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OPINION ON THE LAW ON SOME MEASURES RELATED TO THE SELECTION OF CANDIDATES FOR THE POSITIONS OF MEMBERS IN THE SELF-ADMINISTRATION BODIES OF JUDGES AND PROSECUTORS

MOLDOVA

This Opinion has benefited from contributions made by Mr. Vasil Vashchanka, International Legal Expert, and Mr. Grzegorz Borkowski, Judge, International Legal Expert and former Head of Office of the National Council of the Judiciary of Poland.

Based on an unofficial English translation of the Law.

OSCE Office for Democratic Institutions and Human Rights

Ul. Miodowa 10, PL-00-251 Warsaw
Office: +48 22 520 06 00, Fax: +48 22 520 0605
www.legislationline.org

EXECUTIVE SUMMARY AND KEY RECOMMENDATIONS

On 10 March 2022 the Parliament of Moldova adopted the Law *on Some Measures related to the Selection of Candidates for the Positions of Members in the Self-Administration Bodies of Judges and Prosecutors (hereinafter "the Law")* to introduce an ad-hoc evaluating body to evaluate candidates for the Superior Council of Magistracy (hereinafter "SCM") and the Superior Council of Prosecutors (hereinafter "SCP") to ensure their ethical and financial integrity. This evaluation procedure is limited to the applicants for the specified bodies and is to be carried out by an Independent Evaluation Commission outside the existing framework of integrity assessments in Moldova.

ODIHR welcomes the willingness and continuous efforts of the Moldovan authorities to strengthen the justice system in the country. Notwithstanding the implemented reforms of the legislative and institutional framework regulating the judicial institutions, as noted in the ODIHR Interim Opinion on the Draft Law on the Reform of the Supreme Court of Justice and the Prosecutor's Offices of the Republic of Moldova (as of September 2019) of 16 October 2019[1], problems of integrity, corruption, political influence, and lack of public trust in the judiciary in Moldova have persisted. Recognizing that the independence, impartiality, accountability, transparency and professionalism of the judiciary are key to the rule of law and to engendering public trust in the judiciary, it is essential that authorities continue efforts addressing the above-described challenges faced by the judiciary in Moldova.

Though every state has the right to reform its judicial system, any judicial reform process must not undermine the independence of the judiciary and should be in compliance with applicable international rule of law and human rights standards and OSCE commitments.

It is noted that The Law address some of the concerns and recommendations expressed in the Joint Opinion by the Venice Commission and the Directorate General of Human Rights and Rule of Law of the Council of Europe of December 2021. Nevertheless, it would benefit from further improvement, elaborating on evaluation criteria, means of evidence-gathering, access to information, the time-line and the appeal procedure . This would help to ensure an objective, fair and transparent process and overall legal certainty.

More specifically, and in addition to what is stated above, ODIHR makes the following recommendations to further enhance the Law and the related Rules of Procedure and Evaluation Rules:

A. To review the Law in the course of the evaluation process in consultation with the Evaluation Commission and other relevant stakeholders taking into account the scope and extent of the assessment, and to ensure that in cases

1 See: https://www.legislationline.org/download/id/8414/file/358_JUD_MDA_16Oct2019_en.pdf.

where the evaluation of candidates has not been finalised by the date by which the Law is to lapse, any future procedures for the evaluation of any remaining candidates do not deviate from the integrity criteria set out in the present Law; [para. 44]

B. To clarify in which cases the source of information relevant to the evaluation of the candidate should be held confidential, as well as define the procedure and grounds that would allow a candidate to request disclosure. Such an access request should be assessed and decided on with a reasoned decision by the Evaluation Commission; [paras. 45-47]

C. To elaborate in the Rules of Procedure or the Evaluation Rules the rules of collecting evidence relevant to the evaluation of the candidate including, but not limited to, the selection of those who check background, and methodology to be used in collection and verification of information; [paras. 47-48]

D. To clarify when new or additional information relevant to the evaluation of the candidate may be introduced, such as after the hearing or during the hearing, and how and when the Commission's assessment of the 'justification' of the introduction of such information is made; [paras. 49-50]

E. To strengthen the Evaluation Rules by providing a more precise scope and meaning of the term "ethical integrity" to avoid overly broad application of the term; [paras. 52-53]

F. To set out at least the basis and main elements for each evaluation criterion as well as the standards of information collection (process, evidence, admissibility etc.), either in the Law or the Rules of Procedure or the Evaluation Rules , to ensure transparency and reduce possibilities for arbitrariness and to specify what weight/score is to be given to the different elements for the final evaluation; [paras. 54-55]

G. To introduce mechanisms in the Rules of Procedure or the Evaluation Rules to ensure that all information received through the channels provided by the Law and relied on is properly verified and to stipulate in the Law or either of the Rules that evidence obtained unlawfully should be considered inadmissible, as it would be in civil, administrative or penal procedure.; [para. 59]

H. To consider extending the time-limit for submission of requested information by candidates and to provide the Commission an opportunity to extend the time-limit for the further collection, verification and analysis of the data; [para. 62]

I. To ensure the integrity of the evaluation process by stating in the Rules that where a conflict of interest arises the member of the Evaluation Commission is obliged to abstain from voting on the decision of the evaluation of a particular candidate; [para. 70] and

J. To appropriately balance the private interest of a candidate and the public interest in a transparent process when reflecting private data of a candidate in a published version of a decision and to suspend the publication pending final appeal and decision of the appellate body. [paras. 74-75]

These and additional Recommendations, are included throughout the text of this Opinion, highlighted in bold.

As part of its mandate to assist OSCE participating States in implementing OSCE commitments, the OSCE/ODIHR reviews, upon request, draft and existing legislation to assess their compliance with international human rights standards and OSCE commitments and provides concrete recommendations for improvement.

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I. INTRODUCTION

1. On 1 April 2022, the People's Advocate of the Republic of Moldova sent to the OSCE Office for Democratic Institutions and Human Rights (hereinafter "ODIHR") a request for a legal review of the Law on some measures related to the selection of candidates for the positions of members in the self-administration bodies of judges and prosecutors (hereinafter "the Law").
2. On 7 April 2022, ODIHR responded to this request, confirming the Office's readiness to prepare a legal opinion on the compliance of this Law with international human rights standards and OSCE human dimension commitments.
3. This Opinion was prepared in response to the above request. ODIHR conducted this assessment within its mandate to assist the OSCE participating States in the implementation of their OSCE commitments.[2]

II. SCOPE OF THE OPINION

4. The scope of this Opinion covers the Law submitted for review as well as the related Rules of Procedure and Evaluation Rules. Thus limited, the Opinion does not constitute a full and comprehensive review of the entire legal and institutional framework regulating the ongoing judicial reform and the self-administration bodies of judges and prosecutors in Moldova.
5. The Opinion raises key issues and provides indications of areas of concern. In the interest of conciseness, it focuses more on those provisions that require amendments or improvements than on the positive aspects of the Law. The ensuing legal analysis is based on international and regional human rights and rule of law standards, norms and recommendations as well as relevant OSCE human dimension commitments.
6. Moreover, in accordance with the *Convention on the Elimination of All Forms of Discrimination against Women*[3] (hereinafter "CEDAW") and the *2004 OSCE Action Plan for the Promotion of Gender Equality*[4] and commitments to mainstream gender into OSCE activities, programmes and projects, the Opinion integrates, as appropriate, a gender and diversity perspective.
7. This Opinion is based on an unofficial English translation of the Law provided to the ODIHR, which is attached to this document as an Annex. Errors from translation may result. Should the Opinion be translated in another language, the English version shall prevail.

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2 See especially OSCE Decision No. 7/08 Further Strengthening the Rule of Law in the OSCE Area (2008), point 4, where the Ministerial Council "[e]ncourages participating States, with the assistance, where appropriate, of relevant OSCE executive structures in accordance with their mandates and within existing resources, to continue and to enhance their efforts to share information and best practices and to strengthen the rule of law [on the issue of] independence of the judiciary, effective administration of justice, right to a fair trial, access to court, accountability of state institutions and officials, respect for the rule of law in public administration, the right to legal assistance and respect for the human rights of persons in detention […]".

3 UN Convention on the Elimination of All Forms of Discrimination against Women (hereinafter "CEDAW"), adopted by General Assembly resolution 34/180 on 18 December 1979. The Republic of Moldova acceded to this Convention on 1 July 1994.

4 See OSCE Action Plan for the Promotion of Gender Equality, adopted by Decision No. 14/04, MC.DEC/14/04 (2004), para. 32.

8. In view of the above, ODIHR would like to stress that this Opinion does not prevent ODIHR from formulating additional written or oral recommendations or comments on respective subject matters in Moldova in the future.

III. LEGAL ANALYSIS AND RECOMMENDATIONS

1. Background

9. The Law was adopted by the Parliament of Moldova on 10 March 2022. The Law introduces an ad hoc integrity evaluation procedure for applicants to vacant positions in the SCM and the SCP. This evaluation procedure is limited to the applicants for the specified bodies and is to be carried out outside the existing framework of integrity assessments in Moldova, which is governed primarily by the 2016 Act on the National Integrity Authority and the 2017 Act on Integrity.

10. The Constitution sets up the SCM as the guarantor of independence of the judiciary. The SCM is composed of 12 members: six judicial and six non-judicial, three of whom are ex-officio members (President of the Supreme Court of Justice, the Minister of Justice, and the Attorney General; see Article 122 of the Constitution). The procedure for the selection of judicial members is set out in the 1996 Act on the Superior Council of Magistracy and provides for the selection of judicial members by their peers, in line with international standards. The Law No. 3/2016 on the Public Prosecution Service Prosecutor's Office established the SCP.[5] According to Article 69 of this Law the SCP consists of 12 members, who have a mandate of four years. Five members are prosecutors elected by peers in the General Assembly of Prosecutors, four members are chosen from civil society (of which 1 is selected by the President, 1 by Parliament, 1 by the Academy of Sciences, and 1 by the Government), in addition to three ex officio members (President of the SCM, Minister of Justice, and Ombudsperson). According to Articles 123 and 125 of the Constitution of Moldova it is the SCM and SCP respectively that have the competence to decide on the appointment, transfer, removal from office, and promoting of judges and prosecutors, and imposition of disciplinary sentences against them.[6]

11. A draft version and a revised draft version of the adopted Law were subjects of the Joint Opinion by the European Commission for Democracy through Law (hereinafter "Venice Commission") and the Directorate General of Human Rights and Rule of Law (DGI) of the Council of Europe (hereinafter referred to as "the Joint Opinion") in December 2021, which is also referenced in this Opinion, where relevant.[7]

12. According to the Preamble of the Law, it is adopted to "increase the integrity of the future members of the SCM, of the SCP and their specialized bodies, as well as in order to increase the confidence of the society in the activity of the self-administration bodies of judges and prosecutors, but also, in the justice system, in general…".

5 The Law No. 3/2016 was amended on 25 November 2021. See: <https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-REF(2021)094-e>.

6 Amendments to the selection process are under way. See: <https://www.venice.coe.int/webforms/documents/?pdf=CDL-REF(2022)017-e>.

7 European Commission for Democracy through Law (Venice Commission) and the Directorate General of Human Rights and Rule of Law of the Council of Europe (DG I), Joint Opinion on the revised draft Law "On some measures related to the selection of candidates for the positions of members in the self-administration bodies of judges and prosecutors" (CDL-AD(2021)046), 13 December 2021.

13. This Law was adopted in the context of an intended extraordinary evaluation or vetting process of judges, prosecutors and other officials in the justice system.[8] Further context is provided in paragraph 8 of the Joint Opinion of the Venice Commission according to which the "mandate of the SCM and of the SCP is about to expire…" and "[t]he authorities aim to put in place a system of integrity assessment of the candidates to these positions before the elections take place…" and that "[t]his filtering of candidates would render the extraordinary evaluation of the members of the SCM and SCP, to be carried out under the general scheme, redundant."

14. In the Explanatory Note to the draft version of the Law under review, it is provided that on 19 November 2021 and 3 December 2021 the elections to the administrative positions of the self-governing bodies of judges and prosecutors were due to take place in a general meeting of these bodies, but were postponed due to the Covid-19 pandemic restrictions. The Note further provides that the normative framework in force which stipulates the procedure of evaluation of the candidates to the membership of the SCM and the SCP and to positions within its specialised bodies is insufficient, since currently the candidates to the respective positions are not subjected to an evaluation in the field of integrity.

15. The problems identified could, according to the Explanatory Note, be solved through establishing a procedure to evaluate the integrity of members of the aforementioned bodies. Under these circumstances, in order to ensure the possibility of an efficient process of selection of the members of the SCM, SCP and the specialised departments within these bodies, the Explanatory Note states it is necessary to (1) set up a mechanism for the evaluation of the candidates by an autonomous committee which shall evaluate their integrity; and (2) set up general meetings within a reasonable timeline in order to make the implementation of the aforementioned mechanism possible. The Law establishes an Independent Evaluation Commission (hereinafter "the Commission"). To ensure the implementation of the Law and operationalise the Commission, the latter body adopted the Rules of Procedure of the Independent Evaluation Commission for assessing the integrity of candidates for the position of member in the self-administration bodies of judges and prosecutors (hereafter "Rules of Procedure") on 22 April and amendments to these Rules on 12 May 2022. The Evaluation Rules for assessing the integrity of candidates for the position of member in the self-administration bodies of judges and prosecutors (hereafter "Evaluation Rules") were adopted on 2 May and amended on 30 May 2022 by the Commission. The Rules of Procedure provide *inter alia* for the election of the Chairperson, composition and mandate of the Commission, the rules of conduct of Commission members, meetings, conflict of interest, and voting. The Evaluation Rules identify the main stages of evaluating, conducting of public hearings, decision-making, evaluation criteria and assessing the gravity of any findings concerning the integrity of the candidate, and include an annex to calculate undeclared income for the purpose of assessing a candidate's financial integrity.

8 See for example the GRECO, Interim Compliance Report, Republic of Moldova, Corruption prevention in respect of members of parliament, judges and prosecutors, 4th evaluation round, December 2021, para. 42 available at: <https://rm.coe.int/fourth-evaluation-round-corruption-prevention-in-respect-of-members-of/1680a5722f>.

2. Relevant International Human Rights Standards and OSCE Human Dimension Commitments

2.1 Independence of the Judiciary

16. The independence of the judiciary is a fundamental principle and an essential element of any democratic state based on the rule of law.[9] The principle is also crucial to upholding other international human rights standards.[10] This independence means that both the judiciary as an institution, but also individual judges must be able to exercise their professional responsibilities without being influenced by the executive or legislative branches or other external sources.

17. The independence of the judiciary is also essential to engendering public trust and credibility in the justice system in general, so that everyone is seen as equal before the law and treated equally, and that no one is above the law. Public confidence in the courts as independent from political influence is vital in a society that respects the rule of law. While every State is entitled to reform its judicial system and the legal framework in which its courts and judges operate, reform of the judiciary must respect longstanding international standards on the independence of the judiciary, the separation of powers and the rule of law, and other relevant obligations, including gender equality.

18. At the international level, it has long been recognized that litigants in both criminal and civil matters have the right to a fair hearing before an "independent and impartial tribunal", guaranteed by Article 14 of the International Covenant on Civil and Political Rights (hereinafter "the ICCPR"). [11] The institutional relationships and mechanisms required for establishing and maintaining an independent judiciary are the subject of the UN Basic Principles on the Independence of the Judiciary (1985),[12] and have been further elaborated in the Bangalore Principles of Judicial Conduct (2002).[13] In particular, these principles presuppose that judges are accountable for their conduct to appropriate institutions established to maintain judicial standards, which are themselves independent and impartial, and are intended to supplement and not to derogate from existing rules of law and conduct which bind the judge. International understanding of the practical requirements of judicial independence continues to be shaped by the work of international bodies, including the UN Human Rights Committee[14] and the UN Special

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9 See UN Human Rights Council, Resolution on the Independence and Impartiality of the Judiciary, Jurors and Assessors, and the Independence of Lawyers, A/HRC/29/L.11, 30 June 2015, which stresses "the importance of ensuring accountability, transparency and integrity in the judiciary as an essential element of judicial independence and a concept inherent to the rule of law, when it is implemented in line with the Basic Principles on the Independence of the Judiciary and other relevant human rights norms, principles and standards". As stated in the OSCE Copenhagen Document 1990, "the rule of law does not mean merely a formal legality which assures regularity and consistency in the achievement and enforcement of democratic order, but justice based on the recognition and full acceptance of the supreme value of the human personality and guaranteed by institutions providing a framework for its fullest expression" (para. 2).

10 See e.g., OSCE Ministerial Council Decision No. 12/05 on Upholding Human Rights and the Rule of Law in Criminal Justice Systems, 6 December 2005.

11 UN International Covenant on Civil and Political Rights (hereinafter "ICCPR"), adopted by the UN General Assembly by resolution 2200A (XXI) of 16 December 1966. The Republic of Moldova acceded to the ICCPR on 26 January 1993.

12 UN Basic Principles on the Independence of the Judiciary, endorsed by UN General Assembly resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985, <http://www.ohchr.org/EN/ProfessionalInterest/Pages/IndependenceJudiciary.aspx>.

13 Bangalore Principles of Judicial Conduct, adopted by the Judicial Group on Strengthening Judicial Integrity, which is an independent, autonomous, not-for-profit and voluntary entity composed of heads of the judiciary or senior judges from various countries, as revised at the Round Table Meeting of Chief Justices in the Hague (25-26 November 2002), and endorsed by the UN Economic and Social Council in its resolution 2006/23 of 27 July 2006, <http://www.unodc.org/pdf/crime/corruption/judicial_group/Bangalore_principles.pdf>. See also Measures for the Effective Implementation of the Bangalore Principles of Judicial Conduct (2010), prepared by the Judicial Group on Strengthening Judicial Integrity, <http://www.judicialintegritygroup.org/images/resources/documents/BP_Implementation%20Measures_Engl.pdf>.

14 In its General Comment No. 32 on Article 14 of the ICCPR, the UN Human Rights Committee specifically provided that States should ensure "the actual independence of the judiciary from political interference by the executive branch and legislature" and "take specific measures guaranteeing the independence of the judiciary, protecting judges from any form of political influence in their decision-making through the constitution or adoption of primary and secondary legislation, and establishing clear procedures and objective criteria for the

Rapporteur on the Independence of Judges and Lawyers. It is also worth referring to Article 11 of the *United Nations Convention against Corruption* (UNCAC) whereby State Parties agree to "*take measures to strengthen integrity and to prevent opportunities for corruption among members of the judiciary*".[15]

19. As a member of the Council of Europe, Moldova is bound by the European Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter "the ECHR"), particularly its Article 6, which provides that everyone is entitled to a fair and public hearing "by an independent and impartial tribunal established by law". To determine whether a body can be considered "independent" according to Article 6 para. 1 of the ECHR, the European Court of Human Rights (hereinafter "ECtHR") considers various elements, inter alia, the manner of appointment of its members and their term of office, the existence of guarantees against outside pressure and whether the body presents an appearance of independence.

20. Well-functioning judicial councils, ensuring accountability of the judiciary but at the same time preserving its independence, are of crucial importance in countries adhering to the principles of rule of law. The OSCE/ODIHR has noted previously that: *"In principle, judicial councils or other similar bodies are crucial to support and guarantee the independence of the judiciary in a given country, and as such should themselves be independent and impartial, i.e., free from interference from the executive and legislative branches. Indeed, interfering with the independence of bodies, which are guarantors of judicial independence, could as a consequence impact and potentially jeopardize the independence of the judiciary in general".*[16]

21. The Venice Commission also underlines that "the due functioning of the Judicial Council, in those legal systems where it exists, is an essential guarantee for judicial independence.[17] Furthermore, the Venice Commission has recommended establishing judicial councils as a guarantee to prevent pressure from other branches of government and external actors.[18] The Council of Europe's Committee of Ministers also formulated fundamental judicial independence principles in its *Recommendation CM/Rec(2010)12 on Judges: Independence, Efficiency and Responsibilities*, which among others expressly states that "[t]he authority taking decisions on the selection and career of judges should be independent of the executive and legislative powers".[19]

22. Judicial appointments should be made in a way that maintains the independence of the judiciary and public confidence in judges and the court system.[20]There are a number of international standards on the selection of judges that aim to ensure that decisions on the selection of judges are made in a manner, which ensures the independence of the judiciary and results in the appointment of competent, impartial and independent judges reflecting the composition of the population as a whole. These include, as mentioned, the

appointment, remuneration, tenure, promotion, suspension and dismissal of the members of the judiciary and disciplinary sanctions taken against them. See: UN Human Rights Committee (UN HRC), General Comment No. 32 on Article 14 of the ICCPR: Right to Equality before Courts and Tribunals and to Fair Trial, 23 August 2007, para. 19, <http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CCPR%2fC%2fGC%2f32&Lang=en>.

15 UN Convention against Corruption (UNCAC), adopted by the UN General Assembly on 31 October 2003. The Republic of Moldova ratified the UNCAC on 1 October 2007.

16 OSCE/ODIHR, Final Opinion on Draft Amendments to the Act of the National Council of the Judiciary and Certain other Acts of Poland (5 May 2017), para. 37.

17 Venice Commission, Opinion On The Draft Law On Amendments to the Law On The Judicial Council And Judges (Montenegro), CDL-AD(2018)015, para. 37.

18 Venice Commission, Report on Judicial Appointments, CDL-AD(2007)028, para. 48, which states: "An appropriate method for guaranteeing judicial independence is the establishment of a judicial council, which should be endowed with constitutional guarantees for its composition, powers and autonomy." Available here: <https://rm.coe.int/0900001680700a62>.

19 Council of Europe (CoE), Recommendation CM/Rec(2010)12 on Judges: Independence, Efficiency and Responsibilities, para. 46, <https://rm.coe.int/cmrec-2010-12-on-independence-efficiency-responsibilites-of-judges/16809f007d>.

20 ODIHR, Kyiv Recommendations (2010), para. 24, <http://www.osce.org/odihr/kyivrec>.

independence of the selection body[21], its composition[22] and membership.[23] Transparent and clear selection criteria[24] and decision-making processes[25] are also of relevance in this context, as is the right to challenge decisions.[26] There should also be guarantees against discrimination[27] and the composition of the judiciary should reflect the composition of the population as a whole[28] and be balanced in terms of gender.[29]

23. Moldova is a participating State of the OSCE and as such committed to ensure "the independence of judges and the impartial operation of the public judicial service" as one of the elements of justice "which are essential to the full expression of the inherent dignity and of the equal and inalienable rights of all human beings" (*1990 Copenhagen Document*).[30] In the *1991 Moscow Document*,[31] participating States further committed to "respect the international standards that relate to the independence of judges [...] and the impartial operation of the public judicial service" (para. 19.1) and to "ensure that the independence of the judiciary is guaranteed and enshrined in the constitution or the law of the country and is respected in practice" (para. 19.2). Moreover, in its *Decision No. 7/08 on Further Strengthening the Rule of Law in the OSCE Area* (2008), the Ministerial Council called upon OSCE participating States "to honour their obligations under international law and to observe their OSCE commitments regarding the rule of law at both international and national levels, including in all aspects of their legislation, administration and judiciary", as a key element of strengthening the rule of law in the OSCE area.[32]

24. Other useful reference documents elaborated in various international and regional fora contain more practical guidance to help ensure the independence of the judiciary, including, among others:

- Reports of the UN Special Rapporteur on the Independence of Judges and Lawyers;[33]
- Reports and other documents of the European Network of Councils for the Judiciary (ENCJ);[34]
- The European Charter on the Statute for Judges (1998);[35]

21 See European Charter on the Statute for Judges (Strasbourg, 8-10 July 1998), adopted by the European Association of Judges, published by the Council of Europe [DAJ/DOC (98)23], <https://wcd.coe.int/ViewDoc.jsp?p=&id=1766485&direct=true>, para. 2.1; and para. 46 of CoE Recommendation CM/Rec(2010)12, and footnote 16, section 21.

22 *Ibid.* para. 1.3 (European Charter on the Statute for Judges); and para. 46 (CoE Recommendation CM/Rec(2010)12).

23 *Ibid.* para. 48 (CoE Recommendation CM/Rec(2010)12).

24 UN HRC, General Comment no. 32, para. 19; CCJE, Magna Carta of judges, para. 5; CoE, para. 44 (Recommendation CM/Rec(2010)12); paras. 2.1 and 2.2 of the European Charter on the Statute for Judges; and ODIHR Kyiv Recommendations, para. 21.

25 *Ibid.,* para. 48 (Recommendation CM/Rec(2010)12); and Principle 10 of UN Basic Principles on the Independence of the Judiciary.

26 *Ibid.,* para. 48 (Recommendation CM/Rec(2010)12).

27 *Ibid.,* para. 45 (Recommendation CM/Rec(2010)12); and Principle 10 of UN Basic Principles on the Independence of the Judiciary.

28 ODIHR Kyiv Recommendations, para. 24.

29 See para. 190 under Strategic Objective G.1: "Take measures to ensure women's equal access to and full participation in power structures and decision-making" of the Beijing Platform for Action, Chapter I of the Report of the Fourth World Conference on Women, Beijing, 4-15 September 1995 (A/CONF.177/20 and Add.1), available at <http://www.un.org/esa/gopher-data/conf/fwcw/off/a--20.en> ; OSCE Ministerial Council Decision 7/09 on Women's Participation in Political and Public Life; see also para. 81 on the "Adequate Representation of Women in the Judiciary" of the 2011 Annual Report of the Special Rapporteur on the Independence of Judges and Lawyers, available at: <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G11/130/15/PDF/G1113015.pdf?OpenElement>. See also ODIHR, Gender, Diversity and Justice: Overview and Recommendations (2019).

30 OSCE Copenhagen Document 1990, paras. 5 and 5.12.

31 OSCE, Document of the Moscow Meeting of the Conference on the Human Dimension of the CSCE (Moscow, 10 September-4 October 1991), <http://www.osce.org/fr/odihr/elections/14310>.

32 OSCE, Ministerial Council Decision No. 7/08 on Further Strengthening the Rule of Law in the OSCE Area, Helsinki, 4-5 December 2008, <http://www.osce.org/mc/35494>.

33 Annual reports available in six languages (including English and Russian) available at: <http://www.ohchr.org/EN/Issues/Judiciary/Pages/Annual.aspx>.

34 Available at <https://www.encj.eu/>.

35 European Charter on the Statute for Judges (Strasbourg, 8-10 July 1998), adopted by the European Association of Judges, published by the Council of Europe [DAJ/DOC (98)23], <https://wcd.coe.int/ViewDoc.jsp?p=&id=1766485&direct=true>.

- Report of the Venice Commission on the Independence of the Judicial System, in particular Part I on the independence of Judges[36];
- Opinions of the Consultative Council of European Judges (CCJE) advisory body of the Council of Europe on issues related to the independence, impartiality and competence of judges; and
- Opinions of the OSCE/ODIHR dealing with issues pertaining to judicial councils and the independence of the judiciary.[37]

25. Based on the above, all decisions concerning the appointment and the professional career of judges should be based on merit, following pre-determined objective criteria set out in law, and open and transparent procedures.[38] This extends to a crucial part of the selection process, namely the evaluation of the integrity of the candidates, as in the present situation.

2.2 On the Prosecution Service

26. A series of international documents set a framework of standards and recommendations related to the work, status and role of the prosecution service. These instruments include the *1990 UN Guidelines on the Role of Prosecutors*,[39] which aim to assist UN Member States in securing and promoting the effectiveness, impartiality and fairness of prosecutors in criminal proceedings. Other important principles are contained in the *1999 International Association of Prosecutors' Standards of Professional Responsibility and Statement of the Essential Duties and Rights of Prosecutors*.[40] Further standards are outlined in the UN Convention against Corruption, which calls upon State Parties to take measures to strengthen the integrity of the prosecution services and prevent opportunities for their corruption, bearing in mind their crucial role in combating corruption.[41]

27. The Council of Europe's Committee of Ministers also formulated important and fundamental principles concerning the role of the public prosecution service.[42] The Rome Charter, adopted by the Consultative Council of European Prosecutors (CCPE) in 2014, proclaims the principle of independence and autonomy of prosecutors, and the CCPE recommends that the "*[i]ndependence of prosecutors [...] be guaranteed by law, at the*

36 Report of the Venice Commission on the Independence of the Judicial System, in particular Part I on the independence of Judges, available at: <https://rm.coe.int/1680700a63>.

37 See for instance: OSCE/ODIHR, Final Opinion on Draft Amendments to the Act of the National Council of the Judiciary and Certain other Acts of Poland (5 May 2017); OSCE/ODIHR, Opinion on Certain Provisions of the Draft Act on the Supreme Court of Poland (As of 26 September 2017), <http://www.legislationline.org/documents/id/20682>; Opinion on Certain Provisions of the Draft Act on the Supreme Court of Poland (30 August 2017), <http://www.legislationline.org/documents/id/21259>, OSCE/ODIHR Opinion on the Law of Ukraine on the Judiciary and the Status of Judges (30 June 2017), <http://www.legislationline.org/documents/id/21193>; OSCE/ODIHR, Opinion on the law 29/1967 Concerning the Judicial System, The Supreme Judicial Council of the Judiciary, and the Status of Judges in Tunisia (21 December 2012), <https://www.osce.org/odihr/99826?download=true> and several other opinions available at <http://www.legislationline.org/search/runSearch/1/type/2/topic/9>.

38 ODIHR, Kyiv Recommendations, 2010, paras. 21-23; 2010 Venice Commission, Report on the Independence of the Judicial System – Part I (2010), paras. 23-32; and Articles 4-1, 5-1 and 5-2 (Universal Charter of the Judge).

39 Adopted by the 8th UN Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August to 7 September 1990.

40 International Association of Prosecutors, Standards of Professional Responsibility and Statement of the Essential Duties and Rights of Prosecutors, approved by the International Association of Prosecutors on 23 April 1999. These Standards were annexed to resolution 2008/5 of the Commission on Crime Prevention and Criminal Justice of the UN Economic and Social Council on "Strengthening the rule of law through improved integrity and capacity of prosecution services", which also requested States to take these Standards into consideration when reviewing or developing their own prosecution standards.

41 See Article 11 of the UNCAC.

42 Recommendation Rec(2000)19 of the Committee of Ministers to Member States on the Role of Public Prosecution in the Criminal Justice System (6 October 2000); and Recommendation CM/Rec(2012)11 of the Committee of Ministers to Member States on the Role of Public Prosecutors outside the Criminal Justice System (19 September 2012). See also Parliamentary Assembly of the Council of Europe, Recommendation 1604 (2003) on the Role of the Public Prosecutor's Office in a Democratic Society Governed by the Rule of Law (27 May 2003).

highest possible level, in a manner similar to that of judges".[43] Accordingly, "*prosecutors should be autonomous in their decision making and, while cooperating with other institutions, should perform their respective duties free from external pressures or interferences from the executive power or the parliament, having regard to the principles of separation of powers and accountability*".[44] Certain principles related to the prosecution service are also contained in OSCE commitments, such as the *1990 Copenhagen Document*, which provides that "*the rules relating to criminal procedure will contain a clear definition of powers in relation to prosecution and the measures preceding and accompanying prosecution*".[45] More recently, through the 2006 Brussels Declaration on Criminal Justice Systems, members of the OSCE Ministerial Council stated that *"[p]rosecutors should be individuals of integrity and ability, with appropriate training and qualifications; prosecutors should at all times maintain the honour and dignity of their profession and respect the rule of law*" and that *"[t]he office of prosecutor should be strictly separated from judicial functions, and prosecutors should respect the independence and the impartiality of judges*".[46]

28. Important principles can also be found in various other documents of a non-binding nature, elaborated at the regional and international levels, especially by the Venice Commission, the CCPE and UNODC, which provide more detailed and elaborated guidance.[47]

3. Analysis and Recommendations

3.1 General Comments

29. The first objective of the Law, as provided in the Explanatory Note, is the establishment of an autonomous evaluation commission as foreseen in Article 3 of the Law. This Commission's mandate is the evaluation of the integrity of the candidates for the position of members of the SCM, the SCP, and their respective specialised bodies (Article 1 of the Law). These specialised bodies are listed in Article 2 of the Law and include three bodies formed under the auspices of SCM (namely, the Board for the selection and career of judges, the Board for the evaluation of the performance of judges, and the Disciplinary Board of judges) and three bodies under the auspices of the SCP (namely, the Board for the selection and career of prosecutors, the Board for the evaluation of the performance of prosecutors, and the Disciplinary and Ethics Board). To this end, Article 16 of the Law introduces amendments *inter alia* to the 1996 Act on the Superior Council of Magistracy and the 2016 Act on the Prosecutor's Office, which regulate selection and appointment of members to the SCM and the SCP respectively.

30. The current Law under review is for the purpose of establishing an *ad hoc* filtering mechanism for evaluating candidates for the SCM, SCP and their specialized bodies and

43 Consultative Council of European Prosecutors (CCPE), Rome Charter – Opinion no. 9 (2014) on European Norms and Principles concerning Prosecutors, para. 33.

44 *Ibid.* para. 34 (2014 CCPE Rome Charter).

45 OSCE Copenhagen Document 1990, para. 5.14.

46 OSCE, 2006 Brussels Declaration on Criminal Justice Systems (MC.DOC/4/06).

47 This includes e.g., the Venice Commission's Report on European Standards as regards the Independence of the Judicial System: Part II The Prosecution Service, CDL-AD(2010)040, Venice, 17-18 December 2010 and related Venice Commission opinions; the European Guidelines on Ethics and Conduct for Public Prosecutors, CPGE (2005)05, adopted by the Conference of Prosecutors General of Europe on 31 May 2005; the opinions of the Consultative Council of European Prosecutors (CCEP) available at <https://www.coe.int/en/web/ccpe/opinions/adopted-opinions>, especially, Opinion no. 3 (2008) on the "Role of prosecution services outside the Criminal Law Field"; Opinion no. 9 (2014) on "European norms and principles concerning prosecutors"; Opinion no. 11 (2016) on the "Quality and efficiency of the work of prosecutors, including when fighting terrorism and serious and organised crime"; and Opinion no. 13 (2018) on "Independence, accountability and ethics of prosecutors"; and the Guide on the Status and Role of Prosecutors (2014) of UNODC and the International Association of Prosecutors.

does not concern sitting or current members or judges and prosecutors in those respective roles. While welcoming the willingness and efforts undertaken by public authorities to strengthen judicial and prosecutorial independence in Moldova, it is observed that this evaluation is also to precede the potential extraordinary evaluation or vetting of all judges and prosecutors. In the Joint Opinion of the Venice Commission and of the Directorate General, a distinction is made between "the vetting of serving members of the SCM and SCP and the 'pre-vetting' of candidates to a position on these bodies." The Joint Opinion goes on to note that [i]"ntegrity checks targeted at the candidates to the position of SCM, SCP and their specialized bodies represent a filtering process and not a judicial vetting process, and as such may be considered, if implemented properly, as striking a balance between the benefits of the measure, in terms of contributing to the confidence of judiciary, and its possible negative effects".[48]

31. In its recent Opinion No. 24 (2021) on the Evolution of the Councils for the Judiciary and their role in independent and impartial judicial systems, the CCJE recalls that the selection process of members of a Council including possible campaigns by candidates should be transparent and ensure that the candidates' qualifications, especially their impartiality and integrity are ascertained.[49]

32. While the integrity evaluation does not concern sitting members or judges and prosecutors in their roles, the bodies that the Law covers are more than mere administrative bodies, and in fact assume a significant role in the governing of the justice system in Moldova. Furthermore, the Law's introduction of an *ad hoc* mechanism effectively curtails the authority of judges and prosecutors to freely select the SCM and SCP members from among their peers, reducing their choice to the pre-vetted candidates. There may be weighty public policy reasons for this mechanism, yet it does take away some of the self-governance powers intended by the international standards to safeguard the independence of the judiciary and prosecutors,[50] and places these powers in the hands of an *ad hoc* body. In addition, the Law will have an impact on the candidates' privacy and their reputation. Therefore, it is paramount that the Law and related Rules provide clear, objective and transparent criteria to guide the evaluation process in a manner that upholds the rule of law and respects the independence of the judiciary and prosecutors, and in line with the guiding principles that would be applicable to an extraordinary evaluation or vetting process.

33. All the more, it is worth emphasizing, that in general, changes in personnel are insufficient to turn perceived ineffective or "complicit" judiciaries into trustworthy arbiters and reliable guarantors of rights, if not accompanied by necessary structural changes, including means to strengthen judicial independence,[51] proper judicial training[52] and measures to promote a change of culture within the judiciary.

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48 Venice Commission and CoE DG I, Joint Opinion on the revised draft Law "On some measures related to the selection of candidates for the positions of members in the self-administration bodies of judges and prosecutors" (CDL-AD(2021)046), para. 14.

49 CCJE Opinion No. 24 (2021), Evolution of the Councils for the Judiciary and their role in independent and impartial judicial systems, par. 34, at <https://rm.coe.int/opinion-no-24-2021-of-the-ccje/1680a47604>.

50 Paragraph 46 of the Recommendation CM/Rec(2010)12 of the Council of Europe's Committee of Ministers advises that: "The authority taking decisions on the selection and career of judges should be independent of the executive and legislative powers. With a view to guaranteeing its independence, at least half of the members of the authority should be judges chosen by their peers."

51 See also UN Special Rapporteur on the Promotion of Truth, Justice, Reparation and Guarantees of Non-recurrence, Report on Guarantees of Non-Recurrence, UN Doc A/HRC/30/42, 7 September 2015, para. 57. See also Parliamentary Assembly of the Council of Europe (PACE), Monitoring Committee, Report on the Functioning of Democratic Institutions in the Republic of Moldova, 16 September 2019, para. 102, where it is noted that "[c]hanging officials and staff members might be relevant if duly justified", but also emphasizing that "[i]t is, however, all the more important to ensure that legal changes are implemented with a view to consolidating institutions and independent bodies: reversing legal systems should not be done at the detriment of due respect of predictable procedures, based on clear and objective criteria and should not lead to a 'witch hunt'".

52 ODIHR, Kyiv Recommendations, 2010, para. 19.

34. Thus, without prejudice to the legitimacy of and the need for the current limited *ad hoc* evaluation and eventual comprehensive extraordinary evaluation or vetting procedure of the whole judiciary and prosecutorial system, ODIHR considers it necessary to provide recommendations to limit, to the extent possible, the negative impact that such extraordinary procedures may have on the independence of the judiciary and rule of law more broadly, and to ensure respect for rule of law principles during the processes. Respect for the fundamental principle of the independence of the judiciary must be ensured, and the specific measures adopted must be strictly necessary and proportionate to the factual situation in the country concerned, and appropriately limited in time.[53] It should be borne in mind that in the context of any extraordinary measures particular attention should be attached to the safeguards of the rule of law and due process.[54]

35. According to the Kyiv Recommendations, the selection procedure must be clearly defined by law.[55] Any decisions relating to appointment or promotion of judges should be reasoned with explanation of their grounds, with the possibility for the unsuccessful candidate to challenge the respective decision,[56] which should be subject to judicial review, at least on procedural grounds.[57] The objective is to ensure that the respective selection decisions are based on merit, having regard to the qualifications, skills and capacity required to adjudicate cases by applying the law in conformity with human rights norms.[58]

36. In principle, the publicity of selection/appointment processes can help maintain public confidence in the judiciary. When determining to which extent the different phases of the judicial selection/appointment process should be public, the drafters should balance the need to protect the independence of the judiciary and the necessity to ensure public trust in the process. Holding interviews of candidates in public may promote legitimacy and credibility of the appointment process, especially when there are allegations of lack of transparency and/or risk of corporatism.

37. Thus, in the present case, where members of the SCM and SCP are reaching the end of their mandates and elections are anticipated, the evaluation of integrity of the new candidates of these bodies **must respect principles of judicial[59] and prosecutorial independence respectively.**

3.2 Composition of the Independent Evaluation Commission

38. The Law provides for the Commission to be composed of six members. Three national members are nominated by the parliamentary factions (two by the majority and one by the opposition). The other three members are international members who are nominated by Moldova's "development partners" (Article 5 para. 1 of the Law). All six members are appointed by the Parliament, with a three-fifths majority of votes. In the current

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53 See e.g., International Commission of Jurists, Judicial Accountability - A Practitioner's Guide (2016), pp. 83-84.

54 See the European Court of Human Right's assessment regarding the vetting bodies as "tribunal established by law" in *Xhoxhaj v.Albania* application n. 15227/19, 31 May 2021, pars. 280- 317, where, recalling its previous case-law, the Court pointed out that "for the purposes of Article 6 § 1, a tribunal need not be a court of law integrated within the standard judicial machinery. It may be set up to deal with a specific subject matter which can be appropriately administered outside the ordinary court system".

55 ODIHR, Kyiv Recommendations, 2010, para. 21.

56 2010 CoE Recommendation CM/Rec(2010)12, par. 48; ODIHR, Kyiv Recommendations,. http://www.osce.org/odihr/kyivrec 2010, para. 23; and 2007 CCJE Opinion No. 10 paras. 50-51 and 91-93, and 2001 CCJE Opinion No. 1, paras. 17-31.

57 2010 CoE Recommendation CM/Rec(2010)12, par. 48; and p2007 CCJE Opinion No. 10, par.37. See also e.g., Venice Commission, Opinion on the Cardinal Acts on the Judiciary that were Amended following the Adoption of Opinion CDL-AD(2012)001 on Hungary, CDL-AD(2012)020, 15 October 2012, para. 56.

58 2010 CoE Recommendation CM/Rec(2010)12, par. 44; 2007 Venice Commission's Report on Judicial Appointments paras. 4 and 10); and Principle 10, 1985 UN Basic Principles on the Independence of the Judiciary, which states that "[p]ersons selected for judicial office shall be individuals of integrity and ability with appropriate training or qualifications in law".

59 See para. 45 (CCJE Opinion no. 1 (2001)); and para. 34 (CCJE Opinion No. 6(2004)).

Parliament, this qualified majority of votes is held by the ruling party and the appointment therefore does not require any votes from the opposition.

39. The development partners are defined in Article 5 para. 7 of the Law as "international donors (international organizations, diplomatic missions, and their representative offices in the Republic of Moldova) active in the field of justice reform and the fight against corruption in the last two years".[60] Article 5 para. 7 of the Law does not provide any additional criteria, including on transparency, and gender and diversity as to the international members.

40. The formation of the Commission was finalized by the Parliament on 4 April 2022, with all six members appointed (consisting of four women and two men).[61] The chairperson has been elected. He is one of the international member of the Commission.

41. The Law sets out criteria to be met by the members of the Commission, which include a higher education; irreproachable reputation; at least 10 years of experience in a relevant field; not being a member of parliament, the government, or a political party during the last three years; not being a judge, a prosecutor, or a member of any of the bodies targeted by the Commission's activity during the last three years; and command of the English language. The Law is silent as to the gender-balanced composition of the Commission. This is not in line with international recommendations, which urge to seek gender-balanced representation in all appointments made by public authorities to public committees and other public functions.[62] While recognizing that a gender balance is achieved in the current composition of the Commission, a **mechanism(s) to ensure greater gender balance within the Law could have been introduced**.[63]

42. In that regard it is noted that the Law provides several guarantees to ensure the independence and impartiality of the members of the Commission (Article 6 para. 2 and Article 7 Rules of Procedure). However, some concerns as raised by the Joint Opinion in this regard remain. For example, the requirement that the member "has not held the position of judge or prosecutor in the Republic of Moldova for the last 3 years" is at odds with international standards that require that "judicial members of the Councils for the Judiciary should be *elected* by their peers". No justification seems to be provided for this requirement, especially considering that the *ad hoc evaluation* is an essential part of the

60 The Law provides that the list of development partners be approved by the Government. The Government did so by the Decree No. DG45/2022 of 21 March 2022. According to this decree, the development partners are the embassies of France, Germany, Lithuania, Sweden, the Netherlands, United Kingdom and the United States, as well as the EU Delegation and offices of the Council of Europe, the World Bank, and the UN.

61 See: Moldova Parliament resolution No. HP88/2022 and <https://www.moldpres.md/en/news/2022/04/13/22002802>.

62 According to Council of Europe's Recommendation Rec (2003)3, the Member States should provide for gender-balanced representation in all appointments made by a minister or government to public committees and in posts or functions whose holders are nominated by government and other public authorities; see paras. 9-10 of the Appendix to the *Recommendation Rec (2003)3 of the Committee of Ministers to CoE Member States on the balanced participation of women and men in political and public decision-making*, adopted on 30 April 2002. Furthermore, in its Resolution 66/130, the UN General Assembly encourages States "*to appoint women to posts within all levels of their Governments, including, where applicable, bodies responsible for designing constitutional, electoral, political or institutional reforms*"; see para. 8 of the *General Assembly Resolution 66/130General Assembly Resolution 66/130,* adopted on 19 March 2012.

63 Meaning that the representation of either women or men in any decision-making body in political or public life should not fall below 40%; see Preamble of the *Appendix to Recommendation Rec (2003)3 of the Committee of Ministers on the Balanced Participation of Women and Men in Political and Public Decision-making*, 12 March 2003. For instance, this could consists of requiring that appointees designated by each appointing body should be balanced in terms of gender (see the example in Denmark, where public bodies or organizations are required to propose equal numbers of men and women when nominating committee members, see *Appendix IV to the Explanatory Memorandum on CoE Recommendation CM/Rec(2003)3 on Balanced Participation of Women and Men in Political and Public Decision-making)*. As to the six appointees by the Minister of Justice, the international organizations and development partners could be required to propose two candidates to each position, one woman and one man, and the Minister of Justice should be required to take due account of the objective of ensuring a fair representation of women and men in the Evaluation Committee overall when selecting the international experts.

election process of the members of the judicial and prosecutorial councils and their respective specialized bodies.[64]

3.3 Powers of the Evaluation Commission

43. The Evaluation Commission is given guarantees of functional independence and decision-making autonomy from any natural and legal persons (Article 4 of the Law). The Commission is provided with sufficient powers to carry out its mandate, including collecting and verifying any data relevant to the evaluation of candidates, accessing any information systems that contain relevant data, hearing the candidate, and requesting information from natural and legal persons (Article 6 of the Law). The Commission's authority to request information extends to any natural and legal persons governed by public or private law, including financial institutions. Information requested by the Commission shall be provided free of charge within 10 days and failure to comply shall be sanctioned (Article 10 para. 3 and 10 para. 4 of the Law), although the Law itself does not provide for any specific sanctions.

3.3.1 Scope of application

44. According to Article 15 para. 1 of the Law, it is set to expire on 31 December 2022. At the same time, the Commission shall cease its work "on completion of the evaluation of the last applicant" (Article 3 para. 8 of the Law). It is not entirely clear what procedure will apply if any vacancies in the bodies mentioned in Article 1 of the Law remain unfilled by 31 December 2022. **Given the scope and extent of the assessments foreseen it is recommended to review the Law in the course of the evaluation process in consultation with the Commission and other relevant stakeholders.** To avoid evaluating candidates for the same bodies on the basis of different criteria and a different procedure after 31 December 2022, **it is further suggested to ensure that any future procedures for the evaluation of any remaining candidates of the SCM and SCP and their specialised bodies do not deviate from the integrity evaluation requirements set by the present Law.** It would also be recommended **to include a specific statement ensuring that the evaluation process is carried out without discrimination on any ground.**[65]

RECOMMENDATION A.

To review the Law during the evaluation process in consultation with the Commission and other relevant stakeholders and ensure that in cases where the evaluation of candidates has not been finalized by the date by which the Law is to lapse, any future procedures for the evaluation of any remaining candidates do not deviate from the integrity criteria set out in the present Law.

3.3.2 Information gathering

45. Article 6 of the Law provides that Commission members have the power to collect and verify any data relevant to the evaluation of the candidate per the criteria laid down in

64 Venice Commission and CoE DG I, Joint Opinion on the revised draft Law "On some measures related to the selection of candidates for the positions of members in the self-administration bodies of judges and prosecutors" (CDL-AD(2021)046), para. 22.

65 See regarding the appointment process: ODIHR, Opinion on the Appointment of Supreme Court Judges of Georgia, 2019, paras. 44-45.

the Law and Rules, have access to any information systems that contain relevant data, to request information from natural or legal persons and to accumulate any information relevant to the fulfilment of the Commission's mandate, namely the assessment of the ethical and financial integrity of candidates, under the legislation on data exchange and interoperability. The members may not access state secrets (Article 10 para. 2 of the Law). The fact that the Commission may take any measures to obtain information or may request any public or private entity to provide information about the candidates may be excessive, even if Article 10 (2) precludes access to state secrecy information. Article 8 of the Law provides a non-exhaustive list of sources of information to be verified by the Commission in order to ascertain the financial integrity of the candidate, including tax declarations, sources of income, loans, and gifts of property.

46. It is **recommended that the Law clarifies the nature and type of documents the Commission may request, to ensure that interferences to the candidates' privacy are strictly necessary, and which are relevant to the evaluation process, and may be requested from certain public or private authorities (for instance criminal records, decisions on disciplinary liability, information on assets and financial situation).**[66] For example, the Law does not explicitly **exclude the gathering of information concerning the health status of judges**, which should be protected by the right to respect for private life under Article 8 of the ECHR and Article 17 of the ICCPR. Such aspects should be excluded from the scope of evaluation.

47. As regards the Commission's power to gather information, Article 7 (g) of the Rules of Procedure provides that members protect the confidentiality of the sources of information. While in certain circumstances valid reasons may exist to protect sources of information, read together with Article 6 (c-f) of the Law it may entail that all sources of information that the Commission uses may in fact not be disclosed. This could adversely affect the position of a candidate in their ability to refute any disqualifying factors. A balance will need to be struck by the Commission in their assessment of the need to protect certain sources and the candidate's right to review the information and counter it. In this regard it is noted that Article 2.1(c) of the Evaluation Rules provides that anonymously provided information may be taken into consideration, provided that it meets a certain threshold. It remains important to clarify in which cases the candidate may access these types of sources and when, and based on which weighty reasons, they cannot. Article 2 (h) of the Evaluation Rules provides the possibility for candidates to access 'evaluation material', though it would benefit the working methods if such access is pre-defined with safeguards and criteria in light of the above. **It could be considered to require the Commission to provide a reasoned decision on a request for confidentiality.** Also, it may be considered that such an access request is assessed and reflected through a reasoned decision on the matter. The Rules could further elaborate on the methodology of evaluating evidence (including, but not limited to, the selection of those who check candidates' background, and methods to be used in collection and verification of information).

48. Article 7 (i) of the Rules of Procedure provides that members disclose information that had been obtained from external sources, and that the member considers relevant and credible for the purpose of the evaluation subject, to the Commission. **While language in the Rules and elsewhere in the Law suggests that members may indeed actively**

66 As a comparison, in the context of recruitment, the ODIHR Kyiv Recommendations stress that, while the selecting body can request a standard check for a criminal record and any other disqualifying grounds from the police, "[n]o other background checks should be performed by any security services" and the checks undertaken must be handled with utmost care (see para. 22 (2010 ODIHR Kyiv Recommendations)); similarly, the CCJE strongly advises against background checks that go beyond the generally accepted checks of a candidate's criminal record and financial situation (para. 26 of CCJE Opinion no. 21 (2018) on Preventing Corruption).

seek information, the question arises how this seeking of information as an active duty is balanced with the member's impartiality, and with the need to have a consistent, similar approach towards every single candidate, though with due regard for the extent of an investigation that is required for the circumstances of a given case.

49. Article 3 para. 4 of the Evaluation Rules provides that a candidate may not introduce information if the Commission had requested this earlier and the candidate had not provided it in a timely manner, unless the Commission considers the introduction justified. Given the time-line and the overall steps of the evaluation process it is advisable to clarify when this information may be introduced, such as after the hearing or during the hearing, and how and when the assessment for 'justification' is made. This could be made sufficiently clear in this provision. This provision would further benefit from an explicit reference to Article 12 para. 4 of the Law.

50. **It is essential that the legislation or Rules of Procedure ensure a verifiable record of the Commission's investigations, especially with respect to any findings which serve as a basis of negative evaluations.** In particular, the current Rules of Procedure do not elaborate how the Commission will document information that it receives verbally, other than potentially reflecting it in the minutes of its meetings.

RECOMMENDATION B.

To clarify in which cases the source of information relevant to the evaluation of the candidate should be held confidential, as well as define the procedure and grounds that would allow a candidate to request disclosure. Such an access request should be assessed and decided on with a reasoned decision by the Evaluation Commission.

RECOMMENDATION C.

To elaborate in the Rules of Procedure or the Evaluation Rules the rules of collecting evidence relevant to the evaluation of the candidate including, but not limited to, the selection of those who check background, and methodology to be used in collection and verification of information

RECOMMENDATION D.

To clarify when new or additional information relevant to the evaluation of the candidate may be introduced, such as after the hearing or during the hearing, and how and when the Commission's assessment of the 'justification' of the introduction of such information is made.

3.4 Evaluation criteria

51. Article 8 of the Law sets out criteria for the assessment of candidates' integrity. The Joint Opinion noted insufficient elaboration of the evaluation criteria in the draft Law.[67] These concerns appear to have been partially addressed in the current Law. The Evaluation Rules adopted by the Commission provided additional clarity and guidance. However, it

67 Venice Commission and CoE DG I, Joint Opinion on the revised draft Law "On some measures related to the selection of candidates for the positions of members in the self-administration bodies of judges and prosecutors" (CDL-AD(2021)046), paras. 28-30.

appears that regulatory framework still leaves wide discretion for the Commission's decision-making and could be improved further. In principle, the selection process for candidates should be based on pre-determined, objective and clearly defined criteria[68] to assess their ability, integrity and experience,[69] while ensuring that the composition of the judiciary reflects the composition of the population as a whole[70] and is balanced in terms of gender[71], and is subject to open and transparent procedures.[72]

52. The Law distinguishes between ethical integrity and financial integrity, with each criterion given a number of indicators. In particular, the criterion of ethical integrity includes three indicators (Article 8 par. 2 of the Law), the first one being that the candidate has not seriously violated rules of ethics and professional conduct as well as any wrongful actions that would be "inexplicable from the point of view of a legal professional and an impartial observer". Insofar as the Commission members are called upon to make judgment "from the point of view of a legal professional", it should be recalled that legal background is not required for membership on the Commission and its members would not necessarily have the requisite professional qualifications.[73] Not all members of the Commission should necessarily be lawyers but it would certainly be beneficial for the Law to require that a substantial number of the Commission members have a legal background, which is the case in practice. The other two indicators of ethical integrity are the absence of "reasonable suspicions" that the candidate has committed corruption acts within the meaning of the 2017 Act on Integrity, as well as any breach of the legal regime of declaring personal assets and interests (Article 8 para. 2 of the Law).

53. According to international standards, for the selection of judges and ordinary performance evaluations,[74] an evaluation should be based on objective and clearly defined criteria pre-established by law, to avoid the possibility for arbitrary application. While certain international documents do refer to "integrity" as being essential to the proper discharge of the judicial office, they also warn against the use of "integrity" as a normative concept, emphasizing that its meaning depends on the context and that it is rather recommended to assess whether a specific conduct is likely to diminish respect in the minds of the public.[75] Further, within the context of vetting, the term "integrity" should not be equated with compliance with codes of conduct, which given their nature and the fact they are often drafted in general and vague terms, should not be directly applied as a ground for evaluating or disciplining judges.[76] In the present situation the

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68 See 2007 UN HRC General Comment No. 32, para. 19; 2010 CoE Recommendation CM/Rec(2010)12, para. 44; 2010 Kyiv Recommendations, para. 21; Articles 4-1 and 5-1 Universal Charter of the Judge; 1998 European Charter on the Statute for Judges, paras. 2.1 and 2.2; Venice Commission, Report on the Independence of the Judicial System Part I (2010), para. 27; CCJE Opinion No. 10 on the Council for the Judiciary at the Service of Society (2007), paras. 5-51.

69 1985 UN Basic Principles on the Independence of the Judiciary, para. 13; and 2001 CCJE Opinion No. 1 on the Independence of Judges, paras. 17 and 29.

70 ODIHR Kyiv Recommendations (2010), para. 24; and 2007 CCJE Opinion No. 10 para. 5.

71 See para. 190 under Strategic Objective G.1: "Take measures to ensure women's equal access to and full participation in power structures and decision-making" of the Beijing Platform for Action, Chapter I of the Report of the Fourth World Conference on Women, Beijing, 4-15 September 1995 (A/CONF.177/20 and Add.1); and OSCE Ministerial Council Decision 7/09 on Women's Participation in Political and Public Life, 2 December 2009, para. 1. See also para. 81 of the 2011 Annual Report of the UN Special Rapporteur on the Independence of Judges and Lawyers.

72 ODIHR Kyiv Recommendations (2010), paras. 21-23; and 2010 Venice Commission Report on the Independence of the Judicial System paras. 23-32. See also the Istanbul Declaration on Transparency in the Judicial Process (2013), which was adopted by Chiefs Justices and Senior Justices of the Asian Region on 22 November 2013, Section 13.

73 See, for example, Art. B p.ar. 2 of the Annex to the Constitution of the Republic of Albania, according to which the members of the International Monitoring Operation shall be appointed from among the judges or prosecutors with no less than 15 years of experience in the justice system of their respective countries.

74 See e.g., UN HRC General Comment no. 32 (2007), para. 19; 2010 CoE Recommendation CM/Rec(2010)12, para. 44 ; ODIHR Kyiv Recommendations (2010), para. 21; 1999 Universal Charter of the Judge, Articles 4-1 and 5-1; 1998 European Charter, paras. 2.1. and 2.2.; 2010 Venice Commission's Report on the Independence of the Judicial System Part I, para. 27; CCJE Opinion no. 10 (2007) on Judicial Councils, paras. 50-51; and CCJE Opinion no. 17 (2014) on Judges' Evaluation, para. 9.

75 See e.g., UNODC, Commentary on the Bangalore Principles of Judicial Conduct (2007), paras. 101-102.

76 CCJE, Opinion no. Opinion no. 3 (2002)), paras. 44 and 46-48. See also ODIHR-Venice Commission, Joint Opinion on the Draft Amendments to the Legal Framework on the Disciplinary Responsibility of Judges in the Kyrgyz Republic, 16 June 2014, paras. 25-28.

assessment of ethical integrity involves a verification whether the candidate has not seriously violated rules of ethics and professional conduct. It is important **to more precisely define the scope and meaning of the term "ethical integrity" and avoid overly broad terminology.[77] The Evaluation Rules could be strengthened in this regard**.

54. Financial integrity is met if the candidate's assets have been declared in the manner established by law, and the candidate's "wealth acquired in the last 15 years corresponds to the declared revenues" (Article 8 para. 4 of the Law). Article 6 of the Evaluation Rules provides that for assessing information for financial integrity, undeclared income or expenditures are relevant, and that these include 'prohibited secondary incomes, tax evasion, or violation of anti-money laundering provisions'. The Evaluation Rules further contain an Annex to calculate unjustified wealth. At least the basis and main elements for each criterion as well as the standards of information collection (process, evidence, admissibility etc.) are currently missing and should be set out clearly in the Law or the Commission's Rules, to ensure transparency and reduce possibilities for arbitrariness.[78] It is also generally recommended to specify what weight/score is to be given to the different elements for the final evaluation.[79]

55. Finally, the evaluation should be carried out without discrimination on any ground, in line with the principle of equality, international anti-discrimination standards[80] and applicable domestic law. **This should be reflected in the Law and/or the Rules.**

RECOMMENDATION E.

To strengthen the Evaluation Rules by providing a more precise scope and meaning of the term "ethical integrity" to avoid overly broad application of the term.

RECOMMENDATION F.

To set out at least the basis and main elements for each evaluation criterion as well as the standards of information collection (process, evidence, admissibility etc.), in the Law or the Commission's Rules, to ensure transparency and reduce possibilities for arbitrariness and to specify what weight/score is to be given to the different elements for the final evaluation.

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77 See also Venice Commission and CoE DG I, Joint Opinion on the revised draft Law "On some measures related to the selection of candidates for the positions of members in the self-administration bodies of judges and prosecutors" (CDL-AD(2021)046), para. 29.

78 *Ibid.* paras. 30 and 49 (5) (CCJE Opinion no. 17 (2014) on Judges' Evaluation). For instance, the Albanian "Vetting" Law (Chapters IV-VI) presents each criterion of vetting with great precision and provides for detail as regards the specific aspects and procedure/method of collection of data etc.

79 See ODIHR Opinion on the Appointment of Supreme Court Judges of Georgia (2019), para. 42; and Venice Commission, Opinion on the Draft Criteria and Standards for the Election of Judges and Court Presidents of Serbia, CDL-AD(2009)023, para. 22.

80 See Article 26 of the ICCPR, Article 14 of the ECHR and Protocol No. 12 to the ECHR (ETS No. 177), which was signed by the Republic of Moldova on 4 November 2000, though not yet ratified. See also e.g., Principle 3 of the 2016 Cape Town Principles on the Role of Independent Commissions in the Selection and Appointment of Judges; and Principle 10 of the 1985 UN Basic Principles on the Independence of the Judiciary.

3.5 Privacy

56. According to Article 5 para. 1 of the Rules of Procedure, 'personal data…shall be collected, stored, published and otherwise processed' in accordance with the applicable law. The members have the duty to ensure confidentiality and security of personal data, in accordance with Article 7 (g) of the Rules of Procedure. These are welcome additions, but it may be desirable to supplement them with a clear non-disclosure requirement, subject to sanctions in case of violations. **It is desirable to include a specific reference to the obligations of the Commission and the Secretariat's staff with respect to confidentiality and the protection, processing and storage of personal data by making explicit reference to the respect of the right to privacy and other relevant safeguards.**

57. The scope of inquiry extends to the persons referred to in Articles 33 para. 4 and 33 para. 5 of the 2016 Act on the National Integrity Authority, i.e. family members, parents and parents-in-law, adult children, and any other persons in relation to whom there are indications that they formally own property which belongs to the candidate (Articles 2 para. 2 and 8 para. 5 of the Law). While such information on assets of this list of persons could be relevant for the candidate's assessment, it would not necessarily need to be made public.[81]

58. Further, the Commission may not be in the position to cover these identified persons in the narrow timeframe envisaged for the evaluation (no more than 30 days, according to Article 10 para. 1 of the Law).[82] **It is recommended to draw up a list of persons taking into account their right to privacy on the one hand and the essential information that is required from these persons for the evaluation objectives.**

3.6 Evidence

59. The Law and related Rules are silent as to the admissibility of evidence and as to the criteria for evaluating its probative value, and not fully clear regarding the standard of proof.[83] In principle, the sources of evidence on which evaluations are based must be sufficient and reliable, particularly if the evidence is to form the basis of an unfavourable evaluation.[84] In this context, relevant international bodies have cautioned against taking public views on a judge into account when evaluating him/her.[85] It is thus important **to introduce mechanisms in the Rules that would ensure that all information received through the channels provided by the Law and relied on is properly verified.**[86] Moreover, the Law or Rules **should stipulate that evidence obtained unlawfully should be considered inadmissible, as it would be in civil, administrative or penal procedure**.[87]

60. Ultimately, the Commission needs to apply some evidentiary standard to reach a conclusion on the candidate's evaluation. In the current Law, this standard is linked to

81 See Leonardo S. Borlini, *Report on GRECO's Findings and Recommendations* (20 March 2019), page 16.
82 As pointed out in Venice Commission and CoE DG I, Joint Opinion on the revised draft Law "On some measures related to the selection of candidates for the positions of members in the self-administration bodies of judges and prosecutors" (CDL-AD(2021)046), para. 27.
83 See e.g., in the context of disciplinary proceedings, ODIHR-Venice Commission, Joint Opinion on the draft amendments to the legal framework on the disciplinary responsibility of judges in the Kyrgyz Republic, 16 June 2014, para. 93.
84 See e.g., CCJE Opinion no. 17 (2014) on Judges' Evaluation, para. 49 (9).
85 See e.g., 2017 ODIHR Opinion on the Law of Ukraine on the Judiciary and Status of Judges, para. 69. See also CCJE Opinion no. 17 (2014) on Judges' Evaluation, para. 48. See also Venice Commission and DG I, Joint Opinion on the Law on the Judicial System and the Status of Judges of Ukraine, CDL-AD(2010)026-e, para. 60.
86 ibid. para. 69 (2017 ODIHR Opinion on the Law of Ukraine on the Judiciary and Status of Judges). See also para. 3.5 of CoE, Opinion on the Rules of Procedure of the Public Council of Integrity of Ukraine, April 2017.
87 See e.g., though in the context of disciplinary proceedings, ODIHR-Venice Commission, Joint Opinion on the draft amendments to the legal framework on the disciplinary responsibility of judges in the Kyrgyz Republic, 16 June 2014, para. 93.

the existence of a "serious doubt", i.e. if there is serious doubt whether the candidate complies with the integrity criteria as defined in Article 8 paras. 2, 3, and 4 of the Law, the candidate's evaluation is deemed negative (Article 13 para. 5 of the Law). Article 5 para. 1 of the Evaluation Rules provides that only if a candidate meets all "indicators", they satisfy the criterion of ethical and financial integrity and that in assessing compliance with these indicators, the Commission may take into account the gravity or severity, the surrounding context, and the wilfulness of any integrity incident, and as to minor incidents, whether there has been sufficient passage of time without reoccurrences. In this determination, the Commission will take into account, including but not limited to, whether the incident was a singular event, or causing no or insignificant damage to public or private interests (including public trust), or not perceived by an objective observer as an attitude of disrespect for the social order arising from the disregard for rules and regulations.

RECOMMENDATION G.

To introduce mechanisms in either of the Rules to ensure that all information received through the channels provided by the Law and relied on is properly verified and to stipulate in the Law or Rules that evidence obtained unlawfully should be considered inadmissible, as it would be in civil, administrative or penal procedure.

3.7 Time-line

61. Article 9 para. 2 of the Law provides that the candidate needs to submit the requested information, among which is a declaration of assets and personal interests, including expenses, and a list of persons close to the candidate in accordance with the Law, within 7 days of the request. Failure to submit this information within this time period leads to the conclusion that the candidate has failed the evaluation. Given the extent of the information and period of time that is covered (data from the last five years) and to guarantee some flexibility into the timeline to reflect that the delivery of information may not be feasible within 7 days, for justifiable reasons, **it may be considered to provide a possibility in the Law to prolong this time-limit.**

62. After receipt of the requested information, the Commission has 30 days to verify it, which can be extended by another 15 days if the gathered information is of a complex nature or the additional requested information is submitted with delay. It is not clear what the timeline is to submit additional information as provided in Article 10 para. 7 of the Law. It is further unclear after how many days of verifying the information a hearing is to be scheduled. **It would be desirable to have these issues clarified in the Commission's Rules of Procedure. Further, sufficient time should be allocated taking into account the scope of the assessments and the Commission should be provided an opportunity to extend the time-limit for the further collection, verification and analysis of the data.**

RECOMMENDATION H.

To consider extending the time-limit for submission of requested information by candidates and to provide the Commission an opportunity to extend the time-limit for the further collection, verification and analysis of the data.

3.8 Hearings

63. According to the Law (Article 12 para. 1), the Commission shall invite the candidate for a hearing after examining the information gathered. The candidate is entitled to attend the meetings of the Commission and provide explanations verbally and in writing; be assisted by an attorney; and consult the evaluation materials at least three days before the hearing. These are welcome procedural guarantees.

64. The hearing shall take place in a public session (Article 12 para. 2 of the Law). Candidates may be understandably reluctant to air, and have aired, in public the details of their financial situation, their dealings with family members, and other aspects of their private lives. The candidate may request to hold the hearing in full or in part in a closed setting. The Commission may therefore decide "to conduct part of the hearings closed if the interests of public order, privacy or morality are undermined" (on the basis of Article 12 para. 2 of the Law).

65. There may be specific circumstances that may be invoked by a candidate to request a closed session. Such a decision should be taken with due consideration of the right of the candidate to the protection of his or her honour, privacy and reputation as guaranteed under Article 17 of the ICCPR and Article 8 of the ECHR. **As a key aspect of the evaluation process, it would be desirable to elaborate in the Rules of Procedure the criteria and process for the decision-making on holding a (part of a) hearing in public.**

66. The Commission's decision on the candidate's request to hold a closed hearing is to be explained in a reasoned decision, according to Article 3 para. 2 of the Evaluation Rules. The same provision provides that "the mere possibility of disclosure of the candidate's or other person's personal data shall not be sufficient to close the meeting". It is noted that while the latter would not allow for granting of the request for a closed hearing on any general privacy related ground, the respect of the candidate's right to privacy, would warrant a certain flexibility and safeguards in the relevant provisions. **It is important for the Commission to balance the interests of transparency and openness of the *ad hoc evaluation* process through an open hearing with the right to privacy of the candidate.** Further, it is unclear if a candidate could request a private hearing during the course of a hearing, when certain private issues arise that were previously not foreseen.

3.9 Decision-making

67. It is a welcome feature that the Explanatory Note provides that "the assessment of the integrity of the candidates to the positions within the SCM, SCP and their specialised departments shall bear no effect upon their career as judge or prosecutor" and that the "proposed evaluation of the integrity envisaged … shall be applicable only to the position to which the candidate has applied and does not have the objective to evaluate the professional capacity of the candidates…".

68. The Commission's decision shall be adopted by the majority of the members who take part in decision-making (Article 13 para. 3 of the Law). Given that the Commission's meetings shall be held with the presence of at least four members (Article 11 para. 2 of the Law), this formula presumably means that at least four members must participate in the decision-making. The Law provides that in the event of a parity of votes, the Commission shall vote again on the following day; and if the vote is again split, the evaluated candidate shall be deemed not to have passed the evaluation (Article 13 para. 4 of the Law). In general, the presumption against the candidate in the event of a parity of votes is questionable. **If the evidence before the Commission does not convince the majority of its members that the candidate does not meet the integrity criteria, the presumption should be in favour of the candidate**. It is further unclear in Article 8 para. 1 (e) of the Rules of Procedure, that concerns the Commission's powers during meetings, and that includes taking decisions on candidates as per Article 13 of the Law, what the references to "preliminary, partial, or final evaluation findings' mean, as these are not defined.

69. Article 11 para. 3 of the Rules of Procedure lays out the consecutive formations of the Commission by which non-evaluation related decisions can be taken when there is a parity of votes. Transparency of the voting process, except in case of a secret ballot, is ensured in Article 11 para. 5. At the same time, the provision would benefit from elaboration as to how and when the vote of each member will be announced. The vote of each member should also be recorded in the written evaluation decision.

70. Article 10 of the Rules of Procedure provides circumstances in which conflict of interests may arise and what the relevant members and the Commission should do in those cases. In para. 4 (d) it is provided that the member who is recused in respect of a particular candidate shall not vote, unless in line with Article 13 para. 3 of the Law, or if otherwise the quorum for taking a decision is undermined. Article 11 para. 2 of the Rules of Procedure provides that abstentions are *possible* in Article 10 cases. Further, Article 10 para. 4 provides that abstentions pursuant to Article 11 para. 2 do not apply where decisions on a candidate's evaluation are taken by the majority in line with Article 13 presumably para. 3 of the Law. This provision removes the right to abstain of recused members in the aforementioned cases where it concerns evaluation decisions and where the quorum cannot be met. While appreciating that the quorum for decision-making is to remain intact, it is concerning that even where conflict of interest arises, the member is not obliged to abstain from voting on the decision of the evaluation of a particular candidate, all the more as the member is effectively barred from accessing non-public information, and is required to refrain from gathering information and prepare any materials (Article 10 para. 4 (a-c) of the Rules of Procedure). This signals weight in favour of preserving the quorum rather than maintaining the integrity of the evaluation process, including a member's impartiality, independence and integrity. It is recommended to resolve this situation to maintain the integrity of the evaluation process. Allowing the member of the Commission having conflict of interest to cast the decisive vote would undermine the credibility of the process.

71. Article 3 para. 7 of the Evaluation Rules notes that a person who does not follow the proper order of the proceedings can be excluded. This seems to also include the candidate and/or their attorney. It is unclear what consequences this has on the remainder of the proceedings. **If the attorney is excluded, the candidate must be given the right to choose a new attorney.** Article 4 para. 2 of the Evaluation Rules provides that dissenting members shall write a reasoning and share with other members. Due to the heavy workload, the time constraints, and the potentially high number of candidates that require

evaluation, it can be questioned if such a requirement is indeed necessary, or this should be an entitlement of the dissenting member. Alternatively, a standardised mechanism, with due regard for the circumstances and the facts of each evaluation, could be adopted for the dissenting opinions to ensure efficient working processes for the members. Members could also be given additional time to prepare dissents.

72. Some other provisions would benefit from clarification. For example Article 11 para. 5 of the Rules of Procedure provides that the Chairperson shall announce the vote of all members for each decision, though it could be clarified where and how this is announced or whether this is simply reflected in the published decision. **Article 4 of the Evaluation Rules does not indicate a time-line for the adoption of a decision nor for the possible delay of adoption of a decision that it allows for. This should be elaborated.**

RECOMMENDATION I.

To ensure the integrity of the evaluation process by stating in the Rules that where a conflict of interest arises, the member of the Evaluation Commission is obliged to abstain from voting on the decision of the evaluation of a particular candidate.

3.10 Publicity of decision

73. The Commission is required to issue a reasoned decision on the candidate's evaluation (Article 13 para. 1 of the Law), which shall contain the relevant facts, reasons, and the conclusion (Article 13 para. 2 of the Law). The Commission's decision is published, unless the candidate requests otherwise, within 48 hours of dispatch of the decision (Article 13 para. 7 of the Law). A balance needs to be struck between the need to protect the independence of the judiciary and the necessity to ensure public trust in the process when determining which parts of the evaluation process should be public.[88] For example, when it comes to **the detailed evaluation assessments, results or scores of individual candidates should be treated confidentially and as a rule not be published**,[89] unless it is requested by an individual who underwent evaluation. As it was pointed out in the Joint Opinion, it is not evident that the decision to reject a candidate should be published at all, in order not to prejudice serving judges and prosecutors. The Commission should **duly weigh the *pros* and *cons* of more or full publicity and transparency, especially the impact on the individual independence of judges**. The same considerations should apply regarding the public disclosure of the identities of the voting members together with their respective written reasoning.

74. In particular, Article 5 para. 3 of the Rules of Procedure provides that members of the Commission disclose only the necessary minimum of personal data during public hearings. Taking into account that Article 5 para. 2 provides the specific data, namely the names of (presumably) connected individuals, candidate's contact details, exact location of real estate or other assets, citizen ID and banking numbers, that shall not be published, it is recommended to clarify that the Commission may decide not to publish other data of a personal nature by its own initiative or on the basis of a motion of a candidate, if this risks unjustifiably infringing the privacy of a candidate. **As above, the Law should allow**

88 ODIHR Opinion on the Appointment of Supreme Court Judges of Georgia (2019), para. 55.

89 *Ibid.* para. 56. See also CCJE Opinion no. 17 (2014) on Judges' Evaluation, para. 48.

the Commission to strike a balance between the private interest of a candidate and the public interest in a transparent process.

75. In any case, publication prior to the appellate body's decision is problematic as the adverse effects of the publication of an unsuccessful evaluation on a judge's reputation may hardly be removed by a later rectification.[90] Hence, **publication of the evaluation report should be suspended pending final appeal and decision of the appellate body and the Law should be supplemented accordingly.**

RECOMMENDATION J.

To appropriately balance the private interest of a candidate and the public interest in a transparent process when reflecting private data of a candidate in a published version of a decision and to suspend the publication pending final appeal and decision of the appellate body.

3.11 Appeals against the Commission's decisions

76. The candidate may appeal the decision within five days of receipt (Article 14 para. 1 of the Law). The appeal shall be made to the Supreme Court of Justice, which forms a special bench for hearing appeals against the Commission's decisions. According to Article 14 para. 2 of the Law, the special panel is composed of three judges, as well as one substitute judge, in case of recusals. These judges are to be appointed by the President of the Supreme Court of Justice and confirmed by the President of the Republic of Moldova. The Law further provides in Article 14 para. 3 that the President of Moldova may reject the candidacies nominated by the Supreme Court of Justice, in which case the President of the Supreme Court shall appoint other judges.

77. The provisions allowing the President of the Republic of Moldova to veto judges appointed by the President of the Supreme Court of Justice raise questions with respect to the independence of the appellate tribunal. These provisions were challenged in the Constitutional Court of Moldova by an opposition member of parliament. On 7 April 2022, the Court struck down Article 14 para. 3 of the Law and the related part of Article 14 para. 2, finding them to constitute an undue executive interference with the administration of justice and being at odds with the constitutional separation of powers.[91]

78. The handling of all appeals by the same panel of three judges (plus a substitute judge) may add to the consistency of adjudication, but since in the circumstances of these appeals the judges are likely to know many of the appellants personally, **it would be advisable to have a greater pool of adjudicators to allow for recusals**. **This may be better achieved by a random allocation of appeals to different panels formed from among the judges specializing in criminal, civil and administrative cases.**

79. The Law provides that the appeal is to be handled in accordance with the Administrative Code, subject to the exceptions laid down in the Law (Article 14 para. 6 of the Law). The appeal is to be heard within 10 days (Article 14 para. 7 of the Law). The appeal has no suspensive effect on the Commission's decision, as well as an election or competition in which the candidate participates (Article 14 para. 6 of the Law). Given that the candidate's right to access a position in the public service is at stake, the legal remedy

90 Venice Commission, Interim Opinion on the Law on Government Cleansing (Lustration Law) of Ukraine, CDL-AD(2014)044-e, para. 99.

91 Constitutional Court of Moldova, Decision No. 9 of 7 April 2022.

should address that as far as possible.[92] **To that end, it would be advisable for the appeal to have a suspensive effect on the Commission's decision, and the candidate should be able to participate in the competition, including for selection or election, until the Commission's decision is confirmed by the court**. The Law could also provide additional guarantees of timely resolution of the appeal, such as a speedy transfer of the candidate's file by the Commission to the appellate court. **It would be beneficial to specify in the Law the procedural rights of the candidate who lodges an appeal.**

4. FINAL COMMENTS

80. OSCE participating States have committed to ensure that legislation will be "adopted at the end of a public procedure, and [that] regulations will be published, that being the condition for their applicability" (1990 Copenhagen Document, para. 5.8).[93] Moreover, key commitments specify that "[l]egislation will be formulated and adopted as the result of an open process reflecting the will of the people, either directly or through their elected representatives" (1991 Moscow Document, para. 18.1).[94] The Venice Commission's Rule of Law Checklist also emphasizes that the public should have a meaningful opportunity to provide input.[95]

81. According to the Explanatory Note the draft Law was subject to an impact assessment and consultation process, which is welcome.

82. **The public authorities are encouraged to ensure that any future, and related legislation are subjected to inclusive, extensive and effective consultations, including with civil society, offering equal opportunities for women and men to participate. According to the principles stated above, such consultations should take place in a timely manner, at all stages of the law-making process, including before Parliament**.[96]

[END OF TEXT]

92 The Joint Opinion previously recommended that the appeal should not stop the competition, see par. 38 of the Joint Opinion by the European Commission for Democracy through Law (Venice Commission) and the Directorate General of Human Rights and Rule of Law of the Council of Europe on the revised draft Law "On some measures related to the selection of candidates for the positions of members in the self-administration bodies of judges and prosecutors" (CDL-AD(2021)046), 13 December 2021.

93 Available at <http://www.osce.org/fr/odihr/elections/14304http://www.osce.org/fr/odihr/elections/14304>.

94 Available at <http://www.osce.org/fr/odihr/elections/14310http://www.osce.org/fr/odihr/elections/14310>.

95 See Venice Commission, Rule of Law Checklist, CDL-AD(2016)007, Part II.A.5.

96 See e.g., OECD, International Practices on Ex Post Evaluation (2010).