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(VENICE COMMISSION)

BOSNIA AND HERZEGOVINA

INTERIM FOLLOW-UP OPINION

TO PREVIOUS OPINIONS ON

**THE DRAFT LAW ON THE
HIGH JUDICIAL AND PROSECUTORIAL COUNCIL**

**Adopted by the Venice Commission
at its 139th Plenary Session
(Venice, 21-22 June 2024)**

On the basis of comments by

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I. Introduction

1. By letter of 10 May 2024, Mr Davor Bunoza, Minister of Justice of Bosnia and Herzegovina requested an Opinion of the Venice Commission on the draft law on the High Judicial and Prosecutorial Council ([CDL-REF\(2024\)023](#), hereinafter the “draft law”).

2. Ms Jana Baricova, Mr James Hamilton, Mr Martin Kuijer and Mr Jørgen Steen Sørensen acted as rapporteurs for this Opinion.

3. On 10 and 11 June 2024, a delegation of the Commission composed of Mr Hamilton, Mr Kuijer and Mr Sørensen, accompanied by Ms Martina Silvestri from the Secretariat, visited Sarajevo and had meetings with the Minister of Justice of Bosnia and Herzegovina (BiH), the Minister of Justice of the Federation of Bosnia and Herzegovina (FBiH), the Minister of Justice of the Republika Srpska (RS), representatives of the parliamentary majority and opposition, representatives of the High Judicial and Prosecutorial Council (HJPC) and its Secretariat, the Associations of judges and the Judicial Association Coordination Body, the Bar Associations, representatives of the international community, as well as with representatives of the civil society. The Commission is grateful to the authorities of Bosnia and Herzegovina and to the Council of Europe Office in Sarajevo for the excellent organisation of this visit.

4. The Venice Commission has adopted several Opinions on the HJPC in Bosnia and Herzegovina, namely, the 2012 Opinion on legal certainty and the independence of the judiciary in Bosnia and Herzegovina,¹ the 2014 Opinion on the draft law on the High Judicial and Prosecutorial Council of Bosnia and Herzegovina² and the 2021 Opinion on the draft law on amendments to the Law on the High Judicial and Prosecutorial Council.³ In this Follow-up Opinion, the Commission will build upon its previous recommendations on the relevant matters.

5. The Venice Commission decided to proceed with the elaboration of an Interim Opinion for two reasons. First, in light of the very limited time available to assess a long and complex draft law, the Commission deems it appropriate to continue its reflection on the matter. Second, the draft law is not yet finalised, since the last chapter on the transitional provisions is still to be drafted. In addition, during the visit in Sarajevo, it appeared that several stakeholders were not properly acquainted with the draft law yet and had received the text only a few days before, if not on the very day of the meeting. In some cases, the text had to be provided by the Secretariat of the Venice Commission. The assessment of the Venice Commission can thus only be of an interim character.

6. This Interim Opinion was prepared in reliance on the English translation of the draft law. The translation may not accurately reflect the original version on all points.

7. This Interim Opinion was drafted on the basis of comments by the rapporteurs and the results of the meetings on 10-11 June 2024. The draft opinion was examined at the meeting of the Sub-Commissions on Democratic Institutions and on Latin America on 20 June 2024. Following an exchange of views with Mr Željko Bogut, Secretary General of the Ministry of Justice of Bosnia and Herzegovina, it was adopted by the Venice Commission at its 139th Plenary Session (Venice, 21-22 June 2024).

¹ Venice Commission, Bosnia and Herzegovina, [CDL-AD\(2012\)014](#), Opinion on legal certainty and the independence of the judiciary in Bosnia and Herzegovina.

² Venice Commission, Bosnia and Herzegovina, [CDL-AD\(2014\)008](#), Opinion on the draft law on the High Judicial and Prosecutorial Council of Bosnia and Herzegovina.

³ Venice Commission, Bosnia and Herzegovina, [CDL-AD\(2021\)015](#), Opinion on the draft law on amendments to the Law on the High Judicial and Prosecutorial Council.

II. Background

8. Following the breakup of Yugoslavia, Bosnia and Herzegovina proclaimed independence in 1992 which was followed by the Bosnian War. In late 1995, a peace agreement (the Dayton Agreement) was signed in which the parties agreed to a single sovereign state known as Bosnia and Herzegovina composed of two Entities, the largely Serb-populated Republika Srpska and the mainly Croat-Bosniak-populated FBiH. Although highly decentralised in essence, Bosnia and Herzegovina would be characterised by a central government, with a rotating State Presidency, a central bank and a constitutional court. Following the conclusion of the Dayton Agreement, various institutional reforms, including judicial reforms, were carried out.

9. The establishment of the High Judicial and Prosecutorial Council (hereinafter, the “HJPC or simply the “Council”) has to be understood against that backdrop as it aims to contribute to the defragmentation and consistency of judicial policy in the whole country. The establishment of the HJPC followed a Transfer Agreement,⁴ whereby the Entities transferred certain powers related to the judiciary to State level. This was an essential step in ensuring an independent judiciary and consolidating the rule of law in BiH. The Law establishing the HJPC was adopted by the BiH Parliament in 2004,⁵ and its constitutionality was confirmed by the Constitutional Court of BiH in 2009.⁶

10. The Law on the HJPC and its actual performance have been assessed by the Venice Commission (and various other international institutions) on numerous occasions.⁷ In its most recent (2021) Opinion, the Venice Commission reiterated the need for a “comprehensive revision of the legal framework under which the HJPC operates”⁸ addressing various issues, encompassing:

“ a) providing the HJPC with a constitutional status; b) establishing two sub councils within the HJPC; c) ensuring the adequate representation in the HJPC of non judicial organs; d) ensuring that judges and prosecutors within the HJPC would not be in the position to outvote each other; e) reconsidering the ethnic quotas in the elections to the HJPC; f) improving the procedure of appointment and appraisal of judges and prosecutors; and g) initiating other reforms necessary for an efficient and impartial operation of the judiciary in the country (fighting the backlog, etc.).”

11. The Commission is aware that the current draft law is strongly linked with the European Union path of Bosnia and Herzegovina. At the outset, the Commission wishes to reiterate that it is not within its mandate to comment on the compatibility of the draft law with EU law.

⁴ Agreement on the Transfer of Certain Entity Responsibilities through the Establishment of the High Judicial and Prosecutorial Council of Bosnia and Herzegovina, Sarajevo, 11 March 2004.

⁵ See Official Gazette of Bosnia and Herzegovina, Law No. 25/04 Coll., as amended.

⁶ Case No. U11/08.

⁷ See Venice Commission, [CDL-AD\(2012\)014](#), *op. cit.*, especially paras. 82 *et seq.*; [CDL-AD\(2014\)008](#), *op. cit.*; and [CDL-AD\(2021\)015](#), *op. cit.*, and the reference therein to other expert reports, namely, COM(2005)529, *Communication from the Commission to the Council on the progress achieved by Bosnia and Herzegovina to negotiate a Stabilization and Association Agreement with the European Union*, Brussels, 21 October 2006; *Expert Report on the Rule of Law Issues in Bosnia and Herzegovina* (Priebe Report), Brussels, 5 December 2019; COM(2019)261, *Commission Opinion on Bosnia and Herzegovina's application for membership of the European Union*, Brussels, 29 May 2019; SWD(2019)222, Commission Staff Working Document, *Analytical Report Accompanying the document Communication from the Commission to the European Parliament and the Council, Commission Opinion on Bosnia and Herzegovina's application for membership of the European Union*, Brussels, 29 May 2019; and SWD(2020)350 final, Commission Staff Working Document, *Bosnia and Herzegovina 2020 Report Accompanying the Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions*, Brussels, 6 October 2020.

⁸ Venice Commission, [CDL-AD\(2021\)015](#), *op. cit.*, para. 28.

III. Analysis

A. Preliminary remarks

12. On a general preliminary note, the Venice Commission welcomes the fact that the current draft law constitutes a comprehensive revision which the Commission recommended previously, and it commends the authorities for their efforts to draft the legislative text in line with best European practices and standards. Yet, the Commission recalls the need to carry out other reforms necessary for an efficient and impartial operation of the judiciary in the country.⁹ This is particularly important given that the draft law is just a piece of a broader system, where the HJPC plays a key role in relation to many other segments of the judiciary, regulated by other Laws. In light of this, it is essential to develop a strategy for an overall reform of the judiciary, identifying what are the priorities and the next steps to be followed for improving the efficiency of the system in a coherent way. The proper sequencing of these reforms is important.¹⁰ A reform should for example avoid transferring additional powers to yet unreformed parts of the judiciary.¹¹

13. In this context, the Commission was informed during the visit in Sarajevo that a national strategy on the reform of the judiciary is being prepared. The Commission invites the authorities to consider what would be the other immediate necessary actions directly related to the draft law, i.e. what other pieces of legislation would require to be harmonised afterwards or possibly in parallel to it. The Commission underlines that it is important to carry out this exercise *prior* to adopting the new draft law. This will help in solving a number of issues in the current draft law, such as references in the text to certain bodies that do not exist yet (e.g., the Appellate Court of Bosnia and Herzegovina) or the need for coordination with other pieces of legislation (e.g., issue of immunity regulated both in the draft law on the HJPC and in the draft Law on Courts).¹² Similarly, it is essential to clarify what will be the status of the new draft law with respect to the current Law and to ensure that the HJPC be provided with a clear legal basis.

14. In this respect, the Commission recalls that, in its previous Opinions,¹³ it has repetitively underlined the importance of providing the HJPC with a constitutional status, which would facilitate the role of the HJPC as the guarantor of the independence of the judiciary of Bosnia and Herzegovina. As this has not happened to date, the Commission reiterates its recommendation on this point.

15. In addition, while the current Law sets forth that the Law establishes the High Judicial and Prosecutorial Council of Bosnia and Herzegovina (Article 1.1), the new draft law is silent in this respect in the sense that it merely presupposes the existence of the Council (Articles 1 and 2). Considering the fact that the HJPC is a crucial institution for the independence of the judiciary, which could easily be put at risk by the interference of other state powers, the Commission considers that any provision of the current Law that could serve the aim of protecting the

⁹ Venice Commission, [CDL-AD\(2021\)015](#), *op. cit.*, para. 28. The reform of the judiciary in BiH should tackle several general issues such as the backlog of pending case, inefficiencies of the system, its fragmentation, lack of safeguards against political influence, etc.

¹⁰ Venice Commission, Ukraine, 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 draft amendments to the Law 'on the Judiciary and the Status of Judges' and certain Laws on the activities of the Supreme Court and Judicial Authorities (draft Law no. 3711), adopted by the Venice Commission at its 124th online Plenary Session (8-9 October 2020), [CDL-AD\(2020\)022](#), para. 80.

¹¹ Venice Commission, Ukraine, Urgent joint opinion of the Venice Commission and the Directorate General of Human Rights and the Rule of Law (DGI) of the Council of Europe on the draft law on amendments to certain legislative acts concerning the procedure for electing (appointing) members of the High Council of Justice (HCJ) and the activities of disciplinary inspectors of the HCJ (Draft law no. 5068), [CDL-AD\(2021\)018](#), para. 14.

¹² Venice Commission, Bosnia and Herzegovina, Opinion on the draft law on Courts of Bosnia and Herzegovina, [CDL-AD\(2023\)003](#), para. 23.

¹³ Venice Commission, [CDL-AD\(2012\)014](#), *op. cit.*, para. 84; [CDL-AD\(2014\)008](#), *op. cit.*, paras. 24 and 127.

autonomy and independence of the institution should be repeated in the draft law and not be considered implicit.

16. The same reasoning would apply also to Article 1.3 of the current Law, stipulating the non-application of the provisions of the Law on Ministries and Other Bodies of the Administration of Bosnia and Herzegovina and the Law on Administration of Bosnia and Herzegovina to the (Secretariat of the) HJPC, in order to protect the *sui generis* nature of the HJPC as a self-government body. The draft Law does not contain anymore this exemption and it deprives *de facto* the HJPC of a formal protection against the application of these laws, opening the way to other possible interpretations. As several external observers have noticed,¹⁴ the Law on Administration in particular, if applied to the HJPC, would put the administration of the courts to a certain extent¹⁵ under the control of the executive and legislative powers of the state. The Venice Commission considers that it is of utmost importance that the Council and its Secretariat be exempted from improper forms of accountability towards the executive. Therefore, the Commission recommends reintroducing this provision in the draft law.

17. Moreover, the Commission notes that the draft law lacks transitional and closing provisions. In fact, Part VI of the draft law dedicated to this matter has not yet been developed. The Commission considers that, for assessing the overall adequacy of the draft law, the authorities should submit a draft law that is complete in all its elements as the transitional provisions are an essential part that allows to regulate the actual implementation of the draft law. For example, the issue of ensuring continuity in relation to the current Law could be addressed in there, together with the coordination and harmonisation with other Laws and many other technical aspects.

18. As to the law-making process, the Commission already noted above that several stakeholders were not acquainted with the draft law, which also implies that they have not been involved or consulted during the preparation of the draft law. In this regard, the Venice Commission reiterates, as also outlined in its Rule of Law Checklist,¹⁶ that the law-making processes must be “transparent, accountable, inclusive and democratic”. To satisfy this requirement, the public should have access to draft legislation, at least when submitted to Parliament, and should have a meaningful opportunity to provide input.¹⁷ This includes the opportunity to participate in the conduct of public affairs by exerting influence through public debate and dialogue with their representatives or through their capacity to organise themselves.¹⁸ Where appropriate, impact assessments should be made before the legislation is adopted.¹⁹

19. The Commission therefore recommends starting an inclusive consultation process on the draft law, giving enough time and opportunities to all relevant stakeholders to comment on the draft law.

B. Scope

20. The draft law is composed of six Parts, encompassing some general provisions (Part I), as well as more specific rules related to the institutional set-up of the Council and its members

¹⁴ See, for example, the Report of the review commissioned by the Court Administration of Norway on the May 2024 Draft Law on the High Judicial and Prosecutorial Council of BiH, prepared by Pro. Hans Petter Graver, Ralph Roche and Stephen Walsh, paras. 33-41.

¹⁵ For example, the Parliamentary Assembly would be in a position to dissolve the HJPC upon proposal of the Council of Ministers, HJPC projects could be excluded from donors' funding, HJPC would have to report to the executive and legislative bodies about the exercise of its competences, administrative authorities would have to be consulted prior to the adoption of internal regulations, HJPC administrative bodies would be subordinated to the legislative and executive branches.

¹⁶ Venice Commission, Rule of Law Checklist, [CDL-AD\(2016\)007](#).

¹⁷ Venice Commission, [CDL-AD\(2016\)007](#), *ibid.*, Benchmarks A.5.iv.

¹⁸ UN Human Rights Committee, General Comment No. 25 (1996), Article 25 (Participation in Public Affairs and the Right to Vote), para 8.

¹⁹ Venice Commission, [CDL-AD\(2016\)007](#), *op. cit.*, Benchmarks A.5.v.

(Part II), the appointment of judges and prosecutors (Part III), their disciplinary liability (Part IV), their suspension and termination of office (Part V), and some transitional and closing provisions (Part VI, that is not developed yet, as mentioned above).

21. The analysis of the draft law will focus on three main subjects, namely, the membership and organisation of the HJPC, the appointment of judges and prosecutors, and their disciplinary liability. The provisions related to the suspension and termination of office of judges and prosecutors will be assessed where relevant in connection with these topics.

22. Not every aspect of the draft law will be taken up in this Interim Follow-up Opinion. The Venice Commission will focus on what it considers to be the most important aspects of the draft law. The absence of remarks on other aspects of the draft law should not be interpreted as their tacit approval.

C. Members and organisation of the HJPC

23. Part I of the draft law deals with the members and the organisation of the HJPC and consists of four chapters, notably the composition and election of members (Chapter I), the mandate of the members and the conflict of interest (Chapter II), the competencies of the Council (Chapter III), operational and financial matters (Chapter IV). The following sub-sections will mostly follow the structure of the draft law.

1. Composition and elections of members of the HJPC

Diversity of membership

24. Article 5(5) of the draft law states that “The composition of the Council shall reflect the diversity of the peoples of Bosnia and Herzegovina in terms of ethnic, gender and other participation”.

25. The Venice Commission notes that Article IX(3) of the Constitution of Bosnia and Herzegovina sets forth that “officials appointed to positions in the institutions of Bosnia and Herzegovina shall be *generally representative* (italics added) of the peoples of Bosnia and Herzegovina”. In previous Opinions,²⁰ the Commission has also held that, in the specific context of Bosnian and Herzegovina, it would be preferable to refer to a general representation of the peoples, in line with the Constitution. The Commission agrees that the composition of any institution at State level should reflect as much as possible the country’s diversity in terms of ethnic, gender, linguistic, religious or other criteria, as this diversity would enhance the legitimacy of and public trust in such institution.²¹ However, the Commission also holds that the composition of a key-institution of the judiciary, as is the HJPC, should primarily rely on objective merit-based criteria. As it was done in different context,²² the Commission encourages the authorities to progressively move forward from the ethnical approach towards a system of appointments which is based on the merits of candidates.

26. The Venice Commission therefore recommends adding to Article 5.5 of the draft law a reference to the fact that the HJPC, as the judiciary in general, shall be generally representative of the peoples of Bosnia and Herzegovina, as required by the Constitution of Bosnia and Herzegovina.

²⁰ Venice Commission, [CDL-AD\(2014\)008](#), *op. cit.*, para. 36; Bosnia and Herzegovina, [CDL-AD\(2023\)003](#), *op. cit.*, para. 29.

²¹ See in this respect, Venice Commission, Bosnia and Herzegovina, Opinion on the method of electing judges to the Constitutional Court, [CDL-AD\(2024\)015](#), para. 30.

²² Venice Commission, Lebanon, Opinion on the draft law on the Administrative Judiciary, [CDL-AD\(2024\)006](#), para. 10.

Relevant Venice Commission standards

27. Given the great variety, both in respect of institutional design as well as in respect of the mandate and powers, of the various judicial and prosecutorial councils, the Venice Commission has been hesitant to formulate hard rules and has instead promoted parameters which the legislator needs to meet.²³

28. The Commission summarises these parameters here below, as they will be the main principles of reference for most of the following analysis:

- A balance needs to be struck between judicial independence and self-governance, on the one side, and the necessary accountability of the judiciary, on the other side, in order to avoid negative effects of corporatism within the judiciary. One way to achieve this goal is to establish a judicial council with a balanced composition of its members.²⁴
- A judicial council should have a strong judicial component. The Venice Commission has stated that “[i]n all cases the council should have a pluralistic composition with a substantial part, if not the majority, of members being judges. With the exception of ex-officio members these judges should be elected or appointed by their peers”.²⁵ In more recent Opinions (most notably on Bulgaria²⁶, Serbia²⁷ and France²⁸), the Commission has made reference to the standard set in this respect by the Committee of Ministers of the Council of Europe, i.e. that “not less than half the members of such councils should be judges chosen by their peers from all levels of the judiciary and with the respect of pluralism inside the judiciary”.²⁹ This is a standard that has also been reflected in the case-law of the European Court of Human Rights (“ECtHR”).³⁰
- However, this does not mean that the quality of a judicial council necessarily increases if such a council is composed exclusively of judges. While the main purpose of the very existence of a judicial council is the protection of the independence of judges by insulating them from undue pressures from other powers of the State, involving only judges carries the risk of raising a perception of self-protection, self-interest and cronyism. Corporatism should be counterbalanced by membership of other legal professions, the ‘users’ of the

²³ See Venice Commission, Report on Judicial Appointments, [CDL-AD\(2007\)028](#), International Round Table - "Shaping judicial councils to meet contemporary challenges", Rome (Italy), 21-22 March 2022, [CDL-PI\(2022\)005](#), General conclusions.

²⁴ See for example, Venice Commission, Republic of Moldova, [CDL-AD\(2018\)003](#), Opinion on the Law on amending and supplementing the Constitution (Judiciary) of the Republic of Moldova, para. 56. See also, Venice Commission, Republic of Moldova, [CDL-AD\(2020\)015](#), Urgent Joint Opinion of the Venice Commission and the Directorate of Human Rights (DHR) of the Directorate General of Human Rights and Rule of Law (DGI) of the Council of Europe on the draft law on amending the law No. 947/1996 on Superior Council of Magistracy.

²⁵ Venice Commission, Report on the Independence of the Judicial System Part I: The Independence of Judges, [CDL-AD\(2010\)004](#), para. 32.

²⁶ Venice Commission, Bulgaria, Opinion on the draft Act to amend and supplement the Constitution (in the field of the Judiciary) of the Republic of Bulgaria, [CDL-AD\(2015\)022](#), para. 39; Bulgaria, Opinion on the Judicial System Act, [CDL-AD\(2017\)018](#), para. 14; Bulgaria, Opinion on draft amendments to the Criminal Procedure Code and the Judicial System Act, concerning criminal investigations against top magistrates, [CDL-AD\(2019\)031](#), para. 69; and Bulgaria, Urgent Interim Opinion on the draft new Constitution, [CDL-AD\(2020\)035](#), para. 44.

²⁷ Venice Commission, Serbia, Opinion on the draft Constitutional Amendments on the Judiciary and draft Constitutional Law for the Implementation of the Constitutional Amendments, [CDL-AD\(2021\)032](#), para. 64; and Serbia, Opinion on three draft laws implementing the constitutional amendments on Judiciary, [CDL-AD\(2022\)030](#), para. 71.

²⁸ Venice Commission, France, 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 Superior Council of Magistracy and the status of the judiciary as regards nominations, mutations, promotions and disciplinary procedures, [CDL-AD\(2023\)015](#), paras. 23-25.

²⁹ Committee of Ministers of the Council of Europe, Recommendation CM/Rec(2010)12 on the independence, efficiency and responsibilities of judges, para. 27.

³⁰ ECtHR, *Grzęda v. Poland* [GC], application no. 43572/18, 15 March 2022, para. 305.

judicial system, e.g., attorneys, notaries, academics, and civil society.³¹ This representation is justified since the objectives of a judicial council relate not only to the interests of the members of the judiciary, but especially to general interests. Such non-judicial members in a judicial council may provide democratic legitimacy of the judicial council and a fresh perspective on what is needed to become or be 'a good judge'. Merit is not solely a matter of legal knowledge, analytical skills or academic excellence. It also includes matters such as character, judgment, accessibility, communication skills, efficiency to produce judgements, et cetera.³²

- The judicial component in a council should represent the whole judiciary. The Commission has recommended that there should be a balanced representation of judges from all different levels and courts and the widest possible diversity and representation of gender and regions.³³
- Non-judicial members should have the same protection as judicial members especially as concerns security of tenure and the right to a fair hearing in case of discipline, suspension, and removal, as a crucial precondition for the independence of the Council.³⁴ Any difference in treatment between judicial and non-judicial members should be duly justified.³⁵
- In respect of prosecutorial councils, international standards are scarce.³⁶ Moreover, given the differences between the judiciary and the prosecution, standards applicable to judicial councils are not necessarily *mutatis mutandis* applicable to prosecutorial councils. For example, the Venice Commission has previously recommended that prosecutors elected by their peers represent a substantial part in a prosecutorial council (i.e. not necessarily a majority).³⁷ The standards should respect and where necessary reflect differences in organisation and in function between judges and prosecutors, such as the distinction between prosecutorial systems where prosecutors, like judges, possess full individual independence and those where prosecutors are organised according to hierarchical principles.

The two proposed models

29. Article 6 of the draft law presents two alternative modalities. One is proposed by the working group that prepared the draft law, the second is a proposal of the Ministry of Justice. In both cases, the HJPC is divided into two Departments – a judicial one and a prosecutorial one – each heavily dominated by judges and prosecutors, respectively, elected by their peers, with only two lay members, chosen by the political bodies and shared by the two Departments. The difference lies mostly in that one modality proposes eight judges and eight prosecutors, while the other opts

³¹ Venice Commission, [CDL-AD\(2018\)003](#), *op. cit.*, para. 56; [CDL-AD\(2014\)008](#), *op. cit.*, paras. 30,31.

³² Venice Commission, Cyprus, Opinion on three Bills reforming the Judiciary, [CDL-AD\(2021\)043](#), paras. 50-51. See also: Rule of Law Checklist, [CDL-AD\(2016\)007](#), para. 82: "Involving only judges carries the risk of raising a perception of self-protection, self-interest and cronyism. As concerns the composition of the judicial council, both politicisation and corporatism must be avoided."

³³ Venice Commission, Opinion on the Draft Amendments to the Constitution of Montenegro, as well as on the Draft Amendments to the Law on Courts, the Law on the State Prosecutor's Office and the Law on the Judicial Council of Montenegro, [CDL-AD\(2011\)010](#), paras. 20-22; The Netherlands, Joint opinion on the legal safeguards of the independence of the judiciary from the executive power, [CDL-AD\(2023\)029](#), para. 42; Bulgaria, Opinion on the draft amendments to the Constitution, [CDL-AD\(2023\)039](#), para. 48.

³⁴ CCJE, Opinion No. 24 (2021), on the evolution of the Councils for the Judiciary and their role in independent and impartial judicial systems, paras. 37 and 38.

³⁵ Venice Commission, [CDL-AD\(2023\)029](#), *op. cit.*, paras. 55-56.

³⁶ Venice Commission, Serbia, Opinion on the Draft amendments to the Law on the State Prosecutorial Council of Serbia, [CDL-AD\(2014\)029](#), para. 13; and Montenegro, Interim Opinion on the Draft Law on the State Prosecution Office of Montenegro, [CDL-AD\(2014\)042](#), para. 37.

³⁷ Venice Commission, Kosovo, Opinion on the draft amendments to the Law on the prosecutorial Council of Kosovo, [CDL-AD\(2021\)051](#), para. 26.

for 12 judges and 10 prosecutors. The latter is grounded in the fact that in Bosnia and Herzegovina judges vastly outnumber prosecutors. However, the rest of the draft law seems to be built on the first modality (and a number of provisions would need to be amended if the second modality were to prevail).

30. Applying those parameters to the two modalities of Article 6 described above, the following observations may be made.

31. As for the institutional set-up of the HJPC, the Commission reiterates its understanding that the existence of a common council for judges and prosecutors was agreed upon in the Transfer Agreement and it is therefore not possible to set up a separate judicial council and a separate prosecutorial council without the renegotiation of this Agreement.³⁸ Against this background, and in light of its previous Opinions,³⁹ the Commission welcomes that Article 31 of the draft law stipulates that the HJPC will consist of a Judicial Department composed of judges and lay members and a Prosecutorial Department composed of prosecutors and lay members. Assuming that the competencies listed in Article 53 of the draft law in respect of judges are exclusively carried out by the Judicial Department and those concerning prosecutors by the Prosecutorial Department,⁴⁰ this institutional design seems appropriate.

32. Given the fact that the HJPC *de facto* consists of a judicial council and a prosecutorial council, it is almost unavoidable that the council will consist of a fairly large number of members if one respects the principle of diversity, which is not only enshrined in previous Opinions of the Venice Commission⁴¹ but equally prominently visible in the draft law (Articles 6 to 8 of the draft law). While the Commission has stated in the past that a judicial council, if it is to be effective, should not have too many members,⁴² it should also be borne in mind that there is great diversity in state practice in this regard.⁴³

33. The Commission thus welcomes the fact that the draft law abides by the principle of diversity and ensures that the judicial and the prosecutorial members are representative of all levels and areas of judiciary and prosecution service, which is particularly important in the complex background of the country. Yet, the Commission expresses its preference for the lower number-modality, which combines diversity and varied representation with a limited number of members (18 instead of 24, as in the first modality).

34. The Commission moreover recommends, as it has done in the past,⁴⁴ establishing a Council with an uneven number of members. The two Departments, judicial and prosecutorial, should also consist of an uneven number of members, which implies that they should count on an uneven number of lay members belonging to both Departments.

³⁸ Venice Commission, [CDL-AD\(2021\)015](#), *op. cit.*, para. 13.

³⁹ Venice Commission, [CDL-AD\(2021\)015](#), *ibid.*, para. 13; [CDL-AD\(2012\)014](#), *op. cit.*, para 93.

⁴⁰ The text of the provision is not clear in this respect as the competencies are allocated to 'the Council' as such and not one of its Departments. See below, section on competencies of the HJPC.

⁴¹ See for example, Venice Commission, [CDL-AD\(2014\)008](#), *op. cit.*, para 36; [CDL-AD\(2023\)003](#), *op. cit.*, para. 29.

⁴² Venice Commission, Bulgaria, Urgent Interim Opinion on the draft new Constitution, [CDL-PI\(2020\)016](#), para. 46.

⁴³ See the Comparative Overview on Judicial Councils in Europe, [DG I – DCJ \(2022\)1](#), 14 March 2022, p. 6, showing that there is great diversity in this regard: the Dutch council has 5 members (see the 2023 EU Rule of Law Report on the Netherlands, p. 5) while the Irish council consists of 166 judges. Most countries seem to favour 11 members (6 countries) or 15 members (6 countries). Given the specific Bosnian context, having a council of 18 or 24 members is therefore not deviating too much from the European average.

⁴⁴ See for example, "Having an even number of members in the HJC is less usual than having an odd number, which is the current trend in many European states – there are only a few that have an even number of members in their judicial councils. [...]", Venice Commission, Serbia, Opinion on the draft amendments to the constitutional provisions on the judiciary of Serbia, [CDL-AD\(2018\)011](#), para. 59.

35. Moreover, the Commission has previously recommended that judges and prosecutors within the HJPC should not be in the position to outvote each other.⁴⁵ While this is surely not an issue as far as the decisions within the Departments are concerned, the second modality (a Council composed of 24 members) proposed for the composition of the HJPC may be problematic inasmuch as it carries the risk that the decisions of the plenary could be possibly dominated by the judges (twelve judges against ten prosecutors), depending on the votes of the politically elected lay members and the required majorities. In this respect, the Commission notes that simple majority seems to be the rule, according to Article 47(4), although a threshold of five for each category is foreseen in Article 47(5).⁴⁶ The Commission hence expresses a preference for an equal number of judges and prosecutors (following the first modality, once again).

36. In addition, during the visit in Sarajevo, several interlocutors suggested that the second modality of Article 6 would *de facto* create new regional criteria favouring a composition based along ethnic lines. The Commission is not in a position to assess the veracity of such remarks. However, the Commission underlines, as mentioned above, that access to membership of the HJPC should be, as a matter of principle, dependent on objective qualification criteria, clearly set in the law, and not on a person's affiliation to an ethnic community. Appointment procedures should be a merit-based process, and not a process which would in fact lead to granting special rights for constituent people to the exclusion of minorities or citizens of Bosnia and Herzegovina.⁴⁷

Lay members

37. As to the lay members, one is appointed by the Council of Ministers, upon proposal of the Ministry of Justice of Bosnia and Herzegovina (Article 6.4 or 6.5, depending on the chosen model), while the other would be appointed by the Parliamentary Assembly (Article 6.5 or 6.4). The first modality specifies that this would be done "upon the proposal of the Joint Collegium of both Houses" (Article 6.5) and footnote n.3 adds that "Representatives of the RS MoJ and of the FBiH MoJ propose one representative each, who shall be appointed by the governments and parliaments of the Entities".

38. Article 6.6 provides that the two lay members are "chosen from among attorneys who have passed the bar exam" and who "have a high reputation as a legal expert in the public, private or non-governmental sector". The wording suggests that the lay members need to be practising attorneys. However, Article 7.5 of the draft law seems to suggest that the lay members do not need to be attorneys as long as they are not – or in some cases, have not been in the last 5 years – executive office holders, elected officials or 'judicial office holders'.

39. The Venice Commission considers that corporatism in councils should be counterbalanced by membership of other legal professions, the 'users' of the judicial system, e.g., attorneys, notaries, academics, civil society organisations. In the case of attorneys who practice in the area of criminal defence their participation in decision-making should be regulated by appropriate conflict of interest rules. Only a balanced method of appointment of council members can guarantee the independence of the judiciary.⁴⁸ In addition, from a pragmatic

⁴⁵ Venice Commission, [CDL-AD\(2012\)014](#), *op. cit.*, paras. 92 and 102; see also, Report on European Standards as regards the Independence of the Judicial System: Part II - the Prosecution Service, [CDL-AD\(2010\)040](#), *op. cit.*, para. 66.

⁴⁶ Article 47(5): "A decision by the Council on any matter previously decided by the Judicial Department or pertaining to the proposal of that Department shall require a vote of a minimum of five members of the Council from among the judges, and a vote of a minimum of five members of the Council from among the prosecutors on any matter previously decided by the Prosecutorial Department or pertaining to the proposal of that Department."

⁴⁷ See above, the Section on the Diversity of membership. See, also, Venice Commission, [CDL-AD\(2024\)015](#), *op. cit.*, para. 30, and, *mutatis mutandis*, ECtHR, *Zornić v. Bosnia and Herzegovina*, 15/017/2014, para. 43, Šlaku v. Bosnia and Herzegovina, 26/05/2016, para. 40.

⁴⁸ Venice Commission, Opinion on the Law on amending and supplementing the Constitution (Judiciary) of the Republic of Moldova, [CDL-AD\(2018\)003](#), para. 56; Cyprus - Opinion on three Bills reforming the Judiciary, [CDL-AD\(2021\)043](#),

perspective, the Commission wonders whether it is prudent to exclude *a fortiori*, in a relatively small country, a larger pool of qualified candidates.

40. Therefore, the Commission recommends opening lay membership to other legal professionals, and considering also non-legal professionals, in order to provide the necessary expertise in various other fields that lawyers might be lacking. This is even more necessary in light of the Council's budgeting and managerial powers for the whole judiciary. The representation in the Council of other social stakeholders is justified since a council's objectives relate not only to the interests of the members of the judiciary, but also to public interests. The control of quality and impartiality of justice is a role that reaches beyond the interests of a particular judge or prosecutor. The council's performance of this control will cause citizens' confidence in the administration of justice to be raised.⁴⁹

41. In this context it is noted that the *ratio* of lay members in the respective Departments (2 out of 10) is relatively low, and that is even more so in the overall Council (2 out of 18 or 24 depending on the model chosen). The Venice Commission has previously stated that corporatism should be counterbalanced by ensuring a substantial representation of other professionals, including the civil society.⁵⁰ While the Venice Commission welcomes that judges represent at least half of the members of the Judicial Department and that prosecutors constitute a substantial part of the Prosecutorial Department it at the same time recommends increasing significantly the number of lay members of the HJPC.⁵¹

a. Eligibility and ineligibility criteria of HJPC membership

42. Article 7 of the draft law stipulates certain eligibility criteria for Council membership. Many of these criteria are fairly common, i.e., requiring a certain level of professional experience for the judicial and prosecutorial members (five years) and requiring certain qualitative standards for those members (in terms of their performance appraisals and their disciplinary records).

43. Article 7(5)b stipulates that executive office holders and elected officials in legislative bodies at any level are excluded from becoming lay members of the Council and a cooling off period of five years applies in this respect. The Venice Commission already praised measures creating a "safety distance" between lay members and party politics⁵² and welcomes this cooling off clause.

para. 50; France - Joint opinion on the Superior Council of Magistracy and the status of the judiciary, [CDL-AD\(2023\)015](#), para. 23; Venice Commission, Rule of Law Checklist, [CDL-AD\(2016\)007](#), para. 82.

⁴⁹ Venice Commission, Opinion on the draft Law on the High Judicial and Prosecutorial Council of Bosnia and Herzegovina, [CDL-AD\(2014\)008](#), paras. 32 and 35; Cyprus - Opinion on three Bills reforming the Judiciary, [CDL-AD\(2021\)043](#), para. 51.

⁵⁰ Venice Commission, Romania, Opinion on the Draft Revision of the Romanian Constitution, [CDL-AD\(2002\)012](#), para. 66. See also, [CDL-AD\(2020\)015](#), *op. cit.*, para. 21; Romania, Opinion on draft amendments to Law No. 303/2004 on the Statute of Judges and Prosecutors, Law No. 304/2004 on Judicial Organisation, and Law No. 317/2004 on the Superior Council for Magistracy, [CDL-AD\(2018\)017](#); and [CDL-AD\(2018\)003](#), *ibid.*, para. 56.

⁵¹ See evolving standards in this respect: Venice Commission, Montenegro, Opinion on the Draft Amendments to the Constitution of Montenegro, as well as on the Draft Amendments to the Law on Courts, the Law on the State Prosecutor's Office and the Law on the Judicial Council of Montenegro, [CDL-AD\(2011\)010](#), paras. 20-22; and Montenegro, Opinion on two Sets of draft Amendments to the Constitutional Provisions relating to the Judiciary of Montenegro, [CDL-AD\(2012\)024](#), paras. 20 and 21.

⁵² Venice Commission, Serbia, Follow-up Opinion on three revised draft Laws implementing the constitutional amendments on the Judiciary of Serbia, [CDL-AD\(2022\)043](#), paras. 56-57, and 80; Montenegro - Opinion on the draft amendments to the Law on the Judicial Council and Judges, [CDL-AD\(2022\)050](#), para. 33. In Montenegro the legislator proposed that lay members of the Prosecutorial Council should not have been elected officials or members of the Government in the past five years prior to their elections and not to have been members of political parties with leading roles too. Spouses, partners and close relatives of the politicians were also ineligible. The Venice Commission commented positively on this proposal noting that "the new ineligibility criteria create some 'safety distance' between lay members and party politics, which could make the [Prosecutorial Council] more politically neutral". See Venice Commission, Montenegro, Urgent Opinion on the revised draft amendments to the Law on the State Prosecution Service, [CDL-AD\(2021\)030](#), para. 29.

44. By excluding judges or prosecutors “who have not completed a period of four years” from the end of the previous term in the Council, Article 7.2(e) prohibits a person from being elected for another consecutive mandate. Although a system in which two consecutive mandates are allowed has its advantages (i.e., ensuring continuity and retaining certain experienced members), this prohibition may be appropriate in the context of Bosnia and Herzegovina and is not at odds with any international standard. Continuity can efficiently be ensured by staggering terms of office, which does not seem to be excluded in the draft law but could be made explicit.

45. Other *de facto* ineligibility criteria may be found in Article 20(2), notably the prohibition on serving more than two mandates, in Article 21, by providing that a verification of asset and interest declarations be carried out prior to taking office in the Council, and in Articles 27.1 (b) and 29, as regards the incompatibilities with the position of HJPC member.

46. The Venice Commission finds these requirements appropriate but notes that the draft law remains silent on criminal convictions and recommends adding an explicit ineligibility criterion excluding persons convicted of criminal acts of a certain nature or severity.

b. Methods of election of HJPC members

47. As to the manner in which Council members are elected, the draft law rightly makes a distinction between judicial and prosecutorial members on the one hand and the lay members on the other.

48. Articles 10-18 of the draft law concern the election of the judicial and prosecutorial members of the HJPC. Following a public call (Article 10), every eligible judge/prosecutor may submit a candidature to the election committee (Article 14). The election committee shall be composed of 5 Council members: in case of a judicial Council member the committee consists of four judges and a lay member; in case of a prosecutorial Council member the committee consists of four prosecutors and a lay member (Article 12). The election committee is responsible for the entire procedure except for the actual voting in the various courts, or respectively prosecutor’s offices, which is overseen by decentralised electoral boards (Article 13). Candidates and judges/prosecutors who participated in the voting have the right to file an objection to irregularities in the procedure, which will be decided upon by the Council (Article 17). In the event of that elections need to be repeated or a Council member replaced, the Council may shorten the deadlines for the application and elections (Article 18).

49. This procedure seems in general adequate, but, in light of the principle of *nemo iudex in causa sua*⁵³, Article 17 should clarify that those Council members who were also members of the electoral committee are excluded from voting on the objection to the decision of the electoral committee, as the subject-matter of the objection (i.e. irregularities in the procedure) directly concerns the (decisions taken by and the work of the) electoral committee. Moreover, whereas the procedure is clearly designed to ensure that decisions pertaining to the Judicial Department are as much as possible prepared by the Judicial Department (and *vice versa* with respect to the Prosecutorial Department), it does not seem logical to entrust the Council plenary with deciding on objections, because this means that the objection is decided by a body in which the judges – or prosecutors – do not have a majority. This issue is aggravated if the four members of the electoral committee are excluded.

50. The Venice Commission therefore suggests reducing the number, respectively, of judges or prosecutors, members of the electoral committee and excluding all the members thereof from the decision on the objection that should be then taken by the respective Department. In addition, the term of three days to file the objection to the election committee foreseen in Article 17.3 is

⁵³ The principle according to which no one should be a judge in one’s own case.

rather short and it would be more appropriate to increase it to eight days, as provided for in other similar provisions of the draft law.

51. As regards the election of the lay members of the Council, Article 19 provides that the Council of Ministers and the Parliamentary Assembly of Bosnia and Herzegovina shall notify the Council of the election within 60 days from the call.

52. The above draft provision does not clarify how the selection, appointment and nomination of lay members is carried out. It is recalled that the ECtHR has underlined that, as with judicial members, non-judicial members of a council should be selected through clear and transparent procedures, on the basis of merit, which is crucial for preserving the public's confidence in justice and an additional guarantee of judicial independence.⁵⁴ Hence, the text should at least refer to Article 10.1 of the draft law, establishing that nomination of lay members is preceded by a public call, as well as it should elaborate in (eligibility) criteria and procedures for lay members to be elected.

53. In respect of the member appointed by the Council of Ministers upon the proposal of the Minister of Justice, the Venice Commission recalls that the primary role of judicial councils is to be independent guarantors of judicial independence⁵⁵ or, as the ECtHR said, "a bulwark against political influence over the judiciary".⁵⁶ To achieve this aim, it is important to shield the Council's members from undue influence of the government. Securing an independent and accountable judiciary might not necessarily always be in the short-term political interest of the ruling majority. After all, it was exactly this fear of political interference with the judiciary that formed one of the initial motivations behind the establishment of judicial councils as an alternative to the previous ministerial model of judicial governance. As a minimum guarantee in this respect, the Venice Commission held that if lay members were to be appointed by the government, this should be done under the parliamentary control.⁵⁷

54. The Commission therefore recommends stipulating in Article 19 that parliamentary control is to be exercised over the appointment of the member by the Council of Ministers and the modalities of this control, taking into account the requirements elaborated below in respect of the lay member elected by Parliament. It is recalled that the Commission's view is that "[w]hen lay members are elected by parliament this should be done with the broadest consensus, in principle by a qualified majority vote which involves the opposition, following an open and transparent competition. Effective anti-deadlock mechanisms should be provided."⁵⁸ Such instruments are all the more important in the Bosnian framework requiring the *bona fide* engagement of all relevant political stakeholders.

55. The Venice Commission clarifies that anti-deadlock mechanisms should not result in allowing the Parliament to decide with a simple majority if several attempts were unsuccessful, as this defeats the purpose of having a qualified majority requirement (the ruling force may just wait through several unsuccessful attempts, even sabotaging those votes, and then choose whomever they wish without considering the opposition at all). Rather, it should be considered to take away the appointment by Parliament after a few unsuccessful rounds and give it to another,

⁵⁴ ECtHR, *Catană v. Republic of Moldova*, 21/02/2023, application no. 43237/13, paras. 79-82.

⁵⁵ Venice Commission, [CDL-AD\(2018\)003](#), *op. cit.*, para. 56. See also [CDL-AD\(2020\)015](#), *op. cit.*

⁵⁶ ECtHR, *Grzęda v. Poland* [GC], 12/03/2022, application no. 43572/18, para. 346.

⁵⁷ Venice Commission, Lebanon, Opinion on the draft law on the independence of judicial courts, [CDL-AD\(2022\)020](#), para. 60.

⁵⁸ Venice Commission, [CDL-PI\(2022\)005](#), *op. cit.*, General conclusions. But also: [CDL-AD\(2023\)015](#) *op. cit.*, para. 28; [CDL-AD\(2023\)015](#), *op. cit.*, para. 28; [CDL-PI\(2023\)018](#), Compilation of Venice Commission Opinions and Reports relating to Qualified Majorities and Anti-Deadlock Mechanisms in relation to the election by Parliament of Constitutional Court Judges, Prosecutors General, Members Of Supreme Prosecutorial and Judicial Councils and the Ombudsman, section VI.

more neutral body.⁵⁹ In addition, the Commission considers that, if the number of lay members was to be increased, as recommended, the draft law should entrust non-political bodies such as a bar association with the selection of these members.

56. The Venice Commission observes that Article 6(5) of the draft law, albeit only in the second proposed modality, specifies that the appointment is made upon the proposal of the Joint Collegium of both Houses. Footnote 3 does not help in clarifying how the Entities would be involved and what procedure is to be followed. In any case, as far as the pre-nomination by Entity-level executives is concerned, the above considerations regarding the nomination by the government are also applicable.

c. Tenure and status of HJPC members

Tenure (Termination, Removal and Suspension of HJPC members, Articles 26 to 28)

57. Article 25 of the draft law provides that during their mandate and one year after the end of their mandate, Council members may not apply for vacant positions in the judiciary requiring a competition or certain other high-profile functions.⁶⁰ The Venice Commission, in line with its last Opinion on the HJPC, welcomes this cooling off clause, but it considers that it is excessive inasmuch as the ban applies to vacant positions in lower courts.⁶¹ Even more so as such application should lead to an automatic HJPC mandate termination (Art. 26 par. 1 lit. d)).

58. Article 26 of the draft law stipulates in which situations the mandate of a Council member shall be terminated. It is not clear if the list enumerated in Article 26.1 is exhaustive. The Commission recommends adding, as a separate ground, the death of a member as well as a cross-reference to the situations listed in Article 27.1 (removal from office).

59. Article 26.1(f) of the draft law refers to the situation in which a disciplinary measure has been imposed upon a Council member performing the office by virtue of which she/he has been elected. The Venice Commission considers that the law should specify that only a disciplinary measure of a certain gravity may lead to the termination of a mandate. The automaticity of the mechanism should also be reconsidered. In addition, but this will be further addressed below under the section on disciplinary liability, the Commission recommends that the clause be applied also to situations in which the disciplinary liability is the result of the work performed as Council members, not only as judges and prosecutors, and therefore that lay members be covered as well.

60. Article 26.1 (g) of the draft law stipulates that the mandate of a Council member is terminated following a final criminal conviction. The Venice Commission welcomes such clause but recommends that it be limited to criminal offences of a certain gravity.

61. Also, Article 26.1 (e) should probably correctly refer to Article 27, not 23.

62. Article 27.1 (a) of the draft law refers to situations in which the Council member “seriously damages the reputation of the Council”. The Venice Commission has previously noted that this ground for removal (“seriously undermines reputation of the HJPC”) is rather vague and should be further specified in order to admit removal only in cases of flagrant violation of the Law, which

⁵⁹ Venice Commission, [CDL-AD\(2013\)028](#), Opinion on the draft amendments to three constitutional provisions relating to the Constitutional Court, the Supreme State Prosecutor and the Judicial Council of Montenegro, para. 8.

⁶⁰ Namely, a position in the Constitutional Court of the Federation of Bosnia and Herzegovina or the Constitutional Court of Republika Srpska, or as Chief Disciplinary Counsel or Deputy Disciplinary Counsel in the Office of the Disciplinary Counsel or of Director or Deputy Director in the Secretariat of the HJPC.

⁶¹ Venice Commission, [CDL-AD\(2021\)015](#), *op. cit.*, para. 32.

should be narrowly construed.⁶² The Commission hence reiterates its recommendation and refers to further similar recommendations to consider:

- using a 'mixed legislative technique', i.e., retain the comprehensive formula and accompany them with the most common examples of actions which would qualify as 'seriously damaging the reputation of the Council'. These specific examples would cover the majority of situations and would at the same time serve as guidance for the Council where an all-embracing formula may be needed;⁶³

and/or

- explaining the provision in the explanatory memorandum in more concrete terms in order to provide further guidance to the Council;⁶⁴

and/or

- ensuring that the application of this provision is limited to situations in which the actions are intentional, with deliberate abuse or, arguably, with repeated, serious or gross negligence.⁶⁵

63. Article 27.1 (b) of the draft law refers to incompatibilities. The Venice Commission recommends adding a cross-reference to Article 29 that is a welcome provision, although the draft law should specify that an incompatibility shall not be a reason for removal if the member gives up the other position which gave rise to the incompatibility. Council members should not put themselves into a position where their independence or impartiality may be questioned. This justifies rules on the incompatibility of holding such an office with other functions and is also a reason why many states restrict political activities of persons working in the judiciary. The Venice Commission has previously criticised provisions which contained overly broad prohibitions of involvement in any political activities,⁶⁶ but the wording of Article 29 of the draft law adequately clarifies that its scope is limited to situations in which a Council member is involved in active party politics. In the same vein, the Commission finds that Article 29 should contain a clause similar to Article 158.3 (prohibition to be a member of any organisation that discriminates) and it should apply also to the members of the Secretariat of the Council.

64. Article 27.1(c) of the draft law refers to two situations in which the Council member is incapacitated to perform his/her duties. Either a Council member is absent (for whatever reason) for longer than three months or a Council member is unable to perform his/her duties because of (mental) illness for more than six months. Correspondingly, failure of a member to participate in the work of the Council without a serious and objective reason may indeed result in the termination of his or her mandate (Article 41.1).⁶⁷ The Venice Commission welcomes this provision, but it invites the legislator to consider more flexible time-limits after which the Council member "shall" be removed, especially with regard to the second issue (illness).

65. Articles 27.2 to 27.11 and Article 28 of the draft law contain the procedural framework concerning the criteria for suspension and the procedure for termination. A special commission of five members establishes the relevant facts. The Venice Commission recommends that the special commission contemplated in Articles 27.4 and 27.5 should include more lay members and that the draft law itself, not the Rules of Procedure (Article 27.6), should clarify that the Council member concerned is allowed to consult the file against him or her and be allowed to

⁶² Venice Commission, [CDL-AD\(2021\)015](#), *op. cit.*, para. 85.

⁶³ Venice Commission, [CDL-AD\(2017\)018](#), *op. cit.*, para. 108.

⁶⁴ Venice Commission, [CDL-AD\(2018\)028](#), *op. cit.*, para. 49.

⁶⁵ Venice Commission, [CDL-AD\(2017\)018](#), *op. cit.*, para. 106.

⁶⁶ Venice Commission, [CDL-AD\(2021\)032](#), *op. cit.*, paras. 56-57.

⁶⁷ See Venice Commission, [CDL-AD\(2022\)030](#), *op. cit.*, para. 97.

comment on the file (either personally or using a representative). The special commission itself should decide on the removal. The Commission welcomes that the decision on removal has to contain a “detailed explanation” and that the decision is subject to review by the Court of Bosnia and Herzegovina. These provisions adequately respond to previous recommendations.⁶⁸ However, no judicial challenge is mentioned regarding the decision of the Council to suspend a member. The Venice Commission therefore recommends providing for judicial review of the decision to suspend a Council member in Article 28.⁶⁹

Conflict of interests

66. Article 30 of the draft law deals with conflict of interests, that consists of those situations in which Council members have a private interest which influences or may influence the legal, transparent, objective and impartial performance of their duties in the Council, i.e. in which the private interest is detrimental or may be detrimental to the public interest or public trust. The concept of private interest is defined with reference to any material or non-material benefit for a member of the Council or for a fairly long list of relatives or acquaintances thereof. Article 30.4 stipulates that “[t]he Rules of Procedure of the Council shall regulate in more detail the cases in which a conflict of interest of a Council member is assumed to exist, as well as the grounds and procedure for disqualification of a Council member.”

67. The scope of the provision appears rather broad (“may influence”, “may be detrimental”, “any material or non-material benefit”), and it could be fairly easy to allege that a particular member has a conflict of interest. In its last Opinion on this matter, the Venice Commission had already recommended to make the definition of conflict of interest more precise, for example by specifying “may *reasonably* influence”, and to avoid referring to the Rules of Procedure for its regulation.⁷⁰ The Commission reiterates its recommendation, especially with regard to Article 30.4 and suggests considering to set up a mechanism to establish whether a conflict exists, to which members could refer to in any case of doubt.

President and Vice-Presidents of the HJPC

68. Article 32.2 of the draft law stipulates that “President and Vice-Presidents shall not belong to the same Constituent People. No more than one of them shall be from the ranks of Others.” The Venice Commission has previously said that “it is not appropriate for the President and the Vice Presidents of the [High Judicial and Prosecutorial Council] to be chosen along ethnic lines”.⁷¹ The Commission thus reiterates its recommendation.

69. Moreover, Articles 33 and 34 of the draft law do not allow the lay members to be elected President or Vice-President of the Council. As already mentioned, the Venice Commission has previously held that a difference in treatment between judicial and non-judicial members should be duly justified.⁷² Neither the draft law nor the explanatory note put forward any specific reason for excluding lay members from these positions. The Venice Commission encourages the authorities to reconsider the exclusion of lay members in Articles 33 and 34.

⁶⁸ Venice Commission, [CDL-AD\(2021\)015](#), *op. cit.*, paras. 79-80 and 84; [CDL-AD\(2014\)008](#), *op. cit.*, paras. 51-56.

⁶⁹ See, *mutatis mutandi*, Venice Commission, Poland, Urgent Joint Opinion of the Venice Commission and the Directorate General of Human Rights and Rule of Law of the Council of Europe on the draft law amending the Law on the National Council of the Judiciary of Poland, [CDL-PI\(2024\)009](#), para. 41.

⁷⁰ Venice Commission, [CDL-AD\(2021\)015](#), *op. cit.*, para. 33.

⁷¹ Venice Commission, [CDL-AD\(2014\)008](#), *op. cit.*, para. 47.

⁷² Venice Commission, [CDL-AD\(2023\)029](#), *op. cit.*, para. 55-56. See also, CCJE, Opinion No. 24 (2021), *op. cit.*, paras. 37 and 38.

Duties of HJPC members

70. Articles 41 to 43 regulate the member's duties. It would seem from Article 41.2 that the President and the two Vice-Presidents are full-time members, while at least one judicial and one prosecutorial member "may work" full-time, but that provision is not entirely clear. Most importantly, it is not clear from Article 41.2, whether the President and Vice-Presidents must or may work full-time. Their salaries and benefits are defined by a separate Law. The part-time members are then only entitled to allowances and award for their work in the Council, but the definition of the award is left to the discretion of the BiH Council of Ministers. The Venice Commission recommends making these provisions clearer and reconsidering the prerogative of the executive on the award for part-time members (Article 43.3).

Functional immunity of HJPC members

71. Article 44 of the draft law regulates the functional immunity of Council members as follows: "Members of the Council and members of committees within the framework of the Council shall not be civilly liable for any opinion expressed or decision rendered within the scope of their official duties." The Venice Commission already stated in a previous Opinion on Bosnia and Herzegovina that the idea of "immunity" should include protection from the criminal, civil or disciplinary responsibility,⁷³ and held that "it should be mentioned that the immunity from prosecution for acts performed in the exercise of a judge's function is an integral part of the wider concept of *judicial independence*."⁷⁴ However, this immunity is restricted to immunity from prosecution for acts performed in the exercise of the judges' functions and may not extend also to intentional crimes (e.g. taking bribes).⁷⁵ Therefore, the mere interpretation of the law, assessment of facts or weighing of evidence carried out by judges to determine cases should not give rise to civil, criminal or disciplinary liability, even in case of ordinary negligence. Only failures performed intentionally, with deliberate abuse or, arguably, with repeated or gross negligence should give rise to disciplinary penalties, criminal responsibility, or civil liability.^{76,77}

72. Hence, the Venice Commission therefore reiterates its recommendation to further develop the concept of "immunity".

Right to abstain

73. Article 46 provides that in the voting procedure Council members may not abstain. The provision does not specify what would happen if a member refuses to vote and whether this would amount to an action that "seriously damages the reputation of the Council", potentially resulting in removal from office. Whereas the Commission understands that this provision corresponds to a pragmatic need to ensure the active participation of all members and to avoid situations of blockage, it also notes that the Council is called on to decide on many highly specialised and technical matters and such a blanket ban to abstain may not be appropriate and even detrimental if members were obliged to vote on matters on which they lack competence. Hence, the Commission recommends reviewing the desirability of this provision (possibly by defining the matters on which it is compulsory to vote) and clarifying what would be the consequences of not abiding by this provision.

⁷³ Venice Commission, [CDL-AD\(2023\)003](#), *op. cit.*, para. 55.

⁷⁴ Venice Commission, Republic of Moldova, *Amicus Curiae* Brief on the Criminal liability of judges, [CDL-AD\(2017\)002](#), para 9.

⁷⁵ Venice Commission, [CDL-AD\(2010\)004](#), *op. cit.*, para 61.

⁷⁶ Venice Commission, [CDL-AD\(2017\)002](#), *op. cit.*, para 27.

⁷⁷ Venice Commission, [CDL-AD\(2023\)003](#), *op. cit.*, para. 56.

2. Mandate of the HJPC (Competencies), working methods and financial matters

74. The Council's competencies are listed in Article 53 without distinguishing which competencies are carried out by which of the Council's bodies (plenary, departments, committees, etc.). Under Article 47.2, all issues that the draft law does not delegate to the Departments, disciplinary bodies or appraisal committees, are decided upon in the plenary. For the sake of clarity, the Venice Commission recommends dividing the list of competencies in Article 53 between the respective formations and bodies of the Council. In addition, Article 47.5 should be clarified to ensure that the phrase "any matter" will not be interpreted in a way allowing the plenary to substantially reconsider any decision decided by a Department. In accordance with Art. 47(2), the plenary should not simply be an appeal body for decisions of the Departments.

75. Article 53 of the draft law contains the competencies of the Council among which the most prominent are decisions related to appointments, temporary assignments, incompatibilities, suspension and termination of the mandate of judges and prosecutors, dealing with complaints, judicial discipline and asset declarations, setting standards for performance evaluations and ethical issues, supervising professional training and making annual budget proposals. Many of these competences are quite common in European practice. Furthermore, the competencies include issues related the efficiency and good administration of justice while respecting the substantive judicial decision-making competencies of individual judges and prosecutors in pending cases.

76. Assuming that the competencies listed in Article 53 of the draft law in respect of judges are exclusively carried out by the Judicial Department, this institutional design seems overall adequate. However, in line with the principle of *nemo iudex in causa sua*, the Venice Commission recommends reallocating the competence to decide on 'objections in the appointment procedures for judges and prosecutors' (see Article 53(c)) to a court, for example the Court of Bosnia and Herzegovina (as is the case in Article 27.9). The Venice Commission recalls its previous recommendation according to which "All substantive decisions adopted by the HJPC should be reasoned and subject to judicial review under the Law on Administrative Disputes of Bosnia and Herzegovina."⁷⁸

a. Working methods of the HJPC

77. Articles 46 to 52 of the draft law describe the functioning of the Council, its Departments, sub-councils and other bodies and committees. In the Plenary of 18 members (assuming that this model is chosen), the quorum is 13 members while decisions are taken by "a majority vote of all Council members" unless otherwise provided in the law (Article 47.3 and 4). In a Department, the quorum is seven members, while decisions require an absolute majority vote with at least 5 members who are judges, or respectively prosecutors, voting in favour of the decision. In the event of a tie vote, the Chairperson, or the Deputy Chairperson, shall have the casting vote. (Article 48).

78. The Venice Commission has previously drawn attention to the need to ensure the *effective* operation of a judicial / prosecutorial council in practice. In that regard rules on voting in the council are important. The Commission stated in respect of Serbia: "this high quorum and the super-majority raise the risk of blockages in the work of the HJC"⁷⁹ and "the high quorum [...] may prevent the HJC from operating effectively".⁸⁰ Especially, in respect of judicial appointments, the blockage of a judicial council can be very problematic. "The Council's task in respect of filling [judicial] vacancies will [...] be crucial [...]. A blockage of the Council's work (because of the rather

⁷⁸ Venice Commission, [CDL-AD\(2021\)015](#), *op. cit.*, para. 89(d).

⁷⁹ Venice Commission, [CDL-AD\(2022\)030](#), *op. cit.*, para. 89.

⁸⁰ Venice Commission, Serbia, Follow-up Opinion on three revised draft Laws implementing the constitutional amendments on the Judiciary of Serbia, [CDL-AD\(2022\)043](#), para. 68.

high quorum for the Council to take decisions [...] would thus be highly problematic for the continued functioning of the judiciary.”⁸¹

79. The Venice Commission acknowledges that the relevant provisions of the draft law do not raise any special concerns as regards blockages of the Council. However, the requirement that at least five judges (or prosecutors) should be in favour of a decision, reduces (or actually neutralises) the influence of lay members. The Commission therefore recommends modifying this provision by including the lay members in the threshold.

80. Equally relevant in this regard is Article 55 of the draft law which ensures that the Council has access to relevant information in order to carry out its tasks (and that others have a duty to provide that information). It would however be advisable to explicitly stipulate that the applicability of this provision does not extend to documents and files pertaining to pending court cases.

81. In addition, the Commission realises that the structure of the Council has become very complex and multilayered,⁸² and it may be appropriate to have a reflection about a possible simplification of all these bodies.

82. Another general issue concerns the need for transparency of (the decision-making process in) a judicial or prosecutorial council, especially given the fact that the ‘users’ of the judicial system nowadays expect more in this regard. Not only the political arena with a sometimes very critical rhetoric as regards the judiciary, but also the wider public with a sometimes very low confidence in the integrity of members of the judiciary. Increased transparency has become a key priority in respect of the functioning of various state institutions.

83. Article 5.6 of the draft law stipulating that the work of the Council shall be public and that everyone has the right to access information in conformity with national legislation, is very welcome in this regard.

84. The Venice Commission has also previously stressed the importance of including *fair trial elements* in the working methods of a (judicial) council (on a legislative level).⁸³ These features are especially important in respect of disciplinary proceedings (see below), but some standards apply more generally: clear pre-established procedures, (timely) access to information, adequate possibilities to submit information, the possibility of review against decisions of a council, et cetera. The draft law does contain such elements, but they are scattered throughout the text, and it is advisable to codify them in a more clear and systematic manner.

b. Operational and financial matters

85. The Council will have a wide range of tasks including many administrative tasks for which few judges and prosecutors are equipped by their training. Examples of such include: “advising courts and prosecutor’s offices on appropriate and effective budget, administrative and management techniques and procedures” (Article 53(u)), “initiating, overseeing and coordinating projects related to improving all aspects of the administration of courts and prosecutor’s offices” (Article 53(z)) and making proposals relating to budgets, statistical analysis and information technology (Article 53(n), (o), (p), (r) and (s) of draft law). The Venice Commission wonders whether every member of a body consisting mainly of elected judges and prosecutors is likely always to be well-

⁸¹ Venice Commission, [CDL-AD\(2022\)030](#), *op. cit.*, para. 90.

⁸² The law has introduced a welcomed new layer to the organisational structure (Departments for judges and prosecutors), but has not removed any of the other layers, leading to a result that the HJPC is overly complex with different Sub-Councils for appointment, Committees of the Departments, and different Committees with outside participation of judges and prosecutors for the disciplinary proceedings and removal of Council members.

⁸³ E.g., Venice Commission, Poland, [CDL-PI\(2024\)009](#), Urgent Joint Opinion of the Venice Commission and the Directorate General of Human Rights and Rule of Law of the Council of Europe on the draft law amending the Law on the National Council of the Judiciary of Poland, paras. 18-20; [CDL-AD\(2023\)015](#), *op. cit.*, para. 62.

qualified to carry out these tasks. Lay members, in a more significant number, may play a relevant role in addressing this issue.⁸⁴

86. The Commission also notes that the Council's competence on budgetary matters with respect to the overall judiciary is not detailed enough. During the meetings in Sarajevo, several interlocutors pointed to the lack of competencies and powers of the HJPC on this matter. The Venice Commission echoes the finding of the 2023 European Commission Report, according to which "the HJPC budget planning and fund allocation competences for all courts and prosecutors' offices in the country should be strengthened."⁸⁵

87. Moreover, the Council will be assisted by a Secretariat (Article 56), headed by a Director and Deputy Director who will "oversee the preparation of sessions and the implementation of decisions by the Council and departments" (Article 57.3) and will have the right to attend all meetings of the Council as non-voting-participants and to express their opinion on all issues on the agenda (Article 57.4). They will be responsible for the performance of legal professional issues as well as management and administration (Article 57.2) The Secretariat's duties include the drafting of decisions to be rendered by the Council (Article 56.2).

88. The Venice Commission considers that the draft law strikes a reasonable balance of powers between the Council (and its Chair) and the Secretariat (and its Director). It also finds that the possibility for the Council to remove the Director and Deputy Director (Article 58(4)) should be limited to specific cases of misconduct.

89. Article 61 of the draft law stipulates that the Council itself will propose a draft budget in accordance with the provisions of the Law on Funding the Institutions of Bosnia and Herzegovina.

90. In respect of other countries, the Venice Commission has in the past recommended "to entrench the budgetary autonomy of the [judicial and prosecutorial council] at the constitutional level".⁸⁶ It is recalled that the European Court of Human Rights has held that the existence of guarantees against external pressure on the decisions on budgetary matters is an element of judicial independence.⁸⁷

91. The Commission notes that the draft law remains largely silent on this issue that inevitably affects the independence of the HJPC.⁸⁸ It therefore considers that budgetary autonomy should be regulated in the draft law in more detail, entrusting the Council with the power of elaborating its budget. If the Council is to be truly independent, it must be allowed to elaborate its own draft budget, and this should be submitted to the Parliamentary Assembly. Although the Ministry of Finance and the Ministry of Justice should be consulted and involved in the negotiations, with the possibility of submitting objections to the Council's draft budget, the final say should remain in the hands of Parliament.

D. Appointments and security of tenure of judges and prosecutors

92. Part III of the draft law consists of nine chapters dealing with the appointments of judges and prosecutors. The following sections will focus on the appointment and (in)eligibility criteria of judges and prosecutors (Articles 63 to 127), their appraisal (Articles 128 to 144), the asset declarations (Articles 162 to 173), the assignment and transfer of judges and prosecutors (Articles 145 to 149), and their status in terms of security of tenure, immunity and incompatibilities (Articles 155 to 161).

⁸⁴ See for example, in the Netherlands, Venice Commission, [CDL-AD\(2023\)029](#), *op. cit.*, para. 41.

⁸⁵ European Commission Progress Report for Bosnia and Herzegovina, 8.11.2023, SWD(2023) 691 final, p. 9.

⁸⁶ Venice Commission, [CDL-AD\(2021\)032](#), *op. cit.*, para. 111.

⁸⁷ ECtHR, *Campbell and Fell v. the United Kingdom*, 28 June 2014, applications n. 7819/77 and 7878/77, para. 78; Venice Commission, [CDL-AD\(2016\)007](#), *op. cit.*, para. 75.

⁸⁸ Venice Commission, [CDL-AD\(2016\)007](#), *ibid.*, para. 75.

1. Appointment procedure and (in)eligibility criteria

93. There is a great variety of different methods for the appointment of judges in domestic legal orders, with the result that there is no single 'model' that would ideally comply with the principle of the separation of powers and secure full independence of the judiciary. Much also depends on the legal culture and traditions developed in a country over time.⁸⁹

94. Whatever model is chosen, the appointment of judges should be a merit-based process. It is fair to say that international standards are more in favour of the extensive depoliticisation of the process. Political considerations should not prevail over the objective merits of a candidate.⁹⁰ It is therefore welcome that the draft law introduces a system in which the Council plays a central role in respect of admission to the judiciary, internal competition procedures and transfers.⁹¹

95. In respect of entry into the judiciary, Article 65 of the draft law describes the basic eligibility criteria. These criteria are quite common in other legal systems: citizenship, qualifications, absence of criminal convictions, *et cetera*. Once a year the Council will announce a public competition, which will be posted on the Council's website (Article 93). Article 95 of the draft law describes the various phases; the competitions will consist of an entrance exam (Article 97), a written test (Article 98), and an interview conducted by the interview panel described in Article 81 (Article 99). The draft law explicitly stipulates that the first two of those phases will be conducted anonymously, which is welcome indeed. A candidate will be awarded points for these three stages of the competition. The draft law does not provide for a detailed scoring mechanism; this will be regulated in the 'Book of Rules on Appointments'. However, the draft law itself (Article 96) lists the criteria for assessing candidates in general.

96. Under CM/Rec(2010)12, the 2010 Magna Carta of Judges and the CCJE Opinion No 1(2001), authorities responsible for making and advising on appointments should introduce, publish and give effect to objective and non-discriminatory eligibility criteria, with the aim of ensuring that the selection, appointment and career of judges are based on merit having regard to the qualifications, skills and capacity required to adjudicate cases by applying the law while respecting human dignity.⁹² The criteria mentioned in the draft law appear to fulfil these criteria.

97. Article 71 of the draft law explicitly stipulates that the Council's mandate in respect of judicial appointments will be carried out in a manner respectful of (gender) equality and fair representation of the constituent peoples. The Venice Commission recalls its previous considerations⁹³ according to which, in the specific context of Bosnia and Herzegovina, it would be preferable to refer to a general representation of the peoples, in line with the Constitution.

⁸⁹ Venice Commission, [CDL-AD\(2021\)032](#), *op. cit.*, para. 32; and [CDL-AD\(2023\)015](#), *op. cit.*, para. 32.

⁹⁰ Venice Commission, [CDL-AD\(2023\)015](#), *ibid.*, para. 32; [CDL-AD\(2021\)032](#), *ibid.*, para. 32; [CDL-AD\(2018\)028](#), *op. cit.*, para. 43. Under the 2016 Rule of Law Checklist "it is important that the appointment and promotion of judges is not based upon political or personal considerations, and the system should be constantly monitored to ensure that this is so", while "conferring a role on the executive [in decisions on the appointment and career of judges] is only permissible in States where these powers are restrained by legal culture and traditions, which have grown over a long time, whereas the involvement of Parliament carries a risk of politicisation", [CDL-AD\(2016\)007](#), paras. 79, 81-82. See also CCJE, Magna Carta of Judges, 17/11/2010, para. 5, CCPE, Opinion No. 13 (2018) on Independence, accountability and ethics of prosecutors, 23/11/2018, para. 24, and Recommendation iii.

⁹¹ See also [CDL-AD\(2023\)015](#), France - Joint Opinion on the Superior Council of Magistracy and the status of the judiciary as regards nominations, mutations, promotions and disciplinary procedures, para. 18; Venice Commission Report on the Independence of Judges, [CDL-AD\(2010\)004](#), para. 32.

⁹² See Council of Europe Committee of Ministers Recommendation CM/Rec(2010)12 §44; CCJE Opinion No 1 (2001) on Standards concerning the Independence of the Judiciary and the Irremovability of Judges, para. 25; 2010 Magna Carta of Judges, section on guarantees of independence, para. 5. See also CCJE Opinion No 21 (2018), Preventing Corruption among Judges, para. 24; Venice Commission, Russian Federation, Interim opinion on constitutional amendments and the procedure for their adoption, [CDL-AD\(2021\)005](#), para. 143; Venice Commission, [CDL-AD\(2010\)004](#), *op. cit.*, 24.

⁹³ See section on composition above.

Also, the Commission is of the opinion that courts should reflect as much as possible the country's diversity in terms of ethnic, gender, linguistic, religious or other criteria, as this diversity would enhance the legitimacy of and public trust in the courts. However, judgeship should, as a matter of principle, first and foremost, be dependent on objective qualification criteria, clearly set in law. Judgeship should not be dependent on a person's affiliation to an ethnic community which would in fact lead in the first place to granting special rights for constituent peoples to the exclusion of minorities or citizens of Bosnia and Herzegovina (as well as the granting of special rights for certain constituent people on parts of the territory of Bosnia and Herzegovina to the exclusion of both other constituent people and others).⁹⁴

98. The Judicial Department (in respect of candidate judges) or the Prosecutorial Department (in respect of candidate prosecutors) will then make a list of successful candidates (Article 101). Once a candidate is on the list, he or she shall not be required to take the tests again for the following three years. Once every three months, the Judicial or Prosecutorial Department will announce a list of concrete vacancies following which a successful candidate may apply to these vacancies (Article 102).

99. The applicants will then be ranked by the relevant sub-councils for nominations of candidates. The composition of these sub-councils is described in Articles 79 and 80. It suffices here to say that only (certain) Council members may be on these sub-councils. Some simplification of the composition of these sub-councils could be sought, as mentioned above. Specific nominations by the sub-councils are reasoned and will take into account the results achieved by the candidate in the public competition, the preferences of the candidate and considerations of gender and ethnic representation. Whilst it is welcome that the draft law specifies that the preferences of higher-ranked candidates carry more weight than the preferences of lower-ranked candidates (Article 103.4), the Commission reiterates its previous recommendation according to which the judiciary should not be organised along ethnic lines and the multi-ethnic composition of the judiciary should be of itself sufficient to ensure public trust.⁹⁵ The ranking based on the results achieved by the candidate in the public competition should not be rendered superfluous as a result of last-minute changes inspired by ethnic considerations. The final decision will then be taken by the relevant Department (Article 104).

100. The draft law provides for review of appointment-related decisions. First, a candidate may lodge an objection alleging an irregularity in the procedure which will be decided by the relevant Department (Article 77), but the draft law also provides for judicial review by the Appellate Court of BiH (Article 78). If the Court deems the complaint well-founded it may return the matter to the Council for a fresh decision. It is welcome that the draft law ensures the right to appeal to a court of law, as the Commission recommended in the 2014 Opinion,⁹⁶ and that the judicial review respects the powers of the Council in this manner (and not, for example, entrusts the Court to take a new decision instead of the Council). However, as noted above, the Appellate Court of BiH has not been established yet, hence the Commission emphasises once more the need for harmonisation and sequencing of the reforms.

101. Before an elected candidate can take office as a judge or prosecutor, he or she must successfully submit an asset declaration (Article 74 – a declaration explained in greater detail in Article 162 et seq.). Once a person assumes office, he or she has security of tenure. Judges and prosecutors are appointed for an unlimited mandate. Their mandate only ends in the event of death, resignation, reaching the age for mandatory retirement, permanent loss of ability to perform duties, conviction for a criminal offence for which the law provides imprisonment or dismissal from office for the reasons established by this law (Article 68).

⁹⁴ See, *mutatis mutandis*, ECtHR, *Zornić v. Bosnia and Herzegovina*, application no. 3681/06, 15 July 2014, para. 43, *Šlaku v. Bosnia and Herzegovina*, application no. 56666/12, 26 May 2016, para 40.

⁹⁵ Venice Commission, [CDL-AD\(2021\)015](#), *op. cit.*, para. 71.

⁹⁶ Venice Commission, [CDL-AD\(2012\)014](#), *op. cit.*, para. 97.

102. The procedure for applying *as a judge* to another position within the judiciary is – in essence – quite similar. The draft law does however contain certain specific provisions, such as Article 69 (listing situations in which applications will not be considered; for example if a disciplinary measure is applicable to the applicant or if a candidate wishes to apply to a court in which his or her blood relative holds office), Article 83 (criteria for transfers), Article 88 (criteria for the internal competition procedure), Article 105 et seq. (vacancies in certain superior courts), Article 111 et seq. (appointing court presidents with particular emphasis on assessing the managerial skills of the candidate), Article 123 et seq. (constitutional courts), and Article 125 et seq. (lay judges).

103. Generally speaking, this framework is satisfactory. However, it is recommended to:

- refer to a *general* representation of the peoples in Articles 71 and 103.4, avoiding making appointment of judges and prosecutors dependent on a candidate's affiliation to an ethnic community;
- further specify in Article 124.1(c) the criteria for selection of the judge to be proposed for the Constitutional Court of the Republika Srpska and to be nominated for the Constitutional Court of the Federation of Bosnia and Herzegovina. The draft law states that the Council will consider "other information that the Council considers relevant for the candidate's suitability to work as a judge of the given constitutional court". That formula is excessively vague and provides no guidance to candidates how this provision will be applied in practice;
- reconsider Article 124.2 stating that the candidate has to be a(n) (assistant) professor teaching "constitutional law, international law, criminal law or criminal procedural law, civil law or civil procedural law, administrative law, economic law or family law". As the list is almost exhaustive it either provides little guidance (in which case the listing of various subject areas could be deleted) or excludes certain areas of law for which no justification is given;
- similarly to previous comments on Article 26.1(f) and (g),⁹⁷ the requirement for appointment of lay judges in Article 125.1(e) should be limited to criminal offences of a certain gravity (i.e. excluding traffic offences, etc.).

2. Appraisal of judges and prosecutors

104. Under Article 130 judges and prosecutors will be assessed every three years, which the Venice Commission deems to be an appropriate time interval. Many States have introduced new mechanisms to ensure the integrity of judges and to monitor the quality of their work. The Commission has taken a nuanced approach with regard to these measures. The authority of a judiciary can only be maintained if: (a) the legal system puts in place adequate mechanisms to ensure that candidates are not appointed as judges or prosecutors if they do not have the required competences or do not meet the highest standards of integrity; and (b) the judiciary and prosecutorial service are cleansed of those who are found to be incompetent, corrupt or linked to organised crime.⁹⁸ This is not only essential in view of the role these institutions play in a State governed by the Rule of Law, but also because a judge – once appointed for life – will in principle

⁹⁷ See section above on the Status and security of tenure of Council members.

⁹⁸ See Venice Commission, Albania, Final Opinion on the revised draft constitutional amendments on the Judiciary (15 January 2016) of Albania, [CDL-AD\(2016\)009](#), para. 52: "such measures are not only justified but are necessary [...] to protect itself from the scourge of corruption which, if not addressed, could completely destroy its judicial system."

be irremovable except for limited grounds for dismissal.⁹⁹ The Commission therefore, in principle, does not object as such to the assessment of the performance of magistrates as foreseen in the draft law.

105. The Commission welcomes that the draft law emphasises that the aim of such appraisals is to enhance the quality of the judicial system, to identify training needs, and to strengthen public confidence (Article 128). Its aim is therefore not to 'punish' magistrates or to exercise excessive control over their substantive work.

106. The Commission also welcomes that the draft law itself describes certain core features of the procedure to be followed, i.e., the involvement of the magistrate concerned in the process, his or her possibility to take note of all documents used in the appraisal procedure and the possibility to comment on them, the fact that the decision will be reasoned and the possibility for judicial review (Articles 141 and 142).

107. Articles 137-139 of the draft law codify the main criteria used in the assessment, which is welcome. The draft law *inter alia* refers to 'performance quantity' (Article 138.1(a)). The Venice Commission has previously stated that it is reasonable to use the numerical output of cases as one of the indicators of professionalism.¹⁰⁰ However, the application of this criterion should be applied with due regard to the real situation of the magistrate in practice.¹⁰¹ Numerous factors may affect the 'output' of a judge or prosecutor that are unrelated to his or her professionalism. The law also refers to 'statistical quality of decisions' (Article 138.1(b)). The Commission has previously expressed concerns in respect of professional evaluations that rely heavily on the rate of reversals.¹⁰² This does not mean that the number of reversals (for judges) is completely irrelevant, but the threshold here should be set particularly high,¹⁰³ to become a factor in the evaluation result – otherwise, the risk is to produce a very timid judiciary. Furthermore, appraisal systems based primarily on quantitative performance may lead prosecutors and judges to take unnecessary steps and decisions in order to up their apparent work output.¹⁰⁴ In the case of prosecutors, counting the number of "successful" prosecutions as a measure of the quality of work should be impermissible as it encourages prosecutors to take what may be the wrong decision to prosecute and it penalises them for decisions not to prosecute which may be the correct approach. Furthermore, it amounts to an interference with professional independence.

108. An alternative solution would be not to look at the ratio of reversals (or successful prosecutions), but to concentrate on the jurisprudence created or developed by the decisions taken by the judge (or argumentations raised by prosecutors) and the gravity of errors (or inconsistencies) committed by him or her. A manifestly fallacious legal analysis or irrational assessment of facts in a particular case may tell more about the professionalism of a judge (or a prosecutor) than the average *ratio* of reversals (or successful prosecutions). But such a system has its limits as well. It will require an in-depth examination of the judgments and prosecutions,

⁹⁹ Venice Commission, Albania, Opinion on draft constitutional amendments enabling the vetting of politicians, [CDL-AD\(2018\)034](#), para. 48: "The judicial branch of the government has various specificities (judges are usually appointed for life, they have to be independent and impartial, they are not directly accountable to the other branches of the government, their position cannot be challenged by the electorate at general elections, their decisions cannot be annulled by anybody outside the judicial system, etc.) which justify a differentiated treatment."

¹⁰⁰ Venice Commission, Kazakhstan, Opinion on the Concept Paper on the reform of the High Judicial Council, [CDL-AD\(2018\)032](#), para. 85.

¹⁰¹ Venice Commission, North Macedonia, Opinion on the Laws on the Disciplinary Liability and Evaluation of Judges of "The Former Yugoslav Republic of Macedonia", [CDL-AD\(2015\)042](#), para. 103.

¹⁰² Venice Commission, [CDL-AD\(2018\)032](#), *op. cit.*, para. 82.

¹⁰³ Venice Commission, Armenia, Joint Opinion of the Venice Commission and the Directorate of Human Rights (DHR) of the Directorate General of Human Rights and Rule of Law (DGI) of the Council of Europe on the Draft Law amending and supplementing the judicial code (evaluation system for judges) of Armenia, [CDL-AD\(2014\)007](#), para. 40.

¹⁰⁴ See also CCJE Opinion No 17 (2014) on the Evaluation of Judges' Work, the Quality of Justice and Respect for Judicial Independence, para. 49.6; Venice Commission, Montenegro - Urgent Follow-up Opinion on the revised draft amendments to the Law on the Judicial Council and Judges, [CDL-PI\(2024\)007](#), para. 28.

which will be more time-consuming and, inevitably, more subjective. What is more important in such a system is that one should have trust in the professionalism and impartiality of the evaluators. What is important is that the chosen model should not penalise judges for the reasonable exercise of judicial discretion, even when their decisions are overturned on appeal.¹⁰⁵ Hence, the draft law should elaborate more on how the above criteria should be interpreted and applied.

109. Article 140 of the draft law stipulates which sources of information may be used during the appraisal procedures. It is welcome that the draft law stipulates that the information should be 'objective and relevant'. However, the Commission is concerned about the excessively broad formulation of Article 140.1(c): "all other documents and opinions that contain objective and relevant information about the work, professional activities and personal characteristics of the holder of judicial office". Also, the reference to 'all other documents' grants an unlimited access to information during the appraisal process which does not seem to be proportionate. It would thus appear desirable to redraft this provision in order to make it clearer and precise.

3. Asset declarations by judges and prosecutors

110. The duty of public officials to submit accurate asset declarations exists, in various forms, in many democratic legal orders.¹⁰⁶ In order to be efficient, this legal mechanism has to be accompanied by appropriate sanctions.

111. In setting up a system of asset declarations, a balance should be struck between the effective fight against corruption and the administrative burdens of such a system for individual judges and prosecutors and for the body responsible for verifying the declarations.

112. The Commission has previously advised states to introduce a minimum financial threshold.¹⁰⁷ The draft law contains such financial thresholds that seem to be appropriate. In Article 163.2(e), the reference to all 'vehicles' (i.e., also bicycles, etc.) could be limited to motorised vehicles.

113. Articles 162 et seq. of the draft law provide a regulatory framework for such asset declarations on an annual basis. The judicial office holder has to provide information on "the method and time of acquisition and purchase value, on income, interests, obligations, expenses and guarantees for themselves, their spouse or common-law partner, parents and children, as well as for other persons with whom they live in a joint household". The scope of application of the provision is therefore broad.¹⁰⁸

¹⁰⁵ Venice Commission, Georgia, Opinion on the Law on Disciplinary Responsibility and Disciplinary Prosecution of Judges of Common Courts of Georgia, [CDL-AD\(2007\)009](#), para. 18.

¹⁰⁶ Venice Commission, Ukraine, 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 draft Law amending provisions of the Code of Administrative offences and the Criminal Code regarding the liability of public officials for inaccurate asset declaration (No. 4651 OF 27 January 2021), [CDL-PI\(2021\)010](#), para. 30.

¹⁰⁷ Venice Commission, Armenia, Joint Opinion of the Venice Commission and the Directorate of Human Rights (DHR) of the Directorate General of Human Rights and Rule of Law (DGI), on the amendments to the Judicial Code and some other Laws, [CDL-AD\(2019\)024](#), para. 29: "it seems excessive to give the CPC unrestricted access to the detailed information about every smallest transaction which the judge might have incurred. This information may reveal details about the judge's (and, a fortiori, his or her close relatives') private life which are not relevant for the CPC mandate. If such information must be obtained, it can be done within the framework of a criminal investigation, with all appropriate procedural safeguards (a "probable cause" condition, judicial warrant, etc.)."

¹⁰⁸ See the CCJE Opinion no. 21 (Preventing Corruption Amongst Judges), p. 37: "GRECO also recommends having a specific body inside or outside the judiciary charged with the scrutiny of the timeliness and accuracy of such declarations. (...) Some countries have extended the asset declaration obligation to spouses and other close relatives of the judges."

114. In line with its previous Opinion on the matter,¹⁰⁹ the Venice Commission holds that this set of provisions seems to respond to GRECO's recommendation to develop an effective system for reviewing annual financial statements by members of the judiciary, and to ensure the publication of and easy access to financial information.¹¹⁰ Also, the Commission welcomes that the draft law addresses its previous recommendation as regards the inclusion of civil law partners, parents and other persons with whom the judge or the prosecutor could share a joint household.¹¹¹ Yet, in case of refusal to provide the necessary information by persons for whom the judge or prosecutor is obliged to submit the declaration (Article 163.10), the Commission recommends, in light of the low percentage of judges who submit the asset declarations, to explicitly stipulate in Article 163 that failure to submit the required information will be deemed a disciplinary offence ex Article 185.1 sub k unless the judicial office holder is able to give a satisfactory explanation why he/she is unable to provide the information.¹¹²

115. The Venice Commission welcomes the transparency regime in Article 164, according to which the asset declaration shall be published on the website of the HJPC, while ensuring that certain data are not made public. This system is generally in line with the Commission's previous recommendations,¹¹³ although the list of data included in Article 164.2 may require to be extended in order to ensure the respect for private life (Article 8 ECHR)¹¹⁴ and data protection (Convention 108+).¹¹⁵

116. The Commission also welcomes that Articles 165.6 and 165.8 follow its previous recommendations to expressly mention that the criteria used, and the results of the verification will be made public.¹¹⁶ Likewise, the Commission welcomes the provisions of Articles 169 to 171 providing precise rules on the composition and operation of the Asset Declarations Department of the HJPC, as well as the establishment of an external monitoring of the work of the Department.¹¹⁷

117. Article 166.5 should allow the Asset Declarations Department to send a written request for data, not only to relevant institutions, but also to other legal and physical persons.

118. Article 166.6 stipulates that the Declarations Department shall define more precisely how to access data or obtain data through other ways with an agreement on cooperation with the authorities, institutions and other legal entities that maintain the records. The Commission recommends that the provision be amended by including the sentence "Resources required for accessing commercial records shall be ensured from the HJPC budget", as proposed in a previous draft law.¹¹⁸

119. The Commission also welcomes the establishment of an external monitoring mechanism, checking the work of the Asset Declarations Department (Article 171). Yet it considers that precise rules ensuring the functional independence of the experts engaged in monitoring should be provided.

¹⁰⁹ Venice Commission, [CDL-AD\(2021\)015](#), *op. cit.*, para. 41.

¹¹⁰ GRECO Evaluation Report, Corruption prevention in respect of members of parliament, judges and prosecutors, Greco Eval IV Rep (2015) 2E, adopted on 4 December 2015 and published on 22 February 2016, Recommendation xiii.

¹¹¹ Venice Commission, [CDL-AD\(2021\)015](#), *op. cit.*, para. 43.

¹¹² In the past, the Commission recommended that it should at least be required to submit some forms of evidence of the refusal or the genuine attempt to obtain the information, see Venice Commission, [CDL-AD\(2021\)015](#), *op. cit.*, para. 45.

¹¹³ Venice Commission, [CDL-AD\(2021\)015](#), *ibid.*, para. 47.

¹¹⁴ See ECtHR (GC), *L.B. v. Hungary*, 09/03/2023, para. 122 and 128; CCJE Opinion (2018) No. 21 on Preventing Corruption among judges, para. 40.

¹¹⁵ Council of Europe, Convention 108+, 128th session of the Committee of Ministers, Elsinore, 18 May 2018.

¹¹⁶ Venice Commission, [CDL-AD\(2021\)015](#), *op. cit.*, para. 48.

¹¹⁷ Venice Commission, [CDL-AD\(2021\)015](#), *ibid.*, para. 49.

¹¹⁸ Draft Law on the high Judicial and Prosecutorial Council 2020, [CDL-REF\(2021\)001](#).

4. Transfers and leave of absence

120. The Venice Commission is not opposed to a system allowing transfers (and secondments in the context of professional development of the magistrate concerned). However, such a system should provide for safeguards in order to avoid the use of such instruments to ‘punish’ a judge or prosecutor. For this reason, international standards favour a system in which a judge may only be transferred with his or her consent. “A judge should not receive a new appointment or be moved to another judicial office without consenting to it, except in cases of disciplinary sanctions or reform of the organisation of the judicial system”.¹¹⁹

121. Article 146 (which applies also to prosecutors, see Article 148) of the draft law is problematic from that point of view. It allows judges to be temporarily assigned to another court of the same or lower instance *without* their consent. It is welcome that the draft law *does* specify that such a temporary assignment can not last for more than a year, that the provision will not apply to those judges for whom moving to another court is particularly burdensome given their family situation (i.e. pregnant women, single parents, parents raising a child with special needs or nursing a very young child), and that such an assignment has to be related to backlog issues and shortage of staff issues. Nonetheless, it is recommended to reconsider this possibility in its entirety, especially considering that the grounds for assignment against consent in Article 146.1 are excessively broad (“in order to assist in the elimination of backlogs in the receiving court” or “if there is insufficient number of judges”).

122. In addition, Article 146.4 provides that the judge may appeal against such a decision but that this appeal will be decided upon by the Council itself. The Commission recommends identifying a different court for appeal in light of the principle *nemo iudex in causa sua*.

123. The Council is also given the competence of approving the absence of a judge and prosecutor (see Article 150 et seq.). The Commission finds that a more decentralised approach makes it easier to identify the needs in a given court/office (are various colleagues away at the same time, are there specific shortages due to illness, etc). It is therefore welcome that Article 152 allocates the court president with the power to grant leave if the absence is due to short-term training activities and study trips. However, there may be several other circumstances where the court president could be better placed for taking decisions on absence of leave as well. For example, Article 151 refers to ‘personal and family circumstances justifying absence from duty’. It seems an unnecessary administrative burden to entrust the Council with the competence to decide on *all* these requests – only if the judge is unable to perform his/her duties for a prolonged period of time, might involvement of the Council be advisable. The Commission suggests enlarging the decision-making power of the court presidents to cover more situations.

5. Status: security of tenure, immunity and incompatibilities

124. Council of Europe standards, including case-law of the ECtHR, have established security of tenure (along with irremovability¹²⁰) as a key element of the independence of judges, included in the guarantees of Article 6(1) ECHR. This means that, in practice, the law should provide that judges have guaranteed tenure until retirement. Indeed, in practice the principle of professional lifetime appointment of judges applies in almost all Council of Europe member States.¹²¹

¹¹⁹ See Committee of Ministers of the Council of Europe, CM/Rec(2010)12, *op. cit.*; see also Venice Commission, [CDL-AD\(2021\)032](#), *op. cit.*, paras. 44-45.

¹²⁰ Meaning that a judge cannot be assigned to another court or have his or her duties changed without his or her free consent, see 1998 European Charter on the Statute for Judges, section 3.4; CEPEJ, European Judicial Systems – CEPEJ Evaluation Report 2022- Evaluation Cycle (2020 data), 2022, p.50.

¹²¹ CEPEJ, *idem*. Under the CCJE Opinion No 1 (2001) (§52) “where, exceptionally, a full-time judicial appointment is for a limited period, it should not be renewable unless procedures exist ensuring that: i. the judge, if he or she

Judges' permanent appointment may be terminated only in cases of serious breaches of disciplinary or criminal provisions established by law, or if the judge can no longer perform judicial functions.¹²² In practice, judges have permanent tenure which will only be terminated in case of (a) retirement, (b) at the personal request by the judge concerned, (c) permanent loss of ability to exercise the judicial function, (d) loss of citizenship, and (e) dismissal in case of a criminal conviction for a crime of a particular severity or a disciplinary sanction as a result of a serious disciplinary offence. Articles 68 and 218 of the draft law contain very similar grounds.

125. Article 155 of the draft law provides that the judicial office holder enjoys functional immunity. A balance must be struck between the immunity of judges as a means to protect them against undue pressure and abuse from other state powers or individuals (functional immunity) and the fact that a judge is not above the law (accountability).¹²³ Judges should therefore not benefit from a *general* immunity which protects them against prosecution for criminal acts committed by them for which they should be answerable before the courts. On the other hand, judges should enjoy *functional* immunity (See section above on the status and security of tenure of Council members). The wording of Article 155 seems adequate in this regard.

126. However, the Commission notes that in its previous Opinion on draft law on Courts of Bosnia and Herzegovina,¹²⁴ it found that this same issue was regulated in both draft laws (Article 8.2) and the current law on the HJPC (Article 87). The Commission therefore reiterates its recommendation that the issue of immunity be regulated either in the (draft) law on the HJPC or in the (draft) Law on Courts.¹²⁵

127. Article 158 of the draft law stipulates which offices and additional activities are incompatible with being a judge or prosecutor. Judges should not put themselves into a position where their independence or impartiality may be questioned. This justifies national rules on the incompatibility of judicial office with other functions and is also a reason why many states restrict political activities of judges.¹²⁶ Generally speaking the thrust of the provision is in line with similar provisions in other jurisdictions.

E. Disciplinary liability of judges and prosecutors

128. The disciplinary regime is an essential component of the legal status of magistrates. In the field of judicial discipline, a balance needs to be struck between judicial independence (necessary to avoid political interference by the executive), on the one side, and the necessary accountability of the judiciary, on the other, averting possible negative effects of corporatism within the judiciary.

129. Part IV of the draft law deals with disciplinary liability, addressing first the institutional set-up (the Disciplinary Counsel, Articles 174 to 179, and the Disciplinary Panels, Articles 180 to 182), then the liability itself (offenses and measures, Articles 183 to 189), and finally, the procedure (Statute of limitations, Articles 190 to 192; investigations, Articles 193 to 195; the proceedings Articles 196 to 204; and eventually the confidentiality and records, Articles 205 to 210).

wishes, is considered for re-appointment by the appointing body and ii. the decision regarding re-appointment is made entirely objectively and on merit and without taking into account political considerations."

¹²² CM/Rec(2010)12 §§49-50, Venice Commission, Report on Independence of Judges, [CDL-AD\(2010\)004](#), paras. 33-43; 1998 European Charter on the Statute for Judges, section 3. See also ECtHR, *Baka v. Hungary* (GC), 23/06/2016, application no. 20261/12, para. 172; ECtHR, *Thiam v. France*, 18/10/2018, application no. 80018/12, paras. 59 and 77, ECtHR, *Xhoxhaj v. Albania*, 09/02/2021, application no 15227/19, para. 298, ECtHR, *Gumenyuk and Others v. Ukraine*, 22/07/2021, application no. 11423/19, paras. 54 and 99; CJEU (GC), *Commission v. Poland (Independence of the Supreme Court)*, C-619/18, judgment of 24/06/2019, para. 76, CJEU (GC), *Commission v. Poland (Independence of ordinary courts)*, C-192/18, judgment of 05/11/2019, para. 93ff.

¹²³ Venice Commission, [CDL-AD\(2017\)002](#), *op. cit.*, para. 53.

¹²⁴ Venice Commission, [CDL-AD\(2023\)003](#), *op. cit.*

¹²⁵ Venice Commission, [CDL-AD\(2023\)003](#), *ibid.*, paras. 57.

¹²⁶ Venice Commission, [CDL-AD\(2010\)004](#), *op. cit.*, para. 62.

130. The following sub-sections will focus on these three subject-matters.

131. As a preliminary remark, the Commission notes that this Part of the draft law only deals with the disciplinary liability of judges and prosecutors in their ordinary functions, and not in their function as members of the Council. The regime foreseen for the removal, suspension and termination of office of the members of the Council (Articles 26 to 28) cannot be deemed sufficient to cover all the situations relevant for disciplinary liability. The Commission recommends regulating also the disciplinary liability of the members of the Council (including lay members, see above the section on status and security of tenure of Council members), with specific measures and procedures, as recommended in its previous Opinion.¹²⁷

1. Institutional set-up

132. Articles 174 et seq. of the draft law provide the regulatory framework for disciplinary liability. The institutional set-up may be summarised as follows.

133. The Office of the Disciplinary Counsel (ODC) is headed by the Chief Disciplinary Counsel who is appointed by the Council for a term of five years following a public competition procedure conducted by the Agency for the Civil Service (Article 176).¹²⁸ The ODC will be responsible for conducting disciplinary investigations (either initiated by a complaint or *ex officio*), initiating disciplinary proceedings and representing cases of disciplinary violations before the disciplinary commissions of the Council (Article 174). The other staff members of the ODC appear to be ordinary civil servants. However, the law does provide that the ODC is an “autonomous and functionally independent” body (Article 174.2).

134. In its 2014 Opinion, the Venice Commission found that there should be no institutional or personal interference of the members of the HJPC in the work of the Office of the Disciplinary Counsel, given that this office is part of the institution responsible for considering and applying disciplinary penalties.¹²⁹ In this respect, the participation of HJPC members in the selection and removal of the chief disciplinary council and other employees should be reconsidered.

135. Disciplinary cases are heard by disciplinary panels (Article 180 et seq.). There are first instance panels, second instance panels and appeals panels. These panels consist of three members of which one is a member of the Council (in the relevant Department) and the two others are judges or prosecutors nominated by the various courts or offices as long as these judges or prosecutors have a clean disciplinary record and have scored very well during the last performance evaluation. Article 181(5) provides that “In disciplinary proceedings against judges, both first instance and second instance panels shall be comprised of judges. In disciplinary proceedings against prosecutors, both first instance and second instance panels shall be comprised of prosecutors”. The same logic governs Article 181(7) on the appeal disciplinary panel. This means that lay members of the Council are excluded from being members of the disciplinary panels. This difference in treatment does not seem justified, the *rationale* for including lay members in the judicial or prosecutorial councils is precisely to limit corporativism, hence they should not be excluded from deciding on disciplinary matters.¹³⁰ The Venice Commission therefore recommends deleting these provisions.

¹²⁷ Venice Commission, [CDL-AD\(2021\)015](#), *op. cit.*, paras. 52-53.

¹²⁸ Additional eligibility criteria are enumerated in Art. 178. There is possibly a mistake in paragraph 1: there should not be a mention of the deputy chief disciplinary counsel; to whom paragraph 2 is reserved.

¹²⁹ Venice Commission, [CDL-AD\(2012\)014](#), *op. cit.*, para. 112.

¹³⁰ See section above on Status and security of tenure of Council members, regarding the difference in treatment between lay members and others in the Council. See also, Venice Commission, [CDL-AD\(2023\)029](#), *op. cit.*, para. 55-56. See also, CCJE, Opinion No. 24 (2021), *op. cit.*, paras. 37 and 38.

2. What conduct should render a judge liable to disciplinary proceedings?

136. While acknowledging that “there is no uniform approach to the organisation of the system of judicial discipline and that practice varies greatly in different countries with regard to the choices between defining in rather general terms the grounds for the disciplinary liability of judges and providing an all-inclusive list of disciplinary violations”,¹³¹ the Venice Commission favours specific and detailed description of grounds for disciplinary proceedings,¹³² whereas it recognised that, to a certain degree, it is unavoidable that a legislator uses open-ended formulas in order to ensure the necessary flexibility.¹³³ Relevant in this regard is also whether the task of interpreting and applying these notions is assigned to a body enjoying sufficient institutional autonomy and independence. On this matter, the ECtHR found that in the absence of practice, domestic law needs to establish guidelines concerning vague notions to prevent arbitrary application of the relevant provisions: “the absence of any guidelines and practice establishing a consistent and restrictive interpretation of the offence of “breach of oath” and the lack of appropriate legal safeguards resulted in the relevant provisions of domestic law being unforeseeable as to their effects”.¹³⁴ Increased sensitivity regarding the issue of disciplinary offences and their impact on the independence of the judiciary is also demonstrated in the case-law of the Court of Justice of the European Union.¹³⁵

137. Against that background, the Venice Commission will analyse Articles 183-185.

138. Article 183 of the draft law specifies that disciplinary liability may only result from acts committed intentionally or negligently. This is welcome because a magistrate should not face disciplinary liability as a result of *bona fide* errors or simply for disagreeing, in good faith, with a particular interpretation of the law preferred by the executive, legislature, or other non-judicial entities. However, consideration should be given to the question whether a further qualification of negligence is needed, for example ‘gross or repeated negligence’. Some of the disciplinary grounds in Article 184 (for example failure to comply with the books of rules or providing incorrect or insufficient information to the Council) could otherwise lead too easily to disciplinary liability.

139. Article 184 lists the disciplinary offences of judges. As it did in its last Opinion on the matter,¹³⁶ the Venice Commission recalls some relevant rules regarding the disciplinary liability of judges and prosecutors: a) judges shall not be disciplined for situations which are outside of their control and which may be reasonably explained by the malfunctioning of the judicial system as a whole; b) disciplinary sanctions should not interfere with the judge’s independence in the decision-making and should never extend to differences in legal interpretation of the law or judicial mistakes; c) only deliberate abuse of judicial power or repeated or gross negligence should give rise to a disciplinary violation; d) the disciplinary system should use less drastic sanctions for smaller violations; e) dismissal of a judge should only be ordered in exceptionally

¹³¹ Venice Commission, Kyrgyz Republic, Joint opinion - Venice Commission and OSCE/ODIHR - on the draft amendments to the legal framework on the disciplinary responsibility of judges in the Kyrgyz Republic, [CDL-AD\(2014\)018](#), para. 23.

¹³² See, for example, Venice Commission, Republic of Moldova, Joint Opinion of the Venice Commission and the Directorate of Human Rights (DHR) of the Directorate General of Human Rights and the Rule of Law (DGI) of the Council of Europe, on the Draft Law on disciplinary liability of judges of the Republic of Moldova, [CDL-AD\(2014\)006](#), para. 15.

¹³³ See, for example, Venice Commission, [CDL-AD\(2017\)018](#), *op. cit.*, para. 108; and [CDL-AD\(2019\)024](#), *op. cit.*, para. 40. See also ECtHR, Oleksandr Volkov v. Ukraine, 9/01/2013, application no. 21722/11, para. 175 et seq.

¹³⁴ ECtHR, Oleksandr Volkov v. Ukraine, *op. cit.*, para. 185. See also, ECtHR, Denisov v. Ukraine, 25 September 2018, application no. 76639/11.

¹³⁵ CJEU, C-204/21, 5 June 2023, Commission v Poland, ECLI:EU:C:2023:442; CJEU, C 791-19, 15 July 2021, Commission/Poland (Disciplinary liability of judges), EU:C:2021:596; Joined Cases C-558/18 and C-563/18, 26 March 2020, Miasto Łowicz (Disciplinary regime for magistrates), ECLI:EU:C:2020:234; and Joined Cases C-83/19, C-127/19, C-195/19, C-291/19, C-355/19 and C-397/19, 18 May 2021, Forum of Romanian Judges, ECLI:EU:C:2021:393.

¹³⁶ Venice Commission, [CDL-AD\(2021\)015](#), *op. cit.*, para. 55.

serious cases; f) under-performance should not be automatically equated with a disciplinary violation.¹³⁷

140. On a general note, the Commission notes that Article 184 lists the possible disciplinary offences under 19 different headings. The provision does not establish any order of seriousness, nor does it relate the list of offenses to the available punishments. The Commission thus recommends setting the rules for applying lighter sanctions to smaller violations.

141. In respect of the various disciplinary grounds, the Commission makes the following recommendations.

142. Article 184.1(c) (failure to disqualify in case of a conflict of interest) – The provision should clarify that such a failure will only lead to disciplinary liability if the judicial office holder does not resolve or manage the conflict of interests once s/he has become aware of it.

143. Article 184.1(d) and (e) ('undue delays' and failure to comply with the right to a trial within a reasonable time) – Whether a judge is able to conduct proceedings (or certain procedural acts during those proceedings) in a timely fashion is dependent, *inter alia*, on his/her overall workload, the adequacy of support staff and/or IT facilities, and the procedural behaviour of the parties to the proceedings. In its last Opinion on the matter,¹³⁸ the Commission stated that disciplinary offences "should be defined in such a way as to make sure, that a judge or a prosecutor is not sanctioned for delays that are beyond his/her control (e. those caused by applicants). The Venice Commission realises that this provision may be intended to stem the excessive length of proceedings which might jeopardise the effectiveness and credibility of the administration of justice.¹³⁹ Nevertheless, this issue should be dealt with through a comprehensive reform of procedural law, not through the disciplinary process unless the delays are caused by negligence or voluntarily."¹⁴⁰ Hence, an individual judge or prosecutor should not become the victim of structural deficiencies (including ones of a budgetary nature) within the judiciary as a body. The Commission therefore recommends clarifying that in the latter situation the judge or prosecutor will not face disciplinary liability.

144. Article 184.1(f) (enabling persons not authorised by law to perform judicial functions) – The Venice Commission reiterates its previous recommendation to clarify this provision as its meaning "is unclear and so are the circumstances under which a judge could engage in such an act".¹⁴¹

145. Article 184.1(g) (interfering with the work of a judge or prosecutor contrary to law, with the intention to obstruct or prevent their activities, or to influence their work) – The Venice Commission re-states, as in its previous Opinions on the matter, that this provision is not clear and stresses the need to clarify what is meant by an "obstruction for the purposes of this draft law".¹⁴²

146. Article 184.1(h) (commenting on pending cases) – The Venice Commission reiterates its previous recommendation to clarify this provision.¹⁴³ The disciplinary regime should not apply to normal consultations between peers about work-related issues. The text should clarify that it intends to avoid *undue* interference in pending cases.

¹³⁷ Venice Commission, [CDL-AD\(2015\)042](#), *op. cit.*, para 113.

¹³⁸ Venice Commission, [CDL-AD\(2021\)015](#), *op. cit.*

¹³⁹ ECtHR, Scordino v. Italy (no. 1) [GC], application no. 36813/97, 29/03/2006.

¹⁴⁰ Venice Commission, [CDL-AD\(2021\)015](#), *op. cit.*, para 57. See also [CDL-AD\(2015\)042](#), *op. cit.*, para. 113.

¹⁴¹ Venice Commission, [CDL-AD\(2021\)015](#), *op. cit.*, para. 56; [CDL-AD\(2014\)008](#), *op. cit.*, para. 104.

¹⁴² Venice Commission, [CDL-AD\(2021\)015](#), *ibid.*, para. 56, [CDL-AD\(2014\)008](#), *ibid.*, para. 104.

¹⁴³ Venice Commission, [CDL-AD\(2021\)015](#), *ibid.*, para. 58, and [CDL-AD\(2014\)008](#), *ibid.*, para. 105.

147. Article 184.1(i) (failure to comply with the books of rules). Considering that many issues are regulated by the Council, the current formulation appears excessively broad and should be rephrased to exclude at least bureaucratic minutiae.

148. Article 184.1(s) (violation of ethical standards) – In its 2021 Opinion on Bosnia and Herzegovina,¹⁴⁴ the Commission found the provision reasonable inasmuch as it foresees the disciplinary responsibility only for violations “*that compromises the reputation and integrity of the judiciary*”. The Commission relied on the ECtHR case-law, according to which a judge is considered to be “*well-versed in the law and aware of the rules aimed at upholding the integrity and dignity of a judicial office*”,¹⁴⁵ and it concluded that judges are expected to understand the full meaning of these terms, notably on the basis of domestic case-law on the matter. However, the primary role of the codes of ethical conduct is to provide guidance to judges and prosecutors on ensuring that their behaviour corresponds to the highest ethical standards, both on duty and off, which allows confidence in justice by society. In view of their aspirational purpose setting out general principles of conduct, such codes often include provisions drafted in broad and vague terms which make them unfit for direct application in disciplinary proceedings.¹⁴⁶ For these reasons, the position of the Venice Commission has evolved and has rejected on several occasions the idea of disciplinary responsibility for violation of norms of ethics *per se*.¹⁴⁷ The Commission hence holds its most recent stance against the blanket reference to the ethical standards which is problematic as it poses an issue of clarity and foreseeability of grounds for disciplinary liability.¹⁴⁸

149. Article 185 contains a list of disciplinary offences for prosecutors which is nearly identical to the list for judges. Hence, the same considerations apply. The only difference is that Article 185.1(o) separately mentions the failure to carry out a statutory instruction from a superior prosecutor. The draft law specifies that disciplinary liability may not result from a failure to comply with such an instruction, if the instruction itself violates the law.¹⁴⁹

150. In a recent Opinion on the Netherlands,¹⁵⁰ the Venice Commission has summarised the standards applying with respect to the role of public prosecution in the criminal justice system, emphasising the importance of internal and external independence of the prosecution service.¹⁵¹ In a nutshell, instructions not to prosecute must be prohibited (or remain exceptional) and instructions to prosecute must be strictly regulated.¹⁵² The Venice Commission’s Rule of Law Checklist too suggests that if the executive is permitted to issue specific instructions to the prosecution service in particular cases, these should be “reasoned, in writing, and subject to public scrutiny”.¹⁵³

151. Therefore, the Venice Commission recommends reviewing and amending Article 185.1(o) in light of the above recommendations.

¹⁴⁴ Venice Commission, [CDL-AD\(2021\)015](#), *op. cit.*, para. 61.

¹⁴⁵ ECtHR, *Guz v. Poland*, application no. 965/12, 15/01/2021, para 79.

¹⁴⁶ Venice Commission, Bulgaria, 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 Code of Ethical Conduct for Prosecutors and Investigators, [CDL-AD\(2024\)005](#), para. 16.

¹⁴⁷ Venice Commission, [CDL-AD\(2013\)035](#), *op. cit.*, para 16; [CDL-AD\(2014\)006](#), *op. cit.*, para 35; [CDL-AD\(2014\)007](#), *op. cit.*, para 111.

¹⁴⁸ Venice Commission, [CDL-AD\(2024\)005](#), *op. cit.*, para. 21.

¹⁴⁹ For the Relationship between public prosecutors and the executive and legislative powers, see Committee of Ministers of the Council of Europe, Recommendation (2000)19 on the Role of Public Prosecution in the Criminal Justice System, paras. 10-16.

¹⁵⁰ Venice Commission, [CDL-AD\(2023\)029](#), *op. cit.*

¹⁵¹ Committee of Ministers of the Council of Europe, Recommendation (2000)19 on the Role of Public Prosecution in the Criminal Justice System, paras. 9-14-17-19-36.

¹⁵² Committee of Ministers of the Council of Europe, Recommendation (2000)19, *op. cit.*, para. 13. See also, CCPE, Opinion No. 13(2018), Independence, accountability and ethics of prosecutors, para. 36.

¹⁵³ Venice Commission, [CDL-AD\(2016\)007](#), *op. cit.*, E.1.d.ii.

3. Disciplinary proceedings

152. The Venice Commission has previously stated that “disciplinary proceedings against judges based on the rule of law should correspond to certain basic principles, which include the following: the liability should follow a violation of a duty expressly defined by law; there should be fair trial with full hearing of the parties and representation of the judge; the law should define the scale of sanctions; the imposition of the sanction should be subject to the principle of proportionality; there should be a right to appeal to a higher judicial authority”.¹⁵⁴ Similarly, in its 2016 Rule of Law Checklist the Venice Commission stressed that “[t]he disciplinary system should fulfil the requirements of procedural fairness by way of a fair hearing and the possibility of appeal(s)”.¹⁵⁵ Also the ECtHR’s case-law has underlined refers to the importance of an appropriate framework for independent and impartial review.¹⁵⁶ Likewise, the European Charter on the Statute for Judges requires *inter alia* that the proceedings should be of an adversarial character involving full participation of the judge concerned.

153. The draft law describes the various stages in the disciplinary proceedings. An investigation by the ODC may be initiated by a complaint or *ex officio* (Article 193). The draft law stipulates the requirements of a ‘complaint’, the circumstances under which the ODC shall dismiss a complaint without conducting an investigation, and the circumstances under which the ODC may decide *not* to initiate disciplinary proceedings (Articles 194-195). It also guarantees the confidentiality in those early stages of the investigation (Article 205). The draft law stipulates that within the framework of a disciplinary investigation “all courts, prosecutor’s offices, as well as judges, presidents of courts, chief prosecutors and deputy chief prosecutors, prosecutors, lay judges and employees of courts or prosecutor’s offices are obliged to act in accordance with the Office’s requirements regarding the provision of information, documents or other material in connection with a disciplinary investigation”. The Commission recommends clarifying that the ODC shall not have access to individual files on pending cases.

154. Depending on the outcome of the investigation, disciplinary proceedings may be initiated by the ODC before a disciplinary panel using an automated system for assignment. The proceedings are in public, but under certain circumstances the hearing may be closed (Article 199). This is welcome.¹⁵⁷ The draft law also stipulates that the judicial office holder concerned will be duly notified, has the right to acquaint himself with the underlying documents, will participate in the proceedings and be allowed to be represented by a lawyer (Article 197). The Venice Commission notes that it is not provided for in the draft law that all useful acts of investigation may (or should) also be carried out at the request of the accused magistrate, in fulfilment of his or her right of defence. Similarly, the draft law could expressly stipulate that enough time be given to the judicial office holder concerned to prepare his or her defence. Finally, Article 202 could clarify that decisions shall be reasoned.

155. The Commission welcomes that the draft law explicitly states that the principle of proportionality will apply when imposing disciplinary sanctions (Article 188). This is in line with the position taken by the Committee of Ministers of the Council of Europe¹⁵⁸ and the Venice Commission which stated that the “imposition of the sanction should be subject to the principle

¹⁵⁴ Venice Commission, [CDL-AD\(2016\)009](#), *op. cit.*, para. 34.

¹⁵⁵ Venice Commission, [CDL-AD\(2016\)007](#), *op. cit.*, para. 78.

¹⁵⁶ ECtHR, *Volkov v. Ukraine*, application no. 21722/11, 9/01/2013, para. 184, ECtHR (GC), *Guðmundur Andri Ástráðsson v. Iceland*, 01/12/2020, para. 218 ff; ECtHR, *Grzęda v. Poland* (GC), 15/03/2022, para. 343, ECtHR, *Gloveli v. Georgia*, 07/04/2022, paras. 56-59. See also the European Charter on the Statute for Judges requiring *inter alia* that disciplinary proceedings should be of an adversarial character involving full participation of the judge concerned.

¹⁵⁷ Venice Commission, Lebanon, Opinion on the draft law on the Administrative Judiciary, [CDL-AD\(2024\)006](#), para. 78.

¹⁵⁸ Committee of Ministers of the Council of Europe, CM/Rec(2010)12, para 69: “disciplinary sanctions should be proportionate”.

of proportionality”.¹⁵⁹ In this regard, Article 186 of the draft law is of relevance describing a range of disciplinary measures (reprimand, reduction in salary for a period of up to one year, and removal from office). In addition, a judicial office holder may be obliged to follow specialised training (Article 187). However, the one-year ban on appointment or transfer of a judge or prosecutor who has been reprimanded (Article 189) appears draconian, especially considering that a reprimand is the lowest level of penalty.

156. In addition, Article 191 is silent on the consequences of failure to establish disciplinary liability within two years. The provision should exclude the possibility that the case automatically lapses after this term.

157. Article 193 provides for a single disciplinary investigation where several cases are instituted against the same person. The Commission suggests including also the possibility to prioritise the more serious charges.

158. Article 194.3(b) provides for rejection of an anonymous complaint which is incomplete or incomprehensible. It should nonetheless be possible to investigate an anonymous complaint, even though incomplete, where there is enough evidence to do so.

159. Finally, the draft law also provides for (legal) review to the judicial office holder concerned (Articles 202-203). These provisions are welcome.

IV. Conclusion

160. By letter of 10 May 2024, the Minister of Justice of Bosnia and Herzegovina requested the Venice Commission to adopt an Opinion on the draft law on the High Judicial and Prosecutorial Council.

161. At the outset, the Venice Commission welcomes the fact that the current draft law, albeit not finalised, constitutes the comprehensive revision as recommended by the Commission earlier. Below are some key recommendations reflecting the analysis contained in this Interim Follow-up Opinion.

162. The Venice Commission makes the following preliminary remarks:

- The authorities should adopt a strategic approach to the reform of the judicial sector and consider, *prior* to adopting the draft law, what would be the other immediate necessary actions directly related to it, i.e. what other pieces of legislation would require to be harmonised afterwards or possibly in parallel to it.
- There should be an inclusive consultation process on the draft law, giving enough time and opportunities to all relevant stakeholders to comment on the draft law.
- As previously recommended, the HJPC should be provided with a constitutional status. In continuity with the current law, the general provisions stipulating the non-application of the provisions of the Law on Ministries and Other Bodies of the Administration of Bosnia and Herzegovina and the Law on Administration of Bosnia and Herzegovina to the HJPC should also be maintained, with the aim of preserving the independence of the Council and its Secretariat.

163. On a general note, whereas the Commission agrees that the composition of any institution at State level should reflect as much as possible the country's diversity in terms of ethnic, gender, linguistic, religious or other criteria, it also emphasises that the ethnic approach is to be phased

¹⁵⁹ Venice Commission, [CDL-AD\(2007\)009](#), *op. cit.*, para. 9. See also, [CDL-AD\(2016\)009](#), *op. cit.*, para. 34.

out and any forward-looking piece of legislation should aim at overcoming the ethnic divisions. Thus, the Commission recommends adding to Article 5(5) a reference to the fact that the HJPC, as the judiciary in general, shall be generally representative of the peoples of Bosnia and Herzegovina, as required by the Constitution and modifying all those provisions that still make reference to the constituent peoples of Bosnia and Herzegovina. Likewise, judicial appointments should be primarily merit-based, and the ethnic factor should be only exceptionally taken into consideration, as the multi-ethnic composition of the judiciary should be of itself sufficient to ensure public trust (Articles 71 and 103.2 of the draft law).

164. As regards *membership of the HJPC*, the Commission recommends:

- establishing a Council with an uneven number of members. The two Departments, judicial and prosecutorial, should also consist of an uneven number of members, which implies that they should count on an uneven number of lay members belonging to both Departments;
- opening lay membership to other legal professionals, and considering also non-legal professionals;
- increasing significantly the number of lay members and ensuring that there is no unjustified difference in treatment between judicial and non-judicial members.

165. With respect to the two alternative modalities for the *composition of the Council* proposed by the two versions of Article 6, the Commission expresses its preference for the smaller, and therefore more efficient composition between the two, which combines diversity and varied representation with a limited number of members (18 instead of 24).

166. As to the provisions concerning the *election* of HJPC members, the Commission recommends:

- excluding persons convicted of criminal acts of a certain severity, while nuancing the criteria related to judges and prosecutors that have been subject to a disciplinary measure,
- reducing the number of, respectively judges or prosecutors, members of the electoral committee and excluding all the members thereof from the decision on the objection that should be then taken by the respective Department,
- establishing that nomination of lay members is preceded by a public call in Article 10.1 of the draft law,
- stipulating in Article 19 that parliamentary control is to be exercised over the appointment of the members by the Council of Ministers and the modalities of this control, taking into account the requirements elaborated in respect of the lay member selected by Parliament,
- elaborating in(eligibility) criteria and procedures for lay members to be elected by Parliament, in line with the principle of the broadest consensus, by a qualified majority, following an open and transparent competition. Effective anti-deadlock mechanisms should also be provided. If the number of lay members was to be increased, non-political bodies such as the bar associations should be entrusted with the selection of these members.

167. As to the *status and tenure* of HJPC members, the Commission recommends (or reiterates previous recommendations):

- further specifying the situations in which the Council member “seriously damages the reputation of the Council” (Article 27.1),
- providing for judicial review of the decision to suspend a Council member in Article 28,
- fine-tuning the definition of conflict of interest (Article 30) and avoiding reference to the Rules of Procedure for its regulation,
- further developing the concept of “immunity”.

168. As to the *competencies* of HJPC members, the Venice Commission recommends:

- dividing the list of powers in Article 53 by the respective formations and bodies of the Council (Departments, disciplinary bodies or appraisal committees), and clarifying Article 47.5 to ensure that the plenary of the Council does not become an appeal body of the Departments’ decisions,
- allocating the competence to decide on ‘objections in the appointment procedures for judges and prosecutors’ (see Article 53(c)) to a court,
- entrusting the Council with the power to prepare its own draft budget, to be submitted directly to the Parliamentary Assembly for approval.

169. As to the *appraisals, asset declarations and transfers* of judges and prosecutors, the Venice Commission recommends:

- elaborating the manner in which criteria for appraisals should be interpreted and applied, in particular as concerns the ‘performance quantity’ and the ‘statistical quality of decisions’ (Article 138),
- integrating its few previous recommendations regarding the system of asset declarations that are still not addressed,
- reconsidering the possibility to temporarily transfer judges and prosecutors without their consent (Articles 146 and 148) and providing a different court for appeal of the Council’s decision on the matter.

170. As to the *disciplinary liability* of judges and prosecutors, the Venice Commission recommends reiterating previous recommendations:

- regulating also the disciplinary liability of the members of the Council (including lay members), with specific measures and procedures,
- including lay members in the disciplinary panels, while maintaining a majority of judges or prosecutors (Article 181),
- setting the rules for applying lighter sanctions to smaller violations and fine-tuning several provisions in Article 184 on disciplinary offences,
- amending Article 185 concerning prosecutors, in order to ensure that it responds to the principle that instructions not to prosecute must be prohibited (or remain exceptional) and instructions to prosecute must be strictly regulated,

- clarifying that the ODC shall not have access to individual files on pending cases (Article 205) and its decision should be reasoned.

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