Strasbourg, 7 January 2025 **CDL-PI(2025)003**

**Engl. only**

**EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW**
**(VENICE COMMISSION)**

# COMPILATION

# OF VENICE COMMISSION OPINIONS AND REPORTS

# CONCERNING JUDGES[1]

[1] *This document will be updated regularly. This version contains all 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 judges. It covers notably issues relating to the independence and impartiality of judges, their appointment, accountability, disciplinary sanctions, transfers and termination of office.[2] This compilation does not concern constitutional justice and organisation of prosecution system (these topics are presented in separate compilations), as well as other fair trials guarantees than independence and impartiality of the courts.

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).

[2] On the vetting of judges and prosecutors see Compilation of Venice Commission opinions and reports concerning vetting of judges and prosecutors. CDL-PI(2022)051, 19/12/2022.

## II. CONSTITUTIONAL AND STATUTORY REGULATION

### 2.1 Provisions on appointments, dismissals, salaries and the status of the judges

"[…] The basic principles ensuring the independence of the judiciary should be set out in the Constitution or equivalent texts."

> CDL-AD(2010)004, Report on the Independence of the Judicial System Part I: The Independence of Judges, §22
> See also CDL-AD(2016)015, Amicus Curiae Brief for the Constitutional Court of the Republic of Moldova on the Right of Recourse by the State against Judges, §§48-49.

"It is […] indispensable to provide […] a constitutional right to have access to independent and impartial tribunals, in accordance with Article 6 of the European Convention of Human Rights."

> CDL-INF(1996)006, Opinion on the draft Constitution of Ukraine, p.15

"[…] [I]n the majority of member states, the criteria for the recruitment or the promotion of judges are established by laws or regulations. The only tacit or explicit exceptions to this are those judicial systems where a discretionary power of selection exists through the election by the people (legislative power) or an independent authority, including a judicial one, which can sometimes have political characteristics."

> CDL-AD(2009)023, Opinion on the Draft Criteria and Standards for the Election of Judges and Court Presidents of Serbia, §12

"Since the appointment of judges is of vital importance for guaranteeing their independence and impartiality, it is recommended to regulate the procedure of appointment in […] detail in the Constitution. […]"

> CDL-AD(2008)010, Opinion on the Constitution of Finland, §112
> See also CDL-AD(2019)003, Opinion on the proposed revision of the Constitution of Luxembourg, §106; CDL-AD(2015)045, Interim Opinion on the Draft Constitutional Amendments on the Judiciary of Albania, §47; CDL-AD(2013)010, Opinion on the Draft New Constitution of Iceland, §135

"There are no standards on whether the appointment of court presidents should be explicitly regulated on the constitutional or legislative level. In any case, in view of the important functions of the court presidents, a clear regulation on their appointment must be adopted. [...]"

> CDL-AD(2018)003, Opinion on the Law on amending and supplementing the Constitution (Judiciary) of the Republic of Moldova, §24

"[…] certain basic elements, such as the appointment, guarantees and powers of the judiciary, should be entrenched in the Constitution […] to preserve the system of judicial governance from political fluctuations."

> CDL-AD(2024)006, Opinion on the draft law on the Administrative Judiciary of Lebanon, §13

"For the […] reason of independence and impartiality, the grounds for suspension, dismissal or resignation should be laid down in the Constitution, and the competent court should be set out, as well as the right of appeal of the judge concerned."

> CDL-AD(2008)010, Opinion on the Constitution of Finland, §113

See also CDL-AD(2018)011, Opinion on the draft amendments to the constitutional provisions on the judiciary of Serbia, §46; CDL-AD(2016)009, Final Opinion on the revised draft constitutional amendments on the Judiciary (15 January 2016) of Albania, §35; CDL-AD(2015)037, First Opinion on the Draft Amendments to the Constitution (Chapters 1 to 7 and 10) of the Republic of Armenia, §156; 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, §10; 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, §105; CDL-AD(2002)033, Opinion on the draft amendments to the Constitution of Kyrgyzstan, §11.

"*Offences leading to disciplinary sanctions and their legal consequences should be set out clearly in law.* […]"

CDL-AD(2016)007, Rule of Law Checklist, §78

"A constitutional law is a very rigid legal instrument, which cannot always be quickly adapted to the changing economic conditions. It should set certain *basic principles* that would ensure privileged status of judicial salaries. For example, the constitutional law might proclaim that judicial salaries may be reduced only in case of a major financial crisis and only after the commensurate reduction of salaries in all other sectors of public service. The constitutional law may guarantee regular indexation of judicial salaries in line with the cost of living, fix the salaries of judges at the same level as salaries of certain high-level State officials, etc. [...]"

CDL-AD(2017)019, Opinion on the Draft Judicial Code of Armenia, §59

"[…] Although there is no strict international requirement in this regard, it would be advisable to define the scale of the remuneration for the different types of positions within the judiciary, in the Constitutional Law."

CDL-AD(2011)012, Joint Opinion on the constitutional law on the judicial system and status of judges of Kazakhstan by the Venice Commission and OSCE/ODIHR, §52

"[The questions regarding the application measures of the general principles on the budget of the judiciary and the remuneration of judges] can and should also be addressed by ordinary legislation. In principle, there is no reason why they could not be so addressed in the context of a law on the status of magistrates."

CDL(1995)074rev, Opinion on the Albanian law on the organisation of the judiciary (chapter VI of the Transitional Constitution of Albania), p.3

"The Venice Commission stresses that informal norms should complement and support, and not substitute formal safeguards altogether. A general question to be explored in this opinion is how certain well-entrenched informal norms and practices that are particularly important for the independence of the judiciary should be formalised in statutory law. Experience from other countries has shown that in a polarised political context, informal norms sustaining the rule of law offer little resistance against powerful forces determined to use all available legal and constitutional provisions."

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, §10

## III. JUDGES

### 3.1 Independence and impartiality - definition

"Independence means independence from the executive and the parties. Courts should also be independent from the legislature except in so far as they are bound to apply laws emanating from the legislative body. While 'independence' primarily is a question of absence or presence of organic links between the judiciary and the other poles of public power, 'impartiality' is something normally decided in light of the circumstances of a particular case, i.e. a *prima facie* independent court may act partially. However, in light of the case-law of the ECtHR lack of guarantees of independence may easily create an appearance of lack of impartiality as well. Thus in the present context, as in others, it may be difficult to make a clear distinction between the requirements of independence and impartiality. According to the ECtHR, relevant in the assessment of independence (and impartiality) of a tribunal are 'the manner of appointment of its members and their term of office, the existence of guarantees against outside pressures and the question whether the body presents an appearance of independence'."

> 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, §34
> See also CDL-AD(2018)032, Opinion on the Concept Paper on the reform of the High Judicial Council of Kazakhstan, § 11; CDL-AD(2017)005, Opinion on the amendments to the Constitution of Turkey adopted by the Grand National Assembly on 21 January 2017 and to be submitted to a National Referendum on 16 April 2017, §110

"As recalled in the Rule of Law Checklist, "[t]he European Court of Human Rights highlights four elements of judicial independence: manner of appointment, term of office, the existence of guarantees against outside pressure - including in budgetary matters - and whether the judiciary appears as independent and impartial. […]"

> 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, §12

"Both the judiciary, as an institution, and individual judges must be able to exercise their professional responsibilities in adjudication without being influenced by the executive or any other quarter. Only an independent judiciary is able to render justice impartially on the basis of the law and prevent the abuse of power. It is of vital importance for the rule of law that there is public trust in the proficiency of the judiciary to operate in an independent and impartial manner."

> CDL-AD(2018)028, Opinion on Constitutional arrangements and separation of powers and the independence of the judiciary and law enforcement of Malta, §27

"Judges should be independent and impartial in their decision-making and capable of acting without any restriction, improper influence, pressure, threat or interference, direct or indirect, from any authority, including '*authorities internal to the judiciary*'.
In general, therefore, judicial independence must be protected both in its 'external' and 'internal' components."

> CDL-AD(2017)002, Amicus Curiae Brief for the Constitutional Court of the Republic of Moldova on the Criminal liability of judges, §§14-15
> See also CDL-AD(2016)007, Rule of Law Checklist, §§87, 89; CDL-AD(2018)011, Opinion on the draft amendments to the constitutional provisions on the judiciary of Serbia, §11

"It must be noted… that *judicial independence* is not a prerogative or privilege granted in the judge's own interest, but is a fundamental principle, an essential element of any democratic state, a pre-condition of the rule of law and the fundamental guarantee of a fair trial. […] Decisions which remove basic safeguards of judicial independence are unacceptable even when disguised and can breach Article 6.1 ECHR."

> CDL-AD(2017)002, Amicus Curiae Brief for the Constitutional Court of Moldova on the Criminal liability of judges, §16.

See also CDL-AD(2014)039, Amicus Curiae Brief for the Constitutional Court of Moldova on certain provisions of the law on professional integrity testing, §§12, 13.

"An independent judiciary must necessarily be an accountable one. This implies that, on the one hand, independence cannot be an argument to block any means of accountability, and, on the other hand, the means of accountability may not infringe independence, especially by creating threats and undue pressure."

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), §32.

"The Commission would like to recall and underline that judges are not merely civil servants, insofar as they perform a unique and fundamental constitutional function: it is therefore important to preserve the specificity of the rules applicable to the judiciary when required by the judges' special status, to protect and uphold the basic principle of judicial independence.

In the 2023 Follow-up Opinion (§11) the Commission noted that "neither Article 5 of the draft amendments has been amended, nor any other relevant provision has been added in the law. Insofar as the right to salary and other work-related rights of judges are concerned, the revised draft law still refers to the general framework of the regulations governing the rights and duties of public sector employees. The Venice Commission finds that, in order to comply with the recommendation, either a specific body of legislation shall apply to judges, or the specific work-related rights of judges be specified in the very revised draft law."

CDL-AD(2024)012, Montenegro – Urgent Follow-up Opinion on the revised draft amendments to the Law on the Judicial Council and Judges, §§15-16.

## 3.2 Appointment of judges

### 3.2.1 Qualifications, eligibility requirements

"The principle that all decisions concerning appointment and the professional career of judges should be based on merit, applying objective criteria within the framework of the law is indisputable."

CDL-AD(2010)004, Report on the Independence of the Judicial System Part I: The Independence of Judges, §27

See also CDL-AD(2019)009, Urgent Opinion on the selection and appointment of Supreme Court judges of Georgia, §§21-25, 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, §37

"[…] Merit is not solely a matter of legal knowledge analytical skills or academic excellence. It also should include matters of character, judgment, accessibility, communication skills, efficiency to produce judgements, etc."

CDL-AD(2010)004, Report on the Independence of the Judicial System Part I: The Independence of Judges, §24

"[…] The Commission considers that a "good biography" should not be a separate eligibility criterion. Furthermore, it is too vague to be used as an objective assessment of judicial candidates. Phrased in the very broad manner it currently is, the provision risks being applied arbitrarily. It is, therefore, necessary to identify criteria based on which the integrity of a candidate could be assessed. […]

CDL-AD(2024)006, Opinion on the draft law on the Administrative Judiciary of Lebanon, §54

"In a number of countries judges are appointed based on the results of a competitive examination, in others they are selected from the experienced practitioners. *A priori*, both categories of selection can raise questions. It could be argued whether the examination should be the sole ground for appointment or regard should be given to the candidate's personal qualities and experience as well. As for the selection of judges from a pool of experienced practitioners, it could raise concerns as regards to the objectivity of the selection procedure."

CDL-AD(2007)028, Report on Judicial Appointments by the Venice Commission, §36

"The draft Law […] sets out general requirements that persons wishing to be appointed as judges or prosecutors need to satisfy, as well as requirements for the appointments to the different courts and prosecutor's offices. General requirements include citizenship of BiH, a good medical record, professional competence, the bar exam and the absence of any criminal proceedings. These appear to be appropriate and in line with European standards."

CDL-AD(2014)008, Opinion on the draft Law on the High Judicial and Prosecutorial Council of Bosnia and Herzegovina, §73

"Article 127 proposes to require newly appointed judges to be 30 years old as against the current 25 and to have five years rather than three years' experience. These provisions seem to be reasonable. […]"

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, §26

"It appears from criticisms of the draft Organic Law that it is too lenient with respect to the age requirement and experience, as it may be questioned whether a person will have acquired the necessary experience to be a Supreme Court judge at the age of 30 and after no more than five years of service as a judge, advocate or academic. These relatively low formal thresholds are all the more questionable as they also apply to the position of Chief Justice."

CDL-AD(2019)009, Urgent Opinion on the selection and appointment of Supreme Court judges of Georgia, §23

"[…] While it is usually a fundamental principle that a country cannot have foreign nationals serving as judges, this is one of the areas where the specificities of a very small country such as Monaco need to be taken into consideration: it is, even today, not possible to recruit only Monegasque nationals to all judges' positions, as there are not enough qualified candidates. […]"

CDL-AD(2013)018, Opinion on the balance of powers in the Constitution and the Legislation of the Principality of Monaco, §86

"Provisions on the appointment of judges establish a closed judicial career with strictly defined requirements of judicial experience, the positions of Supreme Court judges being the only exception. This is not a self-evident choice, and arguments can be presented for facilitating the entry from outside the judiciary into at least the Commercial Court and the Administrative Court, perhaps even the High Courts and the Appellate Court."

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, §53
See also CDL-AD(2002)026, Opinion on the Draft Law on Judicial Power and Corresponding Constitutional Amendments of Latvia, §49

"Strictly limiting access to the Supreme Court to candidates from lower courts could lead to the isolation of the judiciary and promote conservative and rigid opinions [...].

As concerns the Supreme Court of the Republic of Moldova, it is essential to note that the removal of this condition [having at least 10 years' experience as a judge] […], as such, should be commended, as long as it brings into the judicial profession other highly-qualified persons from different legal professional backgrounds and as long as it improves the quality and legitimacy of the Supreme Court's decision-making. This is necessary to avoid that politically supported judges enter the highest judicial forum."

CDL-AD(2018)003, Opinion on the Law on amending and supplementing the Constitution (Judiciary) of the Republic of Moldova, §§31, 33
See also CDL-AD(2018)032, Opinion on the Concept Paper on the reform of the High Judicial Council of Kazakhstan, §71

"[…] [T]he composition of both the Supreme Court and the Constitutional Court should include judges with particular expertise in human rights, especially […] where a core body of case-law on such issues is being established."

CDL(1999)078, Opinion on the Reform of Judicial Protection of Human Rights in the Federation of Bosnia and Herzegovina, §32

"The list of grounds for which discrimination [in respect of judicial appointments] is prohibited does not include sexual orientation, which should be added. On the other hand, the (absence) of the knowledge of language can be a valid reason to discriminate. A command of the state language is a legitimate requirement for appointment as a judge. The term 'or other features' may also be too wide: Sufficient legal qualifications, for example, are of course necessary for appointment."

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, §38

"The eligibility requirements to achieve judicial office in Article 45 of the Law on Courts were amended to require fluency in either English, French or German. A requirement of *fluency* is perhaps rather rigid and might reduce the pool of persons available for appointment; probably, a more lenient standard (such as the requirement to have a basic knowledge of one of those languages) would be more appropriate."

CDL-AD(2018)022, Opinion on the law amending the law on the Judicial Council and on the law amending the law on Courts of "the former Yugoslav Republic of Macedonia", §80
See also CDL-AD(2018)033, Opinion on the draft law amending the law on Courts of "the former Yugoslav Republic of Macedonia", §12; CDL-AD(2018)032, Opinion on the Concept Paper on the reform of the High Judicial Council of Kazakhstan, §34

"[…] Article 8 sets out the qualifications of trainees. Among the qualities required of a trainee judge or prosecutor is the following […]: *'Not to have physical or mental health problems or disabilities which will prevent to perform the profession of judgeship […] throughout the country, or not to have handicaps such as unusual difficulties for speaking or controlling movement of organs that may be regarded as odd by other people.'*

This provision is far too broad and would not be regarded as generally acceptable according to European standards in its approach to how to deal with persons under a physical or mental disability. The test of something appearing odd to other people seems an inappropriate one."

CDL-AD(2011)004, Opinion on the Draft Law on Judges and Prosecutors of Turkey, §31

"[…] In order to ensure the high quality and diversity of candidates, mandatory written exams should be introduced at the entry level; a national pool of vacancies should be established rather than having each vacancy published separately, as this would also improve the mobility of the judiciary across the country."

CDL-AD(2012)014, Opinion on Legal Certainty and the Independence of the Judiciary in Bosnia and Herzegovina, §91

"Draft Article 35(6) obliges the candidates for judge's office to make a property statement to the High Council of Justice and to authorise the latter to take the data in the statement into account when deciding on appointment. First, the statement of property by a candidate is not relevant at this stage, since only an increase of property during the mandate of the judge should trigger further investigation into possible corruption. It might also raise the issue of discrimination on the basis of the social, i.e. property status. […]

Furthermore, the possibility of the 'structural unit' of the High Council of Justice to collect information on the financial status of the candidates (draft Art. 351) is also problematic for the same reasons and might jeopardise the right of every citizen to hold any public office protected by the Article 29 of the Georgian Constitution.

Second, although the consent of the candidate is necessary for that the 'structural unit' of the High Council of Justice has access to his/her personal details, in practice, it seems not to be possible for a candidate to refuse this consent."

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, §§51, 52 and 56

"[…] A blanket obligation on judges to waive their right to privacy in general, which also constitutes an additional eligibility requirement to become and remain a judge, appears to constitute an undue restriction of judges' right to privacy. […]"

CDL-AD(2016)025, Endorsed joint opinion on the draft law "on Introduction of amendments and changes to the Constitution" of the Kyrgyz Republic, §81

"[…] [T]he participation of judges in the decision-making on key issues concerning their practical work is further reduced by the Amendments,[…] and the already considerable powers of the Minister of Justice (who is at the same time the Prosecutor General in the Polish system) are further increased. The Venice Commission urges the Parliament of Poland not to adopt those changes."

CDL-AD(2020)017, Urgent Joint Opinion of the Venice Commission and the Directorate General of Human Rights and Rule of Law (DGI) of the Council of Europe on amendments to the Law on the Common courts, the Law on the Supreme court and some other Laws of Poland. §50

### 3.2.2 Incompatibility with other occupations and activities

"[…] This new "incompatibility requirement" is in effect a disciplinary measure disguised as an incompatibility requirement. It allows sitting judges to be dismissed for a deliberate violation of a fundamental human right that is based on a decision/judgment ("act") by an international court or another international institution – where 15 years have not elapsed since the rendering of this act.

[…] In addition, this new "incompatibility requirement" also raises concerns with regard to its positioning within the Judicial Code and the essence of incompatibility requirements. The Draft Amendments introduce a new "incompatibility requirement" according to which a deliberate violation of a fundamental human right constitutes a violation of incompatibility requirements. However, incompatibility requirements are barriers to engaging in activities other than the judge's professional activity, which is also in line with the international legal approach. In this sense,

Article 5, part 1, of the Judicial Code, stipulates that a judge may not hold any position that does not stem from his or her status in state or local self-government bodies, any position in commercial organisations, engage in entrepreneurial activities or perform other paid work, except for scientific, educational, and creative work. It is therefore questionable whether draft Article 86, part 3 and Article159, part 2, of the Judicial Code and Article 12, part 2, of the Law on the Constitutional Court, fit into this practice."

CDL-AD(2022)002, Joint opinion on the draft laws on making amendments to the Constitutional Law in the Judicial Code of Armenia, §§ 20-21

"[...] the 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 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

"[...] The Venice Commission recommends establishing explicitly that it is not permitted to perform any duty or activity, paid or unpaid, except scientific, didactic or creative and possibly other specific activities that the legislature may want to add, such as those described in draft Article 83."

CDL-AD(2021)015, Opinion on the draft Law on amendments to the Law on the High Judicial and Prosecutorial Council of Bosnia and Herzegovina, §35

"Moreover, judges should not put themselves into a position where their independence or impartiality may be questioned. This justifies national rules on the incompatibility of judicial office with other functions and is also a reason why many states restrict political activities of judges."

CDL-AD(2010)004, Report on the Independence of the Judicial System Part I: The Independence of Judges, §62

"Judges at present may not engage in any other occupation or remunerative activities except for 'pedagogical activities'. To that is now to be added 'scientific activities', which is positive […].
On a strict reading this provision might prevent the appointment of judges to public inquiries or commissions representing the state abroad, membership of charitable institutions or the like. Such an interpretation would seem unduly restrictive."

CDL-AD(2005)005, Opinion on Draft Constitutional Amendments Relating to the Reform of the Judiciary in Georgia, §§6-7

"[…] [A] judge should first resign before being able to contest political office, because if a judge is a candidate and fails to be elected, he or she is nonetheless identified with a political tendency to the detriment of judicial independence."

CDL-AD(2008)039, Opinion on the Draft Amendments to the Constitutional Law on the Status of Judges of Kyrgyzstan, §45

"Article 108 § 6 (2) foresees that a judge is liable for the most severe disciplinary offence (leading to dismissal) in case s/he, inter alia, becomes a member of a political party or starts performing parliamentary or other public office. As explained in the Venice Commission's report on the freedom of expression of judges, there is no single model of regulating the political activities of the judges. The Venice Commission finds that, insofar as the Law sanctions the membership of a political party or holding a political function and not the mere political engagement of a judge, it seems to strike an adequate balance between the judge's right to freedom of expression and the public interest in the fair administration of justice. Indeed, a clear division of the political and judicial spheres strengthens the perceived independence of the judiciary. Judges should not put themselves into a position where their independence or impartiality may be questioned. In this regard, the authorities might consider introducing a ban on returning to judiciary for judges who received such a disciplinary sanction. In order to dispel any doubt, the Venice Commission wishes to clarify that one thing is not excessively stigmatising former political activity in the field of the administration of justice, another thing is, as a judge, consciously violating a disciplinary rule and jeopardising the independence and impartiality – both real and perceived - of the judiciary."

> CDL-AD(2022)050, Opinion on the draft amendments to the Law on the Judicial Council and Judges of Montenegro, §65

"Article 89.3 of the draft Law provides that judges […] may not be members of any organisation that discriminates on various grounds, including sex and sexual orientation. There are various churches and religions which do so discriminate and it is perhaps not intended to prevent judges […] being adherents of or practising such religions.

Article 90.3 of the draft Law would prohibit the judge […] from membership of any management or supervisory board of the public or private company or any other legal entity. This seems very broad and would prohibit membership of any charitable or non-profit organisation which had legal personality, possibly including even professional organisations.

Article 92 of the draft Law requires a judge […] to seek the opinion of the [High Judicial and Prosecutorial Council] on whether activities he or she intends to undertake are in conflict with his or her duties under the law. Presumably this should be confined to cases where the judge […] has reason to have at least a doubt about the issue."

> CDL-AD(2014)008, Opinion on the draft Law on the High Judicial and Prosecutorial Council of Bosnia and Herzegovina, §§115 and 117-118

"[…] The drafters [of the constitutional law on disciplinary responsibility of the judges] may also consider imposing a duty on the judge to disclose any paid work."

> CDL-AD(2014)018, Joint opinion of the Venice Commission and OSCE/ODIHR on the draft amendments to the legal framework on the disciplinary responsibility of judges in the Kyrgyz Republic, §33

"Article 36 (amending Article 143 of the Constitution) provides that the mandate of a judge shall be incompatible with 'other compensated professional activity, unless otherwise provided by law'. First of all, the wording of the article (the words 'unless otherwise provided by law') seems to provide extensive discretion to the legislator, while containing no indication regarding possible allowed exceptions. At the same time usual exceptions, such as academic, non-for-profit activity and other similar exceptions should be applied. […]"

> CDL-AD(2015)045, Interim Opinion on the Draft Constitutional Amendments on the Judiciary of Albania, §53

"The situation with regard to remuneration seems to be more complicated. The draft Law should provide general restrictions on the type of remunerated work that is incompatible with a judge's or prosecutor's position. Any offer of remunerated work that may lead to or appear to lead to improper influence, must be declined. However, receiving remuneration should not systematically be linked to disciplinary misconduct. For instance, where a litigant is a student at or involved in work with a university or research institution at which the judge or prosecutor is engaged in academic work, it would be unreasonable to demand from the judge or prosecutor to abandon the academic work altogether. However, this may (and in some cases must) lead to self-recusal and/or a declaration of conflict of interest."

> CDL-AD(2014)008, Opinion on the draft Law on the High Judicial and Prosecutorial Council of Bosnia and Herzegovina, § 97

"In sum, the Venice Commission considers that these provisions require revision: the law should explicitly allow judges and their associations to participate in the public discussion on the matters related to the administration of the judiciary and criticise the legislative amendments or the Government's policies vis-à-vis the judiciary."

> CDL-AD(2020)017, Urgent Joint Opinion of the Venice Commission and the Directorate General of Human Rights and Rule of Law (DGI) of the Council of Europe on amendments to the Law on the Common courts, the Law on the Supreme court and some other Laws of Poland, §30

"It might be appropriate to impose on candidates [for judges of the Supreme Court] the obligation to report not only their own assets, but also the assets of their spouses and children."

> CDL-AD(2019)009, Urgent Opinion on the selection and appointment of Supreme Court judges of Georgia, §60

### 3.2.3 Appointing bodies and appointment procedure

#### 3.2.3.1 Multitude of systems

"[…] There exists a great variety in the method by which judges are appointed in domestic legal orders. [...] No single 'model' exists which could ideally comply with the principle of the separation of powers and secure full independence of the judiciary. [...] But it is fair to say that international standards are more in favour of the extensive depoliticisation of the process. Political considerations should not prevail over the objective merits of a candidate. Article 6 ECHR protects not only the independence of the individual judges but requires a system of judicial appointments that excludes arbitrary appointments."

> CDL-AD(2021)043, Opinion on three bills reforming the judiciary of Cyprus, §33

"Choosing the appropriate system for judicial appointments is one of the primary challenges faced by the newly established democracies; where often concerns related to the independence and political impartiality of the judiciary persist. Political involvement in the appointment procedure is endangering the neutrality of the judiciary in these states, while in others, in particular those with democratically proved judicial systems, such methods of appointment are regarded as traditional and effective.

International standards in this respect are more in favour of the extensive depolitisation of the process. However no single non-political 'model' of appointment system exists, which could ideally comply with the principle of the separation of powers and secure full independence of the judiciary.

In some older democracies, systems exist in which the executive power has a strong influence on judicial appointments. Such systems may work well in practice and allow for an independent judiciary because the executive is restrained by legal culture and traditions, which have grown over a long time.

New democracies, however, did not yet have a chance to develop these traditions, which can prevent abuse. Therefore, at least in new democracies explicit constitutional provisions are needed as a safeguard to prevent political abuse by other state powers in the appointment of judges.

In Europe, methods of appointment vary greatly according to different countries and their legal systems; furthermore they can differ within the same legal system according to the types of judges to be appointed.

Notwithstanding their particularities appointment rules can be grouped under two main categories.

In elective systems, judges are directly elected by the people (this is an extremely rare example and occurs at the Swiss cantonal level) or by the Parliament [...]. This system is sometimes seen as providing greater democratic legitimacy, but it may also lead to involving judges in the political campaign and to the politisation of the process.

Appointments of ordinary judges [in contrast to constitutional judges] are not an appropriate subject for a vote by Parliament because the danger that political considerations prevail over the objective merits of a candidate cannot be excluded.

In the direct appointment system the appointing body can be the Head of State [...].

In assessing this traditional method, a distinction needs to be made between parliamentary systems where the president (or monarch) has more formal powers and (semi-) presidential systems. In the former system the President is more likely to be withdrawn from party politics and therefore his or her influence constitutes less of a danger for judicial independence. What matters most is the extent to which the head of state is free in deciding on the appointment. It should be ensured that the main role in the process is given to an independent body – the judicial council. The proposals from this council may be rejected only exceptionally, and the President would not be allowed to appoint a candidate not included on the list submitted by it. As long as the President is bound by a proposal made by an independent judicial council […] the appointment by the President does not appear to be problematic.

In some countries judges are appointed by the government […]. There may be a mixture of appointment by the Head of State and appointment by the Government. […] As pointed out above, this method may function in a system of settled judicial traditions but its introduction in new democracies would clearly raise concern.

Another option is direct appointment (not only a proposal) made by a judicial council [...]. To the extent that the independence or autonomy of the judicial council is ensured, the direct appointment of judges by the judicial council is clearly a valid model."

CDL-AD(2007)028, Report on Judicial Appointments by the Venice Commission, §§2-3, 59 and 12-17
See also 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 Netherlands, § 24

**3.2.3.2 Appointment by political bodies (Parliament or President); popular elections**

"[…] [T]he Venice Commission observes that the regime of appointment of the President of the Curia introduced with the 2019 amendments could pose serious risks of politicisation and important consequences for the independence of the judiciary, or the perception thereof by the public, considering the crucial role of this position in the judicial system. This is even more relevant when taking into account the limited guarantees of independence which apply after the appointment, given that the President of the Curia can be dismissed or disqualified from office upon a simple majority decision of the Parliament, "*if considered unworthy of office due to some action, or acts committed or omitted*"- a vague and weak criterion for removal from office."

> 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, §15

"[…] [T]he principle of an uninterrupted chain of democratic legitimacy (developed in German doctrine) […] requires that every state body has to receive its powers – even if indirectly – from the sovereign people. A completely autonomous self-administration would lack such democratic legitimacy.

[…] [The appointment of judges by the Parliament is] a method for constituting the judiciary which is highly democratic but […] the balance might be tilted much too far towards the legislative power. This is not without its risks from the point of view of judicial independence, *inter alia* since judicial appointments may over time be more likely than otherwise to become a subject of party politics.

The parliament is undoubtedly much more engrossed in political games and the appointments of judges could result in political bargaining in the parliament […]. The right of appointment ought to remain linked with the head of state. Of course, the president also represents a given political tendency but in most cases he/she will demonstrate greater political reserve and neutrality. […]

Although the appointment of judges by the Parliament is acceptable by European standards, there may be reason to reconsider the possibility of entrusting the President as the appointment authority or by arranging the process of judicial appointments so as to go by submission from the Council of Justice to the President of the Republic (who also is to represent all the people) and from the President [of the Parliament]."

> CDL-AD(2002)026, Opinion on the Draft Law on Judicial Power and Corresponding Constitutional Amendments of Latvia, §§13 and 21-23

"[...] In order to diminish the danger of politicisation of the procedure, Draft art. 78.4 provides for a requirement of a qualified majority in parliament for the election of judges […]. However, despite the fact that the recommendation is made by a judicial body, i.e. Qualification Commission, the parliament, as a political body, '*is undoubtedly much more engrossed in political games and the appointments of judges could result in political bargaining in the parliament* [...]'.

Consequently, the role of the *Verkhovna Rada* should be removed by way of a constitutional amendment […]. In case such a constitutional amendment cannot be introduced, the involvement of the parliament should be mainly ceremonial one and the decisive say in the election of judges should be entrusted to an independent body composed of a majority of judges or of a substantial element of judges elected by their peers […]. In this case, Draft Article 78(4) could provide that Parliament will appoint a candidate where the statutory requirements are met so as to avoid any possibility of political interference. [...]"

> 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, §§50 and 51.

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, §13; CDL-AD(2003)019, Opinion on three Draft Laws Proposing Amendments to the Constitution of Ukraine, §40.

"To balance the disadvantages of a final vote in Parliament, procedures should ensure that the merits and qualifications of each candidate are made available to Parliament and to the general public to the highest extent possible in order to motivate Parliament to vote on the basis of professional merits rather than political preferences etc."

CDL-AD(2019)009, Urgent Opinion on the selection and appointment of Supreme Court judges of Georgia, §57

"[...] The Commission considers that the appointment of supreme court judges directly by the High Council of Justice without the involvement of Parliament, or their appointment by the President (who has otherwise limited powers in the proposed parliamentary system) upon proposal by the High Council of Justice, would better guarantee the independence of those judges."

CDL-AD(2017)023, Opinion on the draft revised Constitution as adopted by the Parliament of Georgia at the second reading on 23 June 2017, §45

See also CDL-AD(2015)037, First Opinion on the Draft Amendments to the Constitution (Chapters 1 to 7 and 10) of the Republic of Armenia, §158

"The new Kyrgyz Constitution does not provide for a single body in charge of appointment and career of judges but has charged separate bodies with this task. Article 64.3 of the Constitution provides that the judges shall be appointed on the proposal of the Council for the Selection of Judges (hereinafter, 'Council') and same article provides judge shall be dismissed on the basis of a proposal by the Council of Judges, which is distinct from the Council for the Selection of Judges. Regrettably, this constitutional provision makes it impossible to establish a single body competent to take decisions on appointment and career of judges. A future constitutional revision could provide for a single body, possibly with sub-commissions for specialized functions (e.g. discipline).

When a constitution provides for more than one body competent for all aspects of the career of the judges, provisions on each of these bodies should be examined in the light of the standards developed for single judicial councils.

The Constitution also designates the President and the Parliament as authorities competent to appoint (elect) judges. As a point of departure, this is not problematic. […] However, special precautions are needed to guarantee that in such appointment procedures the merits of the candidate are decisive, not political or similar considerations. The law should clearly determine the procedure for the selection of judges. Excellence and proficiency of judges are the best guarantees for their independence and for a better service to the citizens. A system of competitive entry examination is appropriate for the selection of judges in countries where judges enter the judiciary right after their law studies (as opposed to the common law system of appointing experienced barristers as judges)."

CDL-AD(2011)019, Opinion on the Draft Law on the Council for the Selection of Judges of Kyrgyzstan, §§13-15

See also CDL-AD(2011)017, Opinion on the Introduction of Changes to the Constitutional Law "On the Status of Judges" of Kyrgyzstan, §74

"Article 90.2 provides that the decision on election to a permanent post shall be taken by a majority of the constitutional composition of the Verkhovna Rada. This is a kind of qualified majority as proposed by the Venice Commission. Despite this improvement there are still strong doubts about the role of Parliament in the election of judges. […]

The election process is susceptible of being highly politicised. Democratic as it may seem at first sight, a process involving intensive questioning by Parliamentarians may create the image of judges being dependent on the views of the legislature in a manner not compatible with the

separation of powers needed in a democracy. […] That a judge later may have to work under the threat of being subjected to similarly politicised dismissal procedure […] is likely to create a picture of a judiciary which somehow is at the mercy of political forces, quite in breach of the principle of judicial independence. […]"

> 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, §§44-45

"*A priori*, the Venice Commission has no objection against appointment of judges by the Head of State when the latter is bound by a proposal of the judicial council and acts in a 'ceremonial' way, only formalising the decision taken by the judicial council in substance. In such a setting, a situation where the President refuses to ratify a decision of the judicial council would be critical because it would de facto give the President a veto against decisions of the judicial council. In order to ensure that the President indeed only has a ceremonial role, the Constitution could provide that proposals by the judicial council would enter into force directly, without the intervention of the President if the President does not enact them within a given period of time. Of course, direct appointment of judges by the judicial council avoids such complex safeguards."

> 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, §16
> See also CDL-AD(2018)032, Opinion on the Concept Paper on the reform of the High Judicial Council of Kazakhstan, §§14 and 15; CDL-AD(2017)019, Opinion on the Draft Judicial Code of Armenia, § 122; CDL-AD(2015)045, Interim Opinion on the Draft Constitutional Amendments on the Judiciary of Albania, §45; 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, §27; 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), §§34 and 35; CDL-AD(2013)010, Opinion on the Draft New Constitution of Iceland, §137; CDL(1995)074rev, Opinion on the Albanian law on the organisation of the judiciary (chapter VI of the Transitional Constitution of Albania), p.2.

"[…] There would seem to be no common opinion yet about the most appropriate procedure. For the legitimacy of the administration of justice a certain involvement of democratically elected bodies like the Diet may be desirable. However, the Prince Regnant is not democratically elected. His involvement in the nomination procedure, other than in a merely formal way, is problematic, especially if this involvement is of a decisive character.

The proposed first paragraph of Article 96 provides that no candidate can be recommended to the Diet for election without the consent of the Prince Regnant. His far-reaching involvement in the election procedure could amount to undue influence and could give rise to doubt about the objective independence and impartiality of the elected judge. […]This situation is not adequately remedied by the provision in the second paragraph of Article 96 that, if a proposed candidate is not approved by the Diet, the choice between the proposed candidate and any other candidate would be made by referendum, since a choice by the people would also not guarantee the impartiality of the elected candidate. […]"

> CDL-AD(2002)032, Opinion on the Amendments to the Constitution of Liechtenstein proposed by the Princely House of Liechtenstein, §§29 and 30

"[...] The principle of independence of the judiciary requires that the selection of judges and magistrates be made upon merit and any undue political influence should be excluded. The Prime Minister should not have the power to influence the appointment of Justices and Judges-Magistrates. This would open the door to potential political influence, which is not compatible with modern notions of independence of the judiciary."

CDL-AD(2018)028, Opinion on Constitutional arrangements and separation of powers and the independence of the judiciary and law enforcement of Malta, §43

"According to Article 117, justices of the peace and judges of the courts are appointed by the Government, not the Grand Duke. Members of the Superior Court of Justice and presidents and vice-presidents of the district courts are appointed by the Government on nominations from the Superior Court of Justice. In several other parliamentary monarchies, the power to appoint judges appertains to the Crown, which exercises it under ministerial responsibility. However, it is a matter of political choice. Most States have a higher judicial council which nominates judges, who are subsequently appointed by the Head of State. Furthermore, the 'Commentaire' proposes setting up such a body […]. Whichever body is formally responsible for appointment (Grand Duke or Government), the necessary guarantees on judicial independence must be provided."

CDL-AD(2009)057, Interim Opinion on the Draft Constitutional Amendments of Luxembourg, §114

"As regards the joint power of the President and the Parliament to form the whole judicial corpus, and in particular the election of all judges of local courts (district, city, regional, military and arbitrage) upon the approval of each nominee by the [Parliament], the Commission is of the view that this politicizes the process of nominating judges too strongly. […]"

CDL-AD(2002)033, Opinion on the draft amendments to the Constitution of Kyrgyzstan, §10

"There is a proposal to introduce elected justices of the peace. It is not clear what is intended. There is no problem with introducing lay judges, but this should not be done through popular elections. Judges would have to campaign for their election or – even worse – political parties would do that for them. This would endanger the impartiality of the judges who might later feel obliged to be 'grateful' to the political party, which supported their election. Such a system should not be introduced in Ukraine, in a context where the independence of the judiciary is essential in combatting corruption."

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, §47

"Another ground for dissolution of Parliament under new Article 98-1 is the second refusal of Parliament to approve a person nominated by the President for the position of a judge of the Constitutional Court or the Supreme Court.
This provision represents a serious threat to the independence of the judiciary. [...] This new provision renders Parliament's power to block presidential nominations to the top judicial posts ineffective, since the risk of dissolution will deter Parliament from voting against the candidates proposed by the President. In essence, it would increase even more the dependence of the judiciary on the President."

CDL-AD(2016)029, Opinion on the draft modifications to the Constitution of Azerbaijan submitted to the Referendum of 26 September 2016, §§65 and 66

#### 3.2.3.3 Involvement of an expert body (Judicial Council) in the appointment

"The mere existence of a high judicial council cannot automatically exclude political considerations in the appointment process.
[…] The Venice Commission is of the opinion that a judicial council should have a decisive influence on the appointment […] of judges […]."

CDL-AD(2007)028, Report on Judicial Appointments by the Venice Commission, §§23 and 25
See also CDL-AD(2018)003, Opinion on the Law on amending and supplementing the Constitution (Judiciary) of the Republic of Moldova, §22; 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, §§38, 42-45; CDL-AD(2017)013, Opinion on the draft revised Constitution of Georgia, §§80, 81

"[…] It would be desirable that an expert body like an independent judicial council could give an opinion on the suitability or qualification of candidates for the office of judge."

CDL-AD(2005)005, Opinion on Draft Constitutional Amendments relating to the Reform of the Judiciary in Georgia, §30

"[…] The main role in judicial appointments should […] be given to an objective body such as the High Judicial Council provided […] in the Constitution. It should be understood that proposals from this body may be rejected only exceptionally. From an elected parliament such self-restraint cannot be expected and it seems therefore preferable to consider such appointments as a presidential prerogative. Candidatures should be prepared by the High Judicial Council, and the President would not be allowed to appoint a candidate not included on the list submitted by the High Judicial Council. For court presidents (with the possible exception of the President of the Supreme Court) the procedure should be the same."

CDL-AD(2005)023, Opinion on the Provisions on the Judiciary in the Draft Constitution of the Republic of Serbia, §17

"In fact, the Minister of Justice is able to select the candidates he/she wishes to put forward and could favour or punish the judges who appear more or less compliant, whereas the CSM [Superior Council of Magistracy] does not have the power to modify the proposal of nominations. The Venice Commission is of the opinion that this system allocates an undesirable power to the executive in the field of judicial appointments. It creates a risk, not purely theoretical, […] that political considerations are taken into account when proposing candidates for a judicial post. The power of the CSM to reject some candidates does not appear sufficient to counter this risk nor does it fulfil the role that is proper to this institution, namely safeguarding the independence of the judiciary. In this respect, the Venice Commission has clearly expressed the view that a judicial council should have a decisive influence on the appointment and promotion of judges. […]

Considering that the CSM is already screening all profiles of candidates (proposed and excluded), making the necessary comparisons to formulate recommendations and opinions, assessing the observations of excluded candidates, it should be possible, as a first step, to modify the organic law in order to entrust it with the power to modify the proposal of the Minister of Justice, by reintegrating or replacing certain candidates, where it considers it appropriate."

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, §40-41

### 3.2.3.4 Appointment procedure

"In Europe, there is a great variety in the method by which judges are appointed in domestic legal orders. No single 'model' exists which could ideally comply with the principle of the separation of powers and secure full independence of the judiciary. But, it is fair to say that international standards are more in favour of the extensive depolitisation of the process. Political considerations should not prevail over the objective merits of a candidate. Article 6 ECHR protects not only the independence of the individual judges but requires a system of judicial appointments that excludes arbitrary appointments."

CDL-AD(2018)028, Opinion on Constitutional arrangements and separation of powers and the independence of the judiciary and law enforcement of Malta, §30

"*It is important that the appointment and promotion of judges is not based upon political or personal considerations, and the system should be constantly monitored to ensure that this is so.*"

CDL-AD(2016)007, Rule of Law Checklist, §79

"In Europe, a variety of different systems for judicial appointments exist and even the proposal for appointment by a single individual, such as the President of the NJO (National Judicial Office), is in principle compatible with the provisions of the ECHR. It seems that the procedure offers guarantees that the appointment of judges is based on merit, applying objective criteria, although the set of substantive and procedural rules do not contain sufficient safeguards in order to exclude that improper considerations play a role.

Doubts arise notably as concerns Section 18.3 ALSRJ, which states that the 'President of NJO may decide to deviate from the shortlist and propose the second or third candidate on the list to fill the post'. No conditions nor criteria are referred to under which the President of the NJO may deviate from the order of the shortlist. […] [T]he decision cannot be appealed to a court. This means that there is no way to check this kind of use of the discretionary power. While there are other legal systems in Europe that do not provide for judicial review of decisions on judicial appointments, in the specific context of a system, where a largely non-accountable person exercises wide discretionary powers, such review appears necessary. In order to enable the courts to review these decisions, the law would have to indicate the criteria to be used by the President of the NJO."

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, §§57 and 58
See also CDL-AD(2019)009, Urgent Opinion on the selection and appointment of Supreme Court judges of Georgia, §§ 33, 36, 40; 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, §§56 and 59

"There is nothing in the Constitution to require such a two-candidate rule. It would be preferable if the High Judicial Council were to put forward only one candidate for each vacant position […]. [T]he two-candidate rule has as a consequence that the final appointment remains in the hands of the parliamentary majority."

CDL-AD(2008)007, Opinion on the Draft Laws on Judges and the Organisation of Courts of the Republic of Serbia, §§59-60

"[…] A member of the HCoJ [High Council of Justice], who is a candidate, should be excluded from all procedures pertaining to the selection and nomination of candidates for judges of the Supreme Court. In addition, other situations are relevant and should be included, notably where a spouse or close relative etc. is a candidate.
It is also important that the final decision of the HCoJ on which candidates to nominate for Parliament's consideration [for selection of judges of the Supreme Court], be based exclusively on how each candidate has scored on the different evaluation criteria applied, not on the result of a secret ballot among the HCoJ members. […]"

CDL-AD(2019)009, Urgent Opinion on the selection and appointment of Supreme Court judges of Georgia, §§51-52

"There is a written qualifying exam for the appointment as a judge […]. The introduction of such an exam […] is to be welcomed. […]

[…] The Article also provides for an appeal to the HJPC. It is not clear how this can work, since the HJPC is both the body making the decision and hearing the appeal. There does not appear to be any provision for an appeal to a court of law, which should be added."

> CDL-AD(2014)008, Opinion on the draft Law on the High Judicial and Prosecutorial Council of Bosnia and Herzegovina, §§77-78

"The appointment process starts with a public announcement of vacancies that must be well-publicised. The announcement is followed by nominations of candidates by special departments set up by the judicial or prosecutorial sub-councils of the [High Judicial and Prosecutorial Council] for nominations for vacancies in the different courts and prosecutors' offices consisting of four or five judges or prosecutors. This suggests that candidates cannot apply for a certain position directly, but only through the sub-councils. Such a practice could be seen as problematic, as it could undermine the transparency and openness of the process."

> CDL-AD(2014)008, Opinion on the draft Law on the High Judicial and Prosecutorial Council of Bosnia and Herzegovina, §76

"Article 4 of the Draft Law introduces an obligation for each member of the JC [Judicial Council] to state 'publicly' the reasons for his/her voting in the process of election of candidates to the judicial position. [...] [A] negative opinion about a particular judge expressed by a member of the JC publicly in the context of the promotion proceedings may be seen as demonstrating a personal bias of the latter against the former. This may lead to disqualification of the member from subsequent disciplinary proceedings concerning the same judge. [...]"

> CDL-AD(2017)033, Opinion on the Draft Law on the termination of the validity of the Law on the Council for establishment of facts and initiation of proceedings for determination of accountability for Judges, on Draft Law amending the Law on the Judicial Council, and on the Draft Law amending the Law on Witness protection of "The former Yugoslav Republic of Macedonia", §20
> See also CDL-AD(2019)008, Opinion on the Draft Law on the Judicial Council of North Macedonia, §18

"According to Article 13.4.2.3 of the draft Law, the Judicial Legal Council Secretariat must publish on its webpage, *inter alia*, information on results of written and oral examinations for the selection of nominees to the position of judges, appraisals of nominees after long-term trainings and of final interviews. It has to be noted that information on the depth of the legal knowledge of judges or candidates for judges should be of limited access to avoid unwanted impacts on the independence of judges after they enter into office. For this reason, the Venice Commission considers that the draft Law should be interpreted in such a way as to only make information on the results of examinations and interviews available to indicate a pass or a fail, without providing further details."

> CDL-AD(2009)055, Opinion on the Draft Law about obtaining information on activities of the Courts of Azerbaijan, §38

"Article 67(1)11 of the Law prohibits any request to an applicant for the position of judge to provide documents going beyond those specified in the Law. In order to avoid the protection provided to the candidate being circumvented, it might be desirable to prohibit in addition the submission, receipt or consideration of any documents which are not relevant to assess the judge's professional skills, as political testimonies."

> 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, §41
> 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, §45

"[…] Deviations from the general rules should be limited to what is necessary for anti-corruption courts to work effectively, and care must be taken to avoid the possible impression that anti-corruption judges are a different or privileged class of judges.

The starting point thus is that while some deviations from the general rules on courts and judges may be acceptable, such deviations should be limited to what is necessary for the anti-corruption courts to work effectively. Hence, the criteria for selection and selection procedure of anti-corruption judges, as well as such arrangements as renumeration, liability and systems of supervision and security of judges, cannot deviate more than necessary from general rules."

> 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, §23-24

"[...] Under the current legislation the system of judicial appointments and promotions is very complex and involves many actors and procedures. This complexity may create an impression that the system is safe, and that it is virtually impossible for incompetent people to become judges. However, this complexity may also become a breeding ground for cronyism and corruption. If the bar is set too high, if the legal procedures are too intricate and if the final decision depends on too many actors, there will always be a temptation to take the path of informal arrangements."

> CDL-AD(2018)032, Opinion on the Concept Paper on the reform of the High Judicial Council of Kazakhstan, §36

"[...] It is positive that the Concept Paper proposes to introduce more "objective and differentiated" criteria for the selection of judges. Rating of candidates on the basis of their graduation exam in the Academy of Justice or the qualification exam may contribute to this goal. It is important, however, to specify the respective weight of different elements ("objective" and "subjective") in the final decision."

> CDL-AD(2018)032, Opinion on the Concept Paper on the reform of the High Judicial Council of Kazakhstan, §66

"As to the use of the "lie detector", even if the results of this test are not binding, it is a major source of concern for the Venice Commission, since the reliability of this method is open to discussion, and it is unclear how the answers received from the candidate in the course of this test may be used. There is a risk that this test will involve irrelevant questions (for example, questions about political preferences of the candidate). Moreover, a lie detector may at most establish whether a statement was accurate but is not useful to evaluate skills of a candidate. The Venice Commission calls on the authorities of Kazakhstan to be extremely cautious with this method; if there is no other way, the results of the "lie detector" test may only be used to trigger additional security checks in respect of the candidate, and should not become a part of the candidate's file accessible to the HJC. But a better solution would be to avoid the "lie detector" test altogether."

> CDL-AD(2018)032, Opinion on the Concept Paper on the reform of the High Judicial Council of Kazakhstan, §50
> See also 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), §74

"Finally, p. 4 (2) of the Concept Paper proposes to introduce competitive selection of presidents of the judicial chambers of the courts of appeal. [...] The idea [...] that presidents of the chambers of the regional courts are also to be appointed through the competition by the HJC is welcome."

CDL-AD(2018)032, Opinion on the Concept Paper on the reform of the High Judicial Council of Kazakhstan, §72

"In general, and in order to avoid situations in the future that could lead to a shortage of judges in the Supreme Court, consideration should be given to publishing the vacancy announcement(s) before the end of the term of office of any outgoing judges, so as to render the vacancy period as short as possible."

CDL-AD(2019)009, Urgent Opinion on the selection and appointment of Supreme Court judges of Georgia, §18

"The Venice Commission and DGI consider the involvement of "international experts delegated by the development partners" in the pre-selection procedure to be an exceptional measure and should therefore naturally be limited in time. The authorities in their written remarks noted that the membership of development partners follows the practice under the Law on pre-vetting. The authorities indicated in their written remarks that the SCM may add selection clarification criteria through a regulation. In the view of the Venice Commission and DGI, development partners should invite applications from suitable candidates to be nominated by them and should conduct a competitive process to find the most suitable nominees according to criteria to be specified in advance. It is essential to ensure high transparency at all stages of the appointment procedure, while political involvement in this procedure should be avoided. This applies, *mutatis mutandis*, also to the CSO representatives who, according to the draft law, would be appointed by the SCM."

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, §56.

### 3.2.3.5. Initial training

"The Council of Europe standards regarding training of judges and prosecutors generally support the view that proper initial and in-service training is an essential and important component of independence of their profession. In particular, the Committee of Ministers' Recommendation 12(2010) states that "[j]udges should be provided with theoretical and practical initial and inservice training, entirely funded by the state. (…) An independent authority should ensure, in full compliance with educational autonomy, that initial and in-service training programmes meet the requirements of openness, competence and impartiality inherent in judicial office". The Magna Carta of Judges (Fundamental Principles) by the Consultative Council of European Judges (CCJE) includes Principle 8 which asserts: "[i]nitial and in-service training is a right and a duty for judges. It shall be organised under the supervision of the judiciary. Training is an important element to safeguard the independence of judges as well as the quality and efficiency of the judicial system". The CCJE recommends that mandatory initial training includes programmes which are appropriate to appointees' professional experience. …

While European standards emphasise the importance of training, they do not prescribe specific details on how the education and training system concerning judges and prosecutors should be organised, or the conditions under which such training is integrated into the process of entering the professions. These matters fall within the organisational competence and discretion of individual countries. As such, the options available to each country for structuring training and determining the entry channels to the judiciary and prosecution services are quite broad."

CDL-AD(2024)036, Serbia - Opinion on the draft Law on the Judicial Academy and draft amendments to the Law on Judges and the Law on the Public Prosecutor's Office, §§ 22-23.

"… [P]lacing initial training before appointment ensures that candidates are adequately prepared, enabling a genuine merit-based evaluation of their qualifications later at the selection process. If professional training occurs after the appointment decision, the sequence becomes inconsistent, as it may weaken the merit-based nature of the appointment process.

27. Secondly, the establishment of a single channel for the professional examination guarantees that all candidates undergo the same rigorous process, thereby ensuring equality and transparency. A uniform procedure mitigates the risk of unequal treatment or discrepancies between candidates, ensuring that all are evaluated under consistent standards."

> CDL-AD(2024)036, Serbia - Opinion on the draft Law on the Judicial Academy and draft amendments to the Law on Judges and the Law on the Public Prosecutor's Office, §§ 26-27.

"In performing its functions, the Academy must be shielded from undue influence and ensure that training and examinations are conducted in accordance with the principles of judicial and prosecutorial independence. In this regard, the Venice Commission has previously emphasised that the training of judges should remain under the control of the judiciary. Similarly, the CCJE has advised that "the judiciary should play a major role in or itself be responsible for organising and supervising training".

The draft law on the Judicial Academy adheres to these principles, as there is a substantial functional relationship between the Academy and the judicial and prosecutorial services. As discussed above (paragraph 32), this relationship is ensured through the Judicial and Prosecutorial Councils, which, according to the Constitution, are responsible for safeguarding the independence of judges and prosecutors."

> CDL-AD(2024)036, Serbia - Opinion on the draft Law on the Judicial Academy and draft amendments to the Law on Judges and the Law on the Public Prosecutor's Office, §§ 26-27.

"41. In the view of the Venice Commission, it is positive that the vast majority of members of the Management Board are appointed by the Judicial and Prosecutorial Councils. The involvement of professional associations in the selection of some of these members is also commendable. However, the fact that the draft law includes the Minister of Justice in the Management Board raises concerns. During the meetings, the rapporteurs were not presented with convincing reasons for the Minister of Justice's participation in the Board. The Venice Commission has previously expressed concerns about the involvement of the Minister of Justice in the organisation of judicial and prosecutorial training. It thus recommends that the authorities consider removing the ex officio participation of the Minister of Justice in the Management Board of the Academy be removed from the draft law."

> CDL-AD(2024)036, Serbia - Opinion on the draft Law on the Judicial Academy and draft amendments to the Law on Judges and the Law on the Public Prosecutor's Office, § 41.

"… [T]he Commission notes that during the on-line consultations almost all the interlocutors expressed their deep regret that under draft Article 51 the initial training of judges will continue to be carried out only in the Basic Court of the capital, Podgorica. It has been argued that this obligation of all new judges to carry out their initial training (which is of six months under draft Article 54) in the capital will have a dissuasive effect upon young judges, especially those without adequate financial means, who come from outside the capital due to the significant financial costs they will have to incur during the months of their initial training.

The Commission underlines that access to the judiciary should be provided to all qualified persons from all sectors of society given that diversity within the judiciary enhances public's trust in it. Therefore it encourages the authorities to take measures in order to facilitate access to the judiciary of young professionals coming from all parts of the country, especially those with insufficient financial means to live in the capital during the period of initial training, a situation which may also raise issues of indirect discrimination."

CDL-AD(2024)012, Montenegro – Urgent Follow-up Opinion on the revised draft amendments to the Law on the Judicial Council and Judges, §§53-54.

## 3.3. Term of office and career

### 3.3.1 Duration

"*Limited or renewable terms in office may make judges dependent on the authority which appointed them or has the power to re-appoint them.*"

CDL-AD(2016)007, Rule of Law Checklist, §76
See also CDL-AD(2005)005, Opinion on Draft Constitutional Amendments relating to the Reform of the Judiciary in Georgia, §8; 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; CDL-AD(2002)32, Opinion on the Amendments to the Constitution of Liechtenstein proposed by the Princely House of Liechtenstein, §31

"[…] [T]he Venice Commission strongly recommends that ordinary judges be appointed permanently until retirement. Probationary periods for judges in office are problematic from the point of view of independence."

CDL-AD(2010)004, Report on the Independence of the Judicial System Part I: The Independence of Judges, §38
See also CDL-AD(2018)011, Opinion on the draft amendments to the constitutional provisions on the judiciary of Serbia, §44; CDL-AD(2017)013, Opinion on the draft revised Constitution of Georgia, §79; CDL-AD(2003)019, Opinion on three Draft Laws proposing Amendments to the Constitution of Ukraine, §39

"[…] Any possible renewal of a term of office could adversely affect the independence and impartiality of judges."

CDL-AD(2002)012, Opinion on the Draft Revision of the Romanian Constitution, §57

"[…] At any rate, given that [judges of local courts] are appointed for seven years only […], the Commission is of the view that the appropriate constitutional law should set out objective criteria for their reappointment, in order safeguard their independence."

CDL-AD(2002)033, Opinion on the draft amendments to the Constitution of Kyrgyzstan, §10

"[…] The appointment of retired judges where there are no other applicants seems to be inconsistent with judicial independence since such persons are not irremovable and may therefore be subjected to improper pressure. […]"

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

"The Supreme Court of Georgia, which is the final instance court in the country, will effectively have an entirely new composition with the appointment of 18 to 20 new judges, who will be appointed for life (until retirement). Since the new Constitution leaves the final decision of the appointment of judges of the Supreme Court to Parliament, this implies that the present parliamentary majority will be entrusted with the appointment of a practically new Supreme Court, the composition of which will possibly remain the same for the next 20 to 30 years.

This is an important and very unusual, if not extraordinary, situation. In most countries, the appointment of judges – especially to a supreme court – is staggered over years, if not decades.

This renders the nomination and appointment procedure for these judges in Georgia all the more important and should be considered with great care.

[…] [T]he fact that the HCoJ [the High Council of Justice] – in its current situation – will be selecting nearly all the candidates for judges of the Supreme Court, producing a list which will then be submitted to a political majority in Parliament (in between elections), which in turn will appoint nearly all the Supreme Court judges, should be a matter of concern. […]"

CDL-AD(2019)009, Urgent Opinion on the selection and appointment of Supreme Court judges of Georgia, §§12-14

### 3.3.2 Probationary period

"[…] The Venice Commission considers that setting probationary periods can undermine the independence of judges, since they might feel under pressure to decide cases in a particular way [...].

This should not be interpreted as excluding all possibilities for establishing temporary judges. In countries with relatively new judicial systems there might be a practical need to first ascertain whether a judge is really able to carry out his or her functions effectively before permanent appointment. If probationary appointments are considered indispensable, a 'refusal to confirm the judge in office should be made according to objective criteria and with the same procedural safeguards as apply where a judge is to be removed from office'.

The main idea is to exclude the factors that could challenge the impartiality of judges: *'despite the laudable aim of ensuring high standards through a system of evaluation, it is notoriously difficult to reconcile the independence of the judge with a system of performance appraisal. If one must choose between the two, judicial independence is the crucial value'*.

In order to reconcile the need of probation / evaluation with the independence of judges, it should be pointed out that some countries like Austria have established a system whereby candidate judges are being evaluated during a probationary period during which they can assist in the preparation of judgements but they cannot yet take judicial decisions which are reserved to permanent judges."

CDL-AD(2007)028, Report on Judicial Appointments by the Venice Commission, §§40-43
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", §§ 45-50; 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, §41; 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, §§39 and 46-47; CDL-AD(2009)023, Opinion on the Draft Criteria and Standards for the Election of Judges and Court Presidents of Serbia, §§35-38; CDL(2005)066, Opinion on Draft Constitutional Amendments concerning the Reform of the Judicial System in "the former Yugoslav Republic of Macedonia", §§23, 29 and 30

"Abolishing probationary periods for judges is a guarantee against attempts to influence their behaviour and is a definite improvement in terms of the judicial independence. [...]"

CDL-AD(2018)003, Opinion on the Law on amending and supplementing the Constitution (Judiciary) of the Republic of Moldova, § 19
See also 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, §37; 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, §23

"[…] [T]he system [established by the statute of the High Council of Justice] of having professional tests following appointment is obviously open to abuses in connection with the confirmation of a magistrate in his or her post."

> CDL(1995)074rev, Opinion on the Albanian law on the organisation of the judiciary (chapter VI of the Transitional Constitution of Albania), p.4

"[…] [T]he discretion of the Supreme Judicial Council in confirming or denying the permanent status to magistrates should be limited by specifying criteria […]. In any case, this procedure should be restricted to courts of first instance."

> CDL-AD(2003)016, Opinion on the Constitutional Amendments reforming the Judicial System in Bulgaria, §26
> See also CDL-AD(2002)015, Opinion on the Draft Law on Amendments to the Judicial System Act of Bulgaria, §5

"[…] Some states have a practice that gives the opportunity to persons who are qualified as judges or prosecutors to gain experience of the legislative process by serving for a period of time at the Ministry of Justice. However, it is vital that there is a clear demarcation in their rights and duties when they serve in these quite different functions, on the one hand as civil servants within a hierarchy and on the other as independent prosecutors or judges."

> CDL-AD(2011)004, Opinion on the Draft Law on Judges and Prosecutors of Turkey, §47

"If the probationary period is to be maintained, the refusal of appointment to the position of tenure should remain an exception. [...]"

> CDL-AD(2017)018, Opinion on the Judicial System Act of Bulgaria, §79

"[…] If probationary appointments are considered indispensable, permanent appointment after the probationary period should be the rule and a 'refusal to confirm the judge in office should be made according to objective criteria and with the same procedural safeguards as apply where a judge is to be removed from office'. […] Objective criteria for refusal of appointment to the position of tenure, with the same procedural safeguards as for removal of judges with tenure, should also be specified in the law if not in the Constitution."

> CDL-AD(2023)039, Opinion of the Draft Amendments to the Constitution of Bulgaria, §60
> See also CDL-AD(2024)006, Lebanon - Opinion on the draft law on the Administrative Judiciary, §50.

"[…] [I]n order to meet the proportionality test, the introduction of probationary periods should go hand in hand with safeguards regarding the decision on a permanent appointment. [...]

Sections 3.3.c and 25.4 ALSRJ even provide for the possibility of repetitive probationary periods. The Law should provide *expressis verbis* for a maximum limit of cumulative probationary periods with the aim of balancing the need for judicial independence, on the one hand, with the interest of the state, on the other.

The delegation of the Venice Commission was informed that, usually a person who intends to become a judge would first become court secretary and, in some cases, stay in this position for up to six years before he or she would be appointed as a regular judge. Under the new Fundamental Law, Court Secretaries may exercise judicial functions in misdemeanour cases (see also below). This means that a person who is already acting in a judicial function could remain in a precarious situation for up to nine years (six years as court secretary and three years in probationary period). The problem is not so much that the evaluation during the time as court secretary and the probationary period would objectively exert pressure on the person concerned. However, the court secretary or probationary judge will be in a precarious situation for many years

and - wishing to please superior judges who evaluate his or her performance - may behave in a different manner from a judge who has permanent tenure ('pre-emptive obedience'). Probationary periods are problematic already as such. The additional time as court secretary further aggravates this problem."

> 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, §§66-68

"[…] In order to identify suitable candidates, candidate judges could rather assist sitting judges as trainees. They would prepare judgments which would be adopted under the authority of a judge with permanent tenure."

> 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, §32

### 3.3.3 Evaluation and promotions

#### 3.3.3.1. General approach

"[…] Article 36 describes the rules of evaluation, which should cover "all aspects of the work of the judge or the president of the court". This formula is too broad, as it may imply that the correctness of the judges' legal opinions and procedural decisions and other similar substantive aspects of their work would be evaluated. The Venice Commission reiterates that the "evaluation" of the interpretation of the law and facts of the cases before the judge is the task of the appellate judge, and not of an evaluation commission."

> CDL-AD(2022)030, Opinion on three draft laws implementing the constitutional amendments on Judiciary of Serbia, §68

"[…] [A] competition should be the rule for all promotions of judges in order to prevent any abuse. Also, there is the risk that the promotion procedure without competition negatively affects the development of regular promotion procedure and of its criteria which should be determined and developed by the High Council, as required by Article 41(1) of the Organic Law."

> 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, §64
> 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, §54

"The evaluation of court and justice systems is generally seen as a good means of implementing managerial or political decisions aimed at improving these systems; whereas, the evaluation of the performance of individual judges is often seen as infringing judges' independence. Although this danger may well exist, it should not prevent an evaluation from taking place. […]"

> CDL-AD(2014)007, Joint opinion on the draft law amending and supplementing the judicial code (evaluation system for judges) of Armenia, §11
> See also CDL-AD(2017)018, Opinion on the Judicial System Act of Bulgaria, §§67-68

“A system on evaluation of judges is generally to be welcomed. […] However it should be stressed that such a system properly implemented will consume a lot of time, personal and economic resources to guarantee results that could be relied upon in the long run.

> 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, §59

“[…] Insofar as the purpose of the evaluation of the judges is not only to assess the professional skills for promoting the judge to higher courts, […] but mainly to appraise the “effectiveness of the judge’s work” […], the judges’ integrity/respect for judicial ethics, and to promote the quality of the judicial activity at all levels of the judicial system, some form of evaluation specific to the judges of the Supreme Court could be devised. This might require some adjustments to the appraisal benchmarks and to the composition of the Evaluation Commission, taking into account the peculiarity of the role of the Supreme Court judges.”

> CDL-AD(2022)050, Opinion on the draft amendments to the Law on the Judicial Council and Judges of Montenegro, §48

“In its 2023 Follow-up Opinion (§22) the Commission noted that “the Supreme Court judges are still exempted from the evaluation cycle, as Article 87 has not been amended. Mindful of the specific role they occupy in the judicial system, the Venice Commission had recommended that some form of evaluation, tailored to the specificity of the role of Supreme Court judges (for example one that focuses on the effectiveness of the judge’s work and on respect of integrity and respect for judicial ethics), be devised”.

The Venice Commission welcomes the fact that the draft law introduces a new set of provisions (draft Articles 101a-101f) on the appraisal of judges of the Supreme Court, following upon the Commission’s recommendations. Interlocutors during the on-line consultations expressed their overall satisfaction with the introduction of these new draft provisions which provide notably for the following: appraisal of performance every five years based on efficiency and integrity (as defined in draft Article 101c); appraisal shall be conducted by the Appraisal Commission (under draft Article 88, the Appraisal Commission, established by the Judicial Council, shall include the president of the Supreme Court and four members of the Judicial Council, three of whom are from the ranks of judges and one from the ranks of eminent lawyers); the appraisal decision will be based on the proposal of the Panel of Judges for Performance Appraisal of the Supreme Court Judges, composed of high level representatives of the Supreme Court departments.”

> CDL-AD(2024)012, Montenegro – Urgent Follow-up Opinion on the revised draft amendments to the Law on the Judicial Council and Judges, §§30-31.

“[…] [I]t should be noted that ‘individual evaluation’ is far from being considered as indispensable by European judicial systems in general.

Countries that have decided not to proceed with an individual evaluation of judges (such as Denmark, England and Wales, Finland, Ireland, Netherlands, Sweden and, to some extent, Spain), have instead developed general performance evaluations of the judicial procedure.”

> CDL-AD(2009)023, Opinion on the Draft Criteria and Standards for the Election of Judges and Court Presidents of Serbia, §§10-11

“[...] [L]aws regulating the assessment or evaluation of the professional duties of judges must be worded and applied with great care and the role of the executive or legislative branches of government in this process should be limited to the extent absolutely necessary.”

CDL-AD(2014)039, Amicus Curiae Brief for the Constitutional Court of Moldova on certain provisions of the law on professional integrity testing, §14
See also CDL-AD(2015)031, Interim Opinion on the Draft Law on Integrity Checking of Ukraine, § 43

"If there is to be a system of evaluation, it is essential that control of the evaluation is in the hands of the Judiciary and not the executive. […] Secondly, the criteria for evaluation must be clearly defined. […]"

CDL(2005)066, Opinion on Draft Constitutional Amendments concerning the Reform of the Judicial System in "the former Yugoslav Republic of Macedonia", §30

"[…] This provision looks problematic as it defines the President of the Court as a central figure in the process of the evaluation of judges. This may not only lead to a conflict of interest, but also result in malpractice, limiting the independence of individual judges."

CDL-AD(2013)015, Opinion on the draft law on the courts of Bosnia and Herzegovina, §66
See also CDL-AD(2014)008, Opinion on the draft Law on the High Judicial and Prosecutorial Council of Bosnia and Herzegovina, §§84

"[…] Submitting a candidate's performance as a judge to scrutiny by the general public, i.e. including by those who have been the object of unfavourable rulings, constitutes a threat to the candidate's independence as a judge and a real risk of politicisation. […]

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, §§60 and 63

"The draft Law contains no details with regard to the procedure and frequency of the evaluation as well as the consequences of such an evaluation. Although the draft Law provides that the HJPC is authorised to adopt evaluation criteria, it is crucial for the criteria, procedure and consequences to be clearly formulated, easily accessible and foreseeable. It is important that the evaluation system be neither used nor seen to be used as a mechanism to subordinate or influence judges."

CDL-AD(2013)015, Opinion on the draft law on the courts of Bosnia and Herzegovina, §68

### 3.3.3.2. Status and composition of the evaluation body

[…] [T]he evaluation of judges with the involvement of prosecutors and advocates is a very sensitive issue. Of course, both prosecutors and advocates are well placed to know a judge's strengths and weaknesses. However, they are not disinterested observers. There is a risk that a judge may tailor his or her relations with particular prosecutors or advocates to secure a more favourable assessment or may be perceived as doing so. Furthermore, there is a particular risk in involving prosecutors in assessments of judges in legal cultures where historically the prosecutors dominated the judiciary. However, these considerations would not have the same force if retired advocates or prosecutors were to be used as assessors.

[…] [T]he use of serving judges to evaluate their colleagues has the potential of causing some difficulties. It could lead to bad personal relationships between colleagues and has the potential to further undermine the morale of the judiciary. Alternatively, where judges receive favourable evaluations this could give rise to allegations of cronyism. There is a danger that such a system could lack credibility.

In general, establishing a mixed team of evaluators, inviting legal professionals from outside the current judicial system may be the least bad option. It is essential to establish an evaluation team with a balanced composition. This will avoid cronyism and the perception of self-protection. In addition, the evaluation must be conducted in a transparent manner and impartially.

> CDL-AD(2014)007, Joint opinion on the draft law amending and supplementing the judicial code (evaluation system for judges) of Armenia, §§ 67, 69 and 70

[…] [W]hen increasing the composition of the [evaluation body], it is important to ensure that lay members, while remaining in the minority compared to judicial members, nevertheless have a meaningful impact on the decision-making process. One possible solution is to design rules governing quorum and decision-making majorities promoting inclusiveness of lay members. An increased quorum requirement might foster greater involvement, though it should not be so high as to create blockages that impede the [body's] operations. As for voting majorities, it may be prudent to establish that [body's] decisions require the support of representatives from both judicial and lay members. The rules could also specify the exact number of lay members whose votes are necessary for a valid decision, similarly to the models that have been discussed by the Venice Commission in other contexts.

> CDL-AD(2024)031, Joint Opinion on the draft amendments to the Judicial Code of Armenia (regarding evaluation of judges), § 26.

"While it is possible to assign different working groups or rapporteurs to conduct evaluations and make recommendations, it is advisable that these proposals be reviewed and approved by the full PEC. A full-composition review ensures consistency, inclusiveness, and coherence in working methods, approaches, and outcomes. Nevertheless, if the decision-making autonomy is to be given to the specific panels of the evaluation body, then the draft law must ensure that the mixed composition of the overall body is also guaranteed at the panel level."

> CDL-AD(2024)031, Joint Opinion on the draft amendments to the Judicial Code of Armenia (regarding evaluation of judges), § 19

"The short mandate may present challenges, as it imposes additional demands on a system that already has a complicated process for nominating and electing both judicial and lay members. The ad hoc principle of appointing the PEC members may not facilitate the retention of institutional memory, and the advantages of such a model are not immediately apparent. A four-year term, as currently practised, could offer a more effective approach.

Additionally, ensuring a gradual replacement of members would help maintain continuity and enhance the efficiency of the PEC. The use of such staggered technique might be beneficial in fostering a stable and consistent system for judicial evaluations in a longer perspective."

> CDL-AD(2024)031, Joint Opinion on the draft amendments to the Judicial Code of Armenia (regarding evaluation of judges), §§ 33-34.

#### 3.3.3.3. Relationship with disciplinary system

"[…] According to draft Article 56(1)(s), a disciplinary offence results where "*performance is assessed as unsatisfactory*". The Commission agrees that if a judge's performance is assessed as unsatisfactory, he or she is not suitable to perform judicial duties and various solutions can be envisaged, including the termination of the mandate as a measure of last resort. However, the Venice Commission stresses that unsatisfactory performance and disciplinary misbehaviour are

two different things and should not be treated in the same manner. The Venice Commission has, on previous occasions, criticised the practice of confusing the two."

> CDL-AD(2021)015, Opinion on the draft Law on amendments to the Law on the High Judicial and Prosecutorial Council of Bosnia and Herzegovina, §60
> CDL-AD(2014)007, Joint opinion on the draft law amending and supplementing the judicial code (evaluation system for judges) of Armenia, §§28, 102 and 108,
> CDL-AD(2018)022, Opinion on the law amending the law on the Judicial Council and on the law amending the law on Courts of "The former Yugoslav Republic of Macedonia", §§58-62; CDL-AD(2018)033, Opinion on the draft law amending the law on Courts of "the former Yugoslav Republic of Macedonia", §43; CDL-AD(2015)042, Opinion on the Laws on the Disciplinary Liability and Evaluation of Judges of "The Former Yugoslav Republic of Macedonia", §§ 51-54

"[...] While some disciplinary breaches may result from the lack of professionalism, in the opinion of the Venice Commission, professional evaluations should be kept separate from the disciplinary proceedings: they have different purpose and are based on different principles. Where there is a risk of a sanction, the situation should be analysed in terms of the disciplinary liability: in particular, the body imposing the sanction should demonstrate the fault of the judge. [...] In addition, if there is a risk of a sanction, the proceedings should be accompanied by the appropriate procedural safeguards. In particular, there should be a possibility for the judge to contest the sanction before a judicial body."

> CDL-AD(2018)032, Opinion on the Concept Paper on the reform of the High Judicial Council of Kazakhstan, §77

"[…][T]he Venice Commission cautions against the unsatisfactory performance of a judge forming the basis for a "most severe disciplinary offence", when repeated twice in a row […]. The Venice Commission reiterates that professional evaluation of a judge and disciplinary liability should be kept clearly distinct and that, to serve as a ground for dismissal, "bad evaluation" should convincingly demonstrate the incapability of the judge to perform judicial functions. […]"

> CDL-AD(2022)050, Opinion on the draft amendments to the Law on the Judicial Council and Judges of Montenegro, §63.

"In the 2023 Follow-up Opinion (§28) the Commission noted that under the draft law "unsatisfactory performance of a judge could form the basis for a "most severe disciplinary offence". The Venice Commission found that the professional evaluation of a judge and disciplinary liability should be kept clearly distinct and that, to serve as a ground for dismissal, a "bad evaluation" should convincingly demonstrate the incapability of the judge to perform judicial functions. It therefore invited the drafters to revise this provision."

The amended draft Article 108 has followed the Commission's recommendation and now provides that unsatisfactory performance of a judge twice in a row could only form the basis for a "severe disciplinary offence", which does not provide for the dismissal of judges but for a fine in the amount of 20% to 40% of the judge's salary, for a period of three to six months (Article 109 § 3 of the draft law)."

> CDL-AD(2024)012 Montenegro – Urgent Follow-up Opinion on the revised draft amendments to the Law on the Judicial Council and Judges, §§37-38

"… [T]he Venice Commission has consistently emphasised the need to make a clear distinction between the evaluation of judges and the disciplinary accountability system. Admittedly, if any errors or misconduct are identified during the evaluation process, this information may be referred to a disciplinary body for appropriate action. …

… [D]raft Article 140.1 § 2 retains the existing provision …, whereby if the [evaluation body] identifies *prima facie* grounds for disciplinary action during the evaluation process, it may refer the matter to the Ethics and Disciplinary Commission for consideration. Importantly, this referral should not carry any binding effect on the disciplinary body, which must remain free to independently examine the material and decide whether to initiate proceedings based on its own assessment. This approach will preserve the necessary distinction between performance evaluations and disciplinary accountability, while ensuring that any serious concerns raised during evaluations are appropriately addressed through the correct channels."

> CDL-AD(2024)031, Joint Opinion on the draft amendments to the Judicial Code of Armenia (regarding evaluation of judges), §§ 45-46

### 3.3.3.4. Evaluation criteria and working methods

"Regular evaluations of the performances of a judge are important instruments for the judge to improve his/her work and can also serve as a basis for promotion. It is important that the evaluation is primarily qualitative and focuses on the professional skills, personal competence and social competence of the judge. There should not be any evaluation on the basis of the content of the decisions and verdicts, and in particular, quantitative criteria such as the number of reversals and acquittals should be avoided as standard basis for evaluation."

> CDL-AD(2011)012, Joint Opinion on the constitutional law on the judicial system and status of judges of Kazakhstan by the Venice Commission and OSCE/ODIHR, §55
> See also CDL-AD(2018)022, Opinion on the law amending the law on the Judicial Council and on the law amending the law on Courts of "The former Yugoslav Republic of Macedonia", §53; CDL-AD(2015)042, Opinion on the Laws on the Disciplinary Liability and Evaluation of Judges of "The Former Yugoslav Republic of Macedonia", §§ 100-101

"If there were to be a measurement of workloads, systems would need to be in place to evaluate the weight and the difficulty of different files. […] Simply counting the number of cases dealt with is crude and may be completely misleading. At most, such a measurement may serve as a useful tool to indicate a possible problem, but can do no more than this and certainly should not be determinative of a problem.

Measurement of the 'observance of procedural periods' […] again may point to a possible problem, but it is important that the judge be given an opportunity to explain any apparent failings in this regard.

Measuring the 'stability of judicial acts' […] is questionable. It effectively means counting the number of successful appeals. Such a measure should be avoided because it involves an interference with the independence of the judge. […] Where a case is overturned on appeal, who is to say that the court of first instance got it wrong and the appeal court got it right? The decision of the judge of the first instance court quashed by the Court of Appeal could well later be supported by the decision of the Court of Cassation, the Constitutional Court or the European Court of Human Rights. […].

The threshold of reversals would need to be quite high and the rule for exceptions to be established by the Council of Judges would have to be very generous. Such a system of on-going assessments is likely to produce a timid judiciary […].

[…] [T]he caseload of judges in Armenia increases annually and could potentially reach unsustainable levels. Insofar as a judge is able to dispose of a certain number of cases annually,

should the caseload continue to increase, it would be unfair to evaluate the judge on the basis of a percentage of disposed cases without properly analysing the reasons for the increase in the caseload. […]

The proposal […] to measure the average duration of examination of cases is inappropriate for similar reasons to those already referred to above […]. Who is to say that a judge who takes longer over a case is not doing a more thorough job than the speedier colleague? […] The judge seeking to meet these time frames might be tempted to disregard what would normally be seen as necessary under the law and his or her interpretation of it.

[…] [T]he 'quality of justification' (reasoning) is often a problem in new democracies and coherent reasoning should be promoted. Logical argumentation, clarity, and other aspects are of interest and are dealt with in Opinion No. 11 of the CCJE on Quality of Judicial Decisions.

Criterion (2) Professional abilities […] raises the problem how one measures the '(a) ability to withstand pressure and threats' […]. If the pressure or the threat is made in open court, one can make a judgment, but pressures or threats made behind-the-scenes are unlikely to be known to the evaluator.

[…] [T]he proposed rating scheme to be assigned to judges is not recommended because it creates more problems than it solves. Although it looks precise, it is not. It is subjective – if the proposed questionnaire or experience judges are used – which is bound to influence the distribution of points. An evaluation does not need exact points. What is important is to know whether or not a judge fulfils all the criteria, where his or her strong points and weaknesses lie and how to improve his or her capacities. This can be done without assigning points. […]

[…] [The Venice Commission recommends] a greater attribution to the qualitative criteria than to the quantitative ones, because the former include the most important aptitudes that a judge should have, such as knowledge and personal skills. Unless there is malice or repeated gross negligence, qualitative criteria should not relate to the interpretation of the law."

> CDL-AD(2014)007, Joint opinion on the draft law amending and supplementing the judicial code (evaluation system for judges) of Armenia, §§37-40, 42-43, 49-50 and 77-78
> See also CDL-AD(2019)008, Opinion on the Draft Law on the Judicial Council of North Macedonia, §§43-45; CDL-AD(2018)032, Opinion on the Concept Paper on the reform of the High Judicial Council of Kazakhstan, §§82-84; CDL-AD(2018)022, Opinion on the law amending the law on the Judicial Council and on the law amending the law on Courts of "the former Yugoslav Republic of Macedonia", §§43-46; CDL-AD(2017)018, Opinion on the Judicial System Act of Bulgaria, §§89, 99-103; CDL-AD(2017)019, Opinion on the Draft Judicial Code of Armenia, §§70-75, 78 and 80; CDL-AD(2015)042, Opinion on the Laws on the Disciplinary Liability and Evaluation of Judges of "The Former Yugoslav Republic of Macedonia", §§102-105 and 107; 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, §§62-70

"The draft law retains the evaluation criteria existing currently in the Judicial Code, maintaining a balance between the above-mentioned qualitative and quantitative measures, with qualitative criteria appearing predominant. This is a positive approach, aligning with the Venice Commission's general recommendations, and it should be effectively implemented through the SJC regulations on evaluation methodology. For instance, one of the qualitative criteria – the "ability to justify judicial acts" – involves assessing a judge's capacity to provide well-reasoned decisions. Various qualitative methods can be employed for this assessment, including the analysis of quashed decisions. As a general observation, such methods must be applied with caution to avoid undermining the principle of *res judicata* and to respect the notion that court decisions are subject to review through the appellate process. If reversal rates are used as part

of this evaluation, the criterion may shift towards a quantitative measure, and it is crucial to ensure that only consistently high and persistent reversal rates are considered in this context. In any event, no criterion should be decisive by itself and the circumstances surrounding the judge's work during the evaluation period (staffing situation, influx of cases, their complexity, etc.) should be duly taken into account."

> CDL-AD(2024)031, Joint Opinion on the draft amendments to the Judicial Code of Armenia (regarding evaluation of judges), § 39.

"Another source of concern is the part of the Law related to the evaluation of the performance by the courts' presidents (see Articles 118 et seq.). It appears that the court's presidents are scored mostly on the basis of the performance of the ordinary judges. This may push presidents to become 'productivity watchdogs' within their courts and may ultimately undermine judicial independence."

> CDL-AD(2015)042, Opinion on the Laws on the Disciplinary Liability and Evaluation of Judges of "The Former Yugoslav Republic of Macedonia", §106

"[…][I]t is commendable that the Law foresee that the president of a court is separately evaluated as a judge and as a president, as foreseen in Article 100 of the Law. This will allow for the distinct assessment of his/her capacity as a judge and as a president, according to different benchmarks. In particular, in his/her evaluation as a president, organisational and managerial skills will be at the core of the assessment."

> CDL-AD(2022)050, Opinion on the draft amendments to the Law on the Judicial Council and Judges of Montenegro, §53

"20 points may be gained by a judge from another type of assessment, described in the third paragraph of Article 104: it is an assessment of the *quality* of the legal reasoning in 10 sample judgements (5 selected randomly and 5 selected by the judge him/herself). This assessment is made by a three-member commission composed of judges of the higher court drawn by lot. This is an interesting model; however, such assessment should only extend to such aspects as the style and clarity of drafting, and not call into doubt the validity of the decisions taken by the judge."

> CDL-AD(2018)022, Opinion on the law amending the law on the Judicial Council and on the law amending the law on Courts of "the former Yugoslav Republic of Macedonia", §49

### 3.3.3.5. Frequency of evaluations

"[…] The two years' period for regular evaluation appears to be too short/frequent: it means practically permanent assessment, which may affect negatively the independence and efficiency of judges. The Venice Commission would recommend a longer period for ordinary judges and an even longer one for senior judges."

> CDL-AD(2018)022, Opinion on the law amending the law on the Judicial Council and on the law amending the law on Courts of "the former Yugoslav Republic of Macedonia", §47
> See also CDL-AD(2019)008, Opinion on the Draft Law on the Judicial Council of North Macedonia, §46

"Article 87 of the Law increases the length of the evaluation cycle from three to five years. […] The Venice Commission notes that the Consultative Council of European Judges found that regular evaluations permit a full picture of a judge's performance to be created. They should not take place too often, however, in order to avoid an impression of constant supervision which could, by its very nature, endanger judicial independence. […] The Venice Commission notes that the Law provides for a series of exceptions to the five-year cycle which allow for an early

evaluation in specific cases. With the above-mentioned in mind, the Venice Commission finds that the 5-year cycle is in line with international standards."

> CDL-AD(2022)050, Opinion on the draft amendments to the Law on the Judicial Council and Judges of Montenegro, §47

"However, the Venice Commission has previously expressed reservations regarding the adoption of a two-year evaluation cycle in Armenia. In other previous assessments, the Commission advised against such frequent evaluations, citing concerns about their potential impact on judicial independence. The Venice Commission and DGI reiterate this position and recommend that the authorities reconsider the proposed frequency, suggesting that the evaluation periods be extended to at least three years to strike a more balanced approach.

As a broader observation, the Venice Commission and DGI note that the issue of frequent regular evaluations may become less pressing if the integrity and professionalism of candidates are rigorously assessed at the point of entry into the judicial profession. Strengthening these initial selection mechanisms may prove even more pertinent, as it could diminish the necessity for overly frequent evaluations during a judge's tenure."

> CDL-AD(2024)031, Joint Opinion on the draft amendments to the Judicial Code of Armenia (regarding evaluation of judges), §§ 36-37.

### 3.3.3.6. Procedural safeguards

"The draft Law also lacks a mechanism for the disqualification of an evaluator at a later stage who fails to recuse him or herself or to report a conflict of interest. Evaluators should also be under the obligation to report any form of communication that attempts to influence the evaluation process by improper means (including, but not limited to, undue pressure, duress, or coercion).

Article 96.2.17 provides for the identity of assessors to be kept confidential. Since this rule is not to be applied in cases where the results of an evaluation are appealed against, it is difficult to see what the point of it is. In any event, any system of evaluation should be transparent. The identity of the evaluator may be highly relevant since the person concerned may be biased against the judge. […]"

> CDL-AD(2014)007, Joint opinion on the draft law amending and supplementing the judicial code (evaluation system for judges) of Armenia, §§62 and 75.

"Under draft Article 140 § 7, appeals against evaluation decisions will be reviewed by other members of the [evaluation body], with no further recourse to challenge the decision before an ordinary court. This raises the question of whether such a model aligns with the right of "access to a court" in respect of the claims against negative evaluation decisions. …

One alternative could be to allow the SJC to review on appeal the PEC's decisions. However, in 2014 the Venice Commission has observed that "it would be preferable simply to provide for an appeal to a court of law."37 Should the preferable option of judicial appeal be pursued by the authorities, jurisdiction over such appeals could be conferred upon the Court of Cassation, as the highest judicial authority in Armenia."

> CDL-AD(2024)031, Joint Opinion on the draft amendments to the Judicial Code of Armenia (regarding evaluation of judges), §§ 47 and 50.

## 3.4 Accountability

### 3.4.1 Immunities

"It is indisputable that judges have to be protected against undue external influence. To this end they should enjoy functional – but only functional – immunity (immunity from prosecution for acts performed in the exercise of their functions, with the exception of intentional crimes, e.g. taking bribes)."

> CDL-AD(2010)004, Report on the Independence of the Judicial System Part I: The Independence of Judges, §61
> See also CDL-AD(2018)022, Opinion on the law amending the law on the Judicial Council and on the law amending the law on Courts of "the former Yugoslav Republic of Macedonia", §79; CDL-AD(2017)002, Amicus Curiae Brief for the Constitutional Court of the Republic of Moldova on the Criminal liability of judges, §9; CDL-AD(2015)013, Opinion on draft constitutional amendments on the immunity of Members of Parliament and judges of Ukraine, §23

"[…] Magistrates […] should not benefit from a general immunity […]. According to general standards they indeed needed protection from civil suits for actions done in good faith in the course of their functions. They should not, however, benefit from a general immunity which protected them against prosecution for criminal acts committed by them for which they should be answerable before the courts. […]"

> CDL-AD(2003)012, Memorandum: Reform of the Judicial System in Bulgaria, §15
> See also CDL-AD(2015)013, Opinion on draft constitutional amendments on the immunity of Members of Parliament and judges of Ukraine, §25; CDL-AD(2015)045, Interim Opinion on the Draft Constitutional Amendments on the Judiciary of Albania, §49; CDL-AD(2003)016, Opinion on the Constitutional Amendments reforming the Judicial System in Bulgaria, §8

"It is reasonable to grant immunity from civil suit to a judge acting in good faith in the performance of his or her duty. But, it should not be extended to a corrupt or fraudulent act carried out by a judge."

> CDL-AD(2008)039, Opinion on the Draft Amendments to the Constitutional Law on the Status of Judges of Kyrgyzstan, §24

"[...]

- while judges may be subject to criminal liability for the interpretation of a law, the ascertainment of facts or the assessment of evidence, such liability should only be possible in cases of malice and, arguably, gross negligence;
- judges should not be held liable for judicial mistakes that do not involve bad faith and for differences in the interpretation of the law. The principal remedy for such mistakes is the appellate procedure;
- criminal and disciplinary liability are not mutually exclusive: disciplinary sanctions may still be appropriate in case of a criminal acquittal; also, the fact that criminal proceedings have not been initiated due to the failure to establish criminal guilt or the facts in a criminal case, does not mean that there was no disciplinary breach by the judge concerned, precisely because of the different nature of these liabilities;
- if a judge's misconduct is capable of undermining public confidence in the judiciary, it is in the public interest to institute disciplinary proceedings against that judge. Criminal proceedings, however, do not consider the particular disciplinary aspect of the misconduct, but criminal guilt;
- In conclusion: only failures performed intentionally, with deliberate abuse or, arguably, with repeated, serious or gross negligence should give rise to disciplinary actions and penalties, criminal responsibility or civil liability."

CDL-AD(2017)002, Amicus Curiae Brief for the Constitutional Court of the Republic of Moldova on the Criminal liability of judges, §53
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, §§113-118; CDL-AD(2016)015, Amicus Curiae Brief for the Constitutional Court of the Republic of Moldova on the Right of Recourse by the State against Judges, §18

"As regards the immunity of judges, it is necessary to separate the substantive issue relating to the material scope of the functional immunity, which should provide the legal grounds to pronounce the inadmissibility of a complaint against a judge, from the procedural safeguards which exist to protect such functional immunity […]."

CDL-AD(2014)018, Joint opinion of the Venice Commission and OSCE/ODIHR on the draft amendments to the legal framework on the disciplinary responsibility of judges in the Kyrgyz Republic, §38

"[…] [A] limited functional immunity from arrest and detention which would interfere with the workings of the court is one thing but a total immunity from prosecution is difficult to justify. […]"

CDL-AD(2005)005, Opinion on Draft Constitutional Amendments relating to the Reform of the Judiciary in Georgia, §11
See also 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, §107

"[…] It is worth highlighting that even if the material scope of the functional immunity is reduced (e.g., by expressly excluding certain criminal offenses such as bribery, corruption or traffic of influence), the procedural safeguards […] will still protect the judges e.g., from blackmail relating to an alleged crime committed in office, by ensuring that only duly substantiated claims or complaints will get the consent of the Council of Judges to proceed further."

CDL-AD(2014)018, Joint opinion of the Venice Commission and OSCE/ODIHR on the draft amendments to the legal framework on the disciplinary responsibility of judges in the Kyrgyz Republic, §42

"[...] A 'procedural immunity', in other words a special legal protection/procedural safeguard for judges accused of breaking the law, typically directed against arrest, detention and prosecution, would help ensure that judges can properly exercise their functions without their independence being compromised through fear of prosecution or other judicial actions by an aggrieved party, including state authorities.

In a number of countries, such 'inviolability' or 'procedural immunity' exists to protect judges from potentially frivolous or false accusations, vexatious or manifestly ill-founded complaints that could exert pressure on them. Should the drafters opt for this type of wider immunity, the scope of such immunity should be strictly circumscribed. In any case, the procedure for lifting the immunity should include procedural safeguards to protect judicial independence and the requisite decision should be taken by an independent judicial body or other independent entity, while ensuring that conditions and mechanisms for lifting such immunity do not put judges beyond the reach of the law. One way to achieve this would be to ensure that the disciplinary commission is composed of a wide variety of stakeholders that would ensure its independence and neutrality [...]"

CDL-AD(2016)025, Endorsed joint opinion on the draft law "on Introduction of amendments and changes to the Constitution" of the Kyrgyz Republic, §§77 and 78

"In the Commission's view, there is no justification in principle for treating judges differently in matters of discipline and removal according to whether they are members of superior or inferior courts. All judges should enjoy equal guarantees of independence and equal immunities in the exercise of their judicial functions. […]"

CDL(1995)074rev, Opinion on the Albanian law on the organisation of the judiciary (chapter VI of the Transitional Constitution of Albania), p.2

"The issue of the personal liability of judges was raised by the Committee of Ministers in its Recommendation CM/Rec(2010)12 on judges […].

While imposing civil liability on a judge is a possibility, the grounds for the compensation of damage should be considered with great caution, as this may have a negative impact on the work of the judiciary as a whole. It could limit the discretion of an individual judge to interpret and apply the law. […]

[…] It is not uncommon for violations of the rights and freedoms guaranteed by the European Convention on Human Rights and/or the national Constitution to occur as a result of the application and/or interpretation of the law. It is also not unusual for the European Court of Human Rights […] to reach different conclusions in defining the scope and content of a right (including procedural rights) or of a legal provision. […] Should the judge be liable if s/he 'wilfully' did not follow the standards established by any of these international organisations? The argument could be made that where the international case-law is well-established, the judge should be expected to follow it. However, the fact that a judge has wilfully chosen not to follow the established standards should not in itself become a ground for personal liability. […] [I]t is of great importance that issues pertaining to the personal liability of judges be determined by national courts, but this should only be allowed on the basis of criteria and procedures that are clearly defined by the law."

CDL-AD(2013)005, Opinion on Draft amendments to Laws on the Judiciary of Serbia, §§18-19 and 22

[…] In relation to this, a further argument for the solution proposed in the Law, the special treatment of magistrates regarding offences committed by them, was – as also pointed to in the explanatory note – to guarantee the independence of judges. This is however a misunderstanding of judicial independence. As the Commission has pointed out on various occasions when discussing immunity of judges, judicial independence is not a personal prerogative or privilege of a judge.[21] It does not mean that when it comes to intentional crimes, such as corruption, judicial independence forms justification for dealing with crimes *ad personam* and excluding judges and prosecutors the remit of specialised structures. Any special treatment of magistrates should be strictly limited to functional immunity for actions carried out in good faith in pursuance of their duties or in the exercise of their functions and should not extend to the commission of crimes.

[…] Dismantling the SIOJ should not be an objective in itself. The objective of dismantling SIOJ should be to ensure more efficacy in investigating and prosecuting offences – most importantly corruption – committed by judges and prosecutors. It is implausible that a structure of non-specialised prosecutors at the level of the prosecutor's offices attached to the High Court of Cassation and Justice and those attached to the courts of appeal will be better placed to conduct investigations into allegations of corruption by judges and prosecutors than the existing specialised prosecution service DNA. Given DNA and DIICOT's relative autonomy and functional independence, their specialisation, experience and the technical means at their disposal, the Venice Commission regrets that unlike the draft law it assessed in its 2021 Opinion (which would have returned to the situation to what it was before the 2018 amendments), the legislator has not restored the competences of these specialised prosecution services. Consequently, the Venice Commission recommends restoring the competences of these specialised prosecution services to also investigate and prosecute offences within their remit committed by judges and prosecutors.

CDL-AD(2022)003, Opinion on the draft law on the dismantling of the section for investigating criminal offences within the judiciary of Romania, §21 and §37

"[...] [H]olding judges liable for the application of the ECHR without any assessment of individual guilt may have an impact on their independence, which includes giving them the professional freedom to interpret the law, assess facts and weigh evidence in each individual case. Erroneous decisions should be challenged through the appeals process and not by holding judges individually liable, unless the error is due to malice or gross negligence by the judge."

CDL-AD(2016)015, Amicus Curiae Brief for the Constitutional Court of the Republic of Moldova on the Right of Recourse by the State against Judges, §79

"[…] [I]t may go too far in giving the judge immunity for such matters as failure to give judgment at all or improper conduct such as giving a judgment as a result of an inducement or bribe, which would be dealt with in criminal and disciplinary proceedings."

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, §28

"There is a suggestion that the decision on detention or arrest in the case of judges of the Constitutional Court should be by Parliament. This would certainly not be desirable, as it would represent a continued politicisation of judicial immunity and endanger judicial independence. […] For ordinary judges, immunity should be lifted by the HCJ. […]"

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, §49

"[...] [T]he consent of the *VerkhovnaRada* for lifting judges' immunity is not an appropriate solution, since this involves a political body in a decision concerning the status of judges and their immunities. Consequently, the competence to lift judges' immunity should not belong to a political body like the *VerkhovnaRada,* but to a truly independent judicial authority. [...]

Furthermore, the criteria for the lifting of such immunity should be specified and the decision should be reasoned."

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, §§58 and 59
See also CDL-AD(2015)013, Opinion on draft constitutional amendments on the immunity of Members of Parliament and judges of Ukraine, §24; 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, §57; 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, §79

"[...] Where it exists, judicial inviolability should be lifted only by organs of the judicial system. Therefore the lifting of immunity by the Supreme Judicial Council or the Constitutional Court respectively is welcome."

CDL-AD(2015)037, First Opinion on the Draft Amendments to the Constitution (Chapters 1 to 7 and 10) of the Republic of Armenia, §154

### 3.4.2 Disciplinary control

#### 3.4.2.1 Grounds for disciplinary proceedings (material aspect)

"[...] [D]isciplinary proceedings against judges based on the rule of law should correspond to certain basic principles, which include the following: the liability should follow a violation of a duty expressly defined by law; there should be fair trial with full hearing of the parties and

representation of the judge; the law should define the scale of sanctions; the imposition of the sanction should be subject to the principle of proportionality; there should be a right to appeal to a higher judicial authority."

CDL-AD(2016)009, Final Opinion on the revised draft constitutional amendments on the Judiciary (15 January 2016) of Albania, §34
See also 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, §12

"It must be pointed out that internationally, there is no uniform approach to the organization of the system of judicial discipline and that practice varies greatly in different countries with regard to the choices between defining in rather general terms the grounds for the disciplinary liability of judges and providing an all-inclusive list of disciplinary violations. […]"

CDL-AD(2014)018, Joint opinion of the Venice Commission and OSCE/ODIHR on the draft amendments to the legal framework on the disciplinary responsibility of judges in the Kyrgyz Republic, § 23

"[…] Only failures performed intentionally or with gross negligence should give rise to disciplinary actions. […]

[…] Applying disciplinary sanctions to an act that could have merely 'affected the court's activity' is excessive. […]"

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, §§19 and 35
See also CDL-AD(2016)013, Opinion on the Draft Code of Judicial Ethic of the Republic of Kazakhstan, §28; CDL-AD(2015)042, Opinion on the Laws on the Disciplinary Liability and Evaluation of Judges of "The Former Yugoslav Republic of Macedonia", §31; CDL-AD(2014)018, Joint opinion of the Venice Commission and OSCE/ODIHR on the draft amendments to the legal framework on the disciplinary responsibility of judges in the Kyrgyz Republic, §32

"[...] [T]he rules on disciplinary liability have direct effect on the independence of the judges. Vague provisions (such as the 'breach of oath' or 'unethical behavior') increase the risk of their overbroad interpretation and abuse, which may be dangerous for the independence of the judges. This is why the Venice Commission has always been in favor of a more specific definition of disciplinary offences in the legislation itself. [...]
[...] [T]he types of unethical behavior which may lead to a disciplinary liability should be described in sufficient detail *in the Constitutional Law itself*. [...] [T]he Code of Ethics may serve as a *supplementary tool* of interpretation of the law. However, the Code should not be used as the *one and only* instrument regulating the disciplinary liability of the judges [...]."

CDL-AD(2016)013, Opinion on the Draft Code of Judicial Ethic of the Republic of Kazakhstan, §§24 and 27
See also CDL-AD(2018)032, Opinion on the Concept Paper on the reform of the High Judicial Council of Kazakhstan, §78

"The Venice Commission acknowledges that, in defining unethical behavior, the law may have recourse to some comprehensive formulas. In such cases, it is better to use a mixed legislative technique: together with such comprehensive formulas, the law should list most common types of unethical behavior. [...]"

CDL-AD(2017)018, Opinion on the Judicial System Act of Bulgaria, §108
See also CDL-AD(2018)028, Opinion on Constitutional arrangements and separation of powers and the independence of the judiciary and law enforcement of Malta, §§46-49

"[…] In general, enumerating an exhaustive list of specific disciplinary offences, rather than giving a general definition which may prove too vague, is a good practice/approach in conformity with international standards."

> 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, §15
> 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", §16; CDL-AD(2014)018, Joint opinion of the Venice Commission and OSCE/ODIHR on the draft amendments to the legal framework on the disciplinary responsibility of judges in the Kyrgyz Republic, §24; CDL-AD(2014)008, Opinion on the draft Law on the High Judicial and Prosecutorial Council of Bosnia and Herzegovina, §90

"While acknowledging that "there is no uniform approach to the organisation of the system of judicial discipline and that practice varies greatly in different countries with regard to the choices between defining in rather general terms the grounds for the disciplinary liability of judges and providing an all-inclusive list of disciplinary violations", […] the Venice Commission favours specific and detailed description of grounds for disciplinary proceedings, […] 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."

> 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, §56

"[…] [P]eriodical breaches of discipline, professional incompetence and immoral acts are categories of conduct which are imprecise as legal concepts and capable of giving rise to abuse."

> CDL(1995)074rev, Opinion on the Albanian law on the organisation of the judiciary (chapter VI of the Transitional Constitution of Albania), p.4

"[...] [M]any of the offences in this catalogue are formulated too vaguely. For example, a judge may be disciplined for 'causing more severe disruption of the relations in the court', which is a very vague definition. Such obscure formulas open the door to abusive interpretations and are very dangerous for judicial independence. [...] Indeed, depending on the constitutional tradition of the state, a more general formula for judicial misconduct can be acceptable, but only under condition that it is understood to be narrowly interpreted."

> CDL-AD(2015)042, Opinion on the Laws on the Disciplinary Liability and Evaluation of Judges of "The Former Yugoslav Republic of Macedonia", §16
> See also CDL-AD(2018)033, Opinion on the draft law amending the law on Courts of "the former Yugoslav Republic of Macedonia", §34

"In the absence of a specific list of undignified or indecent acts, concepts such as 'indecency' and 'indignity' should be avoided as bases for disciplinary action."

> CDL-AD(2015)042, Opinion on the Laws on the Disciplinary Liability and Evaluation of Judges of "The Former Yugoslav Republic of Macedonia", §36

"[…] [T]he Venice Commission strongly criticised the vague term of 'breach of oath' as a basis for the dismissal of a judge and welcomed the introduction of the clause 'commitment of an offence, incompatible with further discharge of the duties of a judge'.

[…] No dismissal should be possible unless the conduct of a judge is covered by the definition of a disciplinary offence. The obligation to typify disciplinary offences on the level of the law also stems from the judgment *Oleksandr Volkov v. Ukraine* of the European Court of Human Rights."

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, §§54-55
See also CDL-AD(2015)013, Opinion on draft constitutional amendments on the immunity of Members of Parliament and judges of Ukraine, §§27 and 30; 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, §33

"Due to the closeness of disciplinary proceedings against judges with criminal proceedings, the criminal procedure principles of foreseeability of statutory offences and of their narrow interpretation, also apply *mutatis mutandis* to disciplinary proceedings. [...]

[...] The terms in Article 6.2.a that public agents – including judges – should '*not admit in their activity any corruption acts, corruption-related acts and deeds of corruptive behaviour*', are generic, hybrid, vague and overlap. [...]"

CDL-AD(2014)039, Amicus Curiae Brief for the Constitutional Court of Moldova on certain provisions of the law on professional integrity testing, §§63 and 65

"[...] [I]t would be preferable not to pursue disciplinary proceedings at all if the violation (even committed with gross negligence) itself is insignificant, to introduce a sort of a *de minimis* requirement (in addition to the proportionality principle set in Article 138 § 2). [...]"
CDL-AD(2017)019, Opinion on the Draft Judicial Code of Armenia, §131

"[…] [A legislative measure penalising the imposition of] a final judicial verdict, recognised and known to be unjust [...] is so clearly open to abuse [and] it should be repealed as a matter of urgency."

CDL(1995)074rev, Opinion on the Albanian law on the organisation of the judiciary (chapter VI of the Transitional Constitution of Albania), p.4

"It is important to underline that, as a rule in European practice, it is not the judge's task to supervise the execution of judgments. [...] It therefore seems to be inappropriate to establish the judge's liability in this context. This could even be used to undermine the judges' independence."

CDL-AD(2008)041, Opinion on the Draft Amendments to the Constitutional Law on the Supreme Court and Local Courts of Kyrgyzstan, §15

"Article 92(9) and (10) refer to activities carried out by members of the judge's family. Family is not defined. Furthermore, while it is important that judges are not able to avoid provisions designed to eliminate corruption through the use of family members, it is also important that judges not be penalised for misbehaviour by members of their family over which they have no control. The provision needs to be expanded to provide for a defence right to the judge concerned in such a case."

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, §56
"Ss. 18 apparently speaks of the judge's failure to declare his property; it is, however, not normal that such behaviour is characterised as a medium-gravity disciplinary violation. […] In the opinion of the Venice Commission the requirement to disclose assets and revenues should be associated with a sanction which is serious enough to serve the purpose of deterrence. While an exception may be made for minor or unintended omissions in the declarations, in principle the failure to declare assets is a sufficiently serious violation to give rise to a dismissal."

CDL-AD(2015)042, Opinion on the Laws on the Disciplinary Liability and Evaluation of Judges of "The Former Yugoslav Republic of Macedonia", § 39
See also CDL-AD(2019)008, Opinion on the Draft Law on the Judicial Council of North Macedonia, §42; CDL-AD(2018)033, Opinion on the draft law amending the law on Courts of "the former Yugoslav Republic of Macedonia", §37

"The principle *ne bis in idem* prohibits double trial and punishment for the same offense in two different criminal proceedings (Article 4 of Protocol no. 7 ECHR). This, in principle, does not exclude the initiation of disciplinary proceedings for the same offence in parallel to criminal proceedings. […]

[…] [T]he disciplinary authorities […] should not be obliged to terminate the disciplinary proceedings when a criminal case is initiated for the same offense. In order to prevent the breach of the principle *ne bis in idem* those authorities should rather have the possibility to terminate the proceedings if they consider that the disciplinary case has a criminal character (the nature of the offense and the gravity of the correspondent disciplinary penalty will be the guiding criteria in the light of the case law of the European Court). […]"

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, §§58 and 60
See also CDL-AD(2017)002, Amicus Curiae Brief for the Constitutional Court of the Republic of Moldova on the Criminal liability of judges, §18

"[…] It would seem desirable to provide that where an event consists of an offence under criminal or administrative law as well as under the disciplinary law, the criminal or administrative proceedings take precedence. […]"

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, §14

"A disciplinary sanction might be imposed on a judge after an acquittal before a criminal court or where the criminal proceedings against him or her have been discontinued but such disciplinary actions and proceedings must not violate the presumption of innocence provided by Article 6.2 of the European Convention on Human Rights. 'Disciplinary bodies should be capable of establishing independently the facts of the cases before them'."

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, §28

"Disciplinary proceedings should deal with gross and inexcusable professional misconduct but should never extend to differences in legal interpretation of the law or judicial mistakes. The basic rules on disciplinary misconduct are outlined in Article 39 of the Constitutional Law. The first ground mentioned therein, namely 'breaching the law while reviewing court cases', is open to a very wide application. […] [I]t is recommended that Article 39 par 1 (1) is amended in order to clarify that it only refers to gross and inexcusable misbehaviour and not to the incorrect application of the law."

CDL-AD(2011)012, Joint Opinion on the constitutional law on the judicial system and status of judges of Kazakhstan by the Venice Commission and OSCE/ODIHR, §60
See also CDL-AD(2018)022, Opinion on the law amending the law on the Judicial Council and on the law amending the law on Courts of "the former Yugoslav Republic of Macedonia", §§69-70; CDL-AD(2018)033, Opinion on the draft law amending the law on Courts of "the former Yugoslav Republic of Macedonia", §§53-

54; CDL-AD(2015)042, Opinion on the Laws on the Disciplinary Liability and Evaluation of Judges of "The Former Yugoslav Republic of Macedonia", §43; CDL-AD(2007)009, Opinion on the Law on Disciplinary Responsibility and Disciplinary Prosecution of Judges of Common Courts of Georgia, §18

"The legal interpretation provided by a judge in contrast with the established case law, by itself, should not become a ground for disciplinary sanction unless it is done in bad faith, with intent to benefit or harm a party at the proceeding or as a result of gross negligence. While judges of lower courts should generally follow established case-law, they should not be barred from challenging it, if in their judgment they consider right to do so."

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, §22.
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", §44

"[...] [S]uch criteria for the establishment of a disciplinary violation as the number of overturned decisions 'should be approached with a great degree of caution. It does not necessarily follow that because a judge has been overruled on a number of occasions that the judge has not acted in a competent or professional manner. It is however reasonable that a judge who had an unduly high number of cases overruled might have his or her competence called into question. Nevertheless, any final decision would have to be made on the basis of an actual assessment of the cases concerned and not on the basis of a simple counting of the numbers of cases which had been overruled.' 'In addition, a distinction might be drawn between decisions made on the basis of obvious errors, which any lawyer of reasonable competence should have avoided and decisions where the conclusion arrived at was a perfectly arguable one which nonetheless was overturned by a higher court.'

Independence of every judge is a precondition that must allow every judge and every panel of judges to make effort in order to change the practice – to adopt a different decision – if s/he thinks it appropriate in a particular case. Only *stubborn resistance* against an *enhanced practice* which leads to a repeated overturning in cases where there is a well-established and clear case-law should probably be counted as a blatant lack of professionalism. [...] The same criticism may be formulated regarding violation of rights so decided by the ECtHR. Judges should follow the European jurisprudence but an erroneous decision should not necessarily result with their dismissal (see new Article CC, ss. 10, first part).

Furthermore, the 'modification' of the lower court judgements may be relatively minor or reflect the discretionary power of the appellate court (for example, the appellate court may reduce a sentence imposed by a lower court even though the lower court acted lawfully and within the authorised limits)."

CDL-AD(2015)042, Opinion on the Laws on the Disciplinary Liability and Evaluation of Judges of "The Former Yugoslav Republic of Macedonia", §§46-48
See also CDL-AD(2018)022, Opinion on the law amending the law on the Judicial Council and on the law amending the law on Courts of "The former Yugoslav Republic of Macedonia", §§72-77; CDL-AD(2014)007, Joint opinion on the draft law amending and supplementing the judicial code (evaluation system for judges) of Armenia, §§114 and 122; CDL-AD(2022)050, Opinion on the draft amendments to the Law on the Judicial Council and Judges of Montenegro, §62

"[…] [I]t would be problematic to discipline judges for merely criticising judicial decisions […] or 'assessments with regard to the activities of state authorities and local authorities, and of the heads of those authorities' […]."

CDL-AD(2013)035, Opinion on the draft Code on Judicial Ethics of the Republic of Tajikistan, §33

“Article 66.j defines as a disciplinary offense as ‘unjustified delays in making decisions or other actions in connection with the performance of the duties of a judge or any other repeated disregard of the duties of a judge’. Due to a lack of clarity and the ability to foresee consequences of one’s own actions, this paragraph should also be revised. The wording such as ‘other actions in connection with performance of the duties’ or ‘repeated disregard of duties’ should be more detailed and clarified. The draft Law should stipulate more specifically what types of duties and actions may result in disciplinary proceedings.”

> CDL-AD(2014)008, Opinion on the draft Law on the High Judicial and Prosecutorial Council of Bosnia and Herzegovina, §101

“[...] [T]he absence of the reference to the fault of the judge in other provisions may be interpreted as implying that it is not a mandatory element for establishing the judge’s liability, while it should be so. The liability of the judges should be considered in the light of their influence on workload and backlog. For example, delays in the court proceedings may be caused by the judge’s lack of organisational skills, but may as well be explained by objective reasons outside his/her control, for example, by the failure of the court bailiffs to ensure appearance of witnesses. [...]
Actually, Article 74 of the Law on the Judicial Council does stipulate that in the sentencing process the Judicial Council has to take into account ‘the degree of responsibility’ of the judge. However, the very existence of a disciplinary breach (not only the sanction) should be conditioned upon the fault of the judge. The honest and hard-working judges should not be disciplined for the situations which result from the poor management of the judicial system as a whole or from other circumstances outside their control.”

> CDL-AD(2015)042, Opinion on the Laws on the Disciplinary Liability and Evaluation of Judges of "The Former Yugoslav Republic of Macedonia", §§18 and 19
> See also CDL-AD(2018)033, Opinion on the draft law amending the law on Courts of “the former Yugoslav Republic of Macedonia”, §57; CDL-AD(2017)018, Opinion on the Judicial System Act of Bulgaria, §106

“Ss. 3 lists as a severe disciplinary violation the ‘biased conduct of court proceedings in particular in terms of equal treatment of parties.’ [...] ‘Unequal treatment of parties’ or ‘bias’ of a judge are against the principle of fair trial and should normally lead to the quashing of a judgement. Hence, if a disciplinary body establishes that the judge was guilty of such behaviour in a particular case, that case should normally be reopened. […].
[...] The existence of a bias is often established from the point of view of a reasonable external observer, which does not necessarily mean that the bias actually existed or that the judge realised that he had a predisposition against one of the parties. [...] Next, the ‘unequal treatment’ of the parties may result from a well-established practice or other external factors which the judge does not really control. Even if the court of appeal establishes that one of the parties has been put in a disadvantage vis-à-vis another by the first instance court, the judge’s fault in it may be minimal. […].”

> CDL-AD(2015)042, Opinion on the Laws on the Disciplinary Liability and Evaluation of Judges of "The Former Yugoslav Republic of Macedonia", §§28 and 29

“Similarly, without providing any guidance or reference to the meaning of ‘inappropriate contact with a party to the proceedings or his/her representative’, Article 66.k may potentially result in an overbroad interpretation. Is a meeting with either or both parties always inappropriate? Do judges have clear guidance with regard to the actions that are inappropriate?”

> CDL-AD(2014)008, Opinion on the draft Law on the High Judicial and Prosecutorial Council of Bosnia and Herzegovina, §103

“Article 66.n, which makes it a disciplinary offense for a judge to make – ‘any comments while the case is deliberated in court, which may be reasonably expected to interfere with or harm the

equitable proceedings or trial, or failing to take appropriate steps to ensure that court employees subordinated to him/her also refrain from making comments' - also seems to be vague and may result in a disproportionate response. [...] A judge, while making certain public comments or statements during the deliberation may indeed harm the reputation and credibility of the court. It would, however, be unreasonable to punish a judge where a court employee, who is subordinated to him or her, fails to refrain from making similar comments. [...]"

CDL-AD(2014)008, Opinion on the draft Law on the High Judicial and Prosecutorial Council of Bosnia and Herzegovina, §105

"[In the draft code on judicial ethics] [t]here is a requirement of judges […] not to disclose ***any*** information in the performance of their duties which seems excessive. It would be appropriate to refer to confidential information. […]"

CDL-AD(2013)035, Opinion on the draft Code on Judicial Ethics of the Republic of Tajikistan, §61
See also CDL-AD(2018)033, Opinion on the draft law amending the law on Courts of "the former Yugoslav Republic of Macedonia", §47; CDL-AD(2015)042, Opinion on the Laws on the Disciplinary Liability and Evaluation of Judges of "The Former Yugoslav Republic of Macedonia", §30

"Ss. 8 speaks of a 'violation of the regulations or otherwise violating the independence of judges during trial', which is categorised as a severe violation. A clearer description of actions which constitute violations of judicial independence should be included. […]
Ss. 11 lists as a severe disciplinary violation a 'more severe violation of public law and order, which undermines [a judge's] reputation and the reputation of the court.' This provision likewise lacks sufficient clarity and foreseeability. While a 'more severe violation of public law and order' may be statutorily defined in other laws (for example, a code on minor offences, called in some other jurisdictions 'administrative offences', or elsewhere), the requirement that the conduct also undermines the judge's reputation and the reputation of the court is open to subjectivity, and should be excluded or narrowed to more specific types of offences.
[...]
S. 1, ss. 2 lists as a 'serious' violation 'misuse of office and exceeding official authorisation'. This provision is extremely broad as it can be interpreted as sanctioning any judicial act not permitted by law. This has the potential to have a chilling effect on the independence."

CDL-AD(2015)042, Opinion on the Laws on the Disciplinary Liability and Evaluation of Judges of "The Former Yugoslav Republic of Macedonia", §§31, 33 and 42

"[...] [I]nsofar as several repeated less serious disciplinary violations are regarded as a 'gross violation', it is necessary to indicate the time-period within which such violation may have this effect by accumulation. [...]"

CDL-AD(2017)019, Opinion on the Draft Judicial Code of Armenia, §158

"[...] [I]nappropriate behaviour of a judge in public which harms the image of the judiciary may constitute a ground for disciplinary liability. [...] [I]n the event that such inappropriate behaviour in public is serious or repeated, it must even constitute a ground for the dismissal of a judge […]"

CDL-AD(2018)033, Opinion on the draft law amending the law on Courts of "the former Yugoslav Republic of Macedonia", §59.

"[…] [N]ot all training should be mandatory and only non-attendance of mandatory trainings should be taken into consideration when deciding whether or not a judge failed to fulfill his/her duty of continuous training."

CDL-AD(2018)033, Opinion on the draft law amending the law on Courts of "the former Yugoslav Republic of Macedonia", §60

"[…] To serve as a ground for dismissal, "bad evaluation" should convincingly demonstrate total ineptitude of the judge to perform judicial functions. […]"

CDL-AD(2019)008, Opinion on the Draft Law on the Judicial Council of North Macedonia, §56

### 3.4.2.2 Disciplinary sanctions – types and proportionality

"It is a universally acknowledged principle that interfering actions of the public administration must always follow the principle of proportionality. As concerns criminal and disciplinary sanctions, the principle asks for a reasonable relationship between the seriousness of the offence, on the one hand, and the quality and the amount of the sanction, on the other."

CDL-AD(2014)039, Amicus Curiae Brief for the Constitutional Court of Moldova on certain provisions of the law on professional integrity testing, §72
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", §57; CDL-AD(2014)039, Amicus Curiae Brief for the Constitutional Court of Moldova on certain provisions of the law on professional integrity testing, §§67, 68, 71 and 75

"Article 6.1 prescribes four different types of disciplinary sanctions, namely warnings, reprimands, reductions of salary, and removal from office.

Having a reasonable range of possible sanctions facilitates compliance with the principle of proportionality […]. From this point of view, the authors of the draft may also wish to consider adding 'temporary suspension from office' as another possible disciplinary sanction. Other possible sanctions could be withdrawal of cases from a judge, or moving a judge to other judicial tasks."

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, §§37-38
See also CDL-AD(2011)004, Opinion on the Draft Law on Judges and Prosecutors of Turkey, §63

"[…] Only deliberate abuse of judicial power or repeated and gross negligence should give rise to a disciplinary violation; the disciplinary system should use less drastic sanctions for smaller violations; dismissal of a judge should only be ordered in exceptionally serious cases; […]"

CDL-AD(2015)042, Opinion on the Laws on the Disciplinary Liability and Evaluation of Judges of "The Former Yugoslav Republic of Macedonia", §113

"As concerns reduction of salary […] it is recommended to specify that reduction of salary may be applied only in cases of deliberate wrongdoing and not in cases having more to do with performance.
As concerns 'removal from office' [it] should be reserved to most serious cases or cases of repetition. It could also be applied in cases of incapacity or behaviour that renders judges unfit to discharge their duties."

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, §§41-42

"[...] [A]mongst the sanctions the Draft Law mentions a temporary transfer of a judge to another court. This is most unusual – the judges are generally transferred from one court to another to support the normal functioning of the latter, i.e. as an organisational measure and not as a punishment. In addition, transferring a judge even for a short period of time is a very costly option, as the judge concerned should be given appropriate housing and otherwise compensated for the

drastic change of his lifestyle. In absence of such compensations a transfer may be a much more serious measure than, for instance, a reduction of salary. [...] Hence, it is recommended not to use transfer as a disciplinary sanction."

> CDL-AD(2015)042, Opinion on the Laws on the Disciplinary Liability and Evaluation of Judges of "The Former Yugoslav Republic of Macedonia", §59

"[…] According to Article 97, paras 3, 4, it is considered to be a 'severe disciplinary offense' when a judge '4. Unjustifiably fails to recuse himself/herself in the cases in which there is a reason for his/her recusal'. The reasons on the basis of which a judge has to recuse himself/herself should be determined and defined by the law. The decision of a judge not to recuse him/herself should only be considered a 'very serious offense' in cases in which there is manifestly a reason for his/her recusal and not in cases in which this decision is based on his or her interpretation of the law."

> 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, §65
> See also CDL-AD(2018)033, Opinion on the draft law amending the law on Courts of "the former Yugoslav Republic of Macedonia", §38

"All of the privileges provided to a judge, as well as retirement benefits, can be withdrawn pursuant to a decision terminating the powers of a judge by the Disciplinary and Qualification Board or a decision by the Judicial Jury according to Article 55-1. The termination of all benefits may be justified in certain cases, however, the sanction imposed should be proportionate to the violation in the individual case. The present provision does not in sufficient detail outline the connection between the breaches of ethics or other offences and the sanction. It is recommended that the provision is further elaborated and describes in more detail which offence or misdemeanour can trigger which sanction."

> CDL-AD(2011)012, Joint Opinion on the constitutional law on the judicial system and status of judges of Kazakhstan by the Venice Commission and OSCE/ODIHR, §54

### 3.4.2.3 Examination of disciplinary cases against judges – procedural aspects

3.4.2.3.1 Who may initiate disciplinary proceedings and decide thereon

"[…] [T]he Venice Commission considers that, having given the power to any member of the Judicial Council to initiate disciplinary proceedings against a judge, the Law might limit the competence of all other subjects mentioned in Article 110 of the Law (Commission for the Code of Ethics, court president and president of the immediately higher court) to simply "informing" the Judicial Council. This is to be read in light of the fact that *"[j]udicial independence is not only the independence of the judiciary as a whole vis-à-vis the other powers of the State, but it has also an "internal" aspect. Every judge whatever his place in the court system, is exercising the same authority to judge. In judicial adjudication he or she should therefore be independent also vis-à-vis other judges and also in relation to his/her court president or other (e.g. appellate or superior) courts"*."

> CDL-AD(2022)050, Opinion on the draft amendments to the Law on the Judicial Council and Judges of Montenegro, §68
> CDL-AD(2010)004, Report on the Independence of the Judicial System Part I: The Independence of Judges, 71
> CDL-AD(2014)032, Joint Opinion of the Venice Commission and the Directorate of Human Rights (DHR) of the Directorate General of Human Rights and Rule of Law (DGI) of the Council of Europe on the draft law on making changes to the law on disciplinary liability and disciplinary proceedings of judges of General Courts of Georgia, §23

"The Venice Commission […] recommends shifting the power of initiation from the Minister of Justice to the CSM, that should be able to initiate the disciplinary proceedings also *ex officio*, and should be able to request the IGSJ to carry out an investigation. The Venice Commission welcomes the fact that in the current draft organic law, broader powers of investigation would be assigned to the filtering panel (*commission d'admission des requêtes*)."

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, §67

"As regards the dismissal of judges, here again the President [of the Republic] plays a crucial role. As regards ordinary judges, they are revoked by a presidential decree, on the basis of a decision of the Judicial Jury. Again, it is not clear to what extent the President is bound by the opinion of the Judicial Jury in this respect. In the opinion of the Venice Commission, when it comes to the dismissals, the President should follow the proposal of the Judicial Jury, and, in case of disagreement, should at least be required to state reasons for this. In addition, there should be an appeal against the decision by Judicial Jury to a court."

CDL-AD(2018)032, Opinion on the Concept Paper on the reform of the High Judicial Council of Kazakhstan, §16

"[…] Any action to remove incompetent or corrupt judges had to live up to the high standards set by the principle of the irremovability of the judges whose independence had to be protected. It was necessary to depoliticise any such move. A means to achieve this could be to have a small expert body composed solely of judges giving an opinion on the capacity or behaviour of the judges concerned before an independent body would make a final decision."

CDL-AD(2003)012, Memorandum: Reform of the Judicial System in Bulgaria, §15

"[…] It would be dangerous to give every person the right to initiate proceedings for the dismissal of a judge. A complaints mechanism for individuals should exist for cases where the judge has misbehaved, but such a complaint should not directly result in initiating dismissal proceedings of the judge."

CDL-AD(2013)005, Opinion on Draft amendments to Laws on the Judiciary of Serbia, §68

"[…] According to Article 19.1.a the notification regarding the committed actions which may constitute disciplinary offenses committed by judges can be submitted by 'any interested person'. This right should be limited either to persons who have been affected by the acts of the judge or to those who have some form of '*legal interest*' in the matter.

According to Article 21, notification on actions that may constitute disciplinary offences shall be filed with the secretariat of the Superior Council of Magistracy, which does not investigate. Investigations are the task of the inspector-judges to whom cases are distributed on a random basis. These provisions are to be welcomed.

Article 26 seems to limit the role of the inspector-judge to preparing and substantiating the disciplinary case file. Inspector-judges should have a strengthened role and in particular should be responsible for drafting the disciplinary charges. Such a provision should be usefully added to the draft Law which is silent on this aspect of the procedure. The inspector-judge would be the best placed for this since the admissibility panel should act only as a filter – deciding on the admissibility – but should not be involved in the drafting of charges."

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, §§64, 68, 69 and 71
See also CDL-AD(2016)013, Opinion on the Draft Code of Judicial Ethic of the Republic of Kazakhstan, §46

"[…] The third actor who may bring a disciplinary case to the SJC is the Minister of Justice. The Venice Commission made critical observations with regard to a comparable provision in Montenegro: "Article 99 grants the Minister of Justice the right to initiate disciplinary proceedings against judges. It may be asked whether this is in harmony with the independence of the judiciary and the principle of the separation of powers". […] However, in the October 2017 Opinion (see § 136) the Venice Commission stated that since the Minister may bring disciplinary cases before the SJC on the equal footing with the Disciplinary Commission, and since the Minister does not play any role in the decision-making, the involvement of the Minister of Justice at the stage of initiation of the disciplinary proceedings is not objectionable. […] At the same time, since the EDC has a more diverse composition than its predecessor, it is possible to envisage that the power of the Minister could be phased out once the new system is up and running."

CDL-AD(2019)024, Joint Opinion of the Venice Commission and the Directorate of Human Rights (DHR) of the Directorate General of Human Rights and Rule of Law (DGI, on the amendments to the Judicial Code and some other Laws of the Republic of Armenia, § 30

"Article 99 grants the Minister of Justice the right to initiate disciplinary proceedings against judges. It may be asked whether this is in harmony with the independence of the judiciary and the principle of the separation of powers."

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, §68

"[...] Under the Draft Amendments the Minister [of Justice] will participate in the work of the [High Judicial] Council as an 'observer'; at the same time s/he plays an active role with regard to the HJC (for instance, he may initiate the investigation into disciplinary misconduct against judges). If the Minister is to have powers to initiate proceedings against judges, it should be made clear that he plays no further role at any meeting of the Council at which the matter is discussed, even as an observer (while he may present a case as a 'party'). [...] [I]f the Minister initiates proceedings against a judge, the Minister should not sit as an *ex officio* member of the Disciplinary Tribunal [...], which reviews the disciplinary sanctions applied by the Council."

CDL-AD(2015)045, Interim Opinion on the Draft Constitutional Amendments on the Judiciary of Albania, §62
See also CDL-AD(2017)019, Opinion on the Draft Judicial Code of Armenia, §136; CDL-AD(2017)033, Opinion on the Draft Law on the termination of the validity of the Law on the Council for establishment of facts and initiation of proceedings for determination of accountability for Judges, on Draft Law amending the Law on the Judicial Council, and on the Draft Law amending the Law on Witness protection of "The former Yugoslav Republic of Macedonia", §29

"[...] The Venice Commission notes that the Inspector […] shall have the status of a High Court judge (Article147/d p. 3), but in the same time s/he is to a certain extent under the control of the Minister of Justice. It is desirable to leave the executive at a certain distance from deciding on the disciplinary liability of judges. As an alternative, the Constitution could simply provide for an impeachment procedure for the Inspector for gross misbehaviour, with the Disciplinary Tribunal having the final word on the issue."

CDL-AD(2016)009, Final Opinion on the revised draft constitutional amendments on the Judiciary (15 January 2016) of Albania, §33

"[…] There is nothing wrong with entrusting the Minister with the inspection functions, or imposing on the court presidents an obligation to submit regular reports to the MoJ. However, the MoJ

should not be able to interfere with the salary of court presidents (at least not without any participation of the judiciary). [...]"

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, §114

"[…] [A] qualified majority [of 2/3 of votes] for the initiation of disciplinary proceedings creates the serious risk that too many complaints would not be followed up at this early stage because of corporatist attitudes within the High Council of Justice. A simple majority should be enough in this respect. Furthermore, draft Article 15 also requires a 2/3 majority in the High Council for the 'arraignment of the judge' on disciplinary proceedings and draft Article 60(3) requires again the same qualified majority to appeal against decisions of the Disciplinary Board. Those are too high majorities which may […] slow down, if not impede the efficient development of disciplinary proceedings as a whole. […]"

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, §24

"[…] [A] mixture of different powers in one hand, in particular, the power to initiate the proceedings and the power to adjudicate […] risks leading to problems […]."

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, §16

"[...] Indeed, a person or a body initiating a disciplinary procedure as an 'accuser' should not then take part in the determination of charges in the capacity of a 'judge'. That being said, this does not require the creation of a separate institution; a clear division of functions within the same body would suffice to address the concerns raised by the ECtHR. [...]"

CDL-AD(2015)042, Opinion on the Laws on the Disciplinary Liability and Evaluation of Judges of "The Former Yugoslav Republic of Macedonia", §73
See also CDL-AD(2018)022, Opinion on the law amending the law on the Judicial Council and on the law amending the law on Courts of "the former Yugoslav Republic of Macedonia", §22; CDL-AD(2017)033, Opinion on the Draft Law on the termination of the validity of the Law on the Council for establishment of facts and initiation of proceedings for determination of accountability for Judges, on Draft Law amending the Law on the Judicial Council, and on the Draft Law amending the Law on Witness protection of "The former Yugoslav Republic of Macedonia", §33

"There are several different and conflicting roles of the HCJ. Most notably, the body which will conduct the monitoring, will also later determine the disciplinary case on its merits. The separation of investigating and decision-making roles was the guiding principle of the previous amendments to the legislation on judiciary in Ukraine. [...] These considerations remain pertinent to the present draft law."

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), §50.

"[…] The Venice Commission […] recommends removing from the Draft Code the power of the presidents to trigger proceedings before the Ethics Commission. [...]
The Venice Commission also recommends excluding the possibility for the Ethics Commission to start the examination of the case on its own initiative, since it may raise serious doubts as to its impartiality during the ensuing consideration of it. A possible solution would be to give the right to

bring proceedings to interested persons and to any member of the Ethics Commission, who in this case should not sit on a panel deciding on the issue."

CDL-AD(2016)013, Opinion on the Draft Code of Judicial Ethic of the Republic of Kazakhstan, §§47 and 48

"[…] [T]he powers which put presidents in a hierarchically superior position *vis-à-vis* their fellow judges should be reconsidered; in particular, powers in the disciplinary field (to impose reprimands and to initiate disciplinary proceeding) and inspection powers should be withdrawn from court presidents […]"

CDL-AD(2017)018, Opinion on the Judicial System Act of Bulgaria, §113
See also CDL-AD(2017)033, Opinion on the Draft Law on the termination of the validity of the Law on the Council for establishment of facts and initiation of proceedings for determination of accountability for Judges, on Draft Law amending the Law on the Judicial Council, and on the Draft Law amending the Law on Witness protection of "The former Yugoslav Republic of Macedonia", §§26 and 27; CDL-AD(2008)041, Opinion on the Draft Amendments to the Constitutional Law on the Supreme Court and Local Courts of Kyrgyzstan, §17

"[…] The reporting member of the High Qualifications Commission, whose position is similar to that of a prosecutor, should be excluded from the deliberations and the vote."

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, §74
See also CDL-AD(2002)015, Opinion on the Draft Law on Amendments to the Judicial System Act of Bulgaria, §5

"[…] The principle of the 'natural judge' implies that disciplinary procedures have to be conducted by a disciplinary jurisdiction 'foreseen by the law'. This excludes an *ad hoc* disciplinary panel, composed on a case-by-case basis. […]"

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, §69

"[...] [T]he composition of the Judicial Inspection composed of five independent investigator-judges, who are selected in a transparent manner, as well as the detailed rules for the '*verification proceedings*' during the examination phase, are strong safeguards against any undue or illegitimate influence by the executive branch on disciplinary proceedings. [...]."

CDL-AD(2014)039, Amicus Curiae Brief for the Constitutional Court of Moldova on certain provisions of the law on professional integrity testing, §22

"Article 28 deals with the admissibility examination of the notification. A decision on admissibility is to be adopted where at least one member of the panel voted in favour of declaring the notification admissible. Rejection of the notification, on the other hand, requires a unanimous vote […]. This seems to balance the system in favour of acceptance. While this is an unusual system, it is acceptable […].

It is to be welcomed that decisions rejecting the notification shall be mandatorily motivated […]. Article 28.7 should provide that decisions of admissibility panels should be notified not only to the person who submitted the notification, but also to the judge concerned."

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, §§73-75

"The admissibility of the complaint is then confirmed by the JC. From the second paragraph of Article 52 it appears that such decision is to be taken by the plenary JC, but this solution may

seriously increase the work-load of the body. [...] [I]t would be more logical to give the power to take admissibility decisions to a smaller body within the JC, for example, to the commission entrusted with the inquiry [...].”

CDL-AD(2018)022, Opinion on the law amending the law on the Judicial Council and on the law amending the law on Courts of “the former Yugoslav Republic of Macedonia”, §20
See also CDL-AD(2019)008, Opinion on the Draft Law on the Judicial Council of North Macedonia, §§23-24

“[…] The Venice Commission recalls that in the recent series of judgments related to the operation of a judicial council in North Macedonia (The former Yugoslav Republic of Macedonia at the time of the judgments), the European Court of Human Rights made it clear that when deciding on disciplinary matters resulting in the dismissal of a judge, a judicial council had to meet the conditions foreseen by Article 6 of the ECHR.”

CDL-AD(2021)015 Opinion on the draft Law on amendments to the Law on the High Judicial and Prosecutorial Council of Bosnia and Herzegovina, §54

“[…] Article 32, in its last paragraph, requires decisions about the submission of the HCJ’s petition regarding dismissal of a judge to be taken by a simpler rather than a two thirds majority. In the light of the flawed composition of the HCJ, this is a regrettable step which would go against the independence of the judges.”

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, §46

“The creation of a Disciplinary Board [i.e. a body which examines disciplinary cases and applies disciplinary sanctions to judges] which is separate from the Superior Council of Magistracy is to be welcomed […].

Article 9.1 defines the composition of the Disciplinary Board (5 judges and 4 persons from civil society). Such a composition is to be welcomed as it should help ensure transparency, as well as community involvement in disciplinary proceedings, while also averting the risk of judicial corporatism.”

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, §§46 and 48

“[...] Imposition of the [most serious] sanction[s] in the end is in the hands of a political entity, the House of Representatives. This is problematic under European standards, even if dismissal requires a two-thirds majority of all Members of the House and is open to contestation in court. [...]”

CDL-AD(2018)028, Opinion on Constitutional arrangements and separation of powers and the independence of the judiciary and law enforcement of Malta, §52

3.4.2.3.2 Due process requirements in the disciplinary proceedings against judges

“[...] Disciplinary proceedings should be started based on factual grounds what requires reliable sources, and the decision to open a case should mention the verifiable factual background which led to the opening of the proceedings.”

CDL-AD(2015)042, Opinion on the Laws on the Disciplinary Liability and Evaluation of Judges of "The Former Yugoslav Republic of Macedonia", §81

"[…] [T]he draft law [should] be amended so as to enable the judge to be informed of the investigation as early as the preliminary investigation stage to allow him/her to benefit from his/her right to counsel in early stages. In this respect, it is not sufficient that draft Article 39(4) states that the judge may invite a counsel to the hearing before the High Council, but this right should be set out in a different article and apply to all stages of disciplinary proceedings and not only in the context of hearing before the Disciplinary Board."

> 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, §50
> 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", §§93 and 98

"The provisions concerning the right of the judge […] accused to be heard and represented before the panel seems appropriate but there is no mention of a right to be heard and represented before the Supreme Judicial Council, which takes the actual decision […]."

> CDL-AD(2009)011, Opinion on the Draft Law amending and supplementing the Law on Judicial Power of Bulgaria, §26

"The legal solution concerning the involvement of the complainant into disciplinary procedure against a judge may differ from one country to another. On one hand, in general the disciplinary liability of judges is regarded as an internal matter to the judiciary […]. On the other hand, the complainant can be the direct victim of the judge's possible disciplinary misconduct, and may have a legitimate interest in participating to the proceedings, in particular where his/her rights are infringed as a result of judge's misconduct. The input of the complainant may also serve to shed light on the concrete circumstances of a given case […]. Yet in order to guarantee the rights of the judge subjected to disciplinary procedures, the non-disclosure provisions should be effectively implemented.

[…] [T]he draft law should also provide for some indications on the consequences of disclosure of information on a disciplinary case by the complainant. It is also recommended that clear criteria be provided in Article 17(5), on the basis of which the High Council of Justice can decide whether the hearing of the complainant is necessary in a given case. Further, Article 39(7) should also indicate unambiguously whether the complainant may be invited to the hearings before the Disciplinary Board as an exception to the principle of confidentiality and under which conditions."

> 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, §§47-48
> 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", 94; CDL(1995)074rev, Opinion on the Albanian law on the organisation of the judiciary (chapter VI of the Transitional Constitution of Albania), p.4

"[The] Article sets out that the [High Judicial Council]'s sessions are open to the public and that it may decide to work in closed session in accordance with the rules of procedure. It is recommended that this be regulated by law rather than by the rules of procedure and clear criteria for in camera proceedings should be provided.
It is, however, also important that provisions be included which allow the judge – whose position is being deliberated on – to request a closed session, especially where disciplinary proceedings are concerned. […]"

> CDL-AD(2014)028, Opinion on the Draft Amendments to the Law on the High Judicial Council of Serbia, §§35 and 37

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", §91

"[…] [P]ublicity should also be the guiding principle for later stages of disciplinary proceedings. […] [T]he draft Article 30(4), according to witch 'Sessions of the Disciplinary Board shall be closed', is problematic. First, it is recommended that sessions, as a general rule, be held in public and be held in camera only exceptionally, at the request of the judge and in the circumstances prescribed by law. Secondly, it is not clear from the wording of Article 30(4) whether the judge's request for publicity, as in the procedure before the High Council […], constitutes an exception to the principle of confidentiality of sessions of the Disciplinary Board or only of information related to the hearings. […]"

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, §§26
See also 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, §60

"Article 31 […] provides in paragraph 3 that 'Repeated absence and in the absence of pleas alleging of the judge or of the person who filed the notification or of their representatives at the meeting of the Disciplinary Board shall not prevent its consideration". This provision is to be welcomed as it is a preventive tool against obstructive non-appearances before the Board.
Article 31.5 further states that 'The Board member appointed reporter or any member of the Disciplinary Board may require hearing of witnesses or to other persons within meeting of examination of disciplinary case'. The judge whose case is considered by the Board should be provided with similar rights."

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, §§77 and 78

"Concerning the complaints procedure about the judges performance […], it can be indeed be regulated in the rules of procedure. However, the law should require clearly the publication of the decisions taken in this respect in order to ensure transparency and accountability.

Finally, Article 52.5, which provides that the record of the disciplinary proceedings taken will be deleted after 2 years seems to establish a period too short to allow the appropriate information to be available when considering promotion procedures or future disciplinary cases."

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, §§41 and 44

"With respect to Article 60, it should be clarified what is meant by 'open records'. The right of personality has to be protected. Therefore, it may not be appropriate to include medical reports in open records as well as disciplinary and penal investigations and prosecutions, at least if they have not resulted in sanctions. If there have been sanctions, only sanctions for severe violations should be included in open records. In any case, access to the file should be regulated, i.e. not just anyone should have access to this information."

CDL-AD(2011)004, Opinion on the Draft Law on Judges and Prosecutors of Turkey, §58

"[…][W]hile the body deciding or recommending on promotions should have access to evaluations, the judge in question should have the opportunity to explain or challenge any adverse finding before that body. […]"

> CDL-AD(2014)007, Joint opinion on the draft law amending and supplementing the judicial code (evaluation system for judges) of Armenia, §23

"[…] [T]he representative [of the High Council of Justice] should at least be obliged to provide reasons for dropping the case, not only because of the requirements of the principle of legal certainty but also in order to protect the professional and personal reputation of the judge in question."

> 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, §62

"It is thus recommended to supplement the draft law to clearly indicate that in case a procedural issue is not regulated in the Law on Disciplinary Liability, one of the procedural codes can be applied by analogy and to state that only the evidence collected in compliance with the rules of evidence contained in that code will be admissible. The fact that the criminal procedural codes provide generally better safeguards to ensure the fairness of the procedure should be taken into account."

> 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, §34

"The random case distribution [amongst members of the Disciplinary Board] […] is to be welcomed."

> 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, §60

"The presumption of innocence, amongst others, laid down in Article 6.2 ECHR, is supposed to apply during the entire criminal (or disciplinary) procedure. [...]"

> CDL-AD(2014)039, Amicus Curiae Brief for the Constitutional Court of Moldova on certain provisions of the law on professional integrity testing, §51

"[…] [T]he use of such means as covert video and audio recordings (Article 12.5) [by professional integrity testers] without any warrant from an independent body, is questionable and raises concern with respect to the right to private life of a judge as well as with respect to the independence of the judiciary in general."

> CDL-AD(2014)039, Amicus Curiae Brief for the Constitutional Court of Moldova on certain provisions of the law on professional integrity testing, §39

"[…] Sanctions applicable to court president should be governed by the same rules as disciplinary measures applied in respect of ordinary judges. This is particularly true in Poland, where court presidents are very powerful and play an important role in the case-processing [...]"

> 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, §116

“Article 67 of the Law on Courts provides that the judge may be suspended pending the disciplinary procedures in case of “initiated procedure for establishing liability”. [...] Suspension should not follow *automatically* the commencement of the procedure. Such decisions should be taken only in the most serious cases, and the JC (or a body within the JC) should have a discretion in these questions, by taking a case-by-case decision.”

CDL-AD(2018)022, Opinion on the law amending the law on the Judicial Council and on the law amending the law on Courts of “the former Yugoslav Republic of Macedonia”, §27

See also CDL-AD(2018)033, Opinion on the draft law amending the law on Courts of “the former Yugoslav Republic of Macedonia”, §66

“The next question is the majority required to take a decision in a disciplinary case. [...]
While the Venice Commission expressed a preference for a simple majority, there is no hard international standards on this point. If the legislator fears judicial corporatism, it is better to avoid a 2/3 majority rule; by contrast, if the aim is to protect the judges from political pressure the 2/3 majority may be helpful. [...]
[...]
[...] As regards the 2/3 majority requirement, the authorities might wish to consider intermediate solutions: for example, a higher majority may be required for the dismissals, whereas lesser disciplinary sanctions may be imposed by a simple majority. When the simple majority in favour of a lesser disciplinary sanction is not reached, the case may be considered as dropped.“

CDL-AD(2018)022, Opinion on the law amending the law on the Judicial Council and on the law amending the law on Courts of “the former Yugoslav Republic of Macedonia”, §§30, 31 and 34

“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

“Although the draft provision has been modified and included the phrase “member of the Judicial Council who filed the motion for establishing disciplinary liability of the judge”, still does not provide for an absolute exclusion of a member of the Judicial Council who files a disciplinary motion but conditions their exclusion on “circumstances that cause doubt about the impartiality” of that person. The Venice Commission recalls that in disciplinary proceedings a person who initiates the inquiry should not decide on the case; in simple terms the member initiating the disciplinary procedure as an “accuser” should not then take part in the determination of charges in the capacity of a “judge”. A clear distinction between the authority initiating proceedings and the authority making decisions in this context upholds and safeguards impartiality.”

CDL-AD(2024)012, Montenegro – Urgent Follow-up Opinion on the revised draft amendments to the Law on the Judicial Council and Judges, §51.

3.4.2.3.3 Appeals against disciplinary decisions

“[…] [A] judicial council should have a decisive influence on the […] promotion of judges and (maybe via a disciplinary board set up within the council) on disciplinary measures against them. An appeal against disciplinary measures to an independent court should be available.”

CDL-AD(2007)028, Report on Judicial Appointments by the Venice Commission, §25

See also 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, §53; CDL-AD(2016)009, Final Opinion on the revised draft constitutional amendments on the Judiciary (15 January 2016) of Albania, §62; CDL-AD(2014)008, Opinion on the draft Law on the High Judicial and Prosecutorial Council of Bosnia and Herzegovina, §110

"[…] Once the disciplinary panel of the Supreme Judicial Council has found in favour of the judge, this decision should be final. […]"

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

"[…] [A] future law on the status of magistrates should provide for judicial review of decisions affecting judges and prosecutors more generally, prior to the review exercised by the Constitutional Court."

CDL(1995)074rev, Opinion on the Albanian law on the organisation of the judiciary? (chapter VI of the Transitional Constitution of Albania), p.4
See also CDL-AD(2017)019, Opinion on the Draft Judicial Code of Armenia, §§144 and 145

"The need for provisions that introduce an appeal to a court of law should not be limited to disciplinary sanctions, but should also cover other acts that have negative effects on the status or the activities of judges, for instance: denial of a promotion, adding (negative) comments to files, class allocation, changes of location etc. […]"

CDL-AD(2011)004, Opinion on the Draft Law on Judges and Prosecutors of Turkey, §76
See also CDL-AD(2019)008, Opinion on the Draft Law on the Judicial Council of North Macedonia, §§58-59

"[...] [I]t is very important that the composition of the appellate judicial body be predetermined by law. Normally the disciplinary decisions should be reviewed by a judicial impartial body […], which decides with all the guarantees of the judicial proceeding."

CDL-AD(2015)042, Opinion on the Laws on the Disciplinary Liability and Evaluation of Judges of "The Former Yugoslav Republic of Macedonia", §96

"The disciplinary system does not provide for a right of appeal to challenge the decision of the Supreme Court and subsequent sanction. [...] Whilst the Venice Commission and the European Court have consistently recommended a right to appeal against decisions on disciplinary sanctions, [...] this safeguard should be fulfilled when the decision in the first instance is taken by the Supreme Court as the highest tribunal, which, even for criminal matters within the meaning of Article 6 ECHR, is accepted by Article 2(2) of Protocol no. 7 of the ECHR. [...] However, as regards the possibility for the Vice-President to issue a written warning, a remedy to an independent instance should also be provided."

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, §35

"[…] Every appeal against disciplinary proceedings should prevent the decision from becoming final until the appeal is determined (not only decisions to dismiss a judge from the office of Court chairman or from office as a judge as provided in Article 38.2).

[…]

Article 40 provides that decisions of the Superior Council of Magistracy can be appealed to the Supreme Court of Justice 'by people who have filed complaints, judicial inspection or the judge concerned'. It is not clear why the judicial inspection should be allowed to appeal. The appeal should be allowed to the parties concerned – the complainant and the judge concerned."

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, §§81, 84

"It is important […] that the appeal instance qualifies as a 'court', i.e. provides for sufficient procedural guarantees and is institutionally independent. In addition, in developing this model the authorities should ensure that the functions of initiating disciplinary proceedings, imposing a disciplinary sanction and deciding on appeals are clearly separated; for example, a person who triggered a disciplinary case should not participate in the subsequent decision-making.
Finally, the Venice Commission recalls that 'Judicial Councils should have a certain discretion, which must be respected by the appellate body'. In exercising its appellate review the appellate body should act with deference to the SJC (or any other body or panel within the SJC imposing the disciplinary sanction), especially as regards the establishment of the factual circumstances and interpretation of the relevant rules of conduct."

CDL-AD(2017)019, Opinion on the Draft Judicial Code of Armenia, §§150-151
See also CDL-AD(2019)008, Opinion on the Draft Law on the Judicial Council of North Macedonia, §§34-35; 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, §§82, 83

"The performance of the Presidents of the most senior courts and the Chief Prosecutor are assessed by the relevant sub-council. […] There is an appeal to the HJPC itself. Assessment of performance is to be taken into account when making appointments to senior positions. In addition, where the President of a court or the Chief Prosecutor receives one of the two lowest assessments he or she loses office. Given the importance of these assessments the specific statement that the appeal to the HJPC is final and no remedies shall be available seems difficult to justify. An appeal should lie to a court of law."

CDL-AD(2014)008, Opinion on the draft Law on the High Judicial and Prosecutorial Council of Bosnia and Herzegovina, §92

"Article 97 describes the process of reopening of a disciplinary case if the ECtHR has established that the judge's rights have been violated in the disciplinary proceedings. […] The reopening of the proceedings should be possible where it is dictated by the findings of the ECtHR, but not mandatory in all cases where a violation of the European Convention has been found."

CDL-AD(2017)033, Opinion on the Draft Law on the termination of the validity of the Law on the Council for establishment of facts and initiation of proceedings for determination of accountability for Judges, on Draft Law amending the Law on the Judicial Council, and on the Draft Law amending the Law on Witness protection of "The former Yugoslav Republic of Macedonia", §41

3.4.3 Judicial ethics: duty of restraint, conflicts of interest etc.

"[…] Judges should not put themselves into a position where their independence may be questioned […].

Although there are countries in Europe and beyond that have achieved high standards of judicial conduct without adopting a code of conduct or ethics for judges, the Council of Europe recommends that a code be adopted: […].

In addition, 'new democracies' of Central and Eastern Europe and of Central Asia tend to acknowledge the need for establishing codes of professional conduct as part of an overall judicial reform. […]

Such a code, or in other words a statement of standards of professional conduct, should also not be seen as a piece of legislation or other provisions of a legal nature, and it should be the judges and their organisation(s) that take the responsibility for the implementation of such a code.

[…] A code of ethics should not be directly applied as a ground for criticism or disciplinary sanctions. Guidelines provide the principles which enable judges to assess how to address specific issues which arise in conducting their day-to-day work, whereas disciplinary procedures are designed to police misconduct and inappropriate conduct which calls out for some form of disciplinary sanction.

[…] The purpose of a code of ethics is entirely different from that achieved by a disciplinary procedure and using a code as a tool for disciplinary procedure has grave potential implications for judicial independence.

However, serious violations of ethical norms could also imply fault and acts of negligence that should, in accordance with the law, lead to disciplinary sanctions. Judges may be held accountable accordingly for their unethical conduct by appropriate institutions, which are themselves independent and impartial, and are intended to supplement and not to derogate from existing rules of law and conduct which bind the judge. There will always be a certain interplay between the principles of ethical conduct and those of disciplinary regulations. In order to avoid the suppression of the independence of a particular judge on the basis of general and sometimes vague provisions of a code of ethics, sanctions have to rely on explicit provisions in the law and should be proportionate to and be applied as a last resort in response to recurring, unethical judicial practice."

> CDL-AD(2013)035, Opinion on the draft Code on Judicial Ethics of the Republic of Tajikistan, §§8, 12-13, 15 and 16, 30-31
> See also CDL-AD(2018)033, Opinion on the draft law amending the law on Courts of "the former Yugoslav Republic of Macedonia", §58; CDL-AD(2016)013, Opinion on the Draft Code of Judicial Ethic of the Republic of Kazakhstan**,** §§6, 7; CDL-AD(2015)042, Opinion on the Laws on the Disciplinary Liability and Evaluation of Judges of "The Former Yugoslav Republic of Macedonia", 32; CDL-AD(2014)018, Joint opinion of the Venice Commission and OSCE/ODIHR on the draft amendments to the legal framework on the disciplinary responsibility of judges in the Kyrgyz Republic, §§25-27

"At the same time, serious violations of ethical norms could also imply fault and acts of negligence that may lead to disciplinary sanctions. However, such disciplinary sanctions must be based on explicit and clear provisions in the law and should be applied in a proportionate manner in response to recurring, unethical judicial practice. For this reason, the Venice Commission has seen it necessary that the law on the Judiciary enumerate an exhaustive list of specific disciplinary offences, rather than giving a general definition of disciplinary offence which may lack clarity and foreseeability."

> CDL-AD(2024)004 - Bulgaria - Joint Opinion on the Code of Ethical Conduct for Judges, § 18.

"In its previous opinions, the Venice Commission noted instances where laws provided for disciplinary offenses in general terms, such as "judicial ethics rules that undermine the authority of justice"18, "regular violations of or grave violation by the judge of the Code of Conduct"19, "disreputable offence contrary to the judicial ethics"20 or "violation of the rules of the Code of Ethics"21. The Commission deemed such provisions inappropriate due to their lack of clarity and

foreseeability in application. The Bulgarian Law on the Judiciary contains a similar vague provision (Article 307, para. 3(3)). The direct integration of the Code into the disciplinary system is further complicated by the absence of safeguards preventing any provision of the Code, even those that are very general and vague, from being used to initiate disciplinary proceedings against a judge. Consequently, the Venice Commission and DGI recommend a review of this part of the Law, emphasising the importance of determining clear grounds for disciplinary liability within statutory legislation. Furthermore, in their submitted comments, the Bulgarian authorities noted that in the proposed amendments to the Law on the Judiciary, a disciplinary offence would be defined as a significant violation of the Code. However, this proposed solution fails to adequately address the ongoing concerns regarding legal foreseeability, as previously discussed."

CDL-AD(2024)004 - Bulgaria - Joint Opinion on the Code of Ethical Conduct for Judges, § 20.

"[…] [I]t is important to ensure a strict separation of duties and responsibilities between the advisory body on ethics and the disciplinary body, since the judge should not have to face the risk that his/her request to the advisory body on ethics be transferred to another procedure that could result in a disciplinary sanction. […]"

CDL-AD(2014)018, Joint opinion of the Venice Commission and OSCE/ODIHR on the draft amendments to the legal framework on the disciplinary responsibility of judges in the Kyrgyz Republic, §30
See also CDL-AD(2017)019, Opinion on the Draft Judicial Code of Armenia, §62

"Furthermore, it is important to expressly specify in the Code and then secure in practice the availability of formal and informal guidance and consultation mechanisms within the judiciary to help judges apply ethical rules in their daily work. The bodies providing ethical advice should be distinct and well differentiated from the disciplinary organs. The opinions obtained through these mechanisms should serve as confidential recommendations to judges. While adherence to such advisory opinions is not mandatory, it might be viewed as indicative of acting in good faith."

CDL-AD(2024)004 - Bulgaria - Joint Opinion on the Code of Ethical Conduct for Judges, § 52.

"The Commission and DGI consider that the Code [of Ethical Conduct of Judges] should retain its significance as a vital self-regulatory tool within the judiciary, ensuring that judges conduct themselves in a manner that upholds public trust in the judiciary in a democratic society. Equipped with its implementation mechanisms (discussed below), the Code should be considered and function as a source of guidance exemplifying best practices for judges' ethical conduct. Thus, it would preserve its distinct but complementary character vis-à-vis statutory legislation concerning judicial discipline."

CDL-AD(2024)004 - Bulgaria - Joint Opinion on the Code of Ethical Conduct for Judges, § 22.

"[...] [A]s to the retired judges, their behaviour may affect the image of the judiciary and may, at least to some extent, be regulated by the Code. However, the requirements for a retired judge cannot be the same as for an active judge, and this should be properly reflected in the Draft Code. For example, the involvement in the public life is probably one of the areas where drastic limitations which may be justified for the serving judges are not necessary in respect of former judges. […]"

CDL-AD(2016)013, Opinion on the Draft Code of Judicial Ethic of the Republic of Kazakhstan, §42
See also CDL-AD(2013)035, Opinion on the draft Code on Judicial Ethics of the Republic of Tajikistan, §§40-41

"The Code presently does not apply to former judges. However, it might be appropriate to consider in respect of certain specific areas expanding the application of the Code to judges who have

ceased to hold their offices, to the extent that their behaviour may still affect the image of the judiciary. The requirements for a former judge cannot be the same as for a judge in office, but the Code should continue to apply to former judges where relevant, for instance in respecting the secrecy of deliberations or maintaining confidentiality. The involvement in the public life is probably one of the areas where the limitations for the former judges should not be necessarily the same as for the serving judges. Restrictions on freedom of expression, political activities, legal practice must be less stringent with regard to the individuals once they cease to hold the judicial office or after certain cooling-off period since the termination of their judicial service. In terms of freedom of speech, the general approach should be that no restrictions apply unless carefully justified by the necessity of preserving the reputation of the judiciary, the confidentiality of the proceedings and the rights of those involved in the proceedings."

CDL-AD(2024)004 - Bulgaria - Joint Opinion on the Code of Ethical Conduct for Judges, § 31.

"The Code is designed to regulate the conduct of judges not only while they are performing their duties, but also in their personal and family lives. This follows from the preamble to the Code as well as Section I which states under the title "Basic Principles" that they "set the standards and outline the framework for regulating the conduct of judges in and outside the office they hold". It is entirely reasonable to expect that judges uphold high ethical standards not only while on duty, but also in their personal and family lives. This naturally entails certain limitations on judges' social and personal activities, as will be discussed in the relevant sections below. Ethical issues that may only arise during off-duty activities (for example, in various social and private events, during communication with media, in the scientific or teaching assignments) should be determined on case-by-case basis with reference, as much as relevant, to the ethical standards determined in the Code, within reasonable limits. Ethical regulation of judges' private activities should be approached prudently and with restraint to avoid undue restrictions on their personal rights and freedoms while still serving its intended purpose. On the other hand, it is evident that majority of the rules deal with the conduct of judges during the performance of their duties."

CDL-AD(2024)004 - Bulgaria - Joint Opinion on the Code of Ethical Conduct for Judges, § 33.

"This Article states that the chairman of the court, chief, Judicial Legal Council Secretariat, proper executive body or other persons that has been given authority by the chairman is the official representative of the court or Judicial Legal Council Secretariat or proper executive body in relationship with editorial offices of the mass media.

The aim of this Article could be understood as being that persons who have not received an authorisation by the chairman are not allowed to be in contact with journalists. This would limit the publicity of courts' activities. Furthermore, it should be noted that the chairman of the court has no authority to intervene in the decision-making process and statements of courts are public."

CDL-AD(2009)055, Opinion on the Draft Law about obtaining information on activities of the Courts of Azerbaijan, §§49, 50

"[…] [J]udges should indeed exercise caution while discussing or criticizing the work of their colleagues. Indeed 'they shall refrain from public statements or remarks that may undermine the authority of the Court or give rise to reasonable doubt as to their impartiality'.

However, judges should not be limited in their freedom to discuss shortcomings of the judiciary outside the circle of their colleagues (for instance, at events such as seminars, conferences, in academic or educational circles). Judges must not fear sanctions for expressing their views publicly on issues that are problematic for the judiciary."

CDL-AD(2013)035, Opinion on the draft Code on Judicial Ethics of the Republic of Tajikistan, §§65-66
See also CDL-AD(2016)013, Opinion on the Draft Code of Judicial Ethic of the Republic of Kazakhstan, §§56, 66

"[…] [S]hould [the prohibition for a judge of] […] 'speaking in support or against any political party' be interpreted as including speech on the functioning of the judicial system, the fact that this may lead to dismissal would constitute a disproportionate interference."

CDL-AD(2014)018, Joint opinion of the Venice Commission and OSCE/ODIHR on the draft amendments to the legal framework on the disciplinary responsibility of judges in the Kyrgyz Republic, §34

"[…] Article 21 prevents judges from criticizing publicly the laws and legal policies of the State. […] 'Critical assessment' of such norms which is a necessary part of the process of adjudication is perfectly admissible, and the Draft Code should expressly allow it (even when it is expressed in open procedural documents). As regards more abstract criticism, not connected to the adjudication of a specific case, indeed, the judge should speak with caution, especially when expressing him/or herself on a *fora* accessible to the general public (as opposed to more closed discussions amongst the professionals of the law; thus, the exception covering 'the scientific and practical conferences, round tables, seminars and other events of educational character', where it is possible for the judge to express critical views, is reasonable). However, judges should not be excluded from sharing experiences and giving voice to opinions on legislative matters. […]"

CDL-AD(2016)013, Opinion on the Draft Code of Judicial Ethic of the Republic of Kazakhstan, §67

"The Venice Commission admits that *manifest, gross and deliberate* disregard of procedural rights of one of the parties which resulted in a denial of justice may exceptionally lead to a disciplinary liability. That being said, the Venice Commission always warned the States from disciplining judges for errors of law or of fact [...]. If these provisions are to remain in the Code as 'ethical obligations', and if they may ultimately lead to the disciplinary liability, the Code should make it clear that procedural errors are to be corrected primarily through the system of appeals, and not through disciplinary liability. It is only when a judge has roughly and systematically infringed his/her own competence that such procedural errors can be considered as a ground for a disciplinary sanction."

CDL-AD(2016)013, Opinion on the Draft Code of Judicial Ethic of the Republic of Kazakhstan, §53

"The obligation to report on the facts of illegal interference in judicial activity (Article 9 p. 4) is not only an ethical norm but should be regarded as a legal obligation. The 'illegal interference' and 'direct or indirect pressure' on a judge is a *crime* and must be reported to the prosecuting authorities in all cases. Moreover, the judge should report to the competent authorities even in cases where there is only an *appearance* of 'interference' or 'pressure' and let them decide whether there is a case to answer."

CDL-AD(2016)013, Opinion on the Draft Code of Judicial Ethic of the Republic of Kazakhstan, §55

"This Article is intended to prevent the judge from showing any signs of religious, political, ethnic or other affiliation and is to be welcomed. The references to 'signs' and to 'such insignia' suggest that it is only physical emblems which are covered. The prohibition should also extend to conduct such as praying or religious gestures or utterances."

CDL-AD(2013)015, Opinion on the draft law on the courts of Bosnia and Herzegovina, §35
See also CDL-AD(2016)013, Opinion on the Draft Code of Judicial Ethic of the Republic of Kazakhstan, §64

"[...] Article 60 § 4 [...] *inter alia* requires the judge 'to refrain from practicing any conduct that may leave an impression of being engaged in political activities'. This is a very high standard, difficult to reach. [...] There is no doubt that 'the right of political participation' of judges (essentially the rights guaranteed by Articles 10 and 11 of the ECHR) may be legitimately restricted. Thus, a judge

may be required to carefully choose the forums where s/he speaks and the format of his public interventions. However, this rule should not prohibit the judge, as a legal expert, from expressing his views before a professional audience, in specialised journals etc., even if those views relate to policy issues."

CDL-AD(2017)019, Opinion on the Draft Judicial Code of Armenia, §54
See also CDL-AD(2016)013, Opinion on the Draft Code of Judicial Ethic of the Republic of Kazakhstan, §§62, 65

"Article 93 of the draft Law requires judges and prosecutors to provide an annual financial report concerning their activities outside their duty as a judge or as a prosecutor. However, the provision falls short of requiring a judge to declare all of his or her assets. It should be noted that full asset disclosure has proved a valuable weapon in combating corruption in other countries."

CDL-AD(2014)008, Opinion on the draft Law on the High Judicial and Prosecutorial Council of Bosnia and Herzegovina, §120

"[…] [T]he Constitution should not give a *carte blanche* to the security services to intercept all communications of a specialised judge/prosecutor and, in particular, of their family members. Any such 'review of telecommunications' should be accompanied by adequate and effective procedural guarantees, protecting those persons from abuses, and clearly described in the law [...]. While specialised judges and prosecutors may waive some of their own privacy rights, this waiver may not cover all their relatives, and the law must provide for a special mechanism to protect privacy interest of those who may accidentally be affected by the surveillance measures."

CDL-AD(2016)009, Final Opinion on the revised draft constitutional amendments on the Judiciary (15 January 2016) of Albania, §51

"[…] While judges should conduct themselves in a respectable way in their private life, it is difficult to lay down very precisely the standards applying to judges' behaviour in their off-duty activities, also considering the constant evolution in moral values in a given country."

CDL-AD(2014)018, Joint opinion of the Venice Commission and OSCE/ODIHR on the draft amendments to the legal framework on the disciplinary responsibility of judges in the Kyrgyz Republic, §29
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", §35

"The Venice Commission and DGI are of the opinion that the monitoring of "the lifestyle of judges" is not necessary and should be removed from the draft law, given that the verification of assets and personal interests is in itself an adequate and sufficient means for monitoring judges' integrity."

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, §71

"[...] While the judge may be held legally responsible for the behaviour of his/her *minor* children, the Draft Code should make it clear that the judge should not answer for his/her grown-up kids and other adults. At the same time a judge might be required to distance him/herself from those family members who infringed the law [...]."

CDL-AD(2016)013, Opinion on the Draft Code of Judicial Ethic of the Republic of Kazakhstan, §69

"Article 22 of the Draft Code goes too far when it requires that the judge should inform the president of the court and the judicial community body about the fact of the divorce and, in particularly, about the reasons thereof. The Venice Commission does not see any justification for this rule. [...]"

CDL-AD(2016)013, Opinion on the Draft Code of Judicial Ethic of the Republic of Kazakhstan, §71

"[...] [T]he duty of the judge to maintain a healthy lifestyle (see Article 29) is both unclear and excessive. […]"

CDL-AD(2016)013, Opinion on the Draft Code of Judicial Ethic of the Republic of Kazakhstan, §72

"[...] [T]he choice to state the principle of equality and non-discrimination as an ethical principle is questionable (even if it can be found in the Bangalore principles and some other ethical codes). To treat the parties without discrimination is, first of all, a legal obligation of the judge.
Article 11 establishes the duty of a judge to inform competent authorities about attempts to bribe him/her. Again, this should be a *legal obligation*, not only a moral duty. Failure to report about such 'offers' should entail legal liability (disciplinary and even criminal), even if the judge has ultimately refused the offer. [...]"

CDL-AD(2016)013, Opinion on the Draft Code of Judicial Ethic of the Republic of Kazakhstan, §§57, 58

"Article 11 p. 2 prohibits disclosing private information which the judge may learn through working on a case. However, such disclosure may take procedural forms – for example, private information may become known from the testimony of a witness, or from the court judgement itself. When disclosure serves a specific procedural purpose (for example, to establish the facts of the case), and is in the interests of justice, it should be allowed (with some exceptions which may be justified by the interests of minors, protection of witnesses etc.). The Code may only regulate 'non-procedural' disclosures (such as relating 'spicy details' of a criminal case to the press, where there is no procedural need for doing it)."

CDL-AD(2016)013, Opinion on the Draft Code of Judicial Ethic of the Republic of Kazakhstan, §59

"Articles 14 – 16 contain provisions which relate partly to labour discipline and managerial duties of the judge (the duty to start the hearings on time, the duty to oversee the work of the employees of the court, etc.) and partly to the quality of the judicial decision-making and procedural propriety (draft clear and well-reasoned texts, do not adjourn hearings because of poor knowledge of the case materials, etc.). However, these rules should be applied with caution: the judge should enjoy wide discretion in conducting the proceedings, and there is no single standard of 'convincing, logical and well-reasoned' decisions. […]"

CDL-AD(2016)013, Opinion on the Draft Code of Judicial Ethic of the Republic of Kazakhstan, §60

## 3.5 Transfers and early termination of office

### 3.5.1 Transfers and missions

"The Venice Commission has consistently supported the principle of irremovability in constitutions. Transfers against the will of the judge may be permissible only in exceptional cases. […]"

CDL-AD(2010)004, Report on the independence of the judicial system – Part I: The independence of judges, §43

"[…] In sum, in order to prevent abuse, the Venice Commission recommends that for the secondment of judges against their will, the 2021 Amendments should provide:

- clear and narrow criteria;
- a justification with a legitimate objective;
- shorter time periods and
- allow it only in exceptional cases.

A random or objective procedure with a geographical limitation should be reintroduced."

CDL-AD(2022)010, Opinion on the December 2021 amendments to the organic Law on Common Courts of Georgia, §43.

"[…] As to the secondment of judges to other bodies, the Venice Commission recommends setting up clear, transparent and foreseeable conditions for the seconded judges to be assigned to a higher position after the period of secondment."

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, § 66 (e)

"[T]*he non-consensual transfer of judges to another court* […] *is* […] *justified in principle in cases of legitimate institutional reorganisation."*

CDL-AD(2016)007, Rule of Law Checklist, §80
See also CDL-AD(2018)033, Opinion on the draft law amending the law on Courts of "the former Yugoslav Republic of Macedonia", §§21-23; 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, §24; 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, §17

"It is also important to ensure that the same level of remuneration and an equivalent or similar position is guaranteed to the judge to be transferred and needs to be stipulated in this provision. […]"

CDL-AD(2018)011, Opinion on the draft amendments to the constitutional provisions on the judiciary of Serbia, §52
See also CDL-AD(2018)033, Opinion on the draft law amending the law on Courts of "the former Yugoslav Republic of Macedonia", §24; 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, §58; CDL-AD(2008)007, Opinion on the Draft Laws on Judges and the Organisation of Courts of the Republic of Serbia, §23

"Article 85 of the Law deals with the permanent voluntary transfer of judges. […] [T]he Venice Commission notes that a guarantee that restructuring of courts is not misused to get rid of some particular judges is still needed. In particular, the Law should provide that a judge should not be transferred against his/her will due to court restructuring to a lower court than the court where he/she has his/her actual judgeship. […] A provision guaranteeing this principle and the principle of securing the same future salary for the judge as in his/her actual position would also be welcomed."

CDL-AD(2022)050, Opinion on the draft amendments to the Law on the Judicial Council and Judges of Montenegro, §45

"[…] Section 31 ALSRJ entitles the chair of the tribunal to re-assign judges without their consent to a judicial position at another service post on a temporary basis out of service interests, every three years for a maximum of one year, or for the promotion of his or her professional development. Section 34 enables the President of the NJO to transfer a judge to another court, if a court is closed or its competence or territorial jurisdiction is reduced to such an extent that it no longer permits the employment of a judge. […]

As long as such transfers are made with the agreement of the judge concerned, it seems that these provisions comply with the above-mentioned principles on the transfer of judges, with the exception of the generally phrased and excessively large possibility of transferring a judge 'for service reasons', for a maximum of one year every three years, which seems to be too often.

However, if the judge does not agree with the transfer he or she is automatically 'exempted from office' for six months and his or her service relationship is terminated […]. This seems to be an overly harsh automatic sanction. While under certain circumstances transfers may be justified, in exceptional cases even without the consent of the judge – for instance due to an organizational reform - there must be clear and proportional rules for such actions as well as a right of appeal."

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, §§77-79

"Transfer to a higher court is possible on the basis of the results of a competition. During the competition, the Qualification Commission monitors of the judges lifestyle, and in addition questions the judges of the court where the applicant judges are sitting about personal qualities of the candidates and their rapport with colleagues. These provisions create considerable unease.

If such a procedure is to be followed, it should be on the basis that anything said must be made available to the applicant who should have an opportunity to comment on it."

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, §68

"[…] The Commission welcomes the fact that the amendments provide for judicial review by the administrative and labour court in the event of a transfer. However, this should be a full review on procedure and substance of the decision […]."

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, §56

"[…] [A]ssignment [of the judge to a different court or] sending on mission should only be possible under strict criteria clearly identified in the law, for instance, the number of cases at the receiving court, the number of cases at the sending court, the number of cases dealt with by the judge who is being assigned. […] Also, the maximum duration of the assignment or the mission should be indicated in the law."

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, §36
See also CDL-AD(2018)033, Opinion on the draft law amending the law on Courts of "the former Yugoslav Republic of Macedonia", §19

"The absence of consent to a transfer to another court in case of closure or reorganisation of a court is too wide a formulation for a ground for dismissal of a judge, even if the closure or reorganisation has been decided by the *Verkhovna Rada* in the form of a law. Much will depend on the proposals for transfer made to the judge and on their timing. […] Before being faced with a dismissal, the judge should receive more than one proposal for transfer and the prospect of upcoming retirements of judges in other courts should be taken into account when making such proposals. Rather than simply dismissing the judge, he or she should be transferred against his or her will. If the judge then does not turn up for work at the new post, ordinary disciplinary measures could be taken, which eventually could lead to a dismissal of the judge but not because of the refusal of the transfer but because of the refusal to work."

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, §29

"Pursuant to the new Article 95 par 6, the transfer and rotation of judges of local courts shall be undertaken by the President upon submission of the Council of Judges in accordance with the procedures and cases laid down in the constitutional law. [...] It would [...] be advisable to omit the involvement of the President in such internal matters of the judiciary."

CDL-AD(2016)025, Endorsed joint opinion on the draft law "on Introduction of amendments and changes to the Constitution" of the Kyrgyz Republic, §71
See also 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, §60

"The presidents have an important power of seconding judges to other courts. […]
The Venice Commission considers that there should be an external check on the presidents' power to second; for example, such decisions should be appealable to the SJC Chambers by interested parties (those who were seconded against their will or who wished to be seconded but were not)."

CDL-AD(2017)018, Opinion on the Judicial System Act of Bulgaria, §§86 and 87

### 3.5.2 Early termination of office and impeachment[3]

"[…] It would not be in accordance with the principles of a society governed by the rule of law to allow the dismissal of serving judges without providing any guarantees. […]"

> CDL-AD(2008)007, Opinion on the Draft Laws on Judges and the Organisation of Courts of the Republic of Serbia, §61

"[…] [G]ranting the [Chair of Parliament] the right to propose the dismissal of judges of the Supreme Court […] and of the Economic Court […] is a serious distortion of the principles of judicial independence and of the separation of powers."

> CDL-INF(1997)006, Opinion on the draft Constitution of the Nakhichevan autonomous republic (Azerbaijan Republic), p.5

"[…] [T]he Commission finds that the Supreme Court should not have the power to dismiss cantonal judges, nor the cantonal high court to dismiss municipal judges […]."

> CDL-INF(1998)015, Opinions on the constitutional regime of Bosnia and Herzegovina, chapter B.I, §9

"The Commission observes that decisions as to the removal of judges is left to the Constitutional Court […]. Although this may be seen as an additional guarantee for judicial independence, the absence of any remedy against such a decision of the Constitutional Court can raise problems. A more adequate solution would be to leave the initial decision as to the removal of a judge to the Council of Justice with the possibility for the judge dismissed to appeal to the Constitutional Court. […]"

> CDL-INF(2001)017, Report of the Venice Commission on the Revised Constitution of the Republic of Armenia, §63

"The provision that a judge may be removed for systematically failing to perform official responsibilities seems to be a provision which is not inappropriate. The failing to perform the official responsibilities has to be caused by a voluntary choice of the concerned person and not by his or her health problems. […]"

> CDL-AD(2003)016, Opinion on the Constitutional Amendments reforming the Judicial System in Bulgaria, §16

"[…] The third paragraph of this Amendment provides for four reasons for a judge's dismissal: 1) being sentenced to at least six months' imprisonment; 2) committing a crime that makes the person unworthy of judgeship; 3) performing judicial functions incompetently, and 4) having committed a serious disciplinary offence.
The first reason raises no apparent issue. In the second, the wording *'a crime that makes the person unworthy of judgeship'* is vague and would benefit from more precise wording by setting out clearly what kind of criminal offence is being referred to.
The third reason poses a real problem as *'performing judicial functions incompetently'* is not precise and can cover a variety of situations, notably, it could apply to a judge who has made a mistake. […]
The fourth reason needs to provide detail on what these serious disciplinary offences are. […]"

> CDL-AD(2018)011, Opinion on the draft amendments to the constitutional provisions on the judiciary of Serbia, §§46-49

[3] See also section 3.4.2 above on disciplinary control

"[…] The choice of automatic termination of tenure following any criminal conviction, irrespective of its gravity, is a very severe one, arguably raising issues under the 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, §24

"The consequences of the dismissal/suspension are the suspension of the payment of salary […]. It should, in the view of the Venice Commission, be taken into consideration that the suspension of salary, besides the fact that it also affects the family of the judge, may seriously hinder the right to a legitimate defence by taking away all of his or her financial means and might therefore seriously affect the human rights of the judge who, until a final condemnation is made, is deemed to be innocent. […]."

CDL-AD(2011)017, Opinion on the introduction of changes to the constitutional law "on the status of judges" of Kyrgyzstan, §§55-56

"[…] [T]he guarantees for dismissal of post holders need to be higher than those for appointment. In particular, it is essential that dismissal due to offences committed by the post holder be investigated by an independent body and not by a political organ as the Parliament or the President. […] Consequently, it should be that decision that leads to dismissal and not the decision of a political organ. Such dismissal should be distinguished from votes of no-confidence, which Parliament can take against certain state officials, like ministers (political responsibility). A vote of no-confidence is not appropriate for judicial officials who do not have a political responsibility before a representative body."

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, §72
See also CDL-CR-PV(1998)004, Meeting of the Working Group on Albania of the Sub-commission on Constitutional Reform with the Constitutional Commission of Albania, «Parts of the constitution considered for the first time», «Article 130».

"[…] [T]here should be no decision of a political organ once the Supreme Judicial Council has decided on the ground for dismissal. There should be an appeal to a court against the Council's decision but after such an appeal the dismissal should enter into force without any decision of 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, §153
See also CDL-AD(2016)025, Endorsed joint opinion on the draft law "on Introduction of amendments and changes to the Constitution" of the Kyrgyz Republic, §73

"[...] [T]he High Council of Justice is empowered to 'decide on the termination of powers' of the judges. In addition, the need for a Presidential act after the decision of the HCJ to dismiss a judge would complicate and delay the process of dismissal and raise potential risks of deadlocks if the President fails to act. [...]"

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, §28

"This proposal would introduce an impeachment procedure against a judge of lower instance courts, which would be initiated by at least 20 per cent of the citizens of Ukraine of the respective court district or by one third of the members of the *Verkhovna Rada*. Following such an initiative, the *Verkhovna Rada* voted on the impeachment and the judge would be dismissed if more than half of all members of the Rada voted for it. Initiatives for the impeachment of judges of the high specialised courts and the Supreme Court could be introduced by one third of all members of the Rada and would be carried if two thirds of all members voted for it.

The introduction of such a procedure is clear contradiction of the principle of the independence of the judiciary and would make the position of the judges dependent on a political organ, the Verkhovna Rada. The initiation of an impeachment by the citizens could even lead to judges trying to please 'the voters' rather than to apply the Constitution and the laws, for example through harsh sentences in highly mediatised criminal cases."

> 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, §§31-32

"[…] [D]ismissing all the judges, outside very exceptional situations such as constitutional discontinuity, is not in line with European standards and the Rule of Law. [...]"

> CDL-AD(2015)027, Opinion on the Proposed Amendments to the Constitution of Ukraine regarding the Judiciary as approved by the Constitutional Commission on 4 September 2015, §37

"[...] [T]o serve as a ground for dismissal bad evaluations should cover a substantial period of the judge's work, and be based on carefully chosen indicators. It would be wrong to conduct two "exceptional" evaluations quickly one after another and dismiss the judge on this basis."

> CDL-AD(2018)033, Opinion on the draft law amending the law on Courts of "the former Yugoslav Republic of Macedonia", §45

"[...] Amongst other grounds, the president [of the court] may be dismissed for the failure to start disciplinary proceedings against the judge of his/her court when there are reasons for it. [...] [T]he question of whether or not a disciplinary offence has been committed is a matter of assessment. [...] This duty should be formulated so as to concern only the *evident and gross* breaches committed by the judges, known to the president, and not every potential irregularity."

> CDL-AD(2018)022, Opinion on the law amending the law on the Judicial Council and on the law amending the law on Courts of "the former Yugoslav Republic of Macedonia", §71
> See also CDL-AD(2018)033, Opinion on the draft law amending the law on Courts of "the former Yugoslav Republic of Macedonia", §§62-65

"Article 47 of the Law on Courts provides that the candidate to the position of president of the court should produce to the JC a work program which should include "measurable parameters" and "time frame for realisation of program objectives". Furthermore, the court president may be dismissed from this position for the "failure to complete work program" (see Article 79, (1) p. 8). These provisions risk turning the court president into a "productivity watchdog", and, in addition, do not take into account objective factors which may prevent the judge from completing the "work program" (such as understaffing, sudden influx of new cases, etc.). These provisions should be reconsidered."

> CDL-AD(2018)022, Opinion on the law amending the law on the Judicial Council and on the law amending the law on Courts of "the former Yugoslav Republic of Macedonia", §81

"The Venice Commission and DGI consider that it cannot be declared through a law that all the relevant appointments made by the NCJ in the particular timeframe are null and void, as this would represent an undue interference with the competence of the judiciary. In the view of the Commission and DGI, depriving the status of a judge through law would prevent the appointees from the right to seek judicial review against the invalidation of their nomination…"

> CDL-AD(2024)029, Poland – Joint Opinion of the Venice Commission and the Directorate General Human Rights and Rule of Law on European standards regulating the status of judges. § 22.

"Based on these considerations, the Venice Commission and DGI conclude that the appointees should be given the right to seek judicial review against the invalidation of their nomination or promotion if the decision of invalidation is not taken by a judicial body. The need to quickly (re-)establish a fully functioning judiciary may justify some modifications in the application of procedural standards but not, for instance, the complete lack of some form of judicial review,

which, arguably, would violate Article 6 of the ECHR. The fact of protesting against a decision would not necessarily have the effect of suspending it while judicial recourse is being sought. …"

> CDL-AD(2024)029, Poland – Joint Opinion of the Venice Commission and the Directorate General Human Rights and Rule of Law on European standards regulating the status of judges. § 36.

### 3.6 Retirement

"[…] [T]he Venice Commission shares the concerns expressed by the Association of Judges of Montenegro about the lack of a specific regulation of judges' social rights in the Law. In this regard, it wishes to stress that judges are not merely civil servants, insofar as they perform a unique and fundamental constitutional function: it is therefore important to preserve the specificity of the rules applicable to the judiciary when required by the judges' special status, to protect and uphold the basic principle of judicial independence."

> CDL-AD(2022)050, Opinion on the draft amendments to the Law on the Judicial Council and Judges of Montenegro, §14

"The retirement age for judges should be clearly set out in the legislation. Any doubt or ambiguity has to be avoided and a body taking decisions on retirement should not be able to exert discretion. […]"

> 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, §52

"[…] Under Article 36 of the Draft Act, a SC [the Supreme Court] judge shall retire upon reaching 65 years of age (under the current Act the upper age-limit for the SC justices is 70).
It is up to the democratic legislator to define the retirement age of judges. However, the general European trend consists of introducing a *higher* age of retirement."

> 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, §§44 and 45

"The MoJ may at his/her discretion extend the judge's mandate beyond the retirement age (Article 69 § 1b). The Act does not say for how long the mandate may be prolonged; those prolongations may be allowed for short periods of time, so that the judge remains uncertain about the further prolongation of his/her contract and becomes more vulnerable to pressure. This possibility should be removed, since it places the career of (usually the most senior) judges in the hands 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, §109
> 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, §52; CDL-AD(2002)026, Opinion on the Draft Law on Judicial Power and Corresponding Constitutional Amendments of Latvia, §57

"Sections 90.h.ha, 94.3 and 96.2 ALSRJ provide for judges who are reaching the so-called 'upper age limit' to be exempted from office six months before the actual retirement date. It seems questionable – even more so in times of strained budgets – to exempt people from office with full payment just because they are going to retire within the next six months."

> 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, §95

"The new early retirement scheme for judges and prosecutors, assistant magistrates of the High Court, assistant magistrates of the Constitutional Court and assimilated legal specialty personnel,

(proposed new Articles 82 and 83 of Law no. 303/2004) allows retirement at the age of 60, after 25 years seniority, and even between 20 and 25 years seniority, with a slightly reduced pension. [...]

This proposal creates a real risk of a severe decrease in the body of magistrates within the Romanian judiciary, especially at the senior level. The Romanian judiciary risks losing its most experienced and qualified members, while the training time for junior judges and prosecutors to join the magistracy will be increased.

[...]

In the current situation of conflict between some holders of political office and magistrates and increased pressure on the magistrates including through some of the amendments discussed, there is a risk that many qualified judges will choose early retirement.

[...] The proposed early retirement scheme should be abandoned unless it can be ascertained that it will have no adverse impact on the functioning of the system."

> 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, §§151, 152, 154 and 155

"[…] The text of these provisions implies that retired judges are permanently limited in the possibility of engaging in law practice, which is clearly an unnecessary and excessive limitation. Although there may be some restrictions, such as temporarily limiting the possibility of a former judge to act as a lawyer before the court of which that judge was a member, they should be narrowly targeted and proportional. […]"

> CDL-AD(2013)035, Opinion on the draft Code on Judicial Ethics of the Republic of Tajikistan, §67

"Proposal no. 10 sets the age of 75 as the retirement age for judges of the Supreme Court and the high specialised courts whereas 65 is fixed as the retirement age for all other judges. Such a stark distinction seems excessive because it would create two classes of judges […]. Such a distinction within the profession of judges is not only discriminatory, it might also lead to judges being willing to compromise in their adjudication in order to obtain promotion before they have to retire at 65."

> 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, §30

"[…] The early removal of a large number of justices of the Supreme Court (including the First President) by applying to them, with immediate effect, a lower retirement age violates their individual rights and jeopardises the independence of the judiciary as a whole […]"

> 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, § 130

"[...] As concerns the retirement age, the Venice Commission has expressed strong criticism of the reduction of the retirement age when this applies to sitting judges but there is no objection in principle to extend the retirement age if sitting judges retain a possibility to retire under current rules."

> CDL-AD(2018)028, Opinion on Constitutional arrangements and separation of powers and the independence of the judiciary and law enforcement of Malta, §42

### 3.7 Remuneration

"[...] Whether or not the reduction of a judge's salary is compatible with judicial independence depends on several factors. One factor is the actual minimum level of the salary. Paragraph 57 of the explanatory memorandum to CM Recommendation (2010)12 maintains that *"An adequate level of remuneration is a key element in the fight against corruption of judges and aims at shielding them from any such attempts."* [...] Irrespective of the relative size of the reduction of the salary, it should not fall below what in Ukraine may be considered an adequate level for a judge in the highest court of the land.

[...] A second factor for considering a reduction of a judges' salary is whether or not such a cut is part of a general reform or if it is directed against judges in general or against specific judges. The remuneration of judges at an adequate level is closely linked to judges' safety of tenure and irremovability, which are both important for protecting judicial independence. However, a reduction of judges' salaries is not in itself incompatible with judicial independence. Paragraph 57 of the explanatory memorandum to CM Recommendation (2010)12 states: *"Public policies aiming at the general reduction of civil servants' remuneration are not in contradiction with the requirement to avoid reducing specifically judges' remuneration".* A reduction of the remuneration for a specific group of judges only, will easily infringe judicial independence. [...] In this case, the reduction is specifically directed at the judges of the Supreme Court only.

[...]The salary of judges is not only an element in judicial independence. A reduction of the remuneration of judges may lead to a risk of corruption and it reduces the attractivity of the position as it has an incidence on the willingness of candidates to apply and for sitting judges to stay in the profession."

> CDL-AD(2019)027, Opinion on the Legal framework in Ukraine governing the Supreme Court and judicial self-governing bodies of the Republic of Ukraine, §§ 76-78

"[…] [T]he Venice Commission is of the opinion that for judges a level of remuneration should be guaranteed by law in conformity with the dignity of their office and the scope of their duties. Bonuses and non-financial benefits, the distribution of which involves a discretionary element, should be phased out."

> CDL-AD(2010)004, Report on the Independence of the Judicial System Part I: The Independence of Judges, §51
> See also CDL-AD(2017)019, Opinion on the Draft Judicial Code of Armenia, §60; CDL-AD(2011)017, Opinion on the introduction of changes to the constitutional law "on the status of judges" of Kyrgyzstan, §71; CDL(1995)074rev, Opinion on the Albanian law on the organisation of the judiciary (chapter VI of the Transitional Constitution of Albania), p.3

"[…] [T]hat the salaries of judges cannot be reduced during their term of office […] is a common and desirable guarantee of judicial independence."

> CDL(1995)074rev, Opinion on the Albanian law on the organisation of the judiciary (chapter VI of the Transitional Constitution of Albania), p.3

"The proposed increase of salary in article 99.3 for a judge acting upon a case on the criminal offence of organized crime or corruption or terrorism or war crimes, as well as in cases of 'difficult work conditions' could be problematic, creating the danger that judges categorize ordinary cases as organized crime cases in order to keep their salaries higher."

> 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, §34

"The conclusion, therefore, is that, in the absence of an explicit constitutional prohibition, a reduction of the salaries of judges may in exceptional situations and under specific conditions be

justified and cannot be regarded as an infringement of the independence of the judiciary. In the process of reduction of the judges' salaries, dictated by an economic crisis, proper attention shall be paid to the fact whether remuneration continues to be commensurate with the dignity of a judge's profession and his or her burden of responsibility. […].

[…] In [a situation of a serious economic crisis], a general reduction of salaries funded by the state budget may include the judiciary, and cannot be qualified as a breach of the principle of the independence of judges. Such a general measure is in line with the Venice Commission's Report on the Independence of the Judicial System which states that 'the level of remuneration should be determined in the light of the social conditions in the country and compared to the level of remuneration of higher civil servants. The remuneration should be based on a general standard and rely on objective and transparent criteria'. Finally, it may be seen as a token of solidarity and social justice […]."

> CDL-AD(2010)038, Amicus Curiae brief for the Constitutional court of "The Former Yugoslav Republic of Macedonia" on Amendments to several laws relating to the system of salaries and remunerations of elected and appointed officials, §§20 and 21
> See also CDL-AD(2015)045, Interim Opinion on the Draft Constitutional Amendments on the Judiciary of Albania, §51

"Allowing the President of the SAC [Supreme Administrative Court] and the Minister, a member of the executive, to choose which judges should receive a distinction associated with higher remuneration raises concerns regarding judicial independence. A judge's remuneration must be established by law and be equal for all judges performing the same duties; differences may exist based on seniority, court level or other reasons clearly laid down by law but not as a result of an individual decision reserved by the Law for a member of the executive. […]

[…]

The Venice Commission maintains its reservations with regard to the honorary titles to judges by the executive, even if they are not accompanied by financial benefits."

> 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, §§80 and 83

### 3.8 Jurors, Lay Assessors, military Judges and other persons performing judicial functions

"[…] Although the perception that a jury system can enhance fair trial and lead to higher acquittal rates may be explained through historical evidence, this view should be approached with caution. Jury systems in and of their own are no guarantee for the independence and fairness of the justice system. This will depend on the legal framework and the practical application of the rules.

The number of jurors is set at 12. This seems to have been controversial, as the presidential administration wanted to have only 7 or a maximum of 9 jurors. However, it is better to have 12 jurors, as a larger number of jurors helps to base the decision on a broader consensus.

[…] The draft Law should explain the process of '*random selection*' in order to exclude any misuse and corruption.

Article 9 is of great importance as it regulates who can be excluded from the list of candidates by the administration. This provision excludes a wide range of professionals such as judges, prosecutors (*prokuror*), military servicemen etc. This is to be highly welcomed.

Article 12 regulates the material compensation for jurors. This seems to be acceptable insofar as it does not place jurors at a financial disadvantage due to their work.

[…] The guarantees of the independence and immunity of judges on the basis of the *Law on the status of judges of the Kyrgyz Republic* is extended to jurors and members of their family. It is however strange that immunity also applies to the members of the family."

> CDL-AD(2008)038, Opinion on the Constitutional Law on Court Juries of Kyrgyzstan, §§7, 14, 18, 21, 22 and 23

"The lay assessors seem to be a firm part of the Bulgarian judicial system […]. They have the same rights and obligations as the judges and the fact that they are nominated by the next higher general assembly of judges helps to ensure their qualification. […] However, their nomination to the specialised criminal court will be made by the Municipal Council of Sofia […], which might be in line with the Bulgarian legal system but, in the context of the accurate selection of judges, may not be an appropriate solution, taking into consideration that those lay assessors have the majority vote in the senate.

Having chosen to have lay assessors in their system to fight corruption and organised crime, the Bulgarian authorities may be aware that these could represent a weak link in their system as they could perhaps be exposed to a greater risk to potential undue influence by persons being judged by the specialised criminal courts. For this reason, lay assessors must be carefully chosen. […]"

> CDL-AD(2010)041, Opinion on the Draft Law amending the Law on Judicial Power and the Draft Law amending the Criminal Procedure Code of Bulgaria, §§36, 37

"Article 62 envisages that people's assessors and jurors are to be paid compensation for the period of their service. This is in principle a very welcome provision but in practice may well create an inhibition to the use of jurors on a wide scale. It is certainly likely to be expensive if juries are commonly used."

> 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, §44

"[…] [T]he Act provides for court assessors in military courts who may be generals, admirals, officers or non-commissioned officers in permanent military service. They take part in court hearings. There seem to be no safeguards in the legislation to ensure that serving military personnel acting as court assessors are independent and impartial unless the requirement in Article 68.3 that they be designated by the General Assembly of the judges of the Appellate Military Court on the proposal of their commanding officers can be so regarded (see the case of *Findlay v. the United Kingdom* […])."

> CDL-AD(2009)011, Opinion on the Draft Law amending the Law on Judicial Power and the Draft Law amending the Criminal Procedure Code of Bulgaria, §29

"[…] [A]ccording to Draft Article 58 (4)6 a person who does not speak Ukrainian is excluded from being a juror. […] It seems reasonable that all judges should have knowledge of the state language, but one has to wonder about a provision which would exclude a substantial part of the population from jury service.

[…] These are important issues which should be carefully examined and addressed. This might include considering practical and more constructive solutions likely to enable access by all to jury service."

> 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, §§29 and 30

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