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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

(VENICE COMMISSION)

REPUBLIC OF MOLDOVA

JOINT FOLLOW-UP OPINION OF THE VENICE COMMISSION AND THE DIRECTORATE GENERAL OF HUMAN RIGHTS AND RULE OF LAW (DGI) OF THE COUNCIL OF EUROPE

TO THE JOINT OPINION ON THE DRAFT LAW ON THE EXTERNAL ASSESSMENT OF JUDGES AND PROSECUTORS (CDL-AD(2023)005)

Adopted by the Venice Commission at its 135th Plenary Session (Venice, 9-10 June 2023)

On the basis of comments by

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I. Introduction

1. By letter of 15 May 2023, Ms Veronica Mihailov-Moraru, the Minister of Justice of the Republic of Moldova requested a follow-up opinion to the 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 (CDL-AD(2023)005) adopted by the Venice Commission at its 134th Plenary Session (Venice, 10-11 March 2023) ("the March 2023 Opinion"). By the letter of 5 June 2023, the Minister of Justice provided a revised draft Law on the external assessment of judges and prosecutors ("the revised draft Law") (CDL-REF(2023)023).

2. Mr Alexander Baramidze, Mr Philip Dimitrov, Mr António Gaspar acted as rapporteurs on behalf of the Venice Commission. Mr Đuro Sessa acted as a rapporteur on behalf of the Directorate General of Human Rights and Rule of Law (DGI) of the Council of Europe ("the Directorate").

3. Given the fact that this is a follow-up opinion, no additional country visit or online consultations with the stakeholders were organised, except for the exchange of views with the Ministry of Justice. Broad online consultations with all the relevant stakeholders had taken place during the preparation of the March 2023 Opinion.

4. This 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.

5. This opinion was drafted on the basis of comments by the rapporteurs. Following an exchange of views with the Minister of Justice of the Republic of Moldova, it was adopted by the Venice Commission at its 135th Plenary Session (Venice, 9-10 June 2023).

II. Background

6. In reply to the recommendations contained in the March 2023 Opinion (CDL-AD(2023)005), the authorities amended the draft Law and submitted the revised text for assessment by the Venice Commission.

7. The current opinion therefore aims at assessing the revised draft Law in the light of its previous recommendations, thus reviewing to which extent the authorities have taken into account the previous recommendations of the Commission and the Directorate. The current opinion further intends to help the authorities identify priorities in that regard, and provide additional guidance and assistance on the implementation of the recommendations.

8. There are eight key recommendations listed in para. 110 of the March 2023 Opinion which read as follows:

I. the draft Law should ensure that the parliamentary opposition gets their nominee elected as a member of the ACs;

II. candidates with a judicial and/or prosecutorial background should be eligible;

III. the voting in the panels of the AC should require a "special majority" (support from the "national" and "international" members);

IV. 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) (IV.1);*
- *the ACs cannot examine alleged offences which would normally be time-barred (IV.2);*

- *the ACs cannot apply any rules which did not exist at the time when the offences were committed (IV.3);*
- *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 (IV.4);*
- *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 (IV.5);*
- *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 (IV.6);*

V. 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);

VI. 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;

VII. 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;

VIII. 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.

9. The other recommendations can be found in the text of the March 2023 Opinion.

III. Analysis

A. Status and functionality of Assessment Commissions ("the ACs")

10. It is positive that the draft Law now clarifies the concept of the accountability of the ACs and their independent status. It is welcome that the draft Law specifies that the immunity enjoyed by the AC members is functional. Accordingly, the relevant recommendations[1] are followed.

11. As **key recommendation (I)**, the Commission and the Directorate advised that the draft Law should ensure that the parliamentary opposition gets their nominee elected as a member of the AC[2]. Art 6 (3) of the revised draft Law now includes a new provision: *"The candidate can only be rejected if he or she does not meet the legal requirements set out in art. 7 para (1). The rejection decision can be appealed, as per the Administrative Code"*. It is welcome that the possibility of removing a candidate from the nomination is strictly limited and that access to judicial remedy in case of dispute is clearly provided. This key recommendation may therefore be considered as followed.

12. **As key recommendation (II),** the Commission and the Directorate suggested that candidates with a judicial and/or prosecutorial background should be eligible for the AC membership[3]. It appears that the revised draft Law would not prevent such candidates from becoming members of the AC. Notably, Article 7 (1) (c)) imposes a general requirement of having ten years' experience the area of law, without giving any further specifics as to the legal profession. It follows that it does not preclude the participation of former judges/prosecutors. The limitation, however, would concern only those who were judges/prosecutors in the last three

[1] See Venice Commission, CDL-AD(2023)005, Joint Opinion 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) ("the March 2023 Opinion"), paras. 31 – 32.
[2] See Venice Commission, the March 2023 Opinion, para. 39.
[3] See Venice Commission, the March 2023 Opinion, para. 37.

years (Article 7 (1) (f)). As explained by the authorities, that limitation was necessary to avoid potential conflicts of interest and the related risks of the lack of impartiality of the AC. The Venice Commission and the Directorate accept this explanation and note that, given the relatively small legal community in the country, the proposed limitations could be justified. This recommendation may therefore be considered as followed.

13. It is welcome that the recommendation for a random distribution of cases to AC panels[4] has been accepted in Art. 13 (2) of the draft Law.

14. The March 2023 Opinion concludes that the voting in the AC panels should require a "special majority" (support from the "national" and "international" members)[5]. **This was key recommendation (III)**. The revised draft Law now provides that the assessment report is approved by the unanimous vote of the Assessment Panel (consisting of three members) and the case is referred to the Superior Council of Magistracy ("the SCM") or Superior Council of Prosecutors ("the SCP"); if the Assessment Panel fails to reach unanimity, the assessment report will be examined by the Assessment Commission (consisting of six members) which may approve the report by a majority vote (four members) (Art. 17 (2) and (3)).

15. While these amendments improve the draft Law and generally address the previous recommendation, the role of the international component is not sufficiently secured. It would be appropriate to stipulate in the draft Law that if the Assessment Commission decides by majority, such majority must include at least two members on the international quota[6].

B. Grounds for vetting

16. The Commission and the Directorate recommended ensuring that the AC's findings should not 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)[7]. **This was key recommendation (IV.1)**. This recommendation has been addressed. Art.11 (2) (a) of the draft Law refers to arbitrary acts as the grounds for vetting if such arbitrariness has been established by the ECtHR. The draft Law would even further ensure the foreseeability of the vetting exercise if it defined the essential elements of the arbitrariness. In addition, Art.11 (7) now specifies that the AC must "take into account" the findings of the final judgments. The authorities pointed to the inaccuracy of the English text and explained that the Romanian version of that paragraph clearly provided that the findings of the final judgments would be binding for the vetting bodies. This is an important clarification that goes in line with the principle of *res judicata* reflected in Article 120 of the Constitution of the Republic of Moldova, postulating that it is mandatory to respect the court decisions. In this context, the March 2023 Opinion highlighted the importance of limiting the competence of the vetting bodies in reviewing the issues of "conflict of interest" and disciplinary compliance because such competence may undermine the legal certainty[8]. It can be assumed that, with these amendments and clarifications, such concerns are sufficiently addressed in the revised draft Law.

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[4] See Venice Commission, the March 2023 Opinion, para. 40.
[5] See Venice Commission, the March 2023 Opinion, para. 42.
[6] See in this regard Venice Commission, CDL-AD(2021)018, 1029/2021 - Ukraine - Urgent joint opinion of the Venice Commission and the Directorate General of Human Rights and the Rule of Law (DGI) of the Council of Europe on the draft law on amendments to certain legislative acts concerning the procedure for electing (appointing) members of the High Council of Justice (HCJ) and the activities of disciplinary inspectors of the HCJ (Draft law no. 5068), paras. 48 and 75 (9); see also, CDL(2023)027, draft Follow-up Opinion to the opinion "on the draft Law "On amendments to certain legislative acts of Ukraine on improving the procedure for the selection of candidates for the position of judge of the Constitutional Court of Ukraine on a competitive basis" (draft law no. 9322 of 25 may 2023), submitted for the 135th Plenary Session (9-10 June 2023), para. 23.
[7] See Venice Commission, the March 2023 Opinion, para.54, para. 62.
[8] See Venice Commission, the March 2023 Opinion, paras.58-62.

17. As **key recommendation (IV.4)** the Commission and the Directorate recommended that 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[9]. In that context, the Commission and the Directorate also suggested abandoning the standard of "serious doubts" when applying certain grounds for vetting[10]. When addressing these recommendations, the authorities removed the reference to "serious doubt" in Art. 11 (2) and provided that the vetting bodies should "determine" the relevant facts. New paragraph 2 of Article 18 has been added stating that the SCM/SCP should take into account "the existence of evidence" with regard to committing the imputed actions. The authorities explained that with these amendments, the case would be assessed based on the available evidence which would imply a higher standard of proof than "serious doubts". The Commission and the Directorate welcome these amendments to improve the draft Law in this part. Whether these provisions are sufficient and appropriate will depend on the practice of their application. With this caveat, it may be considered that this key recommendation has been met.

18. The Commission and the Directorate recommended that the ACs should not be empowered to examine the alleged offences which would normally be time-barred. **This was key recommendation (IV.2),** which the authorities addressed in Article 11. Notably, the time limits have been added in Art 11 (2) (a) and (b); Art 11 (3) (a) provides a shorter time limit (12 instead of 15 years). A further improvement could be to introduce a general safeguard on the statute of limitation applicable to the vetting proceedings. In any event, these changes are welcome, and this key recommendation may be considered to have been met in substance.

19. Another **key recommendation (IV.3)** was that the vetting bodies should not be entitled to apply rules which did not exist at the time when offences were committed[11]. In reply, new paragraph 6 of Article 11 has been introduced, stating that when applying the vetting criteria, the vetting bodies will take into account the legal norms that were in force at the time of the respective actions. Accordingly, this recommendation has been followed.

20. It is welcome that the 15-year period for examining the alleged unexplained wealth in Art 11 (3) (a) has been reduced, as proposed by the Commission and the Directorate[12]. The new period is 12 years does not seem to impose an excessive burden on the judges/prosecutors in light of the clarification that they have been required to declare their income and assets since 2002.

21. The Commission and the Directorate advised, as **key recommendation (IV.5),** that 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[13]. The authorities submitted that the judge/prosecutor concerned would receive a notice in advance (Art. 16 (1) and (2)) which would allow him/her to prepare properly to the proceedings. It is positive that there is a provision about the advance notice, and it would be even better if the specific procedural safeguards and defences were expressly mentioned in the draft Law.

22. As **key recommendation (IV.6)**, the Commission and the Directorate observed that 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[14]. In response to this recommendation, the authorities increased the

[9] See Venice Commission, the March 2023 Opinion, para. 67
[10] See Venice Commission, the March 2023 Opinion, para.69
[11] See Venice Commission, the March 2023 Opinion, para.71.
[12] See Venice Commission, the March 2023 Opinion, paras. 73 and 74.
[13] See Venice Commission, the March 2023 Opinion, para.74.
[14] See Venice Commission, the March 2023 Opinion, para.78.

threshold for tax irregularities, as the criterion for vetting, from three to five average salaries (Art. 11 (3) (b)). It appears that this recommendation is followed only in part. In view of the exceptional measures provided under the drat Law, the authorities are invited to revert to this issue and carefully examine, with the assistance of all the relevant stakeholders, whether or not these thresholds should be higher. Moreover, the authorities are invited to pay special attention to the rules on donations, especially between parents and children in a society with strong intra-family relationships.

C. Assessment procedure

23. The Commission and the Directorate advised that 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)[15]. This is **key recommendation (V)** that has been addressed, to a certain extent, in Art. 14 (3). This rule establishes the categories of information that the AC cannot gather. In this context, it is also relevant that the revised draft Law in Art 16 (5) (f) specifies the right of the judge/prosecutor concerned not to testify against himself/herself. These are positive changes.

24. The Commission and the Directorate proposed specifying the probative value of the information obtained by the AC[16]. In response to this recommendation, new paragraph 9 of Art. 14 has been added which provides that the information that has no relevance for the assessment or constitutes a state secret and that has not been declassified, or anonymous information not confirmed by other sources, cannot be used in the evaluation process. This amendment is welcome.

25. The Commission and the Directorate recommended that 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[17]; the judges and prosecutors concerned should be able to request a closed hearing and such requests should, as a rule, be granted[18]. **This was key recommendation (VI)**. Art. 17 (6) has been changed to address the recommendation. It provides now that the report is made public after the decision of the SCM/SCP. It would be even better if that rule specified that the report is made public after judicial review if it is requested. As to the hearings, Art. 16 (3) has been amended to ensure more privacy for the judge/prosecutor concerned: the rule now states that the video recording of the hearing shall not be placed online unless there is the consent of the judge/prosecutor concerned. However, the revised rule still does not provide for the general approach that the requests for private hearings should be granted unless there are cogent reasons not to allow such requests. This recommendation is therefore followed only in part.

26. As a **key recommendation (VII)**, the Commission and the Directorate advised that the Supreme Court of Justice should be able to make 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 AC[19]. The reason behind this recommendation is that the option of remittal may not always be an effective one; it may result in numerous repetitive re-hearings and complicate the whole proceedings. The draft Law could therefore provide conditions under which the reviewing court would be allowed to finally determine the case. In response to this recommendation, the powers of the SCJ have been amended in Art 19 (5): the SCJ will be able to remit the case to the AC once only, and to the SCM/SCP once only. One of the possible interpretations of this rule is that on the next appeal the SCJ will either dismiss or allow the appeal and finally determine the case.

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[15] See Venice Commission, the March 2023 Opinion, paras. 85 and 87.
[16] See Venice Commission, the March 2023 Opinion, para.86.
[17] See Venice Commission, the March 2023 Opinion, para.94.
[18] See Venice Commission, the March 2023 Opinion, para.93.
[19] See Venice Commission, the March 2023 Opinion, para.100.

If this interpretation of Art 19 (5) is maintained, then the proposed amendments are positive and it may be considered that this recommendation has also been followed.

D. Proportionality of sanctions

27. The Commission and the Directorate recommended that plurality of sanctions should be offered involving proportionality assessment in making individual decisions[20]. It is regrettable that Art. 18 (6) currently offers no scale or alternative sanctions as this would ensure the proportionality assessment depending on the gravity of the negative report. Among other options, the drafters could consider introducing scale in applying the professional bans to address this recommendation. This recommendation has therefore not been followed.

28. The Commission and the Directorate made **key recommendation (VIII)** that a lengthy ban from most legal professions as an additional consequence of the negative vetting is disproportionate and should be reconsidered[21]. It is welcome that Art. 18 (6) has been amended, reducing the list of legal professions and limiting the bans to the judicial or prosecutorial positions; this recommendation has therefore been met.

IV. Conclusion

29. Following the Joint Opinion of the Venice Commission and the Directorate on the draft Law on the external assessment of judges and prosecutors (CDL-AD(2023)005) adopted by the Venice Commission at its 134th Plenary Session (Venice, 10-11 March 2023) ("the March 2023 Opinion"), the domestic authorities amended the draft Law in the light of the received recommendations and requested the follow-up opinion on the revised draft Law.

30. The Venice Commission and the Directorate wish to express their satisfaction with the constructive attitude of the Moldovan authorities. It is commendable that the majority of the recommendations of the March 2023 Opinion have been followed. This concerns the recommendations regarding the status and functioning of the Assessment Commissions, the grounds for vetting of judges and prosecutors, the improvement of the assessment proceedings as well as reducing the negative consequences of the vetting measures.

31. At the same time, some of the recommendations have been followed in part and the measures taken to address such recommendations are still insufficient. Notably, the role of the members of the Assessment Commissions on the international quota has not been sufficiently secured and should be increased. Likewise, the procedural safeguards for the judge/prosecutor concerned should be provided in greater detail, including the right to a private hearing, "inaccessible evidence" or *bona fide* ownership defences. More tools ensuring the principle of proportionality, including the plurality of sanctions, could be envisaged in the draft Law. The Commission and the Directorate acknowledge that the drafters made significant steps to heed those recommendations, and recommend exploring the ways of their further implementation.

32. The Venice Commission and the DGI remain at the disposal of the authorities of the Republic of Moldova for further assistance in this matter.

[20] See Venice Commission, the March 2023 Opinion, para. 101.
[21] See Venice Commission, the March 2023 Opinion, para.102.