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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW
(VENICE COMMISSION)

COMPILATION

OF VENICE COMMISSION OPINIONS AND REPORTS

CONCERNING COURTS[1]

[1] *This document will be updated regularly. This version covers opinions and reports/studies adopted up to and including the Venice Commission's 141st Plenary Session (Venice, 6-7 December 2024).*

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I. INTRODUCTION

This document is a compilation of extracts taken from opinions and reports/studies adopted by the Venice Commission on issues concerning courts and councils of justice. It covers notably the establishment, structuring and composition of courts, the role of higher courts vis-à-vis lower courts, presidents and senior judges, remedies for excessive length of proceedings, the composition of councils of justice, their structure and working methods, and appeals against decisions of councils of justice. This compilation does not concern constitutional justice and organisation of prosecution system (these topics are presented in separate compilations).

The compilation is intended to serve as a source of reference for drafters of constitutions and of pieces of legislation on the judiciary, researchers, as well as the Venice Commission's members, who are requested to prepare comments and opinions concerning legislation dealing with such issues. When referring to elements contained in this draft compilation, please cite the original document but not the compilation as such.

Venice Commission 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.

Each citation in the compilation 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 opinion or report/study from which it was taken. In order to shorten the text, most of further references and footnotes are omitted in the text of citations; only the essential part of the relevant paragraph is reproduced.

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

II. CONSTITUTIONAL AND STATUTORY REGULATION

2.1 Provisions on courts and their structure

"The establishment and jurisdiction of courts, as well as the procedure before the courts, shall be specified by law."

> CDL-INF(1998)015, Opinions on the constitutional regime of Bosnia and Herzegovina, p.44

"It is important that the different types of court are provided for at Constitutional level."

> CDL-AD(2005)003, Joint opinion on a proposal for a constitutional law on the changes and amendments to the Constitution of Georgia by the Venice Commission and OSCE/ODIHR, §102

"Article 125 will be amended to provide that the network of courts and general jurisdiction is to be determined by law, and that the courts are to be established, reorganised and abolished through the law. The intention behind this provision is to prevent such changes being made by means of a decree. Parliament will be empowered (see Article 85) with the right to determine the structure of the court system (called 'network' in the Amendments), to establish, to reorganise and to abolish the courts upon the motion of the President of Ukraine. This solution seems to be reasonable and involves the co-operation between various organs. The Venice Commission welcomes that in the future the network will be defined by law."

> CDL-AD(2013)014, Opinion on the Draft Law on the amendments to the Constitution, Strengthening the Independence of Judges and on the Changes to the Constitution proposed by the Constitutional Assembly of Ukraine, §15

"It is a fact that alternative machineries for resolving conflicts are developing in many European states. The relationship between the ordinary courts and these alternative institutions certainly needs to be analysed and even regulated through legal norms. The Constitution is perhaps not the appropriate place to settle such problems, beyond a mere reference to the existence of the problem as such.

It is not necessarily correct that 'the Constitution must define the individual elements of the court organisational structure'. […] Only the general framework of the organisation of the court system deserves to be reflected in the Constitution itself."

> CDL-INF(1996)002, Opinion on the regulatory concept of the Constitution of the Republic of Hungary, p. 32

"[…] [A] new provision states that the administrative adjudication is to be organised in two instances encompassing the Administrative Court of First Instance and the High Administrative Court. It seems not very logical to refer expressly to a named first instance court in relation to the administrative law when in the previous paragraph the Constitution provides that first instance courts shall be set up by law. [...] It would be preferable if the rules in the Constitution concerning the administrative courts mirror those concerning the ordinary courts, i.e., to make a specific reference to named courts only in relation to the higher courts, leaving it to organic law to organise all courts of first and second instances. […]"

> CDL-AD(2015)045, Interim Opinion on the Draft Constitutional Amendments on the Judiciary of Albania, §39

2.2 Provisions on the Councils of Justice

"While the new arrangements proposed by the draft Law are important and far-reaching, it is important to ensure their stability. It would be counterproductive to the goal of restoring confidence in the judiciary if the statutory rules could be changed at the next change of government. It therefore appears to be advisable to enshrine in the Constitution itself the method of election of the NCJ members, the security of their tenure, the main functions of the NCJ, and the forms of participation of civil society. The matter of the joint term of the members of the NCJ and the composition of the NCJ alongside European standards (and best practices) could also be addressed on this occasion."

> CDL-AD(2024)018, Poland - Urgent Joint Opinion on the draft law amending the Law on the National Council of the Judiciary of Poland, § 76.

"Because of their primary role as guarantors of the independence of the whole judiciary, the security of tenure and functional immunity of the members of the CJP should be set out in the Constitution. The Constitution should refer to the law for the establishment of clear and limited grounds for disciplinary actions and possibly dismissal, which should not relate to the exercise of their functions as members of the CJP. The legislation should also ensure all appropriate / necessary procedural safeguards, in line with the Constitution."

> CDL-AD(2024)041, Türkiye - Opinion on the composition of the Council of Judges and Prosecutors and the procedure for the election of its members, § 63.

"[…] It is positive that the draft Law will be adopted as a law, and not as a decree-law (as the current Decree-Law no. 150/1983). However, certain basic parameters of the composition and powers of the Supreme Council of Magistracy (SCM) should be entrenched in the Constitution, in order not to expose the system of judicial governance to the imperatives of the prevailing politics. Otherwise, any new political majority could be tempted to change the system, which may be detrimental to the independence and efficiency of the judiciary. While a constitutional reform may not be currently on the agenda, if it is to be envisaged in a foreseeable future, the Venice Commission would strongly recommend entrenching some basic rules on the judicial governance at the constitutional level. Procedures before the SCM, discipline and performance evaluations, administration of the judicial process, etc. may be regulated by the ordinary legislation."

> CDL-AD(2022)020, Opinion on the draft law on the independence of judicial courts of Lebanon, §22

"An appropriate method for guaranteeing judicial independence is the establishment of a judicial council, which should be endowed with constitutional guarantees for its […] powers and autonomy."

> CDL-AD(2007)028, Report on Judicial Appointments by the Venice Commission, §48

"There are various models of functioning of supreme judicial councils, but the fundamental legal status of each apex state institution, including the judicial council, should be embedded in the Constitution. […]"

> CDL-AD(2018)003, Opinion on the Law on amending and supplementing the Constitution (Judiciary) of the Republic of Moldova, §56
> See also CDL-AD(2012)014, Opinion on Legal Certainty and the Independence of the Judiciary in Bosnia and Herzegovina, §84

“Given their crucial role in appointing judges, the composition of the Supreme Council [of the Judiciary], as well as their appointment or election, should be defined in the Constitution.”

> CDL-AD(2005)003, Joint opinion on a proposal for a constitutional law on the changes and amendments to the Constitution of Georgia by the Venice Commission and OSCE/ ODIHR, §102
> See also CDL-AD(2019)003, Opinion on the proposed revision of the Constitution of Luxembourg, §108; CDL-AD(2014)008, Opinion on the draft Law on the High Judicial and Prosecutorial Council of Bosnia and Herzegovina, §24

“As stated in previous Venice Commission opinions, what is also very important is to have a well-balanced council, not only between the judicial and non-judicial members, but also among the judicial members so that they represent different types of judges and levels of the judiciary, while ensuring balance between the regions, gender balance etc. This can be difficult to achieve, particularly on a body which if it is to be effective should not have too many members. It is sufficient that the Constitution expresses the principle, while the specific procedures and criteria for a balanced representation of all levels of courts should be regulated in law.”

> CDL-AD(2023)039, Opinion of the Draft Amendments to the Constitution of Bulgaria, §48

“The constitutional text should stipulate what to do if the 2/3 majority in the NA required to elect lay members is not reached. The Commission reiterates that without an anti-deadlock mechanism this rule entrenched in the Constitution may become an obstacle to the proper operation of the two councils. […]”

> CDL-AD(2023)039, Opinion of the Draft Amendments to the Constitution of Bulgaria, §50

“The lawmaker should consider including in the Constitution provisions guaranteeing independence and impartiality of individual members of the [Judicial Council] and of the [Judicial Council] as a whole. [...]”

> 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, §77

“The Montenegrin authorities have decided to propose two separate draft laws in the area of the judiciary: the Draft law on courts and the law on rights and duties of judges and on the High Judicial Council. To adopt two separate laws on this field seems, however, not to be the best solution, as both issues are closely connected. […]

[…] ‘[A] single law would make the regulations more coherent and understandable’.”

> CDL-AD(2014)038, Opinion on the draft laws on courts and on rights and duties of judges and on the Judicial Council of Montenegro, §§13, 14

“The Venice Commission reiterates that the proper functioning of the HJC and the HPC may require creation of sub-bodies [...]; this possibility should be at least mentioned at the constitutional level, while the composition of those sub-bodies and their competency may be described in the implementing legislation.”

> CDL-AD(2016)009, Final Opinion on the revised draft constitutional amendments on the Judiciary (15 January 2016) of Albania, §20

III. COURTS

3.1 Establishment, structuring and composition of courts

"[…] While it is obviously appropriate that questions pertaining to appeals and the procedure before the various courts are determined in the various codes of procedure, it may be preferable, under the specific conditions of a country newly establishing a judicial system based on the rule of law, to have one comprehensive text covering all questions pertaining to the composition, organisation, activities and standing of the judiciary."

CDL-INF(2000)005, Opinion on the draft law of Ukraine on the judicial system, p.2

"The most competent body for designing and changing the court network is the High Judicial Council ('HJC'). The adoption of the network can of course be a competence of Parliament because such decisions have important budgetary implications. However, the initiative for such decisions should come from the HJC rather than the President.

[…] While it is positive that the court network is established by the Rada, this should not be done through a resolution but through the ordinary legislative procedure."

CDL-AD(2013)034, Opinion on proposals amending the draft law on the amendments to the constitution to strengthen the independence of judges of Ukraine, §§13-14
See also CDL-AD(2015)026, Opinion on the Amendments to the Constitution of Ukraine regarding the Judiciary as proposed by the Working Group of the Constitutional Commission in July 2015, §18; CDL-AD(2010)026, Joint opinion on the law on the judicial system and the status of judges of Ukraine by the Venice Commission and the Directorate of Co-operation within the Directorate General of Human Rights and Legal Affairs of the Council of Europe, §16

"It would seem that the territorial organisation of the court system under the draft would be based on the administrative structure of [a country], both as regards the local general courts of first instance and the establishment of […] courts of appeal […]. While the overriding criteria determining the territorial structure of the court system should be the needs of the court system itself and the facility of access by people to the courts, such a system is acceptable in principle. In a new democracy […] it would however seem preferable to avoid such a link between administrative division and court organisation to make it more difficult for the administration to exert undue influence on the courts."

CDL-INF(2000)005, Opinion on the draft law of Ukraine on the judicial system, p.4

"However, it would be preferable to leave the composition of the panels to the rules of procedure."

CDL-AD(2013)015, Opinion on the draft law on the courts of Bosnia and Herzegovina, §59

"[…] According to [the principle of the 'lawful' or 'natural' judge and/or panel], the composition of the panel examining a case should be defined in advance by a statute or at least by objective criteria based on the law. […]

[…] [T]he First President/Presidents of Chambers [of the Supreme Court] should not have an unlimited discretion in setting up panels, distributing cases amongst them and assigning judges (and lay judges) to the benches."

CDL-AD(2017)031, 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, §§87 and 88

"It would be desirable to avoid extensive involvement of the executive (Ministry of Justice) in adopting court rules for internal operation and procedure and delegate the adoption of the internal regulation and rules of procedure to the courts, within the limits set by the laws."

CDL-AD(2013)015, Opinion on the draft law on the courts of Bosnia and Herzegovina, §70
See also CDL-AD(2017)031, 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, §§81, 82, 118 and 119; CDL-AD(2015)023, Opinion on the Rules of Procedure of the Constitutional Chamber of the Supreme Court of the Kyrgyz Republic, §§12 and 13

"[…] There is no international standard on the number of judicial instances; the State is free to choose a model which best suits its needs and is compatible with the national legal traditions."

CDL-AD(2017)019, Opinion on the Draft Judicial Code of Armenia, §38

"The court system is rather complex […]. There are four levels of jurisdiction […]. It should be kept in mind that a very elaborate and complicated judicial system carries with it the risk of prolongation of proceedings. […] Thus structural features in a legal system that cause delays are not an excuse under Article 6. Although the Supreme Court is apparently overloaded today, the solution in a longer term can hardly lie in the establishment of additional court levels but in the streamlining of the proceedings and making them more effective. […] [T]he complicated system of judicial self-government may potentially deprive many judges of the time needed for the real judicial work. […]"

CDL-AD(2010)003, Joint Opinion on the Draft Law on the Judicial System and the Status of Judges of Ukraine by the Venice Commission and the Directorate of Co-operation within the Directorate General of Human Rights and Legal Affairs of the Council of Europe, §§20-23

"[…] [I]f the President's function of establishing and liquidating courts is to remain in the Constitution, the future constitutional reform should ensure that the ceremonial character of that function is clearly reflected. […]"

CDL-AD(2015)007, Joint opinion by the Venice Commission and the Directorate of Human Rights of the Directorate General of Human Rights and the Rule of Law on the Law on the Judiciary and the Status of Judges and amendments to the Law on the High Council of Justice of Ukraine, §34
See also CDL-AD(2015)008, Preliminary Opinion on the Draft Law on amending the Law on the Judicial System and the Status of Judges of Ukraine, §34; CDL-AD(2011)033, Joint opinion on the draft law amending the law on the judiciary and the status of judges and other legislative acts of Ukraine by the Venice Commission and the Directorate of Justice and Human Dignity within the Directorate General of Human Rights and Rule of Law of the Council of Europe, §22

"The Venice Commission […] consider that the appropriate body to make the ultimate assessment on the number of Supreme Court judges and of the need for more judges is usually the legislator or the High Council of Justice, given that the choice depends, inter alia, on the available budgetary means, which cannot be determined by the Supreme Court judges. It is nevertheless highly recommended that the legislator takes into consideration the opinion of the Supreme Court in the legislative process […]."

CDL-AD(2014)031, Joint Opinion of the Venice Commission and the Directorate of Human Rights (DHR) of the Directorate of Human Rights and the Rule of Law (DGI) of the Council of Europe, on the draft Law on Amendments to the Organic Law on General Courts of Georgia, §19

"[…] [I]t may be necessary to fix [in the Draft Code] […] the number of judges of the Court of Cassation, to avoid 'packing' this court by new judges. By contrast, as to the lower courts, it would be better to provide in the Draft Code only general criteria for determining the number of judges and to entrust the SJC and/or Parliament with the power to determine the exact numbers and repartition of judges amongst the lower courts."

CDL-AD(2017)019, Opinion on the Draft Judicial Code of Armenia, §42

"Article 4(3) reads: 'The total number of judges for each court shall be determined by the HJPC, on the elaborated proposal of the President of the Court and the express consent of the Ministry of Justice'. While the first part of the provision […] is logical and not objectionable, it is less clear (1) why the proposal should be submitted by the President of the Court, and (2) when this should be done. It seems that since the total number of judges is to be determined for each Court, the President of each Court should make a proposal, but this needs to be clarified. Equally problematic is the requirement of the express consent of the Minister of Justice of BiH. The draft Law does not provide details on whether and in what case the Minister of Justice may refuse consent or what is to happen in such an eventuality, which has the potential to lead to deadlock."

CDL-AD(2013)015, Opinion on the draft law on the courts of Bosnia and Herzegovina, §25

"Article 4(2) provides that 'the High Court shall have an equal number of judges from each of the constituent Peoples and the appropriate number of judges from the ranks of Others'. The Venice Commission understands that this provision aims to ensure the equitable representation of various peoples living in the territory of BiH. While such an effort is legitimate in the political sphere, for instance in setting the parameters of the voting system, it would be highly problematic to apply it within the judiciary. […]

[…] [O]rganising courts along ethnic lines would be wrong, counterproductive and damaging to the credibility of the judicial institutions. […]"

CDL-AD(2013)015, Opinion on the draft law on the courts of Bosnia and Herzegovina, §§21 and 23

"[…] [S]everal provisions of the Draft confer to the Ministry of Justice powers over the judiciary. Article 47 imposes the obligation on the president of the court to deliver the activity report of the court to the Ministry of Justice, and, at the request of the Ministry of Justice, to deliver specific or periodic reports which are necessary for the performance of tasks falling under their jurisdiction. These obligations seem to place the president of the court in a position of subordination to the Ministry of Justice.

According to Article 50, 'the performance of court administration tasks shall be supervised by the Ministry of Justice. […]'. Article 52 further establishes the possibility for the Ministry of Justice to carry out inspections in courts, for example, in relation to the organisation of work in courts […].

Article 50, para. 2 includes a specific provision which rightly sets out that 'In exercising its supervision functions, the Ministry of Justice may not take actions that interfere with court's decision issuance in legal cases'. However, it should be noted that no clear-cut boundary separates supervision of court administration from supervision of fulfilment of adjudicative tasks. […] It should be considered whether the Judicial Council could be entrusted with the supervision of court administration as defined in Chapter IV of the Draft law on courts […].

It should be considered to harmonize the two laws in this respect, limiting the supervisory role of the Ministry of Justice in a clearer manner. It is recalled in this context that Montenegro has a long history of risk of politicisation of the judiciary, and that, as proposed in the Draft law on rights and duties of judges and on judicial council, the Judicial Council will have a special (more balanced) composition to combat both this risk and the risk of too corporatist approach within the judiciary."

> CDL-AD(2014)038, Opinion on the draft laws on courts and on rights and duties of judges and on the Judicial Council of Montenegro, §§33-36

"The Venice Commission accepts that lay judges may take part in the proceedings before the first instance courts. However, their participation at the level of the SC is, as a rule, ill-advised. […]"

> CDL-AD(2017)031, 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, §70

3.1.1 Specialised courts

"[…] [I]t would seem *inter alia* desirable to state clearly that the general courts have residual jurisdiction, i.e. that they are competent to deal with all justiciable matters which are not specifically referred by law to the specialised courts within the overall system."

> CDL-INF(2000)005, Opinion on the draft law of Ukraine on the judicial system, p. 3

"Usually, the Venice Commission refrains from taking a definite stance on the establishment of separate administrative courts. Both models (having special administrative courts or keeping administrative cases within the jurisdiction of ordinary courts) are legitimate. While specialisation may be very useful in certain circumstances, it creates a risk of complicating the system and is not always cost-efficient, especially in small countries. That being said, 'it is of course perfectly compatible with European standards to introduce administrative courts with specific jurisdiction standing beside the ordinary general courts'.

What may be problematic is where such a three-pillar system has no common highest instance, since the three different chambers remain separated within the Court of Cassation. It may give rise to two types of complications: jurisdictional disputes (disputes about which court is competent to hear a particular case) and inconsistent case law, especially between the civil and the administrative pillars. […] If different branches of the judiciary are completely separate, there is a risk that they develop conflicting approaches to the same issues.

There are different solutions to this problem. One would be to have a joint chamber with a greater amount of judges, but with separate civil and administrative panels. Within this chamber it would be possible to develop case-management and case-distribution with provisions or routines that could support uniformity. […]

Another solution would be to keep separate chambers, but provide for a regular (or *ad hoc*) common sitting of all three chambers of the Court of Cassation, which would resolve jurisdictional disputes and ensure coherence of the case law."

> CDL-AD(2017)019, Opinion on the Draft Judicial Code of Armenia, §§44-47
> See also CDL-AD(2019)004, Opinion on the law on administrative courts and the law on the entry into force of the law on administrative courts and certain transitional rules of Hungary, §§27-28; CDL-AD(2011)012, Joint Opinion on the constitutional law on the judicial system and status of judges of Kazakhstan, §17; CDL-AD(2002)026, Opinion on the Draft Law on Judicial Power and Corresponding Constitutional Amendments of

Latvia, §§6, 7; CDL-INF(2001)017, Report on the Revised Constitution of the Republic of Armenia, §59; CDL-INF(1996)006, Opinion on the draft Constitution of Ukraine, p. 15

"[…] The Venice Commission has previously pointed out the need to unify the system of ordinary courts and to transform the high specialised courts into sections within the Supreme Court, with the (possible) exception of the high administrative court. This could help to ensure the harmonisation of case-law and the uniform application of the law and avoid conflicts between courts and would diminish the bureaucracy. It would also reduce the length of the proceedings, which must be reasonable under Article 6 ECHR."

CDL-AD(2015)026, Opinion on the Amendments to the Constitution of Ukraine regarding the Judiciary as proposed by the Working Group of the Constitutional Commission in July 2015, §19.
See also CDL-AD(2013)014, Opinion on the Draft Law on the amendments to the Constitution, Strengthening the Independence of Judges and on the Changes to the Constitution proposed by the Constitutional Assembly of Ukraine, §45

"The draft provides for a system of separate economic (arbitration) courts. Such systems exist in various countries and the need for judges to specialise in various areas of commercial law to efficiently deal with commercial disputes justifies dealing with commercial cases separately. It is however more common in Western Europe to use special panels of the ordinary courts for such matters, often providing for the involvement of merchants as lay judges. By contrast, the Ukrainian solution appears problematic since it is a simple continuation of the Soviet model which was based on different legal regulations for individuals and socially owned entities. The conceptual justification for this model does not exist in a market economy in which inter-enterprise relations are governed by private law."

CDL-INF(2000)005, Opinion on the draft law of Ukraine on the judicial system, p. 5

"[The law provides that Regional Courts shall have a Civil Case Panel and a Criminal Case Panel]. Ideally there should be the principle of rotation of the judges between panels from time to time. The same applies to the Supreme Court (having Senates) […]."

CDL-AD(2002)026, Opinion on the Draft Law on Judicial Power and Corresponding Constitutional Amendments of Latvia, §42

"[…] A system of granting jurisdiction to military courts for cases involving civilians and where there seems no need to have recourse to military judges is bound to produce violations of the Convention."

CDL-INF(2000)005, Opinion on the draft law of Ukraine on the judicial system, p. 5

"It is true that military courts exist in other countries and are not objectionable as such. The proposed system nevertheless goes beyond what is acceptable. In a democratic country the military has to be integrated into society and not kept apart. Democracies therefore generally provide for the possibility of appeals from military courts to civilian courts and a final appeal to a panel composed of military officers appears wholly unsatisfactory."

CDL-INF(2000)005, Opinion on the draft law of Ukraine on the judicial system, p. 4

"[…] The transfer of the power to adjudicate misdemeanour proceedings to the judiciary is to be welcomed. Under the current system, bodies in charge of misdemeanour procedure do not have the status of courts, although in such procedures sentence of imprisonment may be passed."

CDL-AD(2014)038, Opinion on the draft laws on courts and on rights and duties of judges and on the Judicial Council of Montenegro, §15

"The arguments for specialisation are notably weak when it comes to central matters of criminal jurisdiction. Measures against individuals suspected of having committed a crime are an important part of criminal procedure. In most countries, criminal judges take such decisions during the investigation phase and in Turkey, even after the establishment of the peace judgeships, criminal judges continue to do so during the prosecution phase. For this reason, all criminal judges must be fully competent to take decisions on such matters.

The creation of a specialist court to deal with pre-trial criminal matters does not appear to be a tradition of judicial systems in many European democracies. […]"

CDL-AD(2017)004, Opinion on the duties, competences and functioning of the criminal peace judgeships of Turkey, §§59-60

"[…] [I]t is noted that the Republic of Moldova is a relatively small country where it might not be called for to have a judicial system with many different branches. Thus, even if the introduction of specialized courts may be considered to be successful in some countries, it is still necessary to assess the specific situation in the Republic of Moldova. […]"

CDL-AD(2023)032, Joint Opinion of the Venice Commission and the Directorate General of Human Rights and Rule of Law (DGI) of the Council of Europe on the Draft Law on the Anti-Corruption Judicial System and on Amending Some Normative Acts of Moldova, §17

"In order to prevent the overlapping of the administrative jurisdiction with the jurisdiction of the ordinary courts, it is advised to specify that administrative courts will be entitled to consider cases emanating from administrative legislation. This could help to delimit civil, criminal and administrative disputes. Furthermore, it is recommended to address different types of administrative claims in different articles, including admissibility criteria for each type of claim and a specific time-limit for the court to check the admissibility of a complaint."

CDL-AD(2024)006, Lebanon - Opinion on the draft law on the Administrative Judiciary, §46

3.2 Organisation of work within the courts

3.2.1 The role of the higher courts vis-à-vis the lower courts

"[…] Judicial decisions should not be subject to revision outside the appeal process. […]"

CDL-AD(2013)035, Opinion on the draft Code on Judicial Ethics of the Republic of Tajikistan, §8

"[…] Th[e] internal judicial independence requires that they be free from instructions or pressure from their fellow judges and vis-à-vis their judicial superiors.

Seeking instructions in individual cases from higher instance judges, who would be deciding the appeal, deprives the parties from an independent review of their judgment, thereby violating their right of access to the courts […]. Such practice (including providing instructions) is not only inefficient (one level of jurisdiction is, *de facto*, removed), but it also violates human rights. This practice, if persisted in, should be dealt with through disciplinary means against judges taking part in such practice."

CDL-AD(2014)007, Joint opinion on the draft law amending and supplementing the judicial code (evaluation system for judges) of Armenia, §§15 and 18
See also CDL-AD(2018)032, Opinion on the Concept Paper on the reform of the High Judicial Council of Kazakhstan, §89; CDL-AD(2010)004, Report on the Independence of the Judicial System Part I: The Independence of Judges, §72; CDL-AD(2005)003, Joint opinion on a proposal for a constitutional law on the changes and amendments to the Constitution of Georgia by the Venice Commission and OSCE/ODIHR, §101

"In the previous Opinion, the Venice Commission pointed out different ways in which the Curia and the court leaders can interfere in the administration of justice of the lower courts. The Curia ensures the uniformity of the application of the law by adopting 'an obligatory decision applicable for courts' […], by 'publishing court rulings and decisions or authoritative rulings' […], by making a 'legal standardisation decision' […] and by conducting an analysis of the jurisprudence.

Crucially, chairs and division heads of courts and tribunals continuously monitor the administration of justice by the courts under their supervision and have to inform the higher levels of judgments handed down contrary to 'theoretical issues' and 'theoretical grounds' […]. Non-compliance with the rulings of the higher courts could have a negative influence on the evaluation of the judges and thus on their career.

[…] [U]niformity procedure and its system of supervision by the court presidents might have a chilling effect on the independence of the individual judge […] [and] may only be acceptable if it does not have a negative influence on the career of the judges […].

[…] The supervision of judges by chairs and division heads of courts and tribunals should be abolished."

CDL-AD(2012)020, Opinion on the Cardinal Acts on the Judiciary that were amended following the adoption of Opinion CDL-AD(2012)001 on Hungary, §§50-53

"[…] [W]hile a supreme judicial body such as the Supreme Court generally plays a key role in a country, by, among others, providing legal certainty, foreseeability, and uniformity in the interpretation and application of laws, it should not supervise lower courts nor issue guidelines, directives, explanations, or resolutions that would be binding on judges. Article 96 par 2, as amended, allowing the Supreme Court to give mandatory 'explanations' should, therefore, be deleted.

At the same time, this does not mean that judges at lower instances may simply ignore the judgments of the Supreme Court. By way of appeal, the Supreme Court will ensure that its interpretation of the law prevails. However, lower court judges should have the possibility to distinguish their cases at hand from previous cases and they should be in a position to present new arguments, which then will be tested at the appeals stage."

CDL-AD(2016)025, Endorsed joint opinion on the draft law "on Introduction of amendments and changes to the Constitution" of the Kyrgyz Republic, §§68-69
See also CDL-AD(2019)004, Opinion on the law on administrative courts and the law on the entry into force of the law on administrative courts and certain transitional rules of Hungary, §§102-105; CDL-AD(2018)011, Opinion on the draft amendments to the constitutional provisions on the judiciary of Serbia, §§34 and 35; CDL-AD(2017)019, Opinion on the Draft Judicial Code of Armenia, §§22 and 30; CDL-AD(2017)002, Amicus Curiae Brief for the Constitutional Court of the Republic of Moldova on the Criminal liability of judges, §32; CDL-AD(2015)014, Joint Opinion on the draft law "on introduction of changes and amendments to the Constitution" of the Kyrgyz Republic, §72; CDL-AD(2014)038, Opinion on the draft laws on courts and on rights and duties of judges and on the Judicial Council of Montenegro, §22; CDL-AD(2014)030, Joint Opinion of the Venice Commission and the Directorate of Human Rights (DHR) of the Directorate of Human Rights and Rule of Law (DGI) of the Council of Europe, on the draft Laws amending the Administrative, Civil and Criminal Codes of Georgia, §§33, 34; CDL-INF(2000)005, Opinion on the draft law of Ukraine on the judicial system, p. 4

"[…] Uniformity of interpretation of law shall be encouraged through studies of judicial practice that […] have no binding force."

> CDL-AD(2015)014, Joint Opinion on the draft law "on introduction of changes and amendments to the Constitution" of the Kyrgyz Republic, §71
> See also CDL-AD(2015)008, Preliminary Opinion on the Draft Law on amending the Law on the Judicial System and the Status of Judges of Ukraine, §36

"[…] [T]he highest courts' guidance is very important for the lower courts in the interpretation and implementation of human rights standards in their case-law. It is evident that an appeal procedure before a superior court would provide for better guarantees to the interested parties compared to an appeal procedure before a same level judgeship.

[…] It is hard to see how the system of horizontal appeals can contribute to the objective of standardisation. On the contrary, the horizontal appeals appear to be problematic from the viewpoint of the unification of case-law."

> CDL-AD(2017)004, Opinion on the duties, competences and functioning of the criminal peace judgeships of Turkey, §§72 and 73

"Article 15(3)(b) permits the State Court to reopen criminal proceedings that have been concluded with a legally-binding decision of the Court. This provision is too wide in its current form and would permit the Court to reopen an acquittal in breach of the rule against double jeopardy. The circumstances in which a legally-binding decision can be revisited need to be set out. […]"

> CDL-AD(2013)015, Opinion on the draft law on the courts of Bosnia and Herzegovina, §45

"[…] [If] a non-judicial body were to review judicial decisions, the rights of all possible victims of the criminal conduct punished by the courts would remain unprotected. In addition, if new circumstances have arisen, including awareness of past miscarriages of justice, only courts can be able to review them in final instance. This is why it is essential that when deciding whether or not a case should be referred to a Court of Appeal, the [commission on the miscarriages of justice] should not touch upon what should have been or should be the outcome of the case at issue.

[…] The establishment of a special 'chamber for miscarriages of justice' would be contrary to the constitutional prohibition of extraordinary courts."

> CDL-AD(2013)013, Joint opinion of the Venice Commission and the Directorate for Justice and Human Dignity of the Directorate General of Human Rights and Rule of Law (DG I) of the Council of Europe on the Draft Law on the Temporary State Commission on Miscarriages of Justice of Georgia, §§ 15 and 83

"The newly created Extraordinary Chamber will receive the power to revise legally binding judgments by way of 'extraordinary control'. […]

A system of extraordinary appeals against final judgements existed in many former communist countries. Such system was found by the ECtHR as violating the principle of *res judicata* and of the legal certainty. The proposed Polish system is not entirely identical to the old Soviet system, but has a lot of similarities with it.

[…]

Under the Rule of Law Checklist, the principle of *res judicata* implies that 'final judgments must be respected, unless there are cogent reasons for revising them'. Some of the proposals made

by the Draft Act are acceptable. For example, Article 86 § 1 provides for the reopening of the proceedings where there has been a violation of human rights and freedoms. In such circumstances, the reopening must be possible, but *only under certain conditions* – namely, where the Constitutional Tribunal of Poland or the ECtHR established the fact of such violations."

> CDL-AD(2017)031, 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, §§53-54, 62

"[According to the draft amendments to] the constitution of Kyrgyzstan, the Supreme Court of the Kyrgyz Republic has a right of legislative initiative. The Commission finds that the Supreme Court should not be directly involved in the negotiating efforts to force specific draft legislation through the parliament because this could draw the Supreme Court into the political arena and may thus endanger its independence."

> CDL-AD(2002)033, Opinion on the draft amendments to the Constitution of Kyrgyzstan, §29

3.2.2 Allocation of cases

"[…] Article 32 and 144 of the draft Law empower the presidents of the courts to distribute casefiles amongst judges of their courts in accordance to the case-weight guidelines adopted by the Scientific Committee, established by the Evaluation Commission. It is positive that the law seeks to ensure that the work is distributed amongst judges fairly. However, having clear and foreseeable principles of distribution of incoming cases has another benefit: it reinforces the important principle of a "natural judge", which is an additional guarantee of fairness of the proceedings. One possible solution is to introduce a system of more or less random allocation of cases of the same category or weight to the judges of a given court. Presidents of the courts should not be able to allocate (or transfer) specific sensitive cases to "appropriate" judges, even if, at the end of the day, the workload within a given court is distributed evenly. That does not exclude that the principles of distribution of the workload should allow for some flexibility, and take into account specific competencies of certain judges, but the discretion of the President in these maters should be limited by pre-established rules and any departure from these rules should be permissible in clearly defined conditions and should be objectively justified and explained in each specific case. These rules could be established at the sub-legislative level but should be accessible and sufficiently detailed, in order to ensure transparent and fair distribution of cases and exclude arbitrariness."

> CDL-AD(2022)020, Opinion on the draft law on the independence of judicial courts of Lebanon, §103

"[…] The Venice Commission considers that the competence of the presidents of the courts to define the allocation rules, as long as there are general rules fixed in advance, is a possible solution, which does not affect, as such, core international and European standards, provided that the rules are drawn up taking into account the opinion of judges and on the basis of objective circumstances, according to reasonable criteria set in the law itself. Deciding that certain types of cases must be heard by a chamber composed of five judges may be a sensible option, since in higher courts, especially in supreme courts, the reinforcement of collegiality in the formation of judgment increases the guarantees and can contribute to the consistency of jurisprudence and to better justice. In the specific case, the Venice Commission considers that the criteria established by law are suitable for the President of the Curia to set up an adequate case allocation system in the internal rules of procedure, but it would be advisable to determine in the law itself what are

the criteria for increasing to five the number of judges sitting in the panel for certain types of cases."

> CDL-AD(2021)036, Opinion on the amendments to the Act on the organisation and administration of the Courts and the Act on the legal status and remuneration of judges adopted by the Hungarian parliament in December 2020, §32

"[…] [T]he Venice Commission strongly recommends that the allocation of cases to individual judges should be based to the maximum extent possible on objective and transparent criteria established in advance by the law or by special regulations on the basis of the law, e.g. in court regulations. Exceptions should be motivated."

> CDL-AD(2010)004, Report on the Independence of the Judicial System Part I: The Independence of Judges, §§62, 81
> See also CDL-AD(2002)026, Opinion on the Draft Law on Judicial Power and Corresponding Constitutional Amendments of Latvia, §70.7.

"[…] [T]he Venice Commission recommends that the Hungarian authorities use other mechanisms for the distribution of cases […] '[…] for example on the basis of alphabetical order, on the basis of a computerised system or on the basis of objective criteria such as categories of cases'. The general rules (including exceptions) should be formulated by the law or by special regulations on the basis of the law, e.g. in court regulations laid down by the presidium or president. It may not always be possible to establish a fully comprehensive abstract system that operates for all cases, leaving no room to decisions regarding allocation in individual cases. There may be circumstances requiring a need to take into account the workload or the specialisation of judges. Especially complex legal issues may require the participation of judges who are expert in that area. Moreover, it may be prudent to place newly appointed judges in a panel with more experienced members for a certain period of time. Furthermore, it may be prudent when a court has to give a principled ruling on a complex or landmark case, that senior judges sit in on that case. The criteria for making such decisions by the court president or presidium should, however, be defined in advance on the basis of objective criteria. […]."

> CDL-AD(2012)001, Opinion on Act CLXII of 2011 on the Legal Status and Remuneration of Judges and Act CLXI of 2011 on the Organisation and Administration of Courts of Hungary, §91
> See also CDL-AD(2019)004, Opinion on the law on administrative courts and the law on the entry into force of the law on administrative courts and certain transitional rules of Hungary, §§107-108; CDL-AD(2013)005, Opinion on Draft amendments to Laws on the Judiciary of Serbia, §39; CDL-AD(2011)012, Joint Opinion on the constitutional law on the judicial system and status of judges of Kazakhstan, §27

"[…] [I]t should be made sure that specialisation of judges cannot be used to circumvent the system of random case assignment […]."

> CDL-AD(2010)026, Joint opinion on the law on the judicial system and the status of judges of Ukraine by the Venice Commission and the Directorate of Co-operation within the Directorate General of Human Rights and Legal Affairs of the Council of Europe, §13

"[…] [W]henever there is an electronic case-attribution system [of distribution of cases amongst judges], the rules according to which it operates must be clear and it should be possible to verify their correct application. Ideally, the allocation should be subject to review. [...]"

> CDL-AD(2014)031, Joint Opinion of the Venice Commission and the Directorate of Human Rights (DHR) of the Directorate of Human Rights and the Rule of Law (DGI) of the Council of Europe, on the draft Law on Amendments to the Organic Law on General Courts of Georgia, §80

"[…] If there are to be exceptions to the general principle of random allocation of cases, they should be clearly and narrowly formulated in the law. Setting of the method of distribution of cases should not be within the discretionary power of the MoJ."

> CDL-AD(2017)031, 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, §120

"Articles 31 to 33 establish the rules concerning the adoption by the president of the court of the annual schedule of assignments. It is a well-conceived system, which excludes any external interference, provides for the participation of the judges of the court and guarantees transparency."

> CDL-AD(2014)038, Opinion on the draft laws on courts and on rights and duties of judges and on the Judicial Council of Montenegro, §37

3.2.3 Transfer of cases from one judge to another

"[…] [W]orkload statistics provide objective statistical data, but they are not sufficient as a basis for the decision on transferral [...]. In order to prevent any risk of abuse, court presidents and the President of the NJO (National Judicial Office) should not have the discretion to decide which cases should be transferred or to select the 'sending' or 'receiving' courts. In addition, any such case allocation should be subject to review in order to take into account possible harsh situations where persons without the means to come to a court that is far away from their home town."

> CDL-AD(2012)001, Opinion on Act CLXII of 2011 on the Legal Status and Remuneration of Judges and Act CLXI of 2011 on the Organisation and Administration of Courts of Hungary, §91

"The second urgent topic is the procedure of the transfer of cases. While the NJC adopted criteria on the selection of the court, which is to receive the case, the most critical decision is the selection of individual cases by the president of the overburdened court. The amendments do not provide for the establishment of criteria for this selection.

The NJC should be mandated to establish such criteria, which would have to be objective (e.g. a transparent random selection). The conformity of the selection of a case with such criteria should be the standard for the judicial review of the transfer.
In addition, further issues are linked to the transfer of cases:

1. the date of notification of the transfer to the parties should be the starting point for the 8 days deadline for appeals against transfers, not the date of their publication on the web-site;

2. in case of annulment by the Curia of the assignment of a case to another court, the case should be dealt with by the original court and the President of the NJO should not be able to assign a case to another court instead;

3. even if the Curia uses the NJC's principles on the transfer of cases, the President of the NJO should be explicitly bound by them (and not only 'take them into account') and the judicial review of the transfer of cases should not be restricted to compliance with 'legal provisions' but should explicitly include the principles established by the NJC;

4. as a contradiction of the principle of equality of arms, the competence of the Prosecutor General to give instructions that charges be brought before a court other than the court of general competence should be removed."

> CDL-AD(2012)020, Opinion on the Cardinal Acts on the Judiciary that were amended following the adoption of Opinion CDL-AD(2012)001 on Hungary, §§90-91
> See also CDL-AD(2013)012, Opinion on the fourth amendment to the fundamental law of Hungary, §§73-75

"Cases should not be transferred from a judge without good reason [...]."

> CDL-AD(2013)005, Opinion on Draft amendments to Laws on the Judiciary of Serbia, §42
> See also CDL-AD(2017)019, Opinion on the Draft Judicial Code of Armenia, §53

3.2.4 Presidents (chairpersons) and senior judges: appointment, status, role and powers

3.2.4.1 Appointment of the presidents

"[…] [T]he power of the President to appoint the chairmen of all courts without any involvement of the Council of Justice […] appears to be problematic."

> CDL-AD(2004)044, Interim Opinion on Constitutional Reforms in the Republic of Armenia, §60
> See also CDL(1999)088, Interim report on the constitutional reform In the Republic of Moldova, §26

"[…] The possibility for appointment of the First President [of the Supreme Court] *ad interim* should be limited to situations of real emergency; the Draft Act should provide for an automatic solution (like the appointment of a most senior amongst the Presidents of the Chambers, which does not involve the exercise of the discretion by the President of the Republic) and be limited in time. […]

In principle, the appointment of the First President by the President of the Republic is within the range of acceptable solutions, as long as the judiciary is meaningfully involved in the process. […]"

> CDL-AD(2017)031, 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, §§73 and 75
> See also CDL(1995)074rev, Opinion on the Albanian law on the organisation of the judiciary, p. 2

"[The draft according to that] Chief Judges of the various courts with the exception of the Chief Judge of the Supreme Court are elected by [the parliament…] is problematic from the point of view of judicial independence. The election of the respective Chief Judge by his peers would be preferable."

> CDL-INF(2000)005, Opinion on the draft law of Ukraine on the judicial system, p.3
> See also CDL-AD(2013)005, Opinion on Draft amendments to Laws on the Judiciary of Serbia, §71; CDL-INF(1998)015, Opinions on the constitutional regime of Bosnia and Herzegovina, Chapter B.I, §9

"[…] Indeed, the Commission had indicated in former opinions that granting the final decision on both the appointment and the dismissal of the President of the Supreme Court to the Parliament conveyed the impression of political control. This proposed amendment fully takes such criticism into account, and eliminates any political intervention in the choice of the President of the Supreme Court. In this respect, the transparency of the procedure for appointment and dismissal of the President of the Supreme Court by the two-third majority of the Judicial Council, at the proposal of the Supreme Court's judges, should be ensured.

As concerns the proposal set out in the second set of amendments, the requirement of a two-third majority represents an improvement compared to the present situation; however, the Venice Commission considers that the first proposal – election and release from duty by the Judicial Council - is more appropriate and should be retained."

> CDL-AD(2012)024, Opinion on two Sets of draft Amendments to the Constitutional Provisions relating to the Judiciary of Montenegro, §§16-17

"The President of the Supreme Administrative Court is elected for a nine-year term of office by a two-thirds majority of the members of the National Assembly […]

Efforts should be made, therefore, to ensure that the conditions of election help to minimise the political aspect while at the same time avoiding deadlock. To achieve this, it is important to strictly circumscribe the conditions of eligibility to the office, among which the question of experience is paramount. In the new system introduced in Hungary, while the appointment of judges with administrative experience is to be welcomed, at least five years' experience as a judge should be required for appointment to the post of President of the SAC. […] The condition laid down in Article 44 § 1 b) should thus be amended, within the framework of the Fundamental Law, so that a person appointed judge because of his or her lengthy experience in the public administration could not be appointed President of the SAC until several years after their recruitment as an administrative judge. One may note in this connection that appointment by an executive authority, such as the Head of State, with proper guarantees, may be less political in nature than election by Parliament."

> CDL-AD(2019)004, Opinion on the law on administrative courts and the law on the entry into force of the law on administrative courts and certain transitional rules of Hungary, §§95 and 97

"Given this involvement of the *Jogorku Kenesh* [Parliament] in the appointment and dismissal of Supreme Court judges, it is not apparent why it would, in addition, be necessary for it to also select the Chairperson and deputy chairpersons of the Court. The current procedure, whereby this is left up to the members of the Supreme Court, would appear to be the more reasonable manner of selecting the Chairperson/deputies, since the other members of the Court will be more familiar with the requirements of the post, and the qualifications needed to fill this post. […]"

> CDL-AD(2015)014, Joint Opinion on the draft law "on introduction of changes and amendments to the Constitution" of the Kyrgyz Republic, §78

"Appointment to the positions of administrative court president and vice-president also comes within the Minister's purview […]

[…] It is recommended that the procedure be reconsidered so as to involve the Personnel Council of the NAJC [National Administrative Judicial Council], in an effective role, in the Minister's final decision and to provide for judicial remedy against such decisions."

> CDL-AD(2019)004, Opinion on the law on administrative courts and the law on the entry into force of the law on administrative courts and certain transitional rules of Hungary, §§61 and 64

"The appointment of court presidents by the organs of judicial self-administration […] would go too far as well if this term were to refer only to the Congress of Judges. [...] [S]uch appointments should be rather made by the High Judicial Council, which has a higher democratic legitimacy than the organs of judicial self-administration. If the term 'organs of judicial self-administration' were to include the High Judicial Council then this should be spelled out explicitly."

CDL-AD(2013)034, Opinion on proposals amending the draft law on the amendments to the constitution to strengthen the independence of judges of Ukraine, §18

"The Venice Commission and the Directorate welcome the proposed system of election of court presidents by the judges of the same court by secret ballot which is in line with the requirements of the principle of internal independence of the judiciary […]."

CDL-AD(2014)031, Joint Opinion of the Venice Commission and the Directorate of Human Rights (DHR) of the Directorate of Human Rights and the Rule of Law (DGI) of the Council of Europe, on the draft Law on Amendments to the Organic Law on General Courts of Georgia, §84
See also CDL-AD(2017)018, Opinion on the Judicial System Act of Bulgaria, §81; CDL-AD(2014)031, Joint Opinion of the Venice Commission and the Directorate of Human Rights (DHR) of the Directorate of Human Rights and the Rule of Law (DGI) of the Council of Europe, on the draft Law on Amendments to the Organic Law on General Courts of Georgia, §90

"Paragraph 13/2 sets out that candidates for president of courts, in addition to having the normal qualifications, competence, and worthiness to perform the judicial function, must also have the capacity to manage and organise the activities of the courts. […] All these criteria appear to be appropriate to take into account in choosing a president of a court. It is also to be welcomed that these prerequisites are set out in a normative text, which is far from being the case in all member States.

[...]

Nevertheless, the question is once again the manner in which these criteria are evaluated. This is all the more important as, by definition, a person who is a candidate for president of courts for the first time will not have had the opportunity to show his or her managerial skills. This means that the criteria seem to be subjective [...] This might be revisited."

CDL-AD(2009)023, Opinion on the Draft Criteria and Standards for the Election of Judges and Court Presidents of Serbia, §§50, 52

"[…] [T]he Venice Commission recommends introducing a competitive selection also for deputy managers. As professional judges or prosecutors, they should be able to ensure smooth cooperation also with persons who have different ideas about management."

CDL-AD(2022)045, Urgent Opinion on three Laws concerning the justice system of Romania, §35

3.2.4.2 Terms of appointment, tenure, re-appointment

"[…] [A]ppointing court presidents with administrative functions for a limited period of time does not violate the European standards. However there is not a single standard – in several European countries the principle is that also court presidents are irremovable."

CDL-AD(2014)021, Opinion on the draft law on introducing amendments and addenda to the judicial code of Armenia (term of Office of Court Presidents), §41

"[…] [T]he limitation of the term of office of chairpersons appears to be a guarantee of independence where the executive authorities have a decisive influence on the appointment procedure for chairpersons. In this latter case, according to the Venice Commission, appointments should be for a fixed term and there should be a limit on possible renewals. The influence of chairpersons may grow ever stronger over a long period of time and renewable terms of office may also substantially jeopardise the independence of a Chairperson, who may at some point be influenced in his/her work by the desire to be reappointed by the executive.

However, a short-term appointment risks undermining courts presidents' possibilities to realise effective leadership and to ensure a solid and strong courts' organisation.

[…] It is recommended that immediate reappointment be excluded from the draft law. [...] [T]he Venice Commission and the DHR cannot see the reason why the term of office of court presidents which is five years in the current system, is reduced to three years in the draft amendments. On the contrary, in an appointment system which guarantees better internal independence as the newly proposed one, the court presidents may even have a longer term of office to ensure a solid and strong courts' organisation.

Having regard in particular to the proposed appointment system of court presidents, three years term appears rather short. The Commission and the Directorate recommend thus the extension of the term of office of court presidents."

> CDL-AD(2014)031, Joint Opinion of the Venice Commission and the Directorate of Human Rights (DHR) of the Directorate of Human Rights and the Rule of Law (DGI) of the Council of Europe, on the draft Law on Amendments to the Organic Law on General Courts of Georgia, §§86, 88, 90, and 91
> See also CDL-AD(2014)021, Opinion on the draft law on introducing amendments and addenda to the judicial code of Armenia (term of Office of Court Presidents), §§30, 31

"[…] [T]he term of office of the Chief Justice of the Supreme Court is of 10 years. In the current situation in Georgia, which is at a point of transition to a larger and newly constituted Supreme Court, the appointment of a Chief Justice for as long as 10 years might be too long. Therefore, to facilitate a staggered appointment, […] a shorter term of office for the Chief Justice might be considered."

> CDL-AD(2019)009, Urgent Opinion on the selection and appointment of Supreme Court judges of Georgia, §53

"[…] It would be appropriate to specify the term of the chairs [of the different courts in the Constitution] […]."

> CDL-AD(2005)003, Joint opinion on a proposal for a constitutional law on the changes and amendments to the Constitution of Georgia by Venice Commission and OSCE/ODIHR, §105

[…] Renewable terms of office may also substantially jeopardise the independence of a chairperson, who may at some point be influenced in his/her work by the desire to be reappointed by the executive. However, a short-term appointment risks undermining courts presidents' possibilities to realise effective leadership and to ensure a solid and strong courts' organisation. Based on the above, the Commission would recommend keeping the existing system of seven-year appointments in place without the option of a renewal.

> CDL-AD(2023)039, Opinion of the Draft Amendments to the Constitution of Bulgaria, §87

"[…] The provisions providing for the automatic termination of the mandates of court chairperson upon the enactment of the draft amendment law is problematic and should be removed."

> CDL-AD(2014)031, Joint Opinion of the Venice Commission and the Directorate of Human Rights (DHR) of the Directorate of Human Rights and the Rule of Law (DGI) of the Council of Europe, on the draft Law on Amendments to the Organic Law on General Courts of Georgia, §101

3.2.4.3 Powers of the presidents

"[…] [T]he competence of the court chairperson should stay purely administrative and should not interfere with the judicial functions of judges."

> CDL-AD(2014)031, Joint Opinion of the Venice Commission and the Directorate of Human Rights (DHR) of the Directorate of Human Rights and the Rule of Law (DGI) of the Council of Europe, on the draft Law on Amendments to the Organic Law on General Courts of Georgia, §93
> See also CDL-AD(2014)038, Opinion on the draft laws on courts and on rights and duties of judges and on the Judicial Council of Montenegro, §§23, 24

"[…] [A] president should not be seen as being hierarchically superior to 'ordinary' judges: s/he should not be in a position to give them directions concerning their cases – neither *de jure* nor *de facto*. Therefore, it is important that powers of the presidents are formulated with sufficient precision, so as to limit any possibility of abuse. [...]"

> CDL-AD(2017)018, Opinion on the Judicial System Act of Bulgaria, §83
> See also CDL-AD(2019)004, Opinion on the law on administrative courts and the law on the entry into force of the law on administrative courts and certain transitional rules of Hungary, §§98-101; CDL-AD(2017)019, Opinion on the Draft Judicial Code of Armenia, §52; CDL-AD(2013)015, Opinion on the draft law on the courts of Bosnia and Herzegovina, §62;

"[…] It is thus welcomed that the High Council of Justice is indicated as the unique authority in the draft Law, to formally initiate disciplinary proceedings against judges. The limitation of court presidents' competence to 'inform' the High Council on disciplinary misconduct of a judge is also a positive step which strengthens 'internal' judicial independence."

> CDL-AD(2014)032, Joint Opinion of the Venice Commission and the Directorate of Human Rights (DHR) of the Directorate of Human Rights and the Rule of Law (DGI) of the Council of Europe, on the draft Law on making changes to the Law on disciplinary Liability and disciplinary Proceedings of Judges of General Courts of Georgia, §23
> See also CDL-AD(2017)018, Opinion on the Judicial System Act of Bulgaria, §84; CDL-AD(2008)041, Opinion on the Draft Amendments to the Constitutional Law on the Supreme Court and Local Courts of Kyrgyzstan, §17

"[...] It is not clear why the President of the court should be deciding on the timing and frequency of the assessment. He or she may have the power to signal the need for an assessment or request for a disciplinary investigation. However, it should not be the President's responsibility to make decisions on those issues."

> CDL-AD(2014)008, Opinion on the draft Law on the High Judicial and Prosecutorial Council of Bosnia and Herzegovina, §86

"Article 8.3 sets out what judges should do when there are any attempts to influence them or put undue pressure on them. It might be useful to recommend that the president of the court in question act in support of the individual judge concerned when notifying the judicial community and the law enforcement agencies of this situation."

> CDL-AD(2013)035, Opinion on the draft Code on Judicial Ethics of the Republic of Tajikistan, §51

3.2.5 Remedies against the problem of excessive length of proceedings

"[…] [I]n parallel to introducing the right of a fair trial within reasonable time, the respective superior court or directly the Supreme Court should be entrusted with a specific compensatory and acceleratory remedy against the excessive length of procedure."

> CDL-AD(2013)034, Opinion on proposals amending the draft law on the amendments to the constitution to strengthen the independence of judges of Ukraine, §10

"[The law] enables the President of the NJO to designate another court based on the vague criterion of 'adjudicating cases within a reasonable period of time'. This relates to Articles 11.3 and 11.4 of the Act on Transitional Provisions of 30 December 2011, which were adopted on the constitutional level in order to overcome the annulment of a similar provision on the legislative level by Constitutional Court judgment no. 166/2011 of 20 December 2011. The Constitutional Court had found that provision contrary to the European Convention on Human Rights. […] Even though the reasonable time requirement is part of both Article XXVIII Fundamental Law and Article 6.1 ECHR, it is not absolute, but forms a field of tension with the often conflicting right to a fair trial with respect to the fact that having and exercising more procedural rights necessarily goes hand in hand with a longer duration of the proceedings. Taking into account the importance of the right to a lawful judge for a fair trial, the state has to resort to other less intrusive means, in particular to provide for a sufficient number of judges and court staff. Solutions by means of arbitrary designation of another court cannot be justified at all."

> CDL-AD(2012)001, Opinion on Act CLXII of 2011 on the Legal Status and Remuneration of Judges and Act CLXI of 2011 on the Organisation and Administration of Courts of Hungary, §90

"[…] It seems that the aim of these Articles is to address the serious problem of dilatory or vexatious proceedings and thus protect the right to a fair trial. Such an aim should be welcomed.

The possibility to apply to a higher court with the request to remedy unjustified delay can be an effective tool for the protection of the right to a fair trial. However, the reasons for the dilatory or vexatious proceedings could be many: inefficient and/or cumbersome regulations, increased caseload, lack of training or recourse, etc. Thus, in order to eliminate the problems, the reasons for such delays need to be analysed in order to be addressed correctly.

The basis for this set of provisions is the obligation of a member state, under Article 13 of the European Convention on Human Rights, to provide an effective remedy including, as a last resort, paying damages if a violation of the Convention occurs. […]

The starting point for a regulation should be to view financial compensation as one of several remedies. Financial compensation must thus not be the only remedy or the remedy to be considered first. It all depends on the circumstances of the specific case. […] This means that, as far as possible, violations should primarily be redressed or remedied within the framework of the process in which they arise. For this to be possible, courts and administrative authorities must be aware of all the issues that concern the European Convention on Human Rights in both procedural and material terms. At the same time, individuals cannot remain passive in their contacts with courts and authorities.

It should be emphasised that the Contracting States have great freedom to choose how they fulfil their commitments in this regard. There are various alternatives for damage-regulation for

violations of the European Convention on Human Rights, for example a reduction of a criminal sentence could be an effective remedy in certain cases.

The legislation of a state may also contain a number of proactive safeguards to ensure that judges handle cases without undue delay. For instance, there could be provisions giving a party the right to request the acceleration of the proceedings of a case in court. If a case has been unreasonably delayed, the case could be given priority in the court. Under such provisions the president of a court may have the responsibility to intervene in situations where there is a serious risk that a single case cannot be settled within a reasonable period of time. If a case or matter is not moved forward to a ruling within a reasonable period of time, the president of the court could be obliged to have another judge take over the case.

[…]

[…] [D]raft Article 8A – 8C also introduces a procedure where a request for and a decision on damages are interlinked with the concept of the acceleration of the case handling. The damages, or 'the appropriate indemnity', will be decided beforehand and a system with parallel processes is introduced accordingly.

This decision on damages will serve as a sort of penalty or fine, forcing the judge to deal with the case. This could put him/her under pressure, which in turn could endanger the principle of a fair trial. The principle of state liability followed by the liability of the judge under certain conditions set out in Article 6 of the Law on judges, could also increase this pressure. In following the management of and decision-making in a case, new and unforeseen facts or aspects may be brought into the case or otherwise change the conditions under which justice is or should be rendered in that case. It is therefore important to underline that it is the State that is responsible under the European Convention on Human Rights and not the individual judge."

CDL-AD(2013)005, Opinion on Draft amendments to Laws on the Judiciary of Serbia, §§87-92, 94, 95

"In principle, fining lawyers for causing deliberate delay of court proceedings is acceptable as long as standards of fair trial are respected. No automatic sanction can be foreseen and the circumstances in each case need to be examined individually."

CDL-AD(2014)016, Opinion on the draft amendments to the criminal procedure and civil procedure codes of Albania, §16

"A major issue […] is the backlog of some 12.000 cases at the Supreme Court. Many of the pending cases relate to issues of immovable property. The Minister of Justice and the President of the Supreme Court agree that the Court should reduce its case-load through more uniformisation judgements.

In uniformisation judgements, the plenum of the Supreme Court decides on the provisions of the law, which have been interpreted differently by various appeals courts or – preventively – when such diverging interpretations are likely. These decisions have the force of binding precedent and should allow deciding similar cases more quickly. Given that uniformisation judgements are not abstract but are given in individual cases, the Venice Commission's delegation did not object to this practice.

[…]

[Another] solution [to reduce backlog] was to transform the Supreme Court into a real cassation court, which should not take any evidence and look into points of law only. In addition, any first instance jurisdiction should be removed from the Supreme Court. The Venice Commission's delegation supported this idea."

> CDL-AD(2014)016, Opinion on the draft amendments to the criminal procedure and civil procedure codes of Albania, §§22-23 and 25

3.3 Budgetary and staff autonomy

"It is the duty of the state to provide adequate financial resources for the judicial system. Even in times of crisis, the proper functioning and the independence of the Judiciary must not be endangered. Courts should not be financed on the basis of discretionary decisions of official bodies but in a stable way on the basis of objective and transparent criteria.

International texts do not provide for a budgetary autonomy of the judiciary but there is a strong case in favour of taking views of the judiciary into account when preparing the budget. […]

Decisions on the allocation of funds to courts must be taken with the strictest respect for the principle of judicial independence and the judiciary should have an opportunity to express its views about the proposed budget to parliament, possibly through the judicial council."

> CDL-AD(2010)004, Report on the Independence of the Judicial System Part I: The Independence of Judges, §§53-55.
> See also CDL-AD(2018)003, Opinion on the Law on amending and supplementing the Constitution (Judiciary) of the Republic of Moldova, §44; CDL-AD(2018)011, Opinion on the draft amendments to the constitutional provisions on the judiciary of Serbia, §24; CDL-AD(2015)026, Opinion on the Amendments to the Constitution of Ukraine regarding the Judiciary as proposed by the Working Group of the Constitutional Commission in July 2015, §30; CDL-AD(2014)008, Opinion on the draft Law on the High Judicial and Prosecutorial Council of Bosnia and Herzegovina, §§67-68; CDL-AD(2013)005, Opinion on Draft amendments to Laws on the Judiciary of Serbia §§124; CDL-AD(2011)012, Joint Opinion on the constitutional law on the judicial system and status of judges of Kazakhstan, §§24-25

"[…] It is welcome that the Council is competent to prepare the budget of the judiciary. However, in order to strengthen the independence of the Judiciary, the Council should also be enabled to present this draft and to defend it directly to 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, §184

"[…] In terms of independence, there is no international standard that requires budgetary autonomy for courts, but the views of the judiciary should be taken into account when deciding the budget. […] The process of approval of the draft budget by the Judicial Council/Prosecutorial Council (or the Plenary SJC in the current system), following a proposal of the Minister, is in line with this recommendation. The Commission previously suggested that in order to ensure that the position of the judiciary in budgetary matters is made known to the National Assembly, the Constitution could require that the views of the Judicial Council/Prosecutorial Council on the budget proposal be made public and included as an attachment to the Government's proposal for the State budget."

> CDL-AD(2023)039, Opinion on the draft Amendments to the Constitution of Bulgaria, §55

"Additional guarantees may also be applied to ensure financial independence of the judiciary, such as the prohibition of reducing the budget of courts in comparison to the previous financial

year or without the consent of the HJC, except in the case of a general reduction of the State Budget."

CDL-AD(2013)005, Opinion on Draft amendments to Laws on the Judiciary of Serbia §125

"[The practice according to which, contrary to the principle of budgetary autonomy of the magistracy, the Ministry of Justice in fact controls every detail of the courts' operational budgets] contains obvious dangers of undue interference in the independent exercise of their functions."

CDL(1995)074rev, Opinion on the Albanian law on the organisation of the judiciary, p. 3

"As regards the *development* of the overall budget of the judiciary, the Ministry of Justice may play some role in this process; for example, the Ministry may be allowed to present to Parliament objections or amendments to the budget proposed by the SJC for adoption."

CDL-AD(2017)019, Opinion on the Draft Judicial Code of Armenia, §49

"[…] [T]he parliamentary budget battles […] are undoubtedly of a political nature. […] While wanting to ensure greater independence of judges and courts, and thus to bring about their de-politicization, [by involving the Council of Justice into these battles] it may turn out that they will, quite to the contrary, be engulfed in the political debate. Without deviating from the principle of having a separate budget for the judiciary and, in order to allow for a de facto judicial independence, these of powers and budgetary struggles could rather be left with Minister of Justice or the Cabinet as a whole which will feel politically responsible for the treatment eventually accorded to the judiciary in the matters of proper funding."

CDL-AD(2002)026, Opinion on the Draft Law on Judicial Power and Corresponding Constitutional Amendments of Latvia, §48

"[…] The independence in financial matters, i.e. the right of the judiciary to be granted sufficient funds to properly perform its functions and to have a role in deciding how these funds are allocated, is one of the main elements of the institutional (and also individual) independence of the judiciary. […]

The budgets of courts and prosecutors' offices are determined at the level of the State (state courts), the Republika Srpska (RS courts), the Federation (Central FBiH Courts), the cantons (cantonal courts), and the Brčko District (BD courts). The Federation, due to its structure, bears the brunt of the budget fragmentation, which directly undermines the efficiency of the judiciary of the Entity.

No uniform rules exist in this area with the result that there are quite different budgets allocated to different courts and prosecutors' offices. Moreover, judicial bodies become easily vulnerable to pressure from the institution deciding on the budget.

The HJPC has made an initiative aimed at centralising the financing of the judiciary and bringing it to the state level. So far, this initiative has not been implemented, although the centralisation of the financing could be counted among the most important steps to be taken. On a lower scale, consideration should be given by the Federation, in the long run, to the financing of the judiciary (both courts and prosecutor's office) being concentrated at the entity level. In the short run, the Federation might consider at least bringing the financing of salaries of judges and prosecutors to the Federation level and leaving, for the time being, the financing of the expenditure relating to the running of courts to the cantonal levels."

CDL-AD(2012)014, Opinion on Legal Certainty and the Independence of the Judiciary in Bosnia and Herzegovina, §§95-98

"Article 35(4) stipulates that 'Legal associates, senior legal associates and legal advisors shall be appointed by the High Judicial and Prosecutorial Council'. As far as legal associates and legal advisors shall assist judges in their work, it may be advisable to allow the involvement of the Court and the judges in the selection process. The advisors shall closely work with judges and the operation of the Court may be more efficient if the judges have a say in the selection of their advisors."

CDL-AD(2013)015, Opinion on the draft law on the courts of Bosnia and Herzegovina, §72

"According to Article 48(5), 'At the end of each budget year, the Presidents of the Courts shall inform the Parliamentary Assembly of Bosnia and Herzegovina on the execution of the budget of the respective court'. The rationale for such a procedure is questionable, and it may also have a negative impact on the independence of the judiciary. The President of the Court should be relieved from such a legal obligation and, at the same time, the highest possible standards of transparency for budgetary expenditures by the courts should be provided."

CDL-AD(2013)015, Opinion on the draft law on the courts of Bosnia and Herzegovina, §81

IV. COUNCILS OF JUSTICE[2]

4.1 Functions, duties and duration of mandate

"There is no standard model that a democratic country is bound to follow in setting up its judicial system. With the exception of very few countries where the independence of the judiciary is maintained by other checks and balances, most European countries have established an independent judicial council which has the task of ensuring the proper functioning of an independent judiciary within a democratic state."

CDL-AD(2018)003, Opinion on the Law on amending and supplementing the Constitution (Judiciary) of the Republic of Moldova, §46
See also CDL-INF(1998)009, Opinion on recent amendments to the law on major constitutional provisions of the Republic of Albania, §5

"To sum up, it is the Venice Commission's view that it is an appropriate method for guaranteeing for the independence of the judiciary that an independent judicial council have decisive influence on decisions on the appointment and career of judges. Owing to the richness of legal culture in Europe, which is precious and should be safeguarded, there is no single model which applies to all countries. While respecting this variety of legal systems, the Venice Commission recommends that states which have not yet done so consider the establishment of an independent judicial council or similar body. In all cases the council should have a pluralistic composition with a substantial part, if not the majority, of members being judges. With the exception of ex-officio members these judges should be elected or appointed by their peers."

[2] This section speaks of specialized bodies which deal with judicial appointments, promotions, disciplinary proceedings against judges and, more generally, secure autonomy of the judicial system vis-à-vis other branches of the Government. These bodies are often called "councils of justice" but the name, as well as composition and powers may vary from one country to another. Some countries have no councils of justice at all.

CDL-AD(2010)004, Report on the Independence of the Judicial System Part I: The Independence of Judges, §32
See also CDL-AD(2018)003, Opinion on the Law on amending and supplementing the Constitution (Judiciary) of the Republic of Moldova, §§46-49; CDL-AD(2016)007, Rule of Law Checklist, §§81 and 82; CDL-AD(2014)008, Opinion on the draft Law on the High Judicial and Prosecutorial Council of Bosnia and Herzegovina, §22; CDL-AD(2013)018, Opinion on the balance of powers in the Constitution and the Legislation of the Principality of Monaco, §§88-89; CDL-AD(2007)028, Report on Judicial Appointments by the Venice Commission, §§24, 25; CDL-AD(2004)044, Interim Opinion on Constitutional Reforms in the Republic of Armenia, §59

"[…] [I]n the previous opinion the Venice Commission recommended not to overburden the Judicial Council with purely administrative tasks, such as 'judicial administration, including salaries, court buildings etc.'.

[…] [T]here are different models of distribution of administrative functions [...]. The only important requirement is that the most important administrative functions should belong to a body or bodies enjoying a significant degree of independence.

[…] That solution does not exclude that some specific administrative functions connected to daily operation of the judiciary may be performed by the Ministry of Justice (MoJ). [...]

That being said, all administrative support functions which may have effect on the independence of the judiciary should be performed by a body independent from the MoJ and, as stressed above, accountable to the SJC."

CDL-AD(2017)019, Opinion on the Draft Judicial Code of Armenia, §§98, 100, 102 and 103
See also 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, §§66, 71 and 72; CDL-AD(2007)028, Report on Judicial Appointments by the Venice Commission, §26; CDL-INF(1999)005, Opinion on the reform of the judiciary in Bulgaria, §39

"[…] The Venice Commission maintains its position that there should be a clear distinction between the functions of the Inspectorate and the Supreme Judicial Council (SJC), and that there should be more detailed rules in the law itself concerning the procedure of inspections. Overlapping functions, coupled with lack of clarity concerning their implementation, may lead to abuse of powers."

CDL-AD(2022)022, Opinion on the draft amendments to the Judicial System Act concerning the Inspectorate to the Supreme Judicial Council of Bulgaria, §29

"[…] The Venice Commission maintains its position that there is no need for two separate bodies [i.e. judicial council and the judges' qualification commission] […]."

CDL-AD(2013)014, Opinion on the Draft Law on the amendments to the Constitution, Strengthening the Independence of Judges and on the Changes to the Constitution proposed by the Constitutional Assembly of Ukraine, §40

"It is thus a positive step that the High Council of Justice be the sole authority to initiate disciplinary proceedings against judges, which would provide for more guarantees compared to a system of plurality of disciplinary authorities competent to initiate those proceedings. […] The proposed system provides also for a clear division of tasks between the body in charge of investigating (the High Council of Justice) and the body in charge of deciding on the imposition of the disciplinary sanction, i.e. the Disciplinary Board. This is in line with international recommendations. […]"

CDL-AD(2014)032, Joint Opinion of the Venice Commission and the Directorate of Human Rights (DHR) of the Directorate of Human Rights and the Rule of Law (DGI) of the Council of Europe, on the draft Law on making changes to the Law on disciplinary Liability and disciplinary Proceedings of Judges of General Courts of Georgia, §15
See also CDL-AD(2008)041, Opinion on the Draft Amendments to the Constitutional Law on the Supreme Court and Local Courts of Kyrgyzstan, §17

"[…] It is striking that, while the recommendation by the High Qualifications Commission is to be based exclusively on objective criteria, the High Council of Justice can apparently disagree with a recommendation for reasons that are not determined by the law. This opens the door to arbitrary decisions. It is strongly recommended to circumscribe the role of the High Council of Justice in a much more transparent way. Taking into account the characteristics of the decision-making process before the High Qualifications Commission and the composition of the High Council of Justice, the role of the High Council of Justice should be made of a marginal nature, short of being removed."

CDL-AD(2010)026, Joint opinion on the law on the judicial system and the status of judges of Ukraine by the Venice Commission and the Directorate of Co-operation within the Directorate General of Human Rights and Legal Affairs of the Council of Europe, §50

"It is not uncommon in Europe to have some kind of inspection body that supervises judges […] to some extent, to see if they perform their duties correctly. Some countries have such institutions, others manage without them. However, from a comparative perspective it is clear that the powers of the Turkish HSYK to supervise and control the judges […] are not only greater than in most other European countries, but they have also been traditionally interpreted and applied in such a manner as to exert great influence on core judicial […] powers, in a politicised manner that has been quite controversial.

The core issue with regard to the future independence, efficiency and legitimacy of the Turkish judiciary is whether the recent institutional reform will lead to a change in the way the substantial powers of the HSYK are used, or whether the tradition for political interference will be continued within the new framework."

CDL-AD(2010)042, Interim Opinion on the Draft Law on the High Council for judges and Prosecutors (of 27 September 2010) of Turkey, §§50, 51

"The system of judicial self-government is too complicated. There are too many institutions: meetings of judges on different levels, conferences of judges, the Congress of judges of Ukraine, council of judges of respective courts and Council of Judges of Ukraine which is a different organ than the High Council of Justice. The structure should be simplified to be effective. This pyramid structure can become an obstacle for building a real self-government and the scope for 'judicial politics' seems enormous. The dispersal of powers through many bodies seems to lead to a potentially confusing situation where different bodies would exercise the same powers."

CDL-AD(2010)003, Joint Opinion on the Draft Law on the Judicial System and the Status of Judges of Ukraine by the Venice Commission and the Directorate of Co-operation within the Directorate General of Human Rights and Legal Affairs of the Council of Europe, §122

"[…] [The] [p]rovisions relating to the training of judges and the establishment of a National Institute of Justice […] should be more detailed and should determine the main action of the Institute. The Institute should be controlled by the Supreme Judicial Council rather than the Ministry of Justice. […]."

CDL-AD(2002)015, Opinion on the Draft Law on Amendments to the Judicial System Act of Bulgaria, §5

"The amendments to Article 128 [of the Constitution] reflect the proposed competences of the Judicial Council to elect and release from duty the President of the Judicial Council and of the Supreme Court, and are therefore to be welcomed. […]."

> CDL-AD(2012)024, Opinion on two Sets of draft Amendments to the Constitutional Provisions relating to the Judiciary of Montenegro, §26

"The [High Judicial and Prosecutorial Council] has broad competences […]: it appoints judges and prosecutors […], decides on the suspension of judges, determines criteria for the assessment of judges and prosecutors, decides on the appeals in disciplinary proceedings, gives its views on the annual budget for courts and prosecutors' offices, gives its opinions on draft laws and regulations concerning the judiciary etc. […].

Article 24 of the draft Law gives the HJPC power to require courts, prosecutors' offices and state authorities, as well as judges and prosecutors to provide it with information, documents and other materials in connection with the exercise of its competencies. It can also have access to all premises of courts and prosecutors' offices and their records. Such competences confirm that the HJPC is the central organ within the judiciary.

Under Article 25 of the draft Law, the HJPC prepares a draft annual budget, which is then submitted, through the Ministry of Justice, to the Ministry of Finance and Treasury of BiH for approval. Under Article 23.2 of the draft Law, the HJPC may also make recommendations relating to the annual budgets of courts and prosecutors' offices. The system of financing the judiciary remains, however, highly fragmented, with the budgets determined at several different levels (BiH, the Entities, the FBiH cantons, the District Brčko).

The extent of the competences seems to be in line with European standards, with the exception of the reservations made under Sections D, E and F above."

> CDL-AD(2014)008, Opinion on the draft Law on the High Judicial and Prosecutorial Council of Bosnia and Herzegovina, §§65-68

"The draft law provides a very general regulation on *gathering powers* of the HCJ. In the proposed monitoring, the HCJ would be empowered to request explanations, records or information from different entities as well as natural persons in order to check due performance of duties by the judges of the targeted court. This raises concerns that need to be addressed: firstly, the power to request the information implies the requested party's duty to comply with the request. Such a regulation means that the HCJ is allocated near to unlimited access to any possible material when performing this new monitoring procedure, a power that may be considered excessively broad. Secondly, the draft law does not clarify who are the entities or natural persons that the HCJ will be able to address. Moreover, Article 59-1, para. 7 of the draft law allows for any person to submit any information to the HCJ which may be used in the court monitoring. This could open the door to abuse potentially based on one's dissatisfaction with a court judgment. Lastly, these gathering powers would not be limited to the corruption-related material because the draft law empowers the HCJ to collect material related to any possible misconduct of judges.

The draft law provides that it will be for the HCJ to establish the procedure for monitoring. Accordingly, the HCJ is empowered both to establish the procedure and to execute it. This appears to be an excessive concentration of power even when it is in the hands of the judiciary's self-governing body. The procedural framework is particularly important because, as discussed above, the proposed tools are extraordinary, and they carry serious risks for judicial

independence. For these reasons, the procedural rules, including legal protection and remedies, should be precisely regulated on the statutory level."

> CDL-AD(2023)027, Joint Follow-Up Opinion of the Venice Commission and the Directorate General of Human Rights and Rule of Law (DGI) of the Council of Europe to the Joint Opinion on the Draft Amendments to the Law "On the Judiciary and the Status of Judges" and Certain Laws on the Activities of the Supreme Court and Judicial Authorities of Ukraine (CDL-AD(2020)022), §§47 and 48.

"The Venice Commission previously criticised the power of the Judicial Council to "resolve complaints on the work of judges", in that it failed to specify the scope of the complaints which may be received by the Council, taking into account that the complaints against judgments are to be decided through the appeals system. The Law currently reads that the Judicial Council "considers" complaints on the work of judges (Article 27 § 1 (5) of the Law). While this formulation is an improvement vis-à-vis the former, it still leaves open who is entitled to submit such complaints and on what grounds […]."

> CDL-AD(2022)050, Opinion on the draft amendments to the Law on the Judicial Council and Judges of Montenegro. § 37.

"The structural unit of the High Council of Justice provided for in draft Article 351(1) seems to be an investigative body with very wide and discretionary powers. It is absolutely free to search all possible information on candidates [to judicial positions], without almost any restriction, since these research powers, including those concerning personal details, are covered by the candidate's consent (draft Art. 35(4)). First, it is by no means clear in the draft law how the structural unit of the High Council of Justice will be composed and which working methods will be used. For dealing with highly confidential information, special requirements for the members of such a unit must be laid down in the legislation and also the conditions for their appointment/selection by the High Council and their responsibilities must be made clear."

> CDL-AD(2014)031, Joint Opinion of the Venice Commission and the Directorate of Human Rights (DHR) of the Directorate of Human Rights and the Rule of Law (DGI) of the Council of Europe, on the draft Law on Amendments to the Organic Law on General Courts of Georgia, §55

"In the Commission's view, this provision enables the High Council of Justice to determine its own rules of procedure by adopting an appropriate 'statute', but does not allow for important matters governing its powers and affecting the rights and duties of magistrates to be so regulated. These matters should rather be regulated by a law adopted by Parliament."

> CDL(1995)074rev, Opinion on the Albanian law on the organisation of the judiciary, p. 3

"The obligation [of the Council] to provide an annual report to the National Assembly seems reasonable.

The information provided to the public on the activities of the Council will also assist in rendering the judges' work at the Council more transparent. It will notably allow the public to see that there are sanctions against judges that have committed disciplinary offences etc."

> CDL-AD(2008)006, Opinion on the Draft Law on the High Judicial Council of the Republic of Serbia, §§35, 36 See also 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, §§63 and 64; CDL-AD(2014)008, Opinion on the draft Law on the High Judicial and Prosecutorial Council of Bosnia and Herzegovina, §§71, 72

“The very idea of a ‘joint term of office’ is open to criticism. Desynchronised terms of office are a common feature in collegiate bodies in Europe. They help to preserve institutional memory and continuity of such bodies. Moreover, they contribute the internal pluralism and hence to the independence of these bodies: where members elected by different terms of Parliament work alongside each other, there are better chances that they would be of different political orientation. By contrast, simultaneous replacement of all members may lead to a politically uniform NCJ.”

> CDL-AD(2017)031, 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, §29

“[...] Quasi-total (excluding ex officio members) renewal of the composition of the HJC every three years may affect the institutional continuity of this body. The Concept Paper proposes a mid-term renewal of a part of the composition of the HJC [High Judicial Council]; the Venice Commission is in favour of this proposal but recommends also to extend the duration of the mandate of the HJC members.”

> CDL-AD(2018)032, Opinion on the Concept Paper on the reform of the High Judicial Council of Kazakhstan, §23

“The Venice Commission is of the opinion that when using its legislative power to design the future organisation and functioning of the judiciary, Parliament should refrain from adopting measures which would jeopardise the continuity in membership of the High Judicial Council.

Removing all members of the Council prematurely would set a precedent whereby any incoming government or any new Parliament, which did not approve of either the composition or the membership of the Council could terminate its existence early and replace it with a new Council. In many circumstances such a change, especially on short notice, would raise a suspicion that the intention behind it was to influence cases pending before the Council. [...]”

> CDL-AD(2013)007, Opinion on the Draft Amendments to the Organic Law on Courts of General Jurisdiction of Georgia, §§71-72

“The exclusion of direct reappointment / re-election while prolonging the mandate [six-year term] is aimed at creating more independence for the SCM [Superior Council of the Magistracy] members. This is positive.”

> CDL-AD(2018)003, Opinion on the Law on amending and supplementing the Constitution (Judiciary) of the Republic of Moldova, §§52 and 53

“The Venice Commission suggested that fixed non-renewable terms for the HCoJ members are to be preferred to ensure the appearance of independence of the HCoJ, given the public controversies over its composition and independence. In that context, allowing re-appointment required a specific justification. […]”

> CDL-AD(2023)033, Follow-up Opinion to Previous Opinions Concerning the Organic Law on Common Courts of Georgia, §23

“The Venice Commission observes that the members of the CJP are elected for a term of four years. Their tenure is rather short. Moreover, they can be re-elected (once), which could make them dependent on the appointing/electing authority.”

> CDL-AD(2024)041, Türkiye - Opinion on the composition of the Council of Judges and Prosecutors and the procedure for the election of its members, § 60

"The Venice Commission recommended using a staggered technique in the election of members of the HCoJ. […]

The Commission considers that the introduction in para. 12 of Article 47 of a staggered election of the judge members of the HCoJ is a step in the right direction to fulfil the above recommendation. According to this provision as it stands, during a three-month period the election of more than four judicial members of the HCoJ is proscribed. However, it is doubtful that this limited gradation is sufficient to ensure the continuity and efficiency of the HCoJ.

Firstly, the gradation only applies to the judicial members, not the lay members elected by Parliament. As the rule currently stands, Parliament will still replace the lay members *en bloc* at the same time. In this regard, the September 2023 draft amendments provide that Parliament should not elect more than four lay members of the HCoJ during one session. However, given the long-standing controversy and difficulties in electing lay members, these amendments would rather be insufficient, and it may be better both for the appearance of independence as well as the continuity and efficiency of the HCoJ to divide the election of lay members over two parliamentary terms.

Secondly, the abovementioned three-month restriction in the context of electing four judicial members is not sufficiently long to ensure continuity in the HCoJ. The September 2023 draft amendments extend the period from three to six months, which is positive. However, it would be preferable to have longer intervals between elections, for example half of the members every two years, or one quarter of the members every year of the four-year term."

CDL-AD(2023)033, Follow-up Opinion to Previous Opinions Concerning the Organic Law on Common Courts of Georgia, §§19-22

4.2 Composition of the Councils of Justice

4.2.1 General approach

"There is no standard model that a democratic country is bound to follow in setting up its Supreme Judicial Council so long as the function of such a Council fall within the aim to ensure the proper functioning of an independent Judiciary within a democratic State. Though models exist where the involvement of other branches of power (the legislative and the executive) is outwardly excluded or minimised, such involvement is in varying degrees recognised by most statutes and is justified by the social content of the functions of the Supreme Judicial Council and the need to have the administrative activities of the Judiciary monitored by the other branches of power of the State. It is obvious that the Judiciary has to be answerable for its actions according to law provided that proper and fair procedures are provided for and that a removal from office can take place only for reasons that are substantiated. Nevertheless, it is generally assumed that the main purpose of the very existence of a Supreme Council of the Judiciary is the protection of the independence of judges by insulating them from undue pressures from other powers of the State in matters such as the selection and appointment of judges and the exercise of disciplinary functions."

CDL-INF(1999)005, Opinion on the reform of the judiciary in Bulgaria, §28

See also CDL-AD(2015)042, Opinion on the Laws on the Disciplinary Liability and Evaluation of Judges of "The Former Yugoslav Republic of Macedonia", §61

"The composition of the SJC is in line with the recommendations of the Venice Commission. The majority of the members would be judges (ten out of fifteen), and eight judicial members would be elected from various levels of courts. The Presidents of the Supreme Court of Cassation and Supreme Administrative Court would be members ex officio. The non-judicial members would be elected by the National Assembly with a two-thirds majority, no dead-lock mechanism is provided for. It is recommended to foresee such an anti-deadlock mechanism (for which examples can be taken from the several possibilities presented previously by the Venice Commission)."

CDL-AD(2023)039, Opinion on the Draft Amendments to the Constitution of Bulgaria, §123

"[…] Involving only judges carries the risk of raising a perception of self-protection, self-interest and cronyism. As concerns the composition of the judicial council, both politicisation and corporatism must be avoided. An appropriate balance should be found between judges and lay members. The involvement of other branches of government must not pose threats of undue pressure on the members of the Council and the whole judiciary."

CDL-AD(2016)007, Rule of Law Checklist, §82
See also CDL-AD(2017)018, Opinion on the Judicial System Act of Bulgaria, §§17, 20, 21 and 23; CDL-INF(1998)009, Opinion on recent amendments to the law on major constitutional provisions of the Republic of Albania, §9

"[…] [T]he 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 meant to be an exception becomes the rule and allows 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 […]."

CDL-AD(2021)032, Opinion on the draft Constitutional Amendments on the Judiciary and draft Constitutional Law for the Implementation of the Constitutional Amendments of Serbia, §110

"[…] [P]oliticisation can be avoided if Parliament is solely required to confirm appointments made by the judges."

CDL-AD(2002)021, Supplementary Opinion on the Revision of the Constitution of Romania, §22
See also CDL-AD(2002)026, Opinion on the Draft Law on Judicial Power and Corresponding Constitutional Amendments of Latvia, §13; CDL-INF(1998)009, Opinion on recent amendments to the law on major constitutional provisions of the Republic of Albania, §§9, 19; CDL-INF(1999)005, Opinion on the reform of the judiciary in Bulgaria, §29

"[...] [A] substantial element or a majority of the members of the Judicial Council should be elected by the Judiciary itself. In order to provide for democratic legitimacy of the Judicial Council, other members should be elected by Parliament among persons with appropriate legal qualification taking into account possible conflicts of interest."

CDL-AD(2007)028, Report on Judicial Appointments by the Venice Commission, §29
See also CDL-AD(2018)003, Opinion on the Law on amending and supplementing the Constitution (Judiciary) of the Republic of Moldova, §54; CDL-AD(2008)006, Opinion on the Draft Law on the High Judicial Council of the Republic of Serbia, §76

"In addition, the Constitution does not define precisely the number of members of the HJC. [...] [I]t is quite unusual for a constitutional body to exist without the number of its members being clearly fixed (or at least without having a clear method of defining this number). The very idea of an "institution" implies that its composition is defined either in the law or in the Constitution, and is not left to the discretion of one person, even if this is the head of the State. Absence of a fixed composition undermines the legitimacy of the decisions taken by the body."

> CDL-AD(2018)032, Opinion on the Concept Paper on the reform of the High Judicial Council of Kazakhstan, §22

"[…] [W]hen using its legislative power to design the future organisation and functioning of the judiciary, Parliament should refrain from adopting measures which would jeopardise the continuity in membership of the High Judicial Council. Removing all members of the Council prematurely would set a precedent whereby any incoming government or any new Parliament, which did not approve of either the composition or the membership of the Council could terminate its existence early and replace it with a new Council. In many circumstances such a change, especially on short notice, would raise a suspicion that the intention behind it was to influence cases pending before the Council".

> CDL-AD(2013)007, Opinion on the draft amendments to the organic law on courts of general jurisdiction of Georgia, §§ 69-72.

"[…] The Venice Commission and the Directorate consider that as a matter of principle, the security of the fixed term of the mandates of members of constitutional bodies serves the purpose of ensuring their independence from external pressure. Therefore, measures which would jeopardise the continuity in membership and interfere with the security of tenure of the members of this authority would raise a suspicion that the intention behind those measures was to influence its decisions."

> CDL-AD(2020)001, Joint opinion of the Venice Commission and the Directorate General of Human Rights and Rule of Law (DGI) of the Council of Europe on the draft law on amending and supplementing the constitution with respect to the Superior Council of Magistracy of Moldova, §57

4.2.2. Election of judicial members of the Council

"The objective of the draft Law to respect and apply the principle of election of judicial members of the NCJ by their peers is not only legitimate, but it is required by the decisions of the ECtHR and the CJEU and the Venice Commission and DGI commend the Polish authorities for this proposed change."

> CDL-AD(2024)018, Poland - Urgent Joint Opinion on the draft law amending the Law on the National Council of the Judiciary of Poland, § 35.

"In the Sejm, the draft Law was amended and the right to nominate a judge as candidate was also granted to the Polish Bar Council, the National Bar Council of Attorneys-at-Law and the Polish National Council of Notaries. The involvement of these bodies can be seen as an element of additional involvement and an official acknowledgment of the interest of the relevant stakeholders in an adequate composition of the NCJ. *De facto*, it is most unlikely that they will put forward candidates which would not have found the support of the necessary number of judges, and the interests of these entities without doubt would have been articulated by comments on the candidates which will be nominated by the other actors, as will be done by the public at large, by several NGOs and others."

CDL-AD(2024)018, Poland - Urgent Joint Opinion on the draft law amending the Law on the National Council of the Judiciary of Poland, § 39.

"The elections [of judicial members of the NCJ] are to be managed by the National Electoral Commission (NEC), which is the body in charge of all kinds of elections at all levels, from Elections to the European Parliament to national or local elections. It is composed of one judge of the Constitutional Court, one judge of the Supreme Administrative Court, and seven members elected by the Sejm who must have the qualifications to become a judge. The members are appointed for a non-renewable term of nine years. While this is a body designed to manage elections for general bodies of representation, and while it is preferable in principle that the elections of representative bodies of the judiciary be managed by the judiciary itself, the Commission and DGI have been informed that the NEC has already the task of managing other elections (such as those for the agricultural commissions) and it enjoys public trust as a neutral body; it has experience and the necessary infrastructures and facilities to fulfil this role. Its task is only to control if the formal criteria are met. In addition, the draft law facilitates judicial review of the decisions of the NEC providing for the possibility to appeal to the Supreme Administrative Court in case the NEC refuses to accept the application of a candidate for member of NCJ, which is an adequate regulation. The Venice Commission and DGI therefore find that, in the current specific circumstances of Poland, the managing role of the NEC is suitable to safeguard the integrity of the election procedure. The draft Law does not regulate the elections in as detailed a manner as for general elections, which is acceptable as there is a comparatively much more limited number of candidates and voters."

CDL-AD(2024)018, Poland - Urgent Joint Opinion on the draft law amending the Law on the National Council of the Judiciary of Poland, § 40.

"The draft law provides for a public hearing of the candidates (new Art. 11o), aiming to enhance transparency and foster trust in the process. While this is commendable in principle, the procedure must be shaped very carefully. Although there are limitations on questions and participation outlined in Art. 11o (7), those limitations are constrained narrowly and may not suffice to shield the process from politicisation or possible abuse. A preferable approach would be to determine a clear scope of the hearings and involve designated entities (e.g., ombudsman, judicial associations, civil society organisations) as filters, to pose questions, ensuring relevance and integrity of the process. The Venice Commission and DGI recommend providing therefore stricter grounds, scope, and conditions for participation in the public hearings."

CDL-AD(2024)018, Poland - Urgent Joint Opinion on the draft law amending the Law on the National Council of the Judiciary of Poland, § 41

"The draft Law provides that the judicial members of the NCJ will be chosen through direct elections managed by the National Electoral Commission, instead of assemblies of judges as in the pre-2017 system.
[…] A direct election model is also found in other European systems and is acceptable, provided that the representation of different courts as required by Art. 187(1) of the Constitution is guaranteed. In this regard, the draft Law provides quotas for judges of different levels and jurisdictions (new Art. 11f(1)), which is a way to ensure wide representation of the judiciary in the NCJ as required by the Constitution and European standards. Other models of direct or indirect elections would be possible, but the choice belongs to the Polish authorities, provided that it meets the relevant standards."

CDL-AD(2024)018, Poland - Urgent Joint Opinion on the draft law amending the Law on the National Council of the Judiciary of Poland, §§ 36-37.

"Article 11.f(2) of the draft Law provides that "a judge may cast a vote for one candidate". This seems to mean that a judge has only one vote which he/she can cast for any candidate regardless which category this judge is from. This interpretation supports the aim that the members of the NCJ should act in the interests of the judiciary as such and not in the interest of a group of judges of a certain type of court."

CDL-AD(2024)018, Poland - Urgent Joint Opinion on the draft law amending the Law on the National Council of the Judiciary of Poland, § 38.

4.2.3 Judicial members of the Council and lay members: search of appropriate balance[3]

"[…] The primary role of judicial councils is to be independent guarantors of judicial independence. However, this does not mean that such councils are bodies of judicial 'self-government'. In order to avoid corporatism and politicisation, there is a need to monitor the judiciary through non-judicial members of the judicial council. Only a balanced method of appointment of the SCM members can guarantee the independence of the judiciary. Corporatism should be counterbalanced by membership of other legal professions, the 'users' of the judicial system, e.g. attorneys, prosecutors, notaries, academics, civil society."

CDL-AD(2018)003, Opinion on the Law on amending and supplementing the Constitution (Judiciary) of the Republic of Moldova, §56

"The European Charter on the statute for judges […] states: 'In respect of every decision affecting the selection, recruitment, appointment, career progress or termination of office of a judge, the statute envisages the intervention of an authority independent of the executive and legislative powers within which at least one half of those who sit are judges elected by their peers following methods guaranteeing the widest representation of the judiciary' […].

The CCEJ commends the standards set by the European Charter 'in so far as it advocated the intervention […] of an independent authority with substantial judicial representation chosen democratically by other judges'."

CDL-AD(2007)028, Report on Judicial Appointments by the Venice Commission, §§19, 20

"Under current international standards, there is no uniform model for the composition of judicial and/or prosecutorial councils. […].

Several international instruments, however, provide that when a judicial council is established, a substantial part of its members should be recruited from among judges. […]"

CDL-AD(2014)008, Opinion on the draft Law on the High Judicial and Prosecutorial Council of Bosnia and Herzegovina, §§27, 28
See also CDL-AD(2018)003, Opinion on the Law on amending and supplementing the Constitution (Judiciary) of the Republic of Moldova, §55; CDL-AD(2017)031, 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, §17; 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, §§38 and 39

[3] This section should be read in conjunction with section 4.2.4 below on lay members of the judicial councils

“It is recommended that a substantial element or a majority of the members of the HJPC be elected by their peers and, in order to provide for democratic legitimacy of the HJPC, other members be elected by the Parliamentary Assembly among persons with appropriate qualifications. […].”

> CDL-AD(2014)008, Opinion on the draft Law on the High Judicial and Prosecutorial Council of Bosnia and Herzegovina, §45
> See also CDL-AD(2004)044, Interim Opinion on Constitutional Reforms in the Republic of Armenia, §57

“Amendment XIII proposes that the HJC be composed of ten members: five judges elected by their peers and five prominent lawyers elected by the National Assembly. [...] Having an even number of members in the HJC is less usual than having an odd number, which is the current trend in many European states – there are only a few that have an even number of members in their judicial councils. […]”

> CDL-AD(2018)011, Opinion on the draft amendments to the constitutional provisions on the judiciary of Serbia, §59

“[…] [A]mong the judicial members of the Judicial Council there should be a balanced representation of judges from different levels and courts, and this principle should be explicitly added.”

> CDL-AD(2012)024, Opinion on two Sets of draft Amendments to the Constitutional Provisions relating to the Judiciary of Montenegro, §23
> See also 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, §40; CDL-AD(2011)012, Joint Opinion on the constitutional law on the judicial system and status of judges of Kazakhstan, §20; 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 the State Prosecutor's Office and the Law on the Judicial Council of Montenegro, §39

“[…] [W]hat is also very important is to have a well-balanced council, not only between the judicial and non-judicial members, but also among the judicial members so that they represent different types of judges and levels of the judiciary, while ensuring balance between the regions, gender balance etc. This can be difficult to achieve, particularly on a body which if it is to be effective should not have too many members. It is sufficient that the Constitution expresses the principle, while the specific procedures and criteria for a balanced representation of all levels of courts should be regulated in law.”

> CDL-AD(2023)039, Opinion on the draft Amendments to the Constitution of Bulgaria, §48

“The number of judges in the entire composition of the Council (only 8 out of 24 members) does not seem to be adequate. The limitation of the number of judges to one third falls short of the standards requiring a substantial judicial representation within such institutions. The Venice Commission has stressed that ‘[i]n all cases the council should have a pluralistic composition with a substantial part, if not the majority, of members being judges’.”

> CDL-AD(2011)019, Opinion on the introduction of changes to the constitutional law ‘on the status of judges’ of Kyrgyzstan, §24

“The [High Judicial Council] would thus have 11 judges among its 15 members. This proportion seems even too high and could lead to inefficient disciplinary procedures. While calling for an appeal to a court against disciplinary decisions of judicial councils is required, the Venice

Commission insists that the non-judicial component of a judicial council is crucial for the efficient exercise of the disciplinary powers of the council."

> CDL-AD(2013)034, Opinion on proposals amending the draft law on the amendments to the constitution to strengthen the independence of judges of Ukraine, §41
> See also 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, §§74-76

"[...] [A] structure containing only judges with more than 15 years of experience may not be regarded as properly representative."

> CDL-AD(2015)007, Joint opinion by the Venice Commission and the Directorate of Human Rights of the Directorate General of Human Rights and the Rule of Law on the Law on the Judiciary and the Status of Judges and amendments to the Law on the High Council of Justice of Ukraine, §89

"[...] Article 10.1 provides that members of the Disciplinary Board from among judges shall be elected by the General Assembly of Judges, as follows: 2 judges from the Supreme Court of Justice, 2 judges from the Courts of Appeal and 1 judge from the courts. It is to be welcomed that judges are elected by their peers. However, it is not clear what the rationale is for composing the Disciplinary Board mainly of representatives of the senior judiciary. Why are the judges requested to elect of 4 out of 5 judges from the Supreme and appellate courts? Furthermore, it should be expressly mentioned that election is done by secret ballot."

> CDL-AD(2014)006, Joint opinion of the Venice Commission and the Directorate of Human Rights (DHR) of the Directorate General of Human Rights and Rule of Law of the Council of Europe, and of the OSCE Office for Democratic Institutions and Human Rights (OSCE/ODIHR) on the draft law on disciplinary liability of judges of the Republic of Moldova, §52

"[...] Moreover, the current system should be improved, to get it closer to the European standards in the field of judicial independence. In particular, the proportion of the judicial members elected by their peers in the Judicial Chamber should be increased, and all functions related to the judicial careers, discipline, suspensions etc.– including in relation to the chief judges – should be transferred to this Chamber. The Venice Commission refers the Bulgarian authorities to its 2017 Opinion where it recommended (§ 20) that "elected judicial members should play a more important role within the SCM. The most radical solution would be to abandon the current model of an integrated SCM and create two separate bodies – one supreme council for judges (where elected judicial members would have at least half of the votes) and another supreme council for prosecutors and investigators". Alternatively (§ 21) "if judges and prosecutors are to remain together within the same Council, the powers of the Plenary SCM should be reduced. Most importantly, the powers related to the appointment/dismissal of two chief judges, and the power to remove elected judicial members of the SCM should be transferred to the Judicial Chamber. Additionally, the composition of the Judicial Chamber of the SCM should be changed, in order to increase the proportion of judges elected by their peers." The Venice Commission invites the authorities of Bulgaria to seriously consider these changes (even if it requires a constitutional amendment)."

> CDL-AD(2019)031, Opinion on draft amendments to the Criminal Procedure Code and the Judicial System Act of the Republic of Bulgaria, concerning criminal investigations against top magistrates, §48

"[...] Again, concerning the lay members, the requirement in draft Article 122 of "not being politically affiliated" is valid. At the same time, the term "political affiliation" should not be understood as "conducting advocacy activities"; and the authorities could consider using the

phrase “are not member of political parties” instead of “are not politically affiliated” in the draft provision.”

> CDL-AD(2020)001, Joint opinion on the draft law on amending and supplementing the constitution with respect to the Superior Council of Magistracy, §54

“[...] [T]he recent election of the lay members in a controversial and non-consensual manner, coupled with the hasty adoption and implementation of legislative amendments concerning the composition and functioning of the SCM before the adoption of the constitutional amendments, will have negative consequences in terms of independence of this institution and the public trust towards it.”

> CDL-AD(2020)007, Joint Opinion on the revised draft provisions on amending and supplementing the Constitution with respect to the Superior Council of Magistracy of Moldova, §40

“[...] The draft law should clarify that judicial protection is available to a candidate who is deemed not to meet the criteria of professional ethics and integrity by the Ethics Council. As it stands, the draft law does not refer to the procedure for appeals against decisions of the Ethics Council. During the online meetings, the Ukrainian authorities pointed out that that in conformity with other legislation, any individual public act can be appealed against. This means that a decision that terminates a candidacy for a position at the HCJ or that establishes the non-compliance of a current member of the HCJ with ethics and integrity criteria can be appealed against in court.

[...] Draft Law no. 5068 should explicitly provide for appeals against the decisions of the Ethics Council to the Supreme Court, even if the parallel draft law no. 5067 already envisages reducing the jurisdiction of the unreformed Kyiv City Administrative Court.”

> CDL-AD(2021)018, Urgent joint opinion of the Venice Commission and the Directorate General of Human Rights and the Rule of Law (DGI) of the Council of Europe on the draft law on amendments to certain legislative acts concerning the procedure for electing (appointing) members of the High Council of Justice (HCJ) and the activities of disciplinary inspectors of the HCJ of Ukraine (Draft law no. 5068), §§62-63

4.2.4 Lay members: importance of having the civil society represented

“[…] The management of the administrative organisation of the judiciary should not necessarily be entirely in the hands of judges. In fact, as a general rule, the composition of a Council foresees the presence of members who are not part of the judiciary, who represent other State powers or the academic or professional sectors of society. This representation is justified since a Council’s objectives relate not only to the interests of the members of the judiciary, but especially to general interests. The control of quality and impartiality of justice is a role that reaches beyond the interests of a particular judge. The Council’s performance of this control will cause citizens’ confidence in the administration of justice to be raised. Furthermore, 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.”

> CDL-AD(2014)008, Opinion on the draft Law on the High Judicial and Prosecutorial Council of Bosnia and Herzegovina, §§32 and 35

“[…] [A] basic rule appears to be that a large proportion of the membership [of the Supreme Council of Justice] should be made up of members of the judiciary and that a fair balance should be struck between members of the judiciary and other ex officio or elected members. […]”

CDL-INF(1998)009, Opinion on recent amendments to the law on major constitutional provisions of the Republic of Albania, §§9-12
See also CDL-AD(2007)028, Report on Judicial Appointments by the Venice Commission, §§27 and 30

"[…] It is common practice that 'judicial councils include also members who are not part of the judiciary and represent other branches of power or the academic or professional sector' and the Venice Commission even recommends that a substantial part of the members be non-judicial.

[…]

[…] [I]nstead of excluding legal professionals altogether, consideration might be given to adding members on behalf of the professional community, which would not excessively broaden the size of the HJPC, while ensuring the representation of the users of the judicial system."

CDL-AD(2014)008, Opinion on the draft Law on the High Judicial and Prosecutorial Council of Bosnia and Herzegovina, §§30,31

"Corporatism can be avoided by ensuring that the members of the Judicial Service Commission, elected by their peers, should not wield decisive influence as a body. They must be usefully counterbalanced by representation of civil society (lawyers, law professors and legal, academic or scientific advisors from all branches)."

CDL-AD(2002)012, Opinion on the Draft Revision of the Romanian Constitution, §66
See also CDL-AD(2018)017, Opinion on draft amendments to Law No. 303/2004 on the Statute of Judges and Prosecutors, Law No. 304/2004 on Judicial Organisation, and Law No. 317/2004 on the Superior Council for Magistracy of Romania, §§138, 139; CDL-AD(2017)019, Opinion on the Draft Judicial Code of Armenia, §89; CDL-AD(2017)018, Opinion on the Judicial System Act of Bulgaria, §24; CDL-AD(2015)037, First Opinion on the Draft Amendments to the Constitution (Chapters 1 to 7 and 10) of the Republic of Armenia, §179; 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, §45; CDL-AD(2012)020, Opinion on the Cardinal Acts on the Judiciary that were amended following the adoption of Opinion CDL-AD(2012)001 on Hungary, §§33, 34; CDL-AD(2012)001, Opinion on Act CLXII of 2011 on the Legal Status and Remuneration of Judges and Act CLXI of 2011 on the Organisation and Administration of Courts of Hungary, §45; CDL-AD(2005)003, Joint opinion on a proposal for a constitutional law on the changes and amendments to the Constitution of Georgia by the Venice Commission and OSCE/ ODIHR, §102; CDL-AD(2002)021, Supplementary Opinion on the Revision of the Constitution of Romania, §§21, 22

"[…] It is advisable for judicial councils to include members who are not themselves representatives of the judicial branch. But, such members should preferably be appointed by the legislative branch instead of by the executive."

CDL-AD(2010)042, Interim Opinion on the Draft Law on the High Council for judges and Prosecutors (of 27 September 2010) of Turkey, §34

"In the Venice Commission's view, this composition of an equal number of judges and lay members would ensure inclusiveness of the society and would avoid both politicisation and autocratic government.

A crucial additional element of this balance would be that the President of the Judicial Council should be elected by the Judicial Council from among its lay members (with the exception of the Minister of Justice) by a majority of two thirds and should have a casting vote. […]

[…] Like for the Plenary, among the judicial members of the disciplinary panel there should be a balanced representation of judges from all different levels and courts (see infra the comments on the amendments to the laws)."

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 the State Prosecutor's Office and the Law on the Judicial Council of Montenegro, §§20-22

"With the proposed new composition of the Judicial Council, a parity between judicial and lay members is sought to be achieved. The Venice Commission welcomes this new composition, which would avoid both the risk of politicisation and the risk of self-perpetuating government of judges.

However, the parity of judicial and lay members would not pertain in disciplinary proceedings, as the Minister of Justice could not sit and vote in such cases and, as a consequence, the judges would have a majority […]. Therefore […] a crucial additional element of this balance would be to add a provision in Article 127 of the Constitution on a smaller disciplinary panel within the Judicial Council with a parity of judicial and lay members (with the exclusion of the Minister of Justice). The details concerning this disciplinary panel could be regulated by the Law, taking into account the importance of reconciling the independence of the judiciary and at the same time ensuring accountability."

CDL-AD(2012)024, Opinion on two Sets of draft Amendments to the Constitutional Provisions relating to the Judiciary of Montenegro, §§20, 21

"[…] [T]he organisation of a competition to choose the civil society representatives on the Disciplinary Board is to be welcomed. However, it would be desirable that the criteria for selection of candidates as well as the mechanism for the appointment and functioning of the Commission which is intended to select candidates be specified in the law itself rather than in a regulation. Furthermore, it should be made clear that the Minister's function in appointing these persons is a formal one and that the appointment is carried out in accordance with the recommendations of the Commission which selects candidates."

CDL-AD(2014)006, Joint opinion of the Venice Commission and the Directorate of Human Rights (DHR) of the Directorate General of Human Rights and Rule of Law of the Council of Europe, and of the OSCE Office for Democratic Institutions and Human Rights (OSCE/ODIHR) on the draft law on disciplinary liability of judges of the Republic of Moldova, §54

"[...] [T]he Venice Commission has never been in favour of systems where *all* members of the body were elected by the judges. Given that now the CDF [The Council for Determination of Facts] has obtained very important powers in the sphere of the judges' discipline, it is recommended that a significant proportion of its members are appointed by democratically elected bodies, most preferably by the Parliament with a qualified majority of votes. [...]"

CDL-AD(2015)042, Opinion on the Laws on the Disciplinary Liability and Evaluation of Judges of "The Former Yugoslav Republic of Macedonia", §77

4.2.5 Representation of the executive in the Council; ex officio members

"Although the presence of the members of the executive power in the judicial councils might raise confidence-related concerns, such practice is quite common. [...] Such presence does not seem, in itself, to impair the independence of the council, according to the opinion of the Venice Commission. However, the Minister of Justice should not participate in all the council's decisions, for example, the ones relating to disciplinary measures."

CDL-AD(2007)028, Report on Judicial Appointments by the Venice Commission, §33

See also CDL-AD(2010)026, Joint opinion on the law on the judicial system and the status of judges of Ukraine by the Venice Commission and the Directorate of Co-operation within the Directorate General of Human Rights and Legal Affairs of the Council of Europe, §97; CDL-INF(1998)009, Opinion on recent amendments to the law on major constitutional provisions of the Republic of Albania, §16

"As reiterated in the 2020 Opinion on Bulgaria, [...] the presence of the Minister of Justice on the councils, even on a non-voting basis - which has been retained in the draft amendment to the Constitution - is a source of concern for the Venice Commission. While there may be occasions where the presence of the Minister of Justice in the councils is required, for example in budgetary matters, a general right for the Minister of Justice to participate on the work of the councils may be regarded by the judiciary as a form of pressure from the executive power, especially when the councils decide on disciplinary or career matters.

The Venice Commission has so far been cautious in its approach (while the Group of States against corruption, GRECO, has taken a stricter position in this regard). In an opinion on Montenegro, it stated that "it is wise that the Minister of Justice should not him- or herself be a member". [...] Similarly, in an opinion on the Republic of Moldova: "The self-governing nature of the Superior Council of Prosecutors might be questioned given the ex officio membership of the Minister of Justice". [...] If the participation of the Minister of Justice in the work of the SJC is maintained, the Minister should not participate in disciplinary proceedings against judges. [...] However, in light of the recent judgment of the ECtHR stating, with respect to the Minister of Justice, that "the presence, even if only passive, of a member of the Government on a body empowered to impose disciplinary sanctions on members of the judiciary is, in itself, extremely problematic in the light of the requirements of Article 6 of the Convention and, in particular, the requirement that the disciplinary body be independent", [...] the Venice Commission recommends consideration of the merit of this provision in light of evolving best practices. An alternative could be to limit the possibility of the presence of the Minister of Justice to some specific issues and exclude it for others."

CDL-AD(2023)039, Opinion on the draft Amendments to the Constitution of Bulgaria, §§73 and 74

"It would also be possible to include *ex-officio* members in the HJC, such as the Minister of Justice or the President of the Supreme Court. This can be useful to facilitate dialogue among the various actors in the system. However, care must be taken that including *ex officio* members does not increase the risk of domination of the HJC by the political majority. If the Minister of Justice were to be included as an *ex-officio* member, he or she should not have the right to vote or participate in the decision-making process if it is a decision concerning the transfer of judges and disciplinary measures against judges."

CDL-AD(2018)011, Opinion on the draft amendments to the constitutional provisions on the judiciary of Serbia, §63
See also CDL-AD(2018)003, Opinion on the Law on amending and supplementing the Constitution (Judiciary) of the Republic of Moldova, §§58-60 and CDL-AD(2022)050, Opinion on the draft amendments to the Law on the Judicial Council and Judges of Montenegro. § 19.

"However, principles are by their definition general standards which are not immutable and set in stone, and, when applied, must always take into consideration the particular circumstances of the case at stake. In the specific case of Montenegro, the Venice Commission takes note of the recommendations of GRECO. It further notes that the current formulation of Article 128 § 3 of the Constitution provides that the Minister of Justice shall not vote in the disciplinary proceedings related to accountability of judges. The Constitution is silent about the possibility for the Minister of Justice to take part in any other vote, including those on any career-related issue (transfer,

appointment, dismissal, appraisal). Therefore, it is for the legislature to decide whether the Minister of Justice should be prevented from voting in these matters, in line with the above-mentioned standards, and for the Constitutional Court of Montenegro to review such a legislative amendment. Insofar as the Minister's presence in the Judicial Council is concerned, the Venice Commission reiterates that it is not regulated at the legislative level and, therefore, any change to this provision would need to be done via a constitutional amendment. […]"

> CDL-AD(2022)050, Opinion on the draft amendments to the Law on the Judicial Council and Judges of Montenegro. § 20.

"[…] The Proposal […] removes all participation of prosecutors from the HJC but retains powers of the HJC in respect of prosecutors (incompatibility requirements and discipline). However, the HJC should have no such powers if there is a separate prosecutorial council."

> CDL-AD(2013)034, Opinion on proposals amending the draft law on the amendments to the constitution to strengthen the independence of judges of Ukraine, §42

"[…] It seems that the Volkov judgment does not rule out *ex officio* members. They could be members of the HCJ without a right to vote."

> CDL-AD(2013)014, Opinion on the Draft Law on the amendments to the Constitution, Strengthening the Independence of Judges and on the Changes to the Constitution proposed by the Constitutional Assembly of Ukraine, §57

" […] If the participation of the Minister of Justice in the work of the CSM is maintained, it is welcome that the Minister cannot participate in disciplinary proceedings against magistrats du siège. However, given the fact that the provision appears to be obsolete in French practice and in light of the recent judgment of the ECtHR stating, with respect to the Minister of Justice, that "the presence, even if only passive, of a member of the Government on a body empowered to impose disciplinary sanctions on members of the judiciary is, in itself, extremely problematic in the light of the requirements of Article 6 of the Convention and, in particular, the requirement that the disciplinary body be independent", […] the Venice Commission recommends consideration of the continued merit of this provision in light of evolving best practices."

> CDL-AD(2023)015, Joint Opinion of the Venice Commission and the Directorate General of Human Rights and Rule of Law (DGI) of the Council of Europe on the Superior Council of Magistracy and the Status of the Judiciary as Regards Nominations, Mutations, Promotions and Disciplinary Procedures of France, §30.

"The extensive involvement of the Minister of Justice in the [Council of Judges and Prosecutors]'s operations, particularly in areas directly affecting judges' and prosecutors' career, as well as in relations to the inspections and investigations of judges, prosecutors and the members of the CJP, poses a substantial risk to the separation of powers and the independence of the judiciary. It also significantly affects the appearances of independence of the CJP."

> CDL-AD(2024)041, Türkiye - Opinion on the composition of the Council of Judges and Prosecutors and the procedure for the election of its members, § 54.

"The Undersecretary [the Deputy Minister of Justice], by virtue of her/his role, is likely to carry the priorities and perspectives of the Ministry of Justice into the CJP's deliberations. The presence of the Undersecretary, particularly in a voting capacity, raises further concerns about interference with judicial independence. The inclusion of the Undersecretary within the CJP allows the executive branch to have a direct role in decisions related to the appointment, promotion, and discipline of judges and prosecutors. …

The Venice Commission recalls that European standards discourage *ex officio* membership of the judicial councils. Furthermore, *ex officio* members who are part of the executive are extremely problematic. As with the Minister of Justice, the Venice Commission strongly recommends removing the Undersecretary of Justice from the CJP."

> CDL-AD(2024)041, Türkiye - Opinion on the composition of the Council of Judges and Prosecutors and the procedure for the election of its members, §§ 57-58.

4.2.6 Qualification requirements for the candidates; incompatibilities and quotas

"It is vital that the members of the Council have sufficient practical experience to carry out their work. Therefore, the requirement of seven years' experience provided […] seems adequate."

> CDL-AD(2008)006, Opinion on the Draft Law on the High Judicial Council of the Republic of Serbia, §51

"The requirement of 10 years of experience for judges [to be eligible at the Council] should be reconsidered because it will make the election of qualified candidates from all levels of the judiciary, especially from first level courts, very difficult."

> CDL-AD(2011)019, Opinion on the introduction of changes to the constitutional law "on the status of judges" of Kyrgyzstan, §36

"[…] As regards members elected by the National Assembly, the criteria raise the question as to why only those who have passed the Bar exam fall within the category of 'prominent lawyers'. This would exclude law professors, for instance [...]."

> CDL-AD(2018)011, Opinion on the draft amendments to the constitutional provisions on the judiciary of Serbia, §60

"[…] [T]he amendments could provide that should a chairman of a court be elected in the Council, he or she would have to resign from his or her position as chairman while of course retaining his or her position as an ordinary judge."

> CDL-AD(2013)007, Opinion on the Draft Amendments to the Organic Law on Courts of General Jurisdiction of Georgia, §50

"[…] [I]n order to insulate the judicial council from politics its members should not be active members of parliament."

> CDL-AD(2007)028, Report on Judicial Appointments by the Venice Commission, §32

"According to Article 130 (2), practising lawyers of high professional and moral integrity with at least fifteen years of professional experience are eligible for election to the SJC. The requirement of high moral and professional integrity and at least 15 years of professional experience should evidently also concern the non-judicial members. With respect to these members, "professional experience" can be assumed to refer to various legal professions. This could be explicitly stated in Art 130(2). This would also emphasize that at issue are not party-political mandates. The provision that the members of the SJC, elected from the parliamentary quota, should not be members of the judiciary is welcome. A recommendable rule to be added would also be exclude active politicians (members of the National Assembly) from the "legal experts" that can be elected to the SJC."

CDL-AD(2023)039, Opinion on the draft Amendments to the Constitution of Bulgaria, §49

"Article 16 § 1 of the Law, in defining the required qualifications for being appointed lay members of the Judicial Council, employs the term "experience in legal affairs". A similar wording ("legal matters") is used in Article 38 of the Law. The Venice Commission finds that the expression employed is rather vague. What "legal affairs/legal matters" covers needs further explanation and a clearer definition, as previously recommended in 2014."

CDL-AD(2022)050, Opinion on the draft amendments to the Law on the Judicial Council and Judges of Montenegro, § 29.

"[…] Among the guarantees of political neutrality of the SJC [Supreme Judicial Council], the authorities could consider, if necessary by way of constitutional amendment, […] the restrictions for the politicians (including recent politicians) to become the SJC members. The Judicial Code forbids the SJC members to engage, among other things, in political activities (Art 83, para.1), however this restriction is not sufficient, and it does not address the problem of politicians who, without a cooling-off period, may take up a position in the SJC."

CDL-AD(2023)045, Armenia - Joint opinion of the Venice Commission and the Directorate General of Human Rights and Rule of Law (DGI) of the Council of Europe on the Concept Paper concerning the reform of the Ethics and Disciplinary Commission of the General Assembly of Judges, § 32.

"[…] [T]he Venice Commission considers that the Law is too restrictive when it comes to the "political" ineligibility criteria. In particular, ten years of absolute distance from a political party seem to be a rather long period of time; especially in a small country like Montenegro, it might disproportionately restrict the potential pool of candidates, in particular insofar as lay members [of the Judicial Council] are concerned. While the aim of the Law is legitimate, it excessively penalises former activity in political/party affairs. A person of high reputation may well be a leading party figure who retired from politics in an indisputable manner. In addition, the catch-all "actively engaged in a party" is too vague a formula, that might be misused for the sake of excluding undesirable candidates; it requires clarification. The Venice Commission therefore recommends reducing the cooling off period to 5 years, as it is the case, for example, for members of the Prosecutorial Council, […] and clarifying the formula "actively engaged in a party". […]"

CDL-AD(2022)050, Opinion on the draft amendments to the Law on the Judicial Council and Judges of Montenegro, § 33.

"[…] Out of 15 members [of the Judicial Council] 4 must belong to the non-majority communities, and, in addition, three more must be elected by the double majority vote by the Parliament. [...]

In its 2005 Opinion, the Venice Commission stated that the provisions concerning representatives of the non-majority communities 'are to be welcomed' (§ 40). The question is whether the direct ethnic quota for selecting candidates is still an acceptable solution in the present-day conditions.

[...] Mechanisms of power-sharing between different ethnic communities are to be assessed in the light of the country's recent history; ethnic criterion for eligibility to political posts may be defendable in the aftermath of a civil war but must be reconsidered after a passage of time - see, in particular, the 2005 opinion on the constitutional situation in Bosnia and Herzegovina. […]

In the Macedonian context the proposed Amendment serves to protect non-majority communities. Furthermore, ethnic quotas do not close access to the JC for the candidates from the majority

communities. Consequently, the case of *Sejdić and Finci* cannot serve as a precedent. That being said, the method of the Court's reasoning, namely the 'dynamic' approach to the analysis of the ethnic-based election criteria, still applies.

The Venice Commission recalls in this respect that Point 10 of the UN Basic Principles on the Independence of the Judiciary requires that judges are appointed without discrimination based on the ground of 'national origin'. Recommendation of the Committee of Ministers of the Council of Europe no. R(94)1224 calls for merit-based appointment of judges with regard to 'qualifications, integrity, ability and efficiency' (see Principle 1, point 1(2)-c). Similar principles are proclaimed by the European Charter on the statute for judges [...]. The principle of 'merit-based' appointment is cited with approval by the Venice Commission in its Report on Judicial Appointments, §§ 10 and 36-37.

[...] The 'double majority' principle can hardly be applied in the context of election of judicial members of the JC. Further, the Commission reiterates that the ethnic quota in the specific context of the country is supposed to protect minorities and may thus be regarded as a sort of a 'positive discrimination'. Therefore, direct ethnic quotas remain another possible mechanism securing adequate representation of non-majority communities. The authorities must consider, however, whether ethnic quotas should exist in relation to the lay members of the JC elected by the Parliament."

> 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, §§58, 60-63, 65
> See also CDL-AD(2019)008, Opinion on the Draft Law on the Judicial Council of North Macedonia, §19

"[…] The draft Law indicates that the composition of the [High Judicial and Prosecutorial Council] needs to reflect the ethnical composition of BiH, with at least six members of each of the Constituent Peoples and an appropriate number of members from among Others. Equal gender representation should also be ensured. […]

[…] [I]n a country of the size of BiH, using a requirement for a certain ethnic composition for the HJPC will make it very difficult in practice to also meet the requirement of ensuring an equal representation of the sexes. The Venice Commission strongly supports policies aimed to ensure gender balance in public institutions and believes they should be welcomed and that all efforts in this direction should be praised. However, an inflexible legal provision setting a quota along ethnic and gender lines over those of professional competence - taking the country's size and population into account - may undermine the effective functioning of the system".

> CDL-AD(2014)008, Opinion on the draft Law on the High Judicial and Prosecutorial Council of Bosnia and Herzegovina, §§32 and 35

"With the aim to perfect the composition of the CSM and to ensure the necessary diversity of its members, in light of the principles recalled above, the Commission recommends elaborating some (in)eligibility criteria for the selection of the prominent citizens and setting the requirement of a qualified majority (with due anti-deadlock mechanisms) for the selection of the prominent citizens, in order to ensure the maximum diversity."

> CDL-AD(2023)015, Joint Opinion of the Venice Commission and the Directorate General of Human Rights and Rule of Law (DGI) of the Council of Europe on the Superior Council of Magistracy and the Status of the Judiciary as Regards Nominations, Mutations, Promotions and Disciplinary Procedures of France, §30.

"As to the selection of judicial members by their peers, the Commission reiterates the principle of broad and fair representation of all levels and types of courts. At present, 2 out of 5 positions are allocated to magistrates of 1st instance, on the basis of an indirect suffrage by "collège de grands électeurs". Given the fact that most judges work in these courts, the Commission recommends considering re-balancing the representation of lower and higher courts. It also endorses the proposal currently in the draft organic law to abolish the indirect suffrage by "collège de grands électeurs"."

> CDL-AD(2023)015, Joint Opinion of the Venice Commission and the Directorate General of Human Rights and Rule of Law (DGI) of the Council of Europe on the Superior Council of Magistracy and the Status of the Judiciary as Regards Nominations, Mutations, Promotions and Disciplinary Procedures of France, §31.

4.2.6 Chairperson and vice-chairperson of the Council

"The concentration of powers in one person, the President of the CJP, is problematic per se. Furthermore, as noted above, the President of the CJP being also the Minister of Justice, the combination of roles aggravates the concentration of powers in one person, that is also a member of the Government. …

[…]
Moreover, … although the President of the CJP does not participate in the work of the chambers, and therefore does not take part in decisions related to the appointments of judges and prosecutors or disciplinary matters, she/he has a key role in consenting to inspections and investigations of judges and prosecutors as well as to criminal investigations and disciplinary investigations and prosecutions related to the members of the CJP. The Venice Commission therefore recommends that the President of the CJP should be a neutral figure, elected by its members; that the overall powers of the President of the CJP be reduced, irrespective of who shall become the President; and in particular that the power to consent to inspections and investigations of judges and prosecutors, as well as the power related to criminal investigations and disciplinary investigations and prosecutions of members of the CJP should be removed."

> CDL-AD(2024)041, Türkiye - Opinion on the composition of the Council of Judges and Prosecutors and the procedure for the election of its members, §§ 98 and 100.

4.2.6.1 Appointment/election of the chairperson and vice-chairperson

"It is necessary to ensure that the chair of the judicial council is exercised by an impartial person who is not close to party politics. Therefore, in parliamentary systems where the president / head of state has more formal powers there is no objection to attributing the chair of the judicial council to the head of state, whereas in (semi-) presidential systems, the chair of the council could be elected by the Council itself from among the non-judicial members of the council. Such a solution could bring about a balance between the necessary independence of the chair and the need to avoid possible corporatist tendencies within the council."

> CDL-AD(2007)028, Report on Judicial Appointments by the Venice Commission, §35
> See also CDL-AD(2015)042, Opinion on the Laws on the Disciplinary Liability and Evaluation of Judges of "The Former Yugoslav Republic of Macedonia", § 66; CDL-AD(2004)044, Interim Opinion on Constitutional Reforms in the Republic of Armenia, §58

"[...] [T]he President should be elected from among the lay members with the 2/3 majority of all the members, in order to give the JC more democratic legitimation and credibility before the public and to remove the impression of a corporatist management of the judiciary. [...]"

> CDL-AD(2015)042, Opinion on the Laws on the Disciplinary Liability and Evaluation of Judges of "The Former Yugoslav Republic of Macedonia", §66
> See also CDL-AD(2019)008, Opinion on the Draft Law on the Judicial Council of North Macedonia, §12; CDL-AD(2015)045, Interim Opinion on the Draft Constitutional Amendments on the Judiciary of Albania, §63; 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, §71; CDL-AD(2012)024, Opinion on two Sets of draft Amendments to the Constitutional Provisions relating to the Judiciary of Montenegro, §22

"[...] It is true that the Venice Commission has stated that '*the chair of the council could be elected by the council itself from among the non-judicial members of the council.*' However, this recommendation by the Commission is primarily aimed at situations where judges elected by their peers have the majority in a council and is not applicable if it increases the risk of domination of the HJC by the current majority in parliament."

> CDL-AD(2018)011, Opinion on the draft amendments to the constitutional provisions on the judiciary of Serbia, §66

"It is welcome that the chairpersons of the SJC are elected by rotation from amongst judge members and lay members, for a term of two and half years (Article 81). This method gives a democratic legitimation to the SJC before the public."

> CDL-AD(2017)019, Opinion on the Draft Judicial Code of Armenia, §90

"There may be different approaches with regard to the role of presidents of supreme courts within judicial councils. Some countries choose not to impose any restrictions and allow the President of the Supreme Court to be elected/appointed President of the Council and hold both positions simultaneously (as still is the case in Serbia but is now proposed to be abandoned). In view of enhancing the independence of the judiciary others may prefer to separate the administrative positions within the judiciary and the membership in the Council; and therefore, should the president of the court be appointed President of the Council, this person should then resign from his or her position at the Supreme Court […]."

> CDL-AD(2014)028, Opinion on the Draft Amendments to the Law on the High Judicial Council of Serbia, §23

"It is to be welcomed that under new Article 47(2) of the Law, the chairperson of the Supreme Court will no longer be the ex officio chairperson of the HCJ. The election of the chairperson by the members of the HCJ is in line with international standards."

> CDL-AD(2018)029, 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 of Georgia, §48

"[...] Entrusting the Minister [of Justice] with the presidency of the SJC Plenum (and perhaps also the mere participation to the meeting of the two Chambers) is likely to interfere with the autonomy and independence of the judiciary from the political power. Even the appearance of such influence has to be avoided in order to ensure public trust in the judiciary."

> 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, §§69 and 71
> See also CDL-AD(2002)015, Opinion on the Draft Law on Amendments to the Judicial System Act of Bulgaria, §5; CDL-INF(1999)005, Opinion on the reform of the judiciary in Bulgaria §§34-35

"The election of the Chairman of the Board by its members, by secret ballot […] is to be welcomed. However, it would be desirable for the Board also to elect a Vice-Chairman to act in the absence of the Chairman rather than the arrangement provided for in Article 12.3 that in the absence of the Chairman the oldest member present should take the chair."

> CDL-AD(2014)006, Joint opinion of the Venice Commission and the Directorate of Human Rights (DHR) of the Directorate General of Human Rights and Rule of Law of the Council of Europe, and of the OSCE Office for Democratic Institutions and Human Rights (OSCE/ODIHR) on the draft law on disciplinary liability of judges of the Republic of Moldova, §58

"[…] [I]t is not appropriate for the President and the Vice Presidents of the [High Judicial and Prosecutorial Council] to be chosen along ethnic lines and the decision on their election should not be left to the Parliamentary Assembly. In addition, this system of rotating presidents weakens the HJPC."

> CDL-AD(2014)008, Opinion on the draft Law on the High Judicial and Prosecutorial Council of Bosnia and Herzegovina, §47

4.2.6.2 Removal of the chairperson and vice-chairperson

"With regard to the provision for the removal of the Chairman, as well as a reasoned proposal from three members (Article 12.4) there also needs to be a vote of the members of the Board, who should not have to wait for three months of inaction before taking action themselves. A 2/3 majority could also apply as in the case of the removal of ordinary members."

> CDL-AD(2014)006, Joint opinion of the Venice Commission and the Directorate of Human Rights (DHR) of the Directorate General of Human Rights and Rule of Law of the Council of Europe, and of the OSCE Office for Democratic Institutions and Human Rights (OSCE/ODIHR) on the draft law on disciplinary liability of judges of the Republic of Moldova, §59

[…] [I]t is important that the draft Law provide restrictive grounds for which the Parliamentary Assembly may decide to dismiss the president and vice-president [of the High Judicial and Prosecutorial Council]. [...] There should be input from an expert body before Parliament takes a decision. In addition, unlike the election process where there is a prior selection limiting the choice of the Parliamentary Assembly, in the decision on dismissal, the Parliamentary Assembly is not limited and acts on its own. This is inappropriate and needs to be reconsidered."

> CDL-AD(2014)008, Opinion on the draft Law on the High Judicial and Prosecutorial Council of Bosnia and Herzegovina, §48

4.2.7 Structure, working methods and appeals against decisions of the Council of Justice

"[…] Taking into account the powers granted to the HCJ, it should work as a full-time body and the elected members, unlike the ex officio members, should not be able to exercise any other public or private activity while sitting in the HCJ."

> CDL-AD(2010)029, Joint opinion on the law amending certain legislative acts of Ukraine in relation to the prevention of abuse of the right to appeal by the Venice Commission and the Directorate of Co-operation within the Directorate General of Human Rights and Legal Affairs of the Council of Europe, §30

"The work of the [High Judicial and Prosecutorial Council] should be as transparent as possible; it should be accountable to the public through widely disseminated reports and information. The duty to inform may also include an obligation to submit the report to the Parliamentary Assembly

about the state of affairs in the judiciary or prosecution service. However, this should not be transformed into a formal accountability of the HJPC to the legislative or executive branches of power.

In this respect, Article 25.3 is clearly problematic as it stipulates where reports receive a negative assessment, the Parliamentary Assembly 'may remove the Presidency or a member of the Presidency from the Council'. […]"

> CDL-AD(2014)008, Opinion on the draft Law on the High Judicial and Prosecutorial Council of Bosnia and Herzegovina, §§71, 72
> See also CDL-AD(2008)006, Opinion on the Draft Law on the High Judicial Council of the Republic of Serbia, §§35, 36

"The 2004 Law created the [High Judicial and Prosecutorial Council] as a single and uniform body. Although this is not entirely unusual, ideally the two professions – judges and prosecutors – should be represented by separate bodies. For this reason, the initial structure of the HJPC had been criticised and it was recommended that it be sub-divided into two sub-councils.

However, if both professions are to be represented in a same structure, that structure must provide a clear separation between the two professions. The Venice Commission's requirement is that: '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 because due to their daily 'prosecution work' prosecutors may have a different attitude from judges on judicial independence and especially on disciplinary proceedings'.

The Venice Commission therefore welcomes the establishment by the draft Law of two sub-councils: one for judges and one for prosecutors. It seems to be a balanced solution which, on the one hand, prevents excessive interference of one of the legal professions into the work of the other while, on the other hand, making it possible to maintain the current structure of the HJPC as a common organ of/for judges and prosecutors."

> CDL-AD(2014)008, Opinion on the draft Law on the High Judicial and Prosecutorial Council of Bosnia and Herzegovina, §§58-59 and 61
> See also CDL-AD(2018)017, Opinion on draft amendments to Law No. 303/2004 on the Statute of Judges and Prosecutors, Law No. 304/2004 on Judicial Organisation, and Law No. 317/2004 on the Superior Council for Magistracy of Romania, §§133-136; 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, §28

"The ideal of pluralism implies that lay members of the HCoJ should participate in that body and have a meaningful role in the decision-making of the HCoJ. Accordingly, it is necessary to ensure not only the full composition of the HCoJ including the lay members, but also their effective participation in the HCoJ. Where the representation of judges and lay members in the judicial council was a matter of constitutional principle, the Commission recommended that – for effective participation of both judicial and non-judicial groups – the decision-making majorities could not be secured exclusively by votes of one of those groups. […]

The Venice Commission recommends that the Georgian legislator revise the decision-making procedure within the Council to ensure an appropriate balance between the two groups represented in the Council (lay and judicial members)."

> CDL-AD(2023)006, Georgia - Follow-up Opinion to four previous opinions concerning the Organic Law on Common Courts, §§ 19, 20.

"The September 2023 draft amendments intend to increase the majority required for a decision on the disciplinary liability of judges: it would be 2/3 of the full composition of the HCoJ (which consists of fifteen members). This means that at least ten members should vote in favour of a decision. In view of the fact that nine of the fifteen members are judicial, [...] they will now need only one lay member to have a decision adopted. In these circumstances, the proposed amendment would not always ensure sufficient participation of the lay members in the decision-making process. While it is difficult to give more precise guidance on this matter in the absence of comprehensive factual and contextual information, an additional requirement could provide that for a decision to be adopted, it should be upheld by at least three lay members of the HCoJ."

CDL-AD(2023)033, Georgia - Follow-up Opinion to Previous Opinions Concerning the Organic Law on Common Courts, §18

"[…] The draft Law seeks to respond to some of the earlier recommendations of the Venice Commission and GRECO. In particular, the draft Law introduces a new system of appeal against the decisions of the Supreme Judicial Council in disciplinary matters, by a second-instance panel created within the Council itself. The Venice Commission is of the view that the new mechanism would address the essence of the recommendation of the Committee of Ministers (CM/Rec(2010)12). An appeal to an *external judicial body* could be a better option, but it requires amending the Constitution. Therefore, the creation of an appellate instance *within* the Supreme Judicial Council appears to be an acceptable compromise."

CDL-AD(2022)044, Joint Opinion on the draft amendments to the Judicial Code of Armenia, §48

"The Commission already noted in its 2020 opinion that the Constitution does not specify whether the decisions on disciplinary matters of the two councils are subject to judicial review. […] Previously, the Venice Commission noted that there should be a possibility of an appeal to an independent court against decisions of disciplinary bodies, in conformity with the case-law of the ECtHR; […] however, regarding the scope of such appellate review, the Venice Commission stressed that the appellate body should act with deference to the judicial council. […] This is *a fortiori* true if the disciplinary council itself is an independent body, and if the procedure before it offers guarantees of fair trial – in this case the need to have a review by an independent court becomes less relevant."

CDL-AD(2023)039, Opinion on the draft Amendments to the Constitution of Bulgaria, §52

4.3 Procedural aspects of appointment/elections of the members of the Council of Justice

"The National Assembly should not be given a real choice of candidates and the 'authorised nominators' should only propose one candidate per vacant position. In this way, the National Assembly will have a right of veto. This seems to be the only solution which would avoid political considerations being taken into account in the nomination of the Council members."

CDL-AD(2008)006, Opinion on the Draft Law on the High Judicial Council of the Republic of Serbia, §48

"[The Commission] considers however that the non-judge members should rather be elected by Parliament than by the President of the Republic."

CDL-AD(2004)044, Interim Opinion on Constitutional Reforms in the Republic of Armenia, §57

"[…] [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(2008)006, Opinion on the Draft Law on the High Judicial Council of the Republic of Serbia, §§19, 21; CDL-AD(2008)009, Opinion on the Constitution of Bulgaria, §25; CDL-AD(2003)016, Opinion on the Constitutional Amendments reforming the Judicial System in Bulgaria, §25

"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, §§52-53
> See also CDL-AD(2018)015, Opinion on the draft law on amendments to the law on the Judicial Council and Judges of Montenegro, §§11, 15 and 19; CDL-AD(2018)011, Opinion on the draft amendments to the constitutional provisions on the judiciary of Serbia, §§61-62; CDL-AD(2017)018, Opinion on the Judicial System Act of Bulgaria, §16; CDL-AD(2017)013, Opinion on the draft revised Constitution of Georgia, §87; CDL-AD(2015)045, Interim Opinion on the Draft Constitutional Amendments on the Judiciary of Albania, §§54, 55, 57-59 and 61; CDL-AD(2015)037, First Opinion on the Draft Amendments to the Constitution (Chapters 1 to 7 and 10) of the Republic of Armenia, §180; CDL-AD(2015)026, Opinion on the Amendments to the Constitution of Ukraine regarding the Judiciary as proposed by the Working Group of the Constitutional Commission in July 2015, §§37 and 38; 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, §48-51; 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, §67; 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; CDL-INF(1998)009, Opinion on recent amendments to the law on major constitutional provisions of the Republic of Albania, §19

"As to the lay members, the process of their *nomination* is as important as the method of their election. Their detachment from politics may be ensured through a transparent and open nomination process, at the initiative of autonomous nominating bodies (universities, NGOs, bar associations, etc.) and completed by the Judicial Appointments Council, which is composed of the members of the judiciary. Such nomination process should ensure that the Parliament has to make a selection amongst the most qualified candidates, and not political appointees."

> CDL-AD(2016)009, Final Opinion on the revised draft constitutional amendments on the Judiciary (15 January 2016) of Albania, §16

"The provision in draft Article 127 that the candidates for lay members should be selected on the basis of a public call for candidatures is welcome, as it enhances the transparency of the procedure, hence the public trust in the High Judicial Council."

> 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, §13

"[…] [W]ell-established professional association of lawyers, law schools, etc. should be formally involved in the process of nomination of lay members of the SJC; […]"

CDL-AD(2017)018, Opinion on the Judicial System Act of Bulgaria, §113

"[…] The draft Law therefore leaves the entire process of the election of two members of the HJC to the discretion of the Bar Association and the joint session of deans of law faculties. This approach is questionable because – although the respect for the autonomy of these institutions is relevant in the context of self-governance or other internal matters – the election of the HJC member is clearly not an internal matter of the university or the Bar Association. [...] The procedures for the election of the HJC candidates as well as detailed requirements for the candidates should be set out in this Law."

CDL-AD(2014)028, Opinion on the Draft Amendments to the Law on the High Judicial Council of Serbia, §48

"[…] [T]he procedure of selecting the HJPC members could be regarded as deficient in some respects. Of the 15 members, two are selected by members of the House of Representatives, of the Parliamentary Assembly of BiH and of the Council of Ministers of BiH; two are selected by the Bar Chambers of the Entities; five or six by prosecutors, and five or six by judges. Due to this procedure, the selection could be vulnerable to inter-institutional and inter-personal rivalries in the judiciary."

CDL-AD(2012)014, Opinion on Legal Certainty and the Independence of the Judiciary in Bosnia and Herzegovina, §88

"[…] It should be expressly mentioned that election [of members of the Disciplinary Board] is done by secret ballot."

CDL-AD(2014)006, Joint opinion of the Venice Commission and the Directorate of Human Rights (DHR) of the Directorate General of Human Rights and Rule of Law of the Council of Europe, and of the OSCE Office for Democratic Institutions and Human Rights (OSCE/ODIHR) on the draft law on disciplinary liability of judges of the Republic of Moldova, §52

"The Venice Commission has continuously objected against the use of psychological tests for the recruitment of judges and entrusting those tests to external experts in psychology. In addition, it is quite unusual to see these tests as a pre-condition for the election of a judicial member of the JC [Judicial Council]. This mechanism gives the JC the possibility of screening the candidates, who should, normally, be elected by and represent the judiciary. The Venice Commission recalls that all candidates to the positions of judicial members are already active judges, so they normally should have already at least minimal social skills and integrity. This mechanism is likely to replace the free election of the judicial members with a system of co-optation, which does not fit well to the idea of 'judicial members elected by their peers'. While it is perfectly reasonable to have formal eligibility requirements, and for the JC to control the process of elections, the rationale for the idea of the JC selecting or even shortlisting candidates is not clear nor seems acceptable. The Venice Commission invites the authorities to reconsider this provision."

CDL-AD(2019)008, Opinion on the Draft Law on the Judicial Council of North Macedonia, §16

4.4 Status of members

"[...] In the context of the Republic of Moldova, it is all the more important that members of the SCM enjoy adequate legal protection for their impartiality and independence. As a result, Article 12 of the Law "on the Superior Council of Magistracy" should undergo systemic revision in the light of the principle of security of tenure. It is essential to specify the substantive grounds for termination of office and introduce adequate procedural safeguards in the relevant proceedings against the SCM member."

> CDL-AD(2022)019, Opinion on the draft law on amending some normative acts (Judiciary) of Moldova, §34

"Granting immunity to members of the Council guarantees their independence and allows them to carry out their work without having to constantly defend themselves against, for instance, unfounded and vexatious accusations."

> CDL-AD(2008)006, Opinion on the Draft Law on the High Judicial Council of the Republic of Serbia, §26

"[...] [I]t seems to go very far indeed to provide, as Article 38.1 does, that the Plenary of the HSYK must authorise an investigation and prosecution for an offence committed by an elected council member even in the case of personal offences which are nothing to do with the performance of their duties as members of the HSYK. In other opinions, the Venice Commission has been critical of overbroad immunities being granted to judges. In this case, it is difficult to see why members of the HSYK should have an immunity from investigation and prosecution unless this immunity is waived by the HSYK. The only exception to this provision seems to relate to flagrante delicto cases (Article 38.9)."

> CDL-AD(2010)042, Interim Opinion on the Draft Law on the High Council for judges and Prosecutors (of 27 September 2010) of Turkey, §68

"[…] [T]he members of the HJC should exercise their functions as a full-time profession."

> CDL-AD(2013)034, Opinion on proposals amending the draft law on the amendments to the constitution to strengthen the independence of judges of Ukraine, §43

"Under the draft Law, members of the [High Judicial and Prosecutorial Council] shall serve a term of four years and may be re-elected once (Article 9). No one may be elected for more than two consecutive terms (Article 3.7). The length of the term of office is a standard one, as in most countries, members of judicial councils are elected for a rather short period of time (three years in the Netherlands, six years in 'the former Yugoslav Republic of Macedonia' etc.). In some countries, members of the judicial council have life tenure (Canada, Cyprus etc.) or the length of the term corresponds to that of the primary office of the member. All these solutions are legitimate."

> CDL-AD(2014)008, Opinion on the draft Law on the High Judicial and Prosecutorial Council of Bosnia and Herzegovina, §49
> See also CDL-AD(2014)028, Opinion on the Draft Amendments to the Law on the High Judicial Council of Serbia, §33; CDL-AD(2011)019, Opinion on the introduction of changes to the constitutional law 'on the status of judges' of Kyrgyzstan, §§26, 27

"The Commission considers that the disclosure of the identity of the members together with their votes would serve the purpose of enabling public scrutiny of the behaviour of the single members of the HCoJ, thus further enhancing the trust of the public in the HCoJ as a body. It would also serve as a deterrent from taking political or other irrelevant factors into consideration."

CDL-AD(2020)021, Opinion on the draft Organic Law amending the Organic Law on Common Courts of Georgia, §26

"Councillors who are not *ex officio* members may be elected for a five-year term, with no possibility for re-election. The preclusion from immediate re-election is destined to enhance the guarantees of independence of the […] members [of the High Council of Justice].

Since there is no gradation in the turnover of the Council, the elected members would end their terms simultaneously. Thus the composition of the Council would change almost entirely, with the exception of the ex-officio members. The influence of the ex-officio members within the Council might thereby be unduly strengthened. In addition, a severe lack of continuity in the Council's work might result, due to the fact that the new members would have to familiarise themselves with the tasks of the Council and the transition from one composition to another would cause certain initiatives undertaken by previous councillors to be abandoned or forgotten."

CDL-INF(1998)009, Opinion on recent amendments to the law on major constitutional provisions of the Republic of Albania, §§20, 21
See also CDL-AD(2018)011, Opinion on the draft amendments to the constitutional provisions on the judiciary of Serbia, §65

"Members [of the Disciplinary Board as a body which examines disciplinary cases and applies disciplinary sanctions to judges] will be selected for a fixed term of six years (Article 9.4) and this is to be welcomed, as well.

According to Article 9.5 'the term of office of a member of the Disciplinary Board is extended *de jure* until the establishment of a college in a new composition'. It is recommended to extend the term of the member until the examination of the cases, in which the member is involved, is completed."

CDL-AD(2014)006, Joint opinion of the Venice Commission and the Directorate of Human Rights (DHR) of the Directorate General of Human Rights and Rule of Law of the Council of Europe, and of the OSCE Office for Democratic Institutions and Human Rights (OSCE/ODIHR) on the draft law on disciplinary liability of judges of the Republic of Moldova, §§50-51

"[…] Indeed, conviction of a member of the Council for the criminal offence itself renders him/her dishonourable to exercise the function."

CDL-AD(2014)028, Opinion on the Draft Amendments to the Law on the High Judicial Council of Serbia, §53

"[…] Decisions on suspending a member should be linked to the gravity of the charges against him or her and/or be based on the reasoning that suspending the member is necessary for the effective functioning of the HJC. […]

Although according to Article 43, any member of the HJC has the right to initiate the dismissal of any other member, there are no mechanisms in the draft Law which would provide for the suspension or dismissal of the *ex officio* (non-elected) members if they act in violation of the Constitution or the law. […]."

CDL-AD(2014)028, Opinion on the Draft Amendments to the Law on the High Judicial Council of Serbia, §§30 and 32

"[…] It would […] be more appropriate to deal with 'breach of duty' cases through the usual disciplinary procedure, which should be clearly set out by the draft Law and an appeal to a court of law should be provided […]. The proportionality principle should be adequately taken into

account and the dismissal [of a member of the Judicial Council] should only be applied as a measure of last resort."

CDL-AD(2014)028, Opinion on the Draft Amendments to the Law on the High Judicial Council of Serbia, §58

"[…] The Venice Commission also recommends indicating explicitly that a member of the Council may be stripped of his or her mandate if he or she fails repeatedly to participate in the work of the Council without serious and objective reason (like serious illness etc.; on this point see more in the following section).

[…] [T]he draft Law should describe more precisely in which situations the mandate of a member of the High Judicial Council may be terminated; the draft Law could provide explicitly that the failure of a member to participate in the work of the High Judicial Council without a serious and objective reason may result in the termination of his or her mandate, and such decisions are to be adopted by a simple majority."

CDL-AD(2022)030, Opinion on three draft laws implementing the constitutional amendments on Judiciary of Serbia, §86 and §97

"[…] The Venice Commission has already expressed its preference for specific and detailed description of grounds for offences, […] whereas it recognised that, to a certain degree, it is unavoidable that a legislator uses open-ended formulas in order to ensure the necessary flexibility. […] The ECtHR also found that: "the absence of any guidelines and practice establishing a consistent and restrictive interpretation of the offence […] and the lack of appropriate legal safeguards resulted in the relevant provisions of domestic law being unforeseeable as to their effects". […] The CCJE also stated that "Members may only be removed from office based on proven serious misconduct in a procedure in which their rights to a fair trial are guaranteed. Members may cease to be members in the event of incapacity or loss of the status on the basis of which they were elected or appointed to the Council. If the Council itself or a special body within it are responsible for this decision, the rights of the dismissed member to an appeal must be ensured." […]

[…] Even though the term "unsuitability" is rather broad and this provision has reportedly never been applied in practice, the explanatory note of the legal act shows, as noted by to the Council of State, that this is an *ultimum remedium* in case of gross neglect of duties (e.g., gross mismanagement or deliberate abuse of power). […] The Venice Commission and DG I nevertheless recommend to define in a more concrete and precise manner the concept of "unsuitability". Moreover, although the Minister's decision is subjected to the control of the Supreme Court, the "serious suspicion" of unfitness cannot be considered as evidence of any misconduct and the wording should therefore be rephrased with reference to concrete elements of proof. As confirmed also during the meetings with the national authorities in the Hague, the suspension or dismissal of a judicial member of the Judicial Council does not affect that member's judicial function.

[…] As to the non-judicial members of the Council, they may be subjected to disciplinary punishment, suspended or dismissed by Royal Decree on the recommendation of the Minister of Justice (Article 86 (5) of the Judicial Act.

[…] The Venice Commission and DG I recalls the importance of security of tenure of all Council members as a crucial precondition for the independence of the Council: "Judges appointed to the council for the judiciary should be protected with the same guarantees as those granted to judges

exercising jurisdictional functions, including the conditions of service and tenure and the right to a fair hearing in case of discipline, suspension, and removal. Non-judicial members should have equivalent protection." […]

[…] The difference in treatment (albeit reportedly never applied in practice) between judicial and non-judicial members cannot be justified. Therefore, the Venice Commission and DG I recommend the Dutch authorities to modify the law accordingly."

> CDL-AD(2023)029, Joint Opinion of the Venice Commission and the Directorate General of Human Rights and Rule of Law (DGI) of the Council of Europe on Legal Safeguards of the Independence of the Judiciary From the Executive Power of the Netherlands, §§ 52-56; See also CDL-AD(2024)009, Bosnia and Herzegovina - Interim Follow-up Opinion to previous Opinions on the High Judicial and Prosecutorial Council, § 28

"According to Article 11.2 the reasoned proposal of the Disciplinary Board to revoke the term of office of a member of the Disciplinary Board shall be submitted to the body that appointed or elected that member in order to revoke and replace him/her with another member. The Board should itself be able to dismiss the member rather than simply remitting the matter to the body which elected the member to revoke the appointment. The credibility of the Disciplinary Board would be undermined if this body failed to do so. However, there needs to be a very clear provision to invoke the procedure where a member fails to attend to duties to ensure that proper notice is given."

> CDL-AD(2014)006, Joint opinion of the Venice Commission and the Directorate of Human Rights (DHR) of the Directorate General of Human Rights and Rule of Law of the Council of Europe, and of the OSCE Office for Democratic Institutions and Human Rights (OSCE/ODIHR) on the draft law on disciplinary liability of judges of the Republic of Moldova, §56

"[…] [The law] seems to mean that a person can be removed from the [High Judicial and Prosecutorial Council] for immoral behaviour. This seems to be imprecise and therefore unsatisfactory from the standpoint of legal standards.

Disqualification may be linked to a criminal or a disciplinary offense. Membership may also be suspended where the member's status as a judge or prosecutor is suspended, for instance due to an on-going criminal investigation or for other reasons under the law.

In addition, the decision on cessation has been transferred from the HJPC to the Parliamentary Assembly. This decision does not seem to require a qualified majority. When taken together with the very vague drafting of certain of the situations (if a member fails to perform duties in a proper, effective or impartial manner; when the member commits an act due to which he or she no longer merits to perform the duties on the Council; etc.), this may lead to politicisation – or the impression of politicisation – of the activities of the HJPC, whose members depend on the Parliamentary Assembly not only for their election, but also when exercising their mandate.

In particular, […] the Parliamentary Assembly is empowered to dismiss the member of the HJPC where 'the member fails to perform his/her duties in a proper, effective or impartial manner' […]. However, it is not clear how the effective and proper performance of the HJPC member will be evaluated and what the procedures for such an evaluation are. This needs to be reconsidered.

Article 10.1.e sets out that dismissal may arise 'if the member fails to fulfil the obligations arising from the function he/she performs due to illness or for other reasons'. The inability of the HJPC member to perform functions should indeed result in dismissal, even if this was caused by

objective reasons. However, the period of time he or she is absent should be taken into account: a minimum period of time must be clearly defined after which the dismissal of the member may be sought.

All these provisions should be much more precise and decisions on cessation/dismissal should not be left to the Parliamentary Assembly."

> CDL-AD(2014)008, Opinion on the draft Law on the High Judicial and Prosecutorial Council of Bosnia and Herzegovina, §§51-56

"Article 18 of the Draft law deals with the dismissal of a Judicial Council member. According to Article 18, para. 1 the grounds for dismissal are: '1) he/she discharges his/her duties unconscientiously and unprofessionally; 2) he/she is convicted of an offence which makes him/her unworthy of discharging duties of the Judicial Council member'.

The notions 'unconscientiously and unprofessionally' and 'unworthy of discharging duties' are too vague, and can lead to an arbitrary application of the power to dismiss members of the Judicial Council. It is strongly recommended to define these dismissal grounds more closely.

Council's members are also dismissed if a disciplinary sanction is imposed (Article 18, para. 2). However, in some cases disciplinary sanctions may be imposed for relatively minor matters, in which case dismissal will be a disproportionate measure.

It is important to make it clear in the law that the Council's motion concluding that a Council member has to be dismissed should not be based on the substance of the position/decision of the concerned member in respect of individual files. This is essential for ensuring the independence and autonomy of the Judicial Council."

> CDL-AD(2014)038, Opinion on the draft laws on courts and on rights and duties of judges and on the Judicial Council of Montenegro, §§45-48

"A procedure on the preservation of confidence is specific to political institutions such as governments which act under parliamentary control. It is not suited for institutions, such as the HCJ, whose members are elected for a fixed term. The mandate of these members should only end at the expiration of this term, on retirement, on resignation or death, or on their dismissal for disciplinary reasons.

A disciplinary procedure can only be applied in cases of disciplinary offences and not on grounds of 'lack of confidence'. Article 41 clearly defines the reasons that can lead to a dismissal of the HJC members. The disciplinary procedure must only focus on the question whether the HJC member failed to perform his or her duties 'in compliance with the constitution and law'. This question must not be confused with the question whether said member still enjoys the confidence of the judges who participated in his or her election. In addition, the disciplinary procedure has to guarantee the HJC member a fair trial. It is noted that a general reference to a fair trial is made under Article 46a, but further details on related guarantees would be needed.

[…] Members of judicial councils are independent and often have to make decisions that are unpopular or will not please judges. In subjecting them to a vote of no confidence, their independence will be reduced, making them too dependent on the wishes of the judges and removing them from their role of pursuing the goals of an independent and efficient judiciary for the state as a whole. Furthermore, such a vote is difficult to reconcile with the disciplinary functions

of a judicial council. The Venice Commission therefore strongly recommends for such a procedure not to be introduced."

> CDL-AD(2014)028, Opinion on the Draft Amendments to the Law on the High Judicial Council of Serbia, §§66, 67 and 70
> See also CDL-AD(2018)017, Opinion on draft amendments to Law No. 303/2004 on the Statute of Judges and Prosecutors, Law No. 304/2004 on Judicial Organisation, and Law No. 317/2004 on the Superior Council for Magistracy of Romania, §§143-145

"[...] [T]he members of the HJC elected by the National Assembly may be dismissed by the Assembly by a 5/9th majority regardless of the majority with which they were elected. This should be revised, the majority required for dismissal should be higher, or at least equal to, the majority required for election. It is important that criteria for dismissal (and procedures) be laid down in the Constitution and not just left to legislation."

> CDL-AD(2018)011, Opinion on the draft amendments to the constitutional provisions on the judiciary of Serbia, §68

4.5 Other self-regulatory bodies of the judiciary

"[...] The Venice Commission and the Directorate welcome the temporary nature of the international participation in the Ethics Council and consider the duration of six years to be reasonable given the fact that national law provides for a gradual change in the composition of the HCJ by the various appointing bodies.

[...] While the Ethics Council as such could, in principle, even become a permanent institution, the law should expressly specify that the international participation in the Ethics Council is valid for a single mandate of six years. This would contribute significantly to the constitutionality of the proposed Ethics Council."

> CDL-AD(2021)018, Urgent joint opinion of the Venice Commission and the Directorate General of Human Rights and the Rule of Law (DGI) of the Council of Europe on the draft law on amendments to certain legislative acts concerning the procedure for electing (appointing) members of the High Council of Justice (HCJ) and the activities of disciplinary inspectors of the HCJ of Ukraine (Draft law no. 5068), §§ 35-36

"[...] The inclusion of international experts in the Ethics Council may be difficult for the judges and members of the HCJ to accept but it is important to combat the scourge of corruption without generating instability and more corruption. It is foremost corruption that weakens the sovereignty of the state.

[...] In giving a global evaluation, it is also necessary to take into account all procedural guarantees as stipulated *(inter alia)* in the Rules of Procedure and Methodology of the Ethics Council (see for example item 3.14), and the fact that judicial review is available. A priori, the decisions of the Ethics Council seem to follow these rules and guarantees.

As such, the Ethics Council therefore does not seem to endanger judicial independence or the sovereignty of Ukraine. However, the limit of three months for the electing or appointing bodies and the automatic dismissal of sitting members if these bodies do not act upon the recommendation of the Ethics Council within this deadline appears problematic."

> CDL-AD(2022)023, Joint amicus curiae brief on certain questions related to the election and discipline of the members of the HJC of Ukraine, §§58-60

"The Law on Bodies of Judicial Self-regulation is relatively short and establishes two bodies of judicial self-regulation: (1) the Congress of Judges and (2) the Council of Judges. […]

[...] It seems, therefore, that the idea is to provide a framework to form coherent standpoints for the judicial community with respect to all questions concerning judges.

Regulating self-regulation seems to be a contradiction, however, if such a law is deemed necessary its provisions should not be too rigid. Although it is important to provide a solid basis for judges' self-regulation, it is important not to suffocate it.

In this respect, there are a number of provisions that raise doubt. First, Article 4.4 provides that the status of individuals exercising the activities of judicial self-regulation is governed by the Law on civil service. The content of this Law is not known to the Venice Commission, but it might be too rigid if it provides for strict regulations on responsibilities or perhaps even regulations subordinating the representatives to the administration.

Second, it seems unnecessary for the Congress to be convened by the President of the Kyrgyz Republic, as foreseen by Article 6.2. This provision contradicts the very idea of self-regulation.

Third, Article 8.4 sets out that '*The organisational, technical, material, financial and methodological resources for the activity of the Council of Judges shall be provided by the Judicial department of the Kyrgyz Republic*.' This could create a strong dependency that would be incompatible with the idea of self-regulation.

Fourth, the rules for the election of the representatives are also very rigid, for instance, the prohibition of the re-election of members of the Council of Judges for a second consecutive term (Article 8.8). This means a complete turnover in the membership every three years. Some continuity may be desirable, perhaps the terms of office could be staggered (partial renewal).

The Venice Commission would […] recommend the following: […] [i]nclude, in this Law, how the Council's various representational and advisory functions are to be carried out. It should also be clarified in which cases binding decisions are adopted and what the legal consequences of those binding decisions are."

> CDL-AD(2008)040, Opinion on the Constitutional Law on bodies of Judicial self-regulation of Kyrgyzstan, §§6, 11-16, and 23

"[…] Concerning Article 127.5.1 item 1, which refers to meetings of judges of local and appellate courts, these apparently can discuss the performance of specific judges and take decisions on these issues binding for the judges. This does not appear to be an appropriate provision. Judicial independence requires that judges should not be subjected to peer pressure in relation to any specific cases. Article 127.5.2 also provides that the judges' meetings of the Supreme Court and the high specialized courts have the same powers. This should be deleted or at least clarified to make clear that pressure may not be brought on a judge concerning an individual case.

In relation to Article 130, which provides for a number of persons to be present at the Congress of Judges (including the President of Ukraine, the speaker of the *Verkhovna Rada*, and the Minister for Justice), it is not clear why politicians should be present at these meetings. The presence of politicians may well lead to political pressure being brought. While it is specified that the invited persons may not participate in the voting, it is not clear why their presence is necessary at all.

Draft Article 131 provides for a new system for the election of delegates to the Congress of Judges. The Venice Commission has previously recommended a proportionate representation of the various orders of jurisdiction (CDL-AD(2010)026, para. 96). The same comment could be made here concerning the representation on the basis of the meetings of judges."

> CDL-AD(2011)033, Joint opinion on the draft law amending the law on the judiciary and the status of judges and other legislative acts of Ukraine by the Venice Commission and the Directorate of Justice and Human Dignity within the Directorate General of Human Rights and Rule of Law of the Council of Europe, §§69-71

"The proposed administration of the judiciary is complicated and involves no less than five agencies: the Council of Justice, the Judicial Administration, the Judges Qualification Board, the Judges Disciplinary Board and the Conference of Judges.

[...] The problems which may be involved accordingly do not relate to the number of institutions as such but mainly to the question whether the overall power vested in the system may be too great.

[…] The acceptance of parliamentary control over the disciplinary board is inconsistent. On one hand there is the far-reaching solution concerning the judicial administration and the rights of the Council of Justice while on the other hand there is the far-reaching role to be played by the parliament in staffing issues and judicial oversight. That is, in issues strictly linked to independence and judicial adjudication."

> CDL-AD(2002)026, Opinion on the Draft Law on Judicial Power and Corresponding Constitutional Amendments of Latvia, §§11, 12, and 64

"Indeed, some level of institutional complexity is needed in order to avoid conflicts of interest and introduce checks and balances. For example, in disciplinary proceedings a person who initiates the inquiry should not decide on the case and should not sit on an appeal panel. However, this does not always require creating special institutions. The same may be achieved by splitting the functions within the same body or introducing conflict of interest rules. Again, the necessary checks and balances may be achieved by pluralist internal composition of the single body, and not necessarily by creating external controlling institutions. [...]

The Venice Commission understands that the creation of the new constitutional bodies will automatically terminate the mandate of certain already existing bodies with similar functions [...]. In the opinion of the Venice Commission, this is positive, since co-existence of several inspectorates creates parallelism and it is better not to have different bodies with similar or overlapping functions."

> CDL-AD(2015)045, Interim Opinion on the Draft Constitutional Amendments on the Judiciary of Albania, §§66-67
> See also CDL-AD(2015)045, Interim Opinion on the Draft Constitutional Amendments on the Judiciary of Albania, §§75, 80-82

"[...] [B]oth the Ethics Commissions and the Disciplinary Commission seem to be composed solely of judges. This may give an impression that the question of disciplinary liability is decided within the judicial corporation by bodies which have no external elements and no links to the democratically elected bodies or the broader legal community. [...]"

> CDL-AD(2016)013, Opinion on the Draft Code of Judicial Ethic of the Republic of Kazakhstan, §32.

See also CDL-AD(2015)045, Interim Opinion on the Draft Constitutional Amendments on the Judiciary of Albania, §76

“Indeed, any kind of control by the executive branch or other external actors over Judicial Councils or bodies entrusted with discipline is to be avoided. As noted in the 2014 Joint Opinion, the composition of a disciplinary body is key to guaranteeing its independence and impartiality. In that context, a composition comprising civil society representatives, thus ensuring community involvement in disciplinary proceedings, was noted by the OSCE/ODIHR and the Venice Commission as a particularly welcome development. The rules pertaining to the composition of the disciplinary commission should be amended to ensure that the legislative and/or executive branches do not have decisive influence over such body, while ensuring an adequate representation of civil society/community and a generally gender balanced composition.”

CDL-AD(2016)025, Endorsed joint opinion on the draft law "on Introduction of amendments and changes to the Constitution" of the Kyrgyz Republic, §76
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