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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

(VENICE COMMISSION)

REPUBLIC OF MOLDOVA

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 LAW ON THE EXTERNAL ASSESSMENT OF JUDGES AND PROSECUTORS

Adopted by the Venice Commission at its 134th Plenary Session (Venice, 10-11 March 2023)

On the basis of comments by

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I. Introduction

1. By letter of 13 February 2023, Mr Sergiu Litvinenco, the former Minister of Justice of the Republic of Moldova requested an opinion of the Venice Commission and on the draft Law on external assessment of judges and prosecutors of the Republic of Moldova (CDL-REF(2023)015) (hereinafter "the draft Law").

2. This Opinion was prepared jointly with the Directorate General on Human Rights and Rule of Law of the Council of Europe (hereinafter "DG I"). Mr Alexander Baramidze, Mr Philip Dimitrov, Mr António Henriques Gaspar acted as rapporteurs on behalf of the Venice Commission. Mr Đuro Sessa analysed the draft Law on behalf of the DG I.

3. On 23 and 24 February 2023, the delegation of the Commission had online meetings with the national stakeholders: representatives of the parliamentary majority and opposition parties, Ministry of Justice, Supreme Court of Justice, Chisinau Court of Appeal, Chisinau District Court, Superior Council of Prosecutors and the General Prosecutor's Office, Superior Council of Magistracy, associations of judges and prosecutors, international community, and civil society. The Commission is grateful to the authorities of the Republic of Moldova and to the Council of Europe Office in Chisinau for the excellent organisation of these online meetings.

4. This 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. The Ministry of Justice of the Republic of Moldova provided their written comments to the draft Opinion.

5. This Opinion was drafted on the basis of comments by the rapporteurs and the results of the online meetings on 23 and 24 February 2023. Following an exchange of views with Ms Veronica Mihailov-Moraru, the Minister of Justice of the Republic of Moldova, it was adopted by the Venice Commission at its 134th Plenary Session (Venice, 10-11 March 2023).

II. Background

A. The outline of the draft Law

6. The draft Law prepared by the Ministry of Justice provides for the creation of a special mechanism of vetting (extraordinary evaluation) of judges and prosecutors[1] by two Assessment Commissions (one for judges and one for prosecutors), created specifically for this purpose ("the AC"). Each AC will be composed of 6 members: 3 elected by parliament on a proportional basis, and 3 elected by parliament by a simple majority from a shortlist of 6 candidates proposed by the "development partners" of the Republic of Moldova (international organisations and missions involved in the judicial reform). The draft Law establishes substantive criteria for vetting and gives the AC investigative powers. The investigation conducted by the ACs results in a report which is submitted respectively to the Superior Council of the Magistracy ("the SCM") and the Superior Council of Prosecutors ("the SCP"), which take the final decision in respect of the judge/prosecutor concerned and may possibly dismiss him/her. The decisions of the SCM and SCP are appealable to the Supreme Court of Justice ("the SCJ") which may confirm the decision or return the case for a new consideration to the AC or the SCM/SCP respectively. Judges and prosecutors may avoid undergoing the vetting procedure by tendering their resignation.

[1] Not all judges and prosecutors will be subject to the vetting process: Article 3 of the draft Law describes categories of judges/prosecutors who will be affected and provides some exceptions for other categories. As explained to the rapporteurs, several hundreds of judges and prosecutors will have to undergo the full vetting if the draft Law is adopted.

B. Previous opinions of the Venice Commission

7. This draft Law is the third attempt by the authorities of the Republic of Moldova to "cleanse" the ranks of the judiciary and the prosecution service through an extraordinary vetting process. The Venice Commission and the DG I have had the opportunity to comment on the previous phases of the judicial reform in general and the vetting process in particular.

8. In 2019 the Venice Commission and DG I assessed a draft Law which proposed the establishment of a special *ad hoc* extra-judiciary body tasked with the vetting of the sitting judges of the SCJ.[2] This draft Law has never been adopted, but the recommendations made by the Commission in this context remain relevant for the draft Law under consideration and will be addressed below.

9. In 2021 the authorities of the Republic of Moldova made another legislative proposal that aimed at vetting *candidates* for the positions of members of the SCM and the SCP (pre-vetting). The Commission examined this draft legislation in its 2021 Opinion.[3] The Law was subsequently adopted and an Evaluation Commission (broadly similar to the Assessment Commissions described above) was created to evaluate candidates for the positions in the SCM and SCP. So far, the Evaluation Commission has approved 5 out of 23 candidates for the position of judicial member of the SCM, rejecting the other 18 candidates. The successful candidates will soon be proposed to the general assembly of judges for election to the new composition of the SCM. The process of pre-vetting candidates for the positions of the lay members of the SCM has not yet been completed, and the pre-vetting of candidates for the SCP and other self-governance bodies has not yet started. The SCM and SCP continue to function in their old composition, performing only some minimal functions.

10. In 2022 the authorities decided to extend the mechanism of pre-vetting to the *sitting judges of the SCJ*, as well as to the candidates for the judicial positions within the SCJ. In October and December 2022, the Commission evaluated this proposal and issued two opinions.[4]

11. Finally, in 2023 the Ministry of Justice developed the draft Law under consideration, with a view to extending the vetting procedure to an important number of sitting judges and prosecutors (with some exceptions concerning for example those who have been already vetted) – the so-called "full vetting".[5] Under this draft Law, some 160 judges (out of 433 currently occupying judges' positions) and 230 prosecutors (out of 640 currently serving prosecutors) would undergo a vetting process. Although this and the previous draft Laws have not yet reached the Parliament,

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[2] See Venice Commission, CDL-AD(2019)020, Republic of Moldova – Joint Interim Opinion of the Venice Commission and the Directorate of Human Rights (DHR) and Rule of Law (DGI) of the Council of Europe on the draft law on the reform of the Supreme Court of Justice and the Prosecutor's Office, hereinafter referred to as "the 2019 Opinion".

[3] See Venice Commission, CDL-AD(2021)046, Republic of Moldova – Joint opinion of the Venice Commission and the Directorate General of Human Rights and Rule of Law (DGI) of the Council of Europe on some measures related to the selection of candidates for administrative positions in bodies of self-administration of judges and prosecutors and the amendment of some normative acts, hereinafter referred to as "the 2021 Opinion".

[4] See Venice Commission, CDL-AD(2022)024, Republic of Moldova – 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 law on the Supreme Court of Justice, hereinafter referred to as "the October 2022 Opinion"; CDL-AD(2022)049, Republic of Moldova – Joint follow-up opinion of the Venice Commission and the Directorate General of Human Rights and Rule of Law of the Council of Europe to the opinion on the Draft Law on the Supreme Court of Justice, hereinafter referred to as "the December 2022 Opinion".

[5] The Venice Commission notes that some of the provisions of the draft Law refer also to "candidates" but, as explained by the authorities, this is a mistake and the scope of the law covers only the sitting judges and prosecutors, and not candidates for those positions.

more than 60 % of the Supreme Court judges have submitted their resignation, either to avoid the vetting or as an act of protest.[6]

III. Analysis

A. Constitutionality of the proposed model

12. Contrary to other judicial reforms in other countries involving a constitutional amendment, [7] the proposed vetting of judges and prosecutors in Moldova is regulated by an organic law. Accordingly, the vetting must remain within the constitutional framework, which, most importantly, as noted in the 2019 and 2022 Opinions, entails that the role of the SCM as the sole body competent to dismiss judges must be preserved (like the similar, yet not identical, role of the SCP in respect of the prosecutors).

13. The Constitution is silent about the substantive grounds for the dismissal of judges and prosecutors, thus leaving a large discretion to the legislator,[8] provided that the dismissal is decided by the SCM (or approved by the SCP).[9] In this respect the proposed model is, admittedly, compatible with the Constitution: under the draft Law the report of the Assessment Committee will be advisory in nature, and the SCM/SCP will take the final decision, by a simple majority.[10]

14. While there is no direct constitutional obstacle that would prevent the authorities from pursuing the reform as planned, the legislator's discretion is not unlimited. In such matters, the legislator is also constrained by the general principle of judicial independence[11] and by the rule of law, which are recognised by the Constitution[12] and which follow from the international obligations of the Republic of Moldova. These constitutional constraints are arguably less stringent as regards prosecutors,[13] but even in the context of the prosecution service they do exist. So, even if the proposed draft Law is not in conflict with the specific constitutional rules, it must be ensured that it respects more general constitutional principles.

B. Necessity of the full vetting

15. The Venice Commission has previously acknowledged that "extremely high levels of corruption may justify equally radical solutions, such as an examination of the sitting judges".[14]

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[6] The figure was communicated to the rapporteurs on 23 February 2023.

[7] See, most notably, Venice Commission, CDL-AD(2015)045, Interim Opinion on the Draft Constitutional Amendments on the Judiciary of Albania, paras. 97 et seq.; CDL-AD(2016)009, Final Opinion on the revised draft constitutional amendments on the Judiciary (15 January 2016) of Albania, paras. 52-57.

[8] Article 116 (1) of the Constitution (Status of Judges) establishes the principle of irremovability of judges but indicates that this principle is to be realised "according to the law". Article 116 (6) allows for "sanctioning" of judges also "in accordance with the law" while Article 123 gives to the SCM the power to decide on the "removal from office" and "imposing of the disciplinary sentences" against judges. Article 125 (3) provides for the dismissal of lower prosecutors by the Prosecutor General, at the proposal of the SCP.

[9] This is also the approach of the Committee of Ministers of the Council of Europe to the role of Judicial Councils - see Chapter VI of the Recommendation CM/Rec(2010)12 of the Committee of Ministers to member states on judges: independence, efficiency and responsibilities.

[10] In the October 2022 opinion, para. 52,the Venice Commission objected against the rule requiring a qualified majority in the SCM to disagree with the report of the Evaluation Committee, as this would weaken the role given to the SCM by the Constitution.

[11] See Article 116 of the Constitution.

[12] Enshrined in Article 1 (3) of the Constitution.

[13] Who do not necessarily enjoy the same level of independence as judges - see Venice Commission, CDL-AD(2010)040, Report on European Standards as regards the Independence of the Judicial System: Part II - the Prosecution Service, para. 28.

[14] See the October 2022 Opinion, CDL-AD(2022)024, para. 44, with further references.

Such "critical and extraordinary situation" in the judiciary should be "objectively demonstrated", and other methods of judicial accountability should be explored.[15]

16. The rationale for the draft Law is set out in detail in the explanatory note. The authorities refer to the "extraordinary situation" within the judiciary of the Republic of Moldova and the rampant corruption, which is illustrated by a large number of criminal cases brought against judges by the anti-corruption prosecutor's office, and by the participation of many judges in the "Russian laundromat" money-laundering scheme. According to the authorities, the existing mechanisms of accountability do not work, which results in the loss of credibility of the judiciary. Moreover, fighting corruption in the judiciary is one of the basic conditionalities resulting from the Republic of Moldova – EU Association Agreement.

17. The Venice Commission notes that a range of ordinary anti-corruption institutions and mechanisms is already in place in the Republic of Moldova – such as the National Authority for Integrity which possesses broad powers to control the assets of civil servants (including judges and prosecutors). Judges[16] have an obligation to declare every year, in detail, their income, the income of their spouses, their credit obligations, etc. Special anti-corruption prosecutors who also have been recently reformed are competent to deal with the acts of corruption within judicial system. In the Commission's view, establishing new *ad hoc* bodies distracts resources and political support from the ordinary institutions of the State which were created with the specific aim of combatting judicial corruption.

18. That being said, the Venice Commission acknowledges that the extent of the crisis within the judiciary, and the alleged (in)efficiency of the existing anti-corruption bodies and mechanisms are matters of fact that require in-depth knowledge of the national context. For example, in an opinion on Albania, the Venice Commission concluded that extraordinary vetting was not "only justified but necessary" to tackle the problem of the rampant corruption.[17] This conclusion was reached in the context of a wide national consensus about the necessity of the vetting, which resulted in a quasi-unanimous vote in the Parliament in support of the constitutional reform introducing a vetting mechanism. By contrast, the Venice Commission was more critical of similar initiatives in other contexts – for example, in Croatia where it said that improving existing mechanisms would be "clearly preferable" than the security vetting.[18] In the Republic of Moldova opinions on the necessity of a full vetting are polarised: the insistent opinion of the parliamentary majority, of representatives of the international community, and of some local NGOs engaged with observing and supporting the reform process was that such radical measures were necessary.[19] The representatives of the judiciary and the prosecution service, by contrast, argued that the proposed full vetting would not reach its declared goals but would put individual judges and prosecutors under enormous stress, endanger their independence, and undermine the proper functioning of the legal system.

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[15] Ibid.

[16] In the following text the Opinion will essentially refer to judges, with the understanding that its analysis also refers to the prosecutors *mutatis mutandis*.

[17] Venice Commission, CDL-AD(2016)009, Albania - Final Opinion on the revised draft constitutional amendments on the Judiciary (15 January 2016) of Albania, para. 56.

[18] Venice Commission, CDL-AD(2022)005, Croatia - Opinion on the Introduction of the Procedure of Renewal of Security Vetting Through Amendments to the Courts Act, para. 20

[19] See also the Fourth evaluation round Report by GRECO which suggested that the authorities of the Republic of Moldova should take "appropriate measures […], with due regard to judicial independence, in order to avoid the appointment and promotion to judicial positions of candidates presenting integrity risks" (para. 39) does not give any strict and unambiguous recommendation in this direction, essentially calling for a "standards-compliant procedure" of the evaluation procedure. Interim Compliance Report on the Republic of Moldova, adopted by GRECO at its 89th Plenary Meeting (Strasbourg, 29 November– 3 December 2021).

19. The Venice Commission reiterates that "it falls ultimately within the competence of the Moldovan authorities to decide whether the prevailing situation in the Moldovan judiciary creates sufficient basis for subjecting all judges and prosecutors […] to extraordinary integrity assessments".[20] Therefore, the Commission would simply call on the Parliament of the Republic of Moldova to examine the justification for the reform and the availability of alternative solutions with particular scrutiny.

20. The *scope* of the proposed full vetting is also arguably a major factor to be considered by the Parliament. Thus, for example, in the context of Kosovo the Venice Commission suggested to limit the proposed vetting to the Judicial and Prosecutorial Councils; once vetted, those bodies could deal with problems in the rest of the judicial and prosecutorial systems using the ordinary legal mechanisms and procedures.[21] The Venice Commission and DG I emphasise that the draft Law goes far beyond the previous proposals examined in the Opinions of 2021 and 2022. As to the pre-vetting of candidates, the Venice Commission and DG I had observed that, in principle, it was a relatively uncontroversial exercise.[22] The vetting of the SJC judges was the subject of the October and December 2022 Opinions, as indicated above, in paragraph 10. Now the authorities intend to extend this mechanism to over one third of all judges and prosecutors. The Ministry of Justice argued, in their written comments, that the full vetting will not cover *all* judges and prosecutors but only those in key functions and institutions (like presidents and vice-presidents of the courts, judges of the courts of appeal, the Prosecutor General an his/her deputies, chief prosecutors, those who have failed to pre-vetting, etc.). However, even though the low-level judges and prosecutors would not be affected, the proposed scope of the reform is nevertheless very large and goes far beyond previous attempts to "cleanse" the judiciary and the prosecution service. The impact (both in terms of human rights impact and of the possible adverse effects on the functioning of the system as a whole) of this reform is much deeper, and the stakes are higher. That would require even closer and more critical scrutiny by the Parliament of the reasons adduced by the authorities.

C. The risk of a repeated vetting procedure

21. As noted in the October 2022 Opinion (para. 59), vetting could only be acceptable "if it were construed as a one-off exceptional mechanism". There is a danger that a similar vetting exercise will be repeated at some point in the future when another political force wins the elections. This would be devastating for the independence and efficiency of the judicial system based to a large extent on the stability of the judicial mandates which should not be questioned each time a new majority is formed in the Parliament.

22. As observed in the December 2022 Opinion, including a declaratory statement in the text of the preamble that the vetting would be a unique and one-time measure was not a sufficient safeguard against the repeated and abusive application of the vetting. The Venice Commission and DG I recommended "stipulating certain restrictions aimed at guaranteeing the temporary character of the vetting process, as well as stipulating legal obstacles against its arbitrary prolongation". [23]

23. The drafters responded to this recommendation by expressly providing in the text of the draft Law that the full vetting would be an "exceptional exercise, unique and limited in time" (Article 2 (1)). It is further stated that the draft Law would cease to have effect on the date when the SCJ decides the last appeal against a decision by the SCM/SCP or on the date when the time-limit for appealing against the last SCM/SCP decision expires (Article 15 (1) and Article 21 (8)). The

[20] See the 2021 Opinion, CDL-AD(2021)046, para. 13.
[21] Venice Commission, CDL-AD(2022)011, Kosovo - Opinion on the Concept Paper on the Vetting of Judges and Prosecutors and draft amendments to the Constitution, para. 130
[22] See the 2021 Opinion, CDL-AD(2021)046, para. 43.
[23] See the December 2022 Opinion, CDL-AD(2022)049, para. 38.

entire process will be finished by 31 December 2025. These provisions go in the direction of the previous recommendations of the Venice Commission and DG I and are welcome.

24. However, these provisions remain declarative, and do not bind any future legislature which might decide to repeat the vetting process. The only safeguard against such a scenario is political rather than legal: the current proposal seems to have the support of the main international partners of the Republic of Moldova, which would not necessarily be the case in the future. As to the legal barriers to the repeated attempts to vet judges and prosecutors, a constitutional entrenchment of certain provisions could make such repeated vetting impossible or at least difficult, but the Venice Commission understands that such a constitutional amendment may be politically unattainable in the current circumstances.

D. The Assessment Commissions: their role, composition, and the decision-making procedure

25. Even assuming that the full vetting is justified and will not be repeated in future, it carries with it certain risks for the independence and efficiency of the judicial and the prosecution systems. These risks can be mitigated if certain safeguards in place.

1. Advisory function of the Assessment Commissions

26. The Venice Commission reiterates that the main guarantee against the misuse of the vetting mechanism is the fact that the decision to dismiss judges and prosecutors remains in the hands of the SCP and SCM. The Venice Commission understands that by the time the Law enters into force, the pre-vetting procedure would be completed, the new SCM and SCP would be formed, and the two Councils would be fully operational to start functioning as a central element of the system of governance ensuring the independence of judges and prosecutors. This is not only a constitutional requirement (for this see the analysis above); it also follows from the applicable European standards and recommendation of the Council of Europe bodies. For example, the CCJE expressed strong reservations about vetting procedures in its Opinion No. 25 where it noted that "the vetting of judges is highly problematic because it can be instrumentalised and misused to eliminate politically 'undesirable' judges. If [the vetting] is undertaken at all in a member state, it must be undertaken by an independent institution. The Councils for the Judiciary should play an important role in protecting judicial independence in the process" (para. 22).

27. This key condition is satisfied in the draft Law: the SCM and the SCP may accept or reject the report prepared by the AC.

28. That being said, in practice the creation of the AC as a fact-finding body with large investigative powers and ample resources may weaken the role of the two Councils in the process.[24] Therefore, it is necessary to ensure that the ACs be sufficiently independent and efficient, even if the SCM and the SCP still decide on the dismissals of judges and prosecutors.

2. Independence and efficiency of the Assessment Commissions

29. As noted in the 2021 Opinion, the central question of this model is *custodiet ipsos custodies*:[25] is there a good reason to trust the Assessment Commissions more than the existing bodies of judicial and prosecutorial governance?

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[24] For similar considerations, see Venice Commission, CDL-AD(2015)042, Opinion on the Laws on the Disciplinary Liability and Evaluation of Judges of "The Former Yugoslav Republic of Macedonia", para. 84.

[25] The 2021 Opinion, CDL-AD(2021)046, para. 17.

30. The draft Law provides that the ACs will be independent (Article 5 (1)). To assess whether the ACs are sufficiently independent it is necessary to look at the manner in which their members are appointed, what are their qualifications, the incompatibility requirements, the level of autonomy in internal procedures, security of tenure, mechanisms of accountability of the members, availability of judicial control over the ACs decisions, etc.

a. Immunity of the members

31. Article 5 (1) of the draft Law provides that the ACs are not "accountable to any natural or legal person", including the political factions and development partners that contributed to the appointment of their members. It is not clear what "accountability" means in this context. As explained by the Ministry of Justice in their comments, this is the problem of translation, and the Romanian text provides that the ACs should be "independent from a functional and decision-making point of view". With this explanation, this provision is acceptable.

32. By contrast, the immunity of the members of the ACs provided by the draft Law is an important guarantee to secure their independence. As it was explained to the rapporteurs, only the Prosecutor General has the power to initiate criminal proceedings against the ACs members, and the ACs must give consent to the arrest and detention of their members. This is another strong provision that supports the ACs members' independence. The Venice Commission and DG I recommend in this respect that the immunity should be only functional, and of the same extent and character as the immunity of judges or members of parliament.

b. The composition of the Assessment Commissions

33. Under the draft Law the ACs would have 6 members each, with 3 members elected by the parliamentary factions on a proportional basis and 3 members elected by parliament from a list of 6 candidates nominated by the "development partners". The development partners are defined as "international organisations, diplomatic missions and their representations in the Republic of Moldova active in the areas of justice reform and the fight against corruption in the last 2 years". Their list is to be approved by a decision of the Government.

34. This composition ensures the representation of both political and non-political interests in the ACs and repeats the composition of the "Evaluation Committee" under the existing Law no. 26/2022 which was previously assessed by the Venice Commission and the DG I. It is welcome that some recommendations expressed by the Venice Commission and the DG I with respect to Law no. 26/2022 have been addressed in this draft Law. In particular, the "development partners" are more clearly defined, as is the procedure of presenting the nominees agreed by the development partners to parliament (Article 6 (5)).

35. The parity between "national" and "international" members in the ACs, as well as the presence of one opposition-appointed member in the "national quota" (out of three members) reduces the risk that the ACs will be subdued to the will of the political majority of the day. Indeed, one should not assume that "international" ACs members would independent *per definitionem*; the nomination process by the development partners should ensure their impartiality and independent status, having due regard to their qualifications and previous professional experience. Furthermore, certain other elements of the institutional design of the ACs need to be clarified or improved.

c. Ineligibility criteria related to previous political involvement

36. The first element is the list of the qualification criteria for membership in the ACs and the conditions of ineligibility. In its previous opinions the Venice Commission and DG I commented positively about "ineligibility criteria which aim at excluding political affiliation" (in particular the requirement that the candidate "has not been a member of a political party for the last 5 years"

and "is not a member of Parliament, adviser or public servant in the public administration authority of the Republic of Moldova"). A similar norm is reproduced in Article 7 (1) (d) and (e), which is positive.

d. Eligibility of (former) judges and prosecutors

37. The draft Law prevents former judges and prosecutors who resigned or retired less than three years ago from becoming members of the ACs.[26] As transpires from the previous opinions, it would be desirable that at least some of the member of the ACs either represent the judiciary or at least have a judicial/prosecutorial background.[27] Indeed, the AC is not a regular body of judicial governance, as the SCM, and the European standards providing for the need to have a majority of the "judges elected by their peers" in this body are not directly applicable to the AC.[28] However, as noted by the Venice Commission and DG I a "substantial number of members (if not half) [of the Evaluation Committee should have] judicial background".[29] The Venice Commission understands that in a situation where many sitting judges and prosecutors are opposed to the reform, it would be difficult to find a lot of candidates in their ranks for the elections to the AC. However, judges and prosecutors should be at least able to present their candidacies to the positions in the AC.

e. Election of the "national" members and the composition of the panels

38. Article 6 (1) (a) suggests that the national component of the ACs will have to "respect the proportional representation of the majority and the opposition". However, it is not entirely clear whether the parliamentary opposition is only entitled to *propose* one candidate out of 3, or also may ensure that this candidate gets elected. Article 6 (2) of the draft Law, with reference to Article 6 (1), seems to imply that the candidate proposed by the opposition should still receive the support of a 3/5 majority vote in the plenary Parliament. For the Venice Commission, the parliamentary majority should not be able to block the election of the candidate proposed by the opposition.

39. The Ministry of Justice in their written comments argued that, as the experience of the pre-vetting showed, the majority would not block the election of the candidates proposed by the opposition. They add that even if the necessary majority for appointing an opposition-backed candidate is not reached, the process of selection may start over again and the opposition may propose another candidate. It is commendable that, so far, the majority has not abused its power to block or at least protract the process of election of the opposition-backed candidates. This is a sign of political maturity. However, a theoretic possibility of such a blockage still exists, so the draft Law should ensure that the parliamentary opposition gets their nominee elected as a member of the ACs, even if the majority disapproves of this candidate.

40. Under the draft Law, preliminary work on individual files will be done by the panels of three members of AC. There is little guidance in the draft Law on how the panels will be formed. Will they be standing bodies, or will they be formed on a case-by-case basis? The draft Law instructs that in each panel both categories of members should be present, which is welcome. If there are only two panels, the Venice Commission and DG I would recommend that "national" members representing the parliamentary majority should not be sitting in the same panel. It is also important to provide that the cases will be distributed to the panels randomly and that these panels are

[26] Draft Law, Article 7(1)(f).
[27] See the 2021 Opinion, CDL-AD(2021)046, para. 44, first subparagraph, *in fine*.
[28] The requirement on the proportion of prosecutors in the prosecutorial council, where they are created, are different and less stringent. See, for example, Venice Commission, CDL-AD(2021)051, Kosovo - Opinion on the draft amendments to the Law on the prosecutorial Council of Kosovo, para. 26.
[29] See the 2019 Opinion, CDL-AD(2019)020, para. 55.

created by some general act of the ACs (and not composed on the *ad hoc* basis for each specific case). The role of the Secretariat in the work of the panels should be limited.

41. Also, the draft Law should provide for the procedure of allocating the cases to the panels, which should exclude arbitrary attribution of cases to panels and should be based on clear and objective rules.

42. The report of such a panel is adopted by a simple majority of the votes and is submitted to the plenary AC which has to vote on approving the report by a simple majority of its members (Article 18 (2)). The Venice Commission and DG I note that while in the plenary AC, the national and international members have equal numbers, in the panels one group would necessarily dominate. The Venice Commission recommends specifying in the law that the panels should be composed of representatives of both groups, and that, for a decision to be taken, at least one member from each group should support it (so that the "nationals" cannot outvote the "internationals" and *vice versa*). As to the vote in the plenary AC, at least four votes (out of six) should be required for adopting a report with the recommendation to the SCM/SCP, which means that a report would need some support from both "national" and "international" members, and none of the two groups can govern alone.

43. In their written comments, the Ministry of Justice argued that the compositions of the panels, decision-making procedures by them, powers of the Secretariat, etc. should rather be fixed in the Internal Rules adopted by the Plenary ACs and not in the law itself. Otherwise, the law would be too rigid and overburdened with details. This is a valid argument, and some elements of the internal procedures could indeed be regulated at the sub-legislative level. However, without knowing the rules on the composition of the panels, decision-making majorities etc. it is very difficult for the Venice Commission to evaluate the "balance of powers" within those panels, which will be a key element of the mechanism of the full vetting. This is why it would be preferable to define at least some principles of their composition at the legislative level, while leaving the details to the Internal Rules.

f. The overall assessment of the independence of the Assessment Commissions

44. The three most important improvements for the institutional design of the ACs suggested by the Venice Commission and DG I are as follows:

- the guarantee for the parliamentary opposition to get their nominee elected,
- the eligibility of the candidates with the judicial or prosecutorial background, and
- the "special majority" for voting in the panels.

45. The Venice Commission and DG I have not examined the other elements of the vetting mechanism which might affect the independence and the efficiency of the ACs (such as their budgetary autonomy, internal structure, stability of the mandate of the members of the ACs, the procedure for their dismissal, the level of their remuneration, etc.). However, these elements have not been identified by the interlocutors during the online meetings as potentially problematic.

3. Workload

46. Even if the institutional design of the ACs is in overall satisfactory, the question remains whether the ACs will be able to fulfil their objectives. The largest part of the assessment will be carried out by the panels of which one member will act as a rapporteur. Thus, when it comes to the assessment of prosecutors, over a period of less than three years, each member of the AC for prosecutors will be personally responsible for 115 cases as a member of the panel and 38 cases as a rapporteur who will be responsible for drafting the panel's report.[30] In addition, all

[30] The workload related to the judges would be less important.

members of the AC will have to participate in the plenary work of the AC. The question is whether this load can be carried by the AC of the prosecutors in less than three years. If the answer is negative, then it would be advisable to consider either adding more members to the AC of prosecutors or reducing the number of the judicial and prosecutorial offices which fall within the scope of this draft Law. The rapporteurs were told by the authorities that much of the work would be done by the Secretariat, but the Secretariat cannot completely replace the AC members who must have an in-depth understanding of the cases under consideration, which takes time. For comparison, from the summer to the end of the year of 2022, only 23 cases were completed by the existing pre-vetting commission.

E. The test applied by the Assessment Commissions (substantive grounds for the vetting)

47. The most problematic part of the draft Law concerns the substantive grounds for the vetting contained in Article 12 of the draft Law ("assessment criteria"). Pursuant to Article 12 (2), a judge and a prosecutor under evaluation would fail to pass the vetting procedure if the respective commission "has serious doubts" that this person:

- Seriously violated rules of ethical or professional conduct and "behaved arbitrarily or issued arbitrary acts";
- there is a "reasonable suspicion" that the person committed acts of corruption or "acts related to corruption";
- has admitted incompatibilities and conflicts of interest.

48. Article 12 (2) lists the financial integrity criteria; again, the judge or the prosecutor would fail if the AC has "serious doubts" about the following:

- Failure to declare donations and benefits, in the amount exceeding 10 average salaries;
- Unexplained wealth over the last 15 years exceeding 20 average salaries;
- tax irregularities in the past 10 years resulting in unpaid taxes exceeding 3 average salaries.

49. Finally, Article 12 (5) stipulates that the ACs would "in no way depend on the acts or findings of other bodies".

50. The Venice Commission and DG I find several of these provisions problematic. The Venice Commission and DG I are aware that draft Article 12 mirrors Article 8 of Law no. 26/2022 which regulates the pre-vetting procedure in respect of the candidates for the positions in the SCM and SCP. However, what could be allowed for the purposes of screening of the *candidates*, should not necessarily be allowed for the extraordinary vetting of *the sitting judges and prosecutors*, since in this second case more is at stake for them and for the stability of the legal order in general. While the criteria for the pre-vetting may be relatively loose and based on the holistic assessment of the candidates' integrity, antecedents, connections etc., the dismissal of a lawfully appointed judge or prosecutor needs to be justified with reference to more specific misbehaviour which should be more clearly defined in the law. This comes naturally from the security of tenure of judges, which is the cornerstone of their independence and which distinguishes them from the candidates for the judicial positions.

51. The Ministry of Justice in their written comments argued that the drafters were aware of this difference and tried to formulate the substantive grounds for the full vetting with more precision and in more detail, and that the examination of "professionalism" of judges and prosecutors was left out of the scope of the full vetting, as earlier recommended by the Venice Commission. This is commendable; however, the list of substantive criteria for the vetting is still very long and raises numerous issues.

1. Typology of the grounds for the vetting

52. Article 12 refers to various violations in the criminal, administrative, disciplinary, deontological,[31] and tax fields, which may serve as a basis for a negative assessment by the ACs. Moreover, besides referring to *offences* of different kinds, Article 12 also refers to certain factual *situations* which create *presumptions* of an offence (like the "unexplained wealth" situation referred to in Article 12 (3)). In principle, the Venice Commission and DG I are not against the application of certain legal presumptions in the context of combatting corruption, provided that such presumptions are reasonable, are founded on a strong factual basis, and the respondent may refute the allegations by presenting evidence to the contrary.[32] However, the rules on proving offences and the rules related to the application of factual presumptions may be quite different. For the Venice Commission and DG I, the combination of such heterogenous legal grounds in one legal text makes the analysis of the substantive grounds for the vetting particularly difficult.

2. Interrelation between the vetting procedure with other legal mechanisms and procedures

53. In the Republic of Moldova, as in other legal orders, there are separate legal avenues for each type of offence enumerated in Article 12. However, the draft Law gives the ACs the power to assess these elements without regard to any previous administrative decisions, pending parallel proceedings, or even final judgments. In essence, the ACs are called to check whether judges and prosecutors are law-obedient citizens from all possible points of view and look into nearly every aspect of their lives. This approach is potentially in conflict with a number of constitutional values and principles.

54. The first is the principle of *res judicata*. For the Venice Commission and DG I, the ACs cannot disregard previous judgments which have entered into the legal force – for example, judgments acquitting the judge/prosecutor concerned of a crime of corruption, or annulling a disciplinary sanction imposed on him or her.

55. Furthermore, for the Venice Commission it is not clear how the ACs would establish that the judge acted arbitrarily or issued arbitrary acts. The term "arbitrary acts" used in this provision is dangerously vague. Judges' decisions can only be subject to control through appeals, and the prosecutors' decisions are subject in most cases to judicial review. Of course, judges/prosecutors should not act arbitrarily, and their decisions have to be reasoned. If this is not the case, judges are violating the guarantees of a fair trial, but it falls only to a court to decide if it is so why. At the very minimum, the draft Law should specify that the ACs cannot conclude that a judge issued an arbitrary act if it simply disagrees with the outcome of the relevant case or the legal reasoning. Even acts quashed on appeal cannot be seen as "arbitrary" unless it is proven by the court that they have been adopted in bad faith or as a result of gross and manifest negligence.

56. The Ministry of Justice in their written comments argued that some final decisions were nevertheless arbitrary, referring in particular to the judgments rendered in respect of the 2018 local elections, or the "decisions that were adopted during the period of the captured state" which have been later "recognised as arbitrary by the ECtHR". The Venice Commission admits that certain (but certainly not every) breaches of the European Convention established by the ECtHR may be linked to the behaviour of individual judges and prosecutors, which may require a reopening of the procedure at the national level, and may eventually lead to bringing a judge to

[31] As it is long standing principle established in CCJE Opinion No. 3, para. 48 (i), a breach of ethical principles as such should not be a ground for establishing disciplinary measures against judges. A breach of more specific rules of professional conduct may, however, be seen as a disciplinary offence.
[32] Venice Commission, CDL-AD(2022)048, Armenia - *Amicus curiae* Brief for the Constitutional Court of Armenia on certain questions relating to the Law on the Forfeiture of Assets of Illicit Origin, paras. 60 and 61.

a disciplinary liability. First of all, it would be useful to specify whether the notion of "arbitrariness" should be understood in the same sense as the ECtHR understands it in the context of Article 6 of the European Convention, or means something else. The next question is who is to establish this "arbitrariness" and in which procedure. Extending the notion of "arbitrary acts" to potentially all decisions taken by a judge during the period of "captured State" and giving the ACs the power to decide which acts are arbitrary and which are not seems to run counter the principle of the legal certainty and the finality of the court judgements. At the very least, the notion of an "arbitrary act" should be reformulated as to include only such situations in which the ECtHR has previously established that the judge/prosecutor acted arbitrarily with intention or gross negligence (and not other breaches of the Convention which may be imputed to the malfunctioning of the system as a whole and not to the fault of the individual judge). The Venice Commission refers the authorities of the Republic of Moldova to its previous opinions where it discussed the effects of the findings of the ECtHR on the individual liability of judges.[33] And even where the proceedings have to be reopened following a judgment of the ECtHR, such reopening should follow a normal procedure provided for such cases.

57. The Venice Commission reiterates in this respect that acts of corruption are criminal offences and for such acts all persons including judges/prosecutors should be prosecuted and sentenced by a competent court following a proper procedure. Until this moment everybody enjoys the benefit of doubt. It is unclear how the findings made in the ACs reports under this hearing would correlate with any past or pending criminal proceedings concerning the acts of corruption.

58. Incompatibilities and conflict of interest in court proceedings are mostly solved by the recusal procedure, which is initiated by the parties in the particular case and should be subject to the control of appellate courts. Declaring *ex post* that a judge sitting in a case was in a situation of conflict of interest but did not recuse him- or herself would, in many cases, necessitate a reopening of the proceedings (although, admittedly, there may be some conflicts of interests which do not entail such consequences).

59. The Ministry of Justice explained in their written comments that the decisions of the vetting bodies (the ACs and the SCM/SCP) were not supposed to have this effect and would not lead to the re-opening of the cases. However, this is exactly what is seen as contradictory by the Venice Commission: the decisions of the SCM/SCP concluding that the judge/prosecutor has been in a situation of a conflict of interest in a particular case would co-exist with a valid and final decision taken by those judges/prosecutors in those cases.

60. Finally, as regards alleged disciplinary breaches, it is unclear how the findings of the ACs would correlate with the previous findings of the disciplinary bodies or with any pending procedures which may concern the judges/prosecutors undergoing the vetting procedure. What happens, for example, if the same misbehaviour is discussed in a report of the AC and in a decision of an "ordinary" disciplinary body?

61. The Ministry of Justice explained that the ACs and the SCM/SCP will be able to disregard the decisions in previous disciplinary cases as "manifestly unreasonable". The Venice Commission notes that this *de facto* permits the ACs to reopen any disciplinary case (even a very old one), which is damaging for the legal certainty and may be seen as undermining the constitutional role of the SCM/SCP. Again, a reopening of a disciplinary case may exceptionally be justified (for example, where new circumstances have been discovered, in particular following a judgment of the ECtHR), but the proposed formula leaves too much discretion to the ACs. The Venice Commission reiterates that any reopening should only be allowed exceptionally and follow

[33] See, for example, CDL-AD(2019)028, Republic of Moldova - *Amicus Curiae* Brief on the criminal liability of constitutional court judges, paras. 45 et seq.; CDL-AD(2019)024, Armenia – Joint Opinion of the Venice Commission and the Directorate General of Human Rights and Rule of Law (DGI), on the amendments to the Judicial Code and some other Laws, para. 50.

a normal procedure provided for such situations, in order to exclude that the same matter is considered in parallel within the framework of the vetting procedure and any other national procedure provided for such cases.

62. In sum, while the Venice Commission understands that if the ACs may consider certain behaviours which have been the subject-matter of other proceedings or which have not been yet examined at other fora, the reports of the ACs should not undermine the authority of the final judicial decisions and respect the principle of *res judicata*, as decided in criminal or disciplinary proceedings.

3. The standard of "serious doubts"

63. The AC issues a negative report when it has "serious doubts" about the commission by the judge or the prosecutor concerned of certain offences. The standard implies that the findings of the AC do not establish the fault of the persons concerned, or do not directly entail any liability, which would most likely require a different (higher) standard of proof.[34] To a certain extent, this construction reduces the potential for a conflict between the findings of the AC and of other administrative or judicial bodies, which is addressed above.

64. This construction raises, however, further issues. The first is whether the standard of "serious doubts" applies only to the results of the work of the ACs or should also be applied by the SCM/SCP. Article 19 (4) provides that the decision of the SCM/SCP confirming a negative assessment report of the AC has the effect of "dismissal of the judge in accordance with art. 25 par. (1) letter n) of Law no. 544/1995 on the status of judge and its consequences". But what would be the task of the SCM/SCP in this situation? Two possible interpretations of this provision can be offered.

65. First, one may understand that the SCM/SCP will have to apply the substantive grounds for the dismissal of the judge/prosecutor as provided in the ordinary legislation on the status of judges and prosecutors, using the ordinary standard of proof applied in such cases. Another possible interpretation is that the SCM/SCP would have to use the same standard of proof as the AC ("serious doubts") and base its findings on the substantive grounds which are listed in Article 12.

66. The Venice Commission and DG I consider that the first approach, which would limit the effect of the findings of the AC and thus justify the use of the standard of "serious doubts", is more in line with the role of the SCM/SCP in the process. The vetting procedure, in the foreseen terms and in their consequences, has material analogies with the disciplinary procedures; the effect of the failure to pass the assessment (dismissal) is materially the same as the most serious disciplinary offences, or an accessory penalty as a result of a conviction for some serious crimes.

67. Therefore, it would be better if the SCM/SCP reaches its conclusion on the basis of some consistent certainty, while the "serious doubt" standard may be left to the ACs to apply. In the online meetings some interlocutors suggested that for the two Councils, it would be appropriate to use the standard of "sufficient evidence", "compelling evidence", "balance of probabilities", or even the highest standard of "beyond a reasonable doubt", even though the SCM/SCP are not criminal courts and therefore are not required to use this highest standard of proof in the vetting exercise which is rather of a disciplinary (or quasi-disciplinary) nature.

68. The Ministry of Justice argued in their written comments that the standard of proof should be the same for the ACs and the SCM/SCP: otherwise there is a risk that two bodies reach different conclusions based on the same facts. The Venice Commission notes that even with the same

[34] In the December 2022 Opinion, CDL-AD(2022)049, the Venice Commission insisted that the word "serious" (and not "reasonable") doubts should be used – see para. 32.

standard at both levels the ACs and the SCM/SCP may reach different conclusions. And, indeed, nothing prevents the legislator to raise the standard of proof required for the decision-making by the ACs. What is a source of concern for the Venice Commission is the SCM/SCP deciding on the basis of the standard of "serious doubts".

69. As rightly pointed out by the Ministry of Justice, some of the substantive grounds for the vetting described in Article 12 – and in particular the "unexplained wealth" condition which creates a presumption of the lack of integrity – imply a different distribution of the burden of proof. The use of such presumptions is acceptable, as confirmed by the Venice Commission on several occasions (see the analysis immediately below). However, the "serious doubts" standard is applied to *all* grounds enumerated in Article 12. This may be problematic, for example, in a situation where the SCM decides to order the dismissal of a judge on the basis of a "serious doubt" that this judge has breached a rule of professional conduct.

4. Retroactivity and the problem of "impossible burden"

70. It is a general principle of nearly every legal order that criminal, administrative and disciplinary offences become at some point time-barred (with few notable exceptions which are not relevant in the present context). However, Article 12 seems to allow the AC to prepare a negative report with reference to the misbehaviour which happened years before the enactment of the law. The Venice Commission and DG I consider that the ACs should not be allowed to look into cases which are otherwise time-barred under the usual rules of criminal, administrative, and disciplinary liability.

71. It is further unclear which rules should be applied by the AC to reach its conclusion: those which exist now, or those which existed at the time of the imputed offence? This concerns in particular the rules on incompatibilities, conflicts of interest, the declaration of donations, etc. Judges or prosecutors should not be penalised for not respecting the rules which did not exist at the time of the facts imputed to them. Such rules should exist at least in some general form. A similar issue has been previously addressed in an opinion on Turkey where the Venice Commission observed that "disciplinary liability or *any other similar measure* [italics added] should be *foreseeable*; a public servant should *understand* that he/she is doing something incompatible with his/her status, in order to be disciplined for it".[35]

72. The Ministry of Justice in their written comments noted that "the rules existing at the time of the analysed facts [would be] applied, even if they [had] occurred before the adoption of the law", and that the law would not open a possibility for punishing the judges and prosecutors beyond the statute of limitations. The Venice Commission welcomes this very important clarification. However, in order to exclude any possible misinterpretation of Article 12, this formula could be added to the text of Article 12.

73. Finally, when establishing facts related to the unexplained wealth or undeclared donations, the ACs would have the power to request justification for acquisitions or spendings which took place up to 15 years before the adoption of the law. In a similar context, while acknowledging that the use of such presumptions is permissible, the Venice Commission observed that "the duty to demonstrate the lawful origin of […] property or transactions should not impose a disproportionate burden on the judge, should concern only particularly significant transactions and should not concern, for example, a property which the judge or his or her family have owned for decades. The duty to give explanations should remain reasonable."[36]

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[35] Venice Commission, CDL-AD(2016)037, Turkey - Opinion on Emergency Decree Laws nos. 667-676 adopted following the failed coup of 15 July 2016, para. 119.

[36] Venice Commission, CDL-AD(2019)024, 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, 14 October 2019, footnote to para. 41.

74. In sum, the Venice Commission invites the authorities of the Republic of Moldova to consider reducing the period of time which is taken into consideration in the detection of unexplained wealth and/or undeclared donations, because it is not realistic that anybody would keep records of his or her assets so long. The judges and prosecutors should also have a real chance to refute the presumption and must be able to put forward the "inaccessible evidence" or *bona fide* ownership defence, which should be specified in the law.[37]

5. Proportionality and thresholds

75. Not all of the offences enumerated in Article 12 would call for dismissal. Thus, for example, the provision on the conflict of interests does not contain elements that can identify the relevance and seriousness of what may be at stake, the types of conflicts or incompatibilities and their nature; if they occurred in one case or over some time, etc. A similar observation can be made in respect of the commission of "arbitrary acts", which may be relatively minor and without serious implications.

76. Indeed, the principle of proportionality may be followed by the ACs in practice, which would prepare negative reports only in such cases where the misbehaviour reached some threshold of seriousness. However, it would be preferable to mention in the Law itself that there should be a relation of proportionality between the seriousness of the impugned misbehaviour and the severity of the consequences.

77. The Ministry of Justice argues that the principle of proportionality is already enshrined in the current legislation governing the status of judges and prosecutors and the grounds for the disciplinary liability thereof. This is positive, but the Venice Commission reiterates that Article 12 may arguably be interpreted as creating *new* grounds for the dismissal, not submitted to the existing rules. This is why mentioning the principle of proportionality in the draft Law would be advisable, despite useful clarifications proposed by the Ministry of Justice.

78. Finally, speaking specifically of the unexplained wealth, undeclared donations, and unpaid taxes, the Venice Commission and DG I note that the draft Law sets a specific threshold above which such wealth or donation would constitute a ground for the vetting. On the one hand, setting such thresholds adds certainty to the whole exercise. On the other, there is a risk that the law sets very low thresholds, and that even minor inaccuracies in the declarations, failure to keep a record of insignificant transactions, etc. would lead to the dismissal of a judge or a prosecutor. Thus, for example, sacking a judge just because over the period of 10 years he/she has accumulated tax arrears amounting to not more than 3 times the average salary does not seem to be a proportionate penalty. Everyone has to pay taxes, especially public officials, and especially judges. But people often make mistakes while assessing taxes. And EUR 1,755 (which, as the rapporteurs were told, is approximately 3 times the average salary in the Republic of Moldova) in 10 years is not the amount for which the judge should be dismissed.

79. The Ministry of Justice provided detailed calculations in order to explain how those thresholds had been chosen. Thus, the amount of the "unexplained wealth" accumulated over 10 years would be broadly equivalent to an amount of the personal income tax a judge would have to pay per year. It is good that the thresholds indicated in the draft Law are not chosen arbitrarily but with reference to some economic benchmarks. The Venice Commission and DG I do not know the local conditions well enough and therefore cannot give any precise guidance as to the whether the thresholds set in the law for such purposes are reasonable. However, the rapporteurs were repeatedly reminded of the specific context of the Republic of Moldova, where a large portion of the population lives and works abroad sending money home to support their families,

[37] Venice Commission, CDL-AD(2022)048, Armenia - *Amicus curiae* Brief for the Constitutional Court of Armenia on certain questions relating to the Law on the Forfeiture of Assets of Illicit Origin, para. 61.

and where many legitimate transactions are done routinely in cash, not all transactions are properly recorded, etc. This factor should be taken into consideration by the legislator when defining the amounts of unexplained wealth, undeclared donations, or tax arrears.

6. The overall assessment of the substantive criteria for the vetting

80. In sum, the Venice Commission and DG I have a number of serious concerns about the substantive criteria defined in Article 12 of the draft Law. It does not mean that some of them cannot be used to vet judges and prosecutors. In particular, as previously acknowledged by the Venice Commission, such concepts as the conflict of interests or unexplained wealth are useful and legitimate legal tools for combatting corruption in the public service. It is also possible that the ACs would successfully avoid all the pitfalls identified above: they will only refer to the proven cases of serious misbehaviour, their findings would not contradict *res judicata*, the ACs will not apply the rules retroactively or look at the cases beyond the statute of limitation, nor would they impose on the judges and prosecutors an impossible burden to give explanations and provide evidence, etc. Only such "clear" cases may and must serve as a basis for the negative vetting reports.

81. However, the text of Article 12, as it is formulated now, also creates a danger of abusive or at least too lenient application of the substantive criteria, which might result in dismissals which would be contrary to some fundamental principles of human rights and the rule of law. Even if such mistakes are later corrected in the proceedings before the SCJ, the Constitutional Court, or the European Court of Human Rights, they would undermine the public trust in the reform and destabilise the judiciary and the prosecution service even further.

82. As stressed by the Ministry of Justice in their written comments, the procedural framework of application of the substantive criteria guarantees that the risk of abuse is minimal. The Venice Commission agrees with the Ministry that the institutional framework of the full vetting could be acceptable if the additional recommendations formulated above are followed. However, it is dangerous to rely only on the well-designed implementation mechanism if the substantive rules – or at least some of them – are flawed. So, the Venice Commission and DGI invite the authorities of the Republic of Moldova to thoroughly review Article 12 in order to address the issues identified above.

F. Procedure before the Assessment Commissions and the two Councils

1. Gathering of information by the Assessment Commissions

83. Another source of concern for the Venice Commission and DG I are the powers of the AC to obtain information necessary for the assessment of judges and prosecutors.

84. Article 16 (3) of the draft Law provides that natural and legal persons under public or private law, including financial institutions, may not refuse to provide information on the grounds of protection of personal data, banking secrecy or other data with limited access, except for the information that constitutes state secrecy. According to Article 16 (4) of the draft Law, a failure to submit the requested information within the set deadline shall be sanctioned according to the legislation in force.

85. Given the broad scope of the vetting exercise which may touch upon the behaviour, assets, wealth, and expenses of the judges/prosecutors and their affiliated persons, the draft Law should set out some limits as to what sort of information can be requested and obtained. In particular, the draft Law contains no exceptions regarding potentially self-incriminating information, privileged information (covered by the lawyer-client privilege), medical or other information of the private character. The right to private and family life under Article 28 of the Constitution and

Article 8 of the ECHR should be respected concerning the evaluated judges/prosecutors. The Commission and DG I recall that a similar concern has been raised in the 2019 Opinion.[38]

86. The relevance of the information sought and obtained by the AC is another issue to address. It is necessary to set out more precisely what is the relevance and probative value of such information in determining facts. Moreover, the draft Law should exclude any probative strength of anonymous information in these proceedings.

87. Furthermore, it is not clear what procedural framework will be used for requesting and obtaining such information. The draft Law should specify what happens if the persons concerned refuse to cooperate with the AC and provide for a possibility of judicial review of such disputes. Additional procedural safeguards (like the pre-authorisations by the SCM/SCP) may be introduced in order to ensure that the broadly formulated power of the AC to seek and obtain information necessary to perform its mandate is not abused.

88. The Ministry of Justice explained that the information will be requested, obtained and used by the ACs only for the purposes of "fulfilling its mandate". However, it is necessary to have an external check on this power, so that it is not interpreted in an overly broad manner.

89. In sum, the draft Law should define the categories of information which cannot be requested by the ACs, or which can be requested only in certain cases and only following a certain procedure.

2. Use of the information within and outside the vetting procedure

90. With the broad gathering powers granted to the AC, the vetting mechanism may be used for other purposes, like criminal or civil proceedings, for example. The draft Law should provide that any information and documents obtained by the AC must only be used for the narrow purpose of the vetting procedure and cannot be referred to directly as evidence in other proceedings, in circumvention of the procedural safeguards provided for such proceedings. That should not prevent the ACs from informing competent authorities about facts that may give rise to triggering criminal, administrative cases, etc., if appropriate.

3. Publicity of the hearings and reports by the Assessment Commissions

91. In the 2019 Opinion, the Venice Commission and DG I emphasised the importance of the personal participation of the evaluated judge/prosecutor in the hearing,[39] as well as on the non-disclosure of the assessment results before a decision is finally adopted.[40] It follows from Article 17 (3), the evaluated judge/prosecutor shall have the right to attend the hearing before the panel of the AC and benefit from legal assistance. This is positive, but the law should specify that the evaluated judge/prosecutor must be informed duly and in advance about the hearing. The ability of the judge/prosecutor to present oral and written evidence should be articulated and carefully secured. As a more general recommendation, it would be beneficial if the draft Law contained a special provision devoted to the procedural rights of the evaluated judge/prosecutor.

92. Under Article 17 (4), the hearing shall take place in an open meeting and be audio/video-recorded. The panel may decide to hold the hearing wholly or in part behind closed doors if it is absolutely necessary for the protection of public order, privacy, or morality. Video recordings of the hearings in public meetings are placed on the official website of the Assessment Commission.

[38] See the 2019 Opinion, CDL-AD(2019)020, para. 70.
[39] See the 2019 Opinion, CDL-AD(2019)020, para. 72.
[40] See the 2019 Opinion, CDL-AD(2019)020, para. 73.

93. While the possibility of having an open hearing should be provided in the law, the option of a closed hearing should be given practical effect. The draft Law should expressly specify the right of the evaluated judge/prosecutor to make a request to that effect. The decision to refuse the request should be based on cogent reasons and be subject to revision by SCM/SCP upon appeal. The Venice Commission and DG I stress that contrary to ordinary legal proceedings in the vetting process the integrity and behaviour of the judge/prosecutors will be discussed. Given the already low level of public trust in the judiciary in the Republic of Moldova, as well as the extremely broad mandate and powers of the ACs, there may be weighty reasons for keeping the hearing closed, not only for the sake of preserving the interests of the judges/prosecutors concerned but also for the sake of protecting the public image of the judiciary. Therefore, the Venice Commission and DGI consider that a request by the judge or the prosecutor concerned to have a closed hearing of his or her case should normally be granted.

94. Moreover, the public hearing does not necessarily imply that the assessment report – especially a negative one – should be made equally public at that stage. The Venice Commission has previously stated in a similar context that "the adverse effects of such publication on the person's reputation may hardly be removed by a later rectification, and the affected person has no means to defend himself against such adverse effects. The latter may only appear to be a proportionate measure necessary in a democratic society when [the collaboration with the previous regime] is finally verified, not before. The publication should therefore only occur after the court's decision."[41] Accordingly, the Commission recommended in its 2019 Opinion that the evaluation report should not be made public until the SCM/SCP takes a decision, or the appellate judicial body confirms it on appeal.[42] These considerations are equally pertinent to the present Draft Law. Article 18 (6), which provides for the general rule of publishing assessment reports at that early stage, should be removed.

4. Effects of a negative report by the Assessment Commissions

95. In the October 2022 Opinion and the December 2022 Opinion, the Venice Commission and DG I criticised the provisions on the automatic suspension of judges following the report of the evaluation commission.[43] It is welcome that the draft Law abandoned that proposal. Moreover, the drafters envisage in Article 20 (3) that a decision of the SCM/SCP (admittedly the decision approving a negative report by the AC) shall be suspended in case it is appealed against. That ensures the practical effectiveness of the appeal and the protection of the rights of the evaluated judges/prosecutors.

5. The role of the Superior Council of Magistracy/Superior Council of Prosecutors

96. According to Article 19 (2) of the Draft Law, the SCM/SCP will examine the assessment report provided by the AC and will pass one of the following decisions: (a) accept the report and decide whether or not the assessment has been passed; (b) reject the report and order the reopening of the assessment procedure; (c) after the repeated assessment, accept the report and decide whether or not the assessment has been passed.

97. In its opinion of December 2022, the Venice Commission and DG I considered that the resumption of the evaluation procedure by the evaluation commission upon the rejection of the evaluation report by the SCM was time-consuming and cumbersome. However, it stressed that the authorities had a margin of discretion in that, as long as the decisive role of the SCM, as well

[41] See Venice Commission, Interim Opinion on the Law on Government Cleansing (Lustration Law) of Ukraine, CDL-AD(2014)044, para. 99.
[42] See the 2019 Opinion, CDL-AD(2019)020, para. 73.
[43] See the October 2022 Opinion, CDL-AD(2022)024, para. 52; the December 2022 Opinion, CDL-AD(2022)049, para. 29.

as the guarantees against unnecessary procedural delays were clearly ensured.[44] Further to these considerations, the Commission wishes to underline the fact that vetting is an exceptional exercise that should be done concisely. Given the constitutional role of the SCM/SCP, those bodies should be able to take the necessary additional measures on their own and take a decision without sending the case back to the AC. The Commission and DG I, therefore, for the reasons of expediency, recommend removing the option of remittal of the case to the AC.

6. Scope of the appellate review and the remedial powers of the Supreme Court of Justice

98. Under Article 20 of the draft Law, the decisions of the SCM/SCP can be appealed to the Supreme Court of Justice (the SCJ) either by the respective AC or by the judge/prosecutor concerned. The draft Law does not clearly determine what will be the *scope* of appellate review exercised by the SCJ. Article 20 (5) refers to "factual circumstances" that may prompt the SCJ to allow the appeal. This appears insufficient, especially in the light of the case-law of the ECtHR which suggests that the scope of judicial review should extend not only to the matters of fact, but also the matters of law and the reasonable use of the discretion by the primary body.[45]

99. That being said, in this context, the appellate review should not necessarily involve *de novo* examination of the case. The SCJ may correct gross or obvious errors but must show deference in order to preserve the constitutional role of the SCM/SCP as the primary decision-maker.[46]

100. Lastly, the remedial power of the judicial authority should be effective. According to Article 20 (5) (a) and (b) of the draft Law, when allowing an appeal, the SCJ may only remit the case either to the SCM/SCP or down to the ACs for the resumption of the vetting procedure. First of all, sending the case directly to the AC creates the impression that this commission and not the respective Council is the main deciding body, which should be avoided given that in accordance with the Constitution, the dismissal of the judges and prosecutors can only be decided by the SCM/approved by the SCP. Furthermore, providing only for the power of the SCJ to remit case back and not to take a final decision entails a risk of repetitive appeals, if the ACs or the SCM insist on their original position and do not correct errors identified by the SCJ. Therefore, the SCJ should be entitled to make a final and binding decision if the referral to the SCM/SCP or the AC does not bring a satisfactory result, which is necessary for a meaningful right of appeal before a court of law.

7. Proportionality of sanctions

101. According to Article 19 (4) of the draft Law, the decision of the SCM/SCP confirming the negative report by the respective ACM has the effect of the dismissal of the judge or the prosecutor. In the December 2022 Opinion, the Commission and DG I expressed concerns that the evaluation procedure did not provide any alternatives for the SCM to apply any other measures apart from the removal from office. Despite the argument that, in the context of the vetting exercise, any other sanction other than dismissal would be manifestly insufficient, the Commission and DG I still stressed the need to ensure discretion to the SCM/SCP in applying different measures. That flexibility was important in terms of the principle of proportionality, while the removal from office was the *ultima ratio* measure. Accordingly, even in the vetting procedure,

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[44] See the December 2022 Opinion, CDL-AD(2022)049, para. 51.
[45] See ECtHR, *Ramos Nunes de Carvalho e Sá v. Portugal* [GC], nos. 55391/13 and 2 others, § 196, 6 November 2018; *Obermeier v. Austria*, 28 June 1990, § 70, Series A no. 179; *Diennet v. France*, 26 September 1995, § 34, Series A no. 325-A.
[46] See Venice Commission, CDL-AD(2017)019, Armenia - Opinion on the Draft Judicial Code, para. 151.

the sanctions could be at least more than one.[47] The Commission and DG I would like to repeat that recommendation with regard to the present draft Law.

102. In the October 2022 Opinion the Venice Commission and DG I also noted that additional consequences for the negative evaluation – which include a long ban from most legal professions – are disproportionate and should be reconsidered.[48] Regrettably, the recommendations that all activities of a private nature should be removed from the list of banned professions[49] are not addressed either in the current draft Law.[50]

IV. Conclusion

103. By letter of 13 February 2023, the former Minister of Justice of the Republic of Moldova, Mr Sergiu Litvinenco, requested an opinion of the Venice Commission on the draft Law on the external assessment of judges and prosecutors. The draft Law prepared by the Ministry of Justice provides for the creation of a special mechanism of vetting (extraordinary evaluation) of judges and prosecutors by two Assessment Commissions composed of six members.

104. This draft Law is the third attempt by the authorities of the Republic of Moldova to "cleanse" the ranks of the judiciary and the prosecution service through an extraordinary vetting process. In 2021 the authorities created an evaluation mechanism (pre-vetting) for the candidates for the positions in the two Councils – the Superior Council of Magistracy ("the SCM") and the Superior Council of Prosecutors ("the SCP"). In 2022 the authorities proposed to submit the sitting judges of the Supreme Court of Justice ("the SCJ") to the vetting procedure, and, finally, the draft Law under consideration extends this mechanism, called "full vetting", to over one third of all judges and prosecutors (with some exceptions).

105. The Venice Commission and DG I have acknowledged that extremely high levels of corruption may justify equally radical solutions, such as an examination of the sitting judges, but it should only be used as a measure of last resort. Opinions on the extent of the crisis within the prosecution service and the judiciary, the (in)efficiency of the current mechanisms of accountability, and hence of the necessity of the full vetting are divided in the Republic of Moldova. It is for the Parliament of the Republic of Moldova to examine the justification for the reform and the (in)availability of alternative solutions with particular scrutiny. While the pre-vetting exercise started in 2021 was quite uncontroversial, the current proposal of "full vetting" has a much larger impact and scope. Ideally, certain basic rules on the mechanisms and grounds for the dismissal of judges and prosecutors should be entrenched at the constitutional level, but the Venice Commission and DG I understand that it may be a politically difficult endeavour.

106. Even assuming that the full vetting is justified and will not be repeated in the future, it carries with it risks for the independence and efficiency of the judicial and prosecution systems. These risks can be mitigated if certain safeguards are in place.

107. Some of those safeguards are in the draft Law under examination. The Venice Commission and DG I note with satisfaction that many of their previous recommendations have been implemented in the draft Law. Thus, the fact that the ultimate decision to dismiss judges and prosecutors remains in the hands of the SCP and SCM is admittedly in line with the Constitution and deserves to be assessed positively: it is the central guarantee that the vetting process will not be instrumentalised for ulterior goals.

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[47] See the December 2022 Opinion, CDL-AD(2022)049, para. 40.
[48] See the October 2022 Opinion, CDL-AD(2022)024, para. 61.
[49] See the December 2022 Opinion, CDL-AD(2022)049, para. 39.
[50] Draft Law, Article 19(4)(a-b) and Article 19(5).

108. Moreover, the institutional features of the two Assessment Commissions (the ACs) – the main fact-finding bodies which would send to the SCM and the SCP the reports on respectively the judges and prosecutors concerned – sufficiently ensure their independence from the political majority of the day, in particular through the presence of three members nominated by the development partners of the Republic of Moldova and one member nominated by the opposition in the Parliament.

109. It is also commendable that the decisions of the SCM and SCP on dismissal of judges and prosecutors would be appealable to the Supreme Court of Justice.

110. That being said, several other aspects of the proposed vetting procedure raise serious concerns for the Venice Commission and DG I and should be reconsidered. The Venice Commission and DG I make the following recommendations in this respect:

- the draft Law should ensure that the parliamentary opposition gets their nominee elected as a member of the ACs;
- candidates with a judicial and/or prosecutorial background should be eligible;
- the voting in the panels of the AC should require a "special majority" (support from the "national" and "international" members);
- the substantive grounds for the vetting (current draft Article 12) should be thoroughly reviewed in order to ensure that:
    - the findings of the ACs cannot contradict final judgments (except in some narrowly defined situations, for example where the proceedings have to be reopened following a decision of the European Court of Human Rights);
    - the ACs cannot examine alleged offences which would normally be time-barred;
    - the ACs cannot apply any rules which did not exist at the time when the offences were committed;
    - the standard of "serious doubts" should be applied only in the work of the ACs, while the SCM/SCP should be guided by a higher standard of proof;
    - the judges and prosecutors concerned should have a real chance to refute the presumptions related to the unexplained wealth and must be able to put forward the "inaccessible evidence" or *bona fide* ownership defence in such cases;
    - the thresholds set by the draft Law regarding the criteria of unexplained wealth, undeclared donations, or tax arrears should be carefully reviewed in the light of the specific context of the Republic of Moldova;
- the draft Law should define the categories of information which cannot be requested by the ACs, or which can be requested only in certain cases and only following a certain procedure (providing for a judicial review in the case of a dispute);
- the evaluation report by the ACs should not be made public until the SCM/SCP takes a positive decision, or the appellate judicial body confirms it on appeal; the judges and prosecutors concerned should be able to request a closed hearing and such requests should, as a rule, be granted;
- the Supreme Court of Justice should be able to take a final decision in a case concerning the dismissal of a judge or a prosecutor, and not only remit the case to the SCM/SCP or the ACs;
- a long ban from most legal professions as an additional consequence of dismissal as a result of the negative report is disproportionate and should be reconsidered.

111. In sum, the Venice Commission and DG I observe that while many of its previous recommendations were reflected in the current draft Law, in particular as regards the procedural framework of the vetting process, several important issues, especially related to the substantive grounds for the vetting, need to be addressed by the drafters before they proceed further. The Venice Commission and DG I remain at the disposal of the authorities of the Republic of Moldova for further assistance in this matter.