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

**REPUBLIC OF MOLDOVA**

**DRAFT JOINT FOLLOW UP OPINION  
OF THE VENICE COMMISSION AND THE DIRECTORATE GENERAL  
OF HUMAN RIGHTS AND RULE OF LAW (DGI) OF THE COUNCIL  
OF EUROPE**

**TO THE OPINION**

**ON THE DRAFT LAW ON THE SUPREME COURT OF JUSTICE  
CDL-AD(2022)024**

**On the basis of comments by**

**Mr Philip DIMITROV (Member, Bulgaria)**  
**Mr António HENRIQUES GASPAR (Member, Portugal)**  
**Mr Alexander BARAMIDZE (Former Substitute Member, Expert,  
Georgia)**  
**Ms Nina BETETTO (DGI Expert)**

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**Table of Contents**

I.	Introduction .....	3
II.	Background .....	3
III.	Analysis.....	3
	A. Uniformisation of the application of the law and the independence of judges .....	4
	B. Restructuring of the SCJ (composition and organisation).....	5
	C. Extraordinary evaluation of judges of the SCJ .....	6
	D. Technical remark: the structure of the Draft Law on SCJ .....	8
IV.	Conclusion .....	8

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## I. Introduction

1. By letter of 11 November 2022, the Minister of Justice of the Republic of Moldova requested a follow-up opinion of the Venice Commission on the Draft Law on the Supreme Court of Justice ([CDL-REF\(2022\)063](#); which was revised further to the Joint opinion of the Venice Commission and the Directorate General of Human Rights and Rule of Law (DGI) of the Council of Europe ([CDL-AD\(2022\)024](#)) adopted at the 132<sup>nd</sup> Plenary Session of the Venice Commission, in October 2022. By letter of 2 December 2022, the Minister of Justice of the Republic of Moldova submitted the revised Draft Law on the Supreme Court of Justice (hereafter, “the Draft Law on SCJ”) ([CDL-REF\(2022\)063rev](#)) and the revised Draft Law on the amendment of the Law no. 26/2022 “On Some Measures Related to the Selection of Candidates for Membership in the Self-administrative Bodies of Judges and Prosecutors” (hereafter, “the Draft Law 26/2022”) ([CDL-REF\(2022\)064rev](#)).

2. Mr Alexander Baramidze, Mr Philip Dimitrov, Mr António Gaspar, and Ms Nina Betetto acted as rapporteurs for this opinion.

3. Given the fact that this is a follow-up opinion, no additional country visit or online consultations with the authorities and other stakeholders were organised. Broad online consultations had been organised on 22-23 September 2022, during the drafting of the initial opinion.

4. This joint opinion was prepared in reliance on the English translation of the Draft Law on the Supreme Court of Justice ([CDL-REF\(2022\)063rev](#)) as well as of the Draft law “On Some Measures Related to the Selection of Candidates for Membership in the Self-administrative Bodies of Judges and Prosecutors” ([CDL-REF\(2022\)064rev](#)) including respective information notes. The translation may not accurately reflect the original version on all points.

5. *This opinion was drafted on the basis of comments by the rapporteurs. It was adopted by the Venice Commission at its ...Plenary Session (Venice, ...2022).*

## II. Background

6. The initial joint opinion ([CDL-AD\(2022\)024](#)) on the Draft Law on SCJ ([CDL-REF\(2022\)033](#)) was adopted by the Venice Commission at its 132<sup>nd</sup> Plenary Session on 21-22 October 2022. The Draft Law on SCJ aimed at the reduction of the number of judges in the Supreme Court of Justice (hereafter, “the SCJ”); the adjustment of the composition of the SCJ by ensuring access to the offices of SCJ judge for representatives of other legal professionals such as lawyers, prosecutors, university professors of law; the establishment of a new mandatory condition for candidates to serve as SCJ judges (a positive evaluation by the Evaluation Commission - pre-vetting); the creation of a mechanism for the extraordinary evaluation of the integrity of the current judges of the SCJ (vetting).

7. The Venice Commission addressed the following three groups of issues in its initial joint opinion: the uniformisation of the application of the law; the restructuring of the SCJ (number and composition of judges); and the evaluation of judges (pre-vetting and vetting).

8. The current opinion aims at assessing the new revised draft law against the recommendations contained in the initial joint opinion, as well as at proposing new possible recommendations in the light of the revised Draft Law SCJ and the revised Draft Law on the amendment of the Law no. 26/2022.

## III. Analysis

9. The following analysis will refer to the recommendations appearing in the initial joint opinion ([CDL-AD\(2022\)024, paras 69-70](#)) and examine whether they were followed.

## A. Uniformisation of the application of the law and the independence of judges

10. Key recommendation D: Regarding the uniform application of the law, the Venice Commission recommended to revise the mechanism of “application in the interest of the law” by defining this notion, as well as by clarifying the circumstances of applying this mechanism. Meanwhile, it stated that such judgments shall be binding only regarding the other (future) judgements of the SCJ, and not for lower courts. Moreover, it was recommended that other subjects directly concerned by the question of law examined, as well as the representatives of various legal professions, legal experts, academics, civil society organisations, and the ombudsperson should also be invited to present their views and opinions in their capacity of expert witnesses or *amici curiae*.

11. The Venice Commission finds that the revised draft law neither defines the notion of the “application in the interest of the law” nor does it clarify the circumstances of applying this mechanism. Since the recommendation cannot be considered as having been followed, the Venice Commission reiterates its initial recommendation to revise the mechanism of “application in the interest of the law” by defining this notion, as well as by clarifying the circumstances of applying this mechanism.

12. The Venice Commission positively notes that the sentence providing that “the judgement adopted on the application in the interest of the law shall be binding” (Article 4(6)) was deleted. Nevertheless, to exclude any misinterpretation of the mentioned provision in the future, the Venice Commission recommends to explicitly stipulate in the law that such judgments shall be binding only regarding other (future) judgements of the SCJ, and not for lower courts.

13. The Venice Commission welcomes the provision on adding the Ombudsman in the group of subjects entitled to request the SCJ to rule on the questions of law but notes that the representatives of various legal professions, legal experts, academics, civil society organisations, and the ombudsperson still have no possibility to present their views and opinions in their capacity of expert witnesses or *amici curiae*. It reiterates its recommendation to give them this possibility.

14. The Venice Commission therefore considers that Recommendation D has been only partially addressed.

15. Recommendation F: Regarding the issue of uniformisation of the application of the law, for the sake of clarity and legal certainty, the Venice Commission recommended to ensure the consistency and specificity of the terminology employed in Article 3, in particular as concerns the “generalisation of judicial practice”, a mechanism that should be either removed or detailed further. In addition, the word “non-binding” should be included both in sub-paragraphs (a) and (b) of Article 3).

16. The Draft Article 3(1)(a) and 3(2) has been rephrased in the following way:

**“Article 3. Powers of the Supreme Court of Justice to ensure uniform application of legislation**

(1) For the purpose of ensuring the uniform interpretation and application of legislation, the Supreme Court of Justice shall:

a) draw up guidelines on the application of procedural law, the individualization of criminal punishments and contravention sanctions.”

“(2) Advisory opinions and guidelines on the application of procedural legislation and the individualization of criminal punishments and contravention sanctions shall be published on the official website of the Supreme Court of Justice.”

17. The Venice Commission notes that the authorities removed the phrase “generalise judicial practice”, changed the word “guides” with the word “guidelines” in both paragraphs of Article 3, and removed the word “recommendations” from Paragraph 2.

18. While the word “non-binding” is still missing and the difference between the words “guides” and “guidelines” is unclear, the Venice Commission finds that recommendation F has been partially followed.

### **B. Restructuring of the SCJ (composition and organisation)**

19. Key recommendation B: As regards the composition of judges of the SCJ, to avoid affecting the SCJ sitting judges, the Venice Commission recommended that the mixed composition of the SCJ should only be applied gradually (*pro futuro*) diminishing the number of career judges to 11, via setting forth an interim period of few years during which the actual number of judges would remain flexible. In addition, the Venice Commission found the proportion 7 (non-career judges) – 13 (career judges) as more adequate.

20. Although the current the Draft Law on SCJ did not follow the proposed proportion of 7-13, it nevertheless clearly states that 11 members of the Supreme Court of Justice shall be appointed from among judges and 9 members from among lawyers, prosecutors or university professors in the field of law, thus providing that the majority of the SCJ members are career judges. Key recommendation B can therefore be considered as followed in substance, having regard also to the findings in paragraph 21 below regarding the reduction of the number of sitting judges.

21. Key recommendation C: As regards the number of judges, the Venice Commission recommended that a gradual approach should be taken as regards the reduction of the number of judges, by introducing some transitional provisions that would set forth an interim period of few years during which the actual number of judges may vary between 33 and 20 which would allow to adjust to the other changes introduced by the draft law (appointment of non-career judges, evaluation of judges), while granting some time for settling the backlog of pending cases and the natural departure of judges (e.g. retirement or resignation), so as to ensure the respect of the principle of irremovability of judges as well.

22. A transitional provision guaranteeing the gradual approach has been introduced in Article 12 (1) of the Draft Law on SCJ which stipulates that “*this Law shall enter into force on the date of its publication in the Official Monitor of the Republic of Moldova with the exception of art. 5(1) and art. 6(1) (a), which will be applied from the date when the current judges of the Supreme Court of Justice will stay at 11*”.

23. Moreover, according to Draft Article II (5) of the Draft Law 26/2022, “the judges of the Supreme Court of Justice in office on the day of the entry into force of this Law, who have passed the evaluation, shall continue their activity within the Court.”<sup>1</sup> Likewise, in the information note to the Draft Law 26/2022, the authorities confirmed that the reduction of number of judges in the SCJ from 33 to 20 will take place gradually.<sup>2</sup> The Venice Commission welcomes these improvements as a step in the right direction aimed at following the principle of irremovability of judges.

24. However, the Venice Commission recommends that the wording of the abovementioned provision of the Draft Law 26/2022 be revised, so that the phrase “shall continue their activity within the Court” will not be interpreted as a possibility to employ a judge in any other position

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<sup>1</sup> Draft Law on the amendment of the Law no. 26/2022, [CDL-REF \(2022\)064rev](#), Article II (5).

<sup>2</sup> [CDL-REF \(2022\)064rev](#), Ibid p. 10.

within the Court, clearly stating that such judges should continue working as SCJ judges (e.g. shall continue their *judicial* activity within the Court).

25. The Venice Commission finds that the essential elements (having career judges in majority in the SCJ members and the gradual reduction of the number of judges) of its recommendations B and C have been followed.

### C. Extraordinary evaluation of judges of the SCJ

26. *Key recommendation A1*: In the initial opinion, the Venice Commission reiterated its previous recommendation that “for the draft law to be compliant with the Constitution, all decisions concerning the transfer, promotion and removal from office of judges should be taken by the Superior Council of Magistracy (hereafter, “the SCM”).<sup>3</sup> The SCM should thus be entrusted with the power to take decisions based on the recommendation contained in the report of the Evaluation Committee. The decision of the SCM should be public and fully reasoned and should be triggered automatically by the evaluation commission’s report”.

27. The Commission positively remarks that, according to Draft Article 14<sup>3</sup> of the Draft Law 26/2022, the final decision on passing or non-passing the evaluation of the judge shall be adopted by the SCM by a simple majority, in a public meeting upon the report submitted by the Evaluation Commission.<sup>4</sup>

28. However, the second sentence of Article 14<sup>2</sup>(1) stipulates that “[t]he non-passing of the evaluation shall result in the automatic dismissal of the judge until the decision of the Superior Council of Magistracy on the evaluation is issued”. According to this sentence, in the absence of any decision – acceptance or rejection of the Evaluation Commission’s report – by the SCM, the Evaluation Commission’s report will be binding as it will “automatically” result in the dismissal of a judge.

29. While noting that the changes made are aimed at strengthening the decision-making role of the SCM in removing the judges from the office, the Venice Commission still recommends revising the abovementioned paragraph, so that it be clearly stipulated that the report of the Evaluation Commission cannot in itself lead to the dismissal (or the suspension, if that is what is meant) of a judge, bearing in mind the principle of irremovability of judges and the decisive role of the SCM in this issue.

30. As regards the procedure of evaluation, according to Draft Article 14<sup>3</sup> (4) b) and c) of the Draft Law 26/2022, the SCM may reject the report of the Evaluation Commission and order once the evaluation procedure to be resumed, if it finds circumstances that could lead to the passing or non-passing of the evaluation and then again receive it back from the Evaluation Commission and adopt a decision.<sup>5</sup> The Venice Commission finds this procedure time-consuming and cumbersome. This exchange between the SCM and the Evaluation Commission is not necessary. In case there are missing elements the SCM should itself be able to ask the candidate/person concerned, or the Evaluation Commission, to provide the necessary clarifications in order to take the final decision. This would contribute much more to a timely process and will underline the key role of the SCM in this issue.

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<sup>3</sup> Venice Commission, [CDL-AD\(2019\)020, on the Draft Law on the Reform of the Supreme Court of Justice and the Prosecutor’s Office of the Republic of Moldova, para. 61.](#)

<sup>4</sup>, [CDL-REF \(2022\)064rev](#), Ibid., Draft Article 14<sup>3</sup> (3).

<sup>5</sup> [CDL-REF \(2022\)064rev](#), Ibid., Draft Article 14<sup>3</sup> (4).

31. Therefore, the Venice Commission considers that recommendation A1 has been partially addressed and recommends to clearly stipulate that the report of the Evaluation Commission cannot in itself lead to the dismissal or the suspension of a judge.

32. In the Draft Law no. 26/2022, the authorities made a new change in Article 13 (5) which regulates issues related to the decision of the Evaluation Commission. In particular, the current version of the mentioned provision states that “[a] candidate shall be deemed not to meet the integrity criteria if serious doubts have been found as to the candidate’s compliance with the requirements laid down in Article 8, which have not been mitigated by the evaluated person”. In the recent draft, the word “serious” has been changed with the word “reasonable”.

33. The Venice Commission finds that this change may negatively affect and weaken the basis, the criteria and the proof of a negative judgment, thus endangering the fundamental principles of the rule of law (and also the future career of judges concerned). Hence, the Commission recommends against the change of the word “serious” with the word “reasonable” in the abovementioned provision.

34. *Key recommendation A2:* In the initial opinion, the Venice Commission recommended to ensure that, “in the context of the appeal against the decisions of the SCM based on such report before a panel of the SCJ composed of newly appointed judges, neither the latter nor the appellant be transferred to a different court if the appeal quashes the SCM decision”.

35. The Venice Commission welcomes that the controversial provision, regarding the transfer of SCJ judges that passed the vetting to another court without their consent (through a questionable method of drawing lots), was removed from the draft.<sup>6</sup> This change is in line with the previous findings of the Venice Commission and the CCJE who have always been critical of the transfer of judges to the lower courts without their consent.<sup>7</sup>

36. The Venice Commission considers that Recommendation A2 has been followed.

37. *Key recommendation A3:* In the initial opinion, the Venice Commission indicated that “the evaluation foreseen in the Draft Law could only be acceptable if it were construed as a one-off exceptional mechanism, set-up to resolve the alleged issue of corruption, where the Evaluation Commission would be an ad-hoc body that carries out the necessary inquiries and collects the relevant elements to produce a factual report to be communicated to the SCM. It should be better emphasised that the only objective of all the evaluation is to clarify whether there are any data of corruption and/or actions connected illegal acts. As to the results of the evaluation, if the evaluation were positive (or the decision of the SCM did not result in a removal, or the latter decision were quashed by an appeal), it should not be possible to remove the judge of the SCJ from office. On the other hand, if the evaluation were negative, it should be for the SCM to decide on the removal from office. In any case, the Venice Commission maintained that the consequences of a negative evaluation proposed in Article 14<sup>3</sup>(6) were disproportionate and should be reconsidered”.

38. In this regard, the Commission considers that the amended preamble of the Draft Law 26/2022 stipulating that the purpose of the law is also “to adjust the normative framework to the amendments to the Constitution operated by Law No. 120/2021 to amend the Constitution of the Republic of Moldova, to strengthen the role of the Supreme Court of Justice and to carry out an unique exercise to evaluate the ethical and financial integrity of the judges of the Supreme Court of Justice” is neither clear nor a sufficient safeguard against repeated and abusive application of the vetting of the judges. The one-off and exceptional nature of the evaluation should be better

<sup>6</sup> Initial Draft Law on the Supreme Court of Justice of Moldova, [CDL-REF\(2022\)033](#), Draft Article 14<sup>5</sup>.

<sup>7</sup> Venice Commission, [CDL-AD\(2019\)020](#), paras. 34, 41.

emphasised. Moreover, the word “professionalism” should be excluded as the evaluation of professionalism was omitted from the law already in the initial draft.

39. As regards the consequences of a negative evaluation, it should be mentioned that the prohibited period of time for exercising the position of judge was reduced to 7 years, whereas for the positions of prosecutor, lawyer, notary, authorised administrator, bailiff as well as public dignity positions, this period has been reduced to 5 years. The Venice Commission finds that this is a step in the right direction, while it suggests removing all activities of a private nature from the list of banned professions, since they are beyond the public functions thus making the ban not proportional.

40. Furthermore, it seems that the Draft Law 26/2022 does not provide any alternative to the SCM to apply also other measures apart from the removal of a judge from office. The second sentence of Article 14<sup>2</sup> of the Draft Law 26/2022 seems quite unequivocal, as it provides that the non-passing of the evaluation shall result in the automatic dismissal of the judge. The Commission stresses the need to ensure a margin of discretion to the SCM in applying different measures, the removal from office of a judge being the *ultima ratio*, in conformity with the principle of proportionality.<sup>8</sup>

41. The Venice Commission considers that Recommendation A3 has been partially followed and reiterates its recommendation to better emphasise the one-off and exceptional nature of the evaluation in the drafts as well as to provide any alternative to the SCM to apply also other measures than the removal of a judge from office.

#### **D. Technical remark: the structure of the Draft Law on SCJ**

42. *Recommendation E*: The Venice Commission recommended adopting “*distinct legislative acts to amend other specific organic laws, in particular concerning the exceptional mechanism for the evaluation of judges to be included in the Law 26/2022 on selection of candidates for a membership in self administrative bodies of judges and prosecutors*”.<sup>9</sup>

43. The Venice Commission welcomes that recommendation E has been followed.

#### **IV. Conclusion**

44. The follow-up to the Joint opinion of the Venice Commission and the Directorate General of Human Rights and Rule of Law (DGI) of the Council of Europe on the Draft Law on the Supreme Court of Justice ([CDL-AD\(2022\)024](#)) can be assessed as follows.

- *Recommendations followed or mostly followed*

45. The Venice Commission welcomes the efforts made by the authorities of the Republic of Moldova to address its recommendations and expresses its satisfaction with the following recommendations:

46. *Key recommendation A2*: The Venice Commission welcomes that the possibility to transfer SCJ judges that passed the vetting to another court without their consent was removed from the draft.

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<sup>8</sup> Venice Commission, [CDL-AD\(2015\)045](#) , Interim Opinion on the Draft Constitutional Amendments on the Judiciary of Albania, para. 100.

<sup>9</sup> Venice Commission, [CDL-AD\(2022\)024](#), *Ibid.*, paras. 62-65.



47. Key recommendation B: As to the number and composition of judges of the SCJ, the Venice Commission welcomes that, although the current draft law on SCJ did not follow the proposed proportion of 7-13, it nevertheless clearly states that 11 members of the Supreme Court of Justice shall be appointed from among judges and 9 members from among lawyers, prosecutors or university professors in the field of law, thus providing that the majority of the SCJ members are career judges.

48. Key recommendation C: The Venice Commission welcomes that a transitional provision guaranteeing a gradual approach in the reduction of the number of judges has been introduced in the drafts. However, it recommends that the wording of Draft Article II (5) of Draft Law 26/2022 be revised, so that the phrase “*shall continue their activity within the Court*” will not be interpreted as a possibility to employ a judge in any other position within the Court, and clearly states that such judges should continue working as the SCJ judges.

49. Recommendation E: Concerning the structure of the law, the Venice Commission welcomes the adoption of distinct legislative acts to amend other specific organic laws, in particular concerning the exceptional mechanism for the evaluation of judges to be included in Law 26/2022 regarding the selection of candidates for membership in self administrative bodies of judges and prosecutors.

- *Recommendations partially followed*

50. Nevertheless, several key recommendations made in the Opinion [CDL-AD\(2022\)024](#) have been followed only partly and thus remain pertinent. The Venice Commission invites the authorities of the Republic of Moldova to make full use of its initial and present opinions while the draft laws are under consideration by the authorities, in order to provide all the necessary guarantees for the independence of judges, the impartiality of the evaluation of judges, as well as the composition and organisation of the Supreme Court of Justice, in line with international standards. In particular:

51. Key recommendation A1: As to the recommendation that all decisions concerning the transfer, promotion and removal from office of judges should be taken by the SCM and the SCM should thus be entrusted with the power to take decisions based on the recommendation contained in the report of the Evaluation Committee, the Commission positively remarks that the final decision on passing or non-passing the evaluation of the judge shall be adopted by the SCM by a simple majority, in a public meeting upon the report submitted by the Evaluation Commission. Nevertheless, it recommends revising the draft, so that it clearly stipulates that the report of the Evaluation Commission cannot in itself lead to the dismissal (or the suspension, if that is what is meant) of a judge. The Venice Commission finds that the newly added resumption of the evaluation procedure by the Evaluation Commission upon the rejection of the evaluation report by the SCM is time-consuming and cumbersome.

52. Key recommendation A3: As regards the one-off and exceptional nature of the evaluation as well as disproportionate consequences of a negative evaluation, the Venice Commission welcomes that the prohibited period of time for exercising the position of judge was reduced to 7 years, whereas for other positions this period has been reduced to 5 years. However, the Venice Commission recommends that the one-off and exceptional nature of the evaluation be better emphasised in the draft. Moreover, the word “professionalism” should be excluded from the preamble of the Draft Law 26/2022, as the evaluation of professionalism was omitted from the law already in the initial draft. Furthermore, it seems that Draft Law 26/2022 does not provide any alternative to the SCM to apply also other measures apart from the removal of a judge from office. The Commission recommends giving a discretion to the SCM in applying different measures, the removal from office of a judge being the *ultima ratio*.

53. Key recommendation D: As regards the necessity of a clear definition of the circumstances of the “application in the interest of the law” described in Article 4 of the Draft Law on SCJ and the need to specify that a judgement adopted on the application in the interest of the law can be binding only for other (future) judgements of the SCJ, and not for lower courts as well as the possibility to invite other subject to present their position at the hearing, the Venice Commission finds that the revised draft law neither defines the notion of the “*application in the interest of the law*” nor does it clarify the circumstances of applying this mechanism. Meanwhile the Venice Commission positively notes that the sentence providing that “*the judgement adopted on the application in the interest of the law shall be binding*” (Article 4(6)) was deleted. Nevertheless, it recommends to explicitly stipulate in the law that such judgments shall be binding only regarding other (future) judgements of the SCJ, and not for lower courts. The Venice Commission also welcomes the provision on adding the Ombudsman in the group of subjects entitled to request the SCJ to rule on the questions of law but notes however, that the representatives of various legal professions, legal experts, academics, civil society organisations, and the ombudsperson still have no possibility to present their views and opinions in their capacity of expert witnesses or *amici curiae*.

54. Recommendation F: As to ensuring the consistency and specificity of the terminology employed in Article 3, in particular as concerns the “generalisation of judicial practice”, the Venice Commission welcomes that the authorities removed the phrase “*generalise judicial practice*”, changed the word “*guides*” with the word “*guidelines*” in both paragraphs of the Draft Law on SCJ, and removed the word “*recommendations*” from Paragraph 2. However, the Venice Commission still recommends adding the definer “non-binding” to the word “guidelines” in both paragraphs of Article 3.

- *New recommendation*

55. In the revised Draft Law 26/2022, the authorities made a new change in Article 13 (5) which regulates issues related to the decision of the Evaluation Commission. In particular, the current version of the mentioned provision states that “[a] candidate shall be deemed not to meet the integrity criteria if serious doubts have been found as to the candidate’s compliance with the requirements laid down in Article 8, which have not been mitigated by the evaluated person”. In the recent draft, the word in the mentioned provision “serious” has been changed with the word “reasonable”.

56. The Commission recommends against the change of the word “serious” with the word “reasonable” in the abovementioned provision, may negatively affect and weaken the basis, the criteria and the proof of a negative judgment, thus endangering the fundamental principles of the rule of law and also the future career of judges concerned.

57. The Venice Commission remains at the disposal of the authorities of the Republic of Moldova for further assistance in this matter.