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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW
(VENICE COMMISSION)

MONTENEGRO

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

PROPOSAL**LAW ON AMENDMENTS TO THE LAW ON JUDICIAL COUNCIL AND JUDGES****Article 1**

In the Law on Judicial Council and Judges (Official Gazette of Montenegro 11/15 and 28/15) in Article 16 paragraph 7 the words “as a rule” shall be inserted after the word “Article”.

After paragraph 7 the following new paragraph shall be inserted:

“If the proposal for the election of the members of the Judicial Council referred to in paragraph 6 of this Article contains a smaller number of candidates than the number of the members to be elected, the election procedure shall be repeated for the number of members that were not proposed by the relevant working body of the Parliament.”

Article 2

After Article 139 the following new Article shall be inserted:

“Article 139a

President and members of the Judicial Council whose term of office has expired shall continue performing their duties in the Judicial Council by the time of promulgation of the new composition of the Judicial Council.”

Article 3

This Law shall enter into force on the day of its publication in the “Official Gazette of Montenegro”.

STATEMENT OF REASONS

I CONSTITUTIONAL BASIS FOR THE ADOPTION OF THIS LAW

Constitutional basis for the adoption of the Law on Amendments to the Law on Judicial Council and Judges (Official Gazette of Montenegro 11/15 and 28/15) lies in Article 16 paragraph 1 item 3 of the Constitution of Montenegro. This provision of the Constitution stipulates that the law, in accordance with the Constitution, shall regulate the manner of establishment, organization and competences of the authorities and the procedure before those authorities, if so required for their operation.

II REASONS FOR THE ADOPTION OF THE LAW

The aim of the adoption of the Law on Amendments to the Law on Judicial Council and Judges is to ensure smooth operation of the judicial branch of power and protection of independence and autonomy of courts and judges, which is within the competences of the Judicial Council, as stipulated in Article 126 of the Constitution of Montenegro.

The amendments improve the provisions of the Law that regulate the term of office of the Judicial Council to take into account the potential legal situation that after the expiry of the term of office of the Judicial Council new members are not elected. Thus, the amendments envisage that the President and members of the Judicial Council whose term of office has expired are to continue performing the duties of the members of the Judicial Council until new composition of the Council is promulgated.

Pursuant to the Opinion No 1 (2001) of the Consultative Council of European Judges (CCJE) addressed to the Committee of Ministers of the Council of Europe on standards concerning the Independence of the judiciary and the irremovability of judges, the judiciary is one of the three basic and equal pillars in the modern democratic state.

The right to a fair and public trial before an independent and impartial court established by the law is one of the fundamental civil rights and freedoms guaranteed by Article 32 of the Constitution of Montenegro and Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms. This right is the precondition for exercising almost all other rights and freedoms and as such it must not be either challenged or limited. Not even temporarily in extraordinary circumstances, as envisaged in Article 25 of the Constitution of Montenegro.

The above proposal is in compliance with the standards that the European Convention for the Protection of Human Rights and Fundamental Freedoms stipulates for the duration of the term of office of the judges of the European Court of Human Rights. Article 23 paragraph 7 of the European Convention stipulates that a judge of the European Court of Human Rights remain in the office after the expiry of his/her term of office until he/she is replaced by a new judge.

The basis for the proposed legal solution also lies in the systemic interpretation of the Constitution of Montenegro that establishes the principle of division of powers. This principle would be endangered if one of the branches of power – in this case the judicial one – did not operate. Another basis is the interpretation of Article 110 of Montenegrin Constitution that stipulates that the Government whose term of office has expired continues working until the election of the new Government.

This Law improves the procedure of election of the members of the Judicial Council from among eminent lawyers that are to be elected by the Parliament of Montenegro upon the proposal submitted by the relevant working body of the Parliament. It became obvious that this Article has to be defined more precisely, particularly its part that refers to the proposal for the election of the members of the Judicial Council that is submitted to the Parliament by the relevant working body. The amendments have the following effect: It is not required any longer that all the four members of the Judicial Council that are to be elected from among eminent lawyers have to be elected at the same time. Thus the election of the candidates that have the required majority of votes in the Parliament is not limited by the obligation to ensure that all the members to be elected from among eminent lawyers have to get the required majority of votes at the same time.

III COMPLIANCE WITH EU ACQUIS AND RATIFIED INTERNATIONAL CONVENTIONS

There is no *acquis* that would be relevant for the proposed amendments.

IV EXPLANATION OF THE KEY LEGAL INSTITUTES

Article 1 of the Proposal Law specifies the situation where the proposal for the election of the members of the Judicial Council from among eminent lawyers contains a smaller number of candidates than the number of the members to be elected. The Law proposes that the procedure of election is repeated for such a number of members that were not proposed by the relevant working body of the Parliament.

Article 2 of the Proposal Law adds an Article (139a) into the transitional provisions of the Law. This Article (139a) refers to the term of office of the President and the members of the Judicial Council whose term of office has expired, particularly in the legal situations where after the term of office of the Judicial Council has expired, new members of the Judicial Council are not elected. The proposal is that the President and members of the Judicial Council whose term of office has expired should continue performing their duties until the new composition of the Judicial Council is promulgated.

V FINANCIAL IMPACT ASSESSMENT (ASSESSMENT OF THE OF FUNDS REQUIRED FOR THE IMPLEMENTATION OF THE LAW)

Implementation of the Proposal Law does not require any additional funds from the Budget of Montenegro.

VI REASONS FOR THE ADOPTION OF THE LAW IN THE ABRIDGED PROCEDURE

Pursuant to Article 151 of the Rules of Procedure of the Parliament of Montenegro (Official Gazette of the Republic of Montenegro 51/06 and 66/06 and Official Gazette of Montenegro 88/09, 80/10, 39/11, 25/12, 49/13, 32/14, 42/15, 52/17 and 17/18) and given the fact that the term of office of the members of the Judicial Council expires on 2 July 2018, we are of the opinion that the Proposal Law has to be adopted in the abridged procedure in order to ensure smooth operation of the Judicial Council after the expiry of the term of office of its current composition. This is required to ensure the smooth functioning of the judicial branch of power and protection of independence and autonomy of courts in the case that after the expiry of the term of office of the current members of the Judicial Council new members are not elected.

OVERVIEW OF THE PROVISIONS THAT ARE TO BE AMENDED BY THE LAW

Election of the Judicial Council members from among eminent lawyers

Article 16

A person, who has at least fifteen years of work experience on legal affairs and enjoys personal and professional reputation and was not convicted of criminal offences that render judges unworthy of the exercise of judicial office in accordance with the present Law, may be elected a member of the Judicial Council from among eminent lawyers.

The relevant working body of the Parliament of Montenegro shall launch a public call for the election of a member of the Judicial Council from among eminent lawyers in the Official Gazette of Montenegro and in at least one of the print media based in Montenegro.

The public call for the election of a member of the Judicial Council from among eminent lawyers shall be published by the relevant working body of the Parliament of Montenegro on the website of the Parliament of Montenegro (hereinafter referred to as "the Parliament").

The deadline for applications by candidates shall be 15 days from the launch of the public call.

On the website of the Parliament, the relevant working body of the Parliament shall publish a list of applicants, which shall be available to the public at least ten days after the date of publication.

The relevant working body of the Parliament shall submit the proposal for the election of members of the Judicial Council from among eminent lawyers to the Parliament.

The proposal for the election referred to in paragraph 6 of this Article shall contain the exact number of the candidates that are to be elected as members of the Judicial Council.