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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

(VENICE COMMISSION)

DRAFT INTERIM OPINION

ON

**THE DRAFT DECISIONS OF THE HIGH JUDICIAL COUNCIL
AND OF THE STATE PROSECUTORIAL COUNCIL**

**ON THE IMPLEMENTATION OF THE LAWS ON THE AMENDMENTS
TO THE LAWS ON JUDGES AND ON THE PUBLIC PROSECUTION**

OF SERBIA

on the basis of comments by

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**This document has been classified restricted on the date of issue. Unless the Venice Commission decides otherwise, it will be declassified a year after its issue according to the rules set up in Resolution CM/Res(2001)6 on access to Council of Europe documents.*

I. INTRODUCTION

1. By a letter of 11 March 2011, Ambassador Dragana Filipovic, Permanent Representative of Serbia to the Council of Europe, forwarded a request from the Serbian Ministry of Justice for an opinion on (1) the draft Decision “on determination and execution of the activities of the Standing composition of the High Judicial Council for the implementation of the Law on Amendments and Supplements to the Law on judges, election of Deputy of High Judicial Council and execution of the procedure for the nomination of candidates for the court presidents” and on (2) the draft Decision “on determination and execution of the activities of the Standing composition of the State Prosecutorial Council for the implementation of the Law on Amendments and Supplements to the Law on Public Prosecution, election of the Deputy President of the State Prosecutorial Council” (hereinafter, the “draft Decisions”).

2. Mr James Hamilton was invited by the Venice Commission to provide comments on these draft Decisions and was joined by Mr Virgilijus Valančius invited by the Legal and Human Rights Capacity Building Department to act as rapporteur for this opinion.

3. *The present opinion was adopted by the Venice Commission at its ... Plenary Session (Venice, ...).*

II. BACKGROUND

4. The Council of Europe and, in particular, the Venice Commission have been involved in the evaluation of the Serbian judicial system on various occasions since 2008. The Venice Commission adopted two opinions for Serbia at its 74th Plenary Session (March 2008): one on the draft Law on the High Judicial Council of the Republic of Serbia (CDL-AD(2008)006) and one on the draft laws on judges and on the organisation of courts (CDL-AD(2008)007). In these opinions, the Commission said that the draft laws were, in general, in line with European standards. However, it expressed concern regarding the fact that the Constitution of Serbia did not sufficiently support judicial independence and that there was a risk of politicisation of the judiciary by the election of judges and of the High Judicial Council by the National Assembly (parliament).

5. In June 2009, at its 79th Plenary Session, the Venice Commission adopted an Opinion on the draft Criteria and standards for the election of judges and court presidents of Serbia (CDL-AD(2009)023). In this Opinion, it welcomed the draft Criteria on judges and the fact that its concerns with respect to the re-appointment procedure for existing judges, who had not been guilty of any wrongdoing, were partly addressed by them.

6. At the same Session, the Venice Commission adopted an Opinion on Rules of procedure on criteria and standards for the evaluation of the qualification, competence and worthiness of candidates for bearers of public prosecutor’s function of Serbia (CDL-AD(2009)022). The Commission also welcomed these Rules, however expressed the concern that there was an over mechanic approach to statistical information on the workloads and the like and that evaluating persons through the use of questionnaires by their colleagues, which are filled anonymously, poses some risks, suggesting that some safeguards be built in to avoid the possibility that a prosecutor could be evaluated unfairly.

7. In September 2010, the Serbian authorities, as well as the judicial and legal community, were presented with the Report, prepared by the Legal and Human Rights Capacity Building Department of the Council of Europe, on the Project “Support to the reform of the judiciary in

Serbia in the light of Council of Europe standards¹. The ongoing judicial reform, including the reform of the prosecutorial system, was assessed with regards to the independence, transparency, accountability and efficiency, i.e. the core principles laid down in the National Judicial Reform Strategy (2006). The shortcomings under the “general election” process were noted by Council of Europe experts. Recommendations on how to improve the system were also made; the Road map concerning short, medium and long-term measures to fully implement the National Judicial Reform Strategy in line with European standards, was drafted and made available to the Serbian authorities.

8. On 16 December 2010, before the Plenary Session of the Venice Commission, a meeting was organised in Venice, between the rapporteurs (Messrs James Hamilton and Virgilijus Valancius), Mr Wolfgang Nozar from the European Commission and Ms Snežana Malović, Minister for Justice of Serbia and a delegation from the Ministry, to discuss the latest developments in Serbia’s ongoing judicial reform. This meeting was called notably due to the fact that the European Commission had invited Serbia to deal with what it considers to be an unsatisfactory outcome of the re-appointment procedure of judges and prosecutors.

9. The re-appointment procedure resulted in around 800 judges and prosecutors losing their positions. The Venice Commission and the European Commission consider this tantamount to dismissal. In addition, all those who were not re-appointed received the same letter containing the same explanation with an appendix consisting of a list of names of those who were not re-appointed. Both the European Commission and the Venice Commission did not consider this letter to be a reasoned decision. Although this “decision” could be appealed to the Constitutional Court, neither the European Commission nor the Venice Commission were convinced that this would be sufficient.

10. The European Commission invited the Serbian authorities to address these shortcomings. The Serbian authorities had therefore revised their Law on the High Judicial Council and their Law on Judges and are now working on guidelines/byelaws on the re-appointment procedure.

III. GENERAL REMARKS

11. This Opinion on the draft Decisions takes into account the English translation of the Serbian Law on the High Judicial Council, the Law on Judges, the Law on the State Prosecutorial Council as well as the amendments and supplements to the Law on the High Judicial Council and the Law on Judges adopted in December 2010.

12. In addition, the provisions of the Constitution of Serbia (2006), the National Judicial Reform Strategy (2006), the Criteria and standards for the election of judges and court presidents of Serbia and other relevant legislation of the Republic of Serbia have been taken into consideration.

¹ Report (DG-HL document dated 19 August 2010) written by Mr Pierre Cornu, General Prosecutor of the Canton of Neuchâtel, Switzerland; Mr Virgilijus Valancius, Judge at the Supreme Administrative Court, Professor of Mykolas Romeris University, Lithuania, with the contribution of Mr Wolfgang Tiede (Lawyer, Germany) and Mr Gilles Charbonnier (Inspector of Judicial Services, France), http://www.coe.int/t/dghl/cooperation/capacitybuilding/judicialReform_en.asp#.

IV. THE DRAFT DECISION OF THE HIGH JUDICIAL COUNCIL

13. The draft Decision of the High Judicial Council (hereinafter, the “draft Decision of the HJC”) sets out the activities of the permanent composition of the High Judicial Council² for (1) the implementation of the Law on amendments and supplements to the Law on Judges³; (2) the election of the Deputy President of the HJC; (3) the execution of the procedure for the nomination of candidates for the court presidents; and (4) the deadlines for their execution (paragraph 1 of the draft Decision of the HJC).

14. The draft Decision of the HJC is based on the Law on amendments and supplements to the Law on Judges. While the criticised election procedure had been undertaken by the first composition of the HJC, it will be up to the permanent composition of the HJC to implement the provisions of the amendments and supplements adopted by the National Assembly in December 2010.

15. Articles 5, 6 and 7 of the aforementioned amendments and supplements are the provisions on which the draft Decision of the HJC is based. The following is laid down in paragraph 1 of Article 5 of the Independent articles of the Law on the amendments and supplements of the Law on Judges (the amended Law on Judges):

“the Permanent Composition of the High Judicial Council shall examine the decisions on the termination of office, passed by the First Composition of the High Judicial Council, referred to in Article 101, paragraph 1 of the Law on Judges <...> in compliance with the criteria and standards for the evaluation of qualification, competence and worthiness, which shall be adopted by the Permanent Composition of the High Judicial Council”.⁴

16. The draft Decision of the HJC fully corresponds with the legal provision mentioned above.

17. The last two paragraphs of Article 5 read as follows:

“The proceedings on the appeals, or in respect of constitutional appeals submitted to the Constitutional Court by the judges referred to in paragraph 1 of this Article, shall be terminated by entering into force of this Law and the cases shall be assigned to the High Judicial Council...” (second paragraph).

“Appeals, or constitutional appeals referred to in paragraph 2 of this Article, shall be considered as objections against the decision of the High Judicial Council”. (third paragraph).⁵

18. This provision means that procedures already pending before the Constitutional Court are transferred from the Court to the HJC by law. This raises serious doubts with respect to the principle of the separation of powers and the rule of law.⁶ The legislator should refrain from

² The term “standing” is used throughout the draft Decision.

³ Official Gazette of the Republic of Serbia, No 101/2010.

⁴ Independent articles of the Law on the amendments and supplements of the Law on Judges (Official gazette RS, No. 101/2010). Also in CDL-REF(2011)005.

⁵ Ibid.

⁶ **Article 3 - Rule of law**

Rule of law is a fundamental prerequisite for the Constitution which is based on inalienable human rights.

The rule of law shall be exercised through free and direct elections, constitutional guarantees of human and minority rights, *separation of power*, independent judiciary and observance of Constitution and Law by the authorities.

Article 4 - Division of power

The legal system is unique.

Government system shall be based on the division of power into legislative, executive and judiciary.

intervening into already commenced judicial proceedings and it will be up to the Constitutional Court to decide whether or not legislative changes may cause termination of appeals lodged with the Court. In its opinions on the Constitution of Serbia (CDL-AD(2007)004) and on the draft laws on judges and on the organisation of courts of the Republic of Serbia (CDL-AD(2008)007), the Venice Commission insisted that decisions concerning termination should be appealable to a court of law.

19. It would therefore be preferable that, instead of terminating these proceedings in front of the Constitutional Court, the proceedings be simply suspended, pending the new examination by the HJC and the SPC - but enable the appeals to continue if an unfavourable decision was made in relation to an individual judge or prosecutor. A mere suspension rather than termination would not be open to as strong an objection as could be made in the case of termination. It would also preserve the possibility of what would in practice amount to an appeal to the Constitutional Court, in the event of an unfavourable conclusion for any particular individual.

20. Paragraph 3 of the draft Decision of the HJC provides for the adoption of a legal act, which:

“shall regulate, in more details, the proceedings, method of conducting interviews with the complaint petitioners and a method of application of the existing criteria and measures for the evaluation of qualification, competence and worthiness of a judge in the proceedings for the review of the decisions of the First composition of High Judicial Council on the termination of judicial duty of judges elected pursuant to the previously applied laws”.

21. This provision is based on Article 7 of the Independent articles of the Law on the amendments and supplements of the Law on Judges, which states:

“Criteria and standards referred to in the Article 5, paragraph 1 of this Law shall be adopted by the Permanent Composition of High Judicial Council within 15 days as of the day of the election of the members of the Permanent Composition of High Judicial Council from the rank of judges”.

22. The legal act, which is supposed to be adopted by the permanent HJC within 15 days “as of the date of election of the elective members of the permanent composition of the High Judicial Council from the rank of judges”, is very important for the review procedure. This legal act will regulate proceedings, the method of conducting interviews with the complainants, the method of application of the existing criteria and measures for evaluating qualifications competence and worthiness. Until the Venice Commission receives this legal act, it will not be able to evaluate the appropriateness of the procedures adopted.

23. The newly elected members of the permanent HJC will face the very challenging task of reviewing the files that had been examined earlier by the former composition of the HJC. This duty should be fulfilled with great caution and - *sine qua non* - the proper legal tools. It is therefore very important that such evaluation criteria be drafted in line with European standards.

24. The Venice Commission had evaluated, in June 2009, the draft Criteria and standards for the election of judges and court presidents of Serbia in an opinion (CDL-AD(2009)023) and welcomed these draft Criteria on judges and the fact that its concerns with respect to the re-appointment procedure for existing judges, who had not been guilty of any wrongdoing, were partly addressed by them.

25. These draft Criteria (revised in accordance with the Venice Commission Opinion CDL-AD(2009)023) may probably serve as a basis for the legal act foreseen in paragraph 3 of the draft Decision of the HJC (however, see paragraphs 34-37, below).

26. The 15-day terms introduced in paragraphs 2 (election of the Deputy President of the HJC within 15 days), 3 and 4 (forming of temporary working bodies of the HJC within 15 days) do not contradict European standards and seem to be appropriate.

27. The deadline for the whole review procedure, envisaged in paragraph 5 of the draft Decision of the HJC (“the review procedure of the decisions of the First composition of the High Judicial Council on the termination of the judicial duty of judges elected pursuant to the previously applied laws shall be conducted until the 31 December 2011”), as well as the review procedure for “on the nomination for the election of first time elected judges to the judicial office” (paragraph 6 of the draft Decision) and “on the election of judges to the permanent tenure” (paragraph 7 of the draft Decision) could, however, be made sooner than the end of 2011.

28. For reasons of opportunity, the Venice Commission strongly recommends that all parties concerned complete the review procedure as soon as possible. Therefore, the procedural term for the whole review procedure should be reasonably short.

29. Paragraph 8 of the draft Decision on HJC states that:

“Members of the High Judicial Council which participated in the delivery of decisions on termination of judicial duties of judges elected pursuant to the previously applied laws, decisions on the nomination for the election of first time elected judges to the judicial office, as well as the decision on the election of judges to the permanent tenure, shall refuse from participating in deliberation of questions and adjudication in the proceedings from points 5 to 7 of this Decision, in accordance with the provision of Article 13, paragraph 1, point 6 of the Rulebook of the High Judicial Council”.

30. This provision means that members of the first composition of the HJC, who remain members of the HJC in the permanent composition, will not participate in the review of their own decisions made in the election procedure. This is to be welcomed and is in line with European standards. Taking into consideration that the review procedure will be conducted by elected members of the permanent HJC only (paragraph 4 of the draft Decision of the HJC), this will help to avoid a conflict of interest and increase the fairness, as well as appearance of it, of the entire review procedure.

31. The intention of publishing an announcement of a public notice on the election of presidents of courts “until 1 April 2011” (even if this date will have to be adapted) and of starting the nomination procedure of the candidates for the election of presidents of courts (paragraphs 9 and 10 of the draft Decision of the HJC) is to be welcomed. It fully corresponds with the conclusions of the Report on the Project “Support to the reform of the judiciary in Serbia in the light of Council of Europe standards” (September 2010)⁷.

32. The permanent HJC should, *inter alia*, decide on the working methods (paragraph 3 of the draft Decision of the HJC) that should ensure (i) the fair and unified application of the criteria (to be adopted by the permanent HJC within 15 days after its composition) during the review procedure; (ii) the effectiveness of the procedure, taking into consideration the serious evaluation of all files concerned, and reasonable duration of the review procedure; (iii) the

⁷ See footnote 1, above.

presumption that judges appointed to permanent tenure before December 2009 and who had not been guilty of any wrongdoing guarantees according to European standards.

33. It is unfortunate that the present Opinion cannot include an assessment of “the legal act” that is going to be adopted by the permanent HJC on “proceedings, method of conducting interviews with the complaint petitioners and a method of application of the existing criteria and measures for the evaluation of the qualification, competence and worthiness” (paragraph 3 of the draft Decision of the HJC).

34. The Criteria and standards for the election of judges and court presidents (hereinafter, the “Criteria”) have already been assessed by the Venice Commission (Opinion CDL-AD(2009)023). The Venice Commission has been informed that they were adopted on 3 July 2009⁸.

35. On the basis of the adopted text that it has received, the Venice Commission noted that many of its comments had not been taken into account. For instance, the Venice Commission, after having assessed paragraph 4/3 of the draft Criteria, stated that the said paragraph “should recall who is in charge of carrying out an evaluation of the performance of judicial assistants”.

36. Another example is paragraph 4/4, where it stated that it should include objective criteria with respect to the evaluation on candidates based on reports or paragraph 6/2, which provides that “Competence is conditioned with: good knowledge of material and proceedings codes, awareness of necessity to examine cases, skilfulness, identification in establishing relevant facts, capacity for analytic and synthetic opinion, judging based on own reason, clear expression, exemplary literacy, diligence, self-control, sense for cooperation with colleagues and cultured behavior”. The Venice Commission commented that it should be set out who will define these conditions and on what basis.

37. It should be pointed out, once again, that the Venice Commission has welcomed the idea (paragraph 9 of the draft Criteria) of following the presumption that the judges that have been appointed before December 2009 fulfil the criteria and measures foreseen in the assessed sub-statutory legislation. The Venice Commission, however, noticed that the said presumption may be overturned by the exceptions and warned the Serbian authorities that “this matter should be approached with a great degree of caution as these criteria are going to be difficult evaluate in practice”.

38. In Opinion CDL-AD(2009)023, the Venice Commission also said that “every currently serving judge who has permanent tenure (whether they have applied for re-election or not) should only see his or her tenure terminated by a reasoned decision, which is appealable to a court of law”.

V. THE DRAFT DECISION OF THE STATE PROSECUTORIAL COUNCIL

39. The draft Decision of the State Prosecutorial Council (hereinafter, the “draft Decision of the SPC”) contains eight paragraphs which determine (1) the activities of the standing composition of the State Prosecutorial Council for the implementation of the Law on amendments and additions to the Law on Public Prosecution⁹; (2) the election of the Deputy President of the State Prosecutorial Council; and (3) the deadlines for their execution.

40. The observations made in the assessment of the draft Decision of the HJC apply, *mutatis mutandis*, to the draft Decision of the SPC. The only exception is with respect to the

⁸ Official Gazette of the Republic of Serbia No. 49/2009.

⁹ Official Gazette of the Republic of Serbia No. 101/2010.

guarantees of (judicial) independence. It is to be noted that the notion of the presumption that already appointed judges (in the Serbian context – judges appointed on permanent tenure before December 2009) fulfil criteria and measures e.g. qualification, competence, worthiness etc. does not seem to automatically apply to public prosecutors as well. The latter do not always enjoy the same scope of guarantees as judges (restrictions on irremovability, tenure etc.). This might be revised, as already suggested by the Venice Commission in its Opinion on Rules of procedure on criteria and standards for the evaluation of the qualification, competence and worthiness of candidates for bearers of Public Prosecutor's Function of Serbia (CDL-AD(2009)022).¹⁰

VI. CONCLUSIONS

41. The draft Decision of the HJC and the draft Decision of the SPC are, in general, in line with the Serbian legislation and European standards.

42. The draft Decision of the HJC is based on the Law on amendments and supplements to the Law on Judges (December 2010). Paragraphs 2 and 3 of Article 5 of the Law on amendments and supplements to the Law on Judges raise doubt with respect to the principle of the separation of powers. The legislator should refrain from intervening into already commenced judicial proceedings and it will be up to the Constitutional Court to decide whether or not legislative changes may cause termination of appeals lodged with the Court. With respect to the latter, instead of terminating the already commenced proceedings, the proceedings should simply be suspended pending the new examination by the HJC and the SPC, but enable the appeals to continue in the event of an unfavourable decision in relation to an individual judge or prosecutor.

43. The "legal act", which is supposed to be adopted by the Permanent HJC, is very important for the review procedure. The elected members of the permanent HJC will face the very challenging task of reviewing the files examined earlier by the former composition of the HCJ. This duty should be fulfilled with great caution and - *sine qua non* - the proper legal tools. Therefore, it is very important to draft such evaluation Criteria in line with European standards.

44. The Criteria and standards for the election of judges and court presidents should be redrafted in accordance with the observations expressed in the Opinion of the Venice Commission CDL-AD (2009)023.

45. The Venice Commission remains at the disposal of the Serbian authorities for any further assistance they may require on this issue.

¹⁰ See paragraph 14:

"The practical difficulties associated with such an evaluation system should not be underestimated. If, for instance, the work of a prosecutor during a hearing must be evaluated, this will require that the evaluators attend the hearing and observe the prosecutor concerned. This requires time and the evaluator must know the subject of the specific case. **It might be easier to provide a presumption that - except where concrete elements exist - the prosecutor concerned is presumed to be capable of carrying out his or her duties in a satisfying manner.**"