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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW
(VENICE COMMISSION)

MONTENEGRO

FOLLOW-UP OPINION

**TO THE OPINION ON THE DRAFT AMENDMENTS
TO THE LAW ON THE JUDICIAL COUNCIL AND JUDGES
(CDL-AD(2022)050)**

**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. At its 133rd Plenary Session, the Venice Commission, at the request of Mr Marko Kovač, Minister of Justice of Montenegro, adopted an Opinion on the draft amendments to the Law on the Judicial Council and Judges ([CDL-AD\(2022\)050](#), hereinafter “the December 2022 Opinion”).
2. Following the December 2022 Opinion, the draft amendments were revised and, by letter of 22 February 2023, the Minister of Justice of Montenegro requested a follow-up Opinion of the Venice Commission on the revised draft amendments to the Law on the Judicial Council and Judges ([CDL-REF\(2023\)016](#)) (hereinafter the consolidated version of the law is referred to as “revised draft law”).
3. Ms Marta Cartabia and Mr Philip Dimitrov acted as rapporteurs for this opinion.
4. As this is a follow-up opinion and broad online consultations had been organised on 21 and 22 November 2022, during the preparation of the December 2022 Opinion, a country visit was deemed unnecessary. The opinion was prepared in reliance on the English translation of the revised draft law. The translation may not accurately reflect the original version on all points, therefore certain issues raised may be due to problem of translation.
5. This follow-up opinion was drafted on the basis of comments by the rapporteurs. It was adopted by the Venice Commission at its 134th Plenary Session (Venice, 10-11 March 2023).

II. Analysis

A. Preliminary remarks

6. The Ministry of Justice of Montenegro has revised the draft amendments in light of the December 2022 Opinion and submitted them to the Commission for a follow-up Opinion. The Venice Commission appreciates this constructive approach and reiterates its appreciation for the opportunity to continue the cooperation on this reform.
7. In this follow-up opinion, the Venice Commission will examine to what extent its previous recommendations have been followed.
8. The Venice Commission reiterates that it will not focus in detail on issues such as the *ex officio* presence of the Minister of Justice in the Judicial Council and alternative anti-deadlock mechanisms for the election of lay members of the Judicial Council, as such reforms would require constitutional amendments, and it is not for the revised draft law to address them.¹ However, the Venice Commission considers it relevant that on 27 February 2023 the Parliament of Montenegro appointed three new judges to the Constitutional Court, filling only three of the four vacancies but restoring the quorum needed for the Court’s functioning.² This is an important

¹ With particular regard to the Minister of Justice’s *ex officio* presence in the Judicial Council, the Venice Commission refers to its December 2022 Opinion and recalls that although the presence of members of the executive does not, in itself, impair the independence of a Judicial Council, the Minister of Justice should not have the right to vote or participate in the decision-making process if it is a decision concerning the transfer of judges and disciplinary measures against judges, see December 2022 Opinion, §§ 17-20. With specific regard to disciplinary proceedings see *also*, recently, ECtHR, *Catană v. the Republic of Moldova*, no. 43237/13, 21 February 2023, § 75. The Venice Commission recalls that the Constitution of Montenegro provides that the Minister of Justice shall not vote in the disciplinary proceedings related to accountability of judges but is silent about the possibility for the Minister of Justice to take part in any other vote, including those on any career-related issue. The Venice Commission therefore reiterates that it should be for the legislator to decide whether the Minister of Justice should be prevented from voting in these matters, in line with the above-mentioned standards, and for the Constitutional Court of Montenegro to review such a legislative amendment.

² See the news on the [website](#) of the Parliament of Montenegro.

step towards the effective functioning of the judiciary and the institutions of the state. The Venice Commission hopes that political forces in Parliament will also find soon an agreement on the election of the seventh judge of the Constitutional Court to make the functioning of the latter in full compliance with the Constitution and on the election of the lay members of the Judicial Council, to guarantee the normal turnover in the institution's composition.

9. Lastly, the Venice Commission takes note of the new transitional provisions contained in Articles 138a, 140a and 140b of the revised draft law, setting deadlines for the adoption of secondary legislation and clarifying the applicable norms for procedures (elections, appraisal, disciplinary proceedings) commenced prior to the enactment of the law. These are to be welcomed as they improve the clarity of the law and identify the legal regime applicable in the *interim*.

B. Key recommendations

- *Work-related rights of the judges, such as the right to an adequate salary, or their retirement age, should be clearly regulated by the Law, due to the specificity of the rules applicable to the judiciary, the judges' special status in the society and to protect and uphold the basic principle of judicial independence*

10. The Venice Commission recalls that judges cannot be equated to civil servants. They have a special status and perform a unique and fundamental constitutional function. It is therefore fundamental to preserve the specificity of the rules applicable to the judiciary, in order to protect and uphold the basic principle of judicial independence.³

11. The Venice Commission notes that neither Article 5 of the draft amendments has been amended, nor any other relevant provision has been added in the law.⁴ Insofar as the right to salary and other work-related rights of judges are concerned, the revised draft law still refers to the general framework of the regulations governing the rights and duties of public sector employees. The Venice Commission finds that, in order to comply with the recommendation, either a specific body of legislation shall apply to judges, or the specific work-related rights of judges be specified in the very revised draft law.

12. The Venice Commission therefore concludes that this recommendation has not been followed and remains valid.

- *Insofar as the "political" incompatibility is concerned, the cooling-off period for members of the Judicial Council should be reduced to 5 years, to avoid excessive stigmatisation of political activity and to prevent the pool of potential candidates from being unduly restricted*

13. In the December 2022 opinion, the Venice Commission found that the Law, by introducing a 10-year cooling off period between political activity and the possibility to be appointed as a member of the Judicial Council, excessively penalised former activity in a political party, and it could disproportionately restrict the potential pool of candidates for members of the Judicial Council.⁵ The Venice Commission welcomes the amendments to Articles 12 and 16 of the revised draft law, which reduce the cooling-off period to 5 years.

14. The draft law introduced a ban for a person who, in the last ten years, was an official of a political party or what "actively engaged in the party". The Venice Commission had noted that this

³ December 2022 Opinion, § 14.

⁴ In its written observations of 8 March 2023, the Ministry of Justice reiterated that judges' pension rights, as well as their salary and social protection rights are exercised in accordance with the relevant provisions of the law that applies to employees in the public sector.

⁵ December 2022 Opinion, § 33.

formula was too vague and could be misused for the sake of excluding undesirable candidates and therefore had recommended to clarify.⁶ The Commission notes that this formula has been indeed deleted but it has been replaced by the word “member”, both in Articles 12 and 16 of the revised draft law.

15. The Venice Commission is concerned by this new formulation. Its December 2022 recommendation referred to leading positions in political parties and did not cover simple membership. This addition risks frustrating the positive amendment. The Venice Commission indeed considers it dangerous to accept the idea that having political convictions is *per se* a factor that hampers the capacity for honest, responsible, and non-biased professional performance. Therefore, the Commission recommends confining the political incompatibility provided for in Article 12 and 16 to political party officials who have held positions of responsibility within the party.

16. In sum, the Venice Commission considers that the recommendation on reducing the cooling-off period for “political incompatibility” has been followed; however, it recommends removing the word “member” from Article 12 and 16 of the revised draft law and confining the political incompatibility to high-level officials of a political party only. In its written observations of 8 March 2023, the Ministry of Justice accepted this recommendation and informed the Venice Commission that the word “member” will be removed from Articles 12 and 16.

- *Anti-deadlock mechanisms such as the election of the Acting President of the Supreme Court should be limited to exceptional events, such as the death, resignation or dismissal of the incumbent President, in order to avoid transforming the exception into rule.*

17. The Venice Commission notes that the provision regarding the election of the Acting President of the Supreme Court (Article 36a) has not been amended.⁷ On the contrary, a new Article 106a, providing for the election of an acting court president, has been added in the revised draft law. Pursuant to this provision, an acting court president shall be appointed every time that the mandate of a court president ends. The Venice Commission stresses that it is not against the elections of acting presidents. However, it reiterates that the election of an acting president is by every standard an exceptional procedure that only serves the need to avoid the impasse stemming from an equally exceptional, unforeseen event, such the death, the resignation or the dismissal of the former President (be it of the Supreme Court or of a normal court).⁸ By providing for the election of an acting president even on the occasion of an ordinary turnover, the revised draft law perpetuates the impression that the exception shall be the rule. The legal framework in place should allow enough time for the procedure of election of the new president to be completed before the expiration of the outgoing president’s term.

18. In light of the above, the Venice Commission finds that this recommendation has not been followed.

- *The evaluation criteria should be partly revised in order to ensure that the independence of judges is upheld and judicial discretion is not unduly restricted and that all judges, regardless of the court they work in, should be subject to appropriate evaluation, tailored to the role they occupy in the judicial system.*

19. In the December 2022 Opinion, the Venice Commission expressed its concerns about grading as unsatisfactory a judge’s work if his/her work results are below 80% of the number of

⁶ December 2022 Opinion, § 33.

⁷ In the written observations submitted on 8 March 2023, the Ministry of Justice submitted that the proposed solutions should be kept, also having regard to the recent difficulties in electing the President of the Supreme Court and other courts.

⁸ December 2022 Opinion, § 43.

completed cases stipulated by the Framework Criteria for determining the required number of judges. It considered this threshold to be too high. It further found that the formula “unless the judge provides justified reasons”, the safeguard clause contained in the draft law, needed clarifications.⁹ Article 90 § 3 of the revised draft law lowered the threshold to 70% and clarified the meaning of the justified reasons, by specifying that these are “temporary inability to work, failure to receive timely response from the competent authorities to the judge’s request and other”. The Venice Commission considers that the amendments go in the right direction and improve the criteria for evaluation.

20. The Venice Commission further welcomes that, pursuant to revised Article 92, the performance appraisal of judges will be carried out by checking not only those cases in which the judge’s decision was overturned on appeal,¹⁰ but a wider number of selected cases, including by the judge him/herself.¹¹

21. However, the Venice Commission notes that no amendment has been made to Article 90 § 4 of the revised draft law, which provides that the quality of work of a judge is evaluated based, *inter alia*, on the number of decisions “quashed” on appeal. The Venice Commission recalls that this threshold is fixed to 30% by secondary legislation (a judge who has 30% or more annulled decisions in relation to the total number of decisions taken has his/her score evaluated as unsatisfactory).¹² The Commission reiterates that this threshold is too low and could impair the independence of the judge and subdue the creativity of the jurisprudence. The Venice Commission takes note of the fact that the rules for evaluating judges and president of the courts will be revised after the adoption of legal amendments, within 6 months from the day of the entry into force of the law.¹³

22. Lastly, the Venice Commission notes that the Supreme Court judges are still exempted from the evaluation cycle, as Article 87 has not been amended.¹⁴ Mindful of the specific role they occupy in the judicial system, the Venice Commission had recommended that *some form* (emphasis added) of evaluation, tailored to the specificity of the role of Supreme Court judges (for example one that focuses on the effectiveness of the judge’s work and on respect of integrity and respect for judicial ethics), be devised.¹⁵

23. In light of the aforementioned, the Venice Commission finds that this recommendation has only partially been followed.

- *The Law should ensure that ethical and disciplinary violations are kept duly separate.*

24. Article 107(v) of the revised draft law provides that ethical procedures are suspended (only) when the Commission for Code of Ethics concludes that actions of a judge contain the elements of one of the disciplinary violations codified in Article 108 of the Law. This follows the recommendation formulated in the December 2022 Opinion.¹⁶ The Venice Commission is satisfied that this will ensure clear separation between ethical and disciplinary violations. The

⁹ December 2022 Opinion, § 50.

¹⁰ December 2022 Opinion, § 52.

¹¹ Pursuant to Article 92 of the revised draft law, performance appraisal of judges shall be carried out by checking, *inter alia*: 1) Five cases adjudicated by a final and enforceable decision, selected randomly; 2) Five cases adjudicated by a final and enforceable decision, selected by the judge him/herself; 3) Five cases adjudicated by a final and enforceable decision in which the decisions were repealed, selected randomly.

¹² December 2022 Opinion, § 51.

¹³ As explained in the Ministry of Justice’s written observations of 8 March 2023.

¹⁴ In its written observations of 8 March 2023, the Ministry of Justice reiterated that it does not agree with the proposal to evaluate judges of the Supreme Court, having regard to the fact that the purpose of the judge evaluation system is, among other things, the promotion to a higher court and that, due to the small number of judges in Montenegro, it would be very complex to devise a system for evaluation these judges.

¹⁵ December 2022 Opinion, § 50.

¹⁶ December 2022 Opinion, § 58.

Commission had criticised in the past the general penalisation of breaches of codes of ethics as too general and vague and insisted that much more precise provisions are needed where disciplinary liability is to be imposed. The revised article empowers the Commission for Code of Ethics to refer cases to the only when a disciplinary offence, as defined in the law, is identified.

25. However, the Commission for the Code of Ethics retains its power to “submit a proposal” to determine disciplinary liability of the judge, seeing as Article 110 of the draft law has not been amended. To fully implement this key recommendation, the Commission for the Code of Ethics should limit itself to “informing” the Judicial Council¹⁷ (see also paragraph 31 below).

26. The Venice Commission finds that this recommendation has therefore only partially been followed.

- *Disciplinary sanctions should be reconsidered in order to strike a fairer balance between the seriousness of the breach and the sanction imposed.*

27. Article 108 § 6 of the revised draft law no longer contains sub-paragraph 1(a), which provided that a most serious disciplinary offence (which would cause the direct dismissal of the judge) could be applied if “*without justifiable reason, continuously over the period of two years, in one year, on average has more than 40% of abolished decisions in relation to the number of cases returned by the higher court, which ratio includes at least 30 abolished decisions on an annual level*”. In the December 2022 Opinion, the Venice Commission had warned against this disciplinary offence, specifying that the number of overturned decisions could be taken in consideration as far as the professional evaluation was concerned, but should not constitute a disciplinary offence, especially the most severe.¹⁸ Accordingly, this is a positive development.

28. The other limb of its recommendation referred to the fact that, pursuant to Article 108 § 6 (3) of the draft law, unsatisfactory performance of a judge could form the basis for a “most severe disciplinary offence”.¹⁹ The Venice Commission found that the professional evaluation of a judge and disciplinary liability should be kept clearly distinct and that, to serve as a ground for dismissal, “bad evaluation” should convincingly demonstrate the incapability of the judge to perform judicial functions. It therefore invited the drafters to revise this provision. However, no relevant amendment has been made.²⁰

29. Lastly, the Venice Commission notes that the revised draft law still provides for the dismissal from the Judicial Council of judicial members who have received a disciplinary sanction, regardless of its seriousness.²¹ Insofar as disciplinary sanctions can be imposed also for relatively minor matters (e.g. coming late to a judges’ session), the Venice Commission consider its recommendation still valid.²²

30. Accordingly, the Venice Commission considers that this key recommendation has only partially been followed.

- *the Law should provide that the members of the Judicial Council alone are responsible for initiating disciplinary proceedings.*

¹⁷ December 2022 Opinion, § 58.

¹⁸ December 2022 Opinion, § 62.

¹⁹ December 2022 Opinion, § 63.

²⁰ In the written observations submitted on 8 March 2023, the Ministry of Justice disagreed with such a recommendation and argued that such a provision had been approved by the European Commission at the time of adoption of the law currently in force.

²¹ See, *a contrario*, December 2022 Opinion, § 36.

²² In the written observations submitted on 8 March 2023, the Ministry of Justice reiterated that since the Judicial Council has the authority to elect and dismiss judges and determine disciplinary liability, dismissal from the Judicial Council should be automatic regardless of the severity of the disciplinary offence.

31. In its December 2022 Opinion, the Venice Commission recommended restricting the pool of potential initiators of disciplinary proceedings to the members of the Judicial Council alone (rather than also to the court president, the president of the immediately higher court, the president of the Supreme Court or the Commission for the Code of Ethics, as provided for by the amendments). This recommendation had a double rationale: upholding the principle of internal and external judicial independence and (with particular regard to the power of the Commission for the Code of Ethics) draw a clear demarcation line between the disciplinary and the ethical fields (see also paragraph 25 above). The Venice Commission suggested that the subjects other than the members of the Judicial Council could limit themselves to “inform” the Judicial Council rather than having the power to file a motion for establishment of the disciplinary liability.²³

32. The Venice Commission notes that no amendments have been made to Article 110 of the draft law.²⁴ It therefore concludes that this recommendation has not been followed.

C. Other recommendations

33. Article 16 of the revised draft law on the requirements for lay members of the Judicial Council replaced the vague formulation “experience in legal affairs/legal matters” with a more precise wording (i.e. lawyer, notary, professor of legal sciences or other legal jobs) borrowed from the one contained in Article 33 on the conditions for appointment as President of the Supreme Court. This follows the relevant recommendation of the Venice Commission.²⁵

34. Article 85 of the revised draft law contains a provision securing the same future salary for the judge as in his/her actual position in case of transfer to another court without his/her consent. This follows Venice Commission recommendations and it is therefore welcomed.²⁶ The Venice Commission however reiterates that an explicit provision that a judge should not be transferred against his/her will due to court restructuring to a lower court than the court where he/she has his/her actual judgeship would constitute an important guarantee.²⁷

35. In its December 2022 Opinion, the Venice Commission had recommended introducing a provision providing for the possibility of recusal of the members of the Commission for the Code of Ethics.²⁸ Article 107(b) § 10 of the revised draft law provides that cases and methods for recusal of the members of the Commission for the Code of Ethics shall be regulated by the Rules of Procedure of the Commission for the Code of Ethics. This is a welcomed development, as it will ensure that recusal of members of the Commission be possible, as it is already the case for the recusal of a member of the appraisal commission (Article 88) or of the subjects involved in a disciplinary procedure (Article 120).

36. Article 114 § 3 of the revised draft law clarifies that the disciplinary panel of the Judicial Council is appointed by the latter for a two-year term. This amendment excludes the possibility for an *ad hoc* disciplinary panel, composed on a case-by-case basis, and follows Venice Commission’s recommendations.²⁹

²³ December 2022 Opinion, § 68.

²⁴ In the written observations submitted on 8 March 2023, the Ministry of Justice reiterated that the Commission for the Code of Ethics and the other subjects identified in Article 110 of the draft law should retain their power to initiate disciplinary proceedings, to avoid that a judge escapes both ethical and disciplinary liability and in view of the limited track record and a lack of commitment from the Judicial Council to ensuring accountability hitherto.

²⁵ December 2022 Opinion, § 29.

²⁶ December 2022 Opinion, § 45.

²⁷ December 2022 Opinion, § 45.

²⁸ December 2022 Opinion, § 59.

²⁹ December 2022 Opinion, § 67.

37. Article 120 of the revised draft law provides that a member of the Judicial Council subject to disciplinary proceedings shall not be a member of the disciplinary panel, as previously recommended.³⁰ However, the draft law still lacks a provision explicitly providing that a member of the Judicial Council who initiates the inquiry should not decide on the case.³¹ In its written observations of 8 March 2023, the Ministry of Justice argues that the draft law allows for the recusal of a member of the disciplinary panel. The Venice Commission recalls that it is aware of that but that it, nevertheless, explicitly recommended providing for such an incompatibility in the Law.³²

III. Conclusions

38. The Venice Commission praises the constructive approach of the Ministry of Justice of Montenegro, which submitted a request for a follow-up opinion right after the December 2022 Opinion and prior to the finalisation of the amendments. It encourages the Montenegrin authorities to pursue the work undertaken hitherto.

39. The Venice Commission welcomes the new amendments and confirms its previous overall positive assessment of the draft law. However, some elements still need to be tackled to ensure full compliance with Venice Commission's recommendations.

40. In detail, several recommendations of the December 2022 Opinion have been followed, notably the reduction of the cooling-off period for members of the Judicial Council (see paragraph 13 above, with the *caveat* about simple membership of a political party in paragraphs 14-16 above), the partial revision of evaluation criteria and disciplinary sanctions (see paragraphs 19, 20 and 27 above) and other technical improvements (see paragraphs 33-37 above).

41. Other recommendations have been followed only partially. In particular, evaluation criteria and disciplinary sanctions would benefit from further revision and reflection in order to fully comply with the findings made in the December 2022 Opinion (see paragraphs 21, 28 and 29 above). Moreover, some further effort is needed to ensure clear separation between disciplinary and ethical respective fields of competence (see paragraph 25 above).

42. Other recommendations have not been followed and remain valid. In particular, the Venice Commission reiterates its recommendations:

- To provide that work-related rights of the judges, such as the right to an adequate salary or their retirement age, be regulated by the law;
- To reduce the applicability of exceptional anti-deadlock mechanisms, such as the election of the acting president of the Supreme Court (or of any court, as provided for in new Article 106a) to equally exceptional events, in order to avoid transforming the exception into the rule;
- To envisage appropriate and tailored evaluation for the judges of the Supreme Court; and
- To provide that the members of the Judicial Council alone are responsible for initiating disciplinary proceedings.

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

³⁰ December 2022 Opinion, § 70.

³¹ December 2022 Opinion, § 70.

³² December 2022 Opinion, § 70.