Strasbourg, 21 March 2022 **CDL-AD(2022)005**

Opinion No.1073/2021 Or. Engl.

EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

(VENICE COMMISSION)

CROATIA

OPINION

ON THE INTRODUCTION OF THE PROCEDURE OF RENEWAL OF SECURITY VETTING THROUGH AMENDMENTS TO THE COURTS ACT

Adopted by the Venice Commission
at its 130th Plenary Session
(Venice and online, 18-19 March 2022)

on the basis of comments by

Mr Iain CAMERON (Member, Sweden)
Mr António Henriques GASPAR (Member, Portugal)
Mr Martin KUIJER (Substitute member, The Netherlands)

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I. Introduction

1. By letter of 14 December 2021, Mr Ivan Malenica, Minister of Justice and Public of Administration of Croatia, requested an opinion of the Venice Commission on the introduction of the procedure of renewal of security vetting through amendments to the Courts Act (CDL-REF(2022)001). He specified that this request was made in accordance with the encouragement by the European Commissioner for Justice Mr Didier Reynders. The Minister indicated that he wished to receive the Commission's opinion through the urgent procedure no later than on 15 January 2022. The President of the Commission, however, replied on 21 December 2022 that it would not be possible to prepare such a complex opinion in such a short period of time and without the benefit of extensive exchanges of views with relevant stakeholders. She therefore offered to proceed with an ordinary opinion to be submitted to the 130th Plenary Session in March 2022.

2. Mr Iain Cameron, Mr António Henriques Gaspar and Mr Martin Kuijer acted as rapporteurs for this opinion. On 2-3 February 2022, a delegation of the Venice Commission composed of Mr Gaspar and Mr Kuijer, accompanied by Mr Michael Janssen (Secretariat of the Commission), held meetings in Zagreb with representatives of the Ministry of Justice and Public Administration, the Supreme Court, the State Judicial Council, the State Attorney's Council, the State Attorney's Office, the Association of Croatian Judges, as well as with representatives of civil society. The Commission is grateful to the Croatian authorities for the excellent organisation of these meetings.

3. The proposed amendments were adopted by Parliament on 11 February 2022 as part of a larger reform of judicial organisation ("Amendments of the Courts Act").

4. This opinion was prepared in reliance on the English translation of the draft law provided by the authorities of Croatia. The translation may not always accurately reflect the original version on all points, therefore certain issues raised may be due to problems of translation.

5. This opinion was drafted on the basis of comments by the rapporteurs and the results of the meetings. It was examined by the Sub-Commission on the judiciary on 17 March 2022. Following an exchange of views with the Minister of Justice and Public of Administration of Croatia, Mr Ivan Malenica, it was adopted by the Venice Commission at its 130th Plenary Session (Venice and online, 18-19 March 2022).

II. Background and procedure

6. The Croatian judiciary has a turbulent recent history in which political interference with judicial independence was not uncommon in the mid-1990s and political influence in removal and appointment procedures continued until 2000.[1] Following Croatia's accession to the EU in 2013, judicial reform activities have been based on the implementation of the Judicial Development Strategy 2013-2018, and have aimed at improving the transparency and accountability of the judiciary as well as strengthening its autonomy and independence.[2] To that end amendments to

[1] See Group of States against Corruption (GRECO), Fourth Evaluation Round: Corruption prevention in respect of members of parliament, judges and prosecutors, Evaluation Report Croatia, 2013, paragraph 82, https://www.coe.int/en/web/greco/evaluations/croatia.

[2] See https://ec.europa.eu/info/sites/default/files/2020_rule_of_law_report_-_input_from_member_states_-_croatia.pdf. For example, the power of the Minister of Justice to give opinions on candidates in the procedures for the appointment of presidents of courts and state attorneys was omitted, as well as his/her role in the process of appointing judges to perform the duties of judicial administration (acting presidents of courts), except for those courts in the process of establishment. In addition, amendments to the State Judicial Council Act introduced stricter criteria for the appointment of judges to higher courts (promotion of judges), requiring at least ten years of judicial duty in order to be appointed to county courts (instead of previously requiring eight years), and at least twelve years of

the State Judicial Council Act of 2018 were introduced which reformed, *inter alia*, the system of filing, keeping, controlling and publishing asset declarations of judicial officials.

7. Moreover, under the existing legislative framework judges working in court departments which are specialised in cases involving corruption and organised crime have been subject to security vetting, while judges of the courts of first instance and Supreme Court judges have been subject to basic security vetting before appointment.[3] The proposed amendments introduce, first, periodic renewal of security vetting (after every five years) and second, put in place a requirement for all judges to submit to security vetting (draft Article 86a of the Courts Act).[4] These requirements will be operational within a specific period upon entry into force of the amendments.[5] Under the Security Vetting Act, security vetting is the procedure whereby the competent security and intelligence agency ascertains the existence of security obstacles for specified persons. In the case of basic security vetting, security obstacles are facts which point towards misuse or risk of misuse of an official position or duty, i.e. the exercise of official rights and powers at the expense of national security or the interests of Croatia.[6]

8. The Minister of Justice in his request for an opinion explained that the reasons behind this reform were a continuously high level of negative public perception of corruption in the judiciary. Moreover, there have been several individual, high-profile cases where judges have had frequent inappropriate contacts or otherwise behaved inappropriately. These incidents have resulted in procedures for establishment of violations of the Code of Judicial Ethics as well as disciplinary and criminal proceedings. According to the authorities, those types of proceedings had proved to have insufficient deterrent effect, and additional measures were necessary to strengthen the integrity of the judiciary. They furthermore indicated that while designing the solution in the draft law, they were guided *inter alia* by a relevant Venice Commission opinion concerning Albania.[7]

9. Under the draft law, court presidents are obliged to send applications for security vetting of judges to the Security Intelligence Agency (SOA) via the Ministry of Justice and Public Administration. The SOA carries out the security vetting in accordance with the provisions of the Security Vetting Act, verifies the data entered by judges into a questionnaire and submits a security vetting report to the president of the Supreme Court. Thereafter, a special body, a panel of five judges of the Supreme Court appointed by the General Assembly of the Court, makes the final assessment whether a security obstacle has been established. If it is found that a security obstacle has been established, the president of the Supreme Court communicates this fact to the authorities competent for initiating disciplinary proceedings against judges. This means that any inappropriate conduct can be sanctioned only in disciplinary proceedings before the State Judicial Council, and, where appropriate, in criminal proceedings. While security vetting under the Security Vetting Act

judicial duty in order to be appointed to high courts (instead of previously requiring ten years). In order to further strengthen the professionalism and accountability of judges, the amendments to the Courts Act from 2018 have clarified the assessment criteria (quality, quantity, regularity of judicial duties, professional experience and other activities), and introduced scoring frameworks to evaluate certain criteria for the assessment of judges.

[3] Such checks are not required for county court candidates, nor for high court candidates, because these candidatures are open only to the judicial officials who are already in the system and accordingly passed the security check with their first appointment. However, since the Supreme Court candidatures are open to qualified individuals who are not necessarily judicial officials (attorneys, notaries, law professors, distinguished jurists), a security check is required for all candidates uniformly.

[4] During the meetings in Zagreb, the rapporteurs were informed that similar legislative amendments would introduce periodic security vetting for state attorneys, but this is not the subject of this opinion.

[5] See Articles 15 and 34 of the draft law.

[6] See Articles 2 and 3(2) of the Security Vetting Act.

[7] Namely, Venice Commission, CDL-AD(2016)036, Albania - Amicus Curiae Brief for the Constitutional Court on the Law on the Transitional Re-evaluation of Judges and Prosecutors (The Vetting Law).

requires a written consent by the person concerned,[8] the authorities explained that they planned to make a judge's refusal to give such a consent a disciplinary offence.[9]

10. The Venice Commission regrets that the draft law has already been adopted shortly after the rapporteurs' meetings in Zagreb, on 11 February 2022, pending the preparation of the opinion. It would have been preferable to pause the process so that the results of the Commission's analysis could have been taken into account. The authorities indicated in this regard that the adoption of the "Amendments of the Courts Act" was considered a priority by them in the context of broader judicial reforms (especially the introduction of family law departments) and that it was impossible to withdraw certain provisions from the draft legislation at that stage, as it had already passed the first reading in Parliament. The Venice Commission takes due note of the authorities' assurances that following the adoption of the present opinion, the provisions of the Courts Act regarding security checks of judges would be amended, if necessary.

III. Analysis of the draft law

A. General remarks

11. The Venice Commission has noted on previous occasions – in general terms, not specifically for judges – that "integrity checking and vetting procedures are not explicitly foreseen and regulated by any international instruments. They have however been dealt with, and commented upon, by soft law instruments and by case-law. Most comments relate to the classical lustration-type vetting […]."[10] That said, "more recently, integrity checking and vetting procedures have taken a different form, seeking to cleanse public offices from individuals involved in large-scale corruption or in organised crime. The Venice Commission was again involved in the assessment of some of these initiatives."[11]

12. So far, the Commission has dealt with three subcategories of national measures: (i) "pre-vetting" of candidates to a particular position;[12] (ii) integrity checks which are conducted on a more

[8] See Article 5 of the Security Vetting Act.
[9] By adding such an offence to the list of disciplinary offences under Article 62(2) of the State Judicial Council Act.
[10] See Venice Commission, CDL-AD(2018)034, Opinion on draft constitutional amendments enabling the vetting of politicians in Albania, paragraph 40. According to the Office of the United Nations High Commissioner for Human Rights (OHCHR), "vetting can be defined as assessing integrity to determine suitability for public employment" (see OHCHR, Rule-of-law tools for post-conflict states, Vetting: an operational framework, 2006, page 4). See also the report of the UN Secretary-General on the rule of law and transitional justice in conflict and post-conflict societies (S/2004/616), 2004, paragraph 52: "Vetting usually entails a formal process for the identification and removal of individuals responsible for abuses, especially from police, prison services, the army and the judiciary."
[11] See Venice Commission, CDL-AD(2018)034, Opinion on draft constitutional amendments enabling the vetting of politicians in Albania, paragraph 45, which contains references to further opinions by the Commission.
[12] See e.g. Venice Commission, CDL-AD(2021)046, Republic of Moldova - Joint opinion of the Venice Commission and the Directorate General of Human Rights and Rule of Law (DGI) of the Council of Europe on some measures related to the selection of candidates for administrative positions in bodies of self-administration of judges and prosecutors and the amendment of some normative acts.
The Consultative Council of European Judges (CCJE) expressed the opinion that a distinction should be made between candidate judges entering the judiciary and serving judges: "In no circumstances should the fight against corruption of judges lead to the interference by secret services in the administration of justice. Corruption of judges is an offence and should therefore be tackled within the framework of established legislation." The CCJE furthermore warned that screening of judges for corruption could be misused to eliminate politically "undesirable" judges. See CCJE Opinion No. 21, Preventing Corruption among Judges, paragraphs 27f., https://rm.coe.int/ccje-2018-3e-avis-21-ccje-2018-prevent-corruption-amongst-judges/native/16808fd8dd.

regular basis (for example the obligation to submit annually an asset declaration);[13] (iii) full-fledged vetting procedures such as the vetting of Albanian judges;[14] the Venice Commission has consistently stated that such vetting might be justified, but only in case of exceptional circumstances.[15] Experience has shown that each case is different and needs to be assessed on its own merits.

13. Judicial independence is an integral part of the fundamental democratic principles of the separation of powers and the rule of law,[16] and is guaranteed *inter alia* by Article 6 of the European Convention on Human Rights (ECHR) and also by Article 115 of the Constitution of Croatia. According to international benchmarks, "independence means that the judiciary is free from external pressure, and is not subject to political influence or manipulation, in particular by the executive branch."[17] Vetting of judges, especially when carried out by an executive body, may constitute such an 'external pressure'.

14. At the same time, it must be stressed that the authority of a judiciary can only be maintained if (a) the legal system puts in place adequate mechanisms to ensure that candidates are not appointed as a judge if they do not have the required competences or do not meet the highest standards of integrity; and (b) the judiciary is cleansed of those who are found to be incompetent, corrupt or linked to organised crime.[18] This is not only essential in view of the role a judiciary plays in a state governed by the rule of law, but also because a judge – once appointed for life – will in principle be irremovable except for limited grounds for dismissal.[19]

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[13] See e.g. Venice Commission, CDL-AD(2020)038, Ukraine - Urgent Joint Opinion of the Venice Commission and the Directorate General of Human Rights and Rule of Law (DGI) of the Council of Europe on the Legislative Situation regarding anti-corruption mechanisms, following Decision N° 13-R/2020 of the Constitutional Court of Ukraine.

[14] See Venice Commission, CDL-AD(2016)009, Final Opinion on the revised draft constitutional amendments on the Judiciary (15 January 2016) of Albania, and further related opinions.

[15] See Venice Commission, CDL-AD(2015)045, Interim Opinion on the Draft Constitutional Amendments on the Judiciary of Albania, paragraph 100: The Commission based its recommendations on the assumption that the comprehensive vetting of the judiciary had wide political and public support within the country, that it was an extraordinary and a strictly temporary measure, and that this measure would not be advised to other countries where the problem of corruption within the judiciary did not reach that magnitude.
See also Venice Commission, CDL-AD(2021)046, Republic of Moldova - Joint opinion of the Venice Commission and the Directorate General of Human Rights and Rule of Law (DGI) of the Council of Europe on some measures related to the selection of candidates for administrative positions in bodies of self-administration of judges and prosecutors and the amendment of some normative acts, paragraph 13: The Venice Commission recalled its previously expressed view that critical situations in the field of the judiciary, as extremely high levels of corruption, might justify equally radical solutions, such as a vetting process of the sitting judges.

[16] See e.g. Recommendation Rec (2010) 12 of the Committee of Ministers on judges: independence, efficiency and responsibilities, https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=09000016805afb78; Venice Commission, Rule of Law Checklist, CDL-AD(2016)007, paragraph 74,. See also Venice Commission, Report on European Standards as regards the Independence of the Judicial System: Part I – the Independence of Judges, CDL-AD(2010)004,.

[17] Venice Commission, CDL-AD(2016)007, Rule of Law Checklist, paragraph 74.

[18] Cf. Venice Commission, CDL-AD(2016)009, Final Opinion on the revised draft constitutional amendments on the Judiciary (15 January 2016) of Albania, paragraph 52: "such measures are not only justified but are necessary […] to protect itself from the scourge of corruption which, if not addressed, could completely destroy its judicial system."

[19] Cf. Venice Commission, CDL-AD(2018)034, Opinion on draft constitutional amendments enabling the vetting of politicians in Albania, paragraph 48: "The judicial branch of the government has various specificities (judges are usually appointed for life, they have to be independent and impartial, they are not directly accountable to the other branches of the government, their position cannot be challenged by the electorate at general elections, their decisions cannot be annulled by anybody outside the judicial system, etc.) which justify a differentiated treatment."

15. Vetting involves an interference with the right to private life which is protected *inter alia* by Article 8 of the ECHR. According to the case-law of the ECtHR, the collection and storage of personal information by a government agency, as well as the transfer of data records between agencies, fall within the ambit of Article 8 of the ECHR.[20] The Court has made it clear[21] that a person who is dismissed, transferred etc. from public employment, can complain about a violation of Article 8 of the ECHR[22] if this measure was taken on the basis of a state file. Interference with the right to private life is only acceptable if it is covered by the limitations contained in Article 8 § 2 of the ECHR[23] and if it is proportionate to the aim pursued.

B. The necessity of periodic security vetting of all judges

16. The draft law envisages a mechanism whereby security checks are carried out by the SOA (i.e. an executive body) and not as a temporary measure. While the Venice Commission acknowledges the fact that the draft law provides for several procedural safeguards,[24] it stresses that the necessity for such a far-reaching reform must be well substantiated. In this regard, the Venice Commission raises the following concerns.

17. The current legislation already provides for a wide array of mechanisms to ensure integrity of the judicial corpus: (i) annual asset declarations which are checked by the State Judicial Council; (ii) annual assessments by the court presidents (regarding the minimum output and the behaviour of the judge concerned); (iii) the possibility of disciplinary proceedings; (iv) the possibility of criminal liability (judges only enjoy functional immunity); and (v) the existing possibilities for security vetting which seem to be generally accepted (i.e. access to the judiciary and the appointment to the Supreme Court and to the Office for the Suppression of Corruption and Organised Crime, USKOK). During the meetings the authorities stated that the existing tools were insufficient, as the corruption-related cases involving judges which are currently subject to disciplinary and criminal proceedings had only been detected after a long period of time; other possible cases might remain unrevealed, and any such instances should be effectively prevented. A range of actors – Government, different political parties, representatives of the State Attorney's Office and of civil society – agreed on the need for further measures to ensure judges' integrity. Some of the judicial interlocutors acknowledged that disciplinary proceedings were not always initiated even if they clearly should be. However, that does not clearly demonstrate the need for a *new* mechanism as envisaged in the draft law (especially because in the end it will be up to the same institutional actors as currently to decide on the initiation of disciplinary proceedings).

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[20] See e.g. ECtHR, *Amann v. Switzerland*, no. 27798/95, 16 February 2000; *Chare née Jullien v. France*, no. 14461/88, 9 July 1991; *M.S. v. Sweden*, no. 20837/92, 27 August 1997.

[21] See e.g. ECtHR, *Amann v. Switzerland*, no. 27798/95, 16 February 2000; ECtHR, *Segerstedt-Wiberg v. Sweden*, no. 62332/00, 6 June 2006.

[22] Or of Article 10 of the ECHR, if this measure was based on an opinion which he or she had earlier expressed. See ECtHR, *Wille v. Liechtenstein*, no. 28396/95, 28 October 1999.

[23] This provision reads as follows: "2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

[24] I.e. a judicial body (a special panel composed of Supreme Court judges) deciding on the existence of security obstacles; the finding of which may only be sanctioned in disciplinary or criminal proceedings; the availability of legal remedies; and the confidentiality of the information (the authorities indicated that information stored in SOA may only be accessed by an authorised person of the SOA who (i) holds the appropriate security certificate, (ii) needs to access the information to be able to perform certain tasks, and (iii) has the approval by a superior officer following a reasoned request for access).

18. As far as the authorities refer to recent "individual, high-profile cases of frequent inappropriate contacts and behaviour of judges", it seems that this concerns a quite limited number of cases which are currently subject to disciplinary and criminal proceedings.[25] This situation must be considered as a normal functioning of the system. There does not seem to be clear evidence that corruption in the Croatian judiciary has reached such a scale to justify the introduction of such a far-reaching measure. The mere fact that public *perception* as regards corruption in the judiciary is very high[26] cannot justify in itself such a measure. Furthermore, the lack of citizens' trust in the judiciary on account *inter alia* of corruption seems to be linked to a perceived lack of independence of the judiciary notably on account of alleged interference or pressure from government and politicians.[27] There is a risk that such perceptions would even be aggravated if the security vetting of judges by an executive body were introduced.

19. During the meetings in Zagreb, the delegation was informed about the intention of the Croatian legislator to reconsider the need for a periodic security vetting of all judges every five years *after* the entry into force of the current legislative proposal. However, the necessity of this reform should be convincingly demonstrated *before* the introduction of the proposed mechanism.

20. In the view of the Venice Commission, strengthening and improving the already existing mechanisms – e.g., as regards the transparency/accessibility of asset declarations which according to some of the rapporteurs' interlocutors was unsatisfactory, and the initiation of disciplinary proceedings – would seem clearly preferable as a more proportionate avenue of reform. Consequently, the Commission recommends that the Croatian authorities reconsider their approach to prescribe periodic security vetting of all judges and that they develop an alternative strategy to ensure judges' integrity, based on other existing mechanisms.

21. Given this main conclusion of the Venice Commission, the ensuing recommendations are only given as a subsidiary and are intended solely for the event that the authorities nevertheless adhere to their approach based on periodic security vetting.

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[25] More details are provided in the 2021 Rule of Law Report of the European Commission, page 6 (https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52021SC0713). The Venice Commission refers to the EU reports among other background documents which it used as a factual source of information.

[26] See e.g. Group of States against Corruption (GRECO), Fourth Evaluation Round: Corruption prevention in respect of members of parliament, judges and prosecutors, Evaluation Report Croatia, paragraph 83 which contains further references (https://www.coe.int/en/web/greco/evaluations/croatia). See also, more recently, the 2021 EU Justice Scoreboard, figure 48, according to which the level of perceived judicial independence among the general public has deteriorated in 2021 and remains the lowest in the EU (https://ec.europa.eu/commission/presscorner/detail/en/IP_21_3523).

[27] GRECO noted already in 2013 that "systematic research on the reasons for public mistrust in the judiciary is lacking although there is no evidence of structural corruption in the system." See GRECO's Fourth Evaluation Round Report, paragraph 4. In its corresponding Compliance Report of 2016 (paragraph 19), GRECO indicated that according to research "people see the long duration of proceedings and possible political influence as the main causes of the high perceived level of corruption", as well as – to a lesser degree – the "possibility of bias and lack of objectivity of judicial officials".
Similar conclusions are included in the report "Evaluation on Quality of Selected Justice Services in the Republic of Croatia in 2016" prepared by Ipsos for the Ministry of Justice, 29 June 2016.
According to the 2021 EU Justice Scoreboard, the main reason cited by the general public for the perceived lack of independence of courts and judges is the perception of interference or pressure from the government and politicians. See also the 2021 Rule of Law Report of the European Commission.

C. Specific issues

1. The institutional framework

22. As the Venice Commission has previously highlighted, when integrity checks are not carried out by self-governing bodies of the judiciary themselves but by an external body, utmost consideration must be given to respecting the principles of separation of powers and checks and balances.[28] The entire process of vetting may be compromised if it is conducted or controlled by the executive, and the involvement of the executive, in law and in practice, must be limited to the extent strictly necessary for the functioning of the vetting bodies.[29]

23. In this perspective, the involvement under the draft law of the special Supreme Court panel (which makes the final assessment of the existence of security obstacles) and the exclusive competence of disciplinary bodies and criminal courts for sanctioning any inappropriate conduct detected are to be welcomed. At the same time, it might be difficult for those judicial bodies to assess the reliability of the information submitted by the SOA. The authorities indicated to the rapporteurs that all the information gathered by the SOA – i.e. including classified information, the sources of information and indications when and how it was collected – would be made accessible to those bodies and to the judges concerned.[30] However, they did not provide the legal basis for this assertion, and the draft law does not regulate this. The Venice Commission recommends explicitly regulating access to detailed information and results of the security vetting by – exclusively – the disciplinary bodies, the judges concerned, and the criminal judge.[31] While access to absolutely all information would be quite far-reaching and unusual, especially when it comes to covert sources, it must be ensured that access to information can only be limited if this is necessary for security reasons, and in conformity with fair trial requirements.

24. The Commission furthermore underlines the need for an independent oversight body with extensive powers to verify the information gathered by the SOA. It notes that the SOA is subject to oversight by various bodies including Parliament,[32] but it is not in a position to assess how those mechanisms work in practice. In any case, it is crucial that there be effective internal and external controls over all aspects of the SOA's work, particularly the data banks it maintains, which are at the heart of the work of any security agency. The Venice Commission has previously underlined that security agencies are expected to collect as much information as possible on threats to the

[28] Venice Commission, CDL-AD(2021)046, Republic of Moldova - Joint opinion of the Venice Commission and the Directorate General of Human Rights and Rule of Law (DGI) of the Council of Europe on some measures related to the selection of candidates for administrative positions in bodies of self-administration of judges and prosecutors and the amendment of some normative acts, paragraph 16.
[29] Venice Commission, CDL-AD(2016)036, Albania - Amicus Curiae Brief for the Constitutional Court on the Law on the Transitional Re-evaluation of Judges and Prosecutors (The Vetting Law), paragraph 28.
[30] The authorities stated that this was an improvement if compared to the current situation concerning already existing security vetting of judges. In this regard, a decision of the Constitutional Court of 18 December 2018 (U-III-1709/2018) was brought to the attention of the rapporteurs, which concerned security vetting according to current law in view of appointment to the Supreme Court. The Constitutional Court found a violation of Article 54.2 of the Constitution in relation to the right to a fair trial guaranteed by Article 29.1 of the Constitution and Article 6(1) of the ECHR which includes the principle of efficient legal protection, given that the applicant was not given access to the results of the security vetting; the State Judicial Council had failed to present reasons for its final assessment on the existence of security impediments and to give reasons as to why it was necessary in the circumstances to prevent the applicant from having any access whatsoever to the results of the security vetting. See http://www.codices.coe.int/NXT/gateway.dll?f=templates&fn=default.htm.
[31] In this connection, see also (with respect to integrity checks of judicial candidates) the CCJE Opinion No. 21, Preventing Corruption among Judges, paragraph 26.
[32] Cf. Article 2 of the Act on the Security Intelligence System.

state, which involves collecting information on individuals and impinges on individual rights.[33] It is therefore essential that there be internal limits as well as external limits to their activities and that safeguards and remedies are effective not simply on paper but also in practice.[34] As far as judicial control is concerned, it needs to be ensured that the judges be independent and possess the necessary expertise.[35]

25. As regards more specifically the special Supreme Court panel, the draft law only provides that this panel is composed of five judges of the Supreme Court appointed by the General Assembly of the Court, and that it makes the final assessment of the existence of security obstacles. According to the draft, the procedure of selecting members and the functioning of the panel shall be governed by the Rules of Procedure of the Supreme Court. The authorities indicated that amendments to the Rules of Procedure to that effect would have to be enacted by the president of the Supreme Court upon the opinion of its General Assembly.[36] Such amendments have not yet been drafted. Given the important role of that panel and the possible impact of the security vetting process on the judges' life and the judiciary as a whole, the Venice Commission recommends regulating more details in the law, namely the duration of the mandate of the members of the special Supreme Court panel, the powers of that panel, guarantees of fair trial, the decision-making rules, and the question how the panel members themselves would be vetted.

26. The proposed procedure whereby applications for security vetting are filed by court presidents and the security vetting reports are submitted to the president of the Supreme Court seems to be inconsistent with the general rule under Article 35 of the Security Vetting Act, according to which the security and intelligence agency shall submit the security vetting report to the requesting authority. Moreover, the proposal that the final assessment of the existence of security obstacles is made by a special Supreme Court panel deviates from the general rule under Article 40 of the Security Vetting Act, according to which that assessment is made by the requesting authority. It is furthermore unclear what procedure will be applied for the security vetting of court presidents. These shortcomings of the draft law need to be remedied, including if necessary through an amendment of the Security Vetting Act.

27. The draft law provides that the application by court presidents for basic security vetting with the competent security intelligence agency shall be made via the Ministry of Justice and Public Administration.[37] The authorities indicated that the role of the Ministry would be purely intermediary, "given the limited capacity of the competent Agency", and that it would not come into contact with any data from the security vetting applications. Nonetheless, the Venice Commission cannot see how such an involvement would significantly lower the administrative burden on the SOA and would be strictly necessary. The Commission is also concerned that even such a limited involvement of the Ministry might be seen by the public as an undue interference in the process and further decrease citizens' trust in the independence of the judiciary. The Venice Commission recommends removing from the law the Ministry's role as an intermediary in the security vetting process.

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[33] Cf. Venice Commission, CDL-AD(2015)010, Report on the Democratic Oversight of the Security Services, paragraph 2.

[34] See also in this respect the case-law of the ECtHR, in particular ECtHR, *Segerstedt-Wiberg v. Sweden*, no. 62332/00, 6 June 2006, paragraph 120.

[35] Venice Commission, CDL-AD(2015)010, Report on the Democratic Oversight of the Security Services, paragraph 30.

[36] In accordance with Article 43(10) of the Courts Act.

[37] This concerns the renewal of security vetting of judges and vetting of those who at the date of entry into force of the law have not undergone a security vetting thus far or for over five years. The procedure for already existing security vetting of judicial candidates, of judges handling USKOK cases etc. does not foresee such an involvement of the Ministry.

2. The security vetting process and appeal possibilities

28. Under the draft law, judges are subject to basic security vetting in terms of the Security Vetting Act, which is aimed at identifying security obstacles i.e. facts which point towards misuse or risk of misuse of an official position or duty. Articles 16ff. of that Act distinguish between three degrees of security vetting. The authorities explained that in principle, II Security Degree – which refers to information classified as SECRET – applies to judges.[38] Such vetting is performed on the basis of a security questionnaire to be filled in by the person (judge) concerned and applying specified procedures, namely insight into public sources, official records and data records of the competent security and intelligence agencies and other public authorities; insight into records and personal data records, business and other official documents which legal entities are to keep; interview with the person vetted and other persons, according to the assessment of the security and intelligence agency.[39]

29. Details concerning the questionnaire are determined by Government Regulation. Article 2(1) of the current Regulation of 2008 provides that the questionnaire for I and II degree security vetting shall contain identification data, information on education and employment, information on property, family members and co-habitants, marital status, crimes and minor offences, security information and other information necessary for security vetting, as well as the consent for security vetting. The rapporteurs noted that most of the questions currently applicable to II degree security vetting are fairly basic, with the exception of the question in respect of movable property which does not indicate a financial threshold for disclosure and poses a disproportionate burden on judges.[40] While the authorities indicated that *de facto* a minimum financial threshold was applied, the Venice Commission recommends making this explicit in the questionnaire. A more general concern relates to the fact that the content of the questionnaire can be changed by Government Decree. Given that the degree of interference with the judge's private and family life entailed by the questions asked is a very important factor when assessing the proportionality of the regime, the Venice Commission recommends ensuring that changes to the content of the security vetting questionnaire be made subject to parliamentary oversight.

30. The fact that judges would practically be obliged to fill in the security vetting questionnaire[41] leads to the question whether this is compatible with the right to remain silent and not to incriminate oneself, contained in Article 6 § 2 of the ECHR. In the case of Albania, the Venice Commission noted that an important safeguard against breach of the privilege against self-incrimination was that the judges' background declarations might be used only for the purposes of the assessment and might not be used in criminal proceedings.[42] In the present case of Croatia, any security

[38] Cf. Article 13(2) read in conjunction with Article 23(5) of the Security Vetting Act. In contrast, I Security Degree – which refers to information classified as TOP SECRET – applies to judges working on USKOK files.

[39] See Article 21 of the Security Vetting Act.

[40] Cf. Venice Commission, CDL-AD(2019)024, Armenia - Joint Opinion of the Venice Commission and the Directorate of Human Rights (DHR) of the Directorate General of Human Rights and Rule of Law (DGI) on the amendments to the Judicial Code and some other Laws, paragraph 42: "The Venice Commission stresses, however, that the change in the judge's financial situation should be of a certain magnitude to trigger the obligation set in p. 16. The judge cannot be required to explain every single expenditure he or she might incur, but only those which are clearly out of proportion to his or her official income. Moreover, it is important that the requirements to the content of the declarations are reasonable, that they do not put an impossible obligation on the judges and on their close relatives, and do not expose their private lives more than necessary for preventing corruption."

[41] Pursuant to Article 5 of the Security Vetting Act requires a written consent by the person concerned, but the authorities explained that it was planned to make a judge's refusal to give such consent a disciplinary offence.

[42] See Venice Commission, CDL-AD(2016)036, Albania - Amicus Curiae Brief for the Constitutional Court on the Law on the Transitional Re-evaluation of Judges and Prosecutors (The Vetting Law), paragraph

obstacles established could be sanctioned in disciplinary and criminal proceedings. Given that Article 6 § 2 of the ECHR is in principle not applicable to disciplinary proceedings,[43] the question is whether the information provided by judges in the questionnaire could be used as evidence in criminal proceedings. Several interlocutors of the rapporteurs answered this question negatively, but the legal basis for this assessment remained uncertain and should therefore be clarified.

31. Another question is whether the security vetting is compatible with the right to private life under Article 8 of the ECHR. According to the case-law of the ECtHR, the collection and storage of personal information by a government agency, as well as the transfer of data records between agencies, fall within the ambit of Article 8 of the ECHR.[44] The question arises whether one can waive one's rights under Article 8, by consenting to vetting. The Convention permits waiver of certain rights, under certain circumstances (e.g. to access to a court, where an arbitration clause has been previously freely agreed). However, in the view of the Commission it would be wrong to allow waiver as regards vetting because the waiver is forced: applicants who do not accept the security vetting would have no chance of getting the job and sitting judges who do not consent to security vetting would, according to the Government's proposal, commit a disciplinary offence.

32. Under Article 8 § 2 of the ECHR,[45] interference with the right to private life can be justified if it is necessary in the interests of a legitimate aim and proportionate to the aim pursued.[46] National security is one of the grounds in Article 8 § 2, so vetting is in principle possible. However, as mentioned above (under III.B.), the Venice Commission is of the opinion that the need to vet all judges – meaning even those not involved in any way in security/organised crime cases – has not been convincingly demonstrated by the Croatian authorities. In addition, the proposed measures appear disproportionate, considering that the questionnaire for II degree security vetting covers a wide range of data[47] and that the Act on the Security Intelligence Systems provides the SOA with extensive powers.[48] In this context, the Commission is also concerned about the information provided by the authorities that the retention period for the data submitted in connection with documentation produced in security vetting procedures is 70 years[49] and that deletion of certain information before the expiry of the prescribed retention periods is impossible according to the

52. See also for candidates to the position of members of the High Judicial Council: Venice Commission, CDL-AD(2021)046, Republic of Moldova - Joint opinion of the Venice Commission and the Directorate General of Human Rights and Rule of Law (DGI) of the Council of Europe on some measures related to the selection of candidates for administrative positions in bodies of self-administration of judges and prosecutors and the amendment of some normative acts, § 31

[43] Cf. the case-law of the ECtHR, e.g., with respect to judges, ECtHR, *Kamenos v. Cyprus*, no. 147/07, 31 October 2017, paragraphs 50-53.

[44] See e.g. ECtHR, *Amann v. Switzerland*, no. 27798/95, 16 February 2000; *Chare neé Jullien v. France*, no. 14461/88, 9 July 1991; *M.S. v. Sweden*, no. 20837/92, 27 August 1997.

[45] This provision reads as follows: "2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

[46] In a recent judgment concerning the use of information that was covertly gathered in disciplinary proceedings, the ECtHR did not find a violation of Article 8 of the ECHR, see ECtHR, *Adomaitis v. Lithuania*, no. 14833/18, 18 January 2022. That said, there are several differences between this case and the Croatian proposal (*inter alia*, the Court ruling concerned an ordinary civil servant and not a judge, and there was a concrete – corruption-related – suspicion).

[47] Including e.g. information on health, family and security (e.g. contacts with persons involved in criminal activities).

[48] Including e.g. use of the assistance of secret collaborators and measures of secret information gathering which temporarily restrict certain constitutional human rights and basic freedoms. That said, such measures require a written justified warrant by a Supreme Court judge, see Article 36(1) of the Act on the Security Intelligence System.

[49] In accordance with the Ordinance on the protection of the archival and registry material of the Security Intelligence Agency, adopted on the basis of the Archival Material and Archives Act (*NN* 61/18, 98/19).

applicable regulations. Such rules appear disproportionate in the context of periodic security vetting of judges, which is carried out independently of any concrete suspicion against the judges concerned. The Venice Commission recommends ensuring that the information collected by the SOA be deleted and not be kept for 70 years (unless this is necessary in the interests of national security), especially in the case of judges in respect of whom the Supreme Court panel did not find any security obstacle.

33. The Venice Commission furthermore notes that neither the draft law nor the existing legal acts and regulations seem to clearly specify the assessment criteria for the existence of security obstacles. As mentioned above, the questionnaire covers a wide range of data and it is not clear a) what kind of information would justify the conclusion that there is misuse or risk of misuse of official position or duty by a judge and b) what the criteria are for concluding that the existence of security obstacles constitutes a disciplinary offence. The Venice Commission recommends that the assessment criteria for concluding on the existence of security obstacles and, on that basis, of a disciplinary offence be specified in the law. In addition, the law should provide for an explicit presumption in favour of the judge subject to security vetting: if the information is not sufficient to clearly establish a security obstacle, there should not be any consequences for him or her as a result of the security vetting process.

34. From a procedural point of view, and as underlined by the drafters of the law, the SOA does not take any decisions and any inappropriate conduct established by the special Supreme Court panel on the basis of the security vetting results could be sanctioned only in disciplinary proceedings before the State Judicial Council, and, where appropriate, in criminal proceedings. In those proceedings, the judges concerned enjoy the right to participation, to representation by a defence attorney and to legal remedy. The provisions of the Act on the State Judicial Council also make it clear that the principle of proportionality applies to the disciplinary regime[50] and that the judge has the right of appeal against the decision on dismissal from office or disciplinary responsibility, which has a suspensive effect.[51] The appeal is to be submitted to the Constitutional Court. These procedural safeguards are in line with international standards[52] and are to be welcomed. That said, attention is drawn to the particular difficulties which arise when bodies unfamiliar with evaluating intelligence are given intelligence material and expected to take decisions which can have decisive influence on a person's career.[53] This is particularly pertinent in the present case. While it is up to each country to find an adequate solution to such difficulties, it should be noted that some countries have created special mechanisms for controlling the disclosure of intelligence in vetting cases.[54]

IV. Conclusion

35. The Venice Commission has been asked by the Minister of Justice and Public of Administration of Croatia, in accordance with the encouragement by the European Commissioner for Justice, to prepare an opinion on the introduction of the procedure of renewal of security vetting of judges through amendments to the Courts Act. Even though the Minister had initially asked for the urgent procedure to be followed while the Commission followed the ordinary one, the Commission regrets

[50] See Article 63(6) of the Act on the State Judicial Council, according to which the gravity of the violation and the consequences, the degree of responsibility, etc. must be taken into account.
[51] See Article 71 of the Act on the State Judicial Council.
[52] See e.g. Recommendation Rec (2010) 12 of the Committee of Ministers on judges: independence, efficiency and responsibilities, paragraph 69.
[53] Cf. Venice Commission, CDL-AD(2015)010, Report on the Democratic Oversight of the Security Services, paragraphs 89 and 90.
[54] See e.g. the Swedish Security and Integrity Protection Commission, Records Checks Delegation, which acts as a "filter" on the release of intelligence in vetting cases. https://www.sakint.se/the-swedish-commission-on-security-and-integrity-protection/the-records-checks-delegation/.

that the draft amendments have already been adopted in the meantime, on 11 February 2022, as part of broader judicial reforms. It would have been preferable to pause the process so that the results of the Commission's analysis could have been taken into account. The Venice Commission takes due note of the authorities' assurances that following the adoption of the present opinion, the provisions of the Courts Act regarding security checks of judges would be amended, if necessary.

36. The current legislation already provides for a wide array of mechanisms to ensure integrity of the judicial corpus: (i) annual asset declarations which are checked by the State Judicial Council; (ii) annual assessments by the court presidents (regarding the minimum output and the behaviour of the judge concerned); (iii) the possibility of disciplinary proceedings; (iv) the possibility of criminal liability (judges only enjoy functional immunity); and (v) the existing possibilities for security vetting which seem to be generally accepted (i.e. access to the judiciary and the appointment to the Supreme Court and to the Office for the Suppression of Corruption and Organised Crime, USKOK). The Commission is not convinced of the necessity to introduce an additional new mechanism as envisaged in the draft law (especially because in the end it will be up to the same institutional actors as currently to decide on the initiation of disciplinary proceedings). It is questionable whether the stated reasons for the reform, i.e. high levels of perception of corruption in the judiciary and some individual cases of inappropriate behaviour of judges – against whom disciplinary and criminal proceedings are underway – can justify such a far-reaching measure as periodic security vetting of all judges by the security services. The Commission is concerned that such a measure risk contributing to citizens' lack of trust in the judiciary and in its independence. Consequently, the Venice Commission recommends that the Croatian authorities reconsider their approach to prescribe periodic security vetting of all judges and that they develop an alternative strategy to ensure judges' integrity, based on other existing mechanisms.

37. The further recommendations included in this opinion are intended solely for the event that the authorities nevertheless adhere to their approach based on periodic security vetting. Among these recommendations, the Venice Commission wishes to underline the following ones:

- explicitly regulating that the judges concerned and the disciplinary body (as well as the criminal court, in a given case) – but no other bodies – are guaranteed access to detailed information and results of the security vetting. It must be ensured that such access can only be limited if this is necessary for security reasons, and in conformity with fair trial requirements;
- ensuring that the information collected by the Security Intelligence Agency be deleted and not be kept for 70 years (unless this is necessary in the interests of national security), especially in the case of judges in respect of whom the Supreme Court panel did not find any security obstacle;
- regulating more details concerning the special Supreme Court panel in the law, namely the duration of the mandate of the panel members, the powers of that panel, guarantees of fair trial, the decision-making rules, and the question how the panel members themselves would be vetted;
- removing from the law the Ministry's role as an intermediary in the security vetting process;
- including in the security vetting questionnaire a minimum financial threshold for movable property to be disclosed by judges, and ensuring that changes to the content of the security vetting questionnaire be made subject to parliamentary oversight;
- specifying in the law the assessment criteria for concluding on the existence of security obstacles and, on that basis, of a disciplinary offence. In addition, the law should provide for an explicit presumption in favour of the judge subject to security vetting: if the information is not sufficient to clearly establish a security obstacle, there should not be any consequences for him or her as a result of the security vetting process.

38. The Venice Commission remains at the disposal of the Croatian authorities for further assistance.