



Strasbourg, 9 October 2023

CDL-AD(2023)035

Or. Engl.

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)023)**

**Adopted by the Venice Commission
at its 136th Plenary Session
(Venice, 6-7 October 2023)**

On the basis of comments by

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I. Introduction

1. By letter of 6 September 2023, Ms Veronica Mihailov-Moraru, Minister of Justice of the Republic of Moldova, requested an opinion of the Venice Commission on the Law “On external assessment of judges and prosecutors and the amendment of some normative acts” adopted by the Parliament on 17 August 2023 ([CDL-REF\(2023\)046](#), “the Law”). In her letter, the minister asked the Venice Commission to assess the Law in the light of recommendations provided in the Opinion of 13 June 2023 ([CDL-AD\(2023\)023](#), “the June 2023 Opinion”).¹

2. Mr Alexander Baramidze and Mr Philip Dimitrov 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.

3. The Venice Commission and DGI prepared the present Opinion as a follow-up to the June 2023 Opinion. The follow-up format of the present Opinion allows the Commission and DGI to review to which extent the authorities have taken into account the previous recommendations, help them identify priorities in that regard and provide additional guidance and assistance on the implementation of the recommendations.

4. Given the fact that this is a follow-up opinion, no additional country visit or online consultations with the stakeholders were organised. The rapporteurs were kept informed of the progress of the preparation of the Law.

5. This Opinion was prepared in reliance on the English translation of the Law. The translation may not accurately reflect the original version on all points. The Parliament of the Republic of Moldova provided their written comments on the draft Opinion.

6. This Opinion was drafted on the basis of comments by the rapporteurs. Following an exchange of views with Mr Eduard Serbenco, State Secretary, Ministry of Justice, it was adopted by the Venice Commission at its 136th Plenary Session (Venice, 6-7 October 2023).

II. Background

7. In its June 2023 Opinion, the Venice Commission and DGI pointed out the following outstanding recommendations regarding the Law which was at its drafting stage:

- (A) at least two international members of the Assessment Commissions should be in the deciding majority;²
- (B) procedural safeguards and defences should be mentioned in the law in more detail;³
- (C) the authorities should carefully examine the financial thresholds proposed in the draft Law;⁴
- (D) the right for a private hearing should be better secured;⁵
- (E) a plurality of sanctions should be available.⁶

¹ See Venice Commission, [CDL-AD\(2023\)023](#), Joint Follow-up opinion on the draft Law on the external assessment of judges and prosecutors (“the June 2023 Opinion”).

² See para. 15 of the June 2023 Opinion.

³ See para. 21 of the June 2023 Opinion.

⁴ See para. 22 of the June 2023 Opinion.

⁵ See para. 25 of the June 2023 Opinion.

⁶ See para. 27 of the June 2023 Opinion.

III. Analysis

A. Effective participation of international members in the Assessment Commission

8. According to the new wording of Article 17, para. 3 of the Law, the Assessment Commission, which consists of six members,⁷ approves the vetting report by a majority of members' votes, of which two are the members delegated by international development partners. This wording is welcome, and it follows the relevant recommendation of the Venice Commission and DGI.

B. Procedural safeguards and defences

9. The Venice Commission and DGI recommended addressing procedural safeguards and defences in more detail. In reply to this recommendation, the final text of the Law provides more fair trial guarantees. Above all, the final text of the Law retains the requirement that assessment report must contain the relevant facts and reasons for the conclusions on the assessment of a judge/prosecutor (Article 17, para. 1 of the Law). This provision is important for many reasons, and one of them is enhancing the right of appeal. In that regard, it is also welcome that the final text of Article 17, para. 1 now includes a requirement that the vetting body justify the rejection of specific evidence presented by the judge/prosecutor concerned.

10. The Law secures the right of a judge/prosecutor to have access to the material that has been gathered by the vetting body (Article 16, paras. 1 and 5 (c)). In addition, Article 14, para. 6 of the Law has been supplemented with a new provision stating that if the judge/prosecutor concerned cannot get access to the information which is relevant for his or her assessment, s/he may notify the vetting body about that difficulty; after the receipt of the notification, the vetting body will assess, in each individual case, the merits of the grounds stated in the notification. The new rule aims to protect the judge/prosecutor, if they cannot submit a document to the vetting body because it is missing, destroyed, confidential, or is otherwise "inaccessible".

11. Article 16, para. 5 (d) has been amended. The previous version of this subparagraph allowed the judge/prosecutor subject to vetting to present additional information during the hearing only if s/he "was unable to do so earlier". The latter condition has been removed in the final text, absolving a judge/prosecutor from the duty to substantiate why s/he could not present this evidence earlier.

12. Article 16, para. 5 has been supplemented with a new subparagraph (g) providing for the right of the judge/prosecutor participating in the hearing to request the recusal of a member of the Assessment Commission.

13. These modifications are welcome. The relevant recommendation has been followed.

14. It is noted that Article 16, para. 6 of the Law retains the duty of the judge/prosecutor participating in the hearing to comply with the order in the hearing and to answer the questions of the Assessment Panel. This provision should be interpreted narrowly in the light of legitimate purpose of securing order during the hearings. It should not give the grounds for shifting the burden of proof on the judge/prosecutor concerned or infringing their right to remain passive in defence.

C. Financial thresholds

15. The Venice Commission and DGI recommended that the authorities examine once again the levels of financial thresholds applied in the assessment of financial integrity to ensure that these thresholds are adequate (neither too low, nor too high) and fair. It appears that the relevant

⁷ See Article 6, para. 1 of the Law.

provisions have been reconsidered. In the adopted Article 11, para. 3, the references to the average wages have been limited to the year of 2023. This limitation addresses the advice of the Venice Commission and DGI. Having regard to these changes and the fact that the domestic authorities are better placed to evaluate the significance of financial discrepancies and determine the relevant financial thresholds, the Venice Commission and DGI accept that their recommendation has been followed.

D. Securing the right to a private hearing

16. In reply to this recommendation, Article 16, para. 3 has been amended. It now provides broad grounds for non-public hearings; the judge/prosecutor concerned is entitled to request a non-public hearing, and the vetting body may refuse such a request only on reasonable grounds. The new wording of this provision addresses the recommendation.

E. Plurality of sanctions

17. The Venice Commission and DGI recommended providing the possibility of adapting the gravity of sanction to the individual facts. Given the nature of the vetting proceedings, this requirement should not be too stringent. Article 18, para. 6 has been modified. It now allows for the possibility to order the professional ban not automatically for seven years, as it was in the draft version of that Article, but for a period between five and seven years. This approach introduces a degree of differentiation on a case-by-case basis. The recommendation has been followed.

F. Other recommendations

18. According to the recommendation of the Venice Commission and DGI, the Law should state expressly that the findings of the vetting bodies must not contradict final judgments, except in some narrowly defined situations.⁸ The Venice Commission and DGI note that Article 11, para. 2 (a) has been amended. It now provides that the requirement of ethical integrity is failed if *“in the last 5 years, [he/she] has seriously violated the rules of ethics and professional conduct of judges or, as the case may be, prosecutors, as well as if [he/she] has behaved arbitrarily or has issued arbitrary acts, in the last 10 years, contrary to mandatory rules of law, and the European Court of Human Rights had determined, prior to the adoption of the act, that a similar decision was contrary to the European Convention on Human Rights”*.

19. The new wording of Article 11, para. 2 (a) of the Law is acceptable as it remains within the limits of narrowly defined situations.

20. Also, the provision articulating the binding nature of the court decisions has been modified. Article 11, para. 6 of the Law now provides that *“findings of the irrevocable court decisions are taken into account, obligatorily, by the Assessment Commission, with the exception of decisions which the Assessment Commission considers arbitrary or manifestly unreasonable”*. The same paragraph further provides that *“the Assessment Commission can only rule on violations of the rules of ethics and professional conduct, without ruling on the legality of the respective decisions”*.

21. In view of Article 11, para. 2 (a) of the Law which grants the Assessment Commission competence to examine the arbitrary conduct of a judge or prosecutor, it appears that the logical consequence of this competence would be to envisage certain modalities regarding the court decisions resulting from such arbitrary conduct. However, any such assessment of arbitrariness should focus not on the court decisions themselves, as the current wording of the exception in Article 11, para. 6 may suggest, but rather on the possible violations of the rules of ethics and

⁸ See the June 2023 Opinion, para. 16.

professional conduct by the judges who have delivered those decisions. Article 11, para. 6 of the Law might reflect this distinction more clearly.

22. In the draft Law examined in the June 2023 Opinion, there was a provision ensuring the principle of non-retroactivity of law. According to that draft provision, the vetting bodies had to “*take into account the legal provisions which had been in force at the time of committing the respective actions*”. As this provision is no longer present in the adopted Law, it is appropriate to repeat the earlier recommendation to this effect.⁹ In this context, the Parliament of the Republic of Moldova assured the Venice Commission and DGI that they were ready to make the necessary amendment to the Law.

23. Lastly, in the June 2023 Opinion, the Venice Commission and DGI considered that the recommendation on sufficient judicial review of decisions taken by vetting bodies had been followed, provided that a broad interpretation of Article 19, para. 5 of the Law would be maintained, and the Supreme Court would be able to exercise its jurisdiction to finally determine legal disputes arising under the Law.¹⁰ The Venice Commission and DGI would like to repeat this reservation.

IV. Conclusion

24. By letter of 6 September 2023, the Minister of Justice of the Republic of Moldova, requested a follow-up opinion regarding the Law “On external assessment of judges and prosecutors and the amendment of some normative acts” that was adopted by the Parliament on 17 August 2023.

25. In their previous Opinion of June 2023 ([CDL-AD\(2023\)023](#)), the Venice Commission and DGI pointed out several recommendations which had to be taken into account when adopting the abovementioned Law. It is commendable that the following outstanding recommendations have been addressed: (a) effective participation of international members in the Assessment Commission has been secured; (b) procedural safeguards and defences to the judges and prosecutors concerned have been provided in more detail; (c) the authorities gave further consideration and amended the financial thresholds applicable in the criteria of financial integrity; (d) the right to a private hearing in the vetting proceedings has been better secured; (e) plurality of sanctions has been offered.

26. The Commission and DGI recommend that the provision ensuring the principle of non-retroactivity of law, which was present at the drafting stage of the Law, be reintroduced in the final text of the Law.

27. The Venice Commission and DGI express their satisfaction with the constructive attitude of the Moldovan authorities and remain at their disposal for any further assistance in this matter.

⁹ See the June 2023 Opinion, para. 19.

¹⁰ See the June 2023 Opinion, para. 26.