



Strasbourg, 19 December 2022

**CDL-AD(2022)050**

**Opinion n° 1110 / 2022**

Or. Engl.

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

**MONTENEGRO**

**OPINION**

**ON THE DRAFT AMENDMENTS  
TO THE LAW ON THE JUDICIAL COUNCIL AND JUDGES**

**Adopted by the Venice Commission  
at its 133<sup>rd</sup> Plenary Session  
(Venice, 16-17 December 2022)**

**On the basis of comments by**

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Opinion co-funded  
by the European Union



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## I. Introduction

1. By letter of 11 October 2022, the Minister of Justice of Montenegro requested an opinion of the Venice Commission on the draft amendments to the Law on the Judicial Council and Judges ([CDL-REF\(2022\)049](#)) (hereinafter the consolidated version of the law is referred to as “the Law”).
2. Ms Marta Cartabia and Mr Philip Dimitrov acted as rapporteurs for this opinion.
3. On 21 and 22 November 2022 the rapporteurs, assisted by Ms Simona Granata-Menghini and Mr Domenico Vallario from the Secretariat, had online meetings with the Minister of Justice, representatives of the Judicial Council, some judges of the Supreme Court, the professional association of judges, representatives of the parliamentary majority and representatives of the parliamentary opposition, the bar association as well as with some representatives of civil society. The Commission is grateful to the Ministry of Justice for the excellent organisation of these online meetings.
4. This opinion was prepared in reliance on the English translation of the Law. The translation may not accurately reflect the original version on all points, therefore certain issues raised may be due to problem of translation.
5. This opinion was drafted on the basis of comments by the rapporteurs and the information provided by the interlocutors during the online meetings. The draft opinion was examined at the Joint Meeting of the Sub-Commissions on the Rule of Law and the Judiciary on 15 December 2022. Following an exchange of views with Mr Marko Kovač, Minister of Justice of Montenegro, it was adopted by the Venice Commission at its 133<sup>rd</sup> Plenary Session (Venice, 16-17 December 2022).

## II. Background

6. The amendments to the Law on the Judicial Council and judges represent a key legal reform for Montenegro in the context of the country’s path toward accession to the European Union (“EU”).<sup>1</sup> According to the Ministry of Justice, the amendments aim at bringing the law in line with European standards and best practices and at strengthening the independence, responsibility and efficiency of the judiciary. They are further needed to address a series of practical issues that arose in the practical implementation of the current legal framework, which dates from 2015.<sup>2</sup>
7. The Venice Commission was informed that the amendments have been prepared by a working group which included representatives from the Ministry of Justice, the Supreme Court, the Judicial Council, judges from different court levels, representatives of international organisations and civil society. In the preparation of the amendments, suggestions and recommendations put forward by technical experts of the European Union and the Council of Europe, spanning from 2017 to 2022, were also considered and reflected in the legal text.<sup>3</sup> Furthermore, public consultations and a round-table discussion took place in July 2022. A broad public was invited to submit objections, proposals and suggestions. Almost all the interlocutors of the Venice

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<sup>1</sup> European Commission, [Montenegro 2022 Report](#) (“EU 2022 Montenegro Report”), Chapter 2.2.1, *Judiciary and fundamental rights*, 12 October 2022, *see in particular* pp. 5, 18-26. The independence of the judiciary and its efficiency are under close EU’s scrutiny in the framework of Chapter 23 on *Judiciary and fundamental rights*. According to the report, Montenegro’s judicial system remains moderately prepared (the assessment scale is: early stage, some level of preparation, moderately prepared, good level of preparation and well advanced), with limited progress overall, *see* p. 19.

<sup>2</sup> [CDL-REF\(2022\)050](#), Ministry of Justice of Montenegro, *Explanatory Report to the draft law on amendments to the Law on the Judicial Council and Judges* (“Explanatory Report”), p. 2.

<sup>3</sup> Explanatory Report, p. 2.

Commission expressed their overall satisfaction with the way the public debate on the Law was conducted and the way the working group performed its works, although the suggestions and requests from the different stakeholders were not always taken on board by the Ministry of Justice. Although all the interlocutors, in principle, welcomed the reform as a clear step forward in the area of the judiciary, some stakeholders expressed the view that the amendments had not been ambitious enough and that several shortcomings remain, and labelled the public debate as a missed opportunity. The Venice Commission further learned that some provisions, although commendable on paper, are not always implemented in practice,<sup>4</sup> and there is a fear that the reform will suffer from the same shortcomings.

8. The Venice Commission praises the Minister of Justice for having organised such an inclusive and extensive public debate. It recalls that a transparent, accountable, inclusive and democratic law-making process is paramount to the thriving of the rule of law.<sup>5</sup> Moreover, insofar as the amendments have not been submitted yet to the relevant parliamentary committee for discussion, the Venice Commission is grateful to the Minister of Justice for the opportunity to participate in the reform process at such an early stage and hopes that its assistance will contribute to the improvement of the reform. The Commission encourages the Montenegrin authorities to pursue the process as inclusively as until now.

### III. Analysis

9. It is not the first time that the Venice Commission gives an opinion on the Law on the Judicial Council and Judges of Montenegro. Following the latest constitutional amendments in 2013, the Venice Commission issued in 2014 an opinion on the draft Law on the Judicial Council and Judges.<sup>6</sup> At the time it concluded that, overall, the draft law was of a high quality and aimed at following former recommendations issued by the Venice Commission. However, it issued a series of recommendations aimed at further improving the draft law. The Venice Commission notes that many of these recommendations have not been followed, which it regrets.<sup>7</sup> It reiterates these recommendations and encourages the authorities to take them into due consideration within the framework of the current reform of the Law.

10. In 2018, the Venice Commission was requested again to give an opinion on the Law on the Judicial Council and Judges.<sup>8</sup> The opinion focused on a very specific issue of the law, i.e. the development of an anti-deadlock mechanism devised to overcome the political stalemate that was preventing the election of the new lay members of the Judicial Council. The consequences of these amendments and their effects on the current situation will be discussed in greater detail in section B.2.a below.

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<sup>4</sup> See, for example, EU 2022 Montenegro Report, p. 22. Despite the legal framework (Article 42 of the Law) limits the appointments of court presidents to maximum two terms in order to prevent over-concentration of power, three basic court presidents re-appointed for at least a third term of office between 2019 and 2020 are still in office; or see the requirement to publish a call for lay members of the Judicial Council within two months of the last vote (current Article 16a of the Law), which does not seem, according to the meetings had with the interlocutors, to have been consistently respected. See also footnote 46 and paragraph 54 below.

<sup>5</sup> Venice Commission, [CDL-AD\(2016\)007](#), *Rule of Law Checklist*, II.A.5.iii-iv; see also [CDL-AD\(2019\)015](#), *Parameters on the relationship between the parliamentary majority and the opposition in a democracy: a checklist*, § 79.

<sup>6</sup> Venice Commission, [CDL-AD\(2014\)038](#), *Opinion on the draft law on courts and on rights and duties of judges and on the Judicial Council of Montenegro*.

<sup>7</sup> The main outstanding recommendations will be recalled in the text of this opinion, where appropriate.

<sup>8</sup> Venice Commission, [CDL-AD\(2018\)015](#), *Opinion on the draft law on amendments to the law on the Judicial Council and Judges of Montenegro*.

11. The amendments under consideration focus on several crucial issues: the work of the Judicial Council, the system of ethical and disciplinary liability of judges, the manner of appointment of judges and presidents of the courts, the assignment and transfer of judges, as well as the appraisal of judges. Given the scope of the amendments, the Venice Commission will focus on the most relevant changes and issues arising from discussions with the relevant stakeholders. The absence of comments of other provisions of the Law should not be seen as tacit approval of these provisions.

#### **A. General provisions – work-related rights**

12. The Venice Commission notes at the outset that, insofar as the right to salary and other work-related rights of judges are concerned, the Law refers to the general framework of the regulations governing the rights and duties of public sector employees.<sup>9</sup> The Constitution does not provide for specific protection of the judges' work-related rights either. The Venice Commission learned that a proposal by the Association of Judges of Montenegro to regulate pension, insurance, and salary rights of the judges in the Law has been rejected by the Ministry of Justice, allegedly because providing for different regulations for judges *vis-à-vis* other public servants would discriminate against the latter. In the written observations submitted on 9 December 2022, the Ministry of Justice confirmed, *inter alia*, that pension and insurance rights have equal regulatory treatment in Montenegro and apply equally to all public servants.

13. The Venice Commission also learned that the interpretation of the legal conditions for the retirement of judges and prosecutors is currently disputed, after the 2020 Law on pensions insurance lowered the general age requirement for the right to a pension for public officials, deviating from provisions in the general body of labour law. This led to the termination of the judicial function of 23 judges, based on their having met the conditions for retirement. Proceedings before the Constitutional and Administrative courts, challenging these dismissals and the interpretation of the relevant laws, are ongoing.<sup>10</sup>

14. It is not within the remit of the Venice Commission to assess whether the current application of the Law on pensions or any other relevant law is constitutional or not. However, the Venice Commission shares the concerns expressed by the Association of Judges of Montenegro about the lack of a specific regulation of judges' social rights in the Law. In this regard, it wishes to stress that judges are not merely civil servants, insofar as they perform a unique and fundamental constitutional function: it is therefore important to preserve the specificity of the rules applicable to the judiciary when required by the judges' special status, to protect and uphold the basic principle of judicial independence.

15. In particular, the Venice Commission has previously expressed the opinion that the level of remuneration for judges should be guaranteed by law in conformity with the dignity of their office and the scope of their duties and commensurate with the dignity of a judge's profession and his/her burden of responsibility.<sup>11</sup> Likewise, the retirement age for judges should be clearly set out in the legislation. Any doubt or ambiguity, as those which are currently affecting the

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<sup>9</sup> Article 5 of the Law reads: “Judges shall exercise their right to a salary and other work-related and work-based rights in accordance with the law and other regulations governing the rights and duties of public sector employees.”

<sup>10</sup> EU 2022 Montenegro Report, p. 24.

<sup>11</sup> Venice Commission, [CDL-AD\(2010\)004](#), *Report on the Independence of the Judicial System Part I: The Independence of Judges*, § 51; see also Council of Europe, Committee of Ministers, [Recommendation CM/Rec\(2010\)12 of the Committee of Ministers to members states on judges: independence, efficiency and responsibilities](#) (Adopted by the Committee of Ministers on 17 November 2010 at the 1098<sup>th</sup> meeting of the Ministers' Deputies) (hereinafter “CM/REC(2010)12”), §§ 53-54.

interpretation of pension-related provisions, contribute to legal uncertainty and should be avoided, and the body taking decisions on retirement should not be able to exert discretion.<sup>12</sup>

16. The Venice Commission therefore recommends amending Article 5 of the Law, by specifying that judges exercise their work-related rights according to regulations governing the public sector employees, *unless specific provisions are envisaged for the judicial sector by the law* (emphasis added). In addition, the Venice Commission recommends introducing in the Law specific guarantees protecting the right to an adequate salary and establishing a clear retirement age.

## **B. Judicial Council: composition, functioning and organisation**

### **1. Ex-officio presence of the Minister of Justice in the Judicial Council**

17. Several stakeholders in Montenegro, relying in particular on the Council of Europe Group of States against Corruption (“GRECO”) recommendations,<sup>13</sup> expressed the view that the Minister of Justice should not be an *ex-officio* member of the Judicial Council, as his/her presence weakens the Judicial Council’s independence. Indeed, some interlocutors maintained that the presence of the Minister of Justice in the Judicial Council is one of the main causes of the politicisation of the judiciary in Montenegro.

18. The Venice Commission notes at the outset that this issue does not directly relate to the opinion request, insofar as his/her presence is not regulated in the Law but rather in the Constitution. Nevertheless, the Venice Commission considers it appropriate to make some general remarks about this issue, in response to questions raised during the online meetings.

19. The Venice Commission recalls that, in principle, the presence of members of the executive does not, in itself, impair the independence of a Judicial Council.<sup>14</sup> In particular, the presence of the Minister of Justice can be useful to facilitate dialogue among the various actors in the system. However, care must be taken that including *ex-officio* members does not increase the risk of domination of the Judicial Council by the political majority.<sup>15</sup> More importantly, the Minister of Justice should not have the right to vote or participate in the decision-making process if it is a decision concerning the transfer of judges and disciplinary measures against judges.<sup>16</sup>

20. However, principles are by their definition general standards which are not immutable and set in stone, and, when applied, must always take into consideration the particular circumstances of the case at stake. In the specific case of Montenegro, the Venice Commission takes note of the recommendations of GRECO. It further notes that the current formulation of Article 128 § 3 of the Constitution provides that the Minister of Justice shall not vote in the disciplinary proceedings related to accountability of judges. The Constitution is silent about the possibility for the Minister of Justice to take part in any other vote, including those on any career-related issue (transfer, appointment, dismissal, appraisal). Therefore, it is for the legislature to decide whether the Minister of Justice should be prevented from voting in these matters, in line with the above-mentioned standards, and for the Constitutional Court of Montenegro to review such a legislative amendment. Insofar as the Minister’s presence in the Judicial Council is concerned, the Venice

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<sup>12</sup> Venice Commission, [CDL-AD\(2013\)034](#), *Opinion on proposals amending the draft law on the amendments to the constitution to strengthen the independence of judges of Ukraine*, § 52. Cfr. also with CM/REC(2010)12, § 49, *in fine*.

<sup>13</sup> See, most recently, Council of Europe, Group of States against Corruption (GRECO), Montenegro, Fourth Evaluation Round, *Corruption prevention in respect of members of parliament, judges and prosecutors*, [Second Compliance Report](#), GrecoRC4(2019)27, 6 February 2020, §§ 20-27.

<sup>14</sup> Venice Commission, [CDL-AD\(2007\)028](#), *Judicial Appointments*, § 33.

<sup>15</sup> Venice Commission, [CDL-AD\(2018\)011](#), *Opinion on the draft amendments to the constitutional provisions on the judiciary of Serbia*, § 63.

<sup>16</sup> CDL-AD(2018)011, *op. cit.*, § 63; see also [CDL-AD\(2018\)003](#), *Opinion on the Law on amending and supplementing the Constitution (Judiciary) of the Republic of Moldova*, § 59, with further references.

Commission reiterates that it is not regulated at the legislative level and, therefore, any change to this provision would need to be done via a constitutional amendment. The Venice Commission invites the Montenegrin authorities to reflect on this and stands ready to provide assistance in case of need.

## 2. Lay members

### a. Anti-deadlock mechanism

21. As anticipated above, in June 2018, following a boycott exercised by the opposition in Parliament, the Venice Commission gave its opinion on an anti-deadlock mechanism devised by the legislator to prevent that, on account of delays in the appointment of the new lay members by parliament, the new Judicial Council may not start its functions while the old Council had ceased its functions upon the expiry of its four-year mandate.<sup>17</sup>

22. Recalling that the prolongation of the mandate of the members of the expired Judicial Council is a solution which has been adopted by several European States, the Venice Commission suggested that, *inter alia*, the new Judicial Council be made up of the new judicial members (elected by the judiciary) and the old former lay members as acting lay members of the new Judicial Council, pending the completion of the appointment procedure of the new lay members.<sup>18</sup>

23. The result was the adoption of an anti-deadlock mechanism which entered immediately into effect.<sup>19</sup> The Judicial Council, in the period 2018-2022, operated with four acting members. A full mandate of the Judicial Council elapsed without the parliament proceeding with the election of any lay member. Following the composition of the new Judicial Council in August 2022, the parliament elected only one lay member in September 2022; 3 out of 4 lay members of the Judicial Council have now entered their 9<sup>th</sup> year of mandate.

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<sup>17</sup> CDL-AD(2018)015, op. cit., §§ 1, 39.

<sup>18</sup> CDL-AD(2018)015, op. cit., §§ 40-41.

<sup>19</sup> **Article 16a:** *“If the Parliament does not appoint all four members of the Judicial Council from the ranks of eminent lawyers, the competent working body of the Parliament shall publish a public call two months after the previous voting, until all members of the Judicial Council from the ranks of eminent lawyers are appointed.”*

**Article 16b:** *“If the Parliament appoints fewer than four members of the Judicial Council from the ranks of eminent lawyers, the members of the Judicial Council from the ranks of eminent lawyers who are to be replaced by new members of the Judicial Council from the ranks of eminent lawyers shall be selected by drawing lots.*

*The method of drawing lots shall be governed in more detail by the Rules of Procedure of the Judicial Council.”*

**Article 139a:** *“The president and members of the Judicial Council from the rank of eminent lawyers, whose mandate ends due to the expiration of the term for which they were elected, shall continue to perform their duties until the election and proclamation of the new members of the Judicial Council from the ranks of eminent lawyers.*

*The performance of the duties referred to in paragraph 1 of this Article does not constitute the re-election of the members of the Judicial Council.”*

**Article 139b:** *“If the conditions from Article 139a of this Law are fulfilled, the Judicial Council shall elect the President of the Judicial Council for a certain period of time, until the election and proclamation of new members of the Judicial Council from among eminent lawyers.”*

**Article 139c:** *“If the conditions from Article 139a of this Law are fulfilled, President of Montenegro shall proclaim the composition of the Judicial Council which consists of members of the Judicial Council elected by the Conference of Judges and acting members of the Judicial Council from among eminent lawyers who shall continue to perform their duties until the election and proclamation of new members of the Judicial Council from among eminent lawyers”.*

24. The proposal put forward in the Law is now that the anti-deadlock mechanism lasts for a period of maximum two years.<sup>20</sup>

25. The Venice Commission reiterates what it has affirmed in 2018, i.e. that the difficulty of reaching a qualified majority and the ensuing risk of paralysis of dysfunction of an institution – in particular “safeguard institutions” - should not lead to the abandonment of the requirement of a qualified majority.<sup>21</sup> In this regard, limiting the operativity of the anti-deadlock mechanism to two years can be, in principle, welcomed insofar as it would put pressure on the parliament to elect the remaining lay members.<sup>22</sup> However, the Venice Commission finds that the supreme state interest lies in the preservation of the institutions of the democratic state. The respect for the principle of separation of powers requires that no branch of power/constitutional institution should be permitted by way of deliberate inaction or mere incapability of acting to block the functioning of another branch of power/constitutional institution.

26. Recalling that within the current constitutional framework it is not in the power of anybody else but the parliament to elect the lay members of the Judicial Council, the two-year deadline introduced in Article 16(d) should not lead, in case of inaction of the Parliament, to the institution’s paralysis. The Venice Commission recalls that the due functioning of the Judicial Council, in those legal systems where it exists, is an essential guarantee for judicial independence.<sup>23</sup>

27. The purpose of the anti-deadlock mechanism devised in 2018 was to serve as an exceptional and temporary solution to an institutional crisis; it does not represent a solution to the serious issue of lack of political will to find a broad political agreement on the lay members of the Judicial Council. The Venice Commission reiterates that it is a sign of maturity and responsibility on the part of the political class, both in government and in opposition, to be able to find consensus or agreements, including and in particular as to appointments of independent institutions and top political appointees. Broad political agreement is necessary in order for the state institutions to function in a democratic manner.<sup>24</sup> Having said this, the Montenegrin authorities shall therefore reflect on whether a constitutional reform introducing a further or alternative anti-deadlock mechanism would be the best way to address this seemingly systemic problem. Granting the competence to nominate the candidates to another state institution, a neutral one, following several unsuccessful votes in Parliament, has been chosen as an anti-deadlock mechanism in some countries.<sup>25</sup> This might motivate parliamentarians to reach the qualified majority for the appointment of the lay members of the Judicial Council. The Venice Commission stands ready to provide its assistance in case of need.

28. Lastly, the Venice Commission notes that, if the current amendments were to be approved, the anti-deadlock mechanism would be regulated by both Articles 16 and 139, with contrasting provisions. While the Venice Commission acknowledges, as stated by the Ministry of Justice in the written observations submitted on 9 December 2022, that Article 139 is a transitional and

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<sup>20</sup> Article 16(d) of the Law reads: “*The president and members of the Judicial Council from among the eminent lawyers, whose term of office ends after the expiration of the term for which they were elected, shall continue to perform their duties until the election and announcement of new members of the Judicial Council from among the eminent lawyers, **for a period not longer than two years***” (emphasis added).

<sup>21</sup> CDL-AD(2018)015, op. cit., § 19.

<sup>22</sup> This is indeed the very scope of anti-deadlock mechanisms, discouraging the opposition from behaving irresponsibly but avoiding creating opportunities for the majority by impossible proposals to lead to the necessity for the application of such mechanisms, see CDL-AD(2018)015, op. cit., § 15.

<sup>23</sup> CDL-AD(2018)015, op. cit., § 37, with further reference to the Rule of Law Checklist.

<sup>24</sup> Venice Commission, [CDL-AD\(2021\)030](#), *Montenegro - Urgent Opinion on the revised draft amendments to the Law on the State Prosecution Service*, § 55.

<sup>25</sup> Venice Commission, [CDL-AD\(2015\)037](#), *First Opinion on the Draft Amendments to the Constitution (Chapters 1 to 7 and 10) of the Republic of Armenia*, § 162.



temporary norm, it recommends repealing the no longer valid transitional provisions to improve the legislative quality and clarity of the Law.

b. Qualification requirements and appointment

29. Article 16 § 1 of the Law, in defining the required qualifications for being appointed lay members of the Judicial Council, employs the term “experience in legal affairs”. A similar wording (“legal matters”) is used in Article 38 of the Law. The Venice Commission finds that the expression employed is rather vague. What “legal affairs/legal matters” covers needs further explanation and a clearer definition, as previously recommended in 2014.<sup>26</sup> A source of inspiration for a more precise definition of what these terms mean could be Article 33 of the Law, which lists the conditions for appointment as President of the Supreme Court.

30. Certain representatives of civil society suggested that the Law envisage that lay members of the Judicial Council be nominated by professional associations, law faculties and non-governmental organisations, to avoid a situation in which all members would come from the rank of lawyers. They quoted as an example the Venice Commission’s 2021 opinion on the State Prosecution service.<sup>27</sup> The Venice Commission notes that Article 127 § 2 (3) of the Constitution provides that the lay members of the Judicial Council are elected and released from duty by the parliament on the proposal of the competent working body of the parliament *upon announced public invitation* (emphasis added), meaning a public call open to individuals who comply with the requirements set forth in the Law. On the contrary, insofar as the Prosecutorial Council is concerned, Article 136 § 3 of the Constitution provides that “*The composition, election, mandate, organisation and manner of work of the Prosecution Council shall be regulated by law.*” Naturally, it would be for the Constitutional Court of Montenegro to determine the constitutionality of such a manner of appointment of lay members if it were accepted by the authorities.

c. Vacancies

31. Article 16(a) of the Law sets forth the modalities of publication of the vacancies for the lay members of the Judicial Council (publication of the vacancy in the Official Gazette of Montenegro and in at least one of the print media based in Montenegro). The Venice Commission recommends not considering this list as exhaustive. It recommends adding to this article the clause “*any other appropriate instrument*” to allow for a widespread notice of the announcement: websites and social network are often more effective than the traditional media, which are however to be preserved. Indeed, the Venice Commission notes that, for example, Articles 45 § 1 and 56 § 1 on internal transfer of judges within basic and misdemeanour courts mention the website of the Judicial Council. Similar considerations apply to Articles 34 (for the vacancy of president of the Supreme Court), 40 § 1 (vacancy for president of court) 45 § 3 (on the vacancies for basic court judges).

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<sup>26</sup> CDL-AD(2014)038, op. cit., § 44.

<sup>27</sup> CDL-AD(2021)030, op. cit., §§ 32-45.

#### d. Incompatibilities

32. Article 16 § 2 of the Law introduces new ineligibility criteria for the lay members of the Judicial Council.<sup>28</sup> Ineligibility criteria are also proposed for judicial members of the Judicial Council.<sup>29</sup> The Venice Commission welcomes, in principle, the introduction of ineligibility criteria. These can help reduce the opportunity for conflict of interest (personal incompatibilities) and make the Judicial Council more politically neutral,<sup>30</sup> in addition to potentially increasing the chances to find a political agreement for the election of the lay members in Parliament.

33. However, as raised by several interlocutors, the Venice Commission considers that the Law is too restrictive when it comes to the “political” ineligibility criteria. In particular, ten years of absolute distance from a political party seem to be a rather long period of time; especially in a small country like Montenegro, it might disproportionately restrict the potential pool of candidates, in particular insofar as lay members are concerned. While the aim of the Law is legitimate, it excessively penalises former activity in political/party affairs. A person of high reputation may well be a leading party figure who retired from politics in an indisputable manner. In addition, the catch-all “actively engaged in a party” is too vague a formula, that might be misused for the sake of excluding undesirable candidates; it requires clarification. The Venice Commission therefore recommends reducing the cooling off period to 5 years, as it is the case, for example, for members of the Prosecutorial Council,<sup>31</sup> and clarifying the formula “actively engaged in a party”. It is to be welcomed that the Ministry of Justice accepted (the first part of) this recommendation, as stated in its written observations of 9 December 2022.

34. Article 16 § 2 (3) further requires that the lay members of the Judicial Council shall not have performed the function of judge/prosecutor in the last 8 years. The Venice Commission notes that this provision was criticised by the Association of Judges of Montenegro as it would exclude freshly retired judges with seniority and experience. However, it finds that the criterion aims at avoiding additional, though indirect, corporatism. The introduction of an 8-year cooling off period is less radical than the total prohibition for former judges/prosecutors to apply.<sup>32</sup>

### 3. Professionalisation of duties

35. Article 16(c) § 3 provides that the Judicial Council may decide that the President of the Judicial Council performs his/her duties in a professional manner, i.e. on a full time basis. Proposals to have at least two members performing their duties on a full-time basis were rejected by the Minister of Justice. The Venice Commission considers that, having regard to the size of Montenegro, and although it would always be preferable to have as many members as possible

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<sup>28</sup> Article 16 § 2 of the Law reads: “A member of the Judicial Council from among the prominent lawyers cannot be a person who : 1) is a spouse or a common-law spouse, i.e. a cohabitating partner of the same sex or a relative of a member of a Parliament, member of the Government of Montenegro (hereinafter: the Government) and the President of Montenegro or persons elected, appointed or designated by the President of Montenegro, the Parliament of Montenegro (hereinafter: Parliament) or the Government in the direct line regardless of the degree of kinship, and in the collateral line up to the second degree of kinship or a relative by in-laws up to the first degree;

2) is a person who, in the last ten years, was an official of a political party (party president, member of the presidency, deputy president or member, member of the executive or main board, member of the party’s council and other party official) or actively engaged in the party, was directly elected in elections or held the function of a member of the Government;

3) has performed the function of a judge or prosecutor in the last eight years”.

<sup>29</sup> Except, quite obviously, for no. 3), see Article 12 § 2 of the Law.

<sup>30</sup> The EU 2022 Montenegro Report underlines that the perception of undue political influence over the Judicial and Prosecutorial Council is still high, see p. 20.

<sup>31</sup> CDL-AD(2021)030, op. cit., §§ 28-30

<sup>32</sup> See, differently, CDL-AD(2021)030, op. cit., § 29.

performing their functions on a full-time basis,<sup>33</sup> the amendment represents a clear step forward<sup>34</sup> and seems to strike a fair balance between the competing interests at stake. Therefore, it is to be welcomed.

#### **4. Dismissal for disciplinary reasons**

36. The Venice Commission reiterates its previous recommendation cautioning against dismissal from the Judicial Council of members who have received a disciplinary sanction, regardless of its seriousness.<sup>35</sup> In the written observations submitted on 9 December 2022, the Ministry of Justice maintains that since the Judicial Council has the authority to elect and dismiss judges and determine disciplinary liability, dismissal from the Judicial Council should be automatic regardless of the severity of the disciplinary offence. Nevertheless, the Venice Commission recalls that disciplinary sanctions can be imposed also for relatively minor matters (e.g. coming late to a judges' session), and dismissal from the Judicial Council would constitute a disproportionate sanction in such cases. It therefore reiterates that the possibility of dismissal from the Judicial Council should be limited to disciplinary sanctions of a certain degree of seriousness.

#### **5. Functions of the Judicial Council**

37. The Venice Commission previously criticised the power of the Judicial Council to “resolve complaints on the work of judges”, in that it failed to specify the scope of the complaints which may be received by the Council, taking into account that the complaints against judgments are to be decided through the appeals system.<sup>36</sup> The Law currently reads that the Judicial Council “considers” complaints on the work of judges (Article 27 § 1 (5) of the Law). While this formulation is an improvement *vis-à-vis* the former, it still leaves open who is entitled to submit such complaints and on what grounds. In the written observations submitted on 9 December 2022, the Ministry of Justice maintained that the mentioned provision is compliant with the Constitution insofar as Article 128 § 1(5) provides that the Judicial Council deliberates on applications and complaints regarding the work of the court and takes a standpoint with regard to them. Indeed the Venice Commission is not in principle against this provision but rather recommends clarifying it.

### **C. Appointment and transfer of Judges**

#### **1. Supreme Court**

##### **a. Requirements for being appointed President**

38. Article 33 § 1(2) of the Law expands the pool of potential candidates to the position of President of the Supreme Court to non-judicial professionals. In particular, the Law provides that, in addition to judges or prosecutors who have at least 15 years of experience, whomever has at least 20 years of work experience as a lawyer, notary, professor of legal sciences or in other legal jobs can be appointed as the President of the Supreme Court. The Venice Commission welcomes this provision. In its opinion in fact, strictly limiting access to the Supreme Court to candidates from lower courts could lead to the isolation of the judiciary and promote conservative and rigid opinions, as opposed to being open to new thoughts and concepts, which could be brought in by legal professionals from different backgrounds.<sup>37</sup> Insofar as some interlocutors complained of the fact that the 20-year experience requirement discriminates against non-judicial

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<sup>33</sup> CDL-AD(2013)034, op. cit., § 43.

<sup>34</sup> Currently, the Law does not provide for such a possibility. All members of the Judicial Council sit on it in addition to their main professional activity.

<sup>35</sup> CDL-AD(2014)038, op. cit., § 47.

<sup>36</sup> CDL-AD(2014)038, op. cit., § 52.

<sup>37</sup> CDL-AD(2018)003, op. cit., § 31.

legal professionals, who are supposed to have the same professional dignity as judges and prosecutors, for whom only 15 years are required, the Venice Commission finds that the choice of the drafters falls within their margin of appreciation and does not find the difference in the working experience requested arbitrary or unreasonable.

b. Procedure of appointment

39. Article 35 sets forth the procedure for the appointment of the President of the Supreme Court. The Law provides that, after a list of candidates who meet the statutory requirements for the position of President of Supreme Court has been submitted by the Judicial Council to the General Session of the Supreme Court (Article 35 §§ 1 and 2), each of the judges can vote for up to three candidates (Article 35 § 3). The proposal of the General Session shall therefore contain a maximum of three candidates, who received more than a half of the votes of the total number of judges of the Supreme Court (Article 35 § 4). This represents a departure from the current text, providing that the proposal for the election of the President of the Supreme Court “must specify only one name and must be reasoned”.

40. In the meetings with the Venice Commission, the representatives of the Supreme Court expressed strong reservations about the constitutionality of new Article 35 of the Law. According to them, Article 35 would be contrary to Article 124 of the Constitution, insofar as the latter provides that the President of the Supreme Court is elected by the Judicial Council *at the proposal* (emphasis added) of the General Bench of the Supreme Court. In their view, new Article 35 would render meaningless the power of proposal of the General Bench of the Supreme Court and give too much discretion to the Judicial Council. The Venice Commission observes at the outset that it is not within its mandate nor within the remit of this opinion to assess the constitutionality of Article 35 of the Law or of any other draft amendment. It would indeed be for the Constitutional Court of Montenegro to determine the constitutionality of this provision. For its part, the Venice Commission observes that the provision does not seem to go against international standards.<sup>38</sup> It further observes that Article 124 of the Constitution does not elaborate further on the proposal of the General Bench of the Supreme Court. Insofar as the General Bench of the Supreme Court can propose *a maximum of*, meaning “up to”, three candidates, this seems, *prima facie*, not to impinge upon the constitutional prerogatives of the Supreme Court, who maintains the right of proposal of the candidate to the Judicial Council, which in turn maintains its prerogative of electing the President.

c. Interim President of the Supreme Court

41. Article 36a of the Law provides that: “*After the expiration of the term of office for which he was elected and the termination of the office of the president of the Supreme Court, as well as in the case of resignation or dismissal, the Judicial Council appoints the acting president of the Supreme Court.*”

42. The Venice Commission finds that it is to be welcomed that the Law provide for some transitional mechanism which allows for the Supreme Court to be normally administered pending the election of a new President. In particular, the Venice Commission notes that the Supreme Court is currently being administered by an acting President, and four public calls for the election of a new President of the Supreme Court were unsuccessful.<sup>39</sup>

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<sup>38</sup> See, for example, Council of Europe, CCCJE, Opinion no. 19 (2016), § 53.

<sup>39</sup> EU 2022 Montenegro Report, p.22.

43. The provision seems reasonable insofar as it limits the mandate of the acting president to six months.<sup>40</sup> However, the Venice Commission notes that the election of an acting President is by every standard an exceptional procedure that only serves the need to avoid the impasse stemming from an equally exceptional event, such the death, the resignation or the dismissal of the President of the Supreme Court. As it is currently drafted, Article 36a gives the impression that even after the simple expiration of the term of office of the President, an acting President should be elected. Insofar as Article 34 of the Law provides that the Judicial Council shall announce the vacancy for the position of the President of the Supreme Court two months before the tenure of the President of the Supreme Court ends, this should allow enough time for the procedure of election of the President to be completed, also in light of the new procedure for electing the President. In the written observations submitted on 9 December 2022, the Ministry of Justice submitted that the proposed solution should be kept, also having regard to the recent difficulties in electing the President of the Supreme Court. Nevertheless, the Venice Commission considers that the activation of such an anti-deadlock measure should be limited to situations of real emergency.<sup>41</sup> The Law should not transform the exception into a rule. Lastly, and in order to minimize any possible discretion in the selection of the acting President, the Venice Commission recommends introducing a mechanism that applies automatically in the Law, such as the election of the most senior (not in terms of age but rather of years of experience) judge.<sup>42</sup>

## **2. Basic court judges**

44. The system for appointing basic court judges is amended and made clearer and more transparent. Article 45 of the Law provides for a three-step approach. First, vacancies are filled via a call for internal mobility. Then, judges who have previously successfully completed the judicial training but were not appointed are called to fill the vacant position. This addition addresses certain problems observed in the practical implementation of the Law and gives judges who have already completed the judicial training previously a right of pre-emption.<sup>43</sup> Only when all these reserve lists have been exhausted, shall the Judicial Council publish a public call. The Venice Commission welcomes this amendment.

## **3. Transfer and related rights**

45. Article 85 of the Law deals with the permanent voluntary transfer of judges. While this provision reflects previous recommendations of the Venice Commission insofar as the use of the term “reorganisation of the courts” is concerned,<sup>44</sup> the Venice Commission notes that a guarantee that restructuring of courts is not misused to get rid of some particular judges is still needed. In particular, the Law should provide that a judge should not be transferred against his/her will due to court restructuring to a lower court than the court where he/she has his/her actual judgeship. In the written observations submitted on 9 December 2022, the Ministry of Justice maintained that it would be in practice very difficult for a judge to be transferred to a lower-level court due to the organization of courts in Montenegro. This notwithstanding, the Venice Commission considers that an explicit provision in the Law would constitute an important guarantee for the judiciary. A provision guaranteeing this principle and the principle of securing the same future salary for the judge as in his/her actual position would also be welcomed.<sup>45</sup>

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<sup>40</sup> See, *mutatis mutandis*, Venice Commission, [CDL-AD\(2021\)012](#), *Montenegro – Opinion on the draft amendments to the law on the State Prosecution Service and the draft law on the Prosecutor’s Office for organized crime and corruption*, §§ 49-53.

<sup>41</sup> Venice Commission, [CDL-AD\(2017\)031](#), *Opinion on the Draft Act amending the Act on the National Council of the Judiciary; on the Draft Act amending the Act on the Supreme Court, proposed by the President of Poland, and on the Act on the Organisation of Ordinary Courts*, § 73.

<sup>42</sup> CDL-AD(2017)031, op. cit., § 73.

<sup>43</sup> Explanatory Report, p. 8.

<sup>44</sup> CDL-AD(2014)038, op. cit., § 58.

<sup>45</sup> CDL-AD(2014)038, op. cit., § 58.

46. Articles 55a and 86a of the Law detail the rights of a judge who has been either freshly appointed to (Article 55a) or permanently transferred to (Article 86a) a court which is more than 50 km away from his/her place of habitual residence. In such cases, the judge has the right to an official apartment or to reimbursement of rent, transportation expenses, as well as the right to reimbursement of the expenses sustained for living far from his/her family, provided that s/he or a member of his/her family does not own, co-own or jointly own an apartment, on the territory of the court to which s/he was transferred. The Venice Commission welcomes this provision as it will serve as an incentive to mobility within the country.

## D. Evaluation of Judges

### 1. Evaluation cycle

47. Article 87 of the Law increases the length of the evaluation cycle from three to five years. This may have been done to address the practical difficulties emerging from the implementation of the previous legal framework.<sup>46</sup> Indeed in 2014, the Venice Commission had warned that the system as devised, if properly implemented, would consume a lot of time, personal and economic resources.<sup>47</sup> The Venice Commission notes that the Consultative Council of European Judges (hereinafter “CCJE”) found that regular evaluations permit a full picture of a judge’s performance to be created.<sup>48</sup> They should not take place too often, however, in order to avoid an impression of constant supervision which could, by its very nature, endanger judicial independence. Applying this standard, the Venice Commission previously found that a two-year period for regular evaluation appeared to be too short/frequent as it would have practically meant permanent assessment, which may affect negatively the independence and efficiency of judges.<sup>49</sup> The Venice Commission notes that the Law provides for a series of exceptions to the five-year cycle which allow for an early evaluation in specific cases.<sup>50</sup> With the above-mentioned in mind, the Venice Commission finds that the 5-year cycle is in line with international standards.

### 2. Supreme Court judges

48. The Venice Commission notes that the Law still does not provide for the evaluation of judges of the Supreme Court.<sup>51</sup> This goes against its previous recommendations.<sup>52</sup> Insofar as the purpose of the evaluation of the judges is not only to assess the professional skills for promoting the judge to higher courts, as the Ministry of Justice maintained in the written observations submitted on 9 December 2022, but mainly to appraise the “effectiveness of the judge’s work” (Article 89 of the Law), the judges’ integrity/respect for judicial ethics, and to promote the quality

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<sup>46</sup> See EU 2022 Montenegro Report, p. 24 “Implementation of the system of regular professional evaluation of judges and prosecutors is affected by both council’s inactivity. In 2021, no judges and only one state prosecutor were evaluated using the regular assessment scheme.”

<sup>47</sup> CDL-AD(2014)038, § 59 *in fine*.

<sup>48</sup> CCJE, [Opinion no. 17\(2014\)](#), *On the evaluation of judges’ work, the quality of justice and respect for judicial independence*, § 40.

<sup>49</sup> Venice Commission, [CDL-AD\(2018\)022](#), “The former Yugoslav Republic of Macedonia” – *Opinion on the Law amending the Law on the Judicial Council and on the law amending the law on courts*, § 47.

<sup>50</sup> Article 87 § 3 reads: “Exceptionally, evaluation of the work shall be carried out before the expiration of the period from paragraph 1 of this Article, namely for the judge:

- 1) that was elected for the first time – after three years from taking office;
- 2) whose appraisal score is unsatisfactory, upon the expiry of the period of one year after the decision on the appraisal score has become final and enforceable;
- 3) has submitted an application for the announcement for advancement to the higher instance court or for the president of a court, and does not have a performance appraisal score or more than three years have passed from the last appraisal score.”

<sup>51</sup> Article 87 § 1 of the Law reads: “The performance of judges, **except for judges of the Supreme Court**, shall be appraised every five years [...]” (emphasis added).

<sup>52</sup> CDL-AD(2014)038, *op. cit.*, § 60.

of the judicial activity at all levels of the judicial system, some form of evaluation specific to the judges of the Supreme Court could be devised. This might require some adjustments to the appraisal benchmarks and to the composition of the Evaluation Commission, taking into account the peculiarity of the role of the Supreme Court judges.

### 3. Evaluation criteria

49. Article 89 of the Law amends the criteria for the evaluation of a judge. The main shift is from the “professional knowledge” to the “effectiveness of judge’s work”. One of the new sub-criteria is the “quality of the rationale of decisions”, provided for in Article 90 § 1 (3) of the Law. More in general, the Venice Commission welcomes that the new provisions on appraisal aim at systematizing and rationalizing the system of evaluation of judges. It considers that the devised system of evaluation, if implemented properly, will improve the judiciary while ensuring high quality and accountability. Nevertheless, the Venice Commission finds that some provisions deserve special attention.

50. The effectiveness of a judge’s work is appraised on the basis of three different sub-criteria: quantity of work, quality of work, and quality of the rationale of the decisions. Insofar as the criterion of “quantity of work” is concerned, the work of a judge is graded as unsatisfactory if his/her work results are below 80% of the number of completed cases stipulated by the Framework Criteria for determining the required number of judges. The Venice Commission considers that such a threshold seems rather high. While this might be appropriately counterbalanced by the clause “unless the judge provides justified reasons” it should be clarified what is meant by this rather vague formula.

51. Article 90 § 4 provides that the quality of work of a judge is evaluated based, *inter alia*, on the number of decisions “abolished” in appeal. The Venice Commission notes that in the past it found that such a criterion could impair the independence of the judge and subdue the creativity of the jurisprudence.<sup>53</sup> The CCJE also warned against the use of such criteria, finding that a “*successful appeal can be no more than a different evaluation of a difficult point by the appeal judge, whose decision might itself have been set aside had the matter gone to a yet higher court*”.<sup>54</sup> Therefore, while recognising that the criterion at stake might promote the quality of the justice system and its effectiveness, by preventing futile and unnecessary cases and controversies, for the benefit of the parties and of the efficiency of the judicial system as a whole, the Venice Commission recommends that it be carefully framed. In particular, it is important that the criterion only measure large-scale data, and that threshold of reversals be quite high. In this regard, Article 11 of the Rules for the Evaluation of Judges and Court Presidents (i.e. the secondary legislation referred to in Article 101 of the Law) provides, at its Article 11,<sup>55</sup> that a judge who has 30% or more annulled decisions in relation to the total number of decisions taken has his/her score evaluated as unsatisfactory. For the reasons explained above, the Venice Commission finds this threshold to be too low and recommends that only “serious anomalies” be taken into consideration as a marker for a judge’s evaluation.

52. Article 92 § 1 of the Law provides that the performance appraisal of judges according to the two criteria of the effectiveness of the judge’s work and his/her general abilities and professional activities is carried out by checking, *inter alia*, five cases adjudicated by a final and enforceable decision in which the decisions were repealed, selected randomly. The Venice Commission welcomes this random assessment, especially in regard of the “quality of the reasoning” sub-criterion (as it would be almost impossible that the assessment take into consideration all the

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<sup>53</sup> Venice Commission, [CDL-AD\(2014\)007](#), *Joint opinion on the draft law amending and supplementing the judicial code (evaluation system for judges) of Armenia*, §§ 39-40.

<sup>54</sup> CCJE, [Opinion no. 11\(2008\)](#), *On the quality of judicial decisions*, § 74

<sup>55</sup> [Rules for the Evaluation of Judges and Court Presidents](#), last updated on 8 October 2021 (only in Montenegrin).

decisions written by the judge under evaluation). However, it is not entirely clear why one would only consider cases in which the judge's decision was overturned on appeal. Moreover, it should be made clear that such criteria does not apply to the "quality of work" criterion, which, as explained above, should take into consideration large-scale data.

53. Lastly, it is commendable that the Law foresees that the president of a court is separately evaluated as a judge and as a president, as foreseen in Article 100 of the Law. This will allow for the distinct assessment of his/her capacity as a judge and as a president, according to different benchmarks. In particular, in his/her evaluation as a president, organisational and managerial skills will be at the core of the assessment.<sup>56</sup>

## E. Ethics

54. New Section VI(a) of the Law regulates in detail the composition and the work of the Commission for the Code of Ethics for Judges. These provisions are much more detailed than former Article 11 of the Law. This is, in principle, to be welcomed, considering that the promotion and enforcement of codes of ethics appears to have been very limited hitherto.<sup>57</sup>

55. Before turning to the new legislative provisions on ethics, the Venice Commission wishes to recall that an ethical code serves several important purposes. First of all, it helps judges resolve questions of professional ethics, which in turn will give them the necessary autonomy in their decision-making power and will help them in guaranteeing their independence from other authorities. It further informs the public about the standards of conduct it is entitled to expect from judges. Lastly, it contributes to give the public assurance that the administration of justice is independent and impartial.<sup>58</sup>

56. Having said this, it is important to specify that it is a well-established European practice and standard that principles of conduct should remain independent of and clearly distinct from the disciplinary rules applicable to judges. Failure to observe one of the principles set in the ethical code or in ethical guidelines should not of itself constitute a disciplinary infringement or a civil or criminal offence.<sup>59</sup> 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.<sup>60</sup> More importantly, a code of ethics should not be seen as a piece of legislation, and it should be the judges and their organisation(s) that take the responsibility for the implementation of such a code.<sup>61</sup>

57. Turning to the Montenegrin legal framework on ethics, the Venice Commission notes that the Code of Ethics<sup>62</sup> sets a series of principles of professional conduct which aim at guiding and assisting judges in the daily performance of their activities. The Code of Ethics is complemented by a series of guidelines which have been developed over the last few years,<sup>63</sup> which are meant to assist the judges in specific situations (use of social networks, secondary activities, political

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<sup>56</sup> CCJE, [Opinion no. 19 \(2016\)](#), *On the role of court presidents*, § 42.

<sup>57</sup> EU 2022 Montenegro Report, p. 23.

<sup>58</sup> Venice Commission, [CDL-AD\(2013\)035](#), *Opinion on the draft code of judicial ethics of the Republic of Tajikistan*, § 11.

<sup>59</sup> CCJE, [Opinion no. 3 \(2002\)](#), *On the principles and rules governing judges' professional conduct, in particular ethics, incompatible behaviour and impartiality*, § 48(i).

<sup>60</sup> CDL-AD(2013)035, op. cit., § 16.

<sup>61</sup> CDL-AD(2013)035, op. cit., § 15.

<sup>62</sup> Code of Ethics (available in [English](#) and [Montenegrin](#)).

<sup>63</sup> The Venice Commission has received 4 sets of guidelines, prepared between 2018 and 2022, which have been prepared with the expert support of the Action "Accountability of the Judicial System" under the programmatic framework "Horizontal Facility for Western Balkans and Turkey" funded by the European Union and the Council of Europe.



activity and exercise of the freedom of expression). Article 12 § 5 of the Code of Ethics is quite clear in that it clarifies that the only sanction for a violation of the Code of Ethics is the recording of such violation in the personal file of the judge. This is to be welcomed, as it will prevent from any overlapping with the disciplinary sanctions already provided in the Law. The Venice Commission indeed, already found in the past that, in cases of less serious breaches of judicial ethics, it is legitimate for the ethics commissions to issue reprimand or other similar “soft” sanctions imposed as a result of the “peer review” of the actions of the judge concerned.<sup>64</sup>

58. Some clarifications are needed in respect of Article 107(v) § 3, which reads: “*if, during the procedure of deciding on the violation of the Code of Ethics for Judges, the Commission for Code of Ethics for Judges concludes that actions of a judge include elements of a disciplinary offence, it shall suspend the procedure for establishing the violation of the Code of Ethics for Judges and submit a proposal to determine disciplinary liability of the judge, and later suspend the procedure if disciplinary liability of the judge is determined*”. The provision makes it clear that ethical procedures are abandoned in case the Commission for Code of Ethics concludes that actions of a judge contain the elements of a disciplinary violation. Applying the abovementioned principles to this case, the Venice Commission recommends clarifying here that the disciplinary offence referred to in this provision should be one of those codified in Article 108 of the Law.<sup>65</sup> In this regard, and insofar as the ethical and disciplinary level shall be kept separate one from the other, it further recommends that rather than having the power to “submit a proposal” to determine disciplinary liability of the judge, the Commission for the Code of Ethics should limit itself to “informing” the Judicial Council.

59. As concerns the technical features of the new Commission, the Law, in its Article 107(v) § 5, introduces the possibility to lodge an “objection” against a decision of the Commission for the Code of Ethics before the Judicial Council. The Law further provides for the election of deputies of the chairman and the two members of the Commission. Both provisions, especially the latter, are to be welcomed insofar as the Ethical Commission of the Judicial Council did not perform its duties for 7 months due to its incomplete composition.<sup>66</sup> The qualification requirements, such as having served as a judge for at least five years, not having been disciplinary sanctioned, and not having violated the Code of Ethics also seem reasonable. The possibility for judges and president of courts to ask for an opinion to the Commission for the Code of Ethics on whether a given conduct would constitute a violation of the Code of Ethics reflects one of the most important task of the Commission, and is in line with international standards.<sup>67</sup> Nevertheless, the Venice Commission considers that a provision providing for the recusal of members of the Commission for the Code of Ethics should be introduced, as it is already the case for the recusal of a member of the appraisal commission (Article 88) or of the subjects involved in a disciplinary procedure (Article 120).

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<sup>64</sup> Venice Commission, [CDL-AD\(2016\)013](#), *Opinion on the Draft Code of Judicial Ethic of the Republic of Kazakhstan*, § 18.

<sup>65</sup> See, similarly, [CDL-AD\(2015\)007](#), *Joint opinion by the Venice Commission and the Directorate of Human Rights of the Directorate General of Human Rights and the Rule of Law on the Law on the Judiciary and the Status of Judges and amendments to the Law on the High Council of Justice of Ukraine*, § 50 *in fine*, with further references.

<sup>66</sup> EU 2022 Montenegro Report, p. 23.

<sup>67</sup> See, among others, CM/REC(2010)12, § 74.

## F. Disciplinary sanctions and proceedings

### 1. Disciplinary sanctions

60. Article 108 of the Law describes in a clear and detailed manner the offences leading to disciplinary liability and their legal consequences on judges. This is commendable and in line with international standards.<sup>68</sup>

61. Moreover, the Law clearly defines the scale of sanctions: minor, severe, most severe. The principle of proportionality asks for a reasonable relationship between the seriousness of the offence, on the one hand, and the nature and the amount of the sanction, on the other.<sup>69</sup> The fact that the Law provides for different types of disciplinary sanctions<sup>70</sup> facilitates compliance with such principle.<sup>71</sup>

62. Nevertheless, an appropriate balance is not always struck in the Law. With specific regard to the most serious offences, the Law provides that these are applied if a judge “*performs the judicial office incompetently or unconscientiously*”.<sup>72</sup> Among others, Article 108 § 6 (1)(a) provides that “*Incompetent or unconscientious performance of judicial office [...] shall exist if: [...] 1a) without justifiable reason, continuously over the period of two years, in one year, on average has more than 40% of abolished decisions in relation to the number of cases returned by the higher court, which ratio includes at least 30 abolished decisions on an annual level*”. The Venice Commission reiterates that criteria for the establishment of a disciplinary violation such as the number of overturned decisions should be approached with a great degree of caution. It does not necessarily follow that because a judge has been overruled on a number of occasions, he or she has not acted in a competent or professional manner.<sup>73</sup> Moreover, the “modification” of the lower court judgments may be relatively minor or reflect the discretionary power of the appellate court.<sup>74</sup> The Venice Commission considers that such a criterion can be taken in consideration as far as the professional evaluation of the judge is concerned (but see the comments regarding possible safeguard measures, paragraph 51 above). It is more doubtful whether this could be considered as a disciplinary offence, especially as a “most severe disciplinary offence”, which causes the direct dismissal of the judge. The Venice Commission recommends deleting or at least amending this provision, clarifying that only in cases of stubborn resistance against an enhanced practice which leads to a repeated overturning in cases where there is a well-established and clear case-law can the judge be disciplinarily sanctioned for incompetent performance.<sup>75</sup>

63. Similarly, and although this is not among the amendments prepared by the working group, the Venice Commission cautions against the unsatisfactory performance of a judge forming the basis for a “most severe disciplinary offence”, when repeated twice in a row (as provided in Article

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<sup>68</sup> According to the Rule of Law Checklist, “*Offences leading to disciplinary sanctions and their legal consequences should be set out clearly in law. [...]*”, CDL-AD(2016)007, op. cit., II.E.1.a, § 78. See also Venice Commission, [CDL-AD\(2014\)006](#), *Joint opinion of the Venice Commission and the Directorate of Human Rights (DHR) of the Directorate General of Human Rights and Rule of Law of the Council of Europe, and of the OSCE Office for Democratic Institutions and Human Rights (OSCE/ODIHR) on the draft law on disciplinary liability of judges of the Republic of Moldova*, § 15.

<sup>69</sup> Venice Commission, [CDL-AD\(2014\)039](#), *Amicus Curiae Brief for the Constitutional Court of Moldova on certain provisions of the law on professional integrity testing*, § 72.

<sup>70</sup> Article 109 § 1 of the Law reads: “*Disciplinary sanctions shall include a warning, a fine, an advancement ban and dismissal*”.

<sup>71</sup> CDL-AD(2014)006, op. cit., § 37.

<sup>72</sup> The Law has the merit of clearly explaining what this means, addressing previous recommendations of the Venice Commission, see CDL-AD(2014)038, op. cit., § 46.

<sup>73</sup> Venice Commission, [CDL-AD\(2015\)042](#), *Opinion on the Laws on the Disciplinary Liability and Evaluation of Judges of “the Former Yugoslav Republic of Macedonia”*, § 46.

<sup>74</sup> CDL-AD(2015)042, op. cit., § 48.

<sup>75</sup> CDL-AD(2015)042, op. cit., § 47.

108 § 6 (3).<sup>76</sup> The Venice Commission reiterates that professional evaluation of a judge and disciplinary liability should be kept clearly distinct<sup>77</sup> and that, to serve as a ground for dismissal, “bad evaluation” should convincingly demonstrate the incapability of the judge to perform judicial functions.<sup>78</sup> Especially in light of its reservations on what “unsatisfactory performance” means (see paragraphs 50-51 above), the Venice Commission considers that this provision deserves more attention.

64. Accordingly, the Venice Commission recommends amending the Law insofar as the most severe disciplinary offences are concerned, and to strike a fairer and more proportionate balance between the seriousness of the offence and the gravity of the sanction.

65. Article 108 § 6 (2) foresees that a judge is liable for the most severe disciplinary offence (leading to dismissal) in case s/he, *inter alia*, becomes a member of a political party or starts performing parliamentary or other public office. As explained in the Venice Commission’s report on the freedom of expression of judges, there is no single model of regulating the political activities of the judges.<sup>79</sup> The Venice Commission finds that, insofar as the Law sanctions the membership of a political party or holding a political function and the mere political engagement of a judge, it seems to strike an adequate balance between the judge’s right to freedom of expression and the public interest in the fair administration of justice.<sup>80</sup> Indeed, a clear division of the political and judicial spheres strengthens the perceived independence of the judiciary. Judges should not put themselves into a position where their independence or impartiality may be questioned.<sup>81</sup> In this regard, the authorities might consider introducing a ban on returning to judiciary for judges who received such a disciplinary sanction. In order to dispel any doubt, the Venice Commission wishes to clarify that one thing is not excessively stigmatising former political activity in the field of the administration of justice,<sup>82</sup> another thing is, as a judge, consciously violating a disciplinary rule and jeopardising the independence and impartiality – both real and perceived - of the judiciary.

66. With regard to serious disciplinary offences, the Venice Commission reiterates its previous recommendation that the decision of a judge not to recuse him/herself should only be considered a “very serious offence” in cases in which there is manifestly a reason for his/her recusal and not in cases in which this decision is based on his or her interpretation of the law.<sup>83</sup>

## 2. Disciplinary Panel

67. During the meeting with members of the Judicial Council, the Venice Commission was informed by members of the very Council that the disciplinary panel mentioned in Article 114 § 2 is formed and appointed for a two-year period. The Venice Commission was not able to find this specific provision in the Rules of Procedure of Judicial Council, as indicated during the meetings. The Rules of Procedure of the Judicial Council only mention, in Article 35, that a “disciplinary

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<sup>76</sup> See, *similarly*, CCJE, Opinion no. 17(2014), op. cit., § 44 (“[...]except in exceptional circumstances, dismissal from office should not be the consequence of an unfavourable evaluation alone but only in the case of a serious breach of disciplinary rules or the criminal law, following a proper procedure and based on reliable evidence [...]”) and cfr. with CM/REC(2010)12, § 50.

<sup>77</sup> Venice Commission, [CDL-AD\(2021\)015](#), *Bosnia and Herzegovina - Opinion on the draft law on amendments to the law on the High Judicial and Prosecutorial Council*, §60; CDL-AD(2014)007, op. cit., §§ 27, 102 and 108

<sup>78</sup> Venice Commission, [CDL-AD\(2019\)008](#), *North Macedonia - Opinion on the Draft Law on the Judicial Council*, § 56.

<sup>79</sup> Venice Commission, [CDL-AD\(2015\)018](#), *Report on the Freedom of expression of Judges*, § 82.

<sup>80</sup> *Similarly* Venice Commission, [CDL-AD\(2022\)030](#), *Serbia – Opinion on three draft laws implementing the constitutional amendments on the judiciary*, § 44.

<sup>81</sup> CDL-AD(2010)004, op. cit., § 62.

<sup>82</sup> See para. 33 above.

<sup>83</sup> CDL-AD(2014)038, op. cit., § 65.

council” is formed by the Judicial Council in line with Article 114 of the Law. The provision does not specify the panel’s term of office. However, Article 35 of the Rules clarifies a point that had been previously raised by the Venice Commission,<sup>84</sup> excluding the possibility for an *ad hoc* disciplinary panel, composed on a case-by-case basis. This is to be welcomed. Nevertheless, for the sake of legislative clarity, the Venice Commission recommends providing for this in the Law rather than in the Rules of Procedure of the Judicial Council.

### 3. Initiative to declare disciplinary liability

68. New Article 110 of the Law gives to any member of the Judicial Council, in addition to the court president, the president of the immediately higher court and the president of the Supreme Court or the Commission for the Code of Ethics for Judges, the possibility to file a motion for establishment of the disciplinary liability of a judge. Insofar as hitherto there was a limited track record and a lack of commitment from the Judicial Council to ensuring accountability,<sup>85</sup> the new provision is to be welcomed. Nevertheless, a few clarifications are needed. Firstly, the Venice Commission notes that, pursuant to the amendments, the Minister of Justice will be able to bring disciplinary cases on an equal footing with other members of the Judicial Council. Since the Minister of Justice does not play any role in the decision-making (see Article 128 § 3 of the Constitution), his/her involvement at the stage of initiation of the disciplinary proceedings is less problematic.<sup>86</sup> However, with specific respect to Montenegro, the Venice Commission has previously doubted that such a right is in harmony with the independence of the judiciary and the principle of the separation of powers.<sup>87</sup> Having regard to the fact that the Judicial Council has a mixed composition that also includes four lay members, who adequately counterbalance the risk of corporatism, the authorities might consider that the power of the Minister of Justice to initiate disciplinary proceedings be phased out once the new system proves its effectiveness.<sup>88</sup> Likewise, the Venice Commission recommends reconsidering giving the possibility to the Commission for the Code of Ethics the power/duty to issue disciplinary proceedings against a judge (see paragraph 58 above). Indeed, the Venice Commission considers that, having given the power to any member of the Judicial Council to initiate disciplinary proceedings against a judge, the Law might limit the competence of all other subjects mentioned in Article 110 of the Law (Commission for the Code of Ethics, court president and president of the immediately higher court) to simply “informing” the Judicial Council. This is to be read in light of the fact that “[j]udicial independence is not only the independence of the judiciary as a whole vis-à-vis the other powers of the State, but it has also an “internal” aspect. Every judge whatever his place in the court system, is exercising the same authority to judge. In judicial adjudication he or she should therefore be independent also vis-à-vis other judges and also in relation to his/her court president or other (e.g. appellate or superior) courts”.<sup>89</sup> While in the written observations submitted on 9 December 2022 the Ministry of Justice stressed that empowering these subjects would enhance the accountability of the judiciary, the Venice Commission remains convinced that “the best protection for judicial independence, both internal and external can be assured by a High Judicial

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<sup>84</sup> CDL-AD(2014)038, op. cit., § 69.

<sup>85</sup> EU 2022 Montenegro Report, p. 23.

<sup>86</sup> See Venice Commission, [CDL-AD\(2019\)024](#), *Armenia – 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 amendments to the Judicial Code and some other laws*, § 30, with further references.

<sup>87</sup> See also CDL-AD(2014)038, op. cit., § 68

<sup>88</sup> CDL-AD(2019)024, op. cit., § 30.

<sup>89</sup> CDL-AD(2010)004, op. cit., § 71 *in fine*. See also [CDL-AD\(2014\)032](#), *Joint Opinion of the Venice Commission and the Directorate of Human Rights (DHR) of the Directorate General of Human Rights and Rule of Law (DGI) of the Council of Europe on the draft law on making changes to the law on disciplinary liability and disciplinary proceedings of judges of General Courts of Georgia*, § 23 (“[D]isciplinary powers of court presidents [...] may lead to weakening the independence of a judge in case, for instance, of conflict with the president of the court”).

*Council, as it is recognised by the main international documents on the subject of judicial independence.”<sup>90</sup>*

69. Similar considerations apply to the suggestion made by certain stakeholders that the disciplinary prosecutor should be given the right to initiate a disciplinary procedure. The power of any member of the Judicial Council to initiate a disciplinary procedure will already significantly increase the accountability of the judiciary while respecting the principle of judicial independence.

70. Lastly, attention should be paid to the interplay of Article 110 with Article 114 of the Law, which details the composition of the disciplinary panel. Pursuant to the latter, the disciplinary panel shall consist of three members of the Judicial Council (two from the ranks of judges and one from the ranks of eminent lawyers). The Venice Commission recalls that in disciplinary proceedings a person who initiates the inquiry should not decide on the case; in simple terms the member initiating the disciplinary procedure as an “accuser” should not then take part in the determination of charges in the capacity of a “judge”.<sup>91</sup> While this possibility could be excluded by an appropriate and consistent application of Article 120 § 1 of the Law on recusal,<sup>92</sup> the Venice Commission recommends explicitly providing for such an incompatibility in the Law. Similarly, a provision explicitly stating that a member of the Judicial Council subject to disciplinary proceedings shall not be a member of the disciplinary panel could be added.<sup>93</sup>

#### **IV. Conclusions**

71. The Venice Commission praises the Ministry of Justice of Montenegro for having organised an inclusive, democratic and transparent public debate on the Law. Furthermore, it thanks the Minister for having submitted the request prior to the finalisation of the amendments. The Venice Commission hopes that its assistance at such an early stage of the reform process will contribute to the improvement of the reform.

72. The Venice Commission recalls that it is not within its mandate to assess whether specific provisions of the Law are compliant with the Constitution, a duty that lies only with the Constitutional Court of Montenegro; its task is limited to assessing their compliance with the relevant international standards. In this regard, the Venice Commission finds that the Law addresses several shortcomings identified in its practical implementation and goes, overall, in the right direction. The Law introduces clearer provisions on the appointment and transfer of judges, incentivises internal mobility, provides for a clear and more systematized system of appraisal, sets forth in detail new provisions on the Commission for the Code of Ethics, enhances accountability and transparency by entrusting the Judicial Council with the possibility to initiate disciplinary proceedings.

73. Two of the main topics discussed with the stakeholders by the Venice Commission’s delegation, i.e. the presence of the Minister of Justice in the Judicial Council and the difficulties encountered in the election of the lay members of the Judicial Council, might need further constitutional reflection and cannot be addressed further in this opinion without encroaching on constitutional powers of other bodies. With regard to the election of the lay members of the

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<sup>90</sup> CDL-AD(2010)004, op. cit., § 71 *in fine*.

<sup>91</sup> CDL-AD(2015)042, op. cit., § 73; [CDL-AD\(2015\)045](#), *Interim Opinion on the Draft Constitutional Amendments on the Judiciary of Albania*, § 66, and, *mutatis mutandis*, CDL-AD(2016)013, op. cit., § 48, *in fine*.

<sup>92</sup> Article 120 § 1 of the Law: “*In the procedure to determine the disciplinary liability of a judge, the disciplinary prosecutor, a member of the Disciplinary Council or a member of the Judicial Council, in relation to whom there are circumstances that raise doubts to their impartiality, may not participate in the proceedings.*”

<sup>93</sup> CDL-AD(2021)015, op. cit., § 66.

Judicial Council, the Venice Commission can only repeat that it is a sign of maturity and responsibility on the part of the political class to be able to find consensus or agreements, in particular as to appointments of independent institutions.

74. The Venice Commission regrets that many of its 2014 recommendations have not been implemented. It invites the Montenegrin authorities to take them into due consideration when analysing the possible reform of the Law.

75. Moreover, a number of issues should be further examined and the relevant provisions amended. In particular, the Venice Commission recommends as follows:

- work-related rights of the judges, such as the right to an adequate salary, or their retirement age, should be clearly regulated by the Law, due to the specificity of the rules applicable to the judiciary, the judges' special status in the society and to protect and uphold the basic principle of judicial independence;
- insofar as the "political" incompatibility is concerned, the cooling-off period for members of the Judicial Council should be reduced to 5 years, to avoid excessive stigmatisation of political activity and to prevent the pool of potential candidates from being unduly restricted;
- anti-deadlock mechanisms such as the election of the Acting President of the Supreme Court should be limited to exceptional events, such as the death, resignation or dismissal of the incumbent President, in order to avoid transforming the exception into rule;
- the evaluation criteria should be partly revised in order to ensure that the independence of judges is upheld and judicial discretion is not unduly restricted and that all judges, regardless of the court they work in, should be subject to appropriate evaluation, tailored to the role they occupy in the judicial system;
- the Law should ensure that ethical and disciplinary violations are kept duly separate;
- disciplinary sanctions should be reconsidered in order to strike a fairer balance between the seriousness of the breach and the sanction imposed; and
- the Law should provide that the members of the Judicial Council alone are responsible for initiating disciplinary proceedings.

76. While it encourages the authorities to pursue the good work on these amendments in order to achieve full compliance with the standards, the Venice Commission wishes to stress that great attention will need to be paid to the practical implementation of the new text. As shown in the practical implementation of this very Law, laws on paper may not always be applied in practice. The Venice Commission calls upon all the relevant stakeholders to cooperate and work together to ensure that an independent, accountable, efficient and transparent justice system thrive in Montenegro.

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