapable on agreeing on the candidates and reaching the necessary majority. Other antideadlock mechanisms can be considered as well."

> CDL-AD(2020)035 Bulgaria - Urgent Interim Opinion on the draft new Constitution

22. “Two influencing and decisive factors need to be mentioned in the Moldovan context. First, the current, revised draft Article 122(3) provides that the candidates to the position of lay members of the SCM will be elected and appointed by Parliament with the votes of three fifths of the elected deputies. The qualified majority is an important requirement to ensure democratic legitimacy and to avoid politicisation. […].”

> CDL-AD(2020)033 Republic of Moldova - Urgent joint Amicus Curiae Brief on three legal questions concerning the mandate of members of Constitutional Bodies

25. “As regards the manner of appointment of the five non-judge members, amendment to Article 3 (3), provides that they shall be appointed by Parliament, with the vote of the *majority of the elected deputies*, on the basis of the proposals of the Legal Committee on Appointments and Immunities of the Parliament. Compared to the current version of Article 3(3) of the Law No. 947 on the SCM (“the majority of the deputies who are present”), the new majority better reflects the goal that the lay members be elected with a wide support of the parliament. […].

26. Nevertheless, it might be considered that “the majority of the elected MPs” is a low threshold and it seems likely that a government will normally dispose of such a majority. This draft provision may therefore create the possibility that non-judge members of the Council would be a coherent and like-minded group in line with the wishes of the acting government. This is the reason why the Venice Commission has in the past and in other contexts recommended that “*the elections of judicial council members from the parliamentary component should be by a two-thirds qualified majority, with a mechanism against possible deadlocks or by some proportional method which ensures that the opposition has an influence on the composition of the Council*.” Nevertheless, it is unclear whether the current Constitution allows for election with an absolute or qualified majority (this question is pending before the Constitutional Court). It should also be stressed that the requirement of a higher majority (for instance two-thirds) could block the appointment procedure of lay members because of the failure to achieve such majority in the Moldovan context.”

> CDL-AD(2020)015 Republic of Moldova, Urgent Joint Opinion 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 amending the law No. 947/1996 on Superior Council of Magistracy

26. “In their exchanges with the Moldovan authorities and in their March 2020 Joint Opinion, the Commission and the Directorate underlined that it was important, in particular in the Moldovan context, to avoid the possibility or risk that lay members would be a coherent and like-minded group in line with the wishes of the government of the day. They therefore strongly recommended introducing in the Constitution the requirement of a qualified majority (coupled with an anti-deadlock mechanism) or a proportional method of election of the lay members. […]

27. The current draft article 122(3) provides that “[t]he candidates to the position of members of the Superior Council of Magistracy who are not judges, are elected through a competition, based on a transparent procedure, based on merits and appointed by Parliament with the votes *of three fifths of elected deputies*.”

28. In their 2020 Urgent Joint Opinion and March 2020 Joint Opinion, the Commission and the Directorate expressed their general preference for a two-thirds qualified majority. At the same time, they consider that the authorities have some margin of appreciation in this respect and are best placed to find the right balance in order to prevent that a high majority (as two-thirds), despite the existence of an anti-deadlock mechanism, blocks the election procedure of lay members because of the failure to achieve such majority in the Moldovan context. An anti-deadlock mechanism is of course the ultimate guarantee against such

blocking. However, as the election by a qualified majority ensures that the majority has not the decisive authority on the election of lay members, it is essential that the proportion of the qualified majority presents some reasonable prospect of success, in the concrete political circumstances, in achieving such majority in the election procedure. The provision for a qualified majority of three fifths is therefore acceptable.

29. As regards the anti-deadlock mechanism, draft article 122(4) provides;"[i]f the procedure of appointment, within the requirements of paragraph 3, failed, the candidates to the position of members of the Superior Council of Magistracy who are not judges, are appointed by Parliament with the vote of majority of elected deputies, but not earlier than 15 days."

31. "The Commission and the Directorate welcome that the Moldovan authorities are willing to provide for an antideadlock mechanism as recommended. They are of the view nevertheless that they should consider different options in this respect, as a mere decreased majority after a time-lapse of fifteen days does not appear to represent a sufficiently strong incentive to reaching agreement on the basis of the qualified majority in the first round. The Commission and the Directorate are aware that devising an appropriate and specific anti-deadlock mechanism requires more time than is available in the current context; they would therefore recommend to put in Article 122(4) the more general indication that the organic law on the SCM will provide for a mechanism of election of lay members to be used in case the procedure of appointment provided under article 122(3) failed. Reflection on the appropriate mechanism may then be pursued in due course. […]."

> CDL-AD(2020)007 Republic of Moldova, Joint Opinion on the revised draft provisions on amending and supplementing the Constitution, with respect to the Superior Council of Magistracy; See also CDL-AD(2013)028 Opinion on the draft amendments to three constitutional provisions relating to the Constitutional Court, the Supreme State Prosecutor and the Judicial Council of Montenegro, §§7-8.

108. "Article 102 sets up the National Judicial Council, which is granted the power to propose persons to be appointed as judges or prosecutors and must be made up mostly of judges and prosecutors itself. […] It must ensure that the justice system functions properly and respect the independence of the judiciary – which is more of a constitutional requirement than a duty. […]The Constitution should lay down the rules on the composition and the main functions of the National Judicial Council. Under Article 8§2 of the draft law, two members of the Council – a civil society representative and an academic – will be appointed by a two-thirds majority of the Chamber of Deputies. While it should be welcomed that a qualified majority is required, it would seem necessary to include this in the Constitution, in accordance with Article 72, 2nd and 3rd paragraphs."

> CDL-AD(2019)003 Luxembourg - Opinion on the proposed revision of the Constitution

20. "In most European countries judicial councils have a mixed membership: some members are elected by Parliament (sometimes by a qualified majority), others are elected by the judges, and others are appointed by the President or sit there *ex officio*. The Venice Commission always insisted on the independence of this body, and on its pluralist composition. The baseline is that a substantial proportion of the members of the judicial council should be judges elected by their peers[13] and that Parliament should be able to appoint a certain number of members (the latter guaranteeing democratic legitimacy of this body)."

> CDL-AD(2018)032 Kazakhstan - Opinion on the Concept Paper on the reform of the High Judicial Council

11. "The text submitted to the Venice Commission has followed the fourth option by increasing the majority from 3/5th to 2/3rd in the first round. The second round has been taken out, but the

text kept the commission as an anti-deadlock mechanism and is in line with the recommendations made by the Venice Commission."

> CDL-AD(2018)023 Serbia - Secretariat memorandum Compatibility of the draft amendments to the Constitutional Provisions on the Judiciary of Serbia

25. "The Venice Commission in principle supports the prolongation of the term of office of members of the Judicial Council as a tool to preserve the functioning the democratic institutions of the state. As stated by the government of Montenegro in the statement of reasons, the operation of the Judicial Council is crucial to guarantee the independence of the judiciary; this is an essential element of the Rule of Law. Such prolongation may also function as an anti-deadlock mechanism."

> CDL-AD(2018)015 Opinion on the draft law on amendments to the Lax on the Judicial Council and Judges of Montenegro

28. "The Venice Commission considers that the same result could be achieved in line with Article 127 by providing, should the new lay members not be timely elected by parliament, that only the lay members sitting on the old Judicial Council will sit on the new one as acting lay members, preferably for a limited period of time. This alternative solution would enable the new members who have already been appointed to start sitting on the new Judicial Council, which would provide the latter with more legitimacy than allowing all the members of the expired Council to continue to operate even if for example the new judicial members have been duly elected. This solution also appears like a logical follow up to the possibility, introduced by the draft amendments, for parliament to appoint fewer than all the four members at the same time (see below).
In order to ensure compatibility with Article 18 LJCJ, which provides that "a member of the Judicial Council from among the judges or eminent lawyers may be re-appointed as a member of the Judicial Council after the expiry of four years from the termination of the previous mandate in the Judicial Council", it would be useful to specify in this provision that sitting on the new Judicial Council as acting lay member pending the appointment of the new lay members by parliament does not amount to a re-appointment.

30. As regards the prolongation of the mandate of the President of the Judicial Council, it would seem more acceptable from the viewpoint of legitimacy if the members of the new Judicial Council could elect a new temporary President from among the (acting) lay members: while it is possible that the former President will be re-elected, the choice belongs to the members of the new Council. When the new lay members are appointed by parliament and the Judicial Council gets to a full composition, a new President will be elected. This seems to be the preferable solution even if on the new Judicial Council sit some newly elected Reputable Lawyers and some acting ones (see below).

> CDL-AD(2018)015 Opinion on the draft law on amendments to the Lax on the Judicial Council and Judges of Montenegro

21. "Article 11d of the Draft Act describes what happens if a 3/5th majority cannot be reached. In this case a second round of election is held, in which candidates are elected "by a roll call" (§ 1). Under Article § 2, each MP has one vote, and may vote only for one candidate. Under § 3, "candidates who have received the highest number of votes shall be deemed to have been elected", and each MP may vote "for" or "against" a candidate, or abstain. In the case of a tie, a candidate who received fewer votes "against" will be elected.

22. The system of voting in the second round is not entirely clear. The requirement of a qualified majority in the first round of elections encourages the ruling majority and the opposition to find a compromise and select more neutral figures to serve on the NCJ. This mechanism, however,

would not be effective if in the second round candidates supported only by the ruling party may be elected by a simple majority of votes."

> CDL-AD(2017)031 Poland - Opinion on the Draft Act amending the Act on the National Council of the Judiciary; on the Draft Act amending the Act on the Supreme Court, proposed by the President of Poland, and on the Act on the Organisation of Ordinary Courts

16. "Under Article 19b, lay members are elected by a majority of 2/3rd of the MPs. This is a welcome approach, in line with the previous Venice Commission recommendations. The Venice Commission has recommended several anti-deadlock mechanisms in case this majority cannot be reached. The Commission has also proposed to work with the Bulgarian authorities to develop some other anti-deadlock mechanisms. This proposal remains valid. […]"

> CDL-AD(2017)018 Bulgaria - Opinion on the Judicial System Act

46. "When commenting on the Bulgarian Supreme Judicial Council in its previous opinions, the Venice Commission has already pointed out that the system in place for the election of the "parliamentary" component of the SJC (11 members of the Supreme Judicial Council elected by the National Assembly by simple majority) was giving rise to a risk of politicisation of this body and has repeatedly recommended its revision. Already in 2002, the Commission had stressed that "[t]he composition of the Supreme Council of Justice should be depoliticised by providing for a qualified majority for the election of its members."

47. In spite of the above-mentioned recommendations of the Venice Commission, and notwithstanding the conclusions of its general reports on the judiciary, the current Draft amendments do not address the issue of the majority, which implies that the present voting rule remains unchanged. The Bulgarian Constitution actually does not contain any provision for the required majority to elect the SJC members; hence, it is assumed that this majority, both in Parliament and in the General Meetings of the Judges, Prosecutors and Investigating Magistrates is to be understood as a simple majority. In concrete terms, this means that the party or the coalition of government parties having the majority in the National Assembly are in a position to elect by themselves (as already happened in the past), all eleven SJC members from the "parliamentary quota".

48. In the Explanatory Note to the Draft amendment (see p. 3), the drafters however express their view that "a high degree of consensus amongst the political forces should be sought at the selection of members of the Supreme Judicial Council from the Parliament quota." The Venice Commission recommends taking up this view and enforcing it by introducing a requirement for a qualified majority such as, for example, a two-thirds majority, as it is already the case, under current Article 132a (paragraphs 2 and 3), for the Chief Inspector and the inspectors of the inspectorate to the SJC.

49. The issue of the number of judges or prosecutors members of the SJC Chambers elected by their peers would be of less weight, if the election by the National Assembly would be linked to a qualified majority; this would allow for a larger base of consensus on the persons to be elected, even if some retain that a qualified majority requirement, in the present configuration of the Bulgarian parliament, could lead to a series of bargains in order to reach agreement or could result in a deadlock situation. In the ideal case such "bargains" lead to the election of truly independent candidates as should be the case in a mature democracy. In the event of "political horse-trading", at least the candidates of the majority and opposition will "even out" political influence.

50. The delegation of the Venice Commission was informed about difficulties to achieve a qualified majority in the Bulgarian Parliament. The Commission acknowledges that the political

context can lead to serious problems in this respect. However, it should be possible to overcome these difficulties through carefully designed anti-deadlock mechanisms, which are conducive to achieve consensus.

51. A simple system would be, for instance, a three-fifth majority requirement after three voting rounds, followed, if needed, by the absolute majority of the members of the National Assembly. More complex systems could be devised, including for instance involving the intervention of the President of the Republic or proposals for candidates from neutral bodies. The Venice Commission welcomes the openness noted during the Rapporteurs' visit to Sofia, among some interlocutors, including during talks at the National Assembly, with regard to the recommendation to introduce a qualified majority requirement. The Commission is ready to work with the Bulgarian authorities on developing such anti-deadlock systems."

> CDL-AD(2015)022 Opinion on the draft Act to amend and supplement the Constitution (in the field of the Judiciary) of the Republic of Bulgaria

67. "[…] [T]he Venice Commission recommends that the authorities consider election of the lay members of the JC by a qualified majority in the Parliament. In its Report on Judicial Appointments the Venice Commission emphasised that it is 'strongly in favour of the [depoliticisation] of [Judicial Councils] by providing for a qualified majority for the election of its parliamentary component' (§ 32). At the same time the Venice Commission is mindful of the fact that requiring a too high number of votes from the non-majority MPs may lead to a political stalemate, where few people would be able to block elections of lay members to the JC."

> CDL-AD(2014)026 Opinion on the seven amendments to the Constitution of "the former Yugoslav Republic of Macedonia" concerning, in particular, the judicial Council, the competence of the Constitutional Court and special financial zones

5. "The three constitutional provisions under consideration all contain alternative proposals insofar as the manner of election is concerned, and specifically as regards the anti-deadlock mechanisms.

6. The Venice Commission has repeatedly stressed the importance of providing for anti-deadlock mechanisms in order to ensure the functioning of the state institutions.

7. Qualified majorities aim to ensure that a broad agreement is found in parliament, as they require the majority to seek a compromise with the minority. For this reason, qualified majorities are normally required in the most sensitive areas, notably in the elections of office-holders in state institutions. However, there is a risk that the requirement to reach a qualified majority may lead to a stalemate, which, if not addressed adequately and in time, may lead to a paralysis of the relevant institutions. An anti-deadlock mechanism aims to avoid such stalemate. However, the primary function of the anti-deadlock mechanism is precisely that of making the original procedure work, by pushing both the majority and the minority to find a compromise in order to avoid the anti-deadlock mechanism. Indeed, qualified majorities strengthen the position of the parliamentary minority, while anti-deadlock mechanisms correct the balance back. Obviously, such mechanisms should not act as a disincentive to reaching agreement on the basis of a qualified majority in the first instance. It may assist the process of encouraging agreement if the anti-deadlock mechanism is one which is unattractive both to the majority and the minority.

8. The Venice Commission is aware of the difficulty of designing appropriate and effective anti-deadlock mechanisms, for which there is no single model. One option is to provide for different, decreasing majorities in subsequent rounds of voting, but this has the drawback that the majority may not seek a consensus in the first round knowing that in subsequent rounds their candidate will prevail. Other, perhaps preferable, solutions include the use of proportional

methods of voting, having recourse to the involvement of different institutional actors or establishing new relations between state institutions. Each state has to devise its own formula."

> CDL-AD(2013)028 Opinion on the draft amendments to three constitutional provisions relating to the Constitutional Court, the Supreme State Prosecutor and the Judicial Council of Montenegro

12. "In the view of the Venice Commission, entrusting the Parliament with the power to elect all the four lay members of the Judicial Council with a qualified majority is in keeping with the fundamental function of the Judicial Council to avoid both the risk of politicization and the risk of corporatist and self-perpetuating government of the judiciary. The three-fifths majority in the second round as provided for in the alternative b) seems to be an appropriate solution, also in order to compensate for the removal of the power to appoint two lay members of the President of the Republic, as is provided in Article 127 of the present Constitution. On the contrary, alternative a) providing for the majority of all MPs in the second round of voting does not represent an acceptable solution, as it would act as a disincentive for the majority to reach an agreement in the first round of voting."

> CDL-AD(2013)028 Opinion on the Draft Amendments to three Constitutional Provisions relating to the Constitutional Court, the Supreme State Prosecutor and the Judicial Council of Montenegro

52-53. "The Venice Commission is of the opinion that elections from the parliamentary component should be by a two-thirds qualified majority, with a mechanism against possible deadlocks or by some proportional method which ensures that the opposition has an influence on the composition of the Council. It is a matter for the Georgian authorities to decide which solution is appropriate, but the anti-deadlock mechanism should not act as a disincentive to reaching agreement on the basis of a qualified majority in the first instance."

> CDL-AD(2013)007 Opinion on the Draft Amendments to the Organic Law on Courts of General Jurisdiction of Georgia

29. " [According to Article 95.7 of the Constitution, the Council has three components: "[t]he Council of Judges, the parliamentary majority and the parliamentary opposition correspondingly shall elect one third of the composition of the Council on selection of judges". Article 95.7 of the Constitution also provides that "[t] he Council on selection of judges is composed of judges and representatives of the civil society", but does not determine the distribution of judges and representatives of the civil society for each of the three components. Even under the current Constitution, it seems possible to achieve a composition with a substantial part of the members of the Council being judges, even if not all of them would be elected by their peers. To that end, the draft Law could provide that the majority and the opposition elect also some judges to the Council.] […]."

32. "Article 5.3 sets out that the members of the Council who are proposed by the majority and the opposition of Parliament are to be elected separately at the meeting of the fractions. However, this mechanism can be used only when the majority and the opposition are composed of a single fraction or parliamentary group. In practice, the majority and opposition each will often be composed of more than one fraction. The Council's members should be elected at separate meetings of the deputies from majority and opposition. In order to avoid a blocking of the process (especially by the opposition) within these meetings, the draft Law should establish a low quorum or even no quorum at all."

CDL-AD(2011)019 Opinion on the draft law on the council for the selection of judges of Kyrgyzstan

31."The participation of the legislative branch in the composition of such an authority is characteristic. "In a system guided by democratic principles, it seems reasonable that the Council of Justice should be linked to the representation of the will of the people, as expressed by Parliament." In general, the legislative bodies are entitled to elect part of the members of the high judicial councils among legal professionals, however in some systems members of parliament themselves are members of the judicial council. However, there are also systems where the appointment of judges is in the hands of the executive, and Members of Parliament are excluded from membership of the Judicial Council.

32. However, in order to insulate the judicial council from politics its members should not be active members of parliament. The Venice Commission is also strongly in favour of the depolitisation of such bodies by providing for a qualified majority for the election of its parliamentary component. This should ensure that a governmental majority cannot fill vacant posts with its followers. A compromise has to be sought with the opposition, which is more likely to bring about a balanced and professional composition."

CDL-AD(2007)028-e Report on Judicial Appointments

25. "[…][T]he delegation reiterated the proposal of the Commission to have the parliamentary component of the Council elected with a qualified majority. This would make sure that this component reflected the composition of the political forces in Parliament and would effectively make it impossible that the majority in Parliament fills all positions with its own candidates as it had been the case in the past."

CDL-AD(2003)012 Memorandum: Reform of the Judicial System in Bulgaria, §15 ; See also CDL-AD(2003)016, Opinion on the Constitutional Amendments reforming the Judicial System in Bulgaria, §25 ; See also CDL-AD(2008)006, Opinion on the Draft Law on the High Judicial Council of the Republic of Serbia, §§19, 21 ; see also CDL-AD(2008)009, Opinion on the Constitution of Bulgaria, §25

19. "[…][A] solution should therefore be found ensuring that the opposition also has some influence on the composition of the Council. One possibility would be to require a two-thirds (as in Spain) or three-fourths majority for the election of members by Parliament, another to provide that one of the two lawyer members should be designated by the parliamentary opposition. In any case, the presence of members nominated by the opposition but elected by parliament should be ensured while taking procedural safeguards against the risk of a stalemate."

CDL-INF(1998)009 Opinion on recent amendments to the law on major constitutional provisions of the Republic of Albania

## VII. OMBUDSMAN

45. "As to the appointment procedure, the Venice Commission finds that the 2/3 majority provided for by Article 8 § 1 of the Law to elect the Ombudsman at the first ballot is in line with the Principle 6 § 2 of the Venice Principles, which provides that "*[t]he Ombudsman shall preferably be elected by Parliament by an appropriate qualified majority*". This is to provide the institution with a politically and socially broad base and to strengthen to the highest possible extent the authority, impartiality, independence and legitimacy of the Institution. It is therefore questionable whether the possibility to elect the Ombudsman at the second ballot with an absolute majority of the votes (not even of all members) is still in line with the aforementioned principle, although the key criterion is not the qualified majority in itself, but the requirement of

support for the Ombudsman among parties, including those outside the Government. Simple majority does not require a broad consensus of all tendencies in the Parliament and the appointment of Ombudsman without such a consensus may compromise the institution's credibility. The Venice Commission recommends therefore amending Article 8 § 1 of the Law and providing that a qualified majority of at least 3/5 majority of the members be needed to elect the Ombudsman as from the second (even better the third) ballot."

47. "Turning to the "disqualification" provided for in the second part of Article 9 § 3 (b), the Venice Commission understands that the word refers to the incapacity (*incapacitació* in Catalan in the original text of the Law) procedure which can be triggered by the Parliament, as distinct from the court-declared incapacity referred to in the first part of the provision. Insofar as the Law provides that the same majority as that established for appointment is required to initiate the incapacitation procedure, the Law is compliant with Principle 11 of the Venice Principles (although it would be always preferable to have a higher majority for removal), provided that the considerations made above with regard to the necessary heightening of the majority to elect the Ombudsman are taken into account."

49. "The Venice Commission is also concerned by the majority requested for removing the Ombudsman in case of negligence or carelessness in the exercise of the office. In this case, Article 9 § 5 of the Law provides for the simple absolute majority, which is even less than the majority requested to elect the Ombudsman. This provision therefore stands in stark contrast to the Venice Principles. The Venice Commission therefore recommends amending the majority required to remove the Ombudsman for negligence or carelessness and bring it in line with the majority requested for electing the Ombudsman. This is fundamental for protecting the legal status of the Ombudsman, particularly his or her independence, and for preventing the politicisation of his or her possible dismissal."

27. "Lastly, the Venice Commission recommends that the Law clearly regulate the situations and specific modalities in which such functional immunity may be lifted (see also section F (5) below). In particular, the Law might provide that immunity might be lifted only by a qualified majority of the Parliament, in accordance with the requirements of Principle 11 of the Venice Principles."

> CDL-AD(2022)033 Andorra - Opinion on the Law on the creation and functioning of the Ombudsman

46. "In its 2021 Opinion, the Venice Commission recommended foreseeing a public and transparent selection procedure comprising public call, testing and shortlisting, followed by an election by a qualified majority by the Parliament, as well as a longer term of office and preferably a non-renewable term of office.

47. The recommendation of the Venice Commission was not taken into consideration .
[…].

57. The 2021 recommendation of the Venice Commission to foresee public and transparent dismissal procedures, as well as a qualified majority by Parliament, was not followed. […].

> CDL-AD(2022)028 Kazakhstan - Opinion on the draft constitutional law "On the Commissioner for Human Rights"

56. "Principle 6 of the Venice Principles states: *"The Ombudsman shall be elected or appointed according to procedures strengthening to the highest possible extent the authority, impartiality, independence and legitimacy of the Institution. The Ombudsman shall preferably be elected by Parliament by an appropriate qualified majority."*

58. “While it is conceivable that the appointment of the CHR by the President of the Republic and then by the Upper House of Parliament could be seen as affording to *“highest possible extent the authority, impartiality, independence and legitimacy of the Institution”*, the Venice Principles provide for this election to be done by an appropriate qualified majority. Hence, the election by an increased majority could strengthen the Ombudsman’s impartiality, independence and legitimacy.”

59. “The Commission invites the drafters to consider the possibility of a selection by the Parliament, as envisaged in the Venice Principles, by a qualified majority, in order to strengthen the Ombudsman’s impartiality, independence and legitimacy.”

68. “According to Principle 11 of the Venice Principles, *“The Ombudsman shall be removed from office only according to an exhaustive list of clear and reasonable conditions established by law. These shall relate solely to the essential criteria of “incapacity” or “inability to perform the functions of office”, “misbehaviour” or “misconduct”, which shall be narrowly interpreted. The parliamentary majority required for removal – by Parliament itself or by a court on request of Parliament- shall be equal to, and preferably higher than, the one required for election. The procedure for removal shall be public, transparent and provided for by law.”*

69. This principle needs to be seen in the context with the situation in each individual country. Conditions as well as procedures appear to be of fundamental importance as they constitute strong guarantees for the independence of the Commissioner.”

77. “As stated in Principle 11 of the Venice Principles, the draft should provide for a required majority for termination which should be at least equal to (and preferably higher than) the qualified majority required for election. This is fundamental for protecting the legal status of Commissioner, particularly his or her independence, and for preventing the politicisation of his or her possible dismissal.”

> CDL-AD(2021)049 Kazakhstan - Opinion on the draft law “On the Commissioner for Human Rights", paragraphs, See also CDL-AD(2019)005, Principles on the Protection and Promotion of the Ombudsman Institution ("The Venice Principles").

47. “According to the draft law under consideration, the PAER [“The People's Advocate for the Protection of Entrepreneurs' Rights] is selected by the votes of the majority of members in Parliament. The Venice Principles, in Principle 6, provide for “preferably” a “qualified majority”. This standard in fact reflects the essential importance of the election of the Ombudsman for the independence of the institution and the public image of that independence. The Ombudsman must enjoy the widest possible public consensus, and its public trust and legitimacy depends heavily on his/her election. The implementation of this principle, however, would require e a constitutional amendment.”

91. “As regards the procedure of appointment and dismissal of the People's Advocate for Entrepreneurs' Rights, the Commission notes that in order to implement the Venice Commission’s principle requiring a qualified majority for the election of the Ombudsman, a constitutional amendment would be required. Appointment criteria should also be provided for according to Principle 8 of the Venice Principles.[…].”

> CDL-AD(2021)017 Republic of Moldova - Opinion on the draft Law amending some normative acts relating to the People’s Advocate

110. “Under Article 125 of the Constitution, the independent constitutional bodies are to be elected by a qualified majority, by Parliament.

111. This provision is in keeping with the recommendations of the Venice Commission which prefers appointments by Parliament in the case of Ombudsmen (see Principle 6 of the "Venice Principles"), whereas the Paris Principles are silent on the subject where national human rights institutions are concerned.[…]

112. Indeed, in order to prevent partisan political considerations or specific interests from influencing appointments to positions that require a high degree of independence and impartiality, as in the case of judicial councils or Ombudsman institutions, the Venice Commission has, on numerous occasions, recommended appointment by a qualified majority.

113. The Constitution does not specify what constitutes a qualified majority, leaving it to the legislator to decide what this majority should be. Article 14 of the draft law stipulates a qualified two-thirds majority in the case of the Board.

114. While the Venice Commission has always advocated qualified majority voting, it has at the same time warned of the risk of paralysis and has also recommended developing robust anti-deadlock mechanisms. Such mechanisms should therefore be provided for in the draft law. Given the tasks which the Authority is called upon to perform and its limited powers, reducing the qualified majority to three fifths would be appropriate, and in the event of a deadlock, there should be the possibility of holding a second round of voting. During the visit, the rapporteurs were informed that the requisite majority would be reduced to three fifths precisely in order to avoid deadlocks."

> CDL-AD(2019)013 Tunisia - Opinion on the Draft Organic Law on the Authority for Sustainable Development and the Rights of Future Generations

94. "Article 82 incorporates the institution of Ombudsman, which was established at statutory level in 2002. The article describes the procedure for the appointment of the Ombudsman, who is "appointed by the head of state on the proposal of the Chamber of Deputies". […] The Commission also refers, however, to principle 6, under which "the Ombudsman shall be elected or appointed according to procedures strengthening to the highest possible extent the authority, impartiality, independence and legitimacy of the Institution. The Ombudsman shall preferably be elected by Parliament by an appropriate qualified majority". Yet to comply with this principle, Article 82 should specify that the proposal by the Chamber of Deputies must be adopted by a qualified majority, as described in Article 72, 3rd paragraph.[…]."

> CDL-AD(2019)003 Luxembourg - Opinion on the proposed revision of the Constitution

35."In its 2015 Joint Opinion, the Venice Commission questioned whether a 3/5th majority of the total number of deputies would indeed provide the Defender with sufficient support from parties outside the Government. It is not hard to imagine a parliamentarian context in which one political party or a coalition of parties controls 3/5th of the votes in the National Assembly. It should be remembered that a key criterion of PACE Recommendation 1615 (2003) on Ombudsman Institutions is not a qualified majority in itself, but the requirement of support for the Defender among parties, including those outside the Government. A qualified majority is only a means to achieve wide political support for the Defender, and the majority requirement in the draft constitutional law should be aligned to the specific parliamentarian system of Armenia. This would ensure a broader consensus, and thus consolidate the impartiality of the institution. In the same vein, the First Opinion on the Draft Amendments to the Constitution also recommended that "as the broadest possible consensus on the person elected should be ensured, the election by a two-third majority should be considered". However, as this recommendation was not followed, Article 12.2 now corresponds to Article 192.1 of the new Constitution, making it difficult to change this provision without having to amend the Constitution.

36. It should be pointed out that a qualified-majority requirement increases the risk of a parliamentarian deadlock in the election of the Defender. However, Article 138 of the new Constitution (Temporary Appointment of Officials) only provides a provisional remedy to this problem. Article 138 applies to a broad range of public officials and notably provides that should a 3/5th majority not be reached, then the President of the Republic of Armenia appoints a Human Rights Defender ad interim until the procedure is repeated and a Defender is elected. This can of course not be considered a viable solution if repeated elections also fail."

> CDL-AD(2016)033 Armenia - Opinion on the draft Constitutional Law on the Human Rights Defender

63. "The Venice Commission acknowledges that, in the particular context of BiH, the decision-making in parliament, which can be subject to multiple vetoes, is extremely difficult to achieve. Introducing a qualified majority requirement would create additional difficulties and further complicate the procedure, notably in the appointment of the Ombudspersons. In the light of these considerations, the Commission believes that it belongs to the authorities of BiH to assess whether a qualified majority rule may be successfully introduced and implemented or, from a more pragmatic perspective, a joint decision of the two Houses could serve as a sufficient guarantee for the "broad consensus" needed both to appoint an Ombudsman or to decide on the early termination of his/her mandate. "

> CDL-AD(2015)034 Opinion on the Draft Law on Ombudsman for Human Rights of Bosnia and Herzegovina

48. "Election of the candidate by a 2/3 majority would be a better solution than a 3/5 majority provided by the existing law and by the constitutional amendments. Indeed, in the previous opinion on the Defender the Venice Commission welcomed the election of the Defender by a 3/5 majority, by contrast with the previously existing system; however, the question remains whether 3/5 represents "qualified majority of votes sufficiently large as to imply support from parties outside government", required by p. 7.3 of the PACE Recommendation 1615 (2003). The Venice Commission also draws attention to CDL-PI(2015)015rev where it recommended to the Armenian authorities to consider the election of the Defender by a two- third majority (§ 192). In addition to that, the ideal of "nearly-consensual" election of the Defender would better be served by ensuring personal voting in the Parliament instead of voting "by delegation.

49. Furthermore, an anti-deadlock mechanism should be put in place for situations where a candidate does not obtain the necessary qualified majority of votes in the Parliament. The purpose of such mechanism would be "to create incentives for both the majority and the opposition in Parliament to find a reasonable compromise (or, rather, to create disincentives to prevent situations where they are not capable of finding a compromise)."

> CDL-AD(2015)017 Opinion on the Law on the People's Advocate (Ombudsman) of the Republic of Moldova

50. "According to Article 8(2) of the Law, in order to be elected as People's Advocate, a candidate is required to get the majority of votes in the Parliament. This provision is not in line with the European standards. Recommendation 1615(2003) requires "qualified majority of votes sufficiently large as to imply support from parties outside government." Also, the Venice Commission has repeatedly stressed that the election of an Ombudsman by a broad consensus in the Parliament would certainly strengthen the Ombudsman's impartiality, independence and legitimacy and contribute to the public trust in the institution. Article 8.2 should therefore be amended in such a way as to require for the appointment of the People's Advocate a qualified majority in the Parliament. This may require a constitutional amendment."

CDL-AD(2015)017 Opinion on the Law on the People's Advocate (Ombudsman) of the Republic of Moldova

81. ”The election of the Ombudsman (Article 91a(1)) should require a qualified majority to provide the office with a politically and socially broad base.”

CDL-AD(2008)009 Opinion on the Constitution of Bulgaria

32. “More in general, the fact that Article 6.2 allows for the election of the Peoples Advocate by simple majority after one unsuccessful vote by a qualified majority, makes it too easy to overcome the requirement of the qualified majority. The governmental majority could simply obstruct the first vote in order to be able to have its candidate accepted by simple majority in the second vote. It is therefore recommended that at least three failed votes should be necessary before reverting to a simple majority. Attempts to negotiate a ‘ticket’ of the candidates with most of the votes could be made obligatory (allowing one to become the People’s Advocate and the other to become Deputy).”

CDL-AD(2007)024 Opinion on the Draft Law on the People's Advocate of Kosovo

11. “As a final matter under this head, it is to be noted that according to the above general standards, the normative text regulating the status and functions of the Ombudsman for Human Rights should be embodied in legislation of the national parliament, and the person of the Ombudsman should be elected by the parliament by a majority large enough to ensure a reasonable consensus, i.e. by a qualified majority of all members.»

CDL-AD(2007)020 Opinion on the possible reform of the Ombudsman Institution in Kazakhstan

8.1 “ It would be preferable to have the ombudsperson appointed and dismissed by a qualified majority in Parliament….» […]

11. Article 3 provides for the appointment of the ombudsperson by the National Assembly by simple majority. However, a broad consensus for the choice of the ombudsperson is important in order to ensure public trust in the independence of the ombudsperson. Consequently, a qualified majority in Parliament for the appointment of the ombudsperson is appropriate (2/3 or 3/5 of votes cast). If existing constitutional provisions render the fulfilment of such requirement impossible, other possibilities should be explored, which would allow to come to the same result. However, such modalities would have to be safeguarded on the level of law.”

CDL-AD(2004)041 Joint Opinion on the Draft Law on the Ombudsman of Serbia by the Venice Commission, the Commissioner for Human Rights and the Directorate General of Human Rights of the Council of Europe

8. “The Commission welcomes the new provision in Article 2 par. 1 that «The Ombudsman shall be elected by 83 votes of the deputies of the Milli Mejlis of the Republic of Azerbaijan of three candidates proposed by the President of the Republic». The election by the increased majority in the Parliament will certainly strengthen the Ombudsman’s impartiality, independence and legitimacy. This is a very positive change compared to the provision of the first draft, which stated that «the Ombudsman shall be appointed by the Milli Mejlis of the Republic of Azerbaijan following a recommendation of the President of the Republic of Azerbaijan». The proposal to also involve other persons (such as academics and/or judges of the highest judicial authorities) in the selection of persons proposed for the office of Ombudsman to the Milli Mejlis has not been retained.”

CDL(2001)083 Consolidated Opinion on the Law on Ombudsman in the Republic of Azerbaijan

"Article 10 of the Law provides that the Ombudsman «shall be appointed and dismissed by the House of Representatives and the House of Peoples following a joint proposal by the competent body of the House of Representatives and the House of Peoples. The competent body shall adopt the proposal by a majority of two thirds of its members».

The Working Group's preliminary draft provided for a two-thirds majority at all stages of the appointment procedure, i.e. in the competent joint committee, in the House of Representatives and in the House of Peoples. As indicated by the Working Group in its final report on the Ombudsman institutions in Bosnia and Herzegovina, the provisions in the draft laws regarding the composition and the appointment of Ombudsman «are intended to ensure the broadest possible consensus on the persons concerned. This is the only way of making the institution's impartiality an objective fact, recognisable in the eyes of all citizens» (CDL-INF(99)10). The appointment of the Ombudsman as provided for in Article 10 of the Law, i.e. by a simple majority of members present in the two Houses, seems to be inadequate. Simple majority does not require a broad consensus of all tendencies in the Houses and appointment of Ombudsman without such a consensus may compromise the institution's credibility.»

The Working Group would therefore recommend that the Law be amended in such a way as to require for the appointment of the Ombudsman a two thirds majority in both Houses."

CDL-INF(2001)007 (English only) – Memorandum on the Organic Law on the Institution of the Ombudsman of the Federation of Bosnia and Herzegovina,§2

## VIII. REFERENCE DOCUMENTS

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CDL-AD(2022)050 Montenegro - Opinion on the draft amendments to the Law on the Judicial Council and Judges

CDL-AD(2022)053 Urgent Opinion on the Law on amendments to the Law on the President of Montenegro

CDL-AD(2022)043 Follow-up Opinion on three revised draft Laws implementing the constitutional amendments on the judiciary of Serbia

CDL-AD(2022)042 Serbia - Opinion on two draft laws implementing the constitutional amendments on the prosecution service

CDL-AD(2022)035 Belarus - Opinion on the Constitutional Reform

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CDL-AD(2022)019 Republic of Moldova - Opinion on the draft Law on amending some normative acts (Judiciary)

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CDL-AD(2016)009 Final Opinion on the revised draft constitutional amendments on the Judiciary (15 January 2016) of Albania

CDL-AD(2015)037 First Opinion on the Draft Amendments to the Constitution (Chapters 1 to 7 and 10) of the Republic of Armenia

CDL-AD(2015)027 Opinion on the proposed amendments to the Constitution of Ukraine regarding the judiciary as approved by the Constitutional Commission on 4 September 2015.

CL-AD(2015)024 Opinion on the Draft Institutional Law on the Constitutional Court of Tunisia

CDL-AD(2015)003 Final Opinion on the revised draft Law on the public Prosecution Office of Montenegro

CDL-AD(2015)039 Joint Opinion of the Venice Commission, the Consultative Council of European Prosecutors (CCPE) and OSCE Office for Democratic Institutions and Human Rights (OSCE/ODIHR), on the draft Amendments to the Law on the Prosecutor's Office of Georgia

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