Strasbourg, 19 December 2022 **CDL-AD(2022)043**

Opinion n° 1112 / 2022 Or. Engl.

EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW
(VENICE COMMISSION)

SERBIA

FOLLOW-UP OPINION

TO THE OPINION ON THREE DRAFT LAWS IMPLEMENTING THE CONSTITUTIONAL AMENDMENTS ON THE JUDICIARY (CDL-AD(2022)030)

Adopted by the Venice Commission
at its 133rd Plenary Session
(Venice 16-17 December 2022)

On the basis of comments by

Ms Regina KIENER (Member, Switzerland)
Mr Martin KUIJER (Substitute Member, the Netherlands)
Mr Jean-Claude SCHOLSEM (Substitute Member, Belgium)
Mr Kaarlo TUORI (Honorary President of the Venice Commission)

Contents

I. Introduction

1. At its 132nd Plenary Session, the Venice Commission, at the request of Ms Maja Popović, Minister of Justice of Serbia, adopted an Opinion on three draft Laws implementing the constitutional amendments on the judiciary: the draft Law on the Organisation of the Courts, the draft Law on Judges, and the draft Law on the High Judicial Council (CDL-AD(2022)030, hereinafter: the October 2022 Opinion).

2. Following the October 2022 Opinion, the three draft Laws have been revised and, by letter of 15 November 2022, the Minister of Justice of Serbia requested a follow-up Opinion of the Venice Commission on the three revised draft Laws (CDL-REF(2022)062, CDL-REF(2022)065 and CDL-REF(2022)066 accordingly, hereinafter: the three revised draft Laws).

3. Ms Regina Kiener (member, Switzerland), Mr Martin Kuijer (substitute member, the Netherlands), Mr Jean-Claude Scholsem (substitute member, Belgium) and Mr Kaarlo Tuori (Honorary President, Finland) acted as rapporteurs for this Opinion.

4. Being only a follow-up Opinion, it was prepared without a country visit. It was prepared in reliance on the English translation of the three revised draft Laws, which may not accurately reflect the original version on all points. The Ministry of Justice submitted written comments to the draft follow-up Opinion, which will be reflected in the ensuing analysis.

5. This draft follow-up Opinion was drafted on the basis of comments by the rapporteurs. Following an exchange of views with Minister Popović, it was adopted by the Venice Commission at its 133rd Plenary Session (Venice, 16-17 December 2022).

II. Analysis

A. Preliminary remarks

6. The Serbian authorities have revised the three draft Laws on the judiciary in the light of the Venice Commission's October 2022 Opinion and submitted them to the Commission for a follow-up Opinion, prior to proceeding with their adoption. The Venice Commission appreciates this constructive co-operation.

7. As this Opinion is a follow-up to the October 2022 Opinion, it will examine to what extent the key recommendations made in the latter (para. 97) have been followed.[1] The actions taken by the Serbian authorities regarding other recommendations which can be found throughout the October 2022 Opinion but are not key recommendations and are therefore not mentioned in the conclusions section, will be addressed where appropriate. Finally, some additional recommendations may arise on new issues emerging from the revised draft laws.

8. In the October 2022 Opinion, the Venice Commission observed that the draft Laws were generally well-structured, clearly written, and covered all essential points which needed to be covered. However, the Commission also stressed a need for a change in the legal culture within the judiciary to supplement these positive changes. The overall positive assessment of the revised draft Laws and the general recommendation remains valid.

[1] See for example the previous follow-up Opinions on Serbia : CDL-AD(2021)052, Urgent Opinion on the revised draft Law on the Referendum and the People's Initiative; CDL-AD(2021)048, Urgent Opinion on the revised draft constitutional amendments on the judiciary.

9. Before starting its analysis, the Venice Commission stresses that the follow-up Opinion had to be prepared in a very short timeframe, and that the rapporteurs had to assess not only the changes to the original three draft Laws, already quite voluminous and complex, but also the changes to the revised versions of the three draft Laws proposed by the Ministry in their written comments, as well as their explanations to certain provisions of the revised draft Laws.

B. The revised draft Law on the Organisation of the Courts

1. Key recommendations

• *the authorities should consider a joint adoption of the Rules of Procedure by the High Judicial Council and the Ministry of Justice.*

10. The original text of the draft Law provided that the Minister of Justice would issue the Court's Rules of Procedure, following an "opinion" (and not the consent) of the High Judicial Council (hereinafter: the HJC). This was considered problematic, as the Court's Rules of Procedure cover some areas which are at the core of judicial activity. The revised proposal envisages a joint adoption of the Court's Rules of Procedure by the HJC and the Minister of Justice (revised Article 76 para. 2). The Venice Commission welcomes this development and observes that its recommendation has been followed.

• *the power of the Ministry to issue "criteria for determining the number of court staff" and to give "consent to the rulebook on the internal organisation and systematisation of jobs in the court" should be restricted.*

11. In the October 2022 Opinion, the Venice Commission observed that the competence of the Ministry of Justice (hereinafter: the MoJ or the Ministry) to give "consent to the rulebook on the internal organisation and systematisation of jobs in the court" (as mentioned in Article 73 para. 4) and the competence to approve the number of court staff (as laid down in Article 59) impugned on the autonomy of the courts.

12. The scope of Article 73 is, to a certain extent, limited by a new para. 5 according to which "when performing the tasks of judicial administration in terms of the provision referred to in paragraph 4 of this Article, the [MoJ] shall not encroach on the independence of judges and courts or on the performance of tasks of judicial administration under the competence of the court president". In addition, new Article 95 of the revised draft Law states that "the provisions […] governing the position of the court staff shall apply until the entry into force of *a special law governing the position of the court staff*" (italics added). This has to be welcomed, although it remains to be seen whether this general phrase will effectively limit the Ministry's power to regulate the size and the functions of the non-judicial staff of the courts. The Commission reminds the Serbian authorities of the importance of the budgetary and staff autonomy of the judiciary for its proper functioning and independence and expresses its expectation that the special law will be adopted without delay.

• *the judicial administration tasks of the Ministry should be better delimited in order not to encroach on the autonomy of the courts and not to overlap with the tasks of court presidents.*

13. There are a few amendments which can be seen as an attempt to delimit the tasks of the Ministry in the area of judicial administration, notably the ones discussed in paragraphs 10-12 above. In this respect, new paragraph 5 of Article 73, quoted above, which enshrines the principle that the Ministry should not interfere with the tasks of court administration which are in the competency of the court presidents is of particular importance. Furthermore, the Ministry explained that its role in selecting qualified experts does not interfere with the role of judges to choose a specific expert for a specific case. The Ministry also explained how some of the

supervisory powers of the Ministry follow from the role of the Ministry in providing administrative and technical (including IT) support to the operations of the courts, ensuring proper recording of procedural actions, document flow, etc. These are useful explanations, which might be reflected in the explanatory memorandum to the bill.

14. Some problems identified in the October 2022 Opinion – the lack of clarity of the Ministry's role in the supervision of certain areas of the implementation of the Courts' Rules of Procedure (para. 20), and the Ministry's role in approving the number of the staff (see above) – have only to some extent been addressed. Thus, despite the newly formulated principle of non-interference by the Ministry in the court administration, *specific supervisory powers* of the Ministry remain too broadly defined.

• *The powers of court presidents should be described with more precision, especially as regards the distribution of the workload within their courts*

15. Some clarifications were introduced by revised Articles 52-55. Thus, it is positive that the distribution of the workload has been dealt with in Article 53 para. 3, which has been amended as follows: "The court president shall comply with the annual schedule of tasks in the court and the procedure for the allocation of the court cases in accordance with this Law, the law governing the position of judges and the Court Rules of Procedure".

16. That being said, the administrative competencies of the court presidents, as criticised in paragraphs 26 and 28 of the October 2022 Opinion, remain rather broad. The court presidents retain the power "to ensure legality, order and accuracy in the court, order removal of irregularities and prevent excessive delays" (Article 53) and "organise the work and operations of the court" (Article 52). Only a minor change in Article 52 excludes the function of supporting the "exercise of judicial authority" from the list of functions of court presidents.

17. In addition, it remains unclear whether or not the president may give orders to the judge to take/not to take some specific procedural actions, to withdraw cases from one judge and transfer them to another. Not least, it should be clarified whether court presidents have administrative powers vis-à-vis the non-judicial staff of the court (which is the practice in many countries) or whether this power belongs to the Ministry of Justice (see above).

18. The Ministry explained that the administrative competencies of the court presidents are limited to "financial and accounting operations of the court, labour relations of the court staff, respect of court working hours, respect of hygienic and technical work conditions, timely action of court administration, etc." This is a useful explanation, which might be added to the explanatory memorandum to the bill. In addition, it would be advisable to add to the relevant provision (namely Article 53 of the revised draft Law) an "umbrella clause", similar to the one added to Article 73 in respect of the judicial administration tasks of the Ministry, stipulating that the function of the court administration does not involve the supervision of the conduct of specific cases by individual judges.

19. The Venice Commission thus recommends clarifying these questions and describing them in more detail. As a very minimum, the draft Law should specify that the tasks of the "court administration" of court presidents should not interfere with the conduct of the proceedings in individual cases.

• *the function of "supervision" of a president of a higher court in respect of a lower court president should be described in more detail and such supervision should be reduced to the minimum.*

20. In the October 2022 Opinion, the Venice Commission observed that the exact meaning of the "supervision" of a president of a higher court under Article 55 was unclear, due to the absence of either the enumeration or the description of the exact nature of the supervisory powers of the higher court president in respect of a lower court president. Most importantly, the "failure of the president of the court to act in accordance with measures adopted during the supervision" (Art. 98 of the draft Law on judges) is still defined as a disciplinary breach in the revised draft Law, while the nature of the "measures" that can be ordered during the supervision and the question by whom (the Minister, the president of the higher court) these may be pronounced remains unclear.

21. The supervisory powers of the higher court president are still not described in the revised draft Law with precision. However, some amendments were introduced which may be seen as limiting those supervisory powers. Thus, a new paragraph 4 of Article 55 clarifies that the president of a higher court may only exercise powers which are specifically attributed to him/her by "law or other regulation", and which do not threaten "the independence and work of the supervised court". In addition, the power of the president of a higher court to request information about the work of the lower court will be further limited.[2]

22. Again, as in the case with the powers of the Minister of Justice, the drafters preferred not to reformulate the specific rules, but rather to add a general principle which is supposed to limit the scope and the nature of the "supervision" exercised by the presidents of the higher courts. The Venice Commission understands that a very detailed and exhaustive description of the supervision exercised by the court presidents may be hard to achieve. Adding a general principle delimiting the presidents' powers goes in the right direction, although it remains to be seen whether adding this principle would be enough to protect the independence of judges in daily practice.

• *the notion of "undue influence" should not cover legitimate behaviour of the participants of the court proceedings, as well as the legitimate exercise of the freedom of speech, including public criticism of judicial decisions*.

23. In its October 2022 Opinion the Venice Commission held that the original proposal of Article 8 para.1 prohibiting any "undue influence" on the judges, was not clear enough and could be interpreted as covering also legitimate behaviour of the parties.

24. The Ministry of Justice in their written comments proposes to amend this provision as follows: "The use of legally prescribed rights of participants in court proceedings, reporting on the work of the court and commenting [on] ongoing court proceedings or court decisions in accordance with the regulations governing public information, as well as expert analysis of finally concluded court proceedings and final court decisions shall not be considered the improper influence". This new formula is welcomed since it significantly expands the possibility of commenting on the court proceedings and therefore is more respectful of the freedom of speech. The Venice Commission reiterates that only a virulent criticism of judges combined with threats and baseless accusations can be prohibited and treated as "undue influence", whereas respectful critical analysis and even strong disagreement with the judicial decisions is, in most contexts, a normal part of the public discussion, irrespective of whether the proceedings are over or not. The new formula proposed by the Ministry reflects the spirit of this approach, so the Venice Commission considers that its recommendation has been fully implemented.

[2] According to the revised paragraph 2 of Article 55: "The President of a court of immediately higher instance may request information from the lower instance court regarding the implementation of regulations, governing the court administration [instead of: course of proceedings], as well as other information about the work of that court's administration and the work of that court [instead of: all operation-related data].

2. Other recommendations

25. In the October 2022 Opinion, the Venice Commission identified several provisions in the draft Law which could benefit from further clarification, including the provision concerning the possibility to "annul in administrative dispute" the acts of judicial administration which "threaten the independence of judges" (Article 73 para. 4). The Commission is pleased by the fact that these contentious phrases have been deleted from the revised text of the Article, which means that this recommendation has been followed.

26. The October 2022 Opinion noted that Article 10 of the original draft Law provided for a complaint mechanism, which however was not formulated with sufficient clarity, and left numerous questions unanswered. The questions concerned the addressee of the complaint, its consequences, its procedural forms and, finally, its relationship with the regular avenues of appeal and disciplinary proceedings. The revised draft explains that "if the complaint is founded, the proceedings on the complaint shall be conducted in accordance with Article 56 of this Law." Article 56 clarifies that the complaint shall be submitted to the court president. It also elaborates on the procedure that follows. However, even after reading Article 10 in conjunction with Article 56, it is not clear what could be the consequences of this complaint mechanism ("the measures undertaken") and what is its relationship with the regular avenues of appeal and disciplinary proceedings. The Ministry of Justice explained that this Article reflects the constitutional guarantee of complaining to State authorities, which is distinct from the legal remedies which may follow as a result of such a complaint. This could be added to the explanatory memorandum to the bill.

27. In the October 2022 Opinion, the Venice Commission considered that there was a need for further reference (in Article 11 para. 3 of the draft Law) to the specific laws which, according to the explanation of the MoJ, provided the list of authorities which were meant under "the bodies of the Republic of Serbia" as recipients of the court's "files and documents". These specific laws, according to the MoJ, also defined the procedures for the submission of the case files. No further reference was made in the revised Article 11 of the draft Law. As explained by the Ministry, "it is not expedient to enumerate dozens of laws that govern the court's obligation to deliver […] documents to state authorities". If the drafters consider that enumerating of all such specific laws is too cumbersome or inappropriate for the draft Law, at least the explanatory memorandum to the bill should indicate which legislation establishes the right of the State authorities to obtain access to the court files.

28. The Venice Commission welcomed that Article 75 envisaged the right of a judge to review his/her personal files and the right to complain to the HJC about its content. The Commission, however, regretted that there was no similar provision in relation to the court staff in Article 71. Revised Article 71 of the draft Law now contains similar provision regarding the court staff. Thus, this recommendation of the Venice Commission has been followed.

C. The revised draft Law on Judges

1. Key recommendations

- *the Minister of Justice should not propose lay judges for appointment.*

29. The original text of Article 88 envisaged the appointment of lay members by the HJC at the proposal of the Minister of Justice. This has been found objectionable by the Venice Commission, since in Serbia lay members participate in the adjudication together with the professional judges, and their appointment should therefore not be the Minister's prerogative.

30. The revised Article 88 (which is now Article 89) does not require the proposal of the Minister of justice to the HJC for the appointment of lay judges. The appointment by the HJC shall happen on the basis of a public competition which shall be published and conducted by the HJC. Thus, the appointment procedure for lay members was brought closer to the procedure of appointment of the professional members, and therefore the recommendation formulated by the Venice Commission has been followed.

31. In its previous opinion, the Venice Commission, *inter alia*, praised the Serbian authorities for certain rules regarding the appointment procedure of professional judges, for example the provision contained in Article 52 requiring the consideration of "appropriate representation of members of national minorities and knowledge of professional legal terminology in the language of the national minority that is in official use in the court" when nominating and selecting judges. The Commission is pleased to see that this provision has been replicated in relation to lay judges (new Article 87 of the revised draft Law).

• *the list of disciplinary offences is too broad, with a disproportionate focus on delays in court proceedings; the draft Law should explicitly say that individual judges should not be held responsible for structural deficiencies within the judiciary.*

32. In its October 2022 Opinion, the Venice Commission observed that the overall tenor of Article 97 was worrisome as the list of disciplinary offences, contained therein, was too broad, some of them were overlapping and the whole list of the disciplinary breaches required reconsideration (e.g., sub-paragraphs 3, 5, 6, 7 and 8). In addition, the Commission noted that there was a disproportionate focus on disciplining a judge for delays in the court proceedings, which created a risk for the judge of becoming a victim of structural deficiencies within the judiciary.

33. Article 97 (currently Article 98) has been comprehensively redrafted in the light of the Venice Commission's recommendations. In particular, the list of disciplinary offences was reconsidered (e.g., sub-paragraphs 5, 6, 7 and 8 which were considered problematic by the VC, have been deleted), thus removing the disproportionate focus on the delays in the court proceedings. In addition, the following new paragraph has been added to Article 98: "A judge shall not be responsible for a disciplinary offence committed due to an insufficient number of judges in the court, an increased flow of cases in the court, an insufficient number of court personnel, unsatisfactory spatial and technical conditions for work or other reasons that prevent the effective acting of the judge." This eliminates the possibility of holding judges responsible for structural deficiencies within the judiciary. The recommendation of the Venice Commission has therefore been taken into consideration.

34. However, an important new provision is added to the revised draft Law: an opinion of the Ethics Commission will be necessary to establish a violation of the Ethics Code, which may lead to the finding of disciplinary liability of a judge. The composition of the Ethics Commission is not described in the revised draft Law. In the opinion of the Venice Commission, if this Commission is to give a preliminary assessment on the alleged breaches of the Ethics Code, the composition of the Ethics Commission should be described in the draft Law on the HJC. The Ministry of Justice in their written comments stated that the composition of the Ethics Commission would be prescribed by the provisions of the Law on High Judicial Council. This is positive. Given the importance of the function the Ethics Commission will play under the new system, it is necessary for the law to make appropriate arrangements as regards its composition, the profile and the status of its members, and its working procedures.

• *the concepts of "severe" and "repeated" offences should be developed further, especially in order to exclude dismissal in cases of repeated minor offences.*

35. The concepts of "severe" and "repeated" disciplinary offenses were developed, by excluding some offences from the list of offences which may be treated as "severe" and "repeated" (Article 98 paras. 2 and 3). In addition, the revised draft Law now stipulates that a judge cannot be dismissed for a repeated minor offense (Article 98 para 4). The recommendation of the Venice Commission has therefore been followed.

- *some basic principles of the ethical behaviour should be described in the law itself, while the Code of Ethics may develop them in more detail.*

36. The Venice Commission reiterates its previous recommendation to describe some basic principles of ethical behaviour in the law[3] and to clarify the limits of their application (namely, whether they relate to professional or private life). The revised draft Law does not introduce the basic principles of ethical behaviour as such. However, Article 4 now stipulates that "The Code of Ethics shall govern the principles of independence, impartiality, expertise, responsibility and dignity". Therefore, the recommendation of the Venice Commission has been partially implemented. For better compliance, this paragraph could be reformulated and could become the first paragraph of Article 4 ("The principles of judicial behaviour are independence, impartiality, expertise, responsibility and dignity"). The "expertise", however, is not a principle of ethical behaviour and should be in any event removed from this list. The Ministry of Justice, in their written reply, accepted these remarks.

- *in respect of court presidents, the draft Law should specify the notion of a "major violation of obligations set out by provisions governing the court administration" which may lead to the president's dismissal.*

37. In the October 2022 Opinion, the Venice Commission noted that (a) the scope of the phrase "obligations set out by provisions governing court administration" is not clear or, rather, too vaguely defined; and (b) the draft Law should explain in more detail what sort of "incompetency" could lead to the dismissal of a court president.

38. No changes were introduced in this regard either in Article 81 or Article 40 of the revised draft Law. The Venice Commission understands that the drafters faced a dilemma. On the one hand, an overbroad definition of the "court administration" tasks is problematic because it does not allow to define the powers of the president of the court vis-à-vis ordinary judges and the court staff, and the powers of higher courts' presidents vis-à-vis lower courts' presidents. On the other hand, a very precise and casuistic description of the powers of the president of a court may be incomplete. In sum, the approach chosen by the drafters is understandable, even though the Venice Commission would prefer a more precise definition of the "court administration" tasks and of the supervisory powers of the presidents of the higher courts. The general principle of non-interference with the substantive work of the judges, introduced in Article 36, to some extent mitigates the risk of arbitrariness. That being said, if the draft Law is adopted in its current form, this particular element should be kept under review and changed if there are signs that those provisions are used to the detriment of judicial independence.

39. Two issues, however, remain. The first is that the Venice Commission noted that there was a tension between Article 81 and Article 40 which did not mention the dismissal of a judge or a president of the court due to a negative performance evaluation. This should still be solved by the Serbian legislator.

40. The second relates to the revised Article 36. While the amended Article 36 gives an important clarification about the scope of the performance evaluations (they should not interfere with the assessment of the substantive decisions of the judge and his or her exercise of the professional

[3] See, CDL-AD(2016)013, Republic of Kazakhstan - Opinion on the Draft Code of Judicial Ethic, paras. 26 et seq.

discretion in conducting the proceedings), the Venice Commission recommends to keep the more specific criteria for the evaluation of the work of ordinary judges and, separately, define the basic criteria for the evaluation of the presidents of the courts, which was in the original draft law but was deleted in the revised draft law. The Commission welcomes the intention expressed by the Serbian Minister of Justice to reinstate those more specific criteria in the provision.

- *there is a dangerous overlap between disciplinary proceedings and dismissal proceedings; it is necessary to avoid confusion as to the role played by the High Judicial Council in those proceedings.*

41. Before addressing this key recommendation, the Venice Commission will assess the implementation of previous recommendations which are relevant for the disciplinary and dismissal proceedings.

42. In the October 2022 Opinion, the Venice Commission recommended introducing a filtering mechanism for the dismissal of clearly unmeritorious disciplinary complaints. The revised draft Law introduces no changes in this regard. However, the Venice Commission notes that Article 103 (formerly Article 102) provides that the disciplinary prosecutor may dismiss a complaint. The "threshold" for taking such decision is not established, which means that the negative decision (i.e., not to proceed with a disciplinary case) may be adopted without a hearing, by a judge. With a view to the equal and foreseeable application of the Law, it should establish some threshold requirement, which would permit to distinguish between manifestly ill-founded cases, which may be dismissed by the disciplinary prosecutor, and cases which potentially may raise an issue, and which should be decided by the Disciplinary Commission of the HJC. The Minister of Justice indicated that the disciplinary prosecutor serves in fact as a filtering mechanism, so this recommendation can be considered as implemented.

43. The Venice Commission also recommended that the decisions by the Disciplinary Commission of the HJC be reasoned. This recommendation has been followed, by the addition of a new paragraph 2 to Article 105.

44. The Venice Commission expressed concerns about the procedural rules on the dismissal proceedings before the HJC (Articles 71 and 72), which were less developed than the procedural rules on the disciplinary proceedings (revised Articles 102, 104 and 105). In addition, the HJC had only 30 days for taking a decision on dismissal, which was considered as too short for a meaningful exercise of the right to be heard. According to revised Article 71, the timeline for the dismissal proceedings was increased from 30 to 90 days (para.3). In addition, revised Article 72 para. 3 mentions, albeit briefly, fair trial guarantees. Overall, the Commission considers that its recommendation has been followed.

45. An important recommendation of the Commission focused on the interrelation between two parallel proceedings – disciplinary proceedings examined by the disciplinary prosecutor first and then by the Disciplinary Commission (with the HJC acting as an appellate instance), on the one hand, and dismissal proceedings triggered by the president of the court or by the HJC *proprio motu,* under Article 70, on the other hand. It was unclear to the Venice Commission how the HJC could, at the same time, be the body initiating dismissal proceedings and deciding on the outcome of the disciplinary proceedings. The Commission therefore recommended to avoid such confusion of two different roles.

46. Under the revised draft Law, the power to institute dismissal proceedings belongs also to the Disciplinary Commission (hereinafter: the DC, see revised Article 71 para.1 and Article 100 para 1). It is understood that once the case is brought before the DC by a disciplinary prosecutor, the DC will have three options: to acquit the judge concerned, to render a decision on a lesser disciplinary sanction, or to initiate the dismissal proceedings before the HJC. It is

still unclear, however, what the role of the HJC in the first and in the second scenario would be: if the DC decides that there is no case to answer or the behaviour only deserves a minor punishment, will the HJC have the power nevertheless to decide that the judge deserves a dismissal? In other words, will the HJC be able to go beyond the proposal of the disciplinary prosecutor and the penalty imposed by the DC? It is quite unusual that the HJC has three (conflicting) roles of an appellate body (for smaller sanctions) and of an initiator/adjudicator for the sanction of dismissal.

47. In their observations the Ministry of Justice provided further details about the two procedures and their relation to each other. These explanations, however, confirm the doubts of the Venice Commission as to the possible overlap of the functions of the HJC as an appeal instance in the disciplinary proceedings and the body initiating and adjudicating in a dismissal procedure. Therefore, the Venice Commission considers that its recommendation to clarify the interrelation between the two proceedings has only been partly addressed.

48. In the October 2022 Opinion, the Venice Commission recommended clarifying the possibility of an administrative appeal against the decisions of the HJC rendered during disciplinary proceedings. This recommendation has been followed. According to the revised Article 106, no appeal to an administrative court is possible against the decision of the HJC.

49. Under Article 83, there is a special procedure for the dismissal of a court president, which can be triggered by the judges, a president of a higher court, the performance evaluation body, or the DC (Article 82). At the same time the grounds for bringing a president to liability are partly the same as bringing a judge to the disciplinary liability or dismissing him/her (serious disciplinary offence – see Article 81). It appears that a court president can be removed from his or her position without any involvement of the DC. Similarly, the procedure for dismissing a judge can be initiated by the HJC *ex officio,* without a preliminary examination of the case by the DC.

50. In conclusion, the Venice Commission notes that despite improvements and clarifications introduced in the revised draft Law, the interrelation between different types of liability and different types of proceedings remains unclear. The specific provisions of the revised draft Law do not necessarily infringe upon any standards, but can lead to the conflict of competencies, and thus undermine the efficiency of the disciplinary mechanism. One option would be to explain, in the Rules of Procedure of the HJC, the decision-making process and the respective roles of different actors and bodies (the complainant, the disciplinary prosecutor, the DC, the HJC, etc.) in respect of each type of procedure. Another option would be to treat dismissal as a disciplinary sanction, accompanied by specific procedural requirements.

- *performance evaluations should not involve an assessment of the exercise of the judicial discretion in interpreting facts and the law.*

51. Revised Article 36 para. 3 describes *principles* of evaluation of judges, which excludes the evaluation of the judicial discretion (inner conviction of the judge) in evaluating evidence and interpreting regulations. This addresses the recommendation of the Venice Commission. The Venice Commission reiterates that in the revised draft Law the specific criteria for evaluation were excluded. As recommended above, the draft Law should reinstate the specific criteria for the evaluation of individual judges and, separately, court presidents, while more detailed regulations can be adopted by the HJC. The Ministry of Justice expressed readiness to return the more specific criteria in the text of the law, which is positive.

2. Other recommendations

52. Even though Article 5 of the original draft Law guaranteed adequate salaries for the judges, it included no guarantees for the realisation of this principle. The Commission observed that this problem could be solved by *inter alia* introducing different techniques like benchmarking the level of salaries to the average salary in the country, or to the salaries in the executive or legislative branches. Revised Article 41 introduced a new provision according to which the basis for the calculation and payment of the judge's salary "cannot be less than the average net salary of an employee in the Republic of Serbia according to the last published data of the authority responsible for statistical affairs before the approval of the budget proposal for the next year". The recommendation of the Venice Commission has thus been followed. However, in the last round of comments the Ministry of Justice informed the Commission that this paragraph of Article 41 would to be reformulated, after consultations with the Ministry of Finance. It would read as follows: "the basis for the calculation and payment of the judge's salary is determined by the Budget law". This is a step back compared to revised text since it does not introduce any benchmark for the judicial salaries.

53. In the October 2022 Opinion, the Venice Commission observed that the overall thrust of Article 31 concerning incompatibilities of the judicial mandate with other occupations was in line with similar provisions in other jurisdictions. However, it could be further improved by, *inter alia,* excluding any possibility that a judge could hold any function in the executive branch of government. The Commission further observed that the words "if a law does not prescribe otherwise", contained in Article 31, implied that the judge could be at the same time working in another public office. In the revised Article 31 para.1, the above-mentioned words have been deleted which eliminates the possibility of parallel employment. This is in line with the recommendation of the Venice Commission.

54. Another problem previously identified by the Venice Commission in Article 31 was a very broad prohibition for the judge to "act politically in some other manner" (para.1) and to have other functions (even unpaid) which could be contrary to the dignity, reputation and independence of a judge (para. 2). The Commission observes that no relevant changes have been introduced. The Venice Commission reiterates that the draft Law should specify that only certain "manifest forms of strong political engagement" are prohibited, like holding a position of responsibility in a political party, running in the elections on the ticket of a political party, co-authoring or signing political manifests, proclamations, etc.). The Venice Commission recommends that the law should formulate the limits of permissible political involvement of judges, as indicated below; if necessary, the Code of Ethics could develop this provision further. The Ministry of Justice argued that Article 31 merely reproduces Article 148 para. 4 of the Constitution which stipulates that "political activity of judges shall be prohibited". However, it is clear that not all political acts (voting being the most evident example) are prohibited for judges, but only some forms of political engagement. These issues could be explained in greater detail in the Code of Ethics or in the explanatory memorandum to the bill.

55. Finally, the Venice Commission noted in the October 2022 Opinion that the list of incompatibilities in Article 91 concerning lay judges was very meagre and vaguely formulated, in comparison to Article 31 (concerning professional judges), and that the Article could be expanded to mention clear-cut cases of incompatibilities for lay judges. In addition, despite the clarification by the Ministry given to the rapporteurs (see paragraph 46 of the October 2022 Opinion), that, according to Article 94, the provisions of the draft Law relating to judges also applied to lay judges, the Commission found the application of those rules still unclear, whether these rules are applied to the lay judges in their entirety or only *mutatis mutandis.* Revised Article 91 (currently Article 92) has been slightly amended, excluding attorneys from becoming lay judges. The Ministry in their written comments committed to change the text further, in order to cover other clear-cut cases of incompatibilities: thus, it is proposed that lay judges cannot be State employees. With this

amendment, the recommendation of the Venice Commission in this regard can be considered implemented.

D. The revised draft Law on the High Judicial Council

1. Key recommendations

• *the draft Law should ensure the broadest representation amongst lay members so to avoid a politically homogenous lay component in the High Judicial Council; that can be achieved for example by revising the process of nomination of candidates or the rules on voting for them in the parliamentary Committee for the judiciary.*

56. The Venice Commission reiterates its concern that in selecting four lay members of the Council, the National Assembly will have to choose from a list of eight candidates, pre-selected by the Committee on the Judiciary of the National Assembly (hereinafter: the JC) along political lines. The Venice Commission insisted on ensuring the broadest possible political representation of the lay component of the Council, and, to this aim, it proposed several solutions.

57. One solution was to formulate the (in)eligibility criteria in such a manner as to reinforce the political neutrality of the candidates, in particular the requirement of not having been active in politics for some period before running for a position of lay member. However, the Ministry of Justice argued that such a "cooling off" period could be potentially unconstitutional (see para. 80 of the October 2022 Opinion), which may explain why this path has not been explored.

58. As an alternative, the Ministry of Justice of Serbia proposed to expand the notion of "worthiness" of the candidates, which is one of the criteria for shortlisting them, by specifying in Article 44 of the draft Law that the "worthiness" of the candidate "implies absence of a strong political influence". This is a welcome addition, which should be developed even further. Thus, the draft Law should specify that candidates who were elected officials or members of the Government or members of political parties with leading roles cannot be seen as "worthy" and should therefore not be eligible for the HJC.[4] The draft law should equally stipulate that those candidates whose close relatives, spouses and partners were active in politics are ineligible. In the opinion of the Venice Commission, such a strengthening of the (in)eligibility requirements may alleviate the risk of politicisation of the lay component of the HJC and create a "safety distance" between the lay members and party politics.

59. In the October 2022 Opinion the Venice Commission said that the main concern of avoiding a politically homogeneous lay component could be addressed in various ways. *Inter alia*, the Venice Commission suggested that the eight candidates could be elected through some form of a proportional voting. This suggestion remains an option, but other modalities exist as well.

60. The Ministry of Justice proposed to modify the voting procedure in the JC. Thus, according to revised Article 49 new para. 2, each member of the JC will propose one candidate. The revised draft Law will make some further improvements as regards the transparency of the procedure before the National Assembly and in the procedure before the five-member Commission (which serves as an anti-deadlock mechanism if the National Assembly fails to elect the four members). These additions are intended to give the opposition more say in the election of the lay members of the HJC, which is positive.

[4] Venice Commission, CDL-AD(2021)030, Montenegro - Urgent Opinion on the revised draft amendments to the Law on the State Prosecution Service, para. 28.

61. Most importantly, the Ministry proposed to provide in Article 49 that the JC should decide on the short-list of eight candidates with a majority of two thirds of votes of the JC members so as to ensure the broadest political support of the candidates. If this majority is not reached in the first round, a second round will be held in which the list of eight candidates will have to be approved by a simple majority of votes.

62. The Venice Commission gives a cautious welcome to this initiative of the Serbian authorities. The JC is composed on a proportional basis of representatives of different political parties. Therefore, the requirement of a qualified majority will normally ensure that the candidates will have a significant cross-party support. This reduces the risk of a politically homogeneous lay component, which was the main concern for the Venice Commission in the October 2022 Opinion.

63. As to the anti-deadlock mechanism proposed by the Serbian Ministry of Justice, the Venice Commission reiterates that it is "aware of the difficulty of designing appropriate and effective anti-deadlock mechanisms, for which there is no single model. One option is to provide for different, decreasing majorities in subsequent rounds of voting, but this has the drawback that the majority may not seek a consensus in the first round knowing that in subsequent rounds their candidate will prevail. Other, perhaps preferable, solutions include the use of proportional methods of voting, having recourse to the involvement of different institutional actors or establishing new relations between state institutions. Each state has to devise its own formula."[5]

64. In sum, the Venice Commission welcomes the proposal by the Serbian authorities to (i) require a qualified majority in the JC, and (ii) strengthen the ineligibility criteria, provided that these criteria are further elaborated in the draft Law as recommended by the Commission. This would address the concern expressed by the Venice Commission in its October 2022 Opinion about dangers related to a politically homogenous lay component.

- *the draft Law should describe more precisely in which situations the mandate of a member of the High Judicial Council may be terminated; the draft Law could provide explicitly that the failure of a member to participate in the work of the High Judicial Council without a serious and objective reason may result in the termination of his or her mandate, and such decisions are to be adopted by a simple majority.*

65. Revised Article 54 para. 4, provides for the termination of the mandate of a member of the HJC in case he/she "fails to participate in the work of the Council without a justifiable reason by a simple majority" (Article 20 para. 2). This is in line with the key recommendation of the October 2022 Opinion. The October 2022 Opinion also insisted that the absences must be repeated. The Ministry in their written comments accepted this remark and agreed to amend the text accordingly.

66. The October 2022 Opinion also recommended that a member who risks exclusion should benefit from a fair procedure. The revised draft Law (Article 56 para. 3) enumerates basic procedural safeguards in the context of the proceedings aimed at the early termination of the mandate of the elected member of the HJC.

67. Finally, the October 2022 Opinions stressed that the decision on the termination of the mandate of a member should be taken by a simple majority of the HJC. As follows from Article 20 of the revised draft Law such decisions do not require a special majority of eight

[5] 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.

members, i.e. can be adopted by a simple majority of 6 members (out of 11). Therefore, these recommendations are implemented.

• *if the above two recommendations are addressed, the significance of the issue of the high quorum for taking decisions by the High Judicial Council is reduced; that being said, the heightened majority for taking some important decisions can be maintained.*

68. The Venice Commission reiterates that the high quorum (eight members – see Article 18 of the revised draft Law) may prevent the HJC from operating effectively, especially if the Serbian authorities do not adopt adequate measures in order to avoid a politically homogeneous lay component of the HJC. The recommendation to reduce the quorum to seven members (except for the cases where a special majority is required as per Article 20) has not been followed and remains valid. However, if the measures aimed at reducing the risk of a politically homogeneous lay component are implemented, as described above (see para. 56 et seq. above), the significance of the issue of the high quorum for taking decisions by the High Judicial Council is reduced.

2. Other recommendations

69. The October 2022 Opinion recommended describing more precisely in which situations the mandate of a member of the HJC may be terminated by, *inter alia*, linking it to a behaviour (and not only general "unworthiness"). The Commission observes that Article 54 has not been revised in this regard, except for the replacement of the term "unworthy" with "undignified" which does not seem to be a substantive change, and thus the recommendation of the Venice Commission has not been followed.

70. The Venice Commission had reservations concerning the possibility to terminate the mandate if a member "does not perform the function of a council member in accordance with the Constitution and the law". The Commission considered this wording to be too vague to be used as a ground for dismissal. This sentence has been removed from Article 54 and replaced with a new ground for the termination of the mandate: failure to participate in the work of the Council without justifiable reason. This is in line with the recommendation of the Venice Commission. However, only Article 54 has been amended, while Article 56 still uses the vague formula criticised in by the Venice Commission (that the mandate should be terminated if the member "does not perform the function of a Council member in accordance with the Constitution and the law").

III. Conclusions

71. By letter of 15 November 2022, the Minister of Justice of Serbia requested a follow-up Opinion of the Venice Commission on three revised draft Laws implementing the constitutional amendments on the judiciary: the draft Law on the Organisation of the Courts, the draft Law on Judges, and the draft Law on the High Judicial Council.

72. A considerable part of the recommendations of the October 2022 Opinion have been followed, most notably the recommendations on a joint adoption of the Rules of Procedure by the High Judicial Council and the Ministry of Justice; on abolishing the power of the Minister of Justice to propose lay judges for appointment; on narrowing down the list of disciplinary offences and introducing an explicit prohibition to hold judges responsible for structural problems; on clarifying the concepts of "severe" and "repeated" offences; on excluding the substantive decisions of the judges from the scope of the performance evaluation, and on describing more precisely the grounds for terminating the mandate of the member of the High Judicial Council.

73. Some of the Commission's recommendations have been followed only partially. This concerns, *inter alia,* some broadly formulated or unclear provisions which, as such, do not contradict European standards, but might create a risk of confusion (lack of clarity of the Ministry's role in the supervision of certain areas of the implementation of the Courts' Rules of Procedure (see para. 14 above), the role of the court presidents in the context of "court administration" (para. 16), the powers of the higher courts presidents vis-à-vis lower courts presidents (para. 20), and the interrelation between the disciplinary and dismissal proceedings and the role of the High Judicial Council in those proceedings (para. 47).

74. As regards those recommendations, the Commission acknowledges that the drafters made steps in the direction indicated in the October 2022 Opinion. Most importantly, they added some general principles which will inform the application of the specific rules. The Ministry of Justice proposed some important clarifications regarding the meaning of certain provisions of the revised draft Laws. It is important, however, that these clarifications are reproduced either in the draft Laws or at least in the explanatory memoranda which accompany the adoption of the three bills. That would help ensuring that the three draft Laws under examination, once adopted, are interpreted in a manner respectful of judicial independence. The Venice Commission is confident that the explanations given by the Ministry of Justice in the process of dialogue with the rapporteurs will be used in the parliamentary debate in order to make further improvements to the legislative texts. The Venice Commission also reiterates that a change in the legal culture within the judiciary may in any event be required to supplement the positive changes brought by the ongoing legislative reform.

75. One of the most important components of the success of the reform of the High Judicial Council is the need to ensure that the lay component of the Council is not politically homogenous. In the October 2022 Opinion, the Venice Commission proposed several possible ways of how to mitigate this risk. The Venice Commission welcomes the proposal by the Serbian authorities to (i) require a qualified majority in the Committee on the Judiciary of the National Assembly and to (ii) strengthen the ineligibility criteria, provided that those criteria are further elaborated in the Law as recommended by the Commission. This would address the concern about dangers related to a politically homogenous lay component of the High Judicial Council.

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