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UPDATED COMPILATION OF VENICE COMMISSION OPINIONS AND REPORTS RELATING TO QUALIFIED MAJORITIES AND ANTI-DEADLOCK MECHANISMS

IN RELATION TO THE ELECTION BY PARLIAMENT OF CONSTITUTIONAL AND SUPREME COURT JUDGES/PRESIDENTS, PROSECUTORS GENERAL, MEMBERS OF JUDICIAL AND PROSECUTORIAL COUNCILS, INDEPENDENT/NON-POLITICAL BODIES AND OMBUDSPERSONS

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I. INTRODUCTION

The present document is a compilation of extracts taken from selected relevant opinions and reports adopted by the Venice Commission on issues concerning qualified majorities and anti-deadlock mechanisms in relation to the election by parliament of judges/presidents of Constitutional or Supreme Courts, members of Judicial Councils, Prosecutors General, members of Prosecutorial Councils, members of independent, non-political bodies as well as Ombudspersons. Its aim is to give an overview of the doctrine of the Venice Commission in this field.

This compilation is intended to serve as a source of reference primarily for drafters of constitutions and of legislation relating to this subject-matter, researchers as well as the Venice Commission's members, who are requested to prepare opinions and reports on such legislative texts. When referring to elements contained in this compilation, the original Venice Commission opinion or report should be referenced, and not the compilation as such. In order to shorten the text, references and footnotes are omitted in the text of citations, and only the essential part of the relevant paragraph is reproduced.

This compilation is structured in a thematic manner in order to facilitate access to the topics dealt with by the Venice Commission over the years in this area. It should not, however, prevent members of the Venice Commission from introducing new points of view or diverge from earlier ones, if there is a good reason for doing so. The compilation should merely be considered as a frame of reference.

The Venice Commission’s opinions and reports quoted in this compilation seek to present general standards for all member and observer states of the Venice Commission. Recommendations made in the opinions and reports referenced herein will therefore be of a more general application, although the specificity of national/local situations is an important factor and should be taken into account adequately.

The brief extracts from both opinions and reports quoted herein must be read and assessed in the context of the original text adopted by the Venice Commission from which it has been taken. Each citation therefore has a reference that sets out its exact position in the opinion or report/study (paragraph number, page number for older opinions), which allows the reader to find it in the corresponding opinion or report.

The compilation is not a static document and will regularly be updated with extracts of recently adopted opinions and reports/studies by the Venice Commission. The Secretariat is grateful for suggestions on how to improve this draft compilation (venice@coe.int).

II. GENERAL PRINCIPLES

6.-7. The Venice Commission has repeatedly stressed the importance of providing for anti-deadlock mechanisms in order to ensure the functioning of the state institutions. Qualified majorities aim to ensure that a broad agreement is found in parliament, as they require the majority to seek a compromise with the minority. For this reason, qualified majorities are normally required in the most sensitive areas, notably in the elections of office-holders in state institutions. However, there is a risk that the requirement to reach a qualified majority may lead to a stalemate, which, if not addressed adequately and in time, may lead to a paralysis of the relevant institutions. An anti-deadlock mechanism aims to avoid such stalemate. However, the primary function of the anti-deadlock mechanism is precisely that of making the original procedure work, by pushing both the majority and the minority to find a compromise in order to avoid the anti-deadlock mechanism. Indeed, qualified majorities strengthen the position of the parliamentary minority, while anti-deadlock mechanisms correct the balance back. Obviously, such mechanisms should not act as a disincentive to reaching agreement on the basis of a qualified majority in the first instance. It may assist the process of encouraging agreement if the anti-deadlock mechanism is one which is unattractive both to the majority and the minority.

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

> CDL-AD(2013)028, Opinion on the draft amendments to three constitutional provisions relating to the Constitutional Court, the Supreme State Prosecutor and the Judicial Council of Montenegro; §§ 6-8; see also CDL-AD(2022)054 Opinion on the draft law "on amending some legislative acts of Ukraine regarding improving procedure for selecting candidate judges of the Constitutional Court of Ukraine on a competitive basis", § 67

11.-13. Institutions that cannot function do not fulfil their constitutional purpose and give bad name to democracy. So it is crucial to have anti-deadlock mechanisms. Thus, the Commission stressed the importance of providing for qualified majorities, but warned about the risk of stalemates and recommended to devise effective and solid anti-deadlock mechanisms, giving some examples of possible options. The Commission has previously underlined that qualified majorities strengthen the position of the parliamentary minority, by giving them the negative power to block decisions: "Parliamentary rules on qualified majority […] constitute an instrument that may effectively and legitimately protect opposition and minority interests, both when it comes to procedural participation, powers of supervision and certain particularly important decisions. At the same time, this is an instrument that restricts the power of the democratically elected majority, and which should therefore be used with care, and tailored specifically to the national constitutional and political context."

14. The Commission also found that "the more formal rights and competences the opposition (minority) is given within a constitutional and parliamentary system, the greater the responsibility of the same opposition not to misuse these powers, but to conduct their opposition in a way loyal to the basic system and the idea of legitimate and efficient democratic majority rule. This, however, is not an issue that can be legally regulated, or perceived as any form of formal 'responsibility', but is rather to be seen as a political and moral obligation."

15. Anti-deadlock mechanisms have to discourage the opposition from behaving irresponsibly but should not create opportunities for the majority by impossible proposals to lead to the necessity for the application of such mechanisms. This is why they should be limited in time

and, while avoiding permanent blockages they should not aim at avoiding any blockage at all, which can be an expression of the need for political change.

17. It is true that boycott of parliament by the opposition may frustrate the very intention to provide protection to the opposition itself and lead to the paralysis or dysfunction of the state institutions. The Venice Commission has previously expressed the view that "In principle, the opposition should express its views in the parliament and a boycott is justified only exceptionally." The Commission nevertheless considered that for processes such as the amendment of the Constitution which require the broadest political support, "even if the ruling coalition has the necessary number of votes in the Parliament to pass the amendments, it does not absolve the Government from conducting a genuine all-inclusive debate".

18. One thing is ruling the country in government – which is the job of the majority elected by the people – another thing is changing the fundamental principles of the Constitution which requires the broadest support of a wide number of social and political actors from the majority and the opposition alike. The same can be said in relation to all safeguards procedures and institutions, included the Judicial Council. In a Constitutional state, democracy cannot be reduced to the rule of the majority, but encompasses as well guarantee measures for the opposition.

19. The Venice Commission is of the view that difficulty of reaching a qualified majority and the ensuing risk of paralysis of dysfunction of an institution – in particular "safeguard institutions" - should not lead to abandon the requirement of a qualified majority but rather to devise tailor-made, effective deadlock-breaking mechanisms. A balance needs to be found between the superior state interest of the preservation of the functioning of the institutions and the democratic exigency that these institutions should be balanced and should not be merely dominated by the ruling majority. In other words, the supreme state interest lies in the preservation of the institutions of the democratic state.

> CDL-AD(2018)015, Montenegro - Opinion on the draft law on amendments to the Lax on the Judicial Council and Judges of Montenegro, §§ 11-15, 16-19

67. For the Commission, substantive judicial review of constitutional amendments should only be exercised in those countries where it already follows from clear and established doctrine, and even there with care, allowing a margin of appreciation for the constitutional legislator. As long as the special requirements for constitutional amendment, such as qualified majority of the elected representatives in parliament, as well as other procedural requirements are followed and respected these are and should be a sufficient guarantee against abuse. Amendments adopted following such procedures will in general enjoy a very high degree of democratic legitimacy, which a court should be extremely reluctant to overrule.

> CDL-AD(2020)016, Armenia - Opinion on three legal questions in the context of draft constitutional amendments concerning the mandate of the judges of the Constitutional Court, § 67

34. […] Only the constituent power, often Parliament with a qualified majority or other reinforced procedure, can establish a new framework that will be binding also on the Constitutional Court, through the constitutionally-established procedures for enacting constitutional amendments.

> CDL-AD(2020)039, Ukraine - Urgent opinion on the Reform of the Constitutional Court, § 34

47. The Venice Commission wishes to emphasize once more the importance of the principle of loyal cooperation among state institutions in resolving the present political and constitutional

crisis […]. The crisis cannot be resolved through constitutionally problematic amendments to an ordinary law. Not all the details in the procedure of forming the government can be legally regulated, but much must be left to constitutional conventions. However, these can only develop through observance of the principle of loyal cooperation. If additional legal provisions are needed, they should not be adopted by a simple parliamentary majority, but by a qualified majority, and through an inclusive process that gives room for a public debate. Yet, again, reaching a qualified majority requires adherence to the principle of loyal cooperation. If on the one hand, these provisions of the [Law on the President] may be considered a pragmatic attempt to complement the lacunae in the Constitution in a manner that would facilitate the formation of a government, on the other hand, the procedural boundaries for constitutional revision must be respected.

53. While the Commission acknowledges that the Constitution would benefit from additional regulation on the formation of government, in particular to prevent deadlocks, and understands that the law under consideration represents a pragmatic attempt to solve the institutional impasse, it reiterates that any complementary provisions which affect the system of checks and balances foreseen by the Constitution should be added by means of constitutional revision, following the procedure described in Art. 156 which requires a qualified majority.

> CDL-AD(2022)053, Montenegro – Urgent Opinion on the law on amendments to the Law on the President, §§ 47, 53

III. CONSTITUTIONAL COURT JUDGES

1. Election by Qualified Majority with Anti-Deadlock Mechanism

21. Under the present Constitution, the judges of the Constitutional Court are elected and dismissed by parliament on the proposal of the President of the Republic, without any qualified majority, for a renewable term. In this respect, the Venice Commission had previously stated that this manner of election seriously undermined the independence of the constitutional court in that it did not secure a balanced composition of the court, and was not in line with international standards. The Venice Commission had therefore recommended that, if constitutional judges were to be elected by parliament, their election should be made by a two-third majority with a mechanism against deadlocks, and that the mandate of the constitutional judges should be non-renewable (CDL-AD(2007)047, §§ 122,123; CDL-AD(2012)024, § 35). The Commission had also stated that while the "parliament-only" model provides for high democratic legitimacy, appointment of the constitutional judges by different state institutions has the advantage of shielding the appointment of a part of the members from political actors (CDL-AD(2012)009, § 8).

> CDL-AD(2013)028, Opinion on the draft amendments to three constitutional provisions relating to the Constitutional Court, the Supreme State Prosecutor and the Judicial Council of Montenegro, § 21

116. The Venice Commission indeed regularly recommends establishing mechanisms which help to ensure a balanced composition of constitutional courts. In its 1997 Report, the Commission explained what it means by pluralism: "Constitutional justice must, by its composition, guarantee independence with regard to different interest groups and contribute towards the establishment of a body of jurisprudence which is mindful of this pluralism." Here, the emphasis is on the independence of the judges and their respect for pluralism, not their "representation" of party interests."

140.-141. […] [T]he Venice Commission nonetheless recommends that the Constitution be amended in the long run to introduce a qualified majority for the election of the Constitutional Tribunal judges by the Sejm, combined with an effective anti-deadlock mechanism. A valid

alternative would be to introduce a system by which a third of the judges of the Constitutional Tribunal are each appointed / elected by three State powers – the President of Poland, Parliament and the Judiciary. Of course, even in such a system, it would be important for the parliamentary component to be elected by a qualified majority.

> CDL-AD(2016)001, Opinion on amendments to the Act of 25 June 2015 on the Constitutional Tribunal of Poland, §§ 116, 140-141; see also CDL-AD(2017)013, Opinion on the draft revised Constitution of Georgia, § 74

96. With regard to those members of the Constitutional Court who are appointed by the National Assembly, it is regrettable that this opportunity for constitutional revision has not been seized to introduce: (a) the need for a qualified majority vote in the National Assembly, and (b) an adequate anti-deadlock mechanism. The Venice Commission has previously indicated that a qualified majority should be required in all rounds of voting. Similarly, the Venice Commission has repeatedly stressed the importance of providing for anti-deadlock mechanisms in order to ensure the functioning of state institutions. From a comparative perspective, the Venice Commission recommends the introduction of a qualified majority for the election of the candidates for the position of Constitutional Court judges together with appropriate anti-deadlock mechanisms.

> CDL-AD(2021)032, Serbia - Opinion on the draft constitutional amendments on the judiciary and draft Constitutional Law for the implementation of the constitutional amendments, § 96; see also CDL-AD(2021)007, Joint Opinion on the Draft Constitution of the Kyrgyz Republic, § 97

49. The revised text has failed to take into account the Commission's 'regret' that this opportunity for constitutional revision has not been seized to introduce: (a) the need for a qualified majority vote in the National Assembly for the election of constitutional court judges, and (b) an adequate anti-deadlock mechanism (see para. 96). The Venice Commission wishes to reiterate the importance of such changes.

> CDL-AD(2021)048, Serbia - Urgent opinion on the revised draft constitutional amendments on the judiciary, § 49

73. The amended Constitution changes the method of election of judges of the Constitutional Court. Previously, six judges were appointed by the President of the Republic and six were elected by the Council of the Republic .Pursuant to the revised Article 116 § 3, all the judges of the Constitutional Court will be elected and dismissed by the ABPA [All-Belarusian People's Assembly] based on the proposal of the President of the Republic preliminarily agreed with the Presidium of the ABPA; the same procedure applies to the election and dismissal of the President and the Vice-President of the Constitutional Court (Article 893 (9)). In the light of the misgivings about the composition and the legitimacy of the ABPA and the leading role which is likely to be played by the President in this institution (see above), it is doubtful that such a manner of electing the judges of the Constitutional Court and its leadership will ensure their independence.[…] Even in countries where the judges of the Constitutional Court are elected by Parliament, the Venice Commission recommended that their election should be made by a qualified majority with a mechanism against deadlocks. The Commission has also stated that while the "parliament-only" model provides for high democratic legitimacy, appointment of the constitutional judges by different state institutions has the advantage of shielding the appointment of a part of the members from political actors.

> CDL-AD(2022)035, Belarus - Final Opinion on the Constitutional Reform, § 73

45. […] The Venice Commission welcomes that a three-fifths majority [for the election of a judge to the Constitutional Tribunal] has now been included both in the Act on the

Constitutional Tribunal and the draft constitutional amendments, to ensure cross-party support in the Sejm, with the aim of de-politicising the election of constitutional judges, also in light of its earlier recommendation to Poland for the Constitution "to be amended in the long run to introduce a qualified majority for the election of Constitutional Tribunal judges by the Sejm, combined with an effective anti-deadlock mechanism".

> CDL-AD(2024)035, Poland - Opinion on the draft constitutional amendments concerning the Constitutional Tribunal and two draft laws on the Constitutional Tribunal, § 45

44. The Venice Commission underlines that the composition of the Constitutional Court and the procedure for the appointment of its judges are among the most crucial and sensitive aspects of constitutional adjudication, directly impacting the preservation of a credible system of constitutional rule of law. It is therefore imperative to ensure both the independence of constitutional judges and the involvement of different state organs and political forces in the appointment process, so that judges are perceived as being independent and not merely the instruments of one or another political faction.

45. In this context, the Venice Commission emphasises that the election of constitutional judges by a qualified majority serves as an important safeguard for the depoliticisation of the appointment process, as it necessitates a substantial degree of consensus and ensures that the opposition plays a meaningful role in the selection procedure. While it is acknowledged that the requirement of a qualified majority may give rise to the risk of a stalemate between the majority and the opposition, this risk can be effectively mitigated through the introduction of specific anti-deadlock mechanisms, which are essential to guarantee the continued functioning and renewal of the Constitutional Court.

> CDL-AD(2025)022, Mongolia - Opinion on the draft law on the Constitutional Court and on the draft law on the Procedure of the Constitutional Court of Mongolia, §§ 44- 45

2. Specific Anti-Deadlock Mechanisms

23. As an anti-deadlock mechanism, a second-round of voting is proposed with two options: either a) by the majority of all MPs or b) by a three-fifths majority. The Venice Commission finds that the second option is clearly preferable, as the first option would provide no incentive for the majority to reach a compromise with the minority and would therefore leave room for the election of five members all belonging to the ruling parties.

> CDL-AD(2013)028 Opinion on the draft amendments to three constitutional provisions relating to the Constitutional Court, the Supreme State Prosecutor and the Judicial Council of Montenegro, § 23

12.-13. Article 6 puts into effect the new constitutional rules dealing with the selection and election of constitutional judges. The President of Montenegro and the "responsible working body of the Parliament" (together referred to as "the proposers") issue a public call for the selection of candidates. […] The same person may be elected President or judge of the Constitutional Court only once. In the first voting in the Parliament, a Constitutional Court judge is elected by a two-thirds majority vote, and in the second voting by a three-fifths majority vote of all deputies. […]

14. This mechanism guarantees good transparency and enhances public trust in the Constitutional Court but it could be further improved. The objective of the 2013 constitutional amendments was to ensure a balanced composition of the Constitutional Court. Therefore it is recommended that the Law on the Constitutional Court explicitly regulate the composition of the

"competent working body of the Parliament" such that the representatives of all political parties are represented therein.

> CDL-AD(2014)033, Opinion on the Draft Law on the Constitutional Court of Montenegro, §§ 12-14

21. Admittedly, it can be difficult to reach a qualified two-thirds majority and this may on occasion lead to deadlock, particularly where there is no culture of sufficient democratic compromise among the political forces. In order to avoid such situations, "anti-deadlock mechanisms", should be introduced, such as, for example, a lowering of the required majority to three-fifths following the third unsuccessful vote, and/or the nomination of candidates by other neutral bodies after several unsuccessful votes.

> CDL-AD(2015)024, Opinion on the Draft Institutional Law on the Constitutional Court of Tunisia, § 21

162. However, it has to be ensured that the governmental majority cannot alone elect the judges. Various means are available in order to ensure this. The most frequent is a high qualified majority, e.g. two thirds. The idea is that both majority and opposition will propose highly qualified candidates which are acceptable for the other side. Admittedly, this can lead to a trade-off, both sides accepting also less qualified candidates in exchange for acceptance of their own less qualified candidates. In some countries, the political culture is not developed enough to allow for compromise between majority and opposition and it is very hard to reach a two thirds majority. Anti-blocking measures can be introduced, like nominations of new candidates by neutral bodies, following several unsuccessful votes in Parliament.

> CDL-AD(2015)037 First Opinion on the Draft Amendments to the Constitution (Chapters 1 to 7 and 10) of the Republic of Armenia, § 162

9.-12. The competence to select the candidates is given to the Justice Appointments Council (JAC). Election by the Assembly is by a qualified majority of three-fifths, and an anti-deadlock mechanism is provided at the constitutional level: if the Assembly fails to choose between the three candidates ranked highest by the JAC within 30 days of the submission of the list, the first ranked candidate is deemed appointed. An anti-deadlock mechanism for appointments by the President and by the High Court was introduced by the amendments to the Law on the Constitutional Court in October 2016: Article 7.b/4 provides in respect of the appointment by the President that: "4. The President shall, within 30 days of receiving the list from the Justice Appointments Council, appoint the member of the Constitutional Court from the candidates ranked on the three first positions of the list. The appointment decree shall be announced, associated with the reasons of selection of the candidate. Where the President does not appoint a judge within 30 days of submission of the list by the Justice Appointments Council, the candidate ranked first shall be considered as appointed. Article 7/ç provides in respect of election by the High Court: "For each vacancy, it shall be voted for each of the candidates ranked in the top three places of the list. The candidate obtaining 3/5 of the votes of the present judges shall be declared elected. Where no necessary majority is attained, the candidate ranked first by the Justice Appointments Council shall be considered elected.

95. The Venice Commission is now called to give its own interpretation of this procedural incident, which resulted in two judges being arguably appointed – one by the President, the other by default on the President's quota – to the same vacancy. This interpretation has to be seen within the context of the constitutional mechanism of appointment of constitutional justices as a whole. The Commission will thus provide its interpretation of the relevant constitutional provisions in force so that the current situation of deadlock may be overcome, but it will also formulate some recommendations on how to avoid similar incidents in the long term. In the Commission's view, as already explained before, in theory the model of appointment of

Constitutional Court judges set up by the Constitution and the Law on the Constitutional Court entails the application of the sequence only at the moment of the allocation of the vacancies, upon the opening of each round of appointments. In a given 'round' it depends which vacancy happens to come up first when deciding whether it should be allocated to the President, the Assembly or the High Court. The Chairman of the Constitutional Court allocates the vacancies in the chronological order and in the order of the sequence. Once the vacancies have been allocated, the sequence does not require activation until the next round, that is until the year of expiry of the next three mandates. The ensuing appointing procedures may be carried out autonomously by each appointing authority. There should be three procedures every three years, one per appointing authority. There is no clear regulation on the application of the sequencing rule in case there were, on account of early termination of mandates, more than three procedures and two rounds of appointments would overlap. But if there is no interconnection among these procedures, in principle the JAC could send as many lists as there exist to each appointing authority, on different dates, and both the President and the Assembly (and the High Court, for that matter) could proceed to as many appointments as necessary.

96. However, the above model is based on the assumption that each procedure is autonomous: each appointing authority opens the vacancy and receives its own candidatures, which the JAC subsequently selects and ranks; as a result, each vacancy list should be autonomous from the others, and count at least three candidates (different from the three candidates of the lists of the other appointing authority). In the case in point, instead, as a result of a shortage of candidates (for all the reasons identified above), the lists for the President's appointments and those for the Assembly's appointments were made up largely of the same candidates. This amounted de facto to a pool of 6 candidates for four positions. In these conditions, as well as in view of the fact that overlapping procedures have not been explicitly regulated, it does not seem unreasonable for the President to deem to have to respect the order of the sequence also for the actual choice of the candidate: if the sequence exists, it must have a bearing on the order of appointment from a single list. Furthermore, in such a situation the appointment by one authority has a direct bearing on the appointments of the other authority as it changes the composition of the list of candidates at the disposal of the respective appointing body. Furthermore, had the President chosen two candidates, the Assembly would have disposed of a list of less than the minimum three candidates required by the Constitution. Reservations on account of this perspective do not seem unjustified. The President's conduct in this respect does not therefore appear to justify his impeachment. Finally, the candidate chosen by the President had become one of the first three on the JAC list, following the election by the Assembly of candidate number 3 on the list.

> CDL-AD(2020)010, Albania - Opinion on the appointment of judges to the Constitutional Court, §§ 9-12, 95-96

58. Considering the mandate of the AGE [Advisory Group of Experts], the general rule for decision should be "by consensus". The draft law "On the Constitutional Court" provides that decisions are taken by four votes. It does not envisage a solution in cases where the AGE cannot reach a decision. If the AGE fails to identify at least three candidates to submit to the appointing bodies, the whole procedure is to be repeated (Article 107- 4 of the draft law "On the Constitutional Court").

59. In the Commission's view, given the importance of filling the [Constitutional Court of Ukraine] vacancies in a timely manner, the draft amendments should contain an anti-deadlock mechanism. The Venice Commission is aware of the difficulty of designing appropriate and effective anti-deadlock mechanisms for which there is no single model. Each state has to devise its own formula. However, it is essential to provide for one.

CDL-AD(2022)054, Opinion on the draft law "on amending some legislative acts of Ukraine regarding improving procedure for selecting candidate judges of the Constitutional Court of Ukraine on a competitive basis", §§ 58-59

29. […] In various Opinions, the Venice Commission has recommended providing for an anti-deadlock mechanism, by lowering the qualified majority requirements for the election or appointment of judges to the Constitutional Court in the event of a blockage occurring at first attempt(s), sharing the power to appoint/elect constitutional court judges between different state powers, devolving powers of either the initial selection or the appointment/election of constitutional judges from the original constitutional body to other bodies in case of continued inaction or failure to nominate or appoint constitutional judges or, if an assembly fails to choose within a certain period of time between candidates on a list, the first ranked could be considered as appointed. Such anti-deadlock mechanisms would ideally have to be provided for in the Constitution, as they deviate from the main rules on appointments.

37. […] Regarding potential anti-deadlock mechanisms that could be applied (question 8), the Venice Commission considers that various anti-deadlock mechanisms would be a useful complement to the current system but would require constitutional amendments. At the level of the entities, it could be envisaged in the Federation of Bosnia and Herzegovina to introduce an anti-deadlock mechanism to nominate candidates directly to the House of Representatives, in case of continued inaction of the Commission for Selection and Appointments over a specified period of time, but in order for the selection process itself to be taken away from the House of Representatives constitutional amendments would again be needed. […]

CDL-AD(2024)002, Bosnia and Herzegovina – Opinion on Certain Questions Relating to the Functioning of the Constitutional Court of Bosnia and Herzegovina, §§ 29, 37

46. Increasing the majority required for the election of constitutional judges also increases the importance of an anti-deadlock mechanism. However, the Act on the Constitutional Tribunal only foresees in Article 19, para. 5, that if the Sejm fails to elect a judge of the Tribunal, the Speaker of the Sejm will reinitiate the procedure, providing additionally in Article 16 of the Act that, upon expiration of their term of office, judges shall serve until a successor is elected. While the Venice Commission welcomes the inclusion of the latter provision (as is common practice in other Venice Commission member states and in line with what it has recommended in respect of the tenure of judges of other constitutional courts), it does not consider that a reinitiation of proceedings is an effective anti-deadlock mechanism. […] [T]he Venice Commission recommends to include an effective anti-deadlock mechanism already now in the Act on the Constitutional Tribunal, which would need to be stronger than reinitiation of the proceedings. As it has said before, "It may assist the process of encouraging agreement if the anti-deadlock mechanism is one which is unattractive both to the majority and the minority".

47. With this in mind and while an appropriate threshold of votes to obtain is essentially a political rather than a legal question, it could for example be envisaged that constitutional judges are elected by a two-thirds majority of votes in the Sejm as a rule, whereby a three-fifths majority is used as an anti-deadlock mechanism. Recalling what the Venice Commission has said in respect of Poland in 2016, a valid alternative would certainly be to introduce a system by which a third of the constitutional judges are each elected by three State powers, the President of Poland, the Sejm and the judiciary. This would go some way in detaching the election of constitutional judges from the political majority of the day. However, even in such a system, it would be important for the parliamentary component to be elected by a qualified majority.

53. When it comes to the anti-deadlock mechanism, unlike the Act on the Constitutional Tribunal which does not contain an anti-deadlock mechanism (but – as mentioned above – only provides that the Speaker of the Sejm reinitiates the procedure for selecting judges to the Constitutional Tribunal and that judges remain in office upon expiration of their term until a successor has been elected), Article 3 of the Bill [on amendments to the Constitution] envisages an election by an absolute majority if after two months no judges have been elected by a three-fifths majority. Similarly to the qualified majority, an anti-deadlock mechanism needs to be included in the Constitution itself, and not just in the Bill regulating the transitional provisions to the constitutional amendments, as it would need to be applicable to all elections of constitutional judges. Furthermore, in the view of the Venice Commission, the proposed anti-deadlock mechanism is not conducive to finding a consensus on candidates and will not prevent the ruling majority of the day from delaying proceedings in order to have its preferred candidates elected by an absolute majority. […]

> CDL-AD(2024)035, Poland - Opinion on the draft constitutional amendments concerning the Constitutional Tribunal and two draft laws on the Constitutional Tribunal, §§ 46-47, 53

3. Interim Continuation of Tenure

20. Pursuant to Article 10.3 of the draft Law, the Constitutional Court shall notify the proposer that nominated a judge for election six months before the expiry of the term of office of the judge or before the fulfilment of the conditions for receiving an old-age pension. In accordance with Article 154 of the Constitution, the draft Law regulates the reasons and procedure for the termination of judicial office (Articles 10-12), however, it does not regulate what the consequences are if a nominated candidate is not elected even in a repeated vote. In order to avoid a situation in which judicial positions are vacant due to the fact that new judges have not been elected, the law should explicitly provide that upon the expiry of the term for which a Constitutional Court judge has been elected, s/he continues to perform his/her office until the new judge takes up office.

> CDL-AD(2014)033 Opinion on the Draft Law on the Constitutional Court of Montenegro, § 20

22. Allowing constitutional judges to remain in office until the appointment of a successor (questions 5 and 6), as an exception to constitutional provisions on the term of office of constitutional judges, is a relatively common practice in Europe, permitting constitutional courts to continue to function when appointments of new judges are blocked. At the level of the ECtHR, Protocol No. 15 abolished the age limit of 70 years for judges of the ECtHR, but Article 23 ECHR continues to provide that “The judges shall hold office until replaced. They shall however continue to deal with such cases as they already have under consideration”. Similarly, the Constitutions of Albania (Article 125), Slovenia (Article 165) and Slovakia (Article 134) explicitly provide that constitutional judges continue exercising their mandates until their successor takes oath. The Constitution of Croatia (Article 126) contains a similar provision but limits the prolongation to six months. The Constitutions of Lithuania, Portugal and Spain all stipulate that the mandate of constitutional judges is nine years but are silent regarding prolongation of these mandates. It is instead the respective Laws on the Constitutional Court that stipulate that constitutional judges continue exercising their mandates until their successor takes oath. Similarly, the Constitution of Montenegro provides that the mandate of a judge is 12 years, with the Law on the Constitutional Court (Article 15) stipulating that a constitutional judge can continue exercising his/her mandate if there is no immediate successor for a maximum period of a year, upon decision by Parliament. In Georgia, the Constitution (Article 60) and the Organic Law on the Constitutional Court (Article 18) provide that the term of office of a judge of the Constitutional Court is ten years. However, by decision of the Constitutional Court an exception is made, if – upon expiry of a constitutional judge’s term in office – the

relevant body does not appoint a new member within the time limits established by law and the Court would no longer be quorate. In such a case, the acting judge's term of office is to be extended. The Constitutions of Germany and Latvia do not regulate the length of the mandate of constitutional judges, with this being instead stipulated in their respective laws, which also provide that constitutional judges continue exercising their mandates until their successor takes oath. By contrast, the Constitutions of Italy (Article 135 of the Constitution) and Romania (Article 142 of the Constitution) clearly state that the mandate of constitutional judges cannot be prolonged, with the legal systems of Austria (Article 147 of the Constitution), Bulgaria (Article 147 of the Constitution), the Czech Republic (Article 7, Act on the Constitutional Court), Hungary (Section 15, Act on the Constitutional Court) and Serbia (Article 13, Law on the Constitutional Court) not or no longer allowing for a prolongation of the mandate of constitutional court judges.

23. The examples of Lithuania, Montenegro, Portugal and Spain (as well as, in a different manner, Georgia) demonstrate that constitutional provisions which stipulate the length of the mandate of constitutional judges but are silent on mandate prolongation do not necessarily preclude the adoption of infra-constitutional provisions allowing for judicial mandate prolongation, if the Constitution itself is silent about such a possibility. Indeed, in several previous Opinions, the Venice Commission has explicitly recommended regulating by law (and not through constitutional amendments) that a judge remains in office until his or her successor takes office.

> CDL-AD(2024)002, Bosnia and Herzegovina – Opinion on Certain Questions Relating to the Functioning of the Constitutional Court of Bosnia and Herzegovina, §§ 22-23

53. According to Article 7(1) of the draft law on the Constitutional Court, the mandate of a Justice shall commence on the day of appointment and shall terminate upon the expiration of the term and upon the appointment of the next Justice by the State Great Khural. A similar mechanism is currently applied in many countries - such as Bulgaria, Germany, Latvia, Lithuania, Portugal, and Spain - with the aim of preventing a stalemate in the appointment process from paralysing the functioning of the Court, and is welcome. However, the draft [Law on the Constitutional Court] should explicitly provide that, in the event that the State Great Khural fails to appoint a successor, for example, in case of possible political deadlock, the outgoing Justice may continue to exercise his or her functions beyond the six-year term.

> CDL-AD(2025)022, Mongolia - Opinion on the draft law on the Constitutional Court and on the draft law on the Procedure of the Constitutional Court of Mongolia, § 53

21. The Venice Commission observes at the outset that this proposal addresses its long-standing recommendation expressed in previous opinions about the advisability to adopt a provision allowing a judge of the Constitutional Court to continue to perform his or her office until the new judge takes up office, in order to avoid a situation in which judicial positions are vacant due to the fact that new judges have not been nominated. Accordingly, the Venice Commission welcomes this new provision. The Venice Commission also observes that most Council of Europe member states with a similar rule provide for automatic continuation of a judge's term until a successor is elected, without any conditions. This approach provides a clear rule with less potential for conflict over interpretation.

22.-23. However, the Venice Commission notes that this proposal does not provide for an automatic continuation of the term of office of a judge, but makes it conditional "if it is necessary for decision-making by majority vote of all judges of the Constitutional Court". […] The Venice Commission reiterates that allowing constitutional judges to remain in office until the appointment of a successor, as an exception to constitutional provisions on the term of office of constitutional judges, is a relatively common practice in Europe, permitting constitutional courts to continue to function when appointments of new judges are blocked. Accordingly, the

provision allowing a judge to remain in office until a successor is appointed should be connected to the necessity of the proper functioning of the Constitutional Court without interruption, and not to other special circumstances. Moreover, setting a time limit for such an anti-blocking mechanism could still lead to a blockage of the Constitutional Court, should new judges fail to be elected within the prescribed period. The period of six month might have some instructive effect, but it does not help avoiding blockages.

25. […] [T]he Venice Commission understands the legitimate concerns about the risk of deliberate prolonged inactivity by the appointing authority to keep a judge in office. While the provision allowing a judge to remain in office until a successor is appointed is an important safeguard for ensuring the continuing functioning of a Constitutional Court, it should not be seen as a long-term solution to the potential instability of a Constitutional Court. In that connection, the Venice Commission underlines the importance of the mutual respect and cooperation between all the constitutional bodies in a democratic society. Compliance with the rule of law cannot be restricted to the mere implementation of the explicit and formal provisions of the Constitution and of the law. It also implies constitutional behaviour and practices, which facilitate the compliance with the formal rules by all the constitutional bodies and the mutual respect between them.

26.-28. The Venice Commission further observes that although this proposed condition aims to achieve the continuing functioning of the Constitutional Court by ensuring decision-making by majority vote of all judges of the Constitutional Court, it lacks clear regulation of some important elements. Firstly, regarding the "necessary number of judges", the Venice Commission considers that if the intention of the authorities is to refer to the minimum number required for decision-making by majority vote, – namely, four judges, which is as also the number needed for a quorum, – this should be worded in clear and unequivocal terms. Secondly, the Venice Commission observes that this condition creates a difference in treatment between judges based on the number of vacant positions at the Constitutional Court at the time of the termination of their office. […]

30. Therefore, the Venice Commission considers that the draft law should clearly regulate the above-mentioned aspects of the condition "if it is necessary for decision-making by majority vote of all judges of the Constitutional Court", in order to avoid any possible conflict of interpretation on this notion and its application.

> CDL-AD(2025)051, Montenegro –Follow-Up Opinion to the Opinion on Some Questions Relating to the Procedure of Early Termination of the Mandate of Constitutional Court Judges Due to Age Limits, §§ 21-23, 25-28, 30

IV. SUPREME COURT JUDGES/PRESIDENT

41.-42. Article 36a of the Law provides that: "After the expiration of the term of office for which he was elected and the termination of the office of the president of the Supreme Court, as well as in the case of resignation or dismissal, the Judicial Council appoints the acting president of the Supreme Court." The Venice Commission finds that it is to be welcomed that the Law provide for some transitional mechanism which allows for the Supreme Court to be normally administered pending the election of a new President. […]

43. The provision seems reasonable insofar as it limits the mandate of the acting president to six months. However, the Venice Commission notes 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 event, such the death, the resignation or the dismissal of the President of the Supreme Court. As it is currently drafted, Article 36a gives the impression that even after the simple expiration of the term of office of the President, an acting President should be elected. […] In the written observations submitted on 9 December 2022, the Ministry

of Justice submitted that the proposed solution should be kept, also having regard to the recent difficulties in electing the President of the Supreme Court. Nevertheless, the Venice Commission considers that the activation of such an anti-deadlock measure should be limited to situations of real emergency. The Law should not transform the exception into a rule. […] .

> CDL-AD(2022)050 Montenegro - Opinion on the draft amendments to the Law on the Judicial Council and Judges, §§ 41-43

51. […] In their written comments, the authorities informed the Commission that at the 14 May session of the Committee on Constitution, Legislation, Justice and Regulations of the Chamber of Deputies, Article 78 was amended to include an anti-deadlock mechanism: Supreme Court justices shall be appointed by the President of the Republic, selecting them from a ranked shortlist proposed by the Judicial Appointments Council, and with the agreement of the Senate following a public hearing. The Senate shall adopt the respective agreements by a two-thirds majority of its sitting members, in a session specially convened for that purpose. If thirty days pass from the date the President of the Republic communicates the nomination to the Senate without a vote on the agreement, it shall be understood that the President's nomination has been approved.

53. […] The Commission welcomes the reported amendments to article 78 defining an anti-deadlock mechanism in case the required qualified majority in the Senate cannot be reached in respect of candidates that are proposed. These modifications to Article 78 ensure broad consensus for Supreme Court appointments while preventing institutional paralysis that could harm the functioning of the judicial system.

> CDL-AD(2025)021, Chile - Opinion on the draft Constitutional amendments in respect of the judiciary, §§ 51, 53

V. MEMBERS OF JUDICIAL COUNCILS

1. Election of the Judicial Component

21. Article 11d of the Draft Act describes what happens if a 3/5th majority cannot be reached [in the election of the 15 judicial members of the National Council of the Judiciary]. In this case a second round of election is held, in which candidates are elected "by a roll call" (§ 1). Under Article § 2, each MP has one vote, and may vote only for one candidate. Under § 3, "candidates who have received the highest number of votes shall be deemed to have been elected", and each MP may vote "for" or "against" a candidate, or abstain. In the case of a tie, a candidate who received fewer votes "against" will be elected.

22. The system of voting in the second round is not entirely clear. The requirement of a qualified majority in the first round of elections encourages the ruling majority and the opposition to find a compromise and select more neutral figures to serve on the NCJ. This mechanism, however, would not be effective if in the second round candidates supported only by the ruling party may be elected by a simple majority of votes.

> CDL-AD(2017)031 Poland - Opinion on the Draft Act amending the Act on the National Council of the Judiciary; on the Draft Act amending the Act on the Supreme Court, proposed by the President of Poland, and on the Act on the Organisation of Ordinary Courts, §§ 21-22

53. Option 2 provides for election [of judicial members to the General Council of the Judiciary] by qualified majority of three fifths (as for the lay members), but fails to provide for an adequate anti-deadlock mechanism in the event of a parliamentary stalemate. In light of the recent failure of Parliament to appoint the members of the Council in the last six years, a suitable solution

would be to introduce a rule providing that if the appointments of judicial members are not made within a short but reasonable timeframe, the shortlisted candidates are automatically appointed in accordance with the ranking determined by the results of the vote by the judicial community.

> CDL-AD(2025)038, Spain – Opinion on the manner of election of the judicial members of the General Council of the Judiciary, § 53

2. Election of the Non-Judicial Component

31. As regards the non-judicial component of the judicial council, it fulfils an important balancing function. A large majority of the judges may give rise to concerns about the risk of corporatist management or self-government. The inclusion of lay members is therefore broadly justified by the principle that the supervision of the quality and impartiality of justice extends beyond the interests of the judiciary itself. By exercising such oversight, the judicial council can enhance public confidence in the administration of justice. In many systems, legislative bodies elect part of the membership of judicial councils from qualified legal professionals, ensuring a measure of pluralism and democratic legitimacy in the council's composition. In general, members, including both judicial and lay members, must be selected in a transparent procedure that supports the independent and effective functioning of the judicial council and the judiciary and avoids any perception of political influence, self-interest or cronyism. As a safeguard against politicisation, the Venice Commission has recommended the introduction of a requirement for a qualified majority in the election of the parliamentary component of the judicial council.

> CDL-AD(2025)038, Spain – Opinion on the manner of election of the judicial members of the General Council of the Judiciary, § 31; CDL-AD(2024)041, Türkiye - Opinion on the composition of the Council of Judges and Prosecutors and the procedure for the election of its members, § 29

a) Election by Qualified Majority with Anti-Deadlock Mechanism

26.-27. In their exchanges with the Moldovan authorities and in their March 2020 Joint Opinion, the Commission and the Directorate underlined that it was important, in particular in the Moldovan context, to avoid the possibility or risk that lay members would be a coherent and like-minded group in line with the wishes of the government of the day. They therefore strongly recommended introducing in the Constitution the requirement of a qualified majority (coupled with an anti-deadlock mechanism) or a proportional method of election of the lay members. […] The current draft article 122(3) provides that "[t]he candidates to the position of members of the Superior Council of Magistracy who are not judges, are elected through a competition, based on a transparent procedure, based on merits and appointed by Parliament with the votes of three fifths of elected deputies.

28. In their 2020 Urgent Joint Opinion and March 2020 Joint Opinion, the Commission and the Directorate expressed their general preference for a two-thirds qualified majority. At the same time, they consider that the authorities have some margin of appreciation in this respect and are best placed to find the right balance in order to prevent that a high majority (as two-thirds), despite the existence of an anti-deadlock mechanism, blocks the election procedure of lay members because of the failure to achieve such majority in the Moldovan context. An anti-deadlock mechanism is of course the ultimate guarantee against such blocking. However, as the election by a qualified majority ensures that the majority has not the decisive authority on the election of lay members, it is essential that the proportion of the qualified majority presents some reasonable prospect of success, in the concrete political circumstances, in achieving such majority in the election procedure. The provision for a qualified majority of three fifths is therefore acceptable.

CDL-AD(2020)007, Republic of Moldova, Joint Opinion on the revised draft provisions on amending and supplementing the Constitution, with respect to the Superior Council of Magistracy, §§ 26-28

18. The Venice Commission also notes with concern that for a long time, the lay members of the [High Council of Justice, HCoJ] have not been appointed. Under Article 64 para. 2 of the Constitution, the 3/5th majority is required for the Parliament to elect the HCoJ lay members; however, this majority has never been reached and no anti-deadlock mechanism has been envisaged even though the Venice Commission has earlier emphasised to the Georgian authorities on the importance of such a mechanism in the appointment of lay members to the HCoJ. The current practice is not compatible with the idea of pluralism in the composition of the HCoJ embedded in constitutional norm. This problem may be addressed either by way of a constitutional amendment providing for an anti-deadlock mechanism or by reaching a political compromise over the candidates.

CDL-AD(2023)006, Georgia - Follow-up Opinion to four previous opinion concerning the Organic Law on Common Courts, § 18

37. The Venice Commission recalls that "[w]hen lay members are elected by parliaments this should be done with the broadest consensus, in principle by a qualified majority vote which involved the opposition, following an open and transparent competition. Effective anti-deadlock mechanisms should be provided." To avoid the risk of politicisation in the election of lay members by the parliament, a properly organised selection procedure should be conducted. Such a procedure should meet three cumulative conditions: true pluralism in the selection body; broad support for nominated candidates across the political spectrum; and preventing the majority in the Assembly from circumventing or sabotaging the selection procedure. However, the Venice Commission finds that the current procedures as described in the Law on the KJC and the Rules do not fully meet these requirements.

44. In the Assembly, members of the KJC are elected by a majority of votes cast by deputies present and voting, as stipulated in Article 10(9) of the Law on the KJC. Moreover, Article 10(9) of the Law on the KJC states that if none of the two candidates receives a majority of votes, then in the second round the candidate with the highest number of votes shall be considered as elected. International standards advocate for a broader consensus, which should be secured through a qualified majority, such as two-thirds or three-fifths of all Assembly members. The Venice Commission has noted that the requirement of an absolute majority, in contrast to a simple majority, is acceptable, as it is the lowest level of qualified majority. In the Kosovo system, however, the absolute majority mechanism in the Law on the KJC for the first round is rendered ineffective if those candidates supported only by the ruling party can be elected by a simple majority in the second round. Since this creates a risk of politicisation, the Venice Commission would therefore recommend that the lay members of the KJC are always elected by an absolute majority of the votes in the Assembly.

CDL-AD(2025)015, Kosovo - Opinion on the Law on the Judicial Council and the draft law amending and supplementing it, §§ 37, 44; see also CDL-AD(2025)026, North Macedonia - Opinion on the draft Law on the Judicial Council, §§ 36-37

b) Specific Anti-Deadlock Mechanisms

12. In the view of the Venice Commission, entrusting the Parliament with the power to elect all the four lay members of the Judicial Council with a qualified majority is in keeping with the fundamental function of the Judicial Council to avoid both the risk of politicization and the risk of corporatist and self-perpetuating government of the judiciary. The three-fifths majority in the second round as provided for in the alternative b) seems to be an appropriate solution, also in order to compensate for the removal of the power to appoint two lay members of the President

of the Republic, as is provided in Article 127 of the present Constitution. On the contrary, alternative a) providing for the majority of all MPs in the second round of voting does not represent an acceptable solution, as it would act as a disincentive for the majority to reach an agreement in the first round of voting.

> CDL-AD(2013)028, Opinion on the Draft Amendments to three Constitutional Provisions relating to the Constitutional Court, the Supreme State Prosecutor and the Judicial Council of Montenegro, § 12

46.-47. When commenting on the Bulgarian Supreme Judicial Council in its previous opinions, the Venice Commission has already pointed out that the system in place for the election of the "parliamentary" component of the SJC (11 members of the Supreme Judicial Council elected by the National Assembly by simple majority) was giving rise to a risk of politicisation of this body and has repeatedly recommended its revision. […] the current Draft amendments do not address the issue of the majority, which implies that the present voting rule remains unchanged. […] it is assumed that this majority, both in Parliament and in the General Meetings of the Judges, Prosecutors and Investigating Magistrates is to be understood as a simple majority. […]

48.-49. In the Explanatory Note to the Draft amendment (see p. 3), the drafters however express their view that "a high degree of consensus amongst the political forces should be sought at the selection of members of the Supreme Judicial Council from the Parliament quota." The Venice Commission recommends taking up this view and enforcing it by introducing a requirement for a qualified majority such as, for example, a two-thirds majority, […]. The issue of the number of judges or prosecutors members of the SJC Chambers elected by their peers would be of less weight, if the election by the National Assembly would be linked to a qualified majority; this would allow for a larger base of consensus on the persons to be elected, even if some retain that a qualified majority requirement, in the present configuration of the Bulgarian parliament, could lead to a series of bargains in order to reach agreement or could result in a deadlock situation. In the ideal case such "bargains" lead to the election of truly independent candidates as should be the case in a mature democracy. In the event of "political horse-trading", at least the candidates of the majority and opposition will "even out" political influence.

50.-51. The delegation of the Venice Commission was informed about difficulties to achieve a qualified majority in the Bulgarian Parliament. The Commission acknowledges that the political context can lead to serious problems in this respect. However, it should be possible to overcome these difficulties through carefully designed anti-deadlock mechanisms, which are conducive to achieve consensus. A simple system would be, for instance, a three-fifth majority requirement after three voting rounds, followed, if needed, by the absolute majority of the members of the National Assembly. More complex systems could be devised, including for instance involving the intervention of the President of the Republic or proposals for candidates from neutral bodies. […].

> CDL-AD(2015)022, Opinion on the draft Act to amend and supplement the Constitution (in the field of the Judiciary) of the Republic of Bulgaria, §§ 46-51

25. The Venice Commission in principle supports the prolongation of the term of office of members of the Judicial Council as a tool to preserve the functioning the democratic institutions of the state. As stated by the government of Montenegro in the statement of reasons, the operation of the Judicial Council is crucial to guarantee the independence of the judiciary; this is an essential element of the Rule of Law. Such prolongation may also function as an anti-deadlock mechanism.

28. The Venice Commission considers that the same result could be achieved in line with Article 127 by providing, should the new lay members not be timely elected by parliament, that

only the lay members sitting on the old Judicial Council will sit on the new one as acting lay members, preferably for a limited period of time. This alternative solution would enable the new members who have already been appointed to start sitting on the new Judicial Council, which would provide the latter with more legitimacy than allowing all the members of the expired Council to continue to operate even if for example the new judicial members have been duly elected. […]

> CDL-AD(2018)015, Opinion on the draft law on amendments to the Law on the Judicial Council and Judges of Montenegro, §§ 25, 28

11. The text submitted to the Venice Commission has followed the fourth option by increasing the majority from 3/5th to 2/3rd in the first round. The second round has been taken out, but the text kept the commission as an anti-deadlock mechanism and is in line with the recommendations made by the Venice Commission.

> CDL-AD(2018)023, Serbia - Secretariat memorandum Compatibility of the draft amendments to the Constitutional Provisions on the Judiciary of Serbia as submitted by the Ministry of Justice of Serbia on 12 October 2018 with the Venice Commission's Opinion on the draft Amendments to the Constitutional Provisions on the Judiciary, § 11

29. As regards the anti-deadlock mechanism, draft article 122(4) provides;"[i]f the procedure of appointment, within the requirements of paragraph 3, failed, the candidates to the position of members of the Superior Council of Magistracy who are not judges, are appointed by Parliament with the vote of majority of elected deputies, but not earlier than 15 days."

31. The Commission and the Directorate welcome that the Moldovan authorities are willing to provide for an antideadlock mechanism as recommended. They are of the view nevertheless that they should consider different options in this respect, as a mere decreased majority after a time-lapse of fifteen days does not appear to represent a sufficiently strong incentive to reaching agreement on the basis of the qualified majority in the first round. The Commission and the Directorate are aware that devising an appropriate and specific anti-deadlock mechanism requires more time than is available in the current context; they would therefore recommend to put in Article 122(4) the more general indication that the organic law on the [Superior Council of Magistracy] SCM will provide for a mechanism of election of lay members to be used in case the procedure of appointment provided under article 122(3) failed. Reflection on the appropriate mechanism may then be pursued in due course. […].

> CDL-AD(2020)007 Republic of Moldova, Joint Opinion on the revised draft provisions on amending and supplementing the Constitution, with respect to the Superior Council of Magistracy, §§ 29, 31

56. What should be mentioned in the constitutional text is what to do if the 2/3 majority in the [National Assembly] required to elect lay members [of the High Judicial Council] is not reached. Without an anti-deadlock mechanism this rule entrenched in the Constitution may become an obstacle to the proper operation of the two councils. To address this, the Constitution might provide, for example, that the power to choose a certain minimal number of lay members in this case is temporarily transferred to the President or another independent officeholder (like the Ombudsman, for example), if Parliament is uncapable on agreeing on the candidates and reaching the necessary majority. Other antideadlock mechanisms can be considered as well.

> CDL-AD(2020)035, Bulgaria - Urgent Interim Opinion on the draft new Constitution, § 56

67. The procedure concerning the candidates [to the High Judicial Council, HJC] elected by the National Assembly is regulated in this provision. After having conducted a public

competition, ten candidates will be shortlisted by the responsible parliamentary committee taking into account the principle of 'broadest representation'. The (plenary) National Assembly will then proceed to elect five persons from the shortlist presented to it by the parliamentary committee. A candidate is elected if he or she receives two-thirds of the votes of all deputies. If the National Assembly fails to (timely) elect all five members, the remaining members will be elected by a special commission, comprised of the President of the National Assembly, the President of the Constitutional Court, the President of the Supreme Court, the Supreme Public Prosecutor and the Ombudsman, by a simple majority vote.

68. In general, the proposal of a qualified majority is needed in the parliamentary vote and the provision envisages an adequate anti-deadlock mechanism. The Venice Commission does not object to a qualified majority vote of two-thirds, on the contrary, as it objected to the 3/5th majority in its 2018 Opinion of the Venice Commission (paragraph 61). However, the Venice Commission is aware of the factual backdrop against which these theoretical proposals will operate in practice. As the current National Assembly is dominated by one political party, obtaining a qualified majority vote is not a problem. In order to reinforce depoliticization, while the two-thirds majority requirement should be kept, the Venice Commission recommends that (in)eligibility requirements be added. These could create a certain distance between the members elected by the National Assembly (the "prominent lawyers") and party politics, which could make the HJC (and the HPC) more politically neutral and avoid conflict of interest, even if it may be difficult to completely insulate these members from any political influence. […]

70. The Commission however notes that – where the high quorums are not reached (i.e. once the situation in Serbia changes and the opposition returns to the National Assembly – the coming into play of the anti-deadlock mechanism (a five-member commission consisting of the Speaker of the National Assembly, the President of the Constitutional Court, the President of the Supreme Court, the Supreme Public Prosecutor and the Ombudsman – deciding by simple majority) might then become the rule rather than the exception. Although foreseeing an anti-deadlock mechanism to avoid stalemates is a positive step, and the Commission had welcomed it in its 2018 Opinion of the Venice Commission, the danger is that in the end, it will be up to a small five-person commission to decide the composition of the HJC and the HPC, and as a consequence, the composition of the judiciary. In this respect, discussions with the stakeholders during online meetings with the Venice Commission delegation suggested that this issue might be partially resolved by altering the composition of this commission – and thereby making the pursuit of a consensus more appealing.

> CDL-AD(2021)032 Serbia - Opinion on the draft Constitutional Amendments on the Judiciary and draft Constitutional Law for the Implementation of the Constitutional Amendments, §§ 67-68, 70

13. […] • *the election by high quorums needed in the National Assembly for the election of prominent lawyers to the [High Judicial Council, HJC] (five members) and to the [High Prosecutorial Council, HPC] (four members) may lead to deadlocks in the future. There is a danger that the anti-deadlock mechanism that is meant to be an exception will become the rule and allow politicized appointments. In order to encourage consensus and move away from the anti-deadlock mechanism of a five-member commission, the composition of the latter should be reconsidered*;

14.-15. The background for this key recommendation is the current political situation, where the National Assembly is dominated by a single political party. The Speaker of the National Assembly has informed the Commission that the Serbian authorities have reconsidered the composition of the HJC but have decided not to alter it. The authorities argue that as this anti-deadlock commission should act as a substitute for the competence of the National Assembly, it should be composed of the highest public officials with constitutional legitimacy.

Furthermore, the commission is composed of prominent lawyers, together with the Speaker of the National Assembly, who is an institutional figure in addition to representing parliament.

16. The Venice Commission acknowledges the members' explicit requirements of high competence in the legal field and finds that it is positive that the "prominent lawyers" in the HJC should be appointed by key figures in the Serbian judiciary, such as the President of the Constitutional Court, the President of the Supreme Court and the Supreme Public Prosecutor. It has no objection to the participation of the Ombudsman either; the participation of the Speaker of the National Assembly appears equally understandable, given the fact that the anti-deadlock mechanism supersedes a power of the National Assembly.

17. However, as four out of the five members of this commission are currently elected by the National Assembly (and not all with a qualified majority), for the Commission it is not impossible that the proposed antideadlock mechanism might "lead to politicized appointments", at least until such time as these constitutional amendments enter into force and produce their effects (for example, the President of the Supreme Court will no longer be elected by parliament, and the Prosecutor General will be elected with a qualified majority and will enjoy other guarantees of independence - see para 33 of the October opinion) and the composition of parliament will be more pluralistic.

18.-19. The Commission acknowledges that there is no prescriptive or detailed standard as to the composition of such an antideadlock mechanism, and therefore cannot conclude that the proposed mechanism is not in line with international standards and must be changed. Nonetheless, the Commission encourages the Serbian authorities to explore the possibilities for an alternative antideadlock mechanism which may alleviate the concern that it may not be, or may be perceived not to be, politically neutral.

> CDL-AD(2021)048, Serbia - Urgent opinion on the revised draft constitutional amendments on the judiciary, §§ 13-19

26. Pursuant to the proposed amendments, if Parliament fails to elect a lay member of the [Superior Council of Magistracy, SCM] by three-fifths of all elected members of Parliament, consultations should take place between the parliamentary fractions, following which, within 15 working days, Parliament will hold another round of voting. The same majority of three-fifths of elected MPs shall be necessary to elect a member at this point (draft Article 3(3-1) of the Law "on the Superior Council of Magistracy). In case of another failure to elect a lay member of the SCM, Parliament shall hold one more round of voting in which the majority of all elected members of Parliament shall be sufficient to elect a lay member (draft Article 3 (3-2) of the same Law). Finally, if the candidate has not been elected again, the Committee shall, within a maximum period of two months, hold a new public competition, based on the same procedure, in which candidates rejected by the Parliament may not participate (Article 3 (3-3) of the same Law).

27. As it has been noted in the June 2020 Opinion, the primary function of the anti-deadlock mechanism is that of making the original procedure work, by pushing both the majority and the minority to find a compromise. Qualified majorities strengthen the position of the parliamentary minority, while anti-deadlock mechanisms correct the balance back. Obviously, such mechanisms should not act as a disincentive to reaching agreement in the first instance. It may assist the process of encouraging agreement if the anti-deadlock mechanism is one which is unattractive both to the majority and the minority. As previously stated by the Venice Commission, reduced majority in subsequent rounds of voting undermines the very purpose of the qualified majority rule which is to incite political parties across the political spectrum to find a compromise on the candidates. The CCJE also advises against lowering the necessary majority as this may reduce any incentive for the majority to reach a compromise. Rather, such a mechanism must ensure an independent

selection and might involve the opposition or call for the selection by other institutions from a list of shortlisted candidates.

28. The anti-deadlock mechanism proposed in the draft Law amounts to decreasing the threshold for parliamentary approval of candidate. Knowing that it can achieve a decreased majority or eliminate an undesirable candidate, the majority may be discouraged from seeking a compromise with the minority. Consequently, it is difficult to expect the majority and the minority to find a compromise in consultations within a 15-day period.

> CDL-AD(2022)019, Republic of Moldova - Opinion on the draft law on amending some normative acts (Judiciary), §§ 26-28

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

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

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

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

> CDL-AD(2022)043, Serbia - Follow-up Opinion to the Opinion on three revised draft Laws implementing the constitutional amendments on the Judiciary of Serbia, §§ 60-62, 64

24. The proposal put forward in the Law is now that the anti-deadlock mechanism lasts for a period of maximum two years. [Article 16(d) of the Law reads: The president and members of the Judicial Council from among the eminent lawyers, whose term of office ends after the expiration of the term for which they were elected, shall continue to perform their duties until the election and announcement of new members of the Judicial Council from among the eminent lawyers, for a period not longer than two years.]

25. The Venice Commission reiterates what it has affirmed in 2018, i.e. that the difficulty of reaching a qualified majority and the ensuing risk of paralysis of dysfunction of an institution - in particular “safeguard institutions” - should not lead to the abandonment of the requirement of a qualified majority. In this regard, limiting the operativity of the anti-deadlock mechanism to two years can be, in principle, welcomed insofar as it would put pressure on

the parliament to elect the remaining lay members. However, the Venice Commission finds that the supreme state interest lies in the preservation of the institutions of the democratic state. The respect for the principle of separation of powers requires that no branch of power/constitutional institution should be permitted by way of deliberate inaction or mere incapability of acting to block the functioning of another branch of power/constitutional institution.

26. Recalling that within the current constitutional framework it is not in the power of anybody else but the parliament to elect the lay members of the Judicial Council, the two-year deadline introduced in Article 16(d) should not lead, in case of inaction of the Parliament, to the institution's paralysis. The Venice Commission recalls that the due functioning of the Judicial Council, in those legal systems where it exists, is an essential guarantee for judicial independence.

27. The purpose of the anti-deadlock mechanism devised in 2018 was to serve as an exceptional and temporary solution to an institutional crisis; it does not represent a solution to the serious issue of lack of political will to find a broad political agreement on the lay members of the Judicial Council. The Venice Commission reiterates that it is a sign of maturity and responsibility on the part of the political class, both in government and in opposition, to be able to find consensus or agreements, including and in particular as to appointments of independent institutions and top political appointees. Broad political agreement is necessary in order for the state institutions to function in a democratic manner. Having said this, the Montenegrin authorities shall therefore reflect on whether a constitutional reform introducing a further or alternative anti-deadlock mechanism would be the best way to address this seemingly systemic problem. Granting the competence to nominate the candidates to another state institution, a neutral one, following several unsuccessful votes in Parliament, has been chosen as an anti-deadlock mechanism in some countries. This might motivate parliamentarians to reach the qualified majority for the appointment of the lay members of the Judicial Council. The Venice Commission stands ready to provide its assistance in case of need.

> CDL-AD(2022)050, Montenegro - Opinion on the draft amendments to the Law on the Judicial Council and Judges; §§ 24-27

54. The Commission therefore recommends stipulating in Article 19 that parliamentary control is to be exercised over the appointment of the [High Judicial and Prosecutorial Council, HJPC] member by the Council of Ministers and the modalities of this control, taking into account the requirements elaborated below in respect of the lay member elected by Parliament. It is recalled that the Commission's view is that "[w]hen lay members are elected by parliament this should be done with the broadest consensus, in principle by a qualified majority vote which involves the opposition, following an open and transparent competition. Effective anti-deadlock mechanisms should be provided." Such instruments are all the more important in the Bosnian framework requiring the bona fide engagement of all relevant political stakeholders.

55. The Venice Commission clarifies that anti-deadlock mechanisms should not result in allowing the Parliament to decide with a simple majority if several attempts were unsuccessful, as this defeats the purpose of having a qualified majority requirement (the ruling force may just wait through several unsuccessful attempts, even sabotaging those votes, and then choose whomever they wish without considering the opposition at all). Rather, it should be considered to take away the appointment by Parliament after a few unsuccessful rounds and give it to another, more neutral body. In addition, the Commission considers that, if the number of lay members was to be increased, as recommended, the draft law should entrust non-political bodies such as a bar association with the selection of these members.

CDL-AD(2024)009, Bosnia and Herzegovina – Interim Follow-Up Opinion to Previous Opinions on the Draft Law on the High Judicial and Prosecutorial Council, §§ 54-55

28.-29 The Commission also recommended that parliamentary control is to be exercised over the appointment of the member by the Council of Ministers and that the lay member chosen by the parliament should be elected by qualified majority with an anti-deadlock mechanism. […] This recommendation has been partially followed inasmuch as Article 5(5) provides for a qualified majority (two-third) for the election of a lay member. However, no effective anti-deadlock mechanism is foreseen in the law itself (as for example assigning the decision to a third neutral body). The reference in the explanatory note to the [High Judicial and Prosecutorial Council, HJPC] Book of Rules does not suffice in this regard. The Commission also considers that it would be more appropriate to simplify the process by requiring only the vote of the House of Representatives, instead of the two chambers, upon proposal of a parliamentary committee (Article 18(1) should be amended accordingly).

CDL-AD(2025)004, Bosnia and Herzegovina - Follow-up Opinion to previous Opinions on the draft law on the High Judicial and Prosecutorial Council, §§ 28-29

45. Because of the risk of deadlock in the appointment of [Kosovo Judicial Council] members when absolute majorities are required, the Venice Commission furthermore recommends the adoption of an anti-deadlock mechanism to be invoked should the Assembly fail to elect new members. […] One option the Kosovar authorities could consider is prolonging the mandate of the members already sitting in the KJC as acting members until a new lay member is elected. Granting the competence to nominate the candidates to another, neutral state institution has been chosen as an anti-deadlock mechanism in other countries. Another option would be to draw lots among the eligible candidates proposed to the Assembly. In the case of Kosovo, the Commission notes that drawing lots is a mechanism which was prescribed in the 2105 Regulation on Election of Kosovo Judicial Council Members from the Judiciary (Articles 8(4) and 9(5)). Accordingly, the Venice Commission is of the view that, should the Assembly fail to elect a lay member by an absolute majority, the selection could be determined by the drawing of lots among the candidates proposed by the Committee, rather than by simple majority. Should this process take longer than the mandate of the lay member to be replaced, they could remain at the KJC as acting members until a new lay member is elected.

CDL-AD(2025)015, Kosovo - Opinion on the Law on the Judicial Council and the draft law amending and supplementing it; § 45

VI. PROSECUTORS GENERAL

1. Election by Qualified Majority with Anti-Deadlock Mechanism

35. No single, categorical principle can be formulated as to who - the president or Parliament - should appoint the Prosecutor General in a situation when he is not subordinated to the Government.[…] Advice on the professional qualification of candidates should be taken from relevant persons such as representatives of the legal community (including prosecutors) and of civil society.

36. In countries where the prosecutor general is elected by Parliament, the obvious danger of a politicisation of the appointment process could also be reduced by providing for the preparation of the election by a parliamentary committee, which should take into account the advice of experts. The use of a qualified majority for the election of a Prosecutor General could be seen as a mechanism to achieve consensus on such appointments. However one would need also to provide for an alternative mechanism where the requisite qualified majority cannot be obtained so as to avoid the risk of a deadlock.

CDL-AD(2010)040, Report on European Standards as regards the Independence of the Judicial System: Part II - the Prosecution Service

115. Article 105 para 3 of the Constitution provides that the National Assembly elects the [Prosecutor General, PG] and decides on the termination of his office by a three-fifths majority. There is a possibility that the National Assembly, for political reasons, decides not to approve the proposal of the [High Prosecutorial Council, HPC] to dismiss the PG. [..].

117. The HPC's proposal to dismiss the PG is made by a majority of seven votes (see Article 20, para. 2 of the draft Law on HPC). If such a vote is called for, the PG is excluded from the decision-making process (Article 56 para. 5 of the draft law on HPC). This means that the PG would not be dismissed unless all lay members, and at least three or more elective prosecutorial members of the HPC vote for it.

118. Experience in other countries has shown that it is not illusory for prosecutorial members to align their voting behaviour to that of the PG. The likelihood that they will in future become subordinated to the PG at the least gives rise to a concern that they may not be fully independent on such issues. A possible solution, as recommended above, is that to design appropriate rules and procedures which would reduce the potential abuse of influence of any one individual on other members, thus reducing the likelihood that all prosecutors act as a block.

119. One possible solution would be to reduce the decision-making majority in some situations. The Venice Commission recalls that under Article 163 of the Constitution, para. 2, the Minister of Justice should not vote in a procedure for determining disciplinary responsibility of a public prosecutor. This also arguably applies to the voting on the proposal to remove the PG on disciplinary grounds. The PG should also be excluded from voting on those matters, due to an evident conflict of interest. This leaves nine members of the HPC, which could then take a decision on bringing the PG to liability by a simple majority of five votes out of nine.

CDL-AD(2022)042, Serbia - Opinion on two draft Laws implementing the constitutional amendments on the prosecution service, §§ 115, 117-119

40. The Commission opined that in countries where the Prosecutor General is elected by the Parliament, the obvious danger of a politicisation of the appointment process could be reduced by the use of a qualified majority as a mechanism to achieve consensus on such appointments. The requirement of qualified majority voting should improve the independence of the appointee as it reduces the likelihood of appointing a party loyalist. Yet, a qualified majority rule may also lead to deadlock and dysfunction, particularly so in polarised environments where ideological cleavages and/or previous political developments make it difficult to achieve qualified majorities.

41. The draft Law provides that the Prosecutor General is appointed by the Sejm by an absolute majority (draft Article 13b § 2), with the consent of the Senate. In the view of the Venice Commission, the requirement of absolute majority in the Sejm, in contrast to the simple majority, is acceptable, as it is the lowest level of qualified majority. The specific, politically polarised local context, combined with the relatively short six-year term of office of the Prosecutor General (draft Article 13e § 1), may justify the approach proposed in the draft Law, particularly when the following considerations are taken into account.

42. First, the draft Law involves both chambers of the Parliament in the appointment process. The two chambers imply an institutional plurality and the representation of different interests in the selection process. As the Venice Commission stated previously, second parliamentary chambers may act as counterweights and checks within the Parliament. Accordingly, subject

to other possibly intervening factors, the participation of both the Sejm and the Senate seems a reasonable option with a view to achieving the selection of an independent appointee.

43. The question remains, however, as to how the two-chamber mechanism stands from the perspective of deadlock. It is clear that such a mechanism entails the risk of disagreement between the chambers. A paralysis of the office due to inactivity after the expiry of the Prosecutor General´s term would be prevented by draft Article 13b § 20 which stipulates that the incumbent Public Prosecutor General shall serve until the new Public Prosecutor General takes the oath of office. Still, this provisional situation should not turn into a long-term arrangement. The potential passivity of the Senate is addressed in draft Article 13b § 17 of the draft Law which states that failure on the part of the Senate to pass a resolution within one month shall amount to tacit consent to the appointment of the Public Prosecutor General. Nevertheless, a problematic scenario remains in the event of repeated disagreements between the two chambers when the Senate keeps actively rejecting the candidates selected by the Sejm. […]

44. Second, the draft Law stipulates qualification criteria which narrow the potential pool of candidates to senior professionals in the public prosecution service. Even though these criteria could be further refined, as discussed above, the political discretion is already significantly restricted by the proposed eligibility rules. Moreover, a high level of professional qualification contributes to preserve the political independence of the Prosecutor.

45. Third, the requirement of a public hearing adds transparency and public accountability to the process of electing the Prosecutor General. By exposing the candidates to public scrutiny, the hearing ensures that the electorate, civil society, and other stakeholders have access to the process, allowing for a more open assessment of the qualifications, competencies, and integrity of each candidate. This transparency reduces the likelihood of behind-the-scenes political manoeuvring and fosters greater public confidence in the process.

46. In conclusion, considering that the requirement of a qualified majority of two-thirds or three-fifths in a highly polarised political environment – such as the current political climate in Poland – would effectively grant the political minority a blocking or veto power, and in the light of the above considerations, the Venice Commission considers that the proposed arrangements for the election of the Prosecutor General by an absolute majority vote of the Sejm, with further approval by the Senate, may be considered acceptable.

> CDL-AD(2024)034, Poland – Opinion on the draft amendments to the Law on the Public Prosecutor's Office, §§ 40-46

36. [T]he draft [Law on the Public Prosecutor's Office, LPPO] is silent on the majority required in the Assembly, with it being understood that his/her election by the Assembly only requires a simple majority. The Venice Commission has previously stated that in countries where the Prosecutor General is elected by the Parliament, the obvious danger of a politicisation of the appointment process (which is all the more present in North Macedonia given that the candidates for the position of Public Prosecutor are proposed by the government) could be reduced by the use of a qualified majority as a mechanism to achieve consensus on such appointments. Such a requirement should improve the independence of the appointee as it reduces the likelihood of appointing a party loyalist. It is only on rare occasions that the Venice Commission accepted that the Public Prosecutor (when elected by the Parliament) could be elected by an absolute majority (but not a simple majority as it is in North Macedonia), in situations when the political environment was so polarised that ideological cleavages and/or previous political developments would make it impossible to achieve a higher majority. In such situations, it however relied on other considerations (such as relatively narrow eligibility criteria, the involvement of another chamber of the Parliament etc.). The political context in North Macedonia does not appear to readily warrant a departure from the requirement of a higher

majority in Parliament for the election of the Public Prosecutor. The Venice Commission understands […] that election of the Public Prosecutor by a higher (qualified) majority would require a constitutional amendment and thus cannot be addressed by the draft LPPO. It however considers this issue of such importance that it recommends that, in the context of a future constitutional reform, the Constitution also be amended on this point in order to have the Public Prosecutor elected by a higher (qualified) majority in the Assembly (whereby an appropriate anti-deadlock mechanism is also to be provided for).

> CDL-AD(2025)036, North Macedonia - Joint Opinion on the draft laws on the Public Prosecutor's Office and on the Council of Public Prosecutors, § 36

2. Specific Anti-Deadlock Mechanisms

39. Article 65(2) of the new Constitution provides that the "Prosecutor's Office shall be led by the Prosecutor General, who is elected for a six-year term upon nomination of the Prosecutorial Council". But, Article 16(3) of the draft Law only provides that the Prosecutor General is elected by Parliament, without providing expressly that the election must be made upon nomination of the Prosecutorial Council. There is no such provision in any other Article of the draft Law. Even if there is an express provision in the new Constitution and some provisions in the draft Law that can also be interpreted in a way that Parliament may elect the Prosecutor General only upon nomination by the Prosecutorial Council – in order to avoid any misunderstanding, this should be provided expressly in Article 16(3).

40. Even if the choice is made to provide that the Prosecutorial Council shall nominate the candidate who has received the support of two-thirds of the full composition of the Prosecutorial Council, such an ambitious decision may lead to a deadlock and, therefore, consideration should be given to introducing an anti-deadlock mechanism. It may be necessary to gradually reduce the threshold for this vote following several unsuccessful voting rounds.

41. The rapporteurs were informed that in the latest amendments to this draft Law, Article 16(6) on the procedure and criteria for appointment to office of the Prosecutor General was amended as follows "*6. The Prosecutorial Council with appropriate justification shall present the selected candidate to the Parliament of Georgia. If the nominated candidate fails to obtain the required number of votes of the members of the Parliament of Georgia, the Prosecutor's Council will select other candidates by the procedure prescribed by paragraph 4 of this Article*" (changes in bold). These changes are welcome and for the Council to send an explanation with the recommendation of the candidate brings clarity to the process. Having the Council make another recommendation if the candidate does not get elected by Parliament goes some way to avoiding a deadlock and provides transparency on the manner in which the various bodies are expected to proceed.

> CDL-AD(2018)029, Georgia - Opinion on the provisions on the Prosecutorial Council in the draft Organic Law on the Prosecutor's Office and on the provisions on the High Council of Justice in the existing Organic Law on General Courts, §§ 39-41

15. Article 12 of the revised draft (amending Article 15 2a of the existing law and establishing a "special majority" requirement) calls for another important remark. While it does not allow the prosecutorial members to govern alone (which is positive), at the same time, the mechanism of a "special majority" contains an inherent risk of blockages, if the Assembly-appointed members vote together and block certain decisions, including the decision to select a new Prosecutor General. Thus, it would be advisable to provide for an anti-deadlock mechanism for such cases, which would permit the [Kosovo Prosecutorial Council, KPC] to take such decisions if the prosecutorial and lay members cannot find a compromise. The specific

parameters of such an anti-deadlock mechanism could be identified by the legislator in dialogue with the international partners and main stakeholders.

> CDL-AD(2022)006, Kosovo - Opinion on the revised draft amendments to the Law on the Prosecutorial Council, § 15

3. Interim Continuation of Tenure

55.-57. Under Section 22.2.a ASPGPOPEPC the Prosecutor General will, after the expiry of his or her mandate, continue to exercise his powers until the beginning of the mandate of the new Prosecutor General. […] There is, however, a transition problem when the mandate of the Prosecutor General expires. Section 22.2.a ASPGPOPEPC means that 1/3 plus one member of Parliament can effectively keep him or her in office by blocking the election of a new Prosecutor General and they could thus extend his or her mandate indefinitely. It is not clear to what extent this question was considered in detail when the Fundamental Law and the ASPGPOPEPC were passed. However, the Fundamental Law lays down a long mandate of nine years of service for the Prosecutor General and it would seem unacceptable that a minority of the members of Parliament can in fact keep him or her in office indefinitely by creating a deadlock in the election of a successor.

59. There may be various solutions. One possibility may be to prescribe a deadline - in the Fundamental Law or the ASPGPOPEPC - within which Parliament must have elected a new Prosecutor General. Another solution might be simply to repeal Section 22.2.a ASPGPOPEPC, so that the mandate of the Prosecutor General automatically expires after the termination of his or her mandate. Both solutions of course create the problem that there may be a period without a formally elected Prosecutor General but this may put the necessary pressure on Parliament to elect the successor. What needs to be avoided as well is that the same blocking 1/3 minority can indefinitely extend an interim period under the Deputy Prosecutor General, who was appointed by the outgoing Prosecutor General.

> CDL-AD(2012)008, Opinion on Act CLXIII of 2011 on the Prosecution Service and Act CLXIV of 2011 on the Status of the Prosecutor General, Prosecutors and other Prosecution Employees and the Prosecution Career of Hungary, §§ 55-57, 59

10. The prosecution service is headed by the PG. The status of the PG is regulated partly by the Constitution and partly by the Law on the [State Prosecution Service, SPS]. Under the Constitution, the PG is elected by Parliament at the proposal of the Prosecutorial Council, by 2/3 majority of votes, for a five-years term. If the 2/3 majority cannot be reached on the candidate proposed by the Prosecutorial Council, Parliament may elect any candidate of appropriate qualifications by a 3/5 majority (Article 91). The Constitution is silent on what happens if this majority is not reached.

49. The Venice Commission has previously recommended a qualified majority for the election of the PG, as a mechanism to achieve consensus on such appointments, and also recommended for the introduction of an anti-deadlock mechanism. Unfortunately, a political consensus about the next PG has not been achieved, and the Constitution of Montenegro does not provide for an anti-deadlock mechanism, so the outgoing PG has been performing this function ad interim, on the basis of the decision of the Prosecutorial Council, since 2019.

51. It follows that it is unacceptable that a non-elected prosecutor should perform interim functions indefinitely. In the absence of an appropriate anti-deadlock mechanism provided for in the Constitution, the interim functions should be carried out by the outgoing PG until the election of a new one. This solution is also likely to motivate Parliament to find a compromise as to the choice of the new PG.

52. Once an effective anti-deadlock mechanism is provided, an ad interim PG could be nominated. However, the duration of such interim appointment would have to be necessarily limited to the operation of the anti-deadlock mechanism. Two consecutive six-months terms, as currently foreseen in the draft law, is definitely too long, and would amount to circumventing the qualified majority requirement of the constitution, which is unacceptable.

53. In conclusion: pending the introduction in the Constitution of an appropriate anti-deadlock mechanism for the appointment of the PG, the law should be amended to provide that the outgoing PG will continue to exercise his functions ad interim. Once the anti-deadlock mechanism is introduced, the law may provide that an interim prosecutor be appointed, with the duration of his/her interim functions limited to the operation of the anti-deadlock mechanism.

> CDL-AD(2021)012, Montenegro - Opinion on the draft amendments to the Law on the State Prosecution Service and the draft law on the Prosecutor's Office for organised crime and corruption, §§ 10, 49, 51-53

50. Under the Constitution of Montenegro, the PG is elected by a qualified majority in Parliament, on the proposal of the PC. In 2019, when the term of mandate of the outgoing PG came to an end, the Parliament failed to elect a new one. The Constitution of Montenegro does not provide for an anti-deadlock mechanism for such cases. As a result, the outgoing PG has been performing his functions ad interim, on the basis of a decision of the PC, since 2019.

53. It was reported that in May 2021 the outgoing (interim) PG would reach the retirement age and would have to vacate his position definitely. If no political agreement on the election of the new PG (or on a constitutional amendment introducing an anti-deadlock mechanism or another method of appointment of the PG), is reached by this time, the prosecution service will remain without leadership. This is a constitutional impasse, and while any solution to this problem proposed in a law adopted by a simple majority would be constitutionally questionable, a constitutionally compatible solution needs to be found, even if it is based on the Law of Necessity.

55. The Commission wishes to stress that these transitional arrangements do not represent a solution to the serious issue of the need to find a broad political agreement on the next Prosecutor General. It is a sign of maturity and responsibility on the part of the political class, both in government and in opposition, to be able to find consensus or agreements, including and in particular as to appointments of independent institutions and top political appointees. Broad political agreements are necessary in order for the state institutions to function in a democratic manner. The Venice Commission reiterates that the Constitution should contain an anti-deadlock mechanism which would motivate parliament to reach the qualified majority for the appointment of the Prosecutor General.

> CDL-AD(2021)030, Montenegro - Urgent Opinion on the revised draft amendments to the Law on the State Prosecution Service, §§ 50, 53, 55

VII. MEMBERS OF PROSECUTORIAL COUNCILS

1. Election by Qualified Majority with Anti-Deadlock Mechanism

45. […] [U]nder the Draft Law the politicisation of the Council is somehow reduced by the fact that two out of the four members elected by the Parliament come from civil society and not from the ranks of MPs. However, these candidates still have to obtain the approval of the governing majority (see Article 81 par 2 (d)) which may predetermine their position for the entire period of their service. In order to make those persons less dependent on the will of the ruling majority,

it is necessary to put in place additional guarantees, applied both at the stages of nomination and of election of candidates.

50. At the stage of elections by the Parliament it is important to ensure that the resulting composition of the four Council members elected by the Parliament is not politically monolithic. To achieve this, two alternative solutions may be considered: election by a qualified majority or the introduction of quotas for the opposition.

51. The most radical solution would be to require that at least two out of the four members elected by Parliament are elected by qualified majority (one member representing the Parliament, and one member representing civil society). This would ensure that at least two members of the Council are elected as the result of a compromise, which would somehow counterbalance those two members whose election depends more on the support of the ruling majority, and the fact that the Minister of Justice sits on the Council ex officio.

52. Since such a qualified majority may be hard to achieve in the current political context in Georgia, an alternative solution is also possible: the Draft Law might introduce quotas for members appointed by opposition parties. This means that opposition parties should have the right to appoint at least one member of the Council, regardless of their number of seats in Parliament. Given the current relative strength of the opposition in the Georgian Parliament, the opposition might even be given two seats out of four: one for an MP and one for a representative of civil society whom the opposition wishes to nominate. Whichever solution is chosen, the parliamentary majority would still control more seats in the Prosecutorial Council, due to the participation of the Minister of Justice, but its decisive influence within the Council would be reduced and the Council would become more politically balanced; in order to pass important decisions or to block them, candidates chosen by the parliamentary majority would need to obtain support of those elected by qualified majority or appointed by the opposition, or those members which are elected by the Conference of Prosecutors.

> CDL-AD(2015)039, Joint Opinion on the draft Amendments to the Law on the Prosecutor's Office of Georgia, §§ 45, 50-52

30. The Commission previously proposed several options to reduce the risk of politicisation of the lay component of the KPC including by reserving a certain number of seats to representatives of external independent institutions such as the Bar, the law faculties, the Ombudsperson, etc.

31. At that time, two alternatives proposed for the purpose of offsetting the risk of politicisation, namely the election of the lay members by parliament by a qualified majority (with an effective anti-deadlock mechanism) or the election of the lay members by parliament on the basis of a proportional system (so that lay members are elected by different political forces) were not considered by the Kosovo authorities as viable. Most importantly, the introduction of “qualified majority solutions” that would have enabled some of the lay members to receive support beyond the ruling majority in the Assembly were found to be impossible without amending the Constitution which currently requires a simple majority for decisions related to the KPC.

48. Moreover, as the draft stands now, the procedure of selection of the candidates remains entirely within the control of the Assembly Committee and the Panel. Contrary to the advice set out in the March 2022 Opinion, no expert input is envisaged in the selection process. The recommendation of including expert input in the selection process, should, therefore, be considered not to have been followed.

49. In the light of the above, the Commission is not convinced that the method and procedure of selection of the three lay members elected by the Assembly has addressed the essence of the recommendation, which was to ensure a pluralistic composition of the KPC in order to

reduce the risk of politicisation in the election of lay members. This proposal will need to be further elaborated to strike a fair balance between the risk of corporatism in a KPC dominated by prosecutorial members and the risk of politicisation of the lay members elected by a simple majority of the same Assembly which the Commission has discussed in similar contexts.

51. Yet, the importance of preventing the politicisation of the KPC is paramount. As previously stressed by the Venice Commission, "each state must devise its own formula to create a pluralistic prosecutorial council." The Commission is of the view that if constitutional amendments on the election of lay members with qualified majorities are not possible in the current circumstances, the Law should devise a solution which provides for input from independent experts and bodies to strengthen the impartiality and objectivity of the selection process in the Assembly committee.

> CDL-AD(2023)043, Kosovo - Follow-up Opinion to the Previous Opinions Concerning Amendments to the Law on the Kosovo Prosecutorial Council, §§ 30-31, 48-49, 51

18. It is recalled that the election of all the lay members [of the Prosecutorial Council] by Parliament by a simple majority at the same time (hence by the same political majority and only those persons who have the support of those parties with the majority in Parliament) remains a source of concern as it entails serious risks of the politicisation. In March 2021, the Venice Commission proposed several solutions in this regard: a) election of the lay members by Parliament by a qualified majority (with an effective anti-deadlock mechanism); b) election of the lay members by Parliament on the basis of a proportional system (so that lay members represent different political forces); c) nomination or even direct appointment by external non-governmental actors (such as universities, the Bar, the judiciary, etc.).

19. In its July 2021 Urgent Opinion, the Venice Commission reiterated that it is necessary to ensure that the [Prosecutorial Council] should not be politicised. The Commission did not consider that election by Parliament by simple majority is conducive to political neutrality or at least pluralism. It noted that when qualified majority or proportional voting systems do not appear as an acceptable solution, as a transitional solution, a simple majority may be accepted only if it is coupled with additional solid guarantees and safeguards. Instead, the authorities introduced two mitigating measures in the Law to reduce the politicisation of the [Prosecutorial Council]: new ineligibility criteria and the nomination of one lay member by the NGOs.

22. In addition, the Commission concluded that although the two above-mentioned mitigating measures go in the right direction to reduce politicisation, in all, they are not yet sufficient to eliminate completely the risks of politicisation which are inherent in the election by a simple majority. Therefore, the authorities were encouraged to improve their model. However, no such improvement appears to have been made in the draft Law, and the previous recommendations remain valid.

> CDL-AD(2024)013, Montenegro – Urgent Follow-Up Opinion to the Opinions on the Law on the State Prosecution Service, §§ 18-19, 22-23

15.-17. Pursuant to Article 34 [Law on the Council of Public Prosecutors, LCPP], the four lay members on the Council are to be elected by the Assembly of North Macedonia (following a pubic call) from among university professors of law, attorneys-at-law, former judges of international courts or members of international judicial bodies, and other distinguished legal professionals (two of whom shall belong to communities which are not in the majority in North Macedonia). […] The draft LCPP is silent on the method of election of the lay members. It is however understood to fall under the regular voting procedures of the Assembly, which would require a simple majority in the Assembly for their election.

18. [T]he four lay members represent a minority on the Council [of Public Prosecutors], which makes the risk of politicisation of the Council as a whole less critical than it would have been if they had been in a majority. Nonetheless, the election of the four lay members by a simple majority in the Assembly cannot be said to be conducive to the political neutrality of this component of the Council. Previously, in a situation where following legislative changes lay members would constitute a majority in a prosecutorial council (which is not the case in North Macedonia), the Venice Commission has proposed several alternatives to the election of lay members by a simple majority in parliament, namely:

- election of the lay members by parliament by a qualified majority (with an effective anti-deadlock mechanism);
- election of the lay members by parliament on the basis of a proportional system (so that lay members represent different political forces);
- nomination or even direct appointment by external nongovernmental actors (such as universities, the Bar, the judiciary, etc.).

19. […] [T]here are other ways (in addition to the option(s) mentioned above requiring a constitutional amendment, i.e. election by qualified majority or on the basis of a proportional system in the Assembly) to ensure that the Assembly is not given complete freedom in its selection of lay members without restricting this to the sphere of influence of the Bar Association and the Inter-University Conference (for example, by also involving others, such as civil society organisations, the Ombudsperson of North Macedonia and/or the judiciary in proposing or even short-listing candidates). Therefore, in order to further depoliticise the selection of lay members to the Council, the Venice Commission recommends that the authorities, in the interest of increasing the independence of the Council and its individual members from the powers that be, provide an alternative to the way the four lay members are being elected, whereby it is to be ensured that the election is based on the merits and integrity of the candidates and a diverse representation is favoured.

> CDL-AD(2025)036, North Macedonia - Joint Opinion on the draft laws on the Public Prosecutor's Office and on the Council of Public Prosecutors, §§ 15-19

2. Specific Anti-Deadlock Mechanisms

49. In addition, an anti-deadlock mechanism should be foreseen for the election of the eminent lawyers, e.g. a three-fifth majority for subsequent voting, as provided for in Article 91 of the Constitution for the election of the lay members of the Judicial Council, or the proposal of a higher number of candidates and the election with the absolute majority of the components of the Parliament, or the election by Parliament using a proportional system, or to transfer of the power to elect to university faculties and lawyers' representatives.

> CDL-AD(2014)042 Interim Opinion on the Draft Law on the State Prosecution Office of Montenegro, § 49; see also CDL-AD(2015)003, Final Opinion on the revised draft Law on the public Prosecution Office of Montenegro

13. The text submitted to the Venice Commission is in line with the recommendation made and follows the same solution that was adopted for the HJC i.e. it increased the majority from 3/5th to 2/3rd in the first round of elections of members of the HPC by the Assembly. The second round has been taken out, but the text kept the commission as an anti-deadlock mechanism. It is in line with the recommendations made by the Venice Commission.

> CDL-AD(2018)023, Serbia - Secretariat memorandum Compatibility of the draft amendments to the Constitutional Provisions on the Judiciary of Serbia as submitted by the Ministry of Justice of Serbia on 12 October 2018 with the Venice Commission's Opinion on the draft Amendments to the Constitutional Provisions on the Judiciary, § 13

56. What should be mentioned in the constitutional text is what to do if the 2/3 majority in the [National Assembly] required to elect lay members is not reached. Without an anti-deadlock mechanism this rule entrenched in the Constitution may become an obstacle to the proper operation of the two councils. To address this, the Constitution might provide, for example, that the power to choose a certain minimal number of lay members in this case is temporarily transferred to the President or another independent officeholder (like the Ombudsman, for example), if Parliament is uncapable on agreeing on the candidates and reaching the necessary majority. Other antideadlock mechanisms can be considered as well.

> CDL-AD(2020)035, Bulgaria - Urgent Interim Opinion on the draft new Constitution, § 56

37. There are several possible ways to avert or at least reduce the risk of politicisation. In a previous opinion on Montenegro the Venice Commission advocated the requirement of a qualified majority to elect the lay members of the Prosecutorial Council. In theory, the qualified majority requirement should help to elect a candidate who enjoys the trust of different political forces and is therefore politically neutral. However, the qualified majority solution may present disadvantages. First of all, it may lead to political quid pro quo, when the votes given by the opposition in support of a majority candidate can be exchanged against some other concessions. If this is so, the qualified majority requirement will not necessarily reach its objective to ensure the election of a politically neutral figure. In addition, as the experience of Montenegro shows, it may be practically difficult to reach a political agreement. Thus, a qualified majority requirement should be associated with an effective anti-deadlock mechanism.

38. The Venice Commission has previously examined several such mechanisms. The Commission has expressed preference for a system where if no political agreement on a neutral figure can be reached (possibly in more than one round of voting), the right to appoint a candidate should pass to a neutral body outside Parliament. The Venice Commission recalls its recommendation in the two previous opinions on Montenegro that in the absence of a consensual figure elected by Parliament with a qualified majority, the right to appoint a member (or several members) of the Prosecutorial Council may pass to “University faculties and lawyers” representatives (or, rather, to their representative bodies). The main problem with this solution is to find such an independent outside body, especially in a small country like Montenegro.”

42. As previously stressed by the Venice Commission, in respect of the anti-deadlock mechanism, “each state has to devise its own formula” which should lead to the creation of a pluralistic Prosecutorial Council were politically affiliated members have no clear majority.

> CDL-AD(2021)012, Montenegro - Opinion on the draft amendments to the Law on the State Prosecution Service and the draft law on the Prosecutor’s Office for organised crime and corruption, §§ 37-38, 42

17. […] As the composition of the [High Prosecutorial Council, HPC] is fixed in the Constitution, and the PG will be elected by a qualified majority only in the future, it is extremely important that the rules on the election of the prosecutorial council, its powers as well as the nature of the hierarchical relations within the prosecution service are such as to allow to counter the risk of subordination to the prosecutorial component of the HPC to the PG. […].

28. The election of the lay members of the [High Prosecutorial] Council is regulated in Articles 43 et seq. The draft Law – in line with the constitutional amendments – contains certain key features: [..] (3) qualified majority voting in the National Assembly in order to reinforce the depoliticisation (Article 50), and (4) having in place an anti-deadlock mechanism to avoid stalemates (Article 51).

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

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

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

40. In sum, the Venice Commission welcomes the proposal by the Serbian authorities to (i) require a qualified majority in the JC, and to (ii) strengthen the (in)eligibility criteria, provided they are further elaborated in the Law as recommended by the Commission. This would address the concern about the dangers related to a politically homogenous lay component.

41. For the Venice Commission, the institutional design of the HPC should be such as to avoid two dangers: corporatism and politicisation. Heightened majorities in the decision-making of the [High Prosecutorial Council] ensure that neither prosecutors nor lay members can govern alone. However, the same heightened majorities carry with them the risk of the inability of the Council to take any decision, if lay members always vote together, as a block, and the prosecutorial members do always the same, and the two components disagree amongst themselves. Therefore, it is necessary to increase pluralism within both components. Certain steps, described above, may help achieving this result and therefore avoid blockages. In particular, the legislator should increase the independence of prosecutorial members from the PG and ensure that the lay members represent different political currents.

> CDL-AD(2022)042, Serbia - Opinion on two draft Laws implementing the constitutional amendments on the prosecution service, §§ 17, 28, 36-38, 40-41

VIII. MEMBERS OF INDEPENDENT, NON-POLITICAL BODIES

1. Anti-Corruption Bodies

67. […] The Venice Commission has previously supported the idea of appointment of the head of an anti-corruption agency and two members of an anti-corruption Commission [dealing with illegally acquired assets] by a qualified majority of votes in the Parliament. This model should be coupled with an adequate anti-deadlock mechanism in case such majority cannot be reached. In addition in case a new member may not be elected for want of the necessary qualified majority, the mandate of the outgoing member should be automatically extended. A qualified majority should be required either in the nominating parliamentary Committee or in the plenary session, or at both levels.

CDL-AD(2021)024, Bosnia and Herzegovina – Opinion on the draft law on the prevention of conflict of interest in the institutions of Bosnia and Herzegovina, § 67; see also CDL-AD(2023)004, Ukraine – Amicus curiae brief on certain questions related to the procedure for appointing to office and dismissing the director of the National Anti-Corruption Bureau and the Director of the State Bureau of Investigation, § 57

25. […] In this respect, in earlier opinions the Venice Commission has also noted that the need to ensure independence and neutrality of anti-corruption bodies may require cross-party support of appointments of key officeholders, which may be ensured by a qualified majority, as well as a suitable anti-deadlock mechanism. It is therefore recommended that the Law be amended to oblige the head of the [Anti-Corruption Bureau] to be appointed by a qualified majority in Parliament, coupled with a suitable anti-deadlock mechanism (requiring more than an ordinary majority), or an appropriate alternative, reflecting broad, cross-party agreement in Parliament (for example, in the form of a double majority, entailing a majority among members of parliament both from the majority and the opposition), and that any decision on early termination of his/her term in office be made by the Parliament, not the Prime Minister. As wide a consensus as possible, is all the more necessary for institutions requiring strong public trust and which, given the nature of their functions, such as oversight over the financing of political parties, need to be perceived as politically neutral.

CDL-AD(2023)046, Georgia - Opinion on the provisions of the Law on the fight against Corruption concerning the Anti-Corruption Bureau, adopted by the Venice Commission at its 137th Plenary Session, § 25

2. Electoral Bodies

50. The next step, according to Article 14, states "candidacies [for the Central Election Commission] selected in accordance with letter (b) of this point, are submitted to the Assembly for approval". However, the text does not state the procedure for this approval. It is assumed that each candidacy is voted on and each candidate who receives at least 71 votes in the Assembly is approved. Article 14 does not address the situation where a candidacy fails to receive approval. The Venice Commission and the OSCE/ODIHR recommend that these two points be clarified.

CDL-AD(2009)005, Joint Opinion on the Electoral Code of the Republic of Albania, § 50

32. The draft law states that the approval of the [Central Election Commission, CEC] candidates list must be by a majority of at least four votes of the Commission (Article 30.4) but contains no provisions covering the situation when Commission members do not come to an agreement or deliberately avoid voting for candidates, which may further complicate or even stall the process. It is recommended that the law regulate the decision-making process regarding the appointment of CEC candidates and provide for an anti-deadlock mechanism.

33. Article 31 provides that the "decision on the election of the members of the Central Election Commission" is carried out by the Parliament. However, this process cannot be considered as a proper election since the Parliament can only accept or refuse the whole list of candidates – with a simple majority (cf. Article 91 of the Constitution). Some ODIHR and Venice Commission interlocutors expressed their concern that the decision be taken by the political majority. As already said, the composition of the Commission established by the Parliamentary Committee responsible for election and appointments is aimed at representing an overall balance. This should, however, be confirmed by practice. Thus, good faith in the nomination procedure to avoid a politically biased composition of the CEC is required. Another risk would be that Parliament rejects the list. The law should address this

case and in particular say whether the procedure should then be restarted, and how to avoid a deadlock.

> CDL-AD(2020)026, Montenegro – Urgent Join Opinion on the Draft Law on Elections of Members of Parliament and Councillors, §§ 32-33

31. The draft amendments maintain the process whereby if the CEC chairperson is not elected by two-thirds of CEC members within a given time frame, the President shall submit the same candidate to the Parliament which shall then elect the CEC chairperson. The Venice Commission and ODIHR recognise that there has to be a method to overcome an impasse if the first method does not result in the election of a chairperson. That said, in the absence of a requirement that the election by parliament should take place at qualified majority, this effectively means that the chairperson will represent the ruling party. It must be stressed once more that consensus around the CEC chairperson is an important matter for Georgian democracy. Therefore, every attempt should be made to find as wide a consensus as possible on the CEC chairperson. It should be noted that this concern may also apply even in a non-boycott situation, if the nominee for CEC chairperson does not receive any support from the opposition but can, in any case, be appointed by majority vote. Moreover, the draft does not provide for the case that Parliament does not approve the candidate proposed by the President. To guarantee broader consensus on CEC leadership, consideration should be given to introducing a qualified (e.g. two-thirds) parliamentary majority vote or a double majority requirement (requiring a majority among MPs both of the ruling parties and the opposition parties) for the election of the CEC chairperson, with a final anti-deadlock mechanism.

> CDL-PI(2021)005, Georgia – Joint Urgent Opinion on Draft Amendments to the Election Code, § 31

20. The first key recommendation made in the first Joint Urgent Opinion was composed of the following two elements:
1) to consider introducing a qualified (e.g. two-thirds) parliamentary majority vote or a double majority requirement (requiring a majority among MPs both of the ruling parties and the opposition parties) for the election of the chairperson and non-partisan members of the Central Election Commission (CEC), with a final anti-deadlock mechanism; […]

21. The first part of this recommendation has been implemented by introducing a two-thirds parliamentary majority vote for the election of the chairperson and non-partisan ("professional") members of the CEC, with a final anti-deadlock mechanism: if no two-thirds majority is reached in the first round of voting, a second (again two-thirds), third (three-fifths) and fourth (simple majority) round are possible. While this can be a rather lengthy process (a period of at least four weeks must be kept between the different rounds of voting), the new provisions are clearly a positive step forward, in line with the aforementioned recommendation and with the political agreement. In contrast, the significant reduction of the period between different rounds of voting, from four weeks to one, in the transitional provisions should be reconsidered as it may be detrimental to reaching consensus between the ruling and opposition parties. […]

> CDL-AD(2021)026, Georgia – Urgent Joint Opinion on Revised Draft Amendments to the Election Code, §§ 20-21

28. It is true that further increasing the required majority (to 2/3, as before) might have the consequence that it is more frequently not reached and that the anti-deadlock mechanism comes into effect – which pursuant to the current draft provides for the possibility of two additional rounds of voting under which the candidates can be elected by simple majority (draft Article 211.1(7) of the Rules of Procedure of the Parliament). In other words, there is a higher risk that the ruling party alone could elect the (non-partisan) [Central Election Committee, CEC] members and Chairperson.

29. It must be noted that the proposed anti-deadlock mechanism is different from the previous one assessed by the Venice Commission and ODIHR in June 2021, which was directly based on the political agreement of 19 April 2021 and endorsed by the Venice Commission and ODIHR, and provided the following: If no two-thirds majority was reached in the first round of voting, a second (again two-thirds), third (three-fifths) and fourth (simple majority) round were possible; if the vacancy still remained unfilled at the end of this process, the nomination procedure would start again. The Venice Commission and ODIHR commented that, while this could be a rather lengthy process, those provisions were clearly a positive step forward, in line with previous recommendations and with the political agreement. In light of the preceding paragraphs, the Venice Commission and ODIHR recommend changing the draft amendments to ensure that consensus on the appointment/election of the non-partisan members and Chairperson of the CEC is sought. This might imply requiring a 2/3 parliamentary majority in the first place and, in any case, an anti-deadlock mechanism which favours qualified majorities, before possibly resorting to simple (or absolute) majorities as an ultimate deadlock resolution.

30. In this connection, the proposed limited timing between the rounds of parliamentary re-voting (as early as the beginning of the next week) and between the time the Speaker of Parliament provides the President of Georgia with the list of applicants/documentation and the deadline by which (s)he must appoint a candidate before a new competition is launched (maximum one week) may also be detrimental to reaching consensus between the ruling and opposition parties.21 The Venice Commission and ODIHR recommend that consideration be given to lengthening these periods to allow sufficient opportunity for reaching consensus on the candidate(s).

32. During the interviews held in Tbilisi the authorities did not provide the rapporteurs with a clear explanation why the authority to nominate candidates for non-partisan members and Chairperson of the CEC had been shifted by the June 2023 amendments from the President of Georgia to the Speaker of Parliament. Transferring the nomination authority back to the President might be the additional move needed to gain broader support of the proposed amendments, particularly as under the draft changes the parliamentary quota does not return to the previous 2/3 majority, but only 3/5. In this respect, it is also noted that the proposed final anti-deadlock mechanism that grants authority to the President to appoint a candidate holds little weight, as it being invoked is highly unlikely given the initial anti-deadlock measure of a simple parliamentary majority. The Venice Commission and ODIHR therefore recommend transferring the nomination authority back to the President of Georgia, in line with the previous regulation which was based on the 19 April 2021 political agreement between the majority and several opposition parties.

34. [I]t is noteworthy that, under the current draft, in case of activation of the anti-deadlock mechanism the President of Georgia can in the end – if the different steps of voting by Parliament have proved unsuccessful – appoint any of the candidates participating in the competition (draft Article 211.1(7) of the Rules of Procedure of the Parliament). The Venice Commission and ODIHR recommend considering that the President's discretion at this stage of proceedings be narrowed down; it would be advisable, at least, to require that his/her appointment decision be reasoned.

38. [The provision whereby the terms of office of the CEC members or chairperson are extended in case of deadlock] led in practice to the following situation: the current CEC Chairperson, as well as some members, were elected under this anti-deadlock rule by simple majority, initially for a period of six months, but are still in office at the moment for lack of a political agreement. This regulation was highly unsatisfactory as it could lead to practically unlimited terms of office of persons elected by simple majority. The June 2023 amendments went even further, repealing the limited six-month term and granting the CEC members and Chairperson – all of whom are to be elected by simple majority – five-year terms which are

extended until a new member/Chairperson is elected (Articles 10(3), 12(1) and 12(11.1) of the Election Code). The current draft amendments maintain the five-year term for all CEC members and the Chairperson regardless if elected by qualified or simple majority, with extensions until a new member/Chairperson is elected/appointed (draft Article 10(7) and (9) of the Election Code). The Venice Commission and ODIHR recommend modifying the draft amendments in this respect, in order to ensure that appointments made on the basis of the anti-deadlock mechanism are significantly limited in time and cannot be prolonged. The political agreement of 19 April 2021 included a reasonable formula in this regard, making it clear that such appointments would be temporary, with a term limited to six months, during which the standard appointment procedure should be re-launched.

> CDL-AD(2023)047, Joint Opinion of the Venice Commission and ODIHR on the Draft amendments to the Election Code and to the Rules of Procedure of the Parliament of Georgia, §§ 28-30, 32, 34

13. […] [O]ne of the key recommendations of the initial Opinion was aimed at ensuring that consensus on the appointment/election of the non-partisan members and Chairperson of the CEC is sought. The Opinion noted that one option to achieve this might imply requiring a 2/3 parliamentary majority in the first place and, in any case, an anti-deadlock mechanism which favours qualified majorities, before possibly resorting to simple (or absolute) majorities as an ultimate deadlock resolution. The amendments re-introduced the requirement of a qualified (3/5) majority, but with an anti-deadlock mechanism that provides for the possibility of two additional rounds of voting under which the candidates can be elected by simple majority. The Opinion, stressed that this was clearly "insufficient to ensure a consensus-based political process which is crucial for the independence and impartiality of the CEC and for public trust in this institution."

14. […] [T]he Venice Commission stresses that it did not recommend one specific solution (such as the regulations of June 2021), but that it is clearly up to the Georgian authorities to find an appropriate solution, as long as the final goal to facilitate consensus amongst political stakeholders on the CEC's composition and leadership is met. The Commission reiterates its concerns that the current amendments are insufficient to ensure this. Inter alia, the new anti-deadlock mechanism for filling vacant positions bears the risk that the ruling party alone can elect the (non-partisan) CEC members and Chairperson.

26. The Venice Commission is highly concerned that none of its recommendations has been taken into account by the Georgian authorities, not even partly. The Commission stresses once again that the – now adopted – amendments are clearly insufficient to ensure a consensus-based political process which is crucial for the independence and impartiality of the CEC and for public trust in this institution. One of the major concerns is related to the new anti-deadlock mechanism for filling vacant positions, which provides for the possibility of two additional rounds of voting under which the candidates can be elected by simple majority, and which bears the risk that the ruling party alone can elect the (non-partisan) CEC members and Chairperson.

> CDL-AD(2024)010, Georgia - Follow-up Opinion to the Joint Opinion on the draft amendments to the Election Code and to the Rules of Procedure of the Parliament of Georgia, §§ 13-14, 26

3. Media Regulatory Bodies

81. Despite the absence of international standards on the appointment procedures of civil society representatives in independent media regulatory agencies, the Venice Commission has in general favoured that decisions on the appointment of independent institutions by parliament are made by qualified majority and through an inclusive process that gives room for a public debate. In the particular case of media regulators, it has found that "the purpose of imposing

an obligation for a qualified majority is to ensure cross-party support for significant measures or personalities." This is particularly so as the appointment procedures here concern not the members appointed by the parliament, but those proposed by civil society organisations. To avoid that the candidates proposed by civil society organisations end up representing the interests of the governing majority in the parliament, the Venice Commission therefore recommends that the selection procedures are further detailed in the law, thus limiting the discretionary authority of the parliament in their appointment. In case of voting, qualified majorities should be required, combined with an anti-deadlock mechanism that does not discourage broader political negotiations.

> CDL-AD(2025)027, Republic of Moldova - Opinion on the legislative reforms on mass media regulation: the draft law on mass media, the draft law amending the audiovisual media services code, and the draft law amending the law on advertising, § 81

4. Other Relevant Bodies

35. The Venice Commission and DGI welcome the efforts of the authorities to devise an anti-blocking mechanism for the election of the [Ethics and Disciplinary Commission of the General Assembly of Judges] lay members. In general, the transfer of the electing power from the General Assembly of Judges to the [Supreme Judicial Council, SJC] is a reasonable proposal. However, the mechanism outlined by the Concept Paper lacks important details. There should be clear and fair conditions and time-limits when the electing power is transferred from the General Assembly of Judges to the SJC. The General Assembly of Judges should have adequate time and facilities to vote on the nominated candidates. Moreover, the Assembly's reasoned decision not to elect a candidate, especially if the decision is taken by a qualified majority, should carry considerable weight in further procedures before the SJC. Similar considerations (as to the fair conditions) apply to the procedure before the SJC.

> CDL-AD(2023)045, Armenia – Joint Opinion of the Venice Commission and DGI on the Concept Paper Concerning the Reform of the Ethics and Disciplinary Commission of the General Assembly of Judges, § 35

IX. OMBUDSPERSONS

1. Election by Qualified Majority with Anti-Deadlock Mechanism

12. Election of the candidate [of Defender] by a 2/3 majority would be a better solution than a 3/5 majority provided by the existing law and by the constitutional amendments. Indeed, in the previous opinion on the Defender the Venice Commission welcomed the election of the Defender by a 3/5 majority, by contrast with the previously existing system; however, the question remains whether 3/5 represents "qualified majority of votes sufficiently large as to imply support from parties outside government", required by p. 7.3 of the PACE Recommendation 1615 (2003). The Venice Commission also draws attention to CDL-PI(2015)015rev where it recommended to the Armenian authorities to consider the election of the Defender by a two-third majority (§ 192). In addition to that, the ideal of "nearly-consensual" election of the Defender would better be served by ensuring personal voting in the Parliament instead of voting "by delegation".

13. Furthermore, an anti-deadlock mechanism should be put in place for situations where a candidate does not obtain the necessary qualified majority of votes in the Parliament. The purpose of such mechanism would be "to create incentives for both the majority and the opposition in Parliament to find a reasonable compromise (or, rather, to create disincentives to prevent situations where they are not capable of finding a compromise)".

CDL-AD(2015)035, 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 Amendments to the Law on the Human Rights Defender of the Republic of Armenia, §§ 12-13; see also CDL-AD(2015)037, First Opinion on the Draft Amendments to the Constitution (Chapters 1 to 7 and 10) of the Republic of Armenia, § 192

2. Specific Anti-Deadlock Mechanisms

35. In its 2015 Joint Opinion, the Venice Commission questioned whether a 3/5th majority of the total number of deputies would indeed provide the Defender with sufficient support from parties outside the Government. It is not hard to imagine a parliamentarian context in which one political party or a coalition of parties controls 3/5th of the votes in the National Assembly. It should be remembered that a key criterion of PACE Recommendation 1615 (2003) on Ombudsman Institutions is not a qualified majority in itself, but the requirement of support for the Defender among parties, including those outside the Government. A qualified majority is only a means to achieve wide political support for the Defender, and the majority requirement in the draft constitutional law should be aligned to the specific parliamentarian system of Armenia. This would ensure a broader consensus, and thus consolidate the impartiality of the institution. In the same vein, the First Opinion on the Draft Amendments to the Constitution also recommended that "as the broadest possible consensus on the person elected should be ensured, the election by a two-third majority should be considered". However, as this recommendation was not followed, Article 12.2 now corresponds to Article 192.1 of the new Constitution, making it difficult to change this provision without having to amend the Constitution.

36. It should be pointed out that a qualified-majority requirement increases the risk of a parliamentarian deadlock in the election of the Defender. However, Article 138 of the new Constitution (Temporary Appointment of Officials) only provides a provisional remedy to this problem. Article 138 applies to a broad range of public officials and notably provides that should a 3/5th majority not be reached, then the President of the Republic of Armenia appoints a Human Rights Defender ad interim until the procedure is repeated and a Defender is elected. This can of course not be considered a viable solution if repeated elections also fail."

CDL-AD(2016)033 Armenia - Opinion on the draft Constitutional Law on the Human Rights Defender, §§ 35-36

110.-111. Under Article 125 of the Constitution, the independent constitutional bodies are to be elected by a qualified majority, by Parliament. This provision is in keeping with the recommendations of the Venice Commission which prefers appointments by Parliament in the case of Ombudsmen (see Principle 6 of the "Venice Principles"), whereas the Paris Principles are silent on the subject where national human rights institutions are concerned.[…]

112.-113. Indeed, in order to prevent partisan political considerations or specific interests from influencing appointments to positions that require a high degree of independence and impartiality, as in the case of judicial councils or Ombudsman institutions, the Venice Commission has, on numerous occasions, recommended appointment by a qualified majority. The Constitution does not specify what constitutes a qualified majority, leaving it to the legislator to decide what this majority should be. Article 14 of the draft law stipulates a qualified two-thirds majority in the case of the Board.

114. While the Venice Commission has always advocated qualified majority voting, it has at the same time warned of the risk of paralysis and has also recommended developing robust anti-deadlock mechanisms. Such mechanisms should therefore be provided for in the draft law. Given the tasks which the Authority is called upon to perform and its limited powers,

reducing the qualified majority to three fifths would be appropriate, and in the event of a deadlock, there should be the possibility of holding a second round of voting. During the visit, the rapporteurs were informed that the requisite majority would be reduced to three fifths precisely in order to avoid deadlocks.

> CDL-AD(2019)013, Tunisia - Opinion on the Draft Organic Law on the Authority for Sustainable Development and the Rights of Future Generations, §§ 110-114

45. As to the appointment procedure, the Venice Commission finds that the 2/3 majority provided for by Article 8§1 of the Law to elect the Ombudsman at the first ballot is in line with the Principle 6§2 of the Venice Principles, which provides that "[t]he Ombudsman shall preferably be elected by Parliament by an appropriate qualified majority". This is to provide the institution with a politically and socially broad base and to strengthen to the highest possible extent the authority, impartiality, independence and legitimacy of the Institution. It is therefore questionable whether the possibility to elect the Ombudsman at the second ballot with an absolute majority of the votes (not even of all members) is still in line with the aforementioned principle, although the key criterion is not the qualified majority in itself, but the requirement of support for the Ombudsman among parties, including those outside the Government. Simple majority does not require a broad consensus of all tendencies in the Parliament and the appointment of Ombudsman without such a consensus may compromise the institution's credibility. The Venice Commission recommends therefore amending Article 8§1 of the Law and providing that a qualified majority of at least 3/5 majority of the members be needed to elect the Ombudsman as from the second (even better the third) ballot.

> CDL-AD(2022)033, Andorra - Opinion on the Law on the creation and functioning of the Ombudsman, § 45

X. REFERENCE DOCUMENTS

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CDL-AD(2018)029, Georgia - Opinion on the provisions on the Prosecutorial Council in the draft Organic Law on the Prosecutor's Office and on the provisions on the High Council of Justice in the existing Organic Law on General Courts

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CDL-AD(2021)012, Montenegro - Opinion on the draft amendments to the Law on the State Prosecution Service and the draft law on the Prosecutor's Office for organised crime and corruption

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CDL-AD(2022)019, Republic of Moldova - Opinion on the draft law on amending some normative acts (Judiciary)

CDL-AD(2022)033, Andorra - Opinion on the Law on the creation and functioning of the Ombudsman

CDL-AD(2022)035, Belarus - Final Opinion on the Constitutional Reform

CDL-AD(2022)042, Serbia - Opinion on two draft Laws implementing the constitutional amendments on the prosecution service

CDL-AD(2022)043, Serbia - Follow-up Opinion to the Opinion on three revised draft Laws implementing the constitutional amendments on the Judiciary of Serbia

CDL-AD(2022)050, Montenegro - Opinion on the draft amendments to the Law on the Judicial Council and Judges

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CDL-AD(2023)043, Kosovo - Follow-up Opinion to the Previous Opinions Concerning Amendments to the Law on the Kosovo Prosecutorial Council

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CDL-AD(2025)021, Chile - Opinion on the draft Constitutional amendments in respect of the judiciary

CDL-AD(2025)022, Mongolia - Opinion on the draft law on the Constitutional Court and on the draft law on the Procedure of the Constitutional Court of Mongolia

CDL-AD(2025)026, North Macedonia - Opinion on the draft Law on the Judicial Council

CDL-AD(2025)036, North Macedonia - Joint Opinion of the Venice Commission and the Directorate General Human Rights and Rule of Law (DGI) of the Council of Europe on the draft laws on the Public Prosecutor's Office and on the Council of Public Prosecutors

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