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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW
(VENICE COMMISSION)

BOSNIA AND HERZEGOVINA

DRAFT OPINION

**ON THE DRAFT LAW
ON AMENDMENTS TO THE LAW
ON THE HIGH JUDICIAL AND PROSECUTORIAL COUNCIL**

On the basis of comments by

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I. Introduction

1. By letter of 15 December 2020, the Ministry of Justice of Bosnia and Herzegovina requested an opinion of the Venice Commission on the draft Law on amendments to the Law on the High Judicial and Prosecutorial Council (CDL-REF(2020)003, hereinafter the “draft Law”). The request sets out that the draft Law was framed to comply with the recommendations made by the European Commission on the basis of several peer review missions carried out in the context of the dialogue between the European Union (EU) and Bosnia and Herzegovina (BiH), following the entry into force of the Stabilization and Association Agreement in 2015 and the submission of BiH's application for EU membership in 2016.
2. While the long-term intention is to draft a new, comprehensive legal act on the High Judicial and Prosecutorial Council (hereinafter the “HJPC”), the draft Law has been produced as a short-term (interim) solution. The draft Law puts forward a series of amendments aimed at addressing the most urgent issues of concern related to four main areas, namely: a) conflicts of interests and transparency; b) disciplinary procedures for judges and prosecutors; c) judicial review of the HJPC decisions; and d) removal of members of the HJPC.
3. Ms Veronika Bílková, Mr Nicolae Eșanu and Mr James Hamilton acted as rapporteurs for this opinion
4. Owing to the health situation due to the Covid-19 pandemic, a visit to BiH could not be organised. A series of virtual meetings were therefore organised on 28 – 29 January 2021 with: the Minister of Justice of BiH, the Minister of Justice of the Federation of Bosnia and Herzegovina (FBiH), the Minister of Justice of the Republika Srpska (RS), representatives of the HJPC and its Secretariat, the Judicial Association Coordination Body, the Brčko District Judicial Commission and the Training Centres for Judges and Prosecutors of both entities, representatives of international organisations, as well as civil society. The Commission is grateful to the authorities and to the Council of Europe Office in Sarajevo for the support provided in the organisation of these virtual meetings.
5. This opinion was prepared in reliance on the English translation of the draft Law. The translation may not accurately reflect the original version on all points.
6. *This opinion was drafted on the basis of comments by the rapporteurs and the results of the virtual meetings and written comments from stakeholders. It was adopted by the Venice Commission at its ... online Plenary Session (...).*

II. Background

7. The HJPC was established by the *Law on the High Judicial and Prosecutorial Council of Bosnia and Herzegovina* (hereafter the “Law on the HJPC”) adopted by the BiH Parliament in 2004.¹ It was established as a single State-level council for both judges and prosecutors, tasked to ensure the maintenance of an independent, impartial and professional judiciary in BiH. The constitutionality of the Law on the HJPC was confirmed by the Constitutional Court of BiH in 2009.²

¹ See Official Gazette of Bosnia and Herzegovina, Law No. 25/04 Coll., as amended.

² Case No. U11/08.

8. The establishment of the HJPC was made possible by the Transfer Agreement³ concluded by the two Entities, the Federation of BiH and the Republika Srpska, in March 2004. The Preamble of the Agreement states that:

“The parties desire to consolidate the authority over the Entities’ judiciaries in order to strengthen the independence of the judiciary through the establishment of a single High Judicial and Prosecutorial Council of Bosnia and Herzegovina. /.../ The council shall bear primary responsibility, as defined by the agreement, for the judiciary at all levels throughout Bosnia and Herzegovina and shall oversee judges and prosecutors in a manner that instills public confidence and trust in the judiciary.”

9. The establishment of the HJPC was part of a broader judicial reform having taken place in Bosnia and Herzegovina since the conclusion of the Dayton Agreement (1995). It was also one of the requirements put forward by the EU in the framework of the Structural Dialogue between the EU and Bosnia and Herzegovina. This requirement was clearly formulated in the 2003 Feasibility Study for BiH, which called upon BiH to *“adopt legislation establishing a single High Judicial and Prosecutorial Council for BiH with the aim of consolidating appointment authority over the Entity judiciaries and strengthening the independence of the judiciary throughout BiH”*.⁴

10. The HJPC is a single self-management body for the judiciary on the whole territory of BiH (with its four legal and judicial systems). It is composed of 15 members with a four-year mandate (renewable once), acting in their personal capacity. 11 members represent various judicial and prosecutorial bodies, 4 are elected by other bodies (Council of Ministers, Parliament and Bar Associations). The main tasks of the HJPC are to shield the judiciary from political interference, ensure its independence, guarantee its professionalism and promote judicial reforms. The HJPC appoints and assesses judges and prosecutors and exercises disciplinary powers in respect of them. Through its by-laws applicable in all the four judicial systems, it contributes to the de-fragmentation and consistency of judicial policy.

A. Previous Venice Commission Opinions

11. The Law on the HJPC was not subject to review by the Venice Commission at the time of its adoption (2004). Since then, however, the Commission has had several opportunities to consider the Law, and some amendments to it proposed for adoption (though not always adopted), and it has formulated extensive, and sometimes recurrent, recommendations in this respect.

12. In the 2012 *Opinion on legal certainty and the independence of the judiciary in Bosnia and Herzegovina*, the Venice Commission acknowledged that *“the HJPC has played an extremely important role in strengthening the independence of the judiciary and in furthering contacts and co-operation among judges and prosecutors”*.⁵ It also however identified certain shortcomings in the legal framework and the actual operation of the HJPC. In their light, it made four main recommendations.

13. The first related to the status – in due course, the HJPC should be provided with an explicit constitutional basis. The second related to the composition – the Venice Commission stressed the need to ensure that the two main groups represented in the HJPC, judges and prosecutors, would not be in the position to outvote each other (especially with respect to appointments and disciplinary proceedings). The Commission also suggested that mechanisms should be put in place to ensure that inter-institutional and inter-personal rivalries in the judiciary as well as

³ *Agreement on the Transfer of Certain Entity Responsibilities Through the Establishment of the High Judicial and Prosecutorial Council of Bosnia and Herzegovina*, Sarajevo, 11 March 2004.

⁴ COM(2003)692, *Report from the Commission to the Council on the preparedness of Bosnia and Herzegovina to negotiate a Stabilization and Association Agreement with the European Union*, Brussels, 18 November 2003.

⁵ Opinion No. 648/2011, *Opinion on Legal certainty and the independence of the judiciary in Bosnia and Herzegovina*, CDL-AD(2012)014, para 85.

ethnic tensions could not compromise the independence and impartiality of the HJPC. The third, with respect to the HJPC structure, recommended the creation, within the HJPC, of two sub-councils, one for judges and one for prosecutors. It did so on the understanding that the existence of a common council for judges and prosecutors was agreed upon in the Transfer Agreement and is therefore not open to change without the re-negotiation of this Agreement. The fourth, related to the activities of the HJPC, stressing *inter alia* the need to find an efficient strategy to fight the backlog or to improve the appointment procedure of judges and prosecutors. Most of these recommendations remain relevant today.

14. The 2013 *Opinion on the Draft Law on the Courts of Bosnia and Herzegovina* did not deal with the HJPC at any length, highlighting nonetheless that the competences of the HJPC shall be respected and that other legal acts on the judiciary shall be made compatible with the Law on the HJPC.⁶

15. In the 2014 *Opinion on the draft Law on the High Judicial and Prosecutorial Council of Bosnia and Herzegovina*, the Venice Commission reviewed a comprehensive amendment to the Law on the HJPC drafted in 2014. It welcomed the plan to create within the HJPC two separate sub-councils (in line with the recommendation made in 2012). Yet, it critically assessed other plans, especially those aimed at strengthening the competences of the legislative power with respect to the HJPC (in the appointment or dismissal of the HJPC members) and at introducing ethnic quotas for the membership in the HJPC. The Commission also recommended introducing a right to appeal to a court of law for HJPC decisions related to the appointments or to disciplinary matters.⁷ The Commission is aware that the draft amendment assessed in the 2014 opinion was not adopted in the end and that the Law on the HJPC has not been formally revised since 2008.

16. In 2014-2020, the Venice Commission did not have the opportunity to revisit this topic. The Law on the HJPC and the actual performance of the HJPC have however been regularly assessed by other international bodies, mainly within the EU-BiH dialogue. Whereas the assessment made by these bodies in the early years of the HJPC operation was mostly positive,⁸ in recent years, the reports have adopted an increasingly critical overtone.⁹

B. Other relevant reports

17. The 2019 *Commission Opinion on Bosnia and Herzegovina's application for membership of the European Union* and the *Analytic Report* (its accompanying document) identify similar shortcomings to those contained in the 2012-2014 Venice Commission Opinions and they make similar recommendations. Thus, the European Commission (the "EC") recommends that: a) the HJPC should be provided with an explicit constitutional status; b) the Law on the HJPC should be revised to better regulate the appointment, appraisal and disciplinary procedures of members of the judiciary, and to provide appropriate legal remedies against final decisions of the HJPC; and c) a Law on the Courts of Bosnia and Herzegovina should be adopted to prevent conflicts of

⁶ Opinion No. 723/2013, *Opinion on the draft Law on the Courts on Bosnia and Herzegovina*, 15 June 2013, CDL-AD(2013)015, para 71.

⁷ Opinion No. 712/2013, CDL-AD(2014)008, *op. cit.*, paras 125-126.

⁸ See, for instance, COM(2005)529, *Communication from the Commission to the Council on the progress achieved by Bosnia and Herzegovina to negotiate a Stabilization and Association Agreement with the European Union*, Brussels, 21 October 2006.

⁹ See, in particular, *Expert Report on the Rule of Law Issues in Bosnia and Herzegovina* (Priebe Report), Brussels, 5 December 2019; COM(2019)261, *Commission Opinion on Bosnia and Herzegovina's application for membership of the European Union*, Brussels, 29 May 2019; SWD(2019)222, *Commission Staff Working Document, Analytical Report Accompanying the document Communication from the Commission to the European Parliament and the Council, Commission Opinion on Bosnia and Herzegovina's application for membership of the European Union*, Brussels, 29 May 2019; and SWD(2020)350 final, *Commission Staff Working Document, Bosnia and Herzegovina 2020 Report Accompanying the Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions*, Brussels, 6 October 2020. See also section B below, *Other relevant reports*.

jurisdiction and ensure the required legal certainty in criminal matters.¹⁰ The Analytical Report explicitly notes that so far, BiH has not revised the Law on the HJPC in such a way as to fully implement the recommendations made by the Venice Commission, and it encourages it to do so.¹¹

18. Since the second half of 2019, the assessment produced by the EU and by experts has become much more critical. This is visible in the *Expert Report on the Rule of Law Issues in Bosnia and Herzegovina*, issued by the European Rapporteur for the State of Justice on 5 December 2019 (the Priebe Report).¹² The Priebe Report notes that “over the last years, the HJPC has itself become part of the problem”¹³ and that “in the current BiH judicial order, the HJPC is indispensable. However the HJPC needs serious reform and a radical change of behaviour”.¹⁴ It also contains recommendations which partly overlap with those formulated previously by the Venice Commission and the EU (separate sub-councils, judicial review of HJPC decisions, etc.) and partly go beyond them (new rules for the elections of HJPC members, new system of performance appraisal of judges, etc.).

19. On 6 October 2020, the *Bosnia and Herzegovina 2020 Report* was produced by the EC.¹⁵ Building up on the Priebe Report, this EC Report is also critical of the HJPC noting that “in the reporting period, numerous shortcomings have become evident in the independence, accountability and efficiency of the /HJPC/, which have further significantly deteriorated trust in the judiciary”.¹⁶ The EC Report stresses that:

*“As a /.../ key priority, Bosnia and Herzegovina needs to adopt the new Law on the HJPC on the basis of the 2018 legislative initiative to strengthen the independence and accountability of the HJPC as a guarantor of the independence of the judiciary. This law should align with European Standards the HJPC’s composition, the election and disciplinary responsibility of its members, as well as reform the appointment, promotion, performance appraisal, disciplinary responsibility, conflict of interests and integrity of judicial office holders, and establish a judicial remedy against all HJPC’s final decisions”.*¹⁷

20. In response to these recommendations, the BiH authorities started to work towards the adoption of a completely new legal act on the HJPC. In fact, a draft of such an act, entitled Initiative to Amend the HJPC Law, had already been submitted by the HJPC itself in 2018. In 2019, a Working Group was set up by the Ministry of Justice for these purposes. Since the drafting of a new legal act requires, according to the BiH authorities, a more extensive period of time, the Ministry of Justice decided to submit, as a temporary solution, an amendment to the existing Law on the HJPC that would respond to the main criticism raised against the HJPC and would seek to redress some of the shortcomings in the legal framework. It is this amendment that is under review in this opinion.

III. Relevant international standards

21. The establishment and functioning of high judicial councils, as well as the activities in the competence of the HJPC (appointment of judges, disciplinary procedures etc.), are subject to international standards. The standards are enshrined in instruments adopted both at the universal and at the European level. Some of these instruments are legally binding, others are *soft law* but they often codify existing customary rules or summarise best practices.

¹⁰ COM(2019)261, *op. cit.*, p. 8.

¹¹ SWD(2019)222, *op. cit.*, p. 32.

¹² Priebe Report, *op. cit.*

¹³ *Ibidem*, para 85.

¹⁴ *Ibidem*, para 85.

¹⁵ SWD(2020)350 final, *op. cit.*

¹⁶ *Ibidem*, p. 17.

¹⁷ *Ibidem*, p. 17.

A. Universal standards

22. At the universal level, the International Bill of Rights, encompassing the *Universal Declaration of Human Rights* (the “UDHR”, 1948) and the two *International Covenants* (1966), establishes fundamental human rights standards, including those relating to the judiciary. The UDHR declares that “everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him” (Article 10). The International Covenant on Civil and Political Rights (ICCPR) confirms this principle giving a more detailed list of various procedural rights (Articles 14-15). Both the UDHR and ICCPR, moreover, prohibit discrimination (Article 7 of the UDHR, Articles 3, 14, 25 and 26 of the ICCPR).

23. The basic standards enshrined in the International Bill of Rights are further specified and elaborated upon by a series of non-binding, *soft law* instruments dealing with various aspects of the operation of the judiciary and prosecution services. They include the *UN Basic Principles on the Independence of the Judiciary* (1985),¹⁸ the *Basic Principles on the Role of Lawyers* (1990),¹⁹ the *Guidelines on the Role of Prosecutors* (1990),²⁰ the *Universal Charter of the Judge* (1999),²¹ the *Standards of Professional Responsibility and Statement of the Essential Duties and Rights of Prosecutors* (1999),²² the *Bangalore Principles of Judicial Conduct* (2002),²³ the *Cape Town Principles on the Role of Independent Commissions in the Selection and Appointment of Judges* (2016),²⁴ the UN Commission on Human Rights Resolutions 2003/39: *Integrity of the Judicial System* and 2004/33: *Independence and Impartiality of the Judiciary, Jurors and Assessors and the Independence of Lawyers* or the report of the *Special Rapporteur on the independence of judges and lawyer* (2018).²⁵

B. Council of Europe standards

24. At the European level, the European Convention on Human Rights (the “ECHR” or the “European Convention”, 1950) states that “everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law” (Article 6). Under Article II(2) of the Constitution of Bosnia and Herzegovina, the ECHR applies directly in the territory of BiH and has priority over all other legal acts.

25. The standards of the European Convention are again specified and elaborated upon by a series of non-binding, *soft law* instruments. Some of these instruments have been adopted by the Council of Europe (Recommendation Rec(2000)19 on the *role of public prosecution in the criminal justice system*, Recommendation CM/Rec(2010)12 of the CoE Committee of Ministers to member states on *judges: independence, efficiency and responsibilities*, the CoE Parliamentary Assembly Resolution 1703(2010) on *the Judicial Corruption*, several opinions of

¹⁸ *Basic Principles on the Independence of the Judiciary*, *Seventh UN Congress on the Prevention of Crime and the Treatment of Offenders* (Milan, 26 August-6 September 1985), endorsed by the UN General Assembly resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985.

¹⁹ *Basic Principles on the Role of Lawyers*, Eighth UN Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August to 7 September 1990.

²⁰ *Guidelines on the Role of Prosecutors*, Adopted by the Eighth UN Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August to 7 September 1990.

²¹ *The Universal Charter of the Judge*, International Association of Judges, 17 November 1999.

²² *Standards of Professional Responsibility and Statement of the Essential Duties and Rights of Prosecutors*, International Association of Prosecutors (IAP), 23 April 1999.

²³ *The Bangalore Principles of Judicial Conduct*, the Judicial Group on Strengthening Judicial Integrity, as revised at the Round Table Meeting of Chief Justices held at the Peace Palace, The Hague, November 25-26, 2002, and endorsed by the UN Social and Economic Council resolution 2006/23.

²⁴ Bingham Centre for the Rule of Law, *Cape Town Principles on the Role of Independent Commissions in the Selection and Appointment of Judges*, 2016.

²⁵ UN Doc. HRC/38/38, *Report of the Special Rapporteur on the independence of judges and lawyers. Note by the Secretariat*, 2 May 2018.

the Consultative Council of European Prosecutors (CCPE), notably Opinion No. 9 (2014) on *European norms and principles concerning prosecutors*, and Opinion No. 13 (2018): *Independence, accountability and ethics of prosecutors*,) and by the Venice Commission of the Council of Europe (*Report on Judicial Appointments*,²⁶ *Report on the Independence of the Judicial System*²⁷). Other instruments have been adopted by professional associations, especially the *Consultative Council of European Judges* (CCJE) – Opinions No. 1(2001),²⁸ No. 3(2002),²⁹ No. 7(2007)³⁰ and No. 12(2009)³¹ and CCJE’s *Magna Carta of Judges* (2010).³²

IV. Analysis

26. The Venice Commission recalls that the Draft Law under review is not, and is not meant to be, a new comprehensive legal act on the HJPC that BiH, encouraged by the EU, intends to adopt. Such a new legal act should be, by virtue of Article 21 of the Draft Law, adopted by the Parliament of BiH within a year from the entry into force of the Draft Law. The purpose of the Draft Law is, as the Explanatory note states, to make “*targeted improvements to the existing legal framework /.../ offering emergency fixes*”. The Draft Law seeks to make such emergency fixes in four main areas. Those are: a) conflicts of interests and transparency; b) disciplinary procedures for judges and prosecutors; c) judicial review of HJPC decisions; and d) removal of members of the HJPC.

27. Due to its limited purpose and scope, the Draft Law omits to deal with many of the issues that have been repeatedly raised in previous Venice Commission opinions and in other experts’ views. These issues encompass: a) providing the HJPC with a constitutional status; b) establishing two sub-councils within the HJPC; c) ensuring the adequate representation in the HJPC of non-judicial organs; d) ensuring that judges and prosecutors within the HJPC would not be in the position to outvote each other; e) reconsidering the ethnic quotas in the elections to the HJPC; f) improving the procedure of appointment and appraisal of judges and prosecutors; and g) initiating other reforms necessary for an efficient and impartial operation of the judiciary in the country (fighting the backlog, etc.).

28. The Venice Commission regrets that in such a long period of time (2014-2020), the BiH authorities have not been able to address these shortcomings, which heavily affect the whole judicial system and will keep limiting the impact and effectiveness of the newly proposed amendments. The Commission assumes that all these issues will be dealt with in the new comprehensive legal act on the HJPC, in line with the recommendations formulated previously by the Venice Commission, the EU and experts. From that perspective, the Venice Commission sees the Draft Law as just the first step in a comprehensive revision of the legal framework under which the HJPC operates and it strongly encourages the BiH authorities to speedily proceed with the latter. The Venice Commission stresses its readiness to assist the BiH authorities in this process.

29. The Venice Commission also notes that the set of amendments under review will require the modification of several regulatory instruments already in existence (by-laws). The Venice Commission notes that Article 19 of the Draft Law provides for a period of 45 days from the day when the Draft Law enters into force during which the HJPC must either pass new or harmonise

²⁶ Opinion No. 403/2003, *Report on Judicial Appointments*, CDL-AD(2007)028, 22 June 2007.

²⁷ Study No. 494/2008, *Report on the Independence of the Judicial System. Part I: The Independence of Judges + Par II: Prosecutorial Service*, CDL-AD(2010)004 and CDL-AD(2010)040, 16 March 2010 + 3 January 2011.

²⁸ CCJE, Opinion No. 1 on *standards concerning the independence of the judiciary and the irremovability of judges*, 23 November 2001.

²⁹ CCJE, Opinion No. 3 on *ethics and liability of judges*, 19 November 2002.

³⁰ CCJE, Opinion No. 7 on *justice and society*, 27 November 2005.

³¹ CCJE, Opinion No. 12 on *the relations between Judges and Prosecutors in a democratic society*, 8 December 2009.

³² CCJE, *Magna Carta of Judges*, 17 November 2010.

existing regulations. The Commission deems it an insufficient period of time for preparing good drafts and for ensuring a real participative process. This issue was raised during the preparation of the draft, but the authors thereof rejected it, as reported in the Explanatory note, referring to the fact that the 45-day term will start after the expiry of 90 days from the day when the Draft Law enters into force. Although Article 22 of the Draft Law indeed provides that the law shall apply 90 days after its entry into force, Article 19 clearly states that the 45-day period shall be calculated from the day when the law *enters into force*. In order to exclude any disputes, the Venice Commission recommends amending Article 19 and providing explicitly either that the 45-day term is calculated from the day the law shall apply or that the term is of 135 days from the day the Draft Law enters into force.

A. Conflicts of interests and transparency

30. Most of the provisions introduced by the Draft Law seek to set rules that would help reveal conflicts of interest and increase transparency of the HJPC and of the judiciary (judges and prosecutors) more broadly. For these purposes, the Draft Law:

- a) prevents members of the HJPC from applying or being elected, during the mandate and one year after its end, to certain positions in the judiciary and in the state service (draft Article 5(3));
- b) defines the situations in which members of the HJPC have conflicts of interest (draft Article 10a);
- c) prohibits judges and prosecutors from holding incompatible mandates (draft Articles 82-84) and sets up a procedure to assess the incompatibility (draft Article 85);
- d) introduces the obligation for judges and prosecutors to submit to the HJPC annual declarations of assets and interests for the purpose of its checking and publication (draft Article 86, 86a-e), sets up a new Integrity Unit in the HJPC responsible for this area (draft Article 86f) and establishes new offences related to this area (draft Article 86h).

31. The Venice Commission welcomes the efforts to increase transparency and prevent conflicts of interest both inside the HJPC and among judges and prosecutors more broadly. These efforts are, in principle, in line with international standards and also take account of some of the recommendations that the Venice Commission formulated in its previous opinions. For example, the Draft Law now clearly stipulates that “*academic, scholarly, scientific, professional, cultural and another activity that is compatible with judicial and prosecutorial office*” (draft Article 83(1)) is not subject to the prohibition against holding incompatible offices enshrined in Article 82.

32. With respect to draft Article 5(3), the Venice Commission welcomes the provision that prohibits HJPC members from applying or being elected to vacant positions in the judiciary during the mandate and for a year after the end thereof. As clarified in the Explanatory note, the provision aims to reduce the risk of conflict of interest and abuse of office for obtaining a promotion. However, it seems that this option also excludes the possibility of applying to vacant positions in lower courts, which does not seem justified. In addition, the draft prohibits applying to vacant positions of “*senior civil servants*” in the Office of Disciplinary Counsel or the HJPC Secretariat, a notion which is not clearly defined.

33. With respect to draft Article 10a, the Venice Commission notes that the situations in which HJPC members may be found in conflict of interest are described in a rather vague and general manner. It also notes that the consequences of the conflicts of interest described in draft Article 10a(1)(b) are not stipulated in the Draft Law and are left to be regulated by the Book of Rules of the Council. It would be preferable to have the regulation contained in the Draft Law rather than in a mere internal instrument of the HJPC.

34. Additionally, the conflicts of interest described in draft Article 10a(1)(a) seem to lead to the termination of a mandate by operation of the law, according to draft Article 6(1)(a). It is unclear, however, how the conflict of interest due to the application for a vacant position in the judiciary by a relative of an HJPC member can be raised at the moment of the application itself. If this was the case, the HJPC member's mandate would terminate by operation of law, even though he or she is not involved in the examination process. The Venice Commission recommends amending the draft Article by providing for an obligation for the member of the HJPC to declare the potential conflict of interest and for his/her subsequent exclusion from the examination of the application (See also below, paragraph 81 for the decision to acknowledge the termination of mandate and paragraph 76 for the right to appeal).

35. With respect to draft Article 82, despite the statement in the Explanatory note that the Draft Law "*improves provisions prohibiting judges and prosecutors from performing incompatible duties*" the modifications are rather modest. In fact, the concept of the law in force is maintained, and the judges and prosecutors, with only a few exceptions expressly provided in the law, will be allowed to engage in any duty or activity, if the vague conditions provided in the law are respected (namely, it "*is not incompatible with or could not be seen to interfere with the fair and impartial exercise of judicial or prosecutorial office or that would not affect the independence or dignity of judicial or prosecutorial office, cast doubt upon his or her ability to act impartially, or demean judicial or prosecutorial office*"). Considering the dysfunctions of the BiH judicial system and the HJPC reported by experts,³³ the Venice Commission considers it would be a missed opportunity if the BiH authorities did not limit the scope of activities that judges, prosecutors and HJPC members can do, which may lead to repeated and unwarranted deferral of their duties. 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.

36. With respect to draft Article 83, the Venice Commission observes that this provision (and others in the Draft Law, see examples under the session on Disciplinary liability) refers to judges and prosecutors as employees, incorporated in a structure organised hierarchically. By definition, employees are expected to provide some services, under the supervision of a superior who has the discretion to decide whether to allow the employee to leave the office during working hours. This categorisation of judges and prosecutors is problematic, as the figure of the employee, that is a subordinated person, is not necessarily (or not necessarily perceived as) a truly independent person. Judges and prosecutors are office-holders, not employees, and even in an hierarchical system are expected to carry out their professional duties independently and subject only to the law.

37. The Venice Commission constantly stresses that the issue of internal independence within the judiciary is no less important than the issue of external independence.³⁴ One of the important aspects of judges' internal independence is their independence from the court presidents. Draft Article 83(3) provides that judges, during working hours, can participate in the work of professional bodies or in gathering formed or organised for the purpose of drafting legislation or discussing issues and preparing or presenting materials with relevance to the judiciary only upon obtaining an approval of the court president. This can hardly be considered as contributing to the independence of judges from the court presidents. Likewise, while prosecutors may not have the same degree of internal independence as judges, the Venice Commission has consistently emphasised the need for adequate guarantees against improper interference with the work of prosecutors.³⁵ It is therefore recommended to modify this provision by requiring a simple duty to inform the court president or chief prosecutor of the activities that the judge or prosecutor intend

³³ Priebe Report, *op. cit.*, paras 36 and 74.

³⁴ CDL-AD(2010)004, *op. cit.*, para 68.

³⁵ CDL-AD(2010)040, paras 53-60.

to undertake. (As to the distinction for requiring the approval based on the working hours, see also the section B) on Disciplinary liability).

38. As concerns the prohibition of receiving any remuneration for this last set of activities, even if it seems to be based on the assumption that the salary can be considered a sufficient remuneration, the prohibition cannot be considered an optimal solution. Efficient participation in the activities mentioned in draft Article 83(2)(b) will require from judges and from prosecutors to make additional efforts, and prohibition to receive any remuneration, even for such additional efforts, obviously will not motivate judges or prosecutors to be most efficient.

39. In its 2014 Opinion, the Venice Commission stated:

“97. [...] 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. [...] 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.”³⁶

The prohibition in Article 83 should thus be reconsidered.

40. With respect to draft Article 85, the Venice Commission notes that, as it held in one of its previous opinions, *“in the implementation of a code of ethics, the possibility for judges to seek advice from a body within their organisation(s) should be included”*.³⁷ Draft Article 85 makes it possible for a judge or prosecutor to request an opinion of the HJPC on the compatibility of his/her activity with his/her functions and the Law on the HJPC. This opinion, as specified in draft Article 85(4) shall be binding. The Venice Commission assumes that the binding effect shields the judge or prosecutor from the risk of disciplinary proceedings for the offence foreseen in draft Articles 56(1)(p) and 57(1)(r). It would seem appropriate to indicate this explicitly.

41. With respect to draft Articles 86 and 86a-i, the Venice Commission welcomes the introduction of detailed rules concerning the compulsory declaration of assets and interests and its availability to the public.

42. The Venice Commission presumes that Draft Article 86(1) has an error of translation and the text should read as follows: *“Judges and prosecutors shall submit to the Council their entry and annual declaration of assets and interests, including the manner and time of acquiring such assets and their acquisition value, income, interests, liabilities, expenditures and guarantees for themselves, their spouse or civil-law partner and parents, children and any other persons with whom **they** share a joint household”* (emphasis added). The Commission reads this provision as requiring the submission of the declaration for the listed relatives, independently from the fact that they live with the declarant, **and** any other persons with whom the declarant shares a joint household. The Commission deems it may be excessive to require the judge or prosecutor to submit a declaration also for parents and adult children who do not share a joint household with the declarant.

³⁶ Opinion No. 712/2013, *Opinion on the Draft Law on the High Judicial and Prosecutorial Council of Bosnia and Herzegovina*, CDL-AD(2014)008, 24 March 2014, para 97.

³⁷ Opinion No. 739/2013, *Opinion on the Draft Code on Judicial Ethics of the Republic of Tajikistan*, CDL-AD(2013)035, 10 December 2013, para 16.

43. Draft Article 86(2)(b) provides that the declaration shall contain information on income “*from the core activity for the spouse and children living in the same household*”. This provision raises several issues. Firstly, the Venice Commission wonders why only spouses and children are mentioned, excluding or ignoring civil-law partners, parents and other persons with whom the judge or the prosecutor could share a joint household. Secondly, the fact that these persons are mentioned only in this subparagraph can serve as a basis for interpreting *a contrario* that judges and prosecutors are not obliged to declare other persons mentioned in paragraph (1) the information required in all other subparagraphs. Thirdly, it is not clear what “*the core activity*” means and it would be preferable to clarify that the declaration should include the information about *all* income of these persons. Consequently, the Venice Commission recommends rephrasing this provision in order to make clear that the declaration should include information on all income of all persons mentioned in paragraph (1).

44. Paragraph (7) provides, that “*The declaration shall reflect changes that occurred during the reporting period relative to the previously submitted declaration*”. The Explanatory note, which wrongly makes reference to paragraph (6), declares this paragraph is applicable to the part of the declaration concerning assets. The proposed option will make it difficult not only for the general public, but also for specialised agencies to have a clear picture of the assets and their justification, as it will be necessary every time to open all previous declarations of the person in question and carefully compare them, in order to understand which is the real situation at the time of the assessment. It would be advisable to require the submission of a comprehensive declaration that may be amended on a yearly basis.

45. The Venice Commission acknowledges the complexity of the issue of refusal to provide the necessary information by persons for whom the judge or prosecutor is obliged to submit the declaration (Draft Article 86(10)). Any solution would either assign an overly cumbersome task on the declarant, or excessively weaken the control mechanism. Nevertheless, the solution proposed, in which the judge or the prosecutor shall simply report the refusal in the declaration, cannot be considered as striking a reasonable balance between competing interests. The Commission suggests requiring at least the submission of some forms of evidence of the refusal or the genuine attempt to obtain the information.

46. Draft Article 86(11) deals with the complicated issue of control on the use of cash. The choice of the BiH authorities is to prohibit the use of an amount of cash higher than BAM 5.000 (about 2.555 euros) to explain the funding of his/her expenditures. From the arguments and information provided in the Explanatory note, including the reference to foreign legislation and practice, it seems that the authors of the draft are confusing two different issues, namely, on the one hand, the use of cash transactions for tax evasions and, on the other hand, the declaration of a larger, potentially non-existent, amount of cash, in order to justify expenditures and complications in the process of control of veracity of asset declarations. The problem related to use of cash transactions for tax evasions is irrelevant for this Draft Law, whereas the issue of artificially inflated cash to justify expenditures could be addressed by imposing such limitation for the first declaration, as all further cash transactions would need to be justified nonetheless. It does not seem appropriate to impose a permanent limitation taking into consideration that it is legal to hold more than BAM 5.000 cash in BiH, there are no limits for cash transactions, and the acts of acquisition of goods in cash are in line with the national legislation.

47. The Venice Commission notes that by virtue of Article 86a(6), the public availability of the declaration should be limited to the time period of one year for judges and prosecutors whose mandate comes to an end. As the Explanatory note reports, “*in other countries declarations are also available to the public without a time limit. In this regard, paragraph (6) is rather modest and minimally invasive approach*”. The reasons for the choice of this “minimalist” approach do not seem altogether clear. In addition, the declaration for the first year after the expiry of their

mandate, which former judges or prosecutors are obliged to submit in conformity with draft Article 86 paragraph (9), will never become public. In order to solve this problem and to avoid the risk of compromising the transparency of the declarations, the Venice Commission recommends providing a longer period for the public availability of the declaration for all declarants.

48. Draft Article 86b(5) provides that for the purpose of verification of declarations, the HJPC shall adopt and regularly revise the risk criteria, which are confidential. While it seems reasonable for the HJPC to have competence on the adoption of some regulations concerning risk criteria, it appears questionable to give it full discretion on the matter. The Venice Commission recommends that basic rules be framed by the law, while the HJPC may elaborate them further within the limits drawn by the law. Furthermore, the Commission questions the confidentiality of the risk criteria because it can open wide the door for abuses, and it would permit the use of this instrument for putting pressure on inconvenient judges. In addition, the Venice Commission understands the choice of draft Article 86b(7) to provide that the declaration verification procedure shall be closed to the public, but it recommends to expressly mention that the criteria used and the results of the verification will be made public.

49. Concerning draft Article 86f, the Venice Commission welcomes the establishment of an Integrity Unit. It understands that the reasons for which this Unit has been established as a part of the HJPC Secretariat is primarily linked to the territorial scope the Transfer Agreement grants to the HJPC and any internal organ established within it. However, the Commission highlights the important role the Integrity Unit will have in assessing the declaration of assets and interests, and it therefore points to the need for ensuring the independence of this Unit and the necessity to set up safeguards to shield it from possible interference by the HJPC itself, including the Secretariat management. In this respect, the Venice Commission recommends that more precise rules on the composition, operation of the Unit, including *ex ante* integrity and background checks of its members, alongside effective safeguards should be explicitly provided, including possible external monitoring of the recruitment process.

50. The Commission welcomes draft Article 86f(2), which requires the HJPC to engage experts with an advisory role for the purpose of monitoring the work of the Integrity Unit with regard to the functioning and enforcement of the asset declaration system. Nevertheless, the Commission notes that neither the Draft Law nor the Explanatory note elaborates on the role of these experts. It therefore encourages the BiH authorities to explicitly stipulate in the Draft Law their capacities, which should include at least the ability to access all asset declarations and supporting documents, in line with confidentiality safeguards, to make individual recommendations on how to handle/assess the declarations, to allow follow-up actions if recommendations are not taken into account by the Integrity Unit without due justification (as experts do not have executive but only advisory function), and to publicly report on the overall functioning and enforcement of an asset-declaration system. In light of the above, the Venice Commission recommends that more precise rules on the functional independence, composition and operation of the Unit, and role of the experts engaged in monitoring should be provided in the Draft Law itself and not be left to the regulation by sub-legal acts.

B. Disciplinary procedures for judges and prosecutors

51. The Law on the HJPC contains a whole section, Chapter VI, that deals with disciplinary liability of judges and prosecutors. The Draft Law revises this section by, firstly, extending its application to members of the HJPC (in their capacity as members of the HJPC), secondly, making it impossible to avoid disciplinary liability by transferring to another body, thirdly, consolidating the list of disciplinary offences of judges and prosecutors and introducing additional offences for court presidents and chief prosecutors, and, fourthly, specifying rules on the statute of limitations.

52. The Venice Commission welcomes the extension of the application of the section to the members of the HJPC (amended Article 54). Yet, it notes that this extension is not accompanied by a provision that would set out the specific offences for which members of the HJPC could be held disciplinarily liable in this capacity. It is not clear if and how the provisions on disciplinary liability of judges and prosecutors enshrined in Chapter VI are linked to amended Article 6 and draft Article 6a (Termination of mandate and Removal of members of the Council). It is also unclear in what way certain provisions in this chapter (for instance Article 58: List of Measures) that appears to be drafted specifically for judges and prosecutors, could be applied with respect to the members of the HJPC. During the online discussions, some of the BiH interlocutors suggested that the HJPC members from the ranks of judges and prosecutors could be held disciplinarily liable under the provisions enlisting disciplinary offences of judges and prosecutors (Articles 56 and 57, as amended by the Draft Law), applied *per analogia*.

53. The Venice Commission finds this suggestion problematic. Firstly, the suggestion fails to take into account the difference between the two positions that members of the HJPC occupy, namely their original position (judge, prosecutor, civil servant, etc.) and their position at the HJPC (members of the HJPC). These two positions entail different tasks and different responsibilities and it is thus questionable to what extent disciplinary offences related to the former position may be applied to persons acting in the latter position. For instance, would the disciplinary offence of the disclosure of confidential information obtained in the course of performing judicial or prosecutorial duties (draft Articles 56(1)(a) and 57(1)(a)) also apply to the disclosure of confidential information obtained in the course of performing the tasks of a member of the HJPC? Secondly, linked to that, the Commission finds the potential use of *per analogia* reasoning in disciplinary proceedings problematic. Laws imposing an obligation the breach of which may result in a penalty must be drafted in a clear and unambiguous way. Thirdly, the suggestion would make different members of the HJPC subject to different disciplinary offences and would also make some of them, namely those who are neither judges nor prosecutors by their original position, immune from disciplinary proceedings. The Venice Commission thus recommends that a new provision, listing the specific disciplinary offences of HJPC members, be added to the Draft Law.

54. 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),³⁸ 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.

55. The Venice Commission itself set out detailed rules regarding the disciplinary liability of judges in its 2015 opinion concerning "the former Yugoslav Republic of Macedonia".³⁹ Some recommendations formulated in that opinion are also applicable in the case at hand. They include the following recommendations: a) judges shall not be disciplined for situations which are outside of their control and which may be reasonably explained by the malfunctioning of the judicial system as a whole; b) disciplinary sanctions should not interfere with the judge's independence in the decision-making and should never extend to differences in legal interpretation of the law or judicial mistakes; c) only deliberate abuse of judicial power or repeated and gross negligence should give rise to a disciplinary violation; d) the disciplinary system should use less drastic sanctions for smaller violations; e) dismissal of a judge should only be ordered in exceptionally serious cases; f) under-performance should not be automatically equated with a disciplinary

³⁸ ECtHR, *Mitrinovski v. "The former Yugoslav Republic of Macedonia"*, Application No. 6899/12, 30 April 2015; ECtHR, *Gerovska-Popčevska v. "The former Yugoslav Republic of Macedonia"*, Application No. 48783/07, 7 January 2016; ECtHR, *Poposki and Duma v. "The former Yugoslav Republic of Macedonia"*, Applications No. 69916/10 and 36531/11, 7 January 2016.

³⁹ Opinion No. 825/2015, Opinion on the *Laws on the Disciplinary Liability and Evaluation of Judges of "The Former Yugoslav Republic of Macedonia"*, CDL-AD(2015)042, 21 December 2015.

violation.⁴⁰ These recommendations, though primarily applicable to judges, are applicable to prosecutors and members of the HJPC as well.

56. The lists of disciplinary offences for judges and prosecutors have been revised and consolidated. Some grounds, i.e. violations of the duty of impartiality (Articles 56(1) and 57(1)), acting with bias and prejudice (Articles 56(2) and 57(2)) have been dropped, although the grounds for that are not clear and the Explanatory note does not provide any reasons why this has been the case. These grounds appear to be relevant and should be reintroduced. Other grounds conversely have been maintained, although the previous Venice Commission opinion recommended their revision. This is for instance the case of draft Articles 56(1)(g) and 57(1)(g) which refer to *“interfering with the work of a judge or a prosecutor with the intention to obstruct or prevent their activities, or to influence their work”*. In its 2014 opinion, the Venice Commission noted that the provision was not clear and stressed the need to *“clarify what is meant by an “obstruction” for the purposes of this draft Law”*.⁴¹ No clarification is contained either in the text of the provision or, at least, in the Explanatory note. Similarly, draft Article 56(1)(f) refers to *“enabling a person not authorised by law to perform judicial functions”*, whereas the Venice Commission held, in its 2014 opinion, that the meaning of this provision is unclear and so are the circumstances under which a judge could engage in such an act (applicable also to draft Article 57(1)(f) for prosecutors).⁴² The Venice Commission reiterates its previous recommendation in this respect.

57. New grounds have also been added, some of which seem to be drafted in rather vague terms. For instance, *“violation of the right to a trial within reasonable time”* (draft Articles 56(1)(e) and 57(1)(f)) should be defined in such a way as to make sure, that a judge or a prosecutor is not sanctioned for delays that are beyond his/her control (e.g. those caused by applicants). The Venice Commission realises that this provision may be intended to stem the excessive length of proceedings which might jeopardise the effectiveness and credibility of the administration of justice.⁴³ Nevertheless, this issue should be dealt with through a comprehensive reform of procedural law, not through the disciplinary process unless the delays are caused by negligence or voluntarily.

58. Some of the already existing grounds have moreover been revised in a problematic way. For instance, the Law on the HJPC contains the offence of *“making any comment, while a proceeding is pending in any court, that might reasonably be expected to prejudice or interfere with a fair trial or hearing, or failing to take reasonable steps to maintain and ensure similar abstention on the part of the staff at the court who are subject to his or her authority”* (current Articles 56(15) and 57(14)).⁴⁴ In its 2014 opinion, the Venice Commission recommended clarification of this provision. The Draft Law does not provide any such clarification but, rather, replaces the offence by that of *“making any comment on a court decision, proceeding or a case while the case is ongoing before court”* (draft Articles 56(1)(i) and 57(1)(i)). In this new version, however, the provision is even vaguer and more open-ended than its original wording. The Venice Commission recalls its previous findings related to the freedom of expression of judges:

“80. European legislative and constitutional provisions and relevant case-law show that the guarantees of the freedom of expression extend also to civil servants, including judges. But, the specificity of the duties and responsibilities which are incumbent to judges and the need to ensure impartiality and independence of the judiciary are considered as legitimate aims in order to impose specific restrictions on the freedom of expression, association and assembly of judges including their political activities.

⁴⁰ *Ibidem*, para 113.

⁴¹ Opinion No. 712/2013, CDL-AD(2014)008, *op. cit.*, para 104.

⁴² *Ibidem*, para 102.

⁴³ ECtHR, *Scordino v. Italy* (no. 1) [GC], Application no. 36813/97, 29 March 2006.

⁴⁴ Opinion No. 712/2013, CDL-AD(2014)008, *op. cit.*, para 105.

81. However the ECtHR has considered that, having regard in particular to the growing importance attached to the separation of powers and the importance of safeguarding the independence of the judiciary, any interference with the freedom of expression of a judge calls for close scrutiny.”⁴⁵

59. Pursuant to draft Article 56(1)(h), a final conviction of a judge for a criminal offence constitutes a disciplinary offence. While the Venice Commission recognises the seriousness of such a circumstance which should impede the judge to maintain the judicial office and may lead even to the termination of his/her mandate, it contests that the judge can be considered disciplinary liable for that. As a matter of fact, there is no concrete act or omission imputable to the judge, but the fact of being convicted (for a criminal act or omission that cannot be confused with the conviction itself). Therefore, it is not clear, what exactly must be done during the disciplinary procedure, and on which issues the disciplinary body will deliberate. The Commission recalls, as clarified in the past, that there should be a clear separation between criminal and disciplinary liability.⁴⁶

60. 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.⁴⁷

61. Similarly, as regards the disciplinary responsibility for violation of a principle of the Code of Ethics provided in subparagraph (u), the Venice Commission has already rejected the idea of disciplinary responsibility for violation of norms of ethics *per se*.

“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.”⁴⁸

However, in this case, the Venice Commission finds the provision reasonable inasmuch as it foresees the disciplinary responsibility only for violations “*that compromises the reputation and integrity of the judiciary*”. It also considers that the reference to the “*reputation and integrity of the judiciary*” satisfies the requirement of foreseeability of the law as it is addressed to judges that are expected to understand the full meaning of these terms, notably on the basis domestic case-law on the matter. In this respect, the European Court of Human Rights has found, in a case against Poland, that a judge is considered to be “*well-versed in the law and aware of the rules aimed at upholding the integrity and dignity of a judicial office*”.⁴⁹

62. The same reasoning is also valid for the disciplinary responsibility of court presidents (draft Article 56(2)(e)). For the latter, it is however questionable to provide for disciplinary responsibility

⁴⁵ Opinion n°806/2015, *Report on the Freedom of expression of judges*, CDL-AD(2015)018, paras 80-81.

⁴⁶ Opinion No. 755/2014, CDL-AD(2014)006, *op. cit.*, paras 27-28.

⁴⁷ Opinion No 751/2013, Joint Opinion of the Venice Commission and the Directorate of Human Rights (DHR) of the Directorate General of Human Rights and the Rule of Law of the Council of Europe, *on the Draft Law amending and supplementing the judicial code (evaluation system for judges) of Armenia*, CDL-AD(2014)007, 24 March 2014, para 102.

⁴⁸ Opinion No. 739/2013, CDL-AD(2013)035, *op. cit.*, para 16; Opinion No. 755/2014, Joint Opinion of the Venice Commission and the Directorate of Human Rights (DHR) of the Directorate General of Human Rights and the Rule of Law (DGI) of the Council of Europe, *on the Draft Law on disciplinary liability of judges of the Republic of Moldova*, CDL-AD(2014)006, 24 March 2014, para 35; Opinion No. 751/2013, CDL-AD(2014)007, *op.cit.*, para 111.

⁴⁹ ECtHR, *Case of Guz v. Poland*, Application no. 965/12, 15 January 2021, para 79.

in case of “*management and administration of a court contrary to law*” (draft Article 56(2)(a)), which appears to be a vague formulation, for which it is hard to establish what acts or omissions would serve as a ground for disciplinary liability. The problem of excessive backlog and mismanagement of judicial cases should be dealt with primarily through a reform of the procedural codes rather than the disciplinary regulation.

63. As noted above (see section A) on conflicts of interest and transparency), the introduction of disciplinary responsibility of judges just for “*disregard for working hours and absence from duty*” provided in draft Article 56(1)(t) confirms the conception of judges as employees, which is hardly compatible with the status of persons delivering justice. Although the Venice Commission confirms that judges must respect the schedule of the court and court hearings, the wording of this provision as regards working hours may be problematic. The control of the respect by judges of the schedule of the court and court hearings must be part of the control of delivering justice and only if the disregard for working hours and absence from duty affect the judicial activity can this be a ground for disciplinary responsibility. This provision should be reconsidered.

64. The Venice Commission also notes that the list of disciplinary offences of judges and prosecutors (draft Article 57) are virtually identical and therefore draws the attention to the fact that most of the considerations expressed above about judges, also apply to prosecutors.

65. The Venice Commission notes that the procedures for disciplinary hearings (current Articles 60-75) remain unchanged in the case of a charge against a HJPC member. This means that any disciplinary complaint against a HJPC member, including its President, is heard by one of the Disciplinary Panels which according to current Article 61 are wholly appointed by the HJPC President with no input from anybody else, not even the other members of the HJPC. In addition, the offence is prosecuted by the Disciplinary Counsel, which in turn is appointed by the HJPC again with no other input. In this respect, the Commission has declared, in its 2014 Opinion on BiH, that

*“Taking into account that this office /of the Disciplinary Counsel/ is part of the institution responsible for considering and applying disciplinary penalties, it is crucial to ensure that there is no institutional or personal interference of the members of the HJPC in the work of the Office of the Disciplinary Counsel.”*⁵⁰

The Venice Commission recommends that these procedures be amended in a way to allow for an independent external input into the process when a HJPC member is charged.

66. Furthermore, provided that disciplinary offences are considered by panels established mostly within the HJPC, a provision explicitly stating that the member of the HJPC subject to disciplinary proceedings shall not be a member of either of these panels should be enshrined in the Draft Law (*nemo iudex in causa sua*). The Venice Commission also recalls that decisions in disciplinary matters shall be subject to judicial review which shall not be limited to the two grounds stated in Article 60(7) of the Law on the HJPC (for more on judicial review, see section C) below).

67. The provision that the disciplinary proceedings in case of a criminal offence may not be initiated upon the expiry of one year following the date of the decision in the criminal proceedings became final seems to be introduced for the cases of disciplinary liability for criminal conviction. As mentioned supra, the Venice Commission recommends deleting this disciplinary offence or rephrasing it in a way that refers to cases in which the act or omission qualifies both as a criminal and disciplinary offence. The Commission reiterates, as mentioned above (paragraph 58), that the two proceedings should be kept separate and the criminal one should have precedence.⁵¹

⁵⁰ Opinion No. 712/2013, CDL-AD(2014)008, *op. cit.*, para 112.

⁵¹ Opinion No. 755/2014, CDL-AD(2014)006, *op. cit.*, paras 27-28.

C. Judicial review of HJPC decisions

68. In its 2014 Opinion, the Venice Commission recommended “*introducing a right to appeal to a court of law for HJPC’s written decisions regarding appointments and for assessments of judges and prosecutors as well as for decisions of the disciplinary commission (that can be appealed to the HJPC) – at least for cases where a serious penalty was imposed*”.⁵² The importance of judicial review of the decisions adopted by judicial councils are highlighted in various instruments. Thus, the United Nations *Special Rapporteur on the independence of judges and lawyer* in his 2018 report noted that “*decisions of the disciplinary body should be reasoned and subject to appeal before a competent court*”.⁵³

69. Therefore, the Venice Commission welcomes draft Article 44 inasmuch as it provides that a “*Decision on appointment constitutes a final administrative act of an institution of Bosnia and Herzegovina under Article 4 of the Law on Administrative Disputes of Bosnia and Herzegovina (Official Gazette of BiH, No. 19/02, 88/07, 83/08 and 74/10), and an administrative dispute may be initiated against it, by filing a lawsuit before the Court of Bosnia and Herzegovina*” (paragraph 4). Yet, the Commission assumes and suggests making explicit that such decision can be challenged also on the merit, and not only on procedural matters.

70. Likewise, the Venice Commission welcomes draft Article 44(1), since it stresses that the HJPC decisions on appointment “*shall contain justification regarding the application of criteria*”. The Venice Commission is aware that the lack of any substantive justifications for the appointment decisions, together with the apparently inconsistent nature of these decisions, has been one of the long-standing problems of the HJPC activities. It therefore encourages the HJPC to apply this provision meticulously.

71. Nonetheless, the Venice Commission regrets that there are no other proposals in the Draft Law to change the systems of appointment, promotion or career advancement of judges or prosecutors, in particular as regards the provisions on equality of representation among the constituent peoples in Article 43(2) of the Law on the HJPC. The Venice Commission reiterates that the judiciary should not be organised along ethnic lines. The multi-ethnic composition of the judiciary should be of itself sufficient to ensure public trust.

72. In the Opinion on the Constitutional Situation in Bosnia and Herzegovina and the powers of the High Representative, the Venice Commission stated in particular that:

“20. (...) *While a lack of interethnic trust following a bloody war is not surprising, the various ethnic groups have to live and work together, and not just side-by-side. (...)*

104. *Further constitutional reforms, changing the emphasis from a state based on the equality of three constituent peoples to a state based on the equality of citizens, remain desirable in the medium and long term. (...)*”⁵⁴

73. With respect to the organisation and the composition of courts, the Venice Commission had also stated that “*(...) organising courts along ethnic lines would be wrong, counterproductive and damaging to the credibility of the judicial institutions. Such an approach may also counter Article 14 on the prohibition of discrimination of the European Convention on Human Rights and should therefore be approached with extreme caution.*”⁵⁵

⁵² Opinion No. 712/2013, CDL-AD(2014)008, *op. cit.*, para 126.

⁵³ UN Doc. HRC/38/38, *op. cit.*, para 105.

⁵⁴ Opinion No 308/2004, Opinion on *the Constitutional situation in Bosnia and Herzegovina and the powers of the High Representative*, CDL-AD(2005)004, 11 March 2005, paras 20 and 104; Opinion No. 712/2013, CDL-AD(2014)008, *op. cit.*, para 33.

⁵⁵ Opinion No. 712/2013, CDL-AD(2014)008, *op. cit.*, para 34; see also, Opinion No. 723/2013, CDL-AD(2013)015, *op. cit.*, para 23; and, Opinion No. 648/2011, CDL-AD(2012)014, *op. cit.*, para 89.

74. Incidentally, the Venice Commission suggests to harmonise draft Article 44(1), which provides that the Council's Decision shall be published on the Council's website, with current Article 45, which provides that the decision on appointment shall be published in the Official Gazette of Bosnia and Herzegovina, and the Council shall post the decision in a public viewing area at its premises, which will determine the dating of the decision.

75. The Draft Law also partly modifies the rules otherwise applicable in administrative procedures, by introducing the time period (of 8 days) within which the lawsuit may be filed, requiring the Court of BiH to deal with these lawsuits in an urgent procedure, and providing the lawsuit with a suspensive effect with respect to the assumption of office by the newly appointed judge or prosecutor (paragraphs 5-6). This regulation responds to the concerns expressed *inter alia* by the HJPC that the appeals against the HJPC decisions in appointment matters could unduly slow down the appointment processes. The Venice Commission finds the chosen solution reasonable.

76. The Explanatory note adds that "*decisions of the Council should also be subject to general regulations applicable to public institutions, such as the Administrative Procedure Code and the Administrative Disputes Code, which provides for judicial protection by instituting an administrative dispute before a court*". This formulation is not altogether clear. Does the term "decisions" refer to decisions on appointment only or does it refer to other decisions by the HJPC (for instance in disciplinary matters), as the term "also" would suggest? And does the Explanatory note refer to the same procedure as the amended Article 44(4)?

77. The Venice Commission welcomes the introduction of the right to appeal to the Court of Bosnia and Herzegovina against the decisions related to appointment. Yet, it stresses that the right to appeal should not remain limited to such decisions. As a minimum, the decisions in disciplinary matters and, arguably, decisions on the removal of a member of the HJPC (or on the termination of mandate) should be subject to the right to appeal as well. For those reasons, these decisions always need to contain justification indicating reasons on the basis of which they have been reached.

78. Article 60(7) of the Law on the HJPC grants judges and prosecutors who have been removed from office, the right to appeal to the Court of BiH. Yet, this right only covers judges and prosecutors having been subject to disciplinary proceedings resulting in removal, and its scope is further limited to two possible grounds of appeal (material violation of the procedure by the HJPC and erroneous application of the law by the HJPC). The grounds for appeal provided in Article 11 of the *Law on Administrative Disputes of Bosnia and Herzegovina* are broader and it is not clear why the Law on the HJPC has opted for a different solution.

79. The decisions on the removal of members of the Council (draft Article 6a) do not seem to be subject to the right to appeal at all.

80. The Venice Commission recommends that all substantive decisions adopted by the HJPC shall be reasoned and should be subject to judicial review under the *Law on Administrative Disputes of Bosnia and Herzegovina*.

D. Removal of members of the HJPC

81. The termination of the mandate of the members of the HJPC is regulated in Article 6 of the Law on the HJPC. So far, the provision has foreseen seven grounds on which the termination may occur. The Draft Law removes one of those grounds and reformulates two other. The Venice Commission welcomes the removal of the ground enshrined in Article 6(1)(f), i.e. termination of the mandate *“for the commission of an act that would make him or her unworthy to perform duties in the Council”*. This is a vague formulation. The Venice Commission also welcomes the reformulation of subparagraphs 1(d) and 1(e) – the grounds enshrined in these provisions should now be clearly linked to the regulation relating to the conflict of interests (subparagraph 1(d)) and to the procedure of removal of the member enshrined in draft Article 6a. These changes make the text of the Law on the HJPC more coherent and more precise.

82. As described in the Explanatory note, the Draft Law provides for a distinction between the termination of the mandate of a member of the HJPC by operation of the law, in cases provided in amended Article 6, and dismissal by a motion or *ex officio*, through a decision adopted by the HJPC, in cases provided by draft Article 6a. For the sake of clarity as to the exact day of the termination of the mandate, the Venice Commission suggests to explicitly mention that even in cases of the termination of the mandate by operation of the law, the Council shall adopt an act, in which to take note of the termination of the mandate, with the indication of the day of the termination.

83. Draft Article 6a sets out four grounds for the removal of HJPC members. The Venice Commission welcomes in principle these four grounds, which clearly react to certain long-standing problems that the HJPC has been confronted with. These grounds are the following: a) the member is not performing his or her duty in accordance with the Law and HJPC Rules of Procedure; b) in a case of incompatibility of functions; c) the member commits any misconduct that seriously undermines the reputation of the Council; d) absence from duty of a member of the Council for a period longer than three months continually, or longer than six months continually if the absence is caused by sickness.

84. The removal may be initiated by a motion filed by a judge, a prosecutor or a member of the Council, or *ex officio*. Upon the receipt of the motion or the *ex officio* finding, a special commission composed of five HJPC members is set up to establish the relevant facts and propose a decision. The Commission shall include at least one member from the judges and from the prosecutors. The final decision on the removal is taken by the HJPC by a two-thirds majority vote of those present and voting. The decision has to contain reasoning. There does not seem, as noted above, any possibility for an appeal. The Venice Commission strongly recommends modifying this provision in order to confer such a right of appeal.

85. In principle, the grounds for the removal and the procedure do not seem incompatible with international standards. That judicial councils must be *“held to high standards of ethics”* and that laws and regulations have thus to *“establish clear accountability mechanisms”* has been stressed repeatedly.⁵⁶ At the same time, some grounds for removal are rather vague and should be further specified in the Draft Law. This is the case, notably, of draft Article 6a(1)(c) – *“any misconduct that seriously undermines reputation of the HJPC”*, as well as of draft Article 6a(1)(a) *“if he/she is not performing duty in accordance with the Law and HJPC Rules”* which should be reformulated to allow for the removal of the HJPC member as a solution of last resort for very serious infringements. Such an option may be admissible only in cases of flagrant violation of the provisions of the law, which should be narrowly construed, not for those contrary to the HJPC

⁵⁶ V. Autheman and S. Elena, *Global Best Practices: Judicial Councils, Lessons Learned from Europe and Latin America, IFES Rule of Law White Paper Series No 2*, April 2004, p. 16.

Rules of Procedure, which would otherwise clash with the requirement to guarantee the independence of the HJPC members.

86. The Venice Commission also notes that whereas draft Article 54(4) indicates that the removal procedure does not preclude disciplinary liability, provided that the list of acts enlisted in draft Article 6a(1) and the lists of disciplinary offences foreseen in draft Articles 56 and 57 largely differ, there are limited prospects of putting draft Article 54(4) in application. In this respect, the Venice Commission reiterates its recommendation to introduce a new provision on disciplinary offences for HJPC members. This new provision could be at least partly inspired by draft Article 6a, to make draft Article 54(4) operational and to ensure that in case of misbehaviour of lesser gravity, disciplinary sanctions could be applied as a substitute to, rather than a complement of, removal.

87. The Venice Commission also notes that the differences between motion-triggered and *ex officio* initiated disciplinary proceedings is not altogether clear. The Draft Law fails to specify how and by whom the *ex officio* proceedings could be triggered. The Draft Law also fails to indicate explicitly that members of the HJPC subject to the removal procedure may not be members of the special commission established under draft Article 6a(5), nor may they vote under draft Article 6a(8). The Venice Commission once again repeats that the decision on the removal from the HJPC shall be subject to judicial review.

V. Conclusion

88. The Venice Commission welcomes the efforts of the BiH authorities to respond to the criticism raised against the Law on the HJPC and the actual performance of the HJPC by making certain emergency fixes in the legal framework. It understands that the Draft Law is adopted to bring targeted amendments to the Law on the HJPC and is in no way meant to replace or preclude the adoption of a comprehensive legal act on the HJPC that would be fully in line with international standards. It acknowledges that such a new legal act shall be adopted within a year after the adoption of the Draft Law and it strongly encourages BiH authorities to take account of the recommendations formulated in the previous 2012-2014 Venice Commission opinions and in the views and reports produced by experts and the EU.

89. The Draft Law introduces new provisions that primarily focus on four issues areas: a) conflicts of interests and transparency; b) disciplinary procedures for judges and prosecutors; c) judicial review of HJPC decisions; and d) removal of members of the HJPC. The Venice Commission welcomes a more detailed regulation in these issue areas that the Draft Law provides. It would however like to make the following main recommendations:

- a. Several provisions of the Draft Law are drafted in a rather vague way (e.g. draft Article 10a, draft Articles 56(1)(i) and 57(1)(i)). They should be made more precise.
- b. The lists of disciplinary offences for judges and prosecutors should be revised in light of the recommendations made in the 2014 opinion and in this opinion.
- c. The Draft Law should specify disciplinary offences for which members of the HJPC could be held liable (as members of the HJPC).
- d. All substantive decisions adopted by the HJPC should be reasoned and subject to judicial review under the *Law on Administrative Disputes of Bosnia and Herzegovina*.
- e. As concerns the Integrity Unit, more precise rules on the functional independence, composition and operation of the Unit, and role of the experts engaged in monitoring should be provided in the Draft Law itself and not left to the regulation by sub-legal acts. The capacities of the external experts should include at least

the ability to access all asset declarations and supporting documents, to make individual recommendations on how to handle/assess the declarations, to allow follow-up actions if recommendations are not taken into account by the Integrity Unit without due justification, and to publicly report on the overall functioning and enforcement of an asset-declaration system.

90. Other recommendations are to be found in the body of the text and will not be repeated here.

91. The Venice Commission remains at the disposal of the BiH authorities for further assistance in this matter.

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