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NOTE ON SEVERAL ISSUES RELATING TO JUDICIAL REFORM

GEORGIA

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EXECUTIVE SUMMARY

ODIHR welcomes the request of the then Public Defender of Georgia for international expertise in relation to the international obligations and standards on several issues relating to the reform of the judiciary in Georgia.

A fair, accountable and accessible justice system and an independent and impartial judiciary are fundamental elements of the rule of law and essential to engendering public trust and credibility in the justice system in general. Through their commitments, OSCE participating States have undertaken to "*respect the international standards that relate to the independence of judges […] and the impartial operation of the public judicial service*" 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*" (1991 Moscow Document).

The questions raised by the then Public Defender of Georgia primarily aim at promoting greater legitimacy and credibility of the work and decisions of the High Council of the Judiciary (HCJ) in a context of allegations of lack of transparency and/or risk of corporatism, self-interest or cronyism within the said body. They also aim at enhancing the status, credibility, legitimacy, integrity, accountability and independence of judges, including of high level judicial office-holders. In this respect, it is worth reiterating the importance of judicial management policies and procedures which ensure the accountability of the judiciary and a system of well-functioning checks and balances between the branches of state power.

The Note refers to international and regional authoritative recommendations, case-law as well as practices from the OSCE region that may offer useful guidance and examples on the various subject matters pertaining to the functioning of the judiciary including:

- the modalities of decision-making within judicial councils to avoid the risk of corporatism, noting the possibility to adapt voting modalities and thresholds to ensure consensus of judicial and non-judicial members on fundamental issues regarding the administration of justice, judicial appointments and dismissals, especially to high level positions within the judiciary and other matters that are key to guaranteeing judicial independence;
- the general rules on allocation of cases to individual judges and composition of the bench, including exceptions, to prevent external or internal undue influence;
- the procedures for selecting, appointing or electing a court president to ensure independence from the executive and legislative branches but also from within the judiciary;
- the status and privileges of judges holding administrative or managerial positions, which should allow them to perform their functions in the most proficient, diligent, effective and timely manner, while also maintaining a link with judicial practice;
- the system of verification of judges' asset declarations; and
- the safeguards to ensure the independence of the body in charge of initiating disciplinary cases against judges.

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

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I. INTRODUCTION

1. On 5 December 2022, the then Public Defender of Georgia sent to the OSCE Office for Democratic Institutions and Human Rights (hereinafter "ODIHR") a request for legal expertise on certain topics pertaining to the judicial reform in Georgia.
2. On 23 December 2022, ODIHR responded to this request, confirming the Office's readiness to prepare a Note outlining applicable international and regional standards, and a comparative overview of good legislative practices in other countries in relation to specific aspects of the ongoing judicial reform in Georgia.
3. As per the request of the then Public Defender of Georgia, the Note will in particular focus on the following issues:
   - the rules and modalities of decision-making within judicial councils to reduce the risk of corporatism and cronyism;
   - the exemptions from an electronic case distribution system and modalities of composing a bench/panel of judges;
   - the designation of presidents of courts/sections/chambers;
   - the status and privileges, including reduction of caseload, of judges holding administrative or managerial positions;
   - the scope of the system of verification of judges' asset declarations and modalities for strengthening such a system, including with regard to family members' assets; and
   - the safeguards for ensuring the independence of the body in charge of disciplining judges.
4. This Note should be read together with the findings and recommendations related to the above aspects from ODIHR Opinions on judicial reform in Georgia published in 2019 and 2023,[1] as well as ODIHR monitoring reports relating to the appointment of Supreme Court judges throughout 2019-2021.[2]
5. This Note 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.[3]

1 See ODIHR, *Opinion on the Draft Amendments to the Legal Framework on the Judiciary of Georgia*, 15 March 2023; and *Opinion on Draft Amendments relating to the Appointment of Supreme Court Judges of Georgia*, 17 April 2019.

2 During 2019–2021, ODIHR monitored the process for nomination and appointment of Supreme Court judges of Georgia based on requests of the Public Defender (Ombudsperson) of Georgia. Four respective reports on the monitoring of the nomination and appointment of Supreme Court judges were issued. See ODIHR, *Report on First Phase of the Nomination and Appointment of Supreme Court Judges in Georgia*, June-September 2019 (10 September 2019); *Second Report on the Nomination and Appointment of Supreme Court Judges in Georgia*, June-December 2019 (9 January 2020); *Third Report on the Nomination and Appointment of Supreme Court Judges in Georgia*, December 2020 – June 2021 (9 July 2021); and *Fourth Report on the Nomination and Appointment of Supreme Court Judges in Georgia* (23 August 2021).

3 See especially, *OSCE Decision No. 7/08* on *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 […]*".

II. SCOPE OF THE NOTE

6. The scope of this Note covers only the topics mentioned in the then Public Defender's request as outlined above. Thus limited, the Note does not constitute a full and comprehensive review of the entire legal and institutional framework regulating the judiciary in Georgia.

7. The Note is based on international and regional human rights and rule of law standards, norms and recommendations as well as relevant OSCE human dimension commitments. The Note also highlights, as appropriate, good practices from other OSCE participating States in this field. When referring to national legislation, ODIHR does not advocate for any specific country model; it rather focuses on providing clear information about applicable international standards while illustrating how they are implemented in practice in certain national laws. Any country example should always be approached with caution since it cannot necessarily be replicated in another country and always has to be considered in light of the broader national institutional and legal framework, as well as country context and political culture.

8. Moreover, in accordance with the *Convention on the Elimination of All Forms of Discrimination against Women*[4] (hereinafter "CEDAW") and the *2004 OSCE Action Plan for the Promotion of Gender Equality*[5] and commitments to mainstream gender into OSCE activities, programmes and projects, the Note integrates, as appropriate, a gender and diversity perspective.

9. Should the Note be translated in another language, the English version shall prevail. In view of the above, ODIHR would like to stress that this Note does not prevent ODIHR from formulating additional written or oral recommendations or comments on relevant subject matters in Georgia in the future.

III. LEGAL ANALYSIS

1. Relevant International Human Rights Standards and OSCE Human Dimension Commitments with respect to the Independence of the Judiciary in General

10. The independence of the judiciary is a fundamental principle and an essential element of any democratic state based on the rule of law as well as an integral part of the fundamental democratic principle of the separation of powers.[3] This independence entails that both the judiciary as an institution, but also individual judges, must be able to exercise their professional responsibilities without being influenced by or fearful of arbitrary disciplinary investigations and/or sanctions or decisions by the executive or legislative

4 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. Georgia ratified the CEDAW on 26 October 1994.

5 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); see also para. 5.12 which refers to "*the independence of judges and the impartial operation of the public judicial service*" among "*those 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*". See also *OSCE Ministerial Council Decision No. 12/05 on Upholding Human Rights and the Rule of Law in Criminal Justice Systems*, 6 December 2005.

branches or other external actors. The independence of the judiciary is also essential to engendering public trust and credibility in the justice system in general, so that everyone is treated equally before the law and that no one is above the law. Public confidence in the courts and their perception as independent from political influence are vital in a democratic society that respects the rule of law. The principle of the independence of the judiciary is also crucial to upholding other international human rights standards.[6] More specifically, judicial independence is a prerequisite to the broader guarantee of every person's right to a fair trial i.e., to a fair and public hearing by a competent, independent and impartial tribunal established by law and by an accountable judiciary.

11. 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", articulated in Article 10 of the Universal Declaration of Human Rights, which reflects customary international law, and subsequently incorporated into Article 14 of the International Covenant on Civil and Political Rights (hereinafter "the ICCPR").[7]

12. 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),[8] and have been further elaborated in the Bangalore Principles of Judicial Conduct (2002).[9] 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.[10]

13. In its General Comment No. 32 on Article 14 of the ICCPR, the UN Human Rights Committee (hereinafter "UN HRCttee") 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 appointment, remuneration, tenure, promotion, suspension and dismissal of the members of the judiciary and disciplinary sanctions taken against them*".[11]

14. Article 6 of the European Convention on Human Rights (hereinafter "ECHR")[12] 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 (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

6 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 .

7 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 Georgia acceded to the ICCPR on 3 May 1994.

8 *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.

9 *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. See also Measures for the Effective Implementation of the Bangalore Principles of Judicial Conduct (2010), prepared by the Judicial Group on Strengthening Judicial Integrity.

10 *Bangalore Principles of Judicial Conduct*, 2002, Preamble.

11 UN Human Rights Committee, *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.

12 *Council of Europe's Convention for the Protection of Human Rights and Fundamental Freedoms* (ECHR) entered into force on 3 September 1953. Georgia ratified the ECHR on 20 May 1999.

outside pressure and whether the body presents an appearance of independence.[13] As to the "established by law" requirement, it covers not only the legal basis for the very existence of a "tribunal", but also compliance by the tribunal with the particular rules that govern it, reviewing both its composition in each case and the procedure for the judges' initial appointment.[14] The Note will also make reference to the opinions of the Consultative Council of European Judges (hereinafter "CCJE"),[15] an advisory body of the Council of Europe on issues related to the independence, impartiality and competence of judges, and to the opinions and reports of the Council of Europe's European Commission for Democracy through Law (hereinafter "Venice Commission"), of which Georgia is a member.[16]

15. OSCE participating States have also 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).[17] In the 1991 Moscow Document,[18] 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 also 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.[19] Further and more detailed guidance is also provided by the ODIHR Kyiv Recommendations on Judicial Independence in Eastern Europe, South Caucasus and Central Asia (2010) (hereinafter the "Kyiv Recommendations").[20]

16. 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:

- the Reports of the UN Special Rapporteur on the Independence of Judges and Lawyers;[21]

13 See e.g., European Court of Human Rights (ECtHR), *Campbell and Fell v. the United Kingdom*, Application no. 7819/77, 7878/77, 28 June 1984, para. 78. See also *Olujić v. Croatia*, Application no. 22330/05, judgment of 5 May 2009, para. 38; and *Oleksandr Volkov v. Ukraine*, Application no. 21722/11, judgment of 25 May 2013, para. 103.

14 See e.g., ECtHR, *Guðmundur Andri Ástráðsson v. Iceland* [GC], Application no. 26374/18, 1 December 2020, paras. 223-228.

15 Available at <http://www.coe.int/t/dghl/cooperation/ccje/textes/Avis_en.asp>, particularly CCJE, *Opinion No. 24 (2021): Evolution of the Councils for the Judiciary and their role in independent and impartial judicial systems*, 5 November 2021, read together with *Opinion No. 10 (2007) on the Council for the Judiciary at the service of society*; *Opinion No. 3 (2002) on the Principles and Rules Governing Judges' Professional Conduct, in particular Ethics, Incompatible Behaviour and Impartiality*, 19 November 2002. See also CCJE, *Opinion No. 1 (2001) on Standards Concerning the Independence of the Judiciary and the Irremovability of Judges*, 23 November 2001; Magna Carta of Judges, 17 November 2010; and *Opinion No. 18 (2015) on the Position of the Judiciary and its Relation with the Other Powers of State in a Modern Democracy*, 16 October 2015.

16 In particular European Commission for Democracy through Law (Venice Commission), *Report on Judicial Appointments* (2007), CDL-AD(2007)028-e, 22 June 2007; *Report on the Independence of the Judicial System – Part I: The Independence of Judges* (2010), CDL-AD(2010)004, 16 March 2010 ; and *Rule of Law Checklist*, CDL-AD(2016)007, 18 March 2016.

17 CSCE/OSCE, *Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE*, paras. 5 and 5.12.

18 CSCE/OSCE, *Document of the Moscow Meeting of the Conference on the Human Dimension of the CSCE* (Moscow, 10 September-4 October 1991).

19 OSCE, *Ministerial Council Decision No. 7/08 on Further Strengthening the Rule of Law in the OSCE Area*, Helsinki, 4-5 December 2008.

20 The *ODIHR Kyiv Recommendations on Judicial Independence in Eastern Europe, South Caucasus and Central Asia* (2010) were developed by a group of independent experts under the leadership of ODIHR and the Max Planck Institute for Comparative Public Law and International Law – Minerva Research Group on Judicial Independence.

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

- the Reports and other documents of the European Network of Councils for the Judiciary (ENCJ);[22]
- the European Charter on the Statute for Judges (1998);[23]
- the Report of the Venice Commission on the Independence of the Judicial System, in particular Part I on the independence of judges;[24] and
- ODIHR Opinions dealing with issues pertaining to judicial councils and the independence of the judiciary.[25]

2. BACKGROUND

17. Georgia applied for membership of the European Union (EU) on 3 March 2022. On 17 June 2022, the European Commission recommended that Georgia be granted candidate status once a list of twelve priorities will be addressed.[26] Reform of the judicial system is amongst those priorities.[27] In order to fulfil the preconditions defined by the European Commission, the Legal Issues Committee of the Parliament of Georgia set up a judicial reform working group to initiate legislative changes and develop a judicial reform strategy and action plan.

18. The then Public Defender of Georgia provided proposals for judicial reform to support the Parliament's work in developing legislation to address the EU priorities and to implement necessary steps for judicial reform in compliance with international human rights standards. In order to further inform the ongoing discussions, the then Public Defender requested ODIHR to provide additional expertise on applicable international and regional standards and recommendations in relation to its proposals, as submitted to the Parliament. More specifically, the then Public Defender of Georgia specifically asked ODIHR to focus on the above-mentioned issues.

3. DECISION-MAKING WITHIN JUDICIAL COUNCILS

19. The first issue relates to the rules and modalities of decision-making within judicial councils to reduce the risk of corporatism and cronyism, and the proposal to introduce a double majority mechanism requiring certain decisions to be adopted by a majority of judge members or overall council members as well as by a majority of non-judicial members of the judicial council (hereinafter referred to as "double majority"). The main

22 Available at <https://www.encj.eu/>.
23 *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].
24 Venice Commission, *Report on the Independence of the Judicial System – Part I: The Independence of Judges* (2010), CDL-AD(2010)004, 16 March 2010.
25 See for instance: ODIHR, *Opinion on Draft Amendments relating to the Appointment of Supreme Court Judges of Georgia*, 17 April 2019; *Opinion on the Laws on Courts, on Judicial Administration and on the Legal Status of Judges of Mongolia* (2020); *Final Opinion on Draft Amendments to the Act of the National Council of the Judiciary and Certain other Acts of Poland* (5 May 2017); *Opinion on Certain Provisions of the Draft Act on the Supreme Court of Poland* (as of 26 September 2017); O*pinion on Certain Provisions of the Draft Act on the Supreme Court of Poland* (30 August 2017); *Opinion on the law 29/1967 Concerning the Judicial System, The Supreme Judicial Council of the Judiciary, and the Status of Judges in Tunisia* (as amended up to12 August 2005 (21 December 2012); and several other opinions available at <http://www.legislationline.org>.
26 See *Opinion on the EU membership application by Georgia*, 17 June 2022.
27 *Ibid.* The priority related to judicial reform reads: "*adopt and implement a transparent and effective judicial reform strategy and action plan post-2021 based on a broad, inclusive and cross-party consultation process; ensure a judiciary that is fully and truly independent, accountable and impartial along the entire judicial institutional chain, also to safeguard the separation of powers; notably ensure the proper functioning and integrity of all judicial and prosecutorial institutions, in particular the Supreme Court and address any shortcomings identified including the nomination of judges at all levels and of the Prosecutor-General; undertake a thorough reform of the High Council of Justice and appoint the High Council's remaining members. All these measures need to be fully in line with European standards and the recommendations of the Venice Commission*".

purpose of such a double majority is to reduce the influence of judge members in the council's decision-making process and the risk of corporatism and cronyism.

20. The key purpose of judicial self-governing bodies, particularly judicial councils or similar independent bodies, is to safeguard the independence of the judiciary and of individual judges. To serve this purpose, judicial councils must themselves be independent in their work and decision-making, not only from the other branches of power[28] but also against improper influence from within the judiciary.[29]

21. While the composition of judicial councils varies greatly across the OSCE region, to ensure independence, it is generally recommended that at least half of the council members be judges elected by their peers.[30] At the same time, regional bodies, including ODIHR, the Venice Commission and the CCJE, generally recommend a greater inclusion of non-judicial members, such as attorneys, other legal professionals, academia and civil society representatives, in such bodies to prevent self-interest, self-protection, and cronyism and also to avoid the risk of corporatism, and add a certain level of external, more neutral control.[31]

3.1 Quorum and Voting Thresholds in Judicial Councils' Decision-making

22. The way in which judicial councils exercise their powers and carry out their constitutional responsibilities to ensure the independence of courts and the judiciary should not be undertaken "*in a way which is capable of calling into question its independence in relation to the legislature and the executive*"[32] or from within the judiciary itself. The rules and provisions concerning the quorum and voting thresholds for adopting decisions considerably affect the functioning of a judicial council. In this respect it is noted that non-judicial members "s*hould have the same status and voting rights as judicial members"*[33] and they "*should meet the same standards of integrity, independence and impartiality as judge[s] [members]".*[34]

23. It is noted that **international standards do not specifically address the issue of voting requirements for adopting decisions within judicial councils nor specifically prevent**

28 See 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. 61.

29 See e.g., Council of Europe, *Explanatory Memorandum to the Recommendation 2010(12) on Judges: Independence, Efficiency and Responsibilities*, para. 30.

30 See e.g., ECtHR, *Oleksandr Volkov v. Ukraine*, no. 21722/11, 9 January 2013, para. 112, where the ECtHR has stressed the importance of having the judicial corps elect its own representatives to the council, in order to *"reduc[e] the influence of the political organs of the government on the composition of the [Council]*"; Council of Europe, *Recommendation 2010(12) on Judges: Independence, Efficiency and Responsibilities*, para. 27; CCJE *Opinion No. 24 (2021): Evolution of the Councils for the Judiciary and their role in independent and impartial judicial systems*, 5 November 2021, para. 29; *2010 ODIHR Kyiv Recommendations on Judicial Independence*, para. 7, referring to "substantial number of judicial members elected by the judges"; Council of Europe, Committee of Ministers, Recommendation 2010(12), section 27. European Charter for judges and Explanatory memorandum (1998), para. 1.3, which states: "*In respect of every decision affecting the selection, recruitment, appointment, career progress or termination of office of a judge, the statute envisages the intervention of an authority independent of the executive and legislative powers within which at least one half of those who sit are judges elected by their peers following methods guaranteeing the widest representation of the judiciary*." See also Venice Commission, *Opinion on the Draft Act Amending the Act on the National Council of the Judiciary, on the Draft Act Amending the Act on the Supreme Court, Proposed by the President of Poland, and on the Act on the Organisation of Ordinary Courts* (11 December 2017), para. 17.

31 *Ibid.* para. 38 (*2017 ODIHR Final Opinion*). See also ODIHR, *Opinion on Draft Amendments relating to the Appointment of Supreme Court Judges of Georgia*, 17 April 2019, para. 66; CCJE *Opinion No. 24 (2021): Evolution of the Councils for the Judiciary and their role in independent and impartial judicial systems*, 5 November 2021, para. 20; and *2010 ODIHR Kyiv Recommendations on Judicial Independence*, para. 7. See also Venice Commission, *Opinion on the Seven Amendments to the Constitution of "the former Yugoslav Republic of Macedonia" concerning, in particular, the judicial Council, the competence of the Constitutional Court and special financial zones*, CDL-AD(2014)026-e, paras. 68-76; and *Opinion on the Law on amending and supplementing the Constitution (Judiciary) of the Republic of Moldova*, CDL-AD(2018)003, para. 56, where the Venice Commission noted: "[…] *there is a need to monitor the judiciary through non-judicial members of the judicial council. Only a balanced method of appointment of the members can guarantee the independence of the judiciary. Corporatism should be counterbalanced by membership of other legal professions, the 'users' of the judicial system, e.g. attorneys, prosecutors, notaries, academics, civil society*."

32 ENCJ, *Compendium on Councils for the Judiciary* (2021), p. 10.

33 ENCJ, *Compendium on Councils for the Judiciary* (2021), p. 7.

34 ENCJ, *Compendium on Councils for the Judiciary* (2021), p. 7.

the introduction of a double majority requirement for adopting decisions within judicial councils.

24. The 2019 ODIHR Opinion noted that "*[i]f the stakeholders consider that the existing voting rules confer a too important influence of judge members over the selection/nomination process, the drafters should consider alternative modalities to ensure that public confidence in the process is not altered*."[35] It further referred to the *ENCJ Minimum Standards regarding Non-judicial Members in the Judicial Governance* (2016),[36] which provide some recommendations **to ensure the effective participation of non-judicial members, including in terms of the need to provide for adequate quorum and voting procedures/thresholds/majorities to give effect to this aspiration**.[37] At the same time, the 2019 ODIHR Opinion **warned against the risk of frequent deadlocks when applying the quorum and voting threshold, and recommended to provide for a proper anti-deadlock mechanism**.

25. Generally, qualified majority requirements ensure greater legitimacy of the decisions adopted by judicial councils of mixed compositions as their adoption would generally require support from both judicial and non-judicial members of the council. Thus, this demonstrates greater consensus, especially when such requirements mean in practice that decisions that are important for the functioning of the judiciary and the position and status of judges cannot be adopted without the support of non-judicial members. Accordingly, a number of countries have provided for qualified majority requirements, at least for core decisions that are to be adopted by a judicial council.[38]

26. Regarding "double majority" requirements specifically, depending on the country context and challenges faced regarding the independence and impartiality of the judicial council members and the public perception thereof, such a modality may be tailored in very different ways. For instance, in a context where judicial members were not considered to play a sufficiently important role within the judicial council, the Venice Commission recommended considering a double majority whereby the overall majority of votes of the plenary of the judicial council should be supported by the majority of elected judicial members.[39] Similarly, and as underlined by the European Network of Councils for the Judiciary, **certain voting modalities and thresholds may be adopted**

35 See ODIHR, *Opinion on Draft Amendments relating to the Appointment of Supreme Court Judges of Georgia*, 17 April 2019, para. 66.
36 ENCJ, *Minimum Standards regarding Non-judicial Members in the Judicial Governance* (2016), para. II .4.
37 See ODIHR, *Opinion on Draft Amendments relating to the Appointment of Supreme Court Judges of Georgia*, 17 April 2019, para. 68.
38 For instance, in **Slovenia**, the judicial council consists of 11 members (5 of which are elected from among university professors of law, attorneys and other lawyers, and 6 are judicial members); its decisions are valid if the majority of all members are present at the session (Article 34 Rules of Procedure of the Judicial Council adopted on 7 December 2017) and should be adopted by public vote and with a majority of all of its members though a number of key issues require two-thirds majority votes of all members, including core decisions about judges' career and status such as appointment, promotion, classification of salary grades, proposal for dismissal, criteria for the selection of candidates for judicial post, and for the quality of work of judges, as well as others; appointment and dismissal of presidents and vice-presidents of courts, of disciplinary bodies, and appointment of members of the ethics and integrity commission; election of president and vice-president; adoption of draft financial plan and council's annual report; adoption and amendment of council's rules of procedure; as well as decisions on excluding a members from the discussion and voting (see Article 35 Rules of Procedure of the Judicial Council); in **Bosnia and Herzegovina**, the suspension and termination of the mandate of the members of the judicial council require a qualified majority of vote (Articles 6-7 of the Law on the High Judicial and Prosecutorial Council); in **Bulgaria**, in the Supreme Judicial Council plenary *(composed of 11 members elected by the Judicial system bodies out of their own composition (the judges electing 6, the prosecutors – 4 and the investigating magistrates – 1 of these), 11 members elected by the National Assembly among judges, prosecutors, investigating magistrates, full professors in legal science, attorneys at law or other lawyers, and 3 ex officio members: the President of the Supreme Court of Cassation, the President of the Supreme Administrative Court, and the Prosecutor General)*, a plenary meeting is held if more than half of the members are present (Article 27. Rules on the organisation of the activities of the Supreme Judicial Court and its Administration, SG No. 16 of February 22, 2019) and decision are taken by a simple majority with more than half of the members present, except when they concern subject matters requiring a decision by qualified majority voting (the votes of no less of 17 (of the total 25)), including regarding: 1) the decision to terminate the mandate of an elected member of the Supreme Judicial Council under the terms of Article 130 (8) of the Constitution; and 2) with respect the appointment of the most senior judicial positions: "for the proposal to the President of the Republic of Bulgaria for the appointment and dismissal of the President of the Supreme Court of Cassation, the President of the Supreme Administrative Court and the Chief Prosecutor" (Article 30(2) points (2) and (6) (Amended - SG No. 28 of 2016) of the Judiciary System Act, and Article 29 of the Rules on the organisation of the activities of the Supreme Judicial Court and its Administration, SG No. 16 of February 22, 2019).
39 See e.g., Venice Commission, *Opinion on the Judicial System Act of Bulgaria*, CDL-AD(2017)018, 9 October 2017, para. 23.

for the purpose of ensuring the effective participation of non-judicial members,[40] **the ultimate goal being to ensure consensus of judicial and non-judicial members on fundamental issues regarding the administration of justice, judicial appointments and dismissals, especially to high level positions within the judiciary and other matters that are key to guarantee judicial independence**. For instance, in North Macedonia, a system of double majority exists for the purpose of ensuring that there is agreement from representatives, within the judicial council, of minority communities in North Macedonia regarding appointment to high level judicial offices.[41]

27. Qualified majority as well as double majority requirements may enhance the legitimacy of voting processes and ensure consensus among a plurality of opinions, but also carry the risk of deadlock. In this respect, **it is important to provide in legislation specific deadlock-breaking mechanisms to solve decision-making impasse within judicial councils**. Any anti-deadlock mechanism needs to be devised carefully in order to be effective and not to be perceived as undermining the objective of seeking consensus and bolstering legitimacy.[42] The primary function of the deadlock-breaking mechanism is to push the majority and the minority to find a compromise to avoid the crisis or malfunctioning of an institution; therefore such a mechanism should continue to incentivise the majority and the minority to seek an agreement, which may not be the case, for instance, with rapidly decreasing a requirement for a qualified majority.[43]

28. The challenges of designing appropriate and effective anti-deadlock mechanisms must be acknowledged as there is no single model. Various solutions could be explored in this respect. Beyond decreasing majorities in subsequent rounds of voting, which as mentioned above, may not reach the intended goal of reaching consensus,[44] it is also possible to take recourse to the involvement of other independent or more neutral institutional actors,[45] such as the assembly of judges, bar associations, judicial associations or the national human rights institution. In the case of judicial appointments in particular, it is possible to envisage seeking nominations of candidates from neutral or independent bodies,[46] such as assemblies of the judges of (other) high courts or the plenary of the court for which the replacement is to be made. In any case, each state has to devise its own formula taking into account the country context and institutional framework.[47]

40 See ENCJ, *Minimum Standards regarding Non-judicial Members in the Judicial Governance* (2016), para. II .4.

41 See e.g., Articles 49 and 50 of the *Law on the Judicial Council of the Republic of North Macedonia* (2019) regarding the election by the judicial council of presidents of administrative courts, higher administrative courts and judges and presidents of the Supreme Court.

42 See e.g., Venice Commission, *Opinion on the draft law on amendments to the Lax on the Judicial Council and Judges of Montenegro*, CDL-AD(2018)015, paras. 11-15, where it is emphasized that: "*A balance needs to be found between the superior state interest of the preservation of the functioning of the institutions and the democratic exigency that these institutions should be balanced and should not be merely dominated by the ruling majority. In other words, the supreme state interest lies in the preservation of the institutions of the democratic state*." The Venice Commission also noted that *"…an election of constitutional judges by qualified majority allows depoliticisation of the process of the judges' election, because it requires that the opposition also has a significant position in the selection process*". See also the *Compilation of Venice Commission. Opinions and Reports Related to Qualified Majorities and Anti-Deadlock Mechanisms in Relation to the Election by Parliament of Constitutional Court Judges, Prosecutors General, Members of Supreme Judicial Council and Prosecutorial Councils and the Ombudsman*, CDL-PI(2018)003rev, p. 24.

43 See Venice Commission, *Compilation of Venice Commission. Opinions and Reports Related to Qualified Majorities and Anti-Deadlock Mechanisms in Relation to the Election by Parliament of Constitutional Court Judges, Prosecutors General, Members of Supreme Judicial Council and Prosecutorial Councils and the Ombudsman*, CDL-PI(2018)003rev, p. 13.

44 See e.g., Venice Commission, *Montenegro - Opinion on the Draft Amendments to Three Constitutional Provisions relating to the Constitutional Court, the Supreme State Prosecutor and the Judicial Council*, CDL-AD(2013)028, para. 8.

45 See e.g., ODIHR and Venice Commission, *Joint Opinion on the Draft Amendments to the Legal Framework on the Disciplinary Responsibility of Judges in the Kyrgyz Republic*, CDL-AD(2014)018-e, para. 81.

46 See e.g., Venice Commission, *Opinion on the draft Act to amend and supplement the Constitution (in the field of the Judiciary) of the Republic of Bulgaria*, adopted by the Venice Commission at its 104th Plenary Session (Venice, 23-24 October 2015), CDL-AD(2015)022-e, paras. 46-51.

47 See e.g., Venice Commission, *Montenegro - Opinion on the Draft Amendments to Three Constitutional Provisions relating to the Constitutional Court, the Supreme State Prosecutor and the Judicial Council*, CDL-AD(2013)028, paras. 5-8; and *Tunisia - Opinion on the Draft Institutional Law on the Constitutional Court*, CDL-AD(2015)024, para. 21. See also Venice Commission, *Final Opinion on*

29. In addition, should the deadlock concern judicial appointments, including to higher positions within the judiciary, the prolongation of the term of office of the incumbent may also function as an anti-deadlock mechanism,[48] beyond ensuring the continuation of the functioning of the said institutions. Specific procedural modalities could also be contemplated in case of deadlock. For example, in Romania, in case of parity of votes within the plenary of the Superior Council of Magistracy, the debates and the voting procedure resume on the same day, if possible and, if, after the resumption of the voting procedure, a decision cannot be adopted, the point will be entered on the agenda of the next Plenary meeting, respecting the settlement deadline provided by law, if applicable.[49]

3.2. Additional and Complementary Options to Reduce the Risk of Corporatism within Judicial Councils

30. Additional and complementary options to reduce the risk of judicial corporatism and cronyism within a judicial council could be considered. **The composition of the judicial council and modalities of appointment of its members has a direct impact on its independence and perception of independence, as well as independence of its individual members**. Such options could consist of a combination of the following modalities, among others:

- considering the possibility to have the chairperson of the judicial council to be elected among the non-judicial members of the council;[50]
- ensuring that selection methods for judicial members of the judicial council are designed to guarantee the widest representation of the judiciary at all levels, including *first level courts*,[51] and also take into account geographically diverse representation;[52]
- considering provisions preventing membership of court presidents in judicial councils to avoid the risk of accumulation of power or over-influence of certain judicial members over others;[53]
- introducing requirements to ensure greater gender balance and diversity in the composition of judicial councils.[54]

31. **Increasing accountability of judicial councils and improving the transparency of its work generally contribute to enhancing the quality of the decisions taken by these bodies and to reducing the risk of corporatism and cronyism within the council**. In its Opinion no. 24 (2021), the CCJE noted that judicial councils "*should play a role in*

the Revised Draft Constitutional Amendments on the Judiciary of Albania, CDL-AD (2016)009, para. 37, which refers to the "the nomination of candidates by other neutral bodies after several unsuccessful votes."

48 See e.g., Venice Commission, *Opinion on the draft law on amendments to the Lax on the Judicial Council and Judges of Montenegro*, CDL-AD(2018)015, para. 25.

49 Article 19(1) and (2) Regulations on the organisation and functioning of the Superior Council for Magistracy.

50 See e.g., Venice Commission, *Report on Judicial Appointments*, CDL-AD(2007)028-e, para. 35.

51 See e.g., *2010 ODIHR Kyiv Recommendations on Judicial Independence*, para. 7, which states that "*[the] judge members shall […] represent the judiciary at large, including judges from first level courts*"; Council of Europe, *Recommendation CM/Rec(2010)12 on Judges: Independence, Efficiency and Responsibilities*, para. 27; which states that "*[judge members of judicial councils should be chosen] from all levels of the judiciary and with respect for pluralism inside the judiciary*"; CCJE, *Opinion No. 24 (2021): Evolution of the Councils for the Judiciary and their role in independent and impartial judicial systems*, para. 30.

52 See CCJE, *Opinion No. 24 (2021): Evolution of the Councils for the Judiciary and their role in independent and impartial judicial systems*, para. 30.

53 See e.g., in **Croatia**, Article 124 of Constitution provides that *"[t]he presidents of courts may not be elected to the National Judicial Council.*"

54 See e.g., CCJE, *Opinion No. 24 (2021): Evolution of the Councils for the Judiciary and their role in independent and impartial judicial systems*, para. 30. This could be drafted along the lines of the recommendations made by ODIHR and the Venice Commission regarding proposed measures to ensure greater gender balance in the composition of the Disciplinary Commission under the Council of Judges of the Kyrgyz Republic (see Sub-Section 5.1 of the *OSCE/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, <http://www.legislationline.org/documents/id/19099>).

ensuring that the judiciary works in a transparent and accountable way" and that *"accountability of a [c]ouncil for the [j]udiciary is itself an important source of functional legitimacy",* emphasizing that "*[t]he more powers and responsibilities a [c]ouncil has, the more important it is that it should be accountable for the use of those powers"*.[55]

32. Accountability of judicial councils as a whole can take various forms. The CCJE distinguishes between judicial and explanatory accountability of judicial councils, whereas punitive accountability applies to individual members. It underlines that *"[s]ome decisions of the [judicial council] in relation to the management and administration of the justice system, as well as the decisions in relation to the appointment, mobility, promotion, discipline and dismissal of judges (if it has any of these powers) should contain an explanation of their grounds, have binding force, subject to the possibility of a judicial review. Indeed, the independence of the [judicial council] does not mean that it is outside the law and exempt from judicial supervision*."[56] Generally, explanatory accountability of judicial councils means that, "*every council for the judiciary must work in a transparent fashion, giving reasons for its decisions and procedures and be accountable this way*."[57] Beyond this, councils must also be *"open to critical feedback and ready to improve constantly. This form of accountability is of special importance in the dialogue with the other powers of state and civil society*."[58] Guarantees are needed to support "*the independence and impartiality of any court reviewing the merits of the [judicial council's] decisions, including independence from the [judicial council] itself*."[59] Such supervision can be exercised by an appeal forum that can be within the judicial system (review by the Supreme Court)[60] or by the Constitutional Court,[61] regarding decisions that impact the career of judges (selection/appointment, discipline, dismissal, transfer). For example, in Slovenia, detailed rules instruct on the reasoning and publication of decisions adopted by the judicial council.[62] Punitive accountability allows for individual members of judicial councils to be held accountable for their actions through appropriate means.

33. Transparency is a precondition to increase public confidence in the functioning of the justice system but is also a guarantee from the danger of political or other external or internal influence. The *CCJE* Opinion no.10 recommends that, "*as an essential element of the public confidence in the justice system, the judicial council should act with transparency and be accountable for its activities, in particular through a periodical report suggesting also measures to be taken in order to improve the functioning of the justice system*".[63] Therefore, "*engaging with the public through special websites and reports or by council plenary meetings online are welcome efforts towards greater transparency and accountability*."[64]

55 CCJE, *Opinion No. 24 (2021): Evolution of the Councils for the Judiciary and their role in independent and impartial judicial systems*,, para. 13.
56 CCJE, *Opinion No. 10 (2007) on the Council for the Judiciary at the service of society*, para. 39.
57 CCJE, *Opinion No. 24 (2021): Evolution of the Councils for the Judiciary and their role in independent and impartial judicial systems*, para 18.
58 CCJE, *Opinion No. 24 (2021): Evolution of the Councils for the Judiciary and their role in independent and impartial judicial systems*, para 18.
59 CCJE, *Opinion No. 24 (2021): Evolution of the Councils for the Judiciary and their role in independent and impartial judicial systems*, para. 15.
60 Article 86(4) of the Law on Courts of Lithuania.
61 See the Law on the State Judicial Council of Croatia. See also Articles 27 and 54 U- IX, U-X Rules of Procedure of the Constitutional Court of Croatia.
62 Article 35 of the Judicial Council Act of Slovenia.
63 See CCJE, *Opinion No. 10 (2007) on the Council for the Judiciary at the service of society*.
64 CCJE, *Opinion No. 24 (2021): Evolution of the Councils for the Judiciary and their role in independent and impartial judicial systems*, para. 42.

34. The objective of transparency is "*to inform the public, the executive and the legislative about the state of affairs in the judiciary*".[65] Various methods can be applied to advance transparency, including through widely disseminated reports but also other ways,[66] such as through the publication of the decisions of the council and other documents relating to its work and its meetings,[67] holding public meetings or meetings open to all judges,[68] provision of convincing reasoning of the decisions of the council,[69] and engaging in a voluntary dialogue with other state powers and/or with associations of judges and/or civil society and/or the media.[70] In addition, "*by submitting periodic and public reports which transparently show the principles on which they perform their functions and the outcomes from activities, the councils are accountable for their activities*".[71] At the same time, in many cases, especially including interviews and deliberations concerning judges' evaluations and careers, there is a legitimate interest in holding a confidential debate especially when judges' right to respect to private life are at stake.[72]

4. Electronic Case Distribution System and Composition of the Bench

35. The second issue relates to the use of an electronic case distribution system to determine the composition of the bench/chamber that is to hear a case.

36. Pursuant to the Organic Law of Georgia on Common Courts, the High Council of Justice has introduced an electronic software for random distribution of cases within common courts at city/district and appeals courts as well as the Supreme Court. It is understood

65 See e.g., Venice Commission, *Opinion on the Draft Law on the High Judicial and Prosecutorial Council of Bosnia and Herzegovina* (2014), CDL-AD(2014)008, para 71.

66 For instance, in **Slovenia**, the judicial council submits an annual report to parliament and publishes it on the website (Article 7 of the Judicial Council Act); in **Spain**, the General Council of the Judiciary (GCJ) is obliged to send annually to the parliament a report on the state, operation and activities of the GCJ and of the courts and tribunals, which among others include the needs that, in its opinion, exist in terms of personnel, facilities and resources for the proper performance of the functions, the activities of the president and members with detailed expenditure, gender impact in the judicial sphere and a report on the use of co-official languages in the courts (Article 563(1) and (2) of the Organic Law of Spain 6/1985 on the Judiciary); the parliament may debate on the content and require the President of the Supreme Court to appear and answer questions; additionally, the president of the Supreme Court and the GCJ have an obligation to appear annually before the justice committee of the parliament to report on the most relevant aspects of the state of justice in Spain. (Art 563(4) Organic Law of Spain 6/1985 on the Judiciary, though Article 564 specifies that "a*part from the cases provided for in the previous article, the President of the Supreme Court and the Members of the General Council of the Judiciary shall have no duty to appear before the Chambers by reason of their functions*"). See also e.g., Venice Commission, *Opinion on the Draft Act to Amend and Supplement the Constitution (In The Field Of The Judiciary) of the Republic of Bulgaria (2015)*, CDL-AD(2015)022, para 63.

67 For instance, the publication of meeting summaries like in **Hungary** (see Article 107 Law on the Organisation and Administration of Courts and Art. 20. Decree 49/2018 on Rules on the functioning and organisation of the National Judicial Council), **Slovakia**, **Lithuania**; and/or via posting audio recordings or press releases, such as in **Slovakia** (see Section 6 (10) Act 185/2002 on the Judicial Council of the Slovak Republic). In **Slovenia**, information published by the judicial council includes the judicial council decisions (Slovenian Council publishes decisions for each term of office, decisions connected to ethics and integrity, and to the provision concerning incompatibility with the function of a judge; it also issues explanations regarding the promotion of judges and warnings, opinions and explanations of the Council in other matters). In **Lithuania,** decisions of the council can be found on a general website of the courts (with supporting material). In **Slovakia**, before the meeting of the judicial council, it falls within the president of the judicial council's responsibility to ensure that information on the activities of the judicial council is published on the website of the judicial council at least 15 days prior to the date of the meeting (including the date of the meeting of the judicial council, the draft agenda of the meeting and the preparatory material, which, according to the draft agenda, are to be discussed by the judicial council) and after the meeting, the adopted resolution of the judicial council, the minutes of the vote, the minutes of the meeting of the judicial council and the audio recording of the meeting of the judicial council shall further be published on its website (Section 6 'Meeting of the Judicial Council' of the Act 185/2002 on the Judicial Council of the Slovak Republic).

68 For instance, in **Lithuania,** meetings of the council are public, unless the judicial council adopts a resolution to hold the meeting or a part thereof closed, for instance to ensure the confidentiality of pre-trial investigation data, to protect information about a person's private life or other information the protection of which is regulated by law (see Article 121 of the Law on Courts and Regulation on the work of the Judicial Council of 24 February 2017); in **Hungary**, council meetings are open for all judges, except for situations where closed session is required by law or to ensure protection of privacy rights (Article 106 Law on the Organisation and Administration of Courts); in **Slovakia**, judicial council meetings are held in public and resolutions are adopted by a majority of its members.

69 *Ibid.*, para. 64.

70 See e.g., CCJE, *Opinion No. 24 (2021): Evolution of the Councils for the Judiciary and their role in independent and impartial judicial systems*, paras. 40-47. See also Venice Commission, *Opinion on the Draft Law on the High Judicial and Prosecutorial Council of Bosnia and Herzegovina* (2014), CDL-AD(2014)008, para 72.

71 See the ENCJ Compendium on Councils for the Judiciary, adopted in Vilnius on 29 October 2021. p. 9.

72 See e.g., CCJE, *Opinion No. 24 (2021): Evolution of the Councils for the Judiciary and their role in independent and impartial judicial systems*, para. 42. See also ODIHR, *Opinion on Draft Amendments Relating to the Appointment of Supreme Court Judges of Georgia* (2019), paras. 56-57.

that following a decision of the High Council of Justice, the authority to determine the composition of a bench at the first instance courts is granted to chairpersons of the courts. For reviewing the cases by panels at the appellate courts and the Supreme Court, the electronic software is used to allocate a case to a chair/presiding judge of a hearing.

37. At the outset, it is important to underline that the wording "*established by law*" in Article 14 of the ICCPR and in Article 6 of the ECHR covers not only the legal basis for the very existence of a "tribunal" but also the composition of the bench in each case, including the circumstances for the replacement of judges.[73] The CoE Committee of Ministers' *Recommendation CM/Rec (2010) 12 on Judges: Independence, Efficiency and Responsibilities* underlines that the allocation of cases within a court should follow objective pre-established criteria in order to safeguard the right to an independent and impartial judge.[74] In its Opinion no. 21, the CCJE noted in this respect that in systems where corruption "*has not been an issue"* a *'softer'"* approach to case allocation which gives court presidents some discretion to allocate cases, for example to ensure a fair distribution of workload *"is perfectly legitimate as long as the chosen system ensures in practice the fair and time-efficient administration of justice, and thus enhances public confidence in the integrity of the judiciary*".[75] The ODIHR Kyiv Recommendations also emphasize that *"[a]dministrative decisions which may affect substantive adjudication should not be within the exclusive competence of court chairpersons*", noting that "*case assignment, […] should be either random or on the basis of predetermined, clear and objective criteria determined by a board of judges of the court*" and *"[o]nce adopted, a distribution mechanism may not be interfered with*".[76] In previous opinions, ODIHR specifically raised concerns regarding the powers, in certain countries, of chief judges to approve or influence the composition of a bench of judges.[77]

38. Among others, the World Bank views random assignment of cases, based on clearly defined and published objective criteria, as an internationally recognized good practice for courts and notes its wide use in countries in Europe and Central Asia.[78] It credits random case assignment with ensuring objectivity in case allocation and reassuring the public, as well as limiting opportunities for parties and sources inside the court to engage in "*judge shopping*", i.e. efforts to get the case assigned to a judge who may be, or perceived to be, more favourable to one of the parties.[79]

39. It is noteworthy that the above international and regional standards and recommendations stop short of requiring random case assignment and allow for accommodation of other systems, provided that the allocation of cases follows "*objective pre-established criteria*". The Council of Europe's explanatory memorandum to Recommendation CM/Rec (2010) 12 clarifies that "*[t]here are various systems for the distribution of cases*

73 See ODIHR, *Legal Digest of International Fair Trial Rights* (2012), Sub-Section 3.1.2. See also e.g., ECtHR, *Posokhov v Russia*, no. 63486/00, 4 March 2003, para 39.

74 See Council of Europe Committee of Ministers, *Recommendation CM/Rec(2010)12 on Judges: Independence, Efficiency and Responsibilities*, para. 24. See also, for reference, CoE Recommendation (94)12 Principle I.2.(e) and (f), which notes that: "*[t]he distribution of cases should not be influenced by the wishes of any party to a case or any person concerned with the results of the case. Such distribution may, for instance, be made by drawing of lots or a system for automatic distribution according to alphabetic order of some similar system.*" … and that "*[a] case should not be withdrawn from a particular judge without valid reasons, such as cases of serious illness or conflict of interests. Any such reasons and the procedures for such withdrawal should be provided for by law and may not be influenced by any interest of the government or administration. A decision to withdraw a case from a judge should be taken by an authority which enjoys the same judicial independence as judges*."

75 CCJE Opinion no. 21 (2018), Preventing Corruption Among Judges, paras. 41-43.

76 See *2010 ODIHR Kyiv Recommendations on Judicial Independence*, para. 12.

77 See e.g., ODIHR, *Opinion on the Laws on Courts, on Judicial Administration and on the Legal Status of Judges of Mongolia*, 3 March 2020, para. 170. See also, Organisation for Economic Co-operation and Development (OECD), "*Anti-corruption reforms in Mongolia – Report on the 4th round of monitoring of the Istanbul Anti-Corruption Action Plan"* (2019), pp. 15-16 and Recommendation 11.

78 See Good Practices for Courts: Helpful Elements for Good Court Performance and the World Bank's Quality of Judicial Process Indicators, The World Bank, 2016. According to the World Bank, "*there are no economies in which assignment of cases is not random in the OECD high-income and Europe and Central Asia regions*", p. 30.

79 *Ibid*., pp. 30-31.

on the basis of objective, pre-established criteria. These include, inter alia, the drawing of lots, distribution in accordance with alphabetical order of the names of judges or by assigning cases to divisions of courts in an order specified in advance ("automatic distribution") or the sharing of cases among judges by decision of court presidents. What is important is that the actual distribution is not subject to external or internal influence and is not designed to benefit any of the parties."[80] Allocation criteria could also include rotation in cycles, a party's last names, local court districts, specializations, categories of cases, amongst others.[81] In any case, the general rules, including exceptions, should be clearly formulated by law or special regulations.[82]

40. A number of considerations may be taken into account when devising a case assignment system, which should be clearly established in relevant legislation or regulations, including the need to ensure a fair distribution of work among judges, the complexity of a case (which may require participation of judges who are expert or specialized in that area), the need to ensure that newly appointed judges are part of a panel with more experienced judges for a certain period of time, the need to ensure that senior judges sit in the panel when giving a principled ruling on a complex or landmark case, the possible urgent nature of a case and the need to ensure that cases are heard within a reasonable time, or the importance of a case in political and social terms, the possible sickness or leave of absence of a judge, etc.[83] In addition, since the random allocation of cases does not prevent conflicts of interest arising, it is essential for the "*judiciary to have robust rules in place on recusal and self-recusal of judges in the event of an apparent or even only potential bias in a given case*".[84] Hence, re-assignment criteria are required to address the situations when judges have, or appear to have, an interest in a case, or may appear otherwise prejudiced.

41. Any exception to the system of random or automatic case assignment should not be misused to circumvent such a system.[85] Hence, it is essential that the criteria for deciding upon such exceptions and further re-assignment should be defined in advance and be objective.[86] Any re-assignment should take place based on objective and transparent

80 Council of Europe's Committee of Ministers, *Recommendation CM/Rec(2010)12 on "Judges: independence, efficiency and responsibilities", Explanatory Memorandum*, para. 32.

81 CCJE Opinion no. 21 (2018), Preventing Corruption Among Judges, paras. 41-43.

82 See Venice Commission, *Opinion on Act CLXII of 2011 on the Legal Status and Remuneration of Judges and Act CLXI of 2011 on the Organisation and Administration of Courts of Hungary*, CDL-AD(2012)001, para. 91, which provides that allocation criteria could include "…alphabetical order, on the basis of a computerised system or on the basis of objective criteria such as categories of cases. The general rules (including exceptions) should be formulated by the law or by special regulations on the basis of the law, e.g. in court regulations laid down by the presidium or […] president.". See also Venice Commission, *Opinion on the law on administrative courts and the law on the entry into force of the law on administrative courts and certain transitional rules of Hungary*, CDL-AD(2019)004, paras. 107-108; *Opinion on Draft amendments to Laws on the Judiciary of Serbia*, CDL-AD(2013)005, para. 39; and *Joint Opinion on the constitutional law on the judicial system and status of judges of Kazakhstan*, CDL-AD(2011)012, para. 27.

83 See e.g., ODIHR, Opinion on the Laws on Courts, on Judicial Administration and on the Legal Status of Judges of Mongolia, 3 March 2020, para. 179. See also Venice Commission, *Opinion on Act CLXII of 2011 on the Legal Status and Remuneration of Judges and Act CLXI of 2011 on the Organisation and Administration of Courts of Hungary*, CDL-AD(2012)001, para. 91. See also Venice Commission, *Opinion on the law on administrative courts and the law on the entry into force of the law on administrative courts and certain transitional rules of Hungary*, CDL-AD(2019)004, paras. 107-108; *Opinion on Draft amendments to Laws on the Judiciary of Serbia*, CDL-AD(2013)005, para. 39; and *Joint Opinion on the constitutional law on the judicial system and status of judges of Kazakhstan*, CDL-AD(2011)012, para. 27. See also e.g., Fabri, Marco, and Philip M. Langbroek. 'Is There a Right Judge for Each Case? A Comparative Study of Case Assignment in Six European Countries.' European Journal of Legal Studies, 1 (2007): 292.

84 CCJE Opinion no. 21 (2018), Preventing Corruption Among Judges, paras. 41-43.

85 See e.g., Venice Commission, *Joint opinion on the law on the judicial system and the status of judges of Ukraine*, CDL-AD(2010)026, para. 13, which emphasizes that "…*it should be made sure that specialisation of judges cannot be used to circumvent the system of random case assignment* […]."

86 Venice Commission, *Opinion on Act CLXII of 2011 on the Legal Status and Remuneration of Judges and Act CLXI of 2011 on the Organisation and Administration of Courts of Hungary*, CDL-AD(2012)001, para. 91. See also Venice Commission, *Opinion on the law on administrative courts and the law on the entry into force of the law on administrative courts and certain transitional rules of Hungary*, CDL-AD(2019)004, paras. 107-108; *Opinion on Draft amendments to Laws on the Judiciary of Serbia*, CDL-AD(2013)005, para. 39; and *Joint Opinion on the constitutional law on the judicial system and status of judges of Kazakhstan*, CDL-AD(2011)012, para. 27.

rules, be tracked, and accompanied by a justification with a reference to who made the re-assignment.[87]

42. In light of the above, to protect external and internal judicial independence, **it is important to ensure that case assignment and the composition of the bench hearing individual cases cannot be influenced in any manner, and that it should therefore be either random or organized based on predetermined, clear, transparent and objective criteria. In principle, the general rules on allocation of cases to individual judges and composition of the bench, including exceptions, should be formulated by the law or by special regulations on the basis of the law, based on such criteria.**

43. Case allocation can thus be either done electronically or based on a manual case allocation scheme elaborated within the court system. In addition to ensuring a transparent process, a proper framework for case allocation is also an important factor to fight corruption in the judiciary and to prevent manipulation of the system, contributing positively to the reputation of the judiciary and to fostering greater public trust in the judicial system.[88] If the court presidents/presiding judges have the power to influence the assignment of cases among the individual judges or panels and/or the composition of the respective bench/panels, this puts into question the transparent and objective case assignment mechanism that is supposed to prevent undue internal or external interferences. This could be misused as a means of putting pressure on judges by overburdening them with cases or by assigning them only certain specific cases, which may ultimately be a very effective way of influencing the outcome of the process. This may also create disparities across the country in terms of the handling of individual cases, and potential for corrupt practices due to case assignment systems that may be more easily manipulated. **Proper, objective and pre-determined criteria, rules and procedures regarding the allocation of cases and composition of benches/panels, including clear and transparent criteria and rules regarding exceptions, will render external or internal interference more difficult**.[89]

44. Throughout the OSCE region, different systems exist for the purpose of case allocation and determination of the composition of bench/panels of judges.

45. In **Croatia**, for example, cases are assigned to judges randomly by automatic system. If there is no such system in the particular court, cases are assigned by alphabetic order. The president of the court can only decide to stop assignation of cases if there are justified reasons for such a decision (i.e. sickness, judge dealing with huge and complex cases etc.).[90] In **Bulgaria**, cases are assigned to judges at random by automatic computer system. Presidents of courts do not have a possibility to assign cases. A case may be re-assigned to another judge only if the judge who had received it excludes himself/herself because their participation is inadmissible on grounds provided in law. In that case the re-assignment is carried out again by the automatic computer system at random. In **Spain**, the procedure for assigning cases to judges is verified in accordance with the filing standards, approved by the respective governing bodies of the appellate court and the Supreme Court. These standards are published. There is no discretionary power of the president of the court in this procedure. In **Moldova**, all the cases from the courts are assigned to judges randomly by an automatic system. If there are some incompatibilities, the responsible judge has to inform the president of the court upon which an order is

87 See e.g., ODIHR, *Opinion on the Laws on Courts, on Judicial Administration and on the Legal Status of Judges of Mongolia*, 3 March 2020, pp. 30 – 31.

88 See CCJE Opinion no. 21 (2018), Preventing Corruption Among Judges, paras. 41-43. See also OECD (2022), *Anti-Corruption Reforms in Georgia: Pilot 5th Round of Monitoring Under the OECD Istanbul Anti-Corruption Action Plan*, pp. 68-69.

89 See e.g., ODIHR, *Opinion on the Laws on Courts, on Judicial Administration and on the Legal Status of Judges of Mongolia*, 3 March 2020, para. 178.

90 Information in the following paragraphs is based on country replies to the CCJE survey on the role of court presidents, Croatia, under point 2.7. As the survey was undertaken in 2016, this information does not reflect more recent developments

prepared in which the incompatibility reasons are described. The case is assigned randomly to another judge using the automatic system. The re-assignment procedure of cases does not fall under the competence of the president of the court.

46. In **Germany**, each case is assigned to a judge, or to a panel, based on pre-established criteria. An independent body, the presiding council, consisting of judges elected by their peers, decides on a general yearly plan the assignment of cases in order to avoid arbitrary assignments. Due to the constitutional principle of the "legal judge" it is never admissible to retrieve a single case from a judge and re-assign it. Presidents can initiate to retrieve a case only in exceptional circumstances (e.g. if, unexpectedly, the workload of one panel exceeds that of other panels). The presiding council (Präsidium) is responsible for such a reassignment. In **Italy**, the assignment of cases must be objectively regulated by the court president according to pre-established rules that are submitted to the judges and lawyers, and approved by the Council for the Judiciary based on the opinion of local councils. Once such regulations ("tabelle") are in force, the president has no discretion. The regulations also provide for substitution of judges who are absent or abstaining or disqualified from dealing with an individual case. In **the Netherlands**, decisions on the internal organization are taken by the court's management board, but the law sets the limit of maximum five court divisions.[91] Further, the head of a section or the person in charge of the court schedule can re-assign cases, for example in case a judge is ill or no longer in function. In **France**, the power to assign judges to the services of the court belongs to the president of the court, after consulting the general assembly of magistrates. Court presidents have the discretion to change internal organization. Generally, court systems have some kinds of specialization, with the number and the subject matter of specialised units established within courts depending *inter alia* on the court level, size, and the geographic area served by the court; in general, once the case has been assigned on the basis of subject-matter, then there is a random case assignment on the basis of various criteria, including judges' caseload.[92]

47. One way of addressing the issue of judges' caseload is by developing a case-weighting system, which indicates how cases relate to each other in terms of complexity. A study published by the Council of Europe's Commission for the Efficiency of Justice (CEPEJ) in 2020 draws on the experience of several European countries and the United States in developing case-weighting systems.[93] Case-weighting may also be used for purposes other than case assignment, such as determining court needs in terms of judicial and non-judicial staff, budgeting, setting up productivity quotas for judges, assessments of court performance, etc.

48. The CEPEJ study describes the two most common methods of developing a case-weighting system. The first method (known as "the Delphi method") relies on retrospective self-reports on the time involved in dealing with different types of cases, provided in response to structured questions. After these responses are aggregated, they may also be discussed in group settings to reach a consensus. The second method (called a "time-study") involves an empirical assessment based on real-time and continuous self-documentation of the duration of each activity, measured by each participant individually in a time-log form. The time-study method is more resource-intensive and time-consuming but results in more accurate and in-depth data. For example, in **Estonia**, one

91 Fabri, Marco, and Philip M. Langbroek. 'Is There a Right Judge for Each Case? A Comparative Study of Case Assignment in Six European Countries.' European Journal of Legal Studies, 1 (2007): 292, pp. 299 – 300.

92 See e.g., the comparative overview of case assignment systems in France, the Netherlands, Italy, England and Wales, Germany and Denmark, in Fabri, Marco, and Philip M. Langbroek. 'Is There a Right Judge for Each Case? A Comparative Study of Case Assignment in Six European Countries.' European Journal of Legal Studies, 1 (2007): 292, pp. 304 – 305. See also e.g., Recommendation CM/Rec(2010)12, Explanatory Memorandum, para. 32: "*Caseload and overburdening are valid reasons for the distribution or removal of cases provided such decisions are taken on the basis of objective criteria*".

93 European Commission for the Efficiency of Justice, *Study no. 28, 'Case weighting in judicial systems'*, CEPEJ, July 2020.

of the countries where a case-weighting system is used for the purposes of case assignment, working groups of judges first assessed the time needed to solve different types of civil, criminal, and administrative cases and identified the factors affecting case complexity. The factors identified by these working groups were then researched using a time study that lasted for one and a half years, during which judges filled in timecards for each case solved. At the end of the process, three different case-weighting scales were adopted: for administrative, civil, and criminal matters.[94]

5. DESIGNATION OF PRESIDENTS OF COURTS/SECTIONS/CHAMBERS

49. The third issue raised in the request for a Note relates to the modalities of designating presidents of courts/sections/chambers.

50. CCJE Opinion No. 19 on the Role of Court Presidents notes that "*the procedures for the appointment of presidents of courts should follow the same path as that for the selection and appointment of judges in general, including a process of evaluation of the candidates by the independent body having the authority to select and/or appoint judges based on pre-established objective criteria to ensure that their selection is based on merits, while ensuring that the candidates also demonstrate some managerial competences*."[95] The CCJE further notes that "*irrespective of the existing rules of procedures and what bodies are empowered to decide which candidate will take on the position of court president, what is essential is that the best candidate is selected and/or appointed*."[96]

51. The UN Special Rapporteur on the independence of judges and lawyers generally recommends that states consider "*introducing a system whereby court chairpersons are elected by the judges of their respective courts*"[97] to limit the risk of having internal judicial hierarchy jeopardize the individual independence of judges. The ODIHR Kyiv Recommendations underline the importance of ensuring the transparent and independent selection of court chairpersons, noting that "*a good option is to have the judges of the particular court elect the court chairperson*".[98] The Venice Commission has highlighted the need "*to ensure that court presidents cannot be appointed and dismissed without the significant involvement of the judicial community*"[99] and that the system of "*election of court presidents by the judges of the same court by secret ballot is in line with the requirements of the principle of internal independence of the judiciary* […]."[100] Where the power to appoint the presidents of courts is with the judicial council, "*general assemblies of judges could receive at least the exclusive power to nominate candidates for the subsequent approval by the judicial council*".[101] More generally, it is acknowledged that some form of involvement of the judges of the court in question is recommended, for instance in the form of a binding or advisory vote.[102] In the context of Georgia, the Venice Commission specifically stated that "*the appointment of court*

94 *Ibid.*, pp. 23-26.
95 CCJE, *Opinion No.19 (2019) on the Role of Court Presidents*, para. 38.
96 CCJE, *Opinion No.19 (2019) on the Role of Court Presidents*, para. 39.
97 United Nations, *Report of the Special Rapporteur on the independence of judges and lawyers*, Leandro Despouy, A/HRC/11/41, 24 March 2009, para. 49.
98 See *2010 ODIHR Kyiv Recommendations on Judicial Independence*, para. 16.
99 CDL-PI(2020)002 Joint Urgent Opinion of the Venice Commission and the Directorate General of Human Rights and Rule of Law of the Council of Europe, on the amendments to the Law on Courts, the Law on the Supreme Court, and some other laws. See also CDL-AD(2017)031, Poland – Opinion on the draft act amending the Act on the National Council of the Judiciary, on the draft act amending the Act on the Supreme Court, proposed by the President of Poland, and on the Act on the Organisation of Ordinary Courts
100 See e.g., Venice Commission and the Directorate of Human Rights (DHR) of the Directorate of Human Rights and the Rule of Law (DGI) of the Council of Europe, *Joint Opinion on the draft Law on Amendments to the Organic Law on General Courts of Georgia*, CDL-AD(2014)031, paras. 84 and 90. See also Venice Commission, *Report on the Independence of the Judicial System, Part I*, paras. 68 et seq. See also Venice Commission, *Opinion on the Judicial System Act of Bulgaria*, CDL-AD(2017)018, 9 October 2017, para 81.
101 See e.g., Venice Commission, *Opinion on the Judicial System Act of Bulgaria*, CDL-AD(2017)018, 9 October 2017, para 81.
102 See e.g., CCJE, *Opinion No.19 (2019) on the Role of Court Presidents*, para. 39.

presidents by the judges of the same court ensures a better guarantee for the independence compared to the current system where court presidents are appointed by the High Council of Justice."[103]

52. Generally, the guarantees built into the selection or appointment or election processes of court presidents should address two threats: on the one hand, political interference (from the executive and legislative branches) that would jeopardise external independence of the judiciary; and on the other hand, undue internal influence from within the judiciary that would carry the risk of corporatism.

53. The manner in which court chairpersons are selected, appointed or elected varies greatly among OSCE participating States.

54. Currently, in Europe, judicial councils are typically involved in the appointment of court presidents either by electing court leadership (for example in **Slovenia**,[104] **Serbia**,[105] **Bulgaria**[106]), by proposing candidates for senior positions (**Romania**,[107] **Slovakia**,[108] **Spain)**,[109] or, by expressing opinions on their appointment and dismissal (see e.g., in **Poland**).[110] In **Hungary**, the judicial council's involvement in the appointment procedure is more restricted[111] and an important role is attached to the opinion provided by a reviewing board consisting of peers at the level corresponding to the applicant, which will then decide on supporting candidacy by secret vote of the majority.[112] In **Iceland**, judges elect court presidents from among their ranks by simple majority at the district courts and at the Land Court.[113] Similarly, in **Ukraine**, assembly of judges at the

103 See e.g., Venice Commission and the Directorate of Human Rights (DHR) of the Directorate of Human Rights and the Rule of Law (DGI) of the Council of Europe, *Joint Opinion on the draft Law on Amendments to the Organic Law on General Courts of Georgia*, CDL-AD(2014)031, para. 90.

104 See Article 28 of the Slovenian Courts Act. This does not apply for the President of the Supreme Court.

105 Serbia's High Judicial Council adopted a '*Rulebook on Criteria and Standards for evaluation of expertise, competence and worthiness for the election of judges with permanent tenure to another or higher court and on criteria for proposing candidates for court presidents'*, which assigns the thorough assessment of candidates to a committee composed by three elected judges of the High Judicial Council. The committee checks the submitted applications and determine their permissibility, completeness and timeliness; obtains the evaluation performance grade; grades the program of work of the candidate; interviews the candidates for court president and, finally, makes a preliminary list of candidates which shall then be submitted to the Council. (Article 11) The Committee of the High Judicial Council shall evaluate the competence of the candidates for management and organization of work in courts on the basis of the program of work and the interview with candidates. (Article 13).

106 In Bulgaria, all Presidents of courts - except Presidents of the Supreme Court of Cassation and Supreme Administrative Court - shall be elected by the Supreme Judicial Council. It is also in charge of their removal following special procedure (including disciplinary proceedings); see the *Rules on the Organization of the activities of the Supreme Judicial Council and its Administration*, Article 10(4)

107 In Romania, the assignment of President and Vice-president positions in courts of appeal, second jurisdiction and specialized jurisdiction and first instance court is made only through open competition or organized exam, held anytime necessary by the superior Council of Magistrates through the National Institute of Magistrates. Thereby, an examination board is appointed by the Superior Council of Magistracy, at the proposal of the National Institute of Magistracy, which consists of two judges from the High Court of Cassation and Justice, 2 judges from the courts of appeal and three specialists in management and institutional organization (ideally judges who have attended management courses). The Superior Council of Magistracy validates the outcome of the contest or the examination and appoints the judges to the management positions; see the Law 317/2004 on the Superior Council of Magistracy.

108 See Article 141a of the Slovak Constitution.

109 See Section 123 of the Spanish Constitution: The President of the Supreme Court is appointed by the King on the proposal of the Council.

110 Article 3 of Act on the National Council of the Judiciary.

111 The Judicial Council has the right to consent to the appointment of court leaders who did not receive the approval of the reviewing board, decide on the repeated appointment of certain court leaders, if the office has already been filled by the applicant two times (Article 39(4) of the Law on the Status of Judges, and form a preliminary opinion on an application for a court leader position if the President of the National Office for the Judiciary or the President of the Curia would like to defer from the majority opinion of the body that has formed an opinion on the appointment (Article 132(6)).

112 See Law 161 of 2011 on the Organisation and Administration of Courts. Article 131(1) states: An opinion is provided on the applicants by means of a secret ballot by: - the full session of the Curia (in the case of the vice-president of the Curia and the head of the collegiums), the meeting of all judges at the appropriate level (in the case of the president, vice-president and head of collegium at the regional court of appeal, and court of appeal as well as the president, deputy president and head of the tribunal). the collegium of the appropriate level and case (in the case of the deputy head of collegium of the Curia, regional court of appeal and court of appeal, and the team leader and deputy team leader of the court of appeal), the regional college for public administration and labor (in the case of the head and deputy head of collegium for the regional college for public administration and labor), the assembly of judges (in the case of the president and deputy president of the administrative and labor court, the district court and the district court), the appropriate group (in the case of the administrative and labor court, district court and district court group leader or deputy group leader). If the President of the National Judicial Office or the President of the Curia wishes to appoint a candidate that has not received the majority approval of the relevant review board, the appointment may only go ahead if the National Judicial Council approves.

113 Articles 22 and 31 of the Courts Act no. 50 of 2006.

corresponding court elect the chief judge and their deputy at local courts, the chief judge and their deputies at the appellate courts and highly specialized courts, with secret ballot and with a majority of judges.[114] In **Estonia**, Articles 12, 20 and 24 of the Estonian Courts Act provide for the election of chairpersons of country courts, administrative courts and circuit courts from among the judges of the respective court for five years, following which the Minister of Justice appoints the chairperson of a court after having considered the opinion of the full court.[115]

55. In light of the foregoing, **the procedures for selecting, appointing or electing court president should seek to ensure independence from the executive and legislative branches but also from within the judiciary, and more generally seek to avoid politicization of the said procedures.[116] It is generally considered as a good practice to have the court president designated by the assembly of judges of the particular court or at least to involve the assembly of judges in the process**.

6. Status and Privileges, Including Reduction of Caseload, of Judges Holding Administrative Positions

56. The fourth issue relates to the status and privileges of judges holding administrative or managerial positions within the judiciary.

57. Regarding court presidents, the CCJE considers it very important that, after appointment, they continue to perform as judges in order "*to ensure their continuing professionalism and maintaining contact with other judges in accordance with the principle of primus inter pares, but also to best fulfil their organisational role through direct awareness of issues arising in daily practice*".[117] The CCJE acknowledges however that *"[t]he caseload of court presidents may be reduced having regard to their managerial tasks*".[118]

58. Regarding the members and chairperson of judicial councils, in general, there are no uniform established principles set at the international or regional levels concerning their status and privileges, which are matters left to the discretion of states.[119] At the same time, it is generally considered that full-time membership (for at least a number of members) could assist the judicial council to work as a professional and effective organisation, and, in any case, members of judicial council should be allocated enough time and be properly resourced to fulfil the position.[120] It is important, however, that the mandate of judicial members of the council serving full time is not too long to avoid detachment from the judiciary or the perception that the Council is ruled by a clique of

114 Article 20 of the Law of Ukraine on the Judiciary and the Status of Judges: "*(4) The Chief Judge of the local court, his Deputy, Chief Judge of the appellate court, his Deputies, Chief Judge of the high specialized court and his Deputies may be dismissed ahead of time at the initiative of at least one third of all the judges of the respective court, by secret ballot of at least two-thirds of the judges of this court. (5) The grounds for dismissing a judge from administrative office is his/her application or continuous unsatisfactory discharge of duties of Chief Judge, Deputy Chief Judge respectively, systematic or gross one-time violation of law while discharging the duties*."

115 Articles 12, 20 and 24 of the Estonian Courts Act of 2002 (last amended in 2021).

116 See e.g., Venice Commission, *Opinion on The draft act amending the Act on the national council of the judiciary, on the Draft act amending the Act on the Supreme Court, proposed by the President of Poland, and on the Act on the Organization of Ordinary courts, Poland*, CDL-AD(2017)031, paras. 71-72, where the Venice Commission noted that *"[t]he borderline between internal and external independence may become blurred when the appointment of court presidents is politicized. […] [h]ow those presidents are appointed, dismissed, etc., i.e. whether they themselves enjoy sufficient independence from the executive and the legislature is of great importance to safeguard the independence of the judiciary in general*".

117 See e.g., CCJE, *Opinion No.19 (2019) on the Role of Court Presidents*, para. 15.

118 See e.g., CCJE, *Opinion No.19 (2019) on the Role of Court Presidents*, para. 15.

119 See e.g., United Nations, *Report of the Special Rapporteur on the independence of judges and lawyers*, A/HRC/38/38, 2 May 2018, para. 82.

120 ENCJ, *Compendium on Councils for the Judiciary* (2021), pp. 7-8. See also e.g., Venice Commission, *Opinion on proposals amending the draft law on the amendments to the constitution to strengthen the independence of judges of Ukraine*, CDL-AD(2013)034, para. 43, where the Venice Commission recommended that council members exercise their functions as a full-time profession.

the same judges.[121] To ensure the independence of the judicial council, it is important that the remuneration of its members be commensurate to their position and the workload within the council.[122] It is generally recommended that council members benefit from a salary similar to that of other comparable office-holders.[123] **While it is up to the state to decide whether members of the council should sit as full-time or part-time members, the most fundamental element is to ensure that the status and privileges afforded to the members of judicial council allow them to perform their administrative and managerial tasks while at the same time, not being detached for too long from judicial practice, whilst also being able to get sufficient time to acquire knowledge about the work of the council to make a meaningful contribution**.

59. The status and privileges of judges who hold positions of leadership within the judicial system, such as court presidents and judicial members of judicial councils, significantly vary between countries. Comparative overview of state practices in this respect, such as the survey undertaken by the CCJE,[124] show that court presidents handle varieties of tasks in different European states, which the CCJE grouped into representative, managerial, and jurisdictional. In the first group are functions related to the representation of the court within the judiciary, in relations with other institutions of the legal system such as bar associations and prosecutor's offices, as well as vis-à-vis the media and the general public. Managerial tasks include strategic planning and budgeting, managing court staff and material resources, maintenance of security and court infrastructure, and similar. The CCJE noted a trend towards a wider managerial role of court presidents. Jurisdictional functions of court presidents may include training and promoting consistency of adjudication, monitoring the length of proceedings and judges' caseload, and assessing court performance.

60. As the functions of court presidents and other judges occupying leadership positions in the judiciary differ between jurisdictions, so do their status and privileges. At the same time, it is rather common for judges who serve in leadership positions to receive a higher remuneration than other judges of the same court do, while at the same time having a reduced workload. In national practices, the remuneration and the caseload of court presidents varies substantially between countries, with the most frequent criteria being the level of the court system, the size of the court, and the judge's own seniority.

61. For example, in **Croatia**, court presidents earn about 10 per cent more than their peers do and if the court has more than 20 judges, court presidents do not have the obligation to adjudicate cases. The tasks of court presidents were reported to include recruitment and management of non-judicial court staff, management of court premises, and annual financial planning of court needs. Court presidents' salaries are about 15 per cent higher than those of other judges in the **Czech Republic**, and only presidents of first instance courts participate in adjudication with a reduced caseload, while presidents of higher courts usually do not sit as judges. Court presidents in the Czech Republic prepare annual work plans that determine judges' caseload and duties of non-judicial staff.

62. In **Denmark**, judges earn between 30 per cent (first instance court) and 70 per cent (court of appeal) more than their peers do, and presidents of larger first instance courts and courts of appeal rarely hear cases. Court presidents act as court managers both for non-judicial and judicial staff, within the parameters set by the Danish Court Administration. Remuneration of court presidents in **Estonia** is increased depending on the size of the court: by 15 per cent for courts numbering up to 15 judges, by 25 per cent for courts with

121 ENCJ, *Compendium on Councils for the Judiciary* (2021), p. 8.
122 See e.g., CCJE, *Opinion No. 10 (2007) on the Council for the Judiciary at the service of society*, para. 36. See also ODIHR, *Opinion on the Laws on Courts, on Judicial Administration and on the Legal Status of Judges of Mongolia*, 3 March 2020, para. 61.
123 *Ibid.* 2020 ODIHR Opinion, para. 61.
124 See <Opinion No. 19 on the role of Court Presidents - Consultative Council of European Judges (coe.int)>.

15 to 29 judges, by 35 per cent for courts with 30 to 44 judges, and by 45 per cent for courts with more than 45 judges. Court presidents in Estonia have discretion over their caseload, which they may decrease to the extent necessary to perform their duties as president. Court presidents share managerial responsibilities over budget and staff with court directors. Similar to several other countries, court presidents in **Ireland** decide on their own caseload reduction, but their remuneration is only modestly higher than that of their peers (about 10 per cent). By contrast, in **Hungary**, the law and regulations of the National Office for the Judiciary set specific numerical values both for the remuneration and for the reduction of caseload of court presidents. Presidents of district courts are expected to adjudicate between 20 and 60 days per year and receive remuneration between 25 and 30 per cent higher than their peers (depending on the size of the court). Presidents of regional courts and courts of appeal only have to adjudicate 5 to 10 days per year, while their salary is 50 to 60 per cent higher than the salary of their peers. Court presidents in Hungary have responsibilities for court personnel and finances, judges' schedules, periodic performance assessment of judges, monitoring procedural timelines, and training of judges, among other tasks. Fixed percentages for remuneration are also set in **Moldova**, where court presidents earn 10 to 20 per cent more than other judges of the same courts, while their caseload is reduced by 25 to 50 per cent in first instance courts, by up to 75 per cent for courts of appeal (depending on the size of the court), and by 90 per cent for the president of the Supreme Court. Court presidents in Moldova were reported to have similar responsibilities to their Hungarian counterparts, but they are not involved in performance assessment of judges. In **Slovenia**, where court presidents are paid between 5 and 45 per cent higher than their peers, fixed percentages of caseload reduction were abandoned in 2016 in favour of a more flexible system, where caseload reduction is taken into account during performance evaluation of court presidents.

63. In light of the foregoing, **the status and privileges associated with the exercise of court president positions within the judiciary should be determined based on the scope of the functions and tasks expected in relation to the said leadership position with a view for them to perform their functions in the most proficient, diligent, effective and timely manner, while maintaining a link with judicial practice**.

7. Scope of the System of Verification of Judges' Asset Declarations and Modalities for Strengthening such a System

64. The fifth issue relates to the system of verification of judges' asset declarations, especially as regards the origin of the assets of judges' family members. As a tool for preventing corruption, asset declarations may be used for different purposes, including identifying conflicts of interests, increasing transparency and public trust, and monitoring wealth variations of public officials. The scope of asset declarations may vary depending on these purposes, with wealth monitoring requiring regular declarations of all substantial incomes and assets, and their fluctuations.

65. Article 7.4 of the UN Convention against Corruption (UNCAC) requires States Parties to "*endeavour to adopt, maintain and strengthen systems that promote transparency and prevent conflicts of interest*". Article 8 of the UNCAC further states that a State Party should "*establish measures and systems requiring public officials to make declarations to appropriate authorities regarding, inter alia, their outside activities, employment, investments, assets and substantial gifts or benefits from which a conflict of interest may*

result with respect to their functions as public officials".[125] Generally, declaration forms cover assets, income, liabilities, and expenditures of not only the declarant but also of his/her family members. Otherwise, the declaration system would be ineffective, because assets and interests may be acquired in the name of the family member to avoid disclosure and scrutiny.[126] The definition of the family members depends on the national context and relevant legislation, but should generally cover, spouse or partner of the declarant and persons living in the same household with the declarant and/or having a dependency relation with the declarant such as children and parents.[127] At the same time, disclosure obligations for judges and their family members should be approached in light of the right to respect for private life protected under Article 17 of the ICCPR and Article 8 of the ECHR. Interference with the right to privacy is only acceptable if it is covered by the limitations contained in Article 8 (2) of the ECHR and if it is necessary, proportionate to the aim pursued and applied in a non-discriminatory manner. At the same time, the European Court of Human Rights has considered with regards to judges that "*an audit of assets does not involve an intimate aspect of private conduct that is itself treated as an ethical breach*".[128]

66. Regarding the publication or public disclosure of asset declarations, the Court of Justice of the European Union noted that the "*weighing of the interference resulting from the publication of personal data contained in the declarations of private interest against the objectives of general interest of preventing conflicts of interest and corruption in the public sector involves taking into consideration, inter alia, the fact and the extent of the phenomenon of corruption within the public service of the Member State concerned, so that the result of the weighing up to be carried out of those objectives, on the one hand, and a data subject's rights to respect for private life and to the protection of personal data, on the other, is not necessarily the same for all the Member States*".[129] It further elaborated that "*for the purpose of that balancing exercise, account must be taken inter alia of the fact that the general interest in personal data being published may vary according to the importance of the duties carried out by the declarant, in particular his or her hierarchical position, the extent of the powers of public administration with which he or she may be vested and the powers that he or she has in relation to the commitment and management of public funds*".[130] The publication of those data is particularly sensitive as it may expose the persons concerned to risks of physical attacks, deterioration of assets or other criminal activity, hence the importance of excluding any data that identifies property of the declarants and family members or name-specific information about family members, such as addresses of real estate assets and vehicle registration plate, and the importance of observing the principle of data minimisation.[131] Generally, registers of a judge's assets and income should not be made public unless required by the

125 United Nations Convention against Corruption (UNCAC), adopted 31 October 2003, entered into force 14 December 2005. Georgia ratified the UNCAC on 4 November 2008.
126 See e.g., OECD (2023), *Istanbul Anti-Corruption Action Plan, 5th Round of Monitoring: Guide*, Benchmark 3.4.
127 *Ibid.* OECD (2023), *Istanbul Anti-Corruption Action Plan, 5th Round of Monitoring: Guide*, Benchmark 3.4.
128 See ECtHR, *Xhoxhaj v. Albania*, no. 15227/19, 9 February 2021, para. 362.
129 See Court of Justice of the European Union (CJEU), *OT v. Vyriausioji tarnybinės etikos komisija* [GC], Case C-184/20, 1 August 2022, para. 110.
130 CJEU, *OT v. Vyriausioji tarnybinės etikos komisija* [GC], Case C-184/20, 1 August 2022, para. 111.
131 CJEU, *OT v. Vyriausioji tarnybinės etikos komisija* [GC], Case C-184/20, 1 August 2022, paras. 104 and 115. For instance, in **Moldova**, the National Integrity Agency publishes declarations on its website within 30 days of receipt, but the following information is withheld from publication: the date of birth, identification number, residential address and phone number of the declarant; names and dates of birth, identification numbers, addresses and phone numbers of family members and cohabitating partners; addresses and register numbers of real estate; registration numbers of movable assets; non-deposited cash in national and foreign currencies; bank account numbers; information about jewellery, gemstones, artworks, collectable coins, stamps, weapons; cost of services received; and the declarant's signature; the declarations are stored for 15 years and are verified by the National Integrity Agency.

concrete circumstances, such as justified suspicion of misconduct of the judiciary as a whole in a specific country, which may justify such measures, at least temporarily.[132]

67. The Venice Commission has specifically acknowledged that "*full asset disclosure has proved a valuable weapon in combating corruption*"[133] and that it might "*be appropriate to impose on candidates [for judges of the Supreme Court] the obligation to report not only their own assets, but also the assets of their spouses and children*."[134] The practice varies greatly from country to country as to the scope of judges' asset declarations and whether this covers family members, and what is the definition of a "family member" for the purpose of asset declarations.[135] Generally, the requirement to disclose assets and revenues should be associated with a sanction that is serious enough to serve the purpose of deterrence.[136]

68. For judges' asset declarations to be effective, it is also essential that the body in charge of monitoring and verifying judges' asset declarations has sufficient capacity in terms of human and financial resources as well as powers to carry out its monitoring in a timely fashion. The body in charge of verification of judges' asset declarations should enjoy appropriate safeguards of independence from political influence. Considerations of judicial independence have led some countries to place the responsibility for the verification of declarations on special bodies formed within the judiciary. This approach has its critics, however, who maintain that judicial corporatism and high levels of corruption in some countries render such bodies ineffective. Additionally, the bodies in charge of verification need specialized financial expertise and effective exchange channels of communication with the relevant state agencies, such as tax authorities and registers of immovable assets.[137] Verification bodies also need to have adequate investigative powers and be sufficiently well-resourced in order to carry out on-site inspections. Verification of asset declarations is usually carried out on a random sample of declarers. It is desirable for the sample to be different in each cycle, so that eventually all judges undergo verification.

69. To be effective, it is also important to educate and raise awareness of members of the judiciary both of the risk of conflicts of interest and of the practical application and

132 See e.g., International Association of Judges, *Study on Measures to Promote Integrity and Combat Corruption within the Judiciary* (2016), p. 8.

133 See e.g., Venice Commission, *Opinion on the draft Law on the High Judicial and Prosecutorial Council of Bosnia and Herzegovina*, CDL-AD(2014)008, para. 120.

134 See e.g., Venice Commission, *Georgia - Urgent Opinion on the selection and appointment of Supreme Court judges*, issued pursuant to Article 14a of the Venice Commission's Rules of Procedure on 16 April 2019, CDL-AD(2019)009-e, para. 60.

135 For example, in **Albania**, the law requires public officials to provide asset declarations before starting employment, on periodic basis, after leaving public office, and upon request, with the declaration including the assets of the declaring subject as well as those of spouse and grown children. In **Moldova**, the declarant has to include information about the assets and cash flows of a cohabitating partner and family members; for the purposes of declaration, a "cohabitating partner" is a person who has resided with the declarant for at least half a year and jointly owned, used or disposed of assets during the preceding tax year; "family members" are a spouse, children under 18 years of age, and any person dependant on the declarant. In **Estonia**, the declarant only provides the name and personal identification code or date of birth of the person married to the declarant and of parents and relatives of the declarant in descending line and of persons who have a shared household with the declarant, and their relationship with the declarant, *without including their assets in the declaration;* while declarations are made accessible through a public register, the persons who access declarations must identify themselves by digital identity cards, and declarants have the right to know who accessed their declarations.

136 See e.g., Venice Commission, *Ukraine - Urgent Joint Opinion of the Venice Commission and the Directorate General of Human Rights and Rule of Law (DGI) of the Council of Europe on the legislative situation regarding anti-corruption mechanisms following Decision No. 13-r/2020 of the Constitutional Court of Ukraine*, CDL-PI(2020)018-e, para. 34.

137 For example, in **Albania**, the body in charge it the High Inspectorate of the Declaration and Audit of Assets (HIDAA), which is an independent body in charge of control of assets for all public officials, including judges; the HIDAA inspectors may access information held by banks, telephone companies, immovable property offices and agencies for the legalization of construction, business and licensing registers, the vehicle register, and other institutions; after submission of declarations of assets, a formal check is conducted, to ensure completion of the declaration, then data from the declaration is fed into an electronic system to conduct a plausibility check, which flags grounds for suspicion that income may have been hidden, and the plausibility check is followed by a full audit with respect to randomly selected declarers as well as those occupying high offices; in the course of its fourth evaluation round, the Council of Europe's Group of States against Corruption (GRECO) expressed concerns that the HIDAA did not have sufficient capacity to carry out its monitoring in a timely fashion and had a backlog of verifications;

meaning of relevant laws.[138] In addition, it has been increasingly recognized that in order for declaration systems to be a truly effective tool in relation to the identification of potential or actual conflicts of interest, judges should provide information in such declarations in relation to their outside affiliations and interests, in addition to financial interests.[139] At the same time, disclosure of membership in judicial or other associations should be approached with caution as this information could be misused in some countries to unfairly discriminate against the judge or the association.[140]

8. SAFEGUARDS FOR ENSURING THE INDEPENDENCE OF THE BODY IN CHARGE OF INITIATING DISCIPLINARY CASES AGAINST JUDGES

70. The last issue relates to the modalities of selecting and appointing the body in charge of *initiating* disciplinary cases against judges, and safeguards for ensuring its independence and prevent the risk of corporatism from the selecting and appointing body, a judicial council in this case. In this respect, the comments and considerations made under Section 3 on decision-making within the judicial council are also of relevance to the issue.

71. Various international documents have set out as fundamental guarantees that disciplinary procedures against judges need to be conducted by an independent authority or court and adhere to guarantees of fair trial as well as provide the right to appeal.[141] International recommendations also suggest the establishment of an independent body to initiate disciplinary proceedings, which is separate from the independent body or court which will take the decision relating to the disciplinary liability of a judge, or at least that members who were involved in the investigation do not participate in the adjudication of disciplinary cases.[142] In the case of *Kamenos v. Cyprus*, the ECtHR found that because the same body, or at least the same judges who brought charges against a judge, conducted disciplinary proceedings and ultimately decided to remove the judge from office, the impartiality of the disciplinary body was capable of appearing open to doubt,

138 See e.g., UNODC, *Measures to strengthen integrity among members of the judiciary* (2015), pp. 20-21.
139 *Ibid.*
140 See e.g., International Association of Judges, *Study on Measures to Promote Integrity and Combat Corruption within the Judiciary* (2016), p. 8. See also ODIHR, *Urgent Interim Opinion on the Bill amending the Act on the Organization of Common Courts, the Act on the Supreme Court and Certain Other Acts of Poland (as of 20 December 2019),* 14 January 2020, paras. 65-66, noting that "*the fact of making the information publicly available as contemplated in the Bill would make information about judges' affiliation in any type of non-profit organizations public, which may have a chilling effect on them and other judges wishing to join judges' associations or other types of associations, thus running the risk of unduly limiting their right to freedom of association*".
141 See *the UN Basic Principles on the Independence of the Judiciary*, adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders held at Milan from 26 August to 6 September 1985 and endorsed by General Assembly resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985, paras. 17 and 20. See also Council of Europe's Committee of Ministers, Recommendation CM/Rec(2010)12 on "Judges: independence, efficiency and responsib*ilities",* para. 69, which states that "*disciplinary proceedings should be conducted by an independent authority or a court with all the guarantees of a fair trial and provide the judge with the right to challenge the decision and sanctions*"; the *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], para. 5.1. See further 2010 ODIHR Kyiv Recommendations on Judicial Independence, para. 26, which states that *"[t]here shall be a special independent body (court, commission or council) to adjudicate cases of judicial discipline*". See also e.g., ODIHR, *Note on International Standards and Good practices of disciplinary proceedings against judges* (2018), para. 19, which states "*to ensure inviolability of the judiciary, avoid undue interference from executive and subordination to political exigencies, as well as address dangers of corporatism, disciplinary matters should be dealt with by independent institutions that have a balanced composition*"; and See ECtHR, *Reczkowicz v. Poland*, no. 43447/19, judgment of 22 November 2021
142 Article 61 (3) Law No 115-2016 on the Governance of the Judicial System. See *2010 ODIHR Kyiv Recommendations on Judicial Independence*, para. 26, which specifies that the "*bodies that adjudicate cases of judicial discipline may not also initiate them or have as members persons who can initiate them*". See also CCJE *Opinion no. 3 on the principles and rules governing judges' professional conduct, in particular ethics, incompatible behaviour and impartiality* (2002), paras. 68-69 and 77. See also, ODIHR and 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. 89; and Venice Commission, *Opinion on the Laws on Disciplinary Liability and Evaluation of Judges of the Former Yugoslav Republic of Macedonia*, CDL-AD(2015)042, 21 December 2015, para. 78. See also Venice Commission, *Opinion on the Draft Law on the termination of the validity of the Law on the Council for establishment of facts and initiation of proceedings for determination of accountability for Judges, on Draft Law amending the Law on the Judicial Council, and on the Draft Law amending the Law on Witness protection of "The former Yugoslav Republic of Macedonia"*, CDL-AD(2017)033, para 34.

thus resulting in a violation of Article 6 of the ECHR.[143] This principle is reflected in certain state laws, which prohibit members of disciplinary committees, or who have otherwise been appointed to conduct investigations into a judge from sitting on the case once it has been referred to the disciplinary body.[144]

72. Some standards explicitly provide that the independent authority competent to hear disciplinary cases and to take a decision on disciplinary measures should be composed primarily though not exclusively of judges, or otherwise "*include substantial judicial representation*".[145] In order to prevent allegations of corporatism and guarantee a fair disciplinary procedure, the disciplinary authority could for instance also include members from outside the judicial profession (if such other persons are not members of the legislature, government or administration).[146] Such mixed composition (consisting of a majority of judges, and, for example members of civil society) "*should help ensure transparency, as well as community involvement in disciplinary proceedings, while also averting the risk of judicial corporatism*".[147] Involvement of lay participation in the work of an independent investigatory body, as well as an independent disciplinary body, are both essential to ensure transparency in the disciplinary processes.[148]

73. The ENCJ's Report taking stock of the existing practices of judicial councils shows that there are various disciplinary bodies, including judicial councils or specific disciplinary committees or departments within them, independent national or regional disciplinary boards or committees, heads of courts or the head of the judiciary.[149]

74. Investigations will usually be undertaken by some sort of separate body, board or other institution, at times special independent bodies, that will be responsible for accepting and examining complaints about judges, will review evidence and will then decide whether there is a case against a judge; they may even have the power to initiate disciplinary proceedings against judges *ex officio* or may dismiss vexatious or unsubstantiated claims.[150] At times, the investigation of complaints may also be conducted by a special panel, investigator, rapporteur or committee of inquiry appointed by the body responsible for the administration of disciplinary proceedings.[151] In other countries, a disciplinary

143 See ECtHR, *Kamenos v. Cyprus*, no. 147/07, judgment of 31 October 2017, paras 102-110.

144 See, e.g. **Austria**: Section 112 of the Judges' and Prosecutors' Service Law of 14 December 1961, last amended in 2018; **France**: Article 18 of the Organic Law on the High Council of Magistrates of 5 February 1994, consolidated version of 2019; **Albania**, legislation provides that a member of the judicial council shall not attend the decision-making of a plenary meeting or committees in the event of a decision regarding a disciplinary issue, when the member has submitted with the High Justice Inspector the request, based on which the disciplinary proceeding has been initiated.

145 *Beijing Statement of Principles on the Independence of the Judiciary in the LAWASIA region* (1997), para. 36; See e.g., CCJE, *Opinion No. 10 (2007) on the Council for the Judiciary at the service of society*, paras. 64; and *Opinion No. 3 (2002) on the Principles and Rules Governing Judges' Professional Conduct, in particular Ethics, Incompatible Behaviour and Impartiality*, para. 71. See also the *Universal Charter of the Judge* (1999), Article 11; and *2010 ODIHR Kyiv Recommendations on Judicial Independence*, para. 9.

146 ODIHR, *Note on International Standards and Good practices of disciplinary proceedings against judges* (2018), paras. 19-20, also referring to CCJE, *Opinion No. 3 (2002) on the Principles and Rules Governing Judges' Professional Conduct, in particular Ethics, Incompatible Behaviour and Impartiality*, 19 November 2002, para. 71. See also CCJE: Opinion No. 10 (2007) of 23 November 2007, para. 63.

147 See, for example, ODIHR-Venice Commission- DHR of the Directorate General of Human Rights and Rule of Law of the Council of Europe, *Joint opinion on the draft law on disciplinary liability of judges of the Republic of Moldova*, CDL-AD(2014)006, para. 48.

148 *Istanbul Declaration on Transparency in the judicial process and Measures for the effective implementation of the Istanbul Declaration*, endorsed by Resolution of the UN Economic and Social Council of 23 July 2019, Principle 15.

149 See ENCJ: Development of Minimum Judicial Standards III – Minimum Standards regarding evaluation of professional performance and irremovability of members of the judiciary, Report 2012-2013, p. 20. See also OSCE/ODIHR Note on International Standards and Good practices of disciplinary proceedings against judges (2018) para 21.

150 See e.g. ODIHR, *Note on International Standards and Good practices of disciplinary proceedings against judges* (2018), para. 25. For instance, in **Scotland**: a Judicial Office established by the Scottish Court Service to support the Lord President in his/her non-judicial functions according to Rules 7 and 8 of the Complaints about the Judiciary (Scotland) Rules of 2017, carries out an initial assessment and shall dismiss certain allegations, for instance, due to insufficient information or failure to respect time limits; if a complaint is not dismissed at this stage, it will be referred to the Disciplinary Judge, who will review the complaint and will decide whether the complaint should be further investigated by a judge nominated to do this; the Disciplinary Judge may also decide to dismiss the case if the complaint is vexatious, would not require disciplinary action to be taken, etc.

151 See e.g., in **Austria**: Section 112 of the Judges' and Prosecutors' Service Law of 14 December 1961, last amended in 2018; **England and Wales**: Regulation 10 of the 2014 Judicial Discipline Regulations No. 1919, which speaks of investigating judges appointed by the Lord Chief Justice; **Scotland**: Section 28 of the Judiciary and Courts (Scotland) Act of 29 October 2008, last amended in 2014, specifying that

committee or the judicial inspection unit of the Council for the Judiciary accepts and examines complaints.[152]

75. In the OSCE area, there exists a variety of models for selecting and appointing disciplinary commissioners, inspectors/investigators or other similar bodies in charge of initiating disciplinary cases against judges and investigating the said cases and related facts.[153] The manner in which such disciplinary bodies are established and composed, and the modalities of their selection/appointment, has direct consequences on their independence.[154] The rules on the composition and importance of ensuring the transparency of the selection procedure for investigators in the context of disciplinary proceedings against judges have been underlined by the Venice Commission as a safeguard against undue or illegitimate influence on disciplinary proceedings.[155] The variety of arrangements that can be found in various jurisdictions corresponds to the formats of disciplinary bodies and, where the national council for judiciary is involved, links closely with the composition and appointment processes of the latter. The guarantees of transparency and plurality of views and representativeness play an important role in reducing the risk of political pressure (external independence) and avert internal pressure that may foster judicial corporatism.

9. RECOMMENDATIONS RELATED TO THE PROCESS OF PREPARING AND ADOPTING LAWS ON THE JUDICIARY

76. 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).[156] 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).[157] The Venice Commission's

the Lord President of the Court of Session may adopt rules that, among others, nominate a person to conduct investigations into disciplinary procedures, or parts of such procedures; in **Lithuania**, a Judicial Ethics and Discipline Commission decides whether there are grounds for disciplinary action.

152 See e.g., in **Albania**: Articles 14-15 of the Law on the Organization and Functioning of the High Council of Justice, on the Inspectorate of the High Council of Justice; **Bulgaria:** Article 54 of the Legal Systems Act, on the powers of the Inspectorate of the Supreme Judicial Council; **Croatia**: Article 22 of the Law on the State Judicial Council of 2 June 1993, last amended in 2005, where a disciplinary committee made up of three members of the State Judicial Council appointed by the President of the Council conducts proceedings; **France**: Article 18 of the Organic Law on the High Council of Magistrates of 5 February 1994, consolidated version of 2019; **Spain**: Article 423 of the *Organic Law on the Judiciary* of 1 July 1985, last amended in 2022; **Georgia**, where the law provides for an Independent Inspector established at the High Council of Judges to investigate complaints.

153 For example, in **Bulgaria**, the deputies of the parliament nominate the Inspector General and inspectors, with the interview hearing being open and involving asset declarations, overview of professional qualifications and integrity checks; the parliament elects the Inspector General and each inspector separately, by a majority of two-thirds (Article 64 of the Judiciary System Act of 2007 (last amended in 2018) of Bulgaria); in **Croatia**, Article 12 of the State Judicial Council Act prescribes that disciplinary procedures shall be conducted by a Disciplinary Committee, comprising of three members of the council for the judiciary appointed by the President of the council, unless it is decided that the entire council should conduct the procedure; in **Spain**, the Promoter, who is appointed by the Plenary of the General Council of the Judiciary by an absolute majority vote, will receive the complaints filed against judges, decide on the initiation or discontinuation of the disciplinary proceedings, gather all the information and evidence on the disciplinary liability of the "accused judge" (Article 605 of the Organic Law on the Judiciary of Spain); in **Slovenia**, the judicial council appoints a disciplinary prosecutor and their deputy – who shall be Supreme Court judges - and the disciplinary court by a two-thirds majority vote of all members (Articles 38-40 Judicial Council Act (Official Gazette of the Republic of Slovenia, No. 23/2017)); in **Lithuania**, the Judicial Ethics and Discipline Commission is responsible for investigation and the autonomous Judicial Court of Honour decides on disciplinary matters, with both having a mixed composition and their respective appointment arrangements reflecting balanced composition (the Judicial Ethics and Discipline Commission is composed of seven members: two members of the Commission are appointed by the President of the Republic, one is appointed by the Speaker of the Seimas, four by the Judicial Council (see Regulation of 25 January 2019 on Judicial Ethics and Discipline Commission).

154 *Ibid.* ODIHR, *Note on International Standards and Good practices of disciplinary proceedings against judges* (2018), para. 19.

155 See e.g., Venice Commission, *Amicus Curiae Brief for the Constitutional Court of Moldova on certain provisions of the law on professional integrity testing*, CDL-AD(2014)039-e, para. 22.

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

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

Rule of Law Checklist also emphasizes that the public should have a meaningful opportunity to provide input.[158]

77. With regard to the judiciary's involvement in legal reform affecting its work, international recommendations have stressed "*the importance of judges participating in debates concerning national judicial policy"* and legislative reform concerning their status and the functioning of the judicial system.[159]

78. The preparation of future amendments to the legal framework pertaining to the judiciary should be subjected to legitimate, open and meaningful consultation process, especially with bodies of the judiciary, association of judges or similar bodies, and individual judges, the academia, lawyers' associations as well as with the public or civil society organizations. Moreover, given the potential impact of a future reform of the laws on the independence of the judiciary and the rule of law, it is essential that such reform be preceded by an in-depth research and impact assessment, completed with a proper problem analysis using evidence-based techniques to identify the best efficient and effective regulatory option.[219]

79. It is also key that proper time be allocated for the preparation and adoption of amendments. In that context, both the Government and the Parliament should have sufficient time to review and evaluate the draft amendments, and to take professional account of the opinions of the staff and the relevant committee, and consider the views of judicial stakeholders, civil society organizations and other experts. In principle, adequate time limits should be set prior to the actual drafting exercise, as well as for the proper verification of draft laws and legislative policy for compatibility with international human rights standards, including a gender and diversity impact assessment, at all stages of the law-making process. Furthermore, given the potential substantive changes, sufficient *vacatio legis* should be provided to allow adequate time to implement the proposed reform.

80. In addition, ODIHR would like to refer to its *2019 Recommendations on Gender, Diversity and Justice*[160] as they may serve as useful guidance throughout the judicial reform process in order to ensure the inclusiveness of the justice system in Georgia.

[END OF TEXT]

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

159 See 2010 CCJE Magna Carta of Judges, para. 9, which states that *"[t]he judiciary shall be involved in all decisions which affect the practice of judicial functions (organisation of courts, procedures, other legislation)*"; and ENCJ, *2011 Vilnius Declaration on Challenges and Opportunities for the Judiciary in the Current Economic Climate*, Recommendation 5, which states that *"[j]udiciaries and judges should be involved in the necessary reforms"*.

160 See ODIHR, *Gender, Diversity and Justice: Overview and Recommendations* (2019).