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OPINION ON THE LAW OF THE REPUBLIC OF MOLDOVA ON THE EXTERNAL EVALUATION OF JUDGES AND PROSECUTORS OF 17 AUGUST 2023 (AS LAST AMENDED IN SEPTEMBER 2024)

REPUBLIC OF MOLDOVA

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Based on an English translation of the Law as made available on the website of the Vetting Commission.

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EXECUTIVE SUMMARY AND KEY RECOMMENDATIONS

In 2021, the Government of Moldova initiated a reform process aiming to create an *ad hoc* integrity evaluation procedure for applicants to vacant positions in the Superior Council of Magistracy (SCM) and the Superior Council of Prosecutors (SCP), and their specialized boards, as a first step toward systemic judicial reform to alleviate corruption in the justice system. Subsequently, the public authorities decided to proceed with an *ad hoc* evaluation of the sitting judges of the Supreme Court of Justice (SCJ), and candidates to vacant positions within the SCJ, and later on, to further proceed with an evaluation of certain incumbent high-level judicial and prosecutorial positions. This led to the adoption of a number of laws.

In 2022, ODIHR prepared an *Opinion on the Law on Some Measures related to the Selection of Candidates for Members' Positions in the Self-Administration Bodies of Judges and Prosecutors* (as adopted in March 2022). On 1 July 2024, ODIHR published the *Opinion on the Law on the External Evaluation of Judges and Candidates for the Position of Judge of the SCJ* (adopted on 30 March 2023), with a view to complement the findings and recommendations from the ongoing ODIHR monitoring of the process of evaluating the incumbent SCJ judges.

The present Opinion reviews the Law on the External Evaluation of Judges and Prosecutors of 17 August 2023 (the "Law") that specifically regulates the institutional mechanism and procedures for external evaluation of certain judges and prosecutors and those suspended from office, as well as candidates for these positions. The final decision on the basis of the findings by the *ad hoc* evaluation commission are to be made by the SCM and SCP, respectively, which could result in dismissal. An appeal before the SCJ is also provided for.

This Opinion aims at identifying the aspects of the Law that could benefit from improvement, though noting that the first hearings with respect to the external evaluation process of judges of appellate courts started on 4 February 2025. It does not purport to re-assess or question the legitimacy of the external evaluation. The main purpose is to identify possible shortcomings of the legal framework and resulting procedure with a view to ensure respect for rule of law principles and for the individual rights of incumbent judges and prosecutors undergoing such evaluation. At the same time, as recommended during previous ODIHR monitoring processes, to ensure legal certainty and fairness, the applicable Law and related rules of procedure should not be amended while the evaluation is in progress, unless this is exceptionally required to ensure fairness and credibility of the process, or remedy existing shortcomings providing that the changes equally benefit all participants of the process.

As noted in previous ODIHR opinions, such an external evaluation process should remain a wholly exceptional, one-time, temporary measure, necessary and proportionate to the specific systemic challenges in the country that cannot be addressed using the existing ordinary mechanisms and procedures of judicial accountability because they have proven to be completely ineffective, inadequate and/or malfunctioning. The need for such measures has to be well justified and should never be used under normal conditions, else this would run the risk of setting a precedent where a changing political landscape could prompt a similar exercise. It should also only be used if supported by wide political and public consensus within the country.

More generally, it is recognized that changes in personnel may be insufficient to turn ineffective or 'complicit' judiciaries into trustworthy and credible arbiters, unless this is accompanied by necessary structural reform to strengthen judicial independence. It will therefore be essential that the ongoing external evaluation is complemented by measures to render the ordinary accountability mechanism processes functional and effective, especially in relation to judicial disciplinary proceedings, performance evaluation and asset declaration, judicial training and other measures, including proper financing of the administration of justice, to avert the need to resort to the use of *ad hoc* mechanisms.

Extraordinary evaluation mechanisms, similar to those contemplated in the Law, risk impacting the normal functioning of the judiciary and prosecution service, all the more seeing the delays of the evaluation process for members of self-administration bodies and of incumbent SCJ judges. The Opinion notes that with the 2024 September Amendments to the Law, the personal scope of the evaluation has been reduced to certain specific high-level judicial and prosecutorial positions within the judiciary and the prosecution service. , At the same time, the legal drafters should assess whether the personal scope of this *ad hoc* external evaluation – especially as it relates to candidates for positions that may become vacant as a result of the external evaluation – remains strictly necessary and proportionate.

Although it is recognized that the SCM and SCP are empowered by the Law to adopt the final decisions about the integrity evaluation, it may be questioned why the reformed self-administration bodies for judges and prosecutors - Evaluation and Selection Board of Judges and Superior Council of Prosecutors' Selection and Evaluation Board composed of members who have themselves been subject to external evaluation, would not take over the assessment of the candidates to vacant positions. As indicated in previous ODIHR opinions, constitutional bodies and ordinary mechanisms should be favoured providing that they are independent, operational and effective, over *ad hoc* extraordinary mechanisms.

The Law contains a number of safeguards seeking to ensure the independence and impartiality of the currently operational Evaluation Commissions, such as protection against external influence, functional immunity, ineligibility criteria and a separate budget for the Commissions.

The Opinion also identifies some shortcomings in the Law. Particularly, the Law would have benefited from enhanced selection/appointment procedures for the Evaluation Commissions' members, ultimately triggering increased public trust in the institutional mechanism and evaluation process. It would be beneficial to clarify further the criteria and rules for evaluating the evidence and for information collection to avoid infringement of the right to private life of evaluation subjects and to ensure their procedural rights. The legal framework should be enhanced to ensure that personal data processing is carried out in full compliance with international human rights standards, particularly with respect to their storage and destruction. In addition, the temporal scope for carrying out the external evaluation should be revisited to allow for some flexibility.

More specifically, and in addition to what is stated above, ODIHR makes the following recommendations to further enhance the provisions of the Law and ensure compliance with international human rights standards and OSCE commitments:

A. To consider granting the ordinary mechanisms – the Evaluation and Selection Board of Judges and Superior Council of Prosecutors' Selection and Evaluation Board – the role to evaluate and select candidates to positions that may become vacant as a result of the external evaluation; [paras. 25-26]

B. Regarding the composition of the Evaluation Commissions and replacement of departing members, though recognizing that they are already formed and operational, the following improvements may be considered:

   1. to introduce in the Law a timeline for electing a replacement in case of termination of membership due to resignation, removal or death, or envisage introducing alternate or substitute members selected through the same nomination and appointment process as the initial members, while ensuring that gender considerations are taken into account, throughout the nomination, selection and appointment process for new members with the aim of ensuring gender parity; [para. 36]

   2. to specify that the three eligible candidates proposed by the parliamentary fractions are selected by the Committee on Legal Affairs, Appointments and Immunities in compliance with the principle of proportional representation of the majority and the opposition are voted *en bloc* by the parliament instead of individually or that the Law otherwise requires a specific number of members to be nominated by the majority and by the opposition respectively; [para. 38]

   3. to envisage an anti-deadlock mechanism in the Law in case the parliamentary vote of 3/5th for electing a new member cannot be reached e.g., a co-optation by the Evaluation Commission or other modalities; [para. 46]

C. To elaborate further the Rules of the Commission for the Evaluation of Judges (CEJ) with respect to the different elements to be considered by this body for the evaluation of “ethical integrity”, including with respect to the gravity or severity of the misconduct and the bad faith or wilfulness of the misbehaviour; [para. 63]

D. Regarding information gathering:

   1. to exclude the possibility of gathering documents or information that are not strictly necessary to the evaluation process, including information falling within the scope of sensitive personal data according to international human rights standards; [para. 66];

   2. to provide some flexibility for the timeline to provide information, with a possibility for the evaluation subject to request additional time for valid reasons if and as needed; [para. 67]

E. Regarding evaluation of evidence:

   1. to clarify that reversal of the burden of proof occurs only where relevant and sufficient evidence has been adduced by the Evaluation Commission; [para. 72]

   2. to reflect that the lack of a majority of all the non-recused members of the Evaluation Commission in support of the negative evaluation should be interpreted in favour of the evaluated subject; [para. 75] and

F. To reconsider the immediate publication of the evaluation report upon adoption and provide instead that the publication only occurs after the decision of the

SCM or the SCP becomes final, after exhaustion of appeals, and to ensure a proper balance between the publicity of the evaluation report that forms the basis for the decision and respect for the private and family life of the evaluated judge, prosecutor or candidate. [para. 77]

These and additional Recommendations, are included throughout the text of this Opinion, highlighted in bold.

As part of its mandate to assist OSCE participating States in implementing their OSCE human dimension commitments, ODIHR reviews, upon request, draft and existing laws to assess their compliance with international human rights standards and OSCE commitments and provides concrete recommendations for improvement.

TABLE OF CONTENTS

I. INTRODUCTION

1. On 28 November 2023, the People's Advocate of the Republic of Moldova sent to the OSCE Office for Democratic Institutions and Human Rights (hereinafter "ODIHR") a request to monitor the ongoing external evaluation of judges and prosecutors in the Republic of Moldova and to review the relevant legislation's compliance with international standards and good practices.
2. On 7 December 2023, ODIHR responded to this request, confirming the Office's readiness, among others, to prepare a legal opinion on the compliance of Law No. 252/2023 on the External Evaluation of Judges and Prosecutors and Amending Some Normative Acts adopted on 17 August 2023 (hereinafter "the Law", which has been amended in September 2024)[1] with international human rights standards and OSCE human dimension commitments. ODIHR also reviewed the Law No. 65/2023 on External Assessment of Judges and Candidates for the Position of Judge of the Supreme Court of Justice of 30 March 2023 in its *Opinion on the Law on the External Evaluation of Judges and Candidates for the Position of Judge of the Supreme Court of Justice of the Republic of Moldova*[2] published on 1 July 2024 to inform ODIHR's monitoring of this ongoing process.
3. This Opinion should be read together with the aforementioned as well as previous legal reviews on the judicial reform process in the Republic of Moldova that have been published by ODIHR since 2019.[3] It should also be considered alongside the findings and recommendations from the ODIHR Report on the Evaluation (pre-vetting) of Candidates for Members of the Superior Council of Magistracy in Moldova (2023) that was prepared following ODIHR's monitoring of such evaluation process[4] and the upcoming report on the monitoring of the external evaluation of judges and candidates for the position of judge of the SCJ.
4. This Opinion was prepared in response to the above request. ODIHR conducted this assessment within its mandate to assist the OSCE participating States in the implementation of their OSCE human dimension commitments.[5]

II. SCOPE OF THE OPINION

5. The scope of this Opinion covers only the Law as last amended in September 2024. Thus limited, the Opinion does not constitute a full and comprehensive review of the entire

1 Available at: <66fe928a07666ad040d8b2b9_Law No. 252-2023_amended-26.09.2024.pdf>.
2 See: ODIHR, *Opinion on the Law on the External Evaluation of Judges and Candidates for the Position of Judge of the Supreme Court of Justice of the Republic of Moldova*, 1 July 2024.
3 See *ODIHR Opinion on the Law of Moldova on Some Measures related to the Selection of Candidates for Members' Positions in the Self-Administration Bodies of Judges and Prosecutors* (28 September 2022) in English and in Romanian; and *ODIHR Interim Opinion on the Draft Law on the Reform of the Supreme Court of Justice and the Prosecutor's Offices of the Republic of Moldova* (16 October 2019) in English and in Romanian.
4 See ODIHR, *Report on the Evaluation (pre-vetting) of Candidates for Members of the Superior Council of Magistracy in Moldova* (September 2023).
5 See especially OSCE Decision No. 7/08 Further Strengthening the Rule of Law in the OSCE Area (2008), point 4, where the Ministerial Council *"[e]ncourages participating States, with the assistance, where appropriate, of relevant OSCE executive structures in accordance with their mandates and within existing resources, to continue and to enhance their efforts to share information and best practices and to strengthen the rule of law [on the issue of] independence of the judiciary, effective administration of justice, right to a fair trial, access to court, accountability of state institutions and officials, respect for the rule of law in public administration, the right to legal assistance and respect for the human rights of persons in detention […]*".

legal and institutional framework regulating the judiciary, the prosecution service and the self-administration bodies of judges and prosecutors in Moldova.

6. The Opinion raises key issues and provides indications of areas of concern. In the interest of conciseness, it focuses more on those provisions that require amendments or improvements than on the positive aspects of the Law. The ensuing legal analysis is based on international and regional human rights and rule of law standards, norms and recommendations as well as relevant OSCE human dimension commitments.

7. Moreover, in accordance with the *Convention on the Elimination of All Forms of Discrimination against Women*[6] (hereinafter "CEDAW") and the *2004 OSCE Action Plan for the Promotion of Gender Equality*[7] and commitments to mainstream gender into OSCE activities, programmes and projects, the Opinion integrates, as appropriate, a gender and diversity perspective.

8. This Opinion is based on the English version the Law, as available on the website of the Vetting Commission.[8] Errors may result from translation. Should the Opinion be translated in another language, the English version shall prevail.

9. In view of the above, ODIHR would like to stress that this Opinion does not prevent ODIHR from formulating additional written or oral recommendations or comments on respective subject matters in Moldova in the future.

III. LEGAL ANALYSIS AND RECOMMENDATIONS

1. BACKGROUND AND GENERAL COMMENTS

10. For the relevant overview of the legislative initiatives taken in the course of Moldova's judicial reforms, reference is made to the *ODIHR Opinion on the Law on the External Evaluation of Judges and Candidates for the Position of Judge of the Supreme Court of Justice of the Republic of Moldova*.[9]

11. In August 2023, the Law No. 252/2023 on the External Evaluation of Judges and Prosecutors and Amending Some Normative Acts was adopted and then amended in November 2023 and in September 2024.[10] The Law specifically regulates the procedures for external evaluation of judges who, from 1 January 2017 and up to the date of entry into force of the Law, have held the position of president and/or vice-president of courts, including those who provided the interim of these offices for a period of more than one year, as well as judges of courts of appeal in function, on the date of entry into force of the Law. Similarly, the Law applies to prosecutors who, from 1 January 2017 and up to the date of entry into force of the present Law, have exercised the functions of General Prosecutor, deputy General Prosecutors, chief prosecutors of the departments of the General Prosecutor's Office, including those who have held these positions or who have been interim prosecutors for more than one year. It also applies to prosecutors who, from 1 January 2017 and up to the date of entry into force of this Law have held the position

6 See UN Convention on the Elimination of All Forms of Discrimination against Women (hereinafter "CEDAW"), adopted by General Assembly resolution 34/180 on 18 December 1979. The Republic of Moldova acceded to this Convention on 1 July 1994.
7 See OSCE Action Plan for the Promotion of Gender Equality, adopted by Decision No. 14/04, MC.DEC/14/04 (2004), para. 32.
8 Available at: <National Legal Framework - Vetting Commission>.
9 See *ODIHR Opinion on the Law on the External Evaluation of Judges and Candidates for the Position of Judge of the Supreme Court of Justice of the Republic of Moldova*, 1 July 2024, Sub-Section III.1.
10 Amendments were adopted on 24 November 2023 and on 13 September 2024. These latest amendments are taken into account in this Opinion.

of chief/deputy chief prosecutor of a prosecutor's office, including those who have held these positions or who have been interim prosecutors for more than one year and prosecutors of specialized prosecutors' offices including those delegated within these offices for a period of more than 1 year, from 1 January 2017 and up to the date of entry into force of this law.

12. The Law is also applicable to the judges and prosecutors mentioned above who are suspended from office. Initially, the Law was envisioning to also subject to external evaluation all candidates for the posts referred to above, who would have succeeded in the competitions for those posts by 31 December 2025. With the 2024 amendments, the personal scope of those candidates subject to the external evaluation mechanism has been reduced to only encompass those successful candidates for the positions of court of appeal judges and chief/deputy chief prosecutors of a prosecutor's office, and maximum two candidates successful for the other posts who have received the highest scores in the contest.[11] This means that the Law mirrors the model foreseen in the Law no. 65/2023 on External Assessment of Judges and Candidates for the Position of Judge of the Supreme Court of Justice, by combining the re-evaluation or "vetting" of incumbent office-holders[12] with the evaluation or screening of the candidates ("pre-vetting").

13. The purpose of the external evaluation, according to Article 2 of the Law, is an exceptional and one-off time-limited assessment of the integrity of the subjects, based on the principles of independence of the Evaluation Commissions, fairness of the evaluation procedures, publicity of the acts issued during the evaluation process, and the exceptional nature of the assessment. The Evaluation Commissions, consisting of the Commission for the Evaluation of Judges[13] ("CEJ") and the Commission for the Evaluation of Prosecutors[14] ("CEP"), shall evaluate all subjects by 31 December 2025 and shall operate until the Supreme Court of Justice ("SCJ") has examined the last appeal filed (Article 4 (1) and (6)). As per Article 22 (3) of the Law under review, the duties of the CEJ are exercised by the Evaluation Commission established by Law No. 65/2023 on the External Evaluation of Judges and Candidates for the Position of Judge of the SCJ.[15] The provisions of the Law under review relating to the powers, organization and functioning of the CEJ shall apply to the Evaluation Commission (Article 22 (3) of the Law).

14. According to Article 4 (4) of the Law, the Evaluation Commissions are not public authorities within the meaning of the Administrative Code, but they have the power to gather the necessary information (Article 14), including information gathered by the Evaluation Commission on the basis of the Law No. 26/2022 on measures related to the selection of candidates for the positions of members in the self-administration bodies of judges and prosecutors[16] and of the Law No. 65/2023 on the external evaluation of judges and candidates for the position of judge of the SCJ (Article 14 (12)).

15. Each Evaluation Commission has evaluation panels consisting of three members (Article 15). The Superior Council of Magistracy ("SCM") and the Superior Council of Prosecutors ("SCP") examine the results of the evaluation of the judges and candidate

11 See Article 3 (1) (g) and (h) of the Law.

12 For the purpose of this Opinion, "vetting" is understood as an extraordinary assessment of integrity and/or professionalism of judges and other justice system actors aimed at addressing systemic challenges in the justice system, while "pre-vetting" refers to the screening of candidates for certain positions; see *ODIHR Opinion on the Law on the External Evaluation of Judges and Candidates for the Position of Judge of the Supreme Court of Justice of the Republic of Moldova*, 1 July 2024.

13 This is the same body as the Evaluation Commission of Law no. 65 of 30 March 2023. See: Comisia Vetting - evaluarea externa a judecatorilor si a candidatilor la functia de judecator al Curtii Supreme de Justitie (CSJ) (vettingmd.eu).

14 General Information – Comisia de evaluare a procurorilor (vettingmd.org).

15 For an overview of the legal framework governing the composition, eligibility criteria and membership of the Evaluation Commission set up pursuant to the Law No. 65/2023, see *ODIHR Opinion on the Law on the External Evaluation of Judges and Candidates for the Position of Judge of the Supreme Court of Justice of the Republic of Moldova*, 1 July 2024, Sub-Section 3.1.

16 National Legal Framework - Vetting Commission.

judges and prosecutors and candidate prosecutors, respectively (Article 18). These bodies may either accept the evaluation report and establish whether the subject has passed the evaluation or not. At the end of the proceedings and after the hearing with the evaluated subject, the respective panel of the Evaluation Commissions adopts a reasoned report on the evaluation (Article 17). The SCM or the SCP then examines the evaluation results submitted by the Evaluation Commission and adopts a reasoned decision accepting the evaluation report and deciding whether the evaluation is passed or failed or rejecting the evaluation report, which reopens the evaluation procedure once only (Article 17). The decision that the subject has failed the evaluation shall have the effect of dismissing the judge or the prosecutor (Article 18 (5)). The subject may appeal the decision of the SCM or of the SCP before the SCJ (Article 19).

2. Relevant International Human Rights Standards and OSCE Human Dimension Commitments

16. A detailed overview of applicable international human rights standards and OSCE commitments pertaining to judicial independence and applicable safeguards pertaining to re-evaluation or "vetting", that are relevant for the review of the Law can be found in the *ODIHR Opinion on the Law on the External Evaluation of Judges and Candidates for the Position of Judge of the Supreme Court of Justice of the Republic of Moldova (2024), ODIHR Opinion on the Law on some measures related to the Selection of Candidates for the Positions of Members in the Self-Administration Bodies of Judges and Prosecutors and the Rules of Procedure and Evaluation Rules of the Independent Evaluation Commission* (2022)[17] and the *ODIHR Interim Opinion on the Draft Law on the Reform of the Supreme Court of Justice and the Prosecutor's Offices of the Republic of Moldova* (2019).[18] The recent caselaw of the European Court of Human Rights (ECtHR) pertaining to the vetting process in Albania confirms that Article 6 (1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter "the ECHR") in its civil limb is applicable to vetting processes and provides useful guidance as to the requirements and stringent safeguards that should apply to such extraordinary,

17 See *ODIHR Opinion on the Law on the External Evaluation of Judges and Candidates for the Position of Judge of the Supreme Court of Justice of the Republic of Moldova* (1 July 2024) in English; and *ODIHR Opinion on the Law of Moldova on Some Measures related to the Selection of Candidates for Members' Positions in the Self-Administration Bodies of Judges and Prosecutors* (28 September 2022) in English and in Romanian.

18 See *ODIHR Interim Opinion on the Draft Law on the Reform of the Supreme Court of Justice and the Prosecutor's Offices of the Republic of Moldova* (16 October 2019) in English and in Romanian.

sui generis processes.[19] Other relevant documents include the *ODIHR Recommendations on Judicial Independence and Accountability* (2023) (Warsaw Recommendations).[20]

17. The Joint Opinion, and Joint Follow-Up Opinions of the European Commission for Democracy through Law (Venice Commission) and the Directorate General of Human Rights and Rule of Law (hereinafter "DGI") of the Council of Europe on the Draft Law on the External Assessment of Judges and Persecutors of March and June 2023, and on the adopted Law in October 2023, will also be referenced in this Opinion, where relevant.[21]

18. As this Law also covers prosecutors, it is important to note that prosecutors play a central role in criminal proceedings. However, international instruments do not provide many references to prosecutors, in comparison to judges or defence lawyers. Nevertheless, there are a series of international documents, which set a framework of standards and recommendations specifically related to the work, status and role of the prosecution service. These documents include the *1990 UN Guidelines on the Role of Prosecutors*,[22] which aim at assisting UN Member States in securing and promoting the effectiveness, impartiality and fairness of prosecutors in criminal proceedings. Other important principles are contained in the *1999 International Association of Prosecutors' Standards of Professional Responsibility and Statement of the Essential Duties and Rights of Prosecutors*.[23] Further standards are outlined in Article 11 of the UN Convention against Corruption,[24] which calls upon States Parties to take measures to strengthen the integrity of prosecution services and prevent opportunities for their corruption, bearing in mind their crucial role in combating corruption. The *UNODC Article 11 Implementation Guide*

19 See in particular European Court of Human Rights (ECtHR), *Xhoxhaj v. Albania*, no. 15227/19, 9 February 2021, where the Court recognized that Article 6(1) of the ECHR was applicable to vetting processes and underlined a number of specificities applicable to such processes given their *sui generis* nature as opposed to ordinary disciplinary mechanisms, including that the non-representation of service judges was consistent with the extraordinary nature and spirit of the vetting process, that it was not *per se* arbitrary according to Article 6(1) (civil limb) that the burden of proof shifted onto the applicant after the preliminary findings by the vetting body, that the lack of statutory limitation for asset evaluation was not breaching the principle of legal certainty given its *sui generis* nature and context, that the nature of such proceedings was not necessarily requiring a public hearing on appeal if the applicant enjoyed the opportunity of being given at least one public hearing before a level of jurisdiction and that a lifetime ban from re-entering the justice system was not disproportionate in case of serious ethical violation. See also ECtHR, *Nikëhasani v. Albania*, no. 58997/18, 13 December 2022 (regarding the vetting of prosecutors, confirming that the lifetime ban from re-entering justice system for serious ethical violation was proportionate); *Sevdari v. Albania*, no. 40662/19, 13 December 2022, paras. 94-96, where the Court held that in light of the overall assessment of the particular circumstances of the case, including an isolated professional incident in one's career, "*the applicant's dismissal, based essentially on the fact that she was unable to prove that her husband had paid tax on some of his income from lawful activities in the previous two decades and in the absence of any indications of bad faith or deliberate violations by the applicant herself, was disproportionate to the legitimate aims pursued by the vetting process*", although confirming that it does not consider that "*the functioning of the current vetting process in Albania in general, based on the Constitution and the Vetting Act, discloses as such any systemic problems of compliance with the requirements of the Convention*"; *Besnik Cani v. Albania*, no. 37474/20, 4 October 2022, where the Court underlined the importance of an effective domestic court review and redress in case of arguable claim of manifest breach of fundamental domestic rule adversely affecting appointment of a Special Appeal Chamber (SAC) judge sitting on panel which vetted and dismissed prosecutor; *Thanza v. Albania*, no. 41047/19, 4 July 2023, where the ECtHR found a violation of Article 6(1) ECHR as the applicant was in no position to rebut either the factual allegations or their legal classification for the purposes of the vetting process and was not *"afforded an adequate opportunity to oppose the findings made by the vetting bodies and to plead his case in an effective manner*" (refusal of access to classified information or documents without reasoning as to the necessity and proportionality of any such restrictions or their compliance with Article 6 ECHR), also noting the fundamental importance for the appellate body to "*provide adequate reasoning with due regard to solid evidence and other relevant considerations*" and not to be "*excessively formalistic*".

20 See: ODIHR *Recommendations on Judicial Independence and Accountability* (Warsaw Recommendations), 2023 | OSCE.

21 See the *Joint Opinion of the Venice Commission and the Directorate General of Human Rights and Rule of Law (DGI) of the Council of Europe on the Draft Law on the External Assessment of Judges and Prosecutors* (CDL-AD(2023)005), 14 March 2023, and the *Joint Follow Up Opinions of the Venice Commission and the Directorate General of Human Rights and Rule of Law (DGI) of the Council of Europe to the Opinion on the Draft Law on the External Assessment of Judges and Prosecutors*, (CDL-AD(2023)023), of 13 June 2023 and (CDL-AD(2023)035), of 9 October 2023.

22 Adopted by the 8th UN Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August to 7 September 1990.

23 International Association of Prosecutors, *Standards of Professional Responsibility and Statement of the Essential Duties and Rights of Prosecutors*, approved by the International Association of Prosecutors on 23 April 1999. These Standards were annexed to resolution 2008/5 of the Commission on Crime Prevention and Criminal Justice of the UN Economic and Social Council on "Strengthening the rule of law through improved integrity and capacity of prosecution services", which also requested States to take these Standards into consideration when reviewing or developing their own prosecution standards.

24 *UN Convention against Corruption* (UNCAC), adopted by resolution 58/4 of the UN General Assembly on 31 October 2003, entered into force on 14 December 2005. The Republic of Kazakhstan acceded to this Convention on 18 June 2008.

and Evaluative Framework (2015) provides detailed information on the implementation of Article 11 in relation to prosecutorial integrity.[25] The Council of Europe's ("CoE") Committee of Ministers, the Parliamentary Assembly of the CoE and the Conference of Prosecutors General of Europe, as well as the Consultative Council of European Prosecutors (CCPE) also formulated fundamental principles concerning the role of the public prosecution service, which underline the principle of independence and autonomy of prosecutors.[26] Certain principles related to the prosecution service can also be found in several OSCE commitments.[27]

19. The Opinion will also make reference to other documents of a non-binding nature, elaborated at the regional and international levels, which provide more detailed and elaborated guidance, especially the various publications of UNODC,[28] reports of the UN Special Rapporteur on the Independence of Judges and Lawyers,[29] and the opinions, reports and publications of ODIHR[30] and of the Venice Commission.[31]

3. OBJECTIVE AND SCOPE OF THE EXTERNAL EVALUATION OF JUDGES AND PROSECUTORS

20. The Preamble to the Law underlines that the overall objective of the reform process is to enhance the integrity of justice institutions and increase society's confidence in the justice system. Article 2 (1) of the Law further states that *"[t]he assessment shall be an exceptional, unique and time-limited exercise to verify the integrity of the [evaluated] subjects*".

21. As underlined in previous ODIHR legal reviews and above, in cases of alleged lack of "*integrity*" across the judiciary, the starting point should always be the application of ordinary mechanisms and procedures of judicial accountability, unless they have proven

25 See UNODC, "*United Nations Convention against Corruption: Article 11 implementation Guide and Evaluative Framework*", chapter 4.

26 See e.g., Council of Europe (CoE), Committee of Ministers, *Recommendation Rec(2000)19 on the Role of Public Prosecution in the Criminal Justice System* (6 October 2000); and *Recommendation CM/Rec(2012)11 on the Role of Public Prosecutors outside the Criminal Justice System* (19 September 2012). See also Parliamentary Assembly of the Council of Europe (PACE), *Recommendation 1604 (2003) on the Role of the Public Prosecutor's Office in a Democratic Society Governed by the Rule of Law* (27 May 2003). See also the *European Guidelines on Ethics and Conduct for Public Prosecutors* ("Budapest Guidelines"), CPGE (2005)05, adopted by the Conference of Prosecutors General of Europe organized by the Council of Europe on 31 May 2005; and the opinions of the CCPE available at <https://www.coe.int/en/web/ccpe/opinions/adopted-opinions>, particularly the Joint Opinion of the CCPE and the Consultative Council of European Judges (CCJE) on *"Judges And Prosecutors In A Democratic Society"* (2009) (*Bordeaux Declaration*), the *Opinion No. 9 (2014) on European norms and principles concerning prosecutors* (*Rome Charter*), paras. 33-34, which specifically recommends that the "*[i]ndependence of prosecutors […] be guaranteed by law, at the highest possible level, in a manner similar to that of judges*" and that "*prosecutors should be autonomous in their decision making and, while cooperating with other institutions, should perform their respective duties free from external pressures or interferences from the executive power or the parliament, having regard to the principles of separation of powers and accountability*"; *Opinion No. 13(2018) "Independence, accountability and ethics of prosecutors"*; and *Opinion no. 3 (2008) on the "Role of prosecution services outside the Criminal Law Field"*.

27 See e.g., OSCE, *OSCE Copenhagen Document 1990*, para. 5.14, which provides: "*the rules relating to criminal procedure will contain a clear definition of powers in relation to prosecution and the measures preceding and accompanying prosecution*". See also OSCE, *2006 Brussels Declaration on Criminal Justice Systems* (MC.DOC/4/06), whereby members of the OSCE Ministerial Council stated that *"[p]rosecutors should be individuals of integrity and ability, with appropriate training and qualifications; prosecutors should at all times maintain the honour and dignity of their profession and respect the rule of law*" and that *"[t]he office of prosecutor should be strictly separated from judicial functions, and prosecutors should respect the independence and the impartiality of judges*".

28 In particular, the *Guide on the Status and Role of Prosecutors* (2014) and the *Criminal Justice Assessment Toolkit – Prosecution Service* (2006) of UNODC and the International Association of Prosecutors.

29 Available at: <https://www.ohchr.org/en/special-procedures/sr-independence-of-judges-and-lawyers/annual-thematic-reports>, especially the *2020 Report on the Impact of Corruption on Public Prosecution Services* and the *2012 Report on the Independence and Impartiality of Prosecutors and Prosecution Services*.

30 See in particular e.g., ODIHR Needs Assessment Report, *Strengthening functional independence of prosecutors in Eastern European participating States* (2020); and DCAF-ODIHR-UN Women, *Gender and Security Toolkit – Tool 4: Justice and Gender* (2019). See also ODIHR legal reviews on the prosecution service here.

31 European Commission for Democracy through Law (Venice Commission), *Compilation of Venice Commission Opinions and Reports Concerning Prosecutors*, CDL-PI(2022)023; *Report on European Standards as regards the Independence of the Judicial System: Part II The Prosecution Service*, CDL-AD(2010)040; and *Rule of Law Checklist*, CDL-AD(2016)007, 18 March 2016. See also related Venice Commission's legal opinions on the prosecution service.

to be completely ineffective, inadequate and/or malfunctioning. Accordingly, before resorting to an *ad hoc* mechanism such as re-evaluation or vetting, a State must demonstrate that the existing mechanisms and the judiciary in general are compromised to such an extreme scale and depth that the ordinary mechanisms of judicial accountability cannot possibly secure the independence, impartiality and integrity of judges.[32] Since re-evaluation or vetting of sitting judges may ultimately result in their removal from office, a particularly high threshold must be applied in order to respect the fundamental principle of the independence of the judiciary and security of tenure of judges. The specific measures adopted must therefore be strictly necessary and proportionate to the factual situation in the country concerned, and appropriately limited in time.[33] They must also be supported by wide political and public consensus within the country. As also noted in previous ODIHR opinions, such an external evaluation process should remain a wholly exceptional, one-time, temporary measure. Hence, it is positive that Article 2 (1) of the Law specifically mentions these principles.

22. The Opinion does not purport to assess the legitimacy of and the need for the external evaluation contemplated in the Law under review. It primarily aims at identifying the aspects of the Law that could benefit from improvement, though noting that the first hearing with respect to the external evaluation process of judges of appellate courts started on 4 February 2025. The main purpose is to identify possible shortcomings of the legal framework and resulting procedure with a view to ensure respect for rule of law principles and for the individual rights of incumbent judges and prosecutors undergoing such evaluation in accordance with the key principles stated above. All subsequent recommendations in the present Opinion are thus based on the assumption that the external evaluation process is an extraordinary and a strictly temporary measure to address systemic challenges, including reported high level of corruption and lack of public trust in the justice system in Moldova.

23. At the same time, with respect to judicial reforms addressing integrity and accountability deficiencies, it has been noted that "*changes in personnel are generally insufficient to turn ineffective or 'complicit' judiciaries into trustworthy arbiters and reliable guarantors of rights, if not accompanied by necessary structural changes, including means to strengthen judicial independence*,[34] *proper judicial training*,[35] *and measures to promote a change of culture within the judiciary*."[36] It will therefore be essential **that the ongoing external evaluation is complemented by measures to render the ordinary accountability mechanism processes functional and effective, especially in relation to judicial disciplinary proceedings, performance evaluation and asset declaration, judicial training and other measures, including proper financing of the administration of justice, to avert the need to resort to the use of *ad hoc* mechanisms**.

24. The Law is applicable only to judges and prosecutors who held managerial positions or operate at the appeal level (and prosecutors of specialized prosecutor's office), as well as candidates to certain of these positions. Managerial positions are key in the context of the independence of the judiciary and it may be justifiable that selection processes for such

32 See e.g., International Commission of Jurists, *Judicial Accountability - A Practitioner's Guide* (2016), pages 83-84.
33 See e.g., *ibid*. pages 83-84, *Judicial Accountability - A Practitioner's Guide* (2016).
34 See also UN Special Rapporteur on the Promotion of Truth, Justice, Reparation and Guarantees of Non-recurrence, *Report on Guarantees of Non-Recurrence*, UN Doc A/HRC/30/42, 7 September 2015, para. 57. See also Parliamentary Assembly of the Council of Europe (PACE) Monitoring Committee, *Report on the Functioning of Democratic Institutions in the Republic of Moldova*, 16 September 2019, para. 102, where it is noted that *"[c]hanging officials and staff members might be relevant if duly justified",* but also emphasizing that *"[i]t is, however, all the more important to ensure that legal changes are implemented with a view to consolidating institutions and independent bodies: reversing legal systems should not be done at the detriment of due respect of predictable procedures, based on clear and objective criteria and should not lead to a 'witch hunt'".*
35 ODIHR, *Kyiv Recommendations on Judicial Independence in Eastern Europe, South Caucasus and Central Asia* (2010), para. 19.
36 See ODIHR, *Opinion on the Law on Some Measures related to the Selection of Candidates for the Positions of Members in the Self-administration Bodies of Judges and Prosecutors* (Moldova), 28 September 2022, para. 33.

positions be subject to special scrutiny to guarantee the integrity of these key players in the administration of justice.

25. As noted above, with the 2024 amendments, the personal scope of those candidates subject to the *ad hoc* external evaluation has been reduced to only encompass those successful candidates for the positions of court of appeal judges and chief/deputy chief prosecutors of a prosecutor's office, and up to two candidates successful for the other posts who have received the highest scores in the contest.[37] It is welcome that the personal scope of such external evaluation has been reduced given the sheer number of office-holders potentially falling within its purview,[38] all the more given the estimated average duration of a single re-evaluation process of more than 100 days.[39] This should in principle reduce the risk of impacting the normal functioning of the judiciary and prosecution service, seeing the delays of the ongoing evaluation process for members of self-administration bodies and of incumbent SCJ judges.

26. More generally, the legal drafters should assess whether the personal scope envisaged for the *ad hoc* external evaluation of the other judges and prosecutors as envisaged in the Law – especially as it relates to candidates for positions that may become vacant as a result of the external evaluation – remains strictly necessary and proportionate. In this respect, while recognizing that the SCM and SCP are empowered by the Law to adopt the final decisions with respect to the external evaluation, it may be questioned why the reformed self-administration bodies for judges and prosecutors, composed of members who have themselves been subject to external evaluation,[40] would not take over the assessment of the candidates to the positions which may have become vacant as a result of the external evaluation. According to Article 15 (7) (b) of the Law 26/2022, after the completion of the evaluation of these candidates, the SCM will convene the general assembly of judges to select the members of the Evaluation and Selection Board.[41] As indicated in previous ODIHR opinions, constitutional bodies and ordinary mechanisms should be favoured providing that they are independent, operational and effective, over *ad hoc* extraordinary mechanisms. **The legal drafters may therefore consider having the candidates for the vacant positions selected by the Evaluation and Selection Board of Judges and Superior Council of Prosecutors' Selection and Evaluation Board once the members for these Boards are selected and appointed.**

RECOMMENDATION A.

To consider granting the ordinary mechanisms – the Evaluation and Selection Board of Judges and Superior Council of Prosecutors' Selection and Evaluation Board – the role to evaluate and select candidates to positions that may become vacant as a result of the external evaluation.

37 See Article 3 (1) (g) and (h) of the Law.

38 In its March 2023 Opinion on the then Draft Law, the Venice Commission estimated the proposed "vetting" mechanism to cover about 160 judges (out of 433 currently occupying judges' positions) and 230 prosecutors (out of 640 currently serving prosecutors); see Venice Commission, *Republic of Moldova - Joint opinion of the Venice Commission and the Directorate General of Human Rights and Rule of Law (DGI) of the Council of Europe on the draft Law on the external assessment of Judges and Prosecutors*, 14 March 2023, para. 11.

39 See Commission on the External Evaluation of Judges and Candidates for the position of Judge of the Supreme Court of Justice, *2023 Annual Report*, para. 30.

40 Especially the Evaluation and Selection Board of Judges (see <Subjects evaluated by the Vetting Commission>) and the Superior Council of Prosecutors' Selection and Evaluation Board (see <Subjects of evaluation – Prosecutor Vetting Commission>).

41 This meeting is scheduled to take place on 19 December 2024, see: MOLDPRES News Agency - Judges who passed external evaluation to be appointed at Moldova's General Assembly of Judges.

4. EVALUATION COMMISSION

27. As mentioned above, the duties of the CEJ are exercised by the Evaluation Commission established by the Law No. 65/2023 Law No. 65/2023 on the External Evaluation of Judges and Candidates for the Position of Judge of the SCJ (Article 22 (3) of the Law). Hence, the six members of the CEJ are the same as those appointed by the Parliament to sit within the Evaluation Commission.[42] The Rules of Organization and Functioning of the Independent Evaluation Commission on the External Evaluation of Judges and Candidates for the Position of Judge of the Supreme Court of Justice have been amended for the purpose of conducting the external evaluation under the Law No. 252/2023 and are therefore applicable to the CEJ (see e.g., Section VII of the Rules).[43] The CEJ has started the process for the assessment of the judges of the courts of appeal by informing the judges about the initiation of the evaluation procedure and developing the required Declarations and Ethics Questionnaire to be used during the process.[44] On 4 February 2025, the first hearing with respect to the external evaluation process of judges of appellate courts took place.[45] It should be noted that a great majority of court of appeal judges have resigned as a sign of protest.[46]

28. Similarly, the CEP is operational and on 18 December 2023 approved its own Rules of Procedure of the Prosecutor Vetting Commission (as most recently amended on 20 June 2024),[47] along with the Declaration and Ethics Questionnaire, which are to be completed by the subjects it will evaluate.[48] These rules govern the organization and functioning of the CEP, including its conduct, meeting procedures, voting processes, conflict of interest obligations, communication and transparency efforts, secretariat operations, evaluation criteria, public hearing procedures, and personal data protection.

29. For the external evaluation to be effective, it is important that the powers of the Evaluation Commissions be commensurate to the task, and that the Commissions fully respect the rule of law (including transparency) and the rights of the evaluated subjects.

30. A re-evaluation or vetting should be carried out by a competent, independent and impartial body. In determining whether a body can be considered "independent" according to Article 6 (1) of the ECHR, the ECtHR generally considers various elements, *inter alia*, the manner of appointment of its members and their term of office, the existence of guarantees against outside pressure, whether the body presents an appearance of independence, their financial independence and ability to decide on its organizational structure and personal.[49]

31. The Law accords different roles to the Evaluation Commissions. On the one hand, the bodies carry out the evaluation of incumbent judges and prosecutors, which would be carrying out an *ad hoc* evaluation process of the ethics and financial integrity. On the

42 One of the CEJ members resigned in 29 March 2024 with effect from 15 May 2024. A new member was appointed by the Parliament on 18 July 2024; see <Members of the Vetting Commission>.
43 Amended on 27 November 2023 and 22 March 2024, see <6613c94d14b7cec6484bc105_6.pdf (website-files.com)>.
44 See <Vetting - Information for candidates>.
45 See <The first hearings in the evaluation process of the judges of the Centre Court of Appeal>.
46 See <Subjects of the evaluation of the Vetting Commission>: out of 40 court of appeal judges of the Court of Appeal of the Centre (formerly Court of Appeal of Chisinau), 21 have resigned; out of 15 court of appeal judges of the Court of Appeal of the North (formerly Court of Appeal of Balti), 12 have resigned; and out of 8 court of appeal judges of the Court of Appeal of the South (formerly Court of Appeal of Cahul and Comrat), 3 have resigned. See also Vetting of Courts of Appeal starts with the evaluation of the Chisinau Court of Appeal (vettingmd.eu); see also: Key aspects regarding the operation of the panels in evaluating certain categories of judges (vettingmd.eu).
47 See <https://vettingmd.org/wp-content/uploads/2024/07/2024.06.20_ROP_ENG.pdf>.
48 See: Internal Regulations – Prosecutor Vetting Commission (vettingmd.org)
49 See, regarding the assessment of the Independence and impartiality of vetting bodies, ECtHR, *Xhoxhaj v. Albania*, no. 15227/19, 9 February 2021, paras. 295-302. See also more generally, ECtHR, *Campbell and Fell v. the United Kingdom*, no. 7819/77, 7878/77, 28 June 1984, para. 78. See also *Olujić v. Croatia*, no. 22330/05, 5 May 2009), para. 38; and *Oleksandr Volkov v. Ukraine*, no. 21722/11, 25 May 2013, para. 103.

other hand, they also carry out the assessment of the candidates for certain judicial or prosecutorial positions to fill in the vacant posts, which can be seen as part of or similar to the regular process to find suitable candidates for these positions. Since the former may ultimately result in removal and hence impact the security of tenure of these judges and prosecutors which constitutes a fundamental guarantee of their independence, it therefore warrants a more cautious approach. In that respect, it is welcome that the Law contains a number of safeguards to ensure the institutional independence of the Evaluation Commissions and the individual independence of its members.

32. To highlight their independence, the Law states that in their work, the Commissions shall be guided by the Constitution, the Law and by other regulatory documents governing the areas related to their work (Article 5 (2) of the Law). It is important to note that neither the executive nor the legislative branch has exclusive power in the appointment of the Evaluation Commissions' members and no branch of power has the possibility to appoint the majority of members since half of them (three) are proposed by development partners,[50] and the three other members are proposed by parliamentary factions while respecting the proportional representation of the majority and the opposition (Article 6 (1) of the Law). Moreover, the members are appointed for a fixed term and serve only until the last appeal has been examined by the SCJ (Article 4 (6)). The Evaluation Commissions have a separate budget (Article 4 (7)), which contributes to the financial independence of these bodies. Further, their members are protected by irremovability, and benefit from functional immunity along with the staff of their respective secretariats (Article 5 (6)). It is welcome that the amendments adopted in November 2023 extend the functional immunity to cover not only the heads of the respective secretariats but also their staff, who carry out essential functions to support the completion of the external evaluation process. It is not clear from the text of the Law what is the material scope of the functional immunity as it refers to not being liable "*for opinions expressed in the exercise of their mandate and duties*". In principle, functional immunity should only apply for *lawful* acts performed in carrying out their functions and should not cover certain intentional crimes, such as accepting bribes, corruption, traffic of influence or other similar offenses, which cannot be considered as acts committed in the *lawful* exercise of their functions.[51] **It is recommended to specify the scope of the functional immunity envisaged in the Law accordingly.**

33. The Law also requires the members of the Evaluation Commissions to provide declarations of assets and personal interests (Article 7 (6)), which has proven to be a useful tool to prevent corruption, detect illicit enrichment and conflicts of interests. Only the Prosecutor General has the power to initiate criminal proceedings against the Evaluation Commissions' members and the heads of their respective secretariats, but only with the consent of the respective Evaluation Commission, except in the case of *flagrante delicto*, where such consent is not required.

34. In light of the foregoing, the combination of the above provisions provides strong safeguards to ensure the independence of the Evaluation Commissions and that they are not compromised through fear of the initiation of prosecution or civil action, including by state authorities.

50 According to Article 6(6) of the Law, "*development partners shall mean international donors (international organisations, diplomatic missions and their representations in the Republic of Moldova) active in the field of justice reform and the fight against corruption during the last 2 years. The list of development partners is approved by Government order*."

51 See e.g., as a comparison, on the functional immunity of judges, ODIHR-Venice Commission, *Joint Opinion on the Draft Amendments to the Legal Framework on the Disciplinary Responsibility of Judges in the Kyrgyz Republic* (2014), paras. 41-42. See also, e.g., Venice Commission, *Amicus Curiae Brief on the Immunity of Judges in Moldova* (2013), para. 19.

35. The independence of the Evaluation Commissions is also ensured through their respective Secretariats (Article 9), which "*shall be independent of any public authority and shall work solely for the purpose of assisting the evaluation commission in discharging its duties*". However, the Law also provides that *"[a]t the request of the chairperson of the evaluation commission or of the head of the secretariat, the public authorities and institutions shall delegate or temporarily detach employees to assist the evaluation commission to discharge its duties, including by way of derogation from the provisions of the laws governing the operation of those public authorities and institutions and the laws governing the status of certain categories of civil servants."* This delegation or secondment of employees from other public authorities and institutions may involve a certain material, hierarchical and administrative dependence of such employees on their primary employers. **The Law should make it clear that delegated or seconded employees shall act independently from the body which delegated or seconded them and/or from their primary employers. The Rules of Organization and Functioning of the Evaluation Commissions should also clarify the required expertise and selection criteria for secretariat staff and their remuneration.**

4.1. Composition and Selection Process

36. The current composition of the CEJ consists of five men and one woman and the CEP of three women and three men. Nothing is said in the Law as to the need to ensure gender balance throughout the process of proposing candidates and in the respective rules and procedures governing the selection and appointment.[52] It is worth recalling international recommendations, which urge states to adopt laws and other measures to ensure gender parity in decision-making positions at all levels in public administration and the judiciary.[53] Unless provided in other legislation, **it would have been advisable to reflect in the Law the fact that gender considerations should be taken into account throughout the nomination, selection and appointment process, with the aim to ensure gender parity.[54] This could be achieved by requiring that the pool of proposed candidates nominated by the parliamentary factions and by the development partners be balanced in terms of gender, as well as ensuring that the relative representation of women and men is taken into consideration during the selection by the parliamentary committee and then in the final appointments, though not at the expense of the basic criterion of merit.**

37. A number of recommendations made in the *ODIHR Report on the Evaluation (pre-vetting) of Candidates for Members of the Superior Council of Magistracy in Moldova*

52 See Article 7 of the UN Convention on the Elimination of Discrimination against Women (CEDAW), which deals with women's equal and inclusive representation in decision-making systems in political and public life, and Article 8, which calls on all States Parties to take appropriate measures to ensure such access; Beijing Platform for Action, Chapter I of the Report of the Fourth World Conference on Women, Beijing, 4-15 September 1995 (A/CONF.177/20 and Add.1), Strategic Objective G.1. "*Take measures to ensure women's equal access to and full participation in power structures and decision-making*"; Council of Europe *Recommendation Rec (2003)3 of the Committee of Ministers to CoE Member States on the balanced participation of women and men in political and public decision making* adopted on 30 April 2002; *OSCE Ministerial Council Decision No. 7/09 on Women's Political Participation in Political and Public Life*, adopted on 2 December 2009.

53 See CEDAW Committee, *General Recommendation No. 40 of the CEDAW Committee on equal and inclusive representation of women in decision-making systems*, 23 October 2024, para. 49 (a). The OSCE Athens Ministerial Council Decision on Women's Participation in Political and Public Life calls on participating States to "*consider providing for specific measures to achieve the goal of gender balance in all legislative, judicial and executive bodies*" (see the OSCE Ministerial Council, Decision No. 7/09, Women's Participation in Political and Public Life, para. 20). According to Council of Europe's Recommendation Rec (2003)3, the Member States should provide for gender-balanced representation in all appointments made by a minister or government to public committees and in posts or functions whose holders are nominated by government and other public authorities; see also the Appendix to the Recommendation Rec (2003)3 of the Committee of Ministers to CoE Member States on the balanced participation of women and men in political and public decision-making, adopted on 30 April 2002. Furthermore, General Assembly Resolution 66/130General Assembly Resolution 66/130, adopted on 19 March 2012, encourages States "to appoint women to posts within all levels of their Governments, including, where applicable, bodies responsible for designing constitutional, electoral, political or institutional reforms", para. 8.

54 In line with CEDAW Committee, *General Recommendation No. 40 of the CEDAW Committee on equal and inclusive representation of women in decision-making systems*, 23 October 2024, para. 49 (a).

are also relevant to the present analysis of the Law, in particular with respect to **the requirement for the parliamentary committee to provide a reasoning for their choice when recommending the national and international members and to stipulate consultation of civil society in the selection of the national members to the Evaluation Commission**.[55] While CEJ and CEP have already been composed, this consideration should be taken into account in the process of potential future appointments to replace departing members.

38. In addition, Article 6 (1)(a) refers to the "*proportional representation of the majority and the opposition*" among the three members proposed by parliamentary fractions. It is not entirely clear however whether and how the parliamentary opposition will be guaranteed representation within the Evaluation Commissions since from the wording of the provision, candidates proposed by the opposition would still each individually require the support of the Committee on Legal Affairs, Appointments and Immunities followed by a 3/5th majority vote for each candidate in the plenary (Article 6 (2)). This means that the opposition-backed candidate would not necessarily become a member of the Evaluation Commission, which may contribute to the politicization of the process. **A more appropriate regulation could have been to specify that the three eligible candidates proposed by the parliamentary fractions are selected by the Committee in compliance with the principle of proportional representation of the majority and the opposition and are then voted *en bloc* by the Parliament instead of individually.**[56] From Article 6 (5), it is also not clear whether the three nominees proposed by development partners are voted *en bloc* or individually by the Parliament and this should be clarified. There is also no requirement for an alternative candidate if all candidates nominated by the opposition are rejected for not complying with Article 7(1) or did not obtain the highest number of votes before the Committee. It is recommended that the Law **allows parliamentary fractions to propose alternative candidates in the event that candidates previously proposed by the opposition are not selected. Further, in case of early termination of a mandate of a candidate proposed by the opposition, the above recommendation would ensure that a substitute member is elected from the list proposed by opposition.**

39. The parity between members nominated by the parliamentary fractions and the development partners reduces the risk of politicization of the Evaluation Commissions. The members of the Evaluation Commissions need to fulfil the requirements listed in Article 7 (1) of the Law.[57] Development partners nominate up to six candidates by joint letter (Article 6 (5)). To ensure the legitimacy of this approach involving development partners, it is important that the nomination process is open, transparent and inclusive.[58] **It is thus recommended to detail in the Law the selection procedure ensuring that development partners invite applications from suitable candidates while conducting a competitive process, while ensuring openness and transparency of the selection**

55 *ODIHR Report on the evaluation (pre-vetting) of candidates for members of the Superior Council of Magistracy in Moldova* (29 September 2023), para. 24.

56 See Venice Commission and DGI, *Joint Opinion on the draft Law on the external assessment of Judges and Prosecutors*, 14 March 2023, para. 35.

57 i.e., (a) have higher education; (b) have an impeccable reputation; (c) have at least 10 years' experience in one or more of the following fields: law, economics, tax, finance; (d) not hold and or have not held office as a Member of Parliament or member of the Government in the last 3 years; (e) have not been a member of a political party in the last 3 years; (f) have not held the office of judge or prosecutor in the Republic of Moldova in the last 3 years; (g) have sufficient knowledge of English to carry out the tasks of the Evaluation Commission

58 See e.g., ODIHR, *Interim Opinion on the Draft Law on the Reform of the Supreme Court of Justice and the Prosecutor's Offices of the Republic of Moldova* (as of September 2019), October 2019, paras. 52 and 72. See also e.g., Venice Commission, *Ukraine - Opinion on the Draft Law on Anticorruption Courts and on the Draft Law on Amendments to the Law on the Judicial System and the Status of Judges (concerning the introduction of mandatory specialisation of judges on the consideration of corruption and corruption-related offences)*, CDL-AD(2017)020, para. 51.

procedure.[59] **In addition, to enhance the inclusiveness of the process, local civil society representatives working on rule of law and human rights could also be involved in the process for selecting both the candidates proposed by the parliamentary fractions and those proposed by the development partners**, for instance, by establishing consultative pre-selection bodies involving civil society representatives to assist during the selection/nomination process, seek feedback from civil society organizations on a proposed shortlist, organizing consultations with candidates, allowing the attendance of civil society representatives as monitors or observers.

40. Finally, while the involvement of development partners or international experts in vetting or similar processes aim to strengthen the impartiality and credibility of the process, it is important that such a modality enjoys public support, there is a clear undertaking of international partners to contribute to the process, and that such a scheme is temporary and ultimately replaced with ordinary mechanisms of judicial and prosecutorial accountability.[60]

4.2. Eligibility Criteria

41. The highest level of professionalism should be required for members of the Evaluation Commissions as they will be evaluating the experienced judges and prosecutors of the country. The Law sets out eligibility criteria of the prospective members of the Evaluation Commissions in Article 7 (1) and (2) of the Law. These include: holding a university degree; having an impeccable reputation; having at least 10 years' experience in one or more of the following areas: legal, economic, tax, financial; not holding and having held the position of member of the Parliament of the Republic of Moldova or member of the Government of the Republic of Moldova; not having been a member of a political party in the last 3 years; not having been a judge or prosecutor in the Republic of Moldova for the last 3 years; having has sufficient knowledge of English to carry out the duties of the Assessment Commission. As a general point of ineligibility, membership of the assessment commission is incompatible with any public office in Moldova.

42. Unless it is clear in the Moldovan context how **the requirement of "impeccable reputation" is interpreted, it is recommended to clarify how this is determined**. As also recommended in the *ODIHR Report on the Evaluation (pre-vetting) of Candidates for Members of the Superior Council of Magistracy in Moldova*, **the Law should be supplemented to introduce a modality for undertaking background checks of the candidates for the Evaluation Commissions**.[61]

43. The Law provides for two ineligibility criteria which aim at limiting political influence or affiliation, namely a member may not be or have been a member of the parliament, the government, or a political party from Moldova[62] during the last three years nor have been a judge or a prosecutor, during the last three years. The ECtHR has underlined that, while Article 6 (1) of the ECHR is applicable to vetting processes, the non-representation of serving professional judges was consistent with the extraordinary nature and spirit of the vetting process to avoid individual conflicts of interest and ensure public confidence in

59 See e.g., Venice Commission, *Ukraine - Opinion on the Draft Law on Anticorruption Courts and on the Draft Law on Amendments to the Law on the Judicial System and the Status of Judges (concerning the introduction of mandatory specialisation of judges on the consideration of corruption and corruption-related offences)*, CDL-AD(2017)020, para. 51.

60 See ODIHR, *Interim Opinion on the Draft Law on the Reform of the Supreme Court of Justice and the Prosecutor's Offices of the Republic of Moldova* (as of September 2019), October 2019.

61 *ODIHR Report on the Evaluation (pre-vetting) of Candidates for Members of the Superior Council of Magistracy in Moldova* (29 September 2023), paras. 24 and 39.

62 On 7 July 2023, the Parliament adopted a law that interpreted that provision as applying only to political parties from Moldova.

the process[63] (as opposed to disciplinary or other bodies of judicial administration[64]). While there is no decisive influence of the political branches as to the appointment of the members of the Evaluation Commissions and these Commissions' financial and operational independence appears guaranteed, it may be of concern that members are not required to have exercised judicial function[65] or at least have a law degree and/or some legal experience, Article 7(1)(c) refers to experience in law or economics or taxation or finance. While acknowledging that other professionals can make a useful contribution to the evaluation of judges or prosecutors, it is important that some or a majority of members can draw from relevant knowledge of and experience in judicial systems or **at least some past legal experience and/or legal qualifications and the eligibility requirements should be amended accordingly**. **This consideration should be taken into account in case of replacements and appointments of new (alternative or substitute) members.**

44. According to Article 7 (2), membership of the Evaluation Commissions is incompatible with any public office in the Republic of Moldova. It is not clear whether "public office" is clearly defined in the Moldovan legal system. For example, whether the public notaries or professors at public universities would as such be ineligible to be members of the Evaluation Commissions, which should not be the case.

45. It should be ensured that no conflicts of interest arise in the Evaluation Commissions when carrying out their various tasks.[66] Article 10 of the Law only notes that members of the Evaluation Commissions should "*not [to] engage in activities that could give rise to a conflict of interest and actions incompatible with membership of the Evaluation Commission and to declare them in the manner laid down in the rules governing the organization and functioning of the Evaluation Commission*." However, Article 7 does not provide for the ineligibility of persons whose spouse, parents, children or children's spouses are judges or prosecutors. Moreover, other situations of potential conflicts of interest may arise with close personal relations. **This should be included as grounds for ineligibility, or at least as grounds of recusal thus obliging Commissions' members to recuse themselves in such a situation.**

4.3. Termination of Membership

46. According to Article 7 (3), membership of the Evaluation Commissions shall cease in case of resignation, removal, death or termination of the work of the Evaluation Commissions. However, the Law is silent on the timeline for appointing a new member in case of termination of membership due to resignation, removal or death, which may impair or delay the functioning of the Evaluation Commissions. Whilst the appointment procedure is within the purview of the Parliament, **the Law should envisage a timeline within which such a replacement should be accomplished,** or alternatively, for the purpose of efficiency, **substitute members could be introduced for members of the Evaluation Commissions, after having gone through the same nomination and**

63 See, regarding the assessment of the Independence and impartiality of vetting bodies, ECtHR, *Xhoxhaj v. Albania*, no. 15227/19, 9 February 2021, paras. 299-300.

64 According to international standards, in order to safeguard judicial independence, every ordinary decision affecting the selection, recruitment, appointment, evaluation or termination of office of judges should be undertaken by an authority independent of the executive and legislative powers within which at least one half of those who sit are judges elected by their peers, to prevent outside, possibly undue influence; see e.g., ODIHR, *Warsaw Recommendations on Judicial Independence* (2023), paras. 2 and 17; and 2010 ODIHR Kyiv Recommendations. See also *2010 Venice Commission Report on the Independence of the Judicial System*, which both state that *"[a] substantial element or a majority of the members of the Judicial Council should be elected by the Judiciary itself*". On disciplinary bodies in particular, see also CoE, *European Charter on the Statute for Judges* (1998) DAJ/DOC (98)23), para. 5.1; and ECtHR, *Oleksandr Volkov v. Ukraine*, no. 21722/11, 25 May 2013, para. 109.

65 As a matter of fact, not all members have judicial experience.

66 See ODIHR, *Interim Opinion on the Draft Law on the Reform of the Supreme Court of Justice and the Prosecutor's Offices of the Republic of Moldova* (as of September 2019), October 2019, para. 75. See also, as a comparison, *CCJE Opinion no. 10 (2007) on Judicial Councils*, Recommendation D(a).

appointment process as the main members of these bodies, although this may not be feasible with respect to the ongoing process**.** If nevertheless considered, such a mechanism should ensure **that an outgoing member be replaced by their alternates nominated by the same nominating body who had initially nominated the outgoing member. It is also noted that the Law does not address the issue of potential deadlock regarding the parliamentary vote of 3/5th to approve a new member. It would have been useful to envisage an effective anti-deadlock mechanism in the Law e.g., the co-optation by the Evaluation Commissions or other modalities. In addition, the Law should be explicit, to the extent possible, with respect to gender as well as diversity considerations when replacing a member. This would help ensuring or safeguarding gender balance and the independence of the Evaluation Commissions.**

47. Removal may occur in cases of incompatibility or no longer complying with the eligibility requirements listed in Article 7 (1), intentional violation of the Law or Rules of Procedure, committing an offence with intent, the failure to attend at least three meetings "without due cause", or the inability to serve as a member, including for health reasons, for more than 30 days (Article 7 (3) (2)). The decision on removal is adopted by a vote of at least 2/3rd of the members of the Evaluation Commission, without the concerned member voting.

48. **Unless it is clear in the Moldovan context how the term "due cause" is interpreted, this can be very subjective and such wording should be clarified. Also, guidance on how the 30 days are to be counted is not provided. In addition, in order not to delay the evaluation process, it may generally be advisable to provide for the possibility of temporary replacement of a member on the ground of impossibility to serve due to illness. In principle, grounds of health should not serve as a ground for revocation of the mandate, unless this health situation would make it permanently impossible for members to perform their functions.**

49. Finally, Article 8 (3) provides for the grounds for termination of office of the Chairperson and regulates who may vote. **It should be clearly stated that the Chairperson has no right to vote on this matter.**

RECOMMENDATION B.

Regarding the composition of the Evaluation Commissions and replacement of departing members, though recognizing that they are already formed and operational, the following improvements may be considered:

1. to introduce in the Law a timeline for electing a replacement in case of termination of membership due to resignation, removal or death, or envisage introducing alternate or substitute members selected through the same nomination and appointment process as the initial members, while ensuring that gender considerations are taken into account, throughout the nomination, selection and appointment process for new members with the aim of ensuring gender parity
2. to specify that the three eligible candidates proposed by the parliamentary fractions are selected by the Committee on Legal Affairs, Appointments and Immunities in compliance with the principle of proportional representation of the majority and the opposition are voted *en bloc* by the parliament instead of

individually or that the Law otherwise requires a specific number of members to be nominated by the majority and by the opposition respectively.

3. to envisage an anti-deadlock mechanism in the Law in case the parliamentary vote of 3/5th for electing a new member cannot be reached e.g., the co-optation by the Evaluation Commission or other modalities.

5. EVALUATION PROCEDURE

5.1. Evaluation Criteria

50. As underlined in the caselaw of the ECtHR, the re-evaluation criteria should fulfil the qualitative requirements of accessibility and foreseeability,[67] to avoid possibility for arbitrary application. Article 11 of the Law sets out criteria for the assessment of subjects' "ethical and financial integrity". The Evaluation Commission's evaluation then serves as the basis for the decision by the SCM or the SCP.

51. The criterion of "ethical integrity" includes two indicators, namely when the judge: (a) "*in the last 5 years* […], *has seriously violated the rules of ethics and professional conduct of judges, prosecutors or, as the case may be, other professions, as well as if they acted arbitrarily or issued arbitrary acts, over the last 10 years, contrary to the imperative rules of the law and the European Court of Human Rights had established, before the adoption of the act, that a similar decision was contrary to the European Convention on Human Rights*"; (b) "*over the last 10 years, the subject had incompatibilities and conflicts of interest in their activity that affected the position held*."

52. In both cases, a judge or prosecutor or a candidate to the position of judge or prosecutor shall be deemed not to meet these criteria if the respective Evaluation Commission has serious doubts that certain facts support that either of these aspects are not met. This implies that the findings of the Commission do not establish the fault of the persons concerned, or do not directly entail any liability, which would most likely require a stricter burden of proof. However, the wording of Article 11 gives wide discretion to the Commission's evaluation, which then serves as the basis for the SCM's decision. It should be recalled that a legal background is not required for membership on the Commission and its members may not, as a result, necessarily have the requisite professional qualifications to make such an assessment.

53. Generally, the reference to "ethical integrity" is problematic since, as pointed out by ODIHR on several occasions, given the nature of rules of professional ethics, they "*are often drafted in general and vague terms, which do not fulfil the requirement of foreseeability*", hence they "*should not be equated with a piece of legislation and directly*

67 See ECtHR, *Xhoxhaj v. Albania*, no. 15227/19, 9 February 2021, paras. 384-388. See also e.g., as a comparison, the criteria for the selection of judges and ordinary performance evaluations, UN Human Rights Committee, *General Comment no. 32 on Article 14 of the ICCPR: Right to Equality before Courts and Tribunals and to Fair Trial*, 23 August 2007, para. 19; CoE, *Recommendation CM/Rec(2010)12 of the Committee of Ministers to Member States on Judges: Independence, Efficiency and Responsibilities*, adopted by the Committee of Ministers on 17 November 2010, para. 44; *ODIHR Kyiv Recommendations on Judicial Independence in Eastern Europe, South Caucasus and Central Asia* (2010) (ODIHR Kyiv Recommendations), para. 21; *Universal Charter of the Judge* (1999, as last updated in 2017), adopted by the International Association of Judges, Articles 4-1 and 5-1; the *European Charter on the Statute for Judges* (Strasbourg, 8-10 July 1998), adopted by the European Association of Judges, DAJ/DOC (98)23, paras. 2.1. and 2.2; *Report on the Independence of the Judicial System – Part I: The Independence of Judges (2010)*, CDL-AD(2010)004, para. 27; CCJE, *Opinion no. 10 (2007) on the Council for the Judiciary at the Service of Society, paras. 50-51*; CCJE, *Opinion no. 17 (2014) on the Evaluation of Judges' Work, the Quality of Justice and Respect for Judicial Independence*, paras. 9 and 17. See also ODIHR Warsaw Recommendations on Judicial Independence (2023), which provide that "*Disciplinary proceedings and periodic evaluations of judges should be subject to clearly differentiated procedures, conducted by separate bodies under well-defined standards promulgated by law"*, para. 26.

applied as a ground for disciplinary sanctions".[68] While certain international documents do refer to "integrity" as being essential to the proper discharge of their duties judicial office, they also warn against the use of "integrity" as a normative concept, emphasizing that its meaning depends on the context and that it is rather recommended to assess whether a specific conduct is likely to diminish respect in the minds of the public.[69] Furthermore, the purpose of a code of ethics is to provide overall rules, recommendations or standards of good behaviour, that guide the actions of judges and prosecutors, and enable them to assess specific issues, which may arise in conducting their day-to-day work, or during off duty activities. The codes of ethics should consist of guiding principles and norms and should not automatically lead to sanctions impacting the status of a judge or of a prosecutor.

54. In the present situation, the assessment of "ethical integrity" involves, among others, a verification of whether the subject of the external evaluation has seriously violated rules of ethics and professional conduct of judges or, as the case may be, prosecutors. As underlined in the caselaw of the ECtHR, the grounds used in the context of vetting or re-evaluation of judges should "*normally be read and interpreted in conjunction with other more specific disciplinary rules, as in force at the material time, sanctioning breaches of an ethical or professional nature*".[70] In the Moldovan context, as already recommended by ODIHR in the 2023 monitoring report,[71] with respect to the evaluation (pre-vetting) of candidates for members of the Superior Council of Magistracy, it is important **to more precisely define the scope and meaning of the term "ethical integrity", possibly indicating to actions that could amount to disciplinary violations, to avoid an overly broad and potentially arbitrary application**.[72]

55. Moreover, breach of "ethical integrity" may potentially cover a wide range of actions ranging from minor misbehaviours to serious misconduct giving rise (potentially) to disciplinary sanctions. The ECtHR has underlined, in the context of vetting, that dismissal from office for minor or isolated professional error was disproportionate, noting the absence of bad faith or deliberate violations by the applicant.[73] It is thus recommended **to more precisely indicate the specific actions that could amount to serious violations of rules of judicial ethics and professional conduct**, excluding from their scope minor or isolated professional errors or acts committed without bad faith or that that were not deliberate.

56. The assessment of whether a judge "…*acted arbitrarily or issued arbitrary acts, over the last 10 years, contrary to the imperative rules of the law and the European Court of Human Rights had established, before the adoption of the act, that a similar decision was contrary to the European Convention on Human Rights*" (Article 11 (2) (a)) would seemingly allow the Evaluation Commission to review the merits of decisions that were taken by the judges. The provision specifies that an arbitrary act would depend on having the ECtHR previously held a similar act/decision as being contrary to the ECHR, which

68 See e.g., ODIHR Warsaw Recommendations on Judicial Independence (2023), para. 25; and ODIHR-Venice Commission, *Joint Opinion on the Draft Amendments to the Legal Framework on the Disciplinary Responsibility of Judges in the Kyrgyz Republic* (2014), paras. 25-26. See also *CCJE Opinion no. 3 on ethics and liability of judges* (2002), paras. 44 and 46-47; Venice Commission, *Opinion of the Venice Commission on the Draft Code on Judicial Ethics of the Republic of Tajikistan*, CDL-AD(2013)035, para. 31.

69 See UNODC, Commentary on the Bangalore Principles of Judicial Conduct (2007), paras. 101-102. See also CCJE, Opinion no. 3 (2002), paras. 44 and 46-48.

70 See ECtHR, *Xhoxhaj v. Albania*, no. 15227/19, 9 February 2021, para. 387.

71 See the *ODIHR Report on the evaluation (pre-vetting) of candidates for members of the Superior Council of Magistracy in Moldova* (29 September 2023), para. 24 (g) and Section 7.

72 See *ODIHR Report on the evaluation (pre-vetting) of candidates for members of the Superior Council of Magistracy in Moldova* (29 September 2023), para. 24 (g). See also *ODIHR Interim Opinion on the Draft Law on the Reform of the Supreme Court of Justice and the Prosecutor's Offices of the Republic of Moldova* (as of September 2019), para. 81. See also *Venice Commission and DGI, Republic of Moldova - Joint Opinion on the revised draft Law "On some measures related to the selection of candidates for the positions of members in the self-administration bodies of judges and prosecutors"*, CDL-AD(2021)046-e, para. 29.

73 See ECtHR, *Sevdari v. Albania*, no. 40662/19, 13 December 2022, paras. 94-96.

should *a priori* limit its scope. It must be underlined that judicial decisions/acts that were contrary to the established case law of the ECtHR should not automatically result in a negative evaluation as evaluating the integrity of a judge on the basis of the content of judicial decisions should be dealt with utmost caution. It is not clear how the Evaluation Commission will determine that there has been "arbitrary behaviour". If the alleged behaviour potentially amounts to gross negligence or malpractice, an act of corruption or other criminal offence, it should in principle be evaluated through the established ordinary procedure. While in cases of clear signs of gross negligence, professional misconduct or other disciplinary violations, the Evaluation Commission may draw relevant conclusions, allegations of criminal nature should be investigated by the competent authorities and sentenced by the criminal court.

57. Further, Article 11 (2) (b) refers to circumstances where the evaluated subject "admitted incompatibilities and conflicts of interest in their activity that affected the position held" during the last 10 years, which is clearer than the previous wording which was referring to the fact that the subject "had incompatibilities and conflicts of interest in their activity that affected the position held". It is especially welcome that Article 11 (6) of the Law introduced by the amendments of November 2023 clarifies that the assessment is carried out in light of the legal provisions in force at the time when the relevant facts were committed.[74]

58. Financial integrity is assessed based on the determination that (a) "*the difference between assets, expenses and income, for the last 12 years, exceeds 20 average salaries per economy, as set by the Government for the year 2023*; (b) *over the last 10 years, the subject committed tax irregularities as a result of which the amount of unpaid tax exceeded, in total, 5 average wages per economy, as set by the Government for the year 2023.*" For this purpose, the Evaluation Commissions verifies the compliance of the subject with respective tax and transparency laws, as well as with any financial obligations, among others. In addition, the evaluation covers persons close to the candidate within the meaning of the Law no. 133/2016 on the Declaration of Assets and Personal Interests as well as of the persons indicated in Article 33 paragraphs (4) and (5) of the Law no. 132/2016 on the National Integrity Authority.[75]

59. The Evaluation Commissions' members are to make a judgment, based on "serious doubts" that the evaluation subjects violated rules of financial integrity. It should be recalled that a legal background is not required for membership on the Commission and its members may not, as a result, necessarily have the requisite professional qualifications to make such an assessment.

60. The Law is silent as to the admissibility of evidence. Article 6 of the ECHR does not lay down any rules on the admissibility of evidence or the way it should be assessed, which are therefore primarily matters for regulation by national law and the national courts.[76] At the same time, there should be a proper examination of the submissions, arguments and evidence adduced by the parties.[77] In principle, the sources of evidence on which evaluations are based must be sufficient and reliable, particularly if the evidence is to form the basis of an unfavourable evaluation leading to the dismissal of a judge.[78] At the same time, the ECtHR has recognized that in the context of vetting and evaluation of a

74 As also recommended in the *Joint Opinion of the Venice Commission and the Directorate General of Human Rights and Rule of Law (DGI) of the Council of Europe on the Draft Law on the External Assessment of Judges and Prosecutors* (CDL-AD(2023)005), 14 March 2023, para. 71.
75 See: National Legal Framework - Vetting Commission (vettingmd.eu) .
76 See e.g., ECtHR, *Xhoxhaj v. Albania*, no. 15227/19, 9 February 2021, para. 325.
77 *Ibid.* para. 326.
78 CCJE, *Opinion no. 17 (2014) on the Evaluation of Judges' Work, the Quality of Justice and Respect for Judicial Independence*, para. 39.

judge's assets, there needs to be a greater flexibility as to possible temporal, statutory limitations which are usually a guarantee of reliability of evidence, as this would otherwise greatly restrict and impinge on the authorities' ability to evaluate the lawfulness of the total assets acquired by the person being vetted, although noting that such flexibility is not unlimited.[79] In particular, the duty to demonstrate the lawful origin of property or transactions should not impose a disproportionate burden on the judge, for instance with respect to long-term family properties, and should only be limited to significant transactions.[80] In this respect, it is also important that there are possible attenuating circumstances if a vetting subject faces an objective impossibility to submit supporting documents.[81] It is thus welcome that Article 14 (6) of the Law provides that *"[i]n the event of the impossibility of presenting the information due to its inaccessibility, the subject of the evaluation shall inform the evaluation committee about this fact*".

61. The evaluation subject shall be deemed not to have passed the assessment if one or more grounds for non-compliance with the criteria laid down in Article 11 are found to exist (Article 17 (4) of the Law). Contrary to the Rules of Procedure of the Prosecutor Vetting Commission, which elaborates the different factors for the assessment of the ethical integrity criteria in Article 24, the Rules of Organization and Functioning of the Evaluation Commission for judges do not further elaborate the elements to be considered when assessing ethical integrity, only indicating that the subject's cooperation or lack thereof during the evaluation process may be considered or that failure to duly complete the declarations and questionnaires in a timely manner may lead to the conclusion that the subject does not meet the ethical criteria. The Annex to the Rules of Organization and Functioning only specifies modalities for determining unjustified wealth.

62. The **Law and respective Rules of the CEJ would benefit from further elaboration regarding the different elements to be considered by the Evaluation Commission for the final evaluation of "ethical integrity"**; it would also be more transparent if the Rules would be aligned in this regard to ensure that the same concepts are not applied in a different manner by the respective Evaluation Commissions.

63. Finally, the evaluation should be carried out without discrimination on any ground, in line with the principle of equality, international anti-discrimination standards and applicable domestic law.[82] **This should be reflected in the Law.**

RECOMMENDATION C.

To elaborate further the Rules of the Commission for the Evaluation of Judges with respect to the different elements to be considered by this body for the evaluation of "ethical integrity", including with respect to the gravity or severity of the misconduct and the bad faith or wilfulness of the misbehaviour.

5.2. Initiation of the Evaluation and Information Gathering

64. Article 14 (1) of the Law stipulates that the Evaluation Commissions and their secretariats shall have real-time access to information systems containing the necessary information

79 See e.g., ECtHR, *Xhoxhaj v. Albania*, no. 15227/19, 9 February 2021, para. 349.
80 See e.g., *Joint Opinion of the Venice Commission and the Directorate General of Human Rights and Rule of Law (DGI) of the Council of Europe on the Draft Law on the External Assessment of Judges and Prosecutors* (CDL-AD(2023)005), 14 March 2023, para. 73.
81 See e.g., ECtHR, *Xhoxhaj v. Albania*, no. 15227/19, 9 February 2021, para. 351.
82 See Article 26 of the ICCPR, Article 14 of the ECHR and Art. 1 of Protocol No. 12 to the ECHR (ETS No. 177), which was signed by the Republic of Moldova on 4 November 2000, though not yet ratified. See also e.g., Principle 3 of the 2016 Cape Town Principles on the Role of Independent Commissions in the Selection and Appointment of Judges; and Principle 10 of the 1985 UN Basic Principles on the Independence of the Judiciary.

for the fulfilment of the mandate, subject to the conditions of the legislation on data exchange and interoperability. The Evaluation Commissions "*may receive from any person only relevant information about the subject and may gather on their own such information*" (Article 14 (1)).

65. During the process of information gathering, the Law provides that individuals and legal persons under public or private law, including financial institutions, may not refuse to provide information invoking protection of personal data, banking secrecy or other data with limited access, except for: a) information that falls under the provisions of Law on state secrecy and has not been declassified; b) information that refers to medical confidential data; and c) information which is subject to lawyer-client confidentiality (Article 14 (3)). Other types of information that deserve special protection should similarly be excluded from this obligation of communication, including journalists' sources or other information falling withing the scope of sensitive personal data.[83] Indeed, the evaluation should not result in wide-ranging investigations into certain aspects of the subjects' personal life that may be highly sensitive, which arguably would go beyond the actual role of the Evaluation Commissions.[84] It is welcome that Article 14 (10) specifies that "*information that does not have a causal link with the assessed evaluation file, information that constitutes a state secret and has not been declassified, as well as anonymous information, not confirmed by other official sources, cannot be used*" although they may *a priori* be collected.

66. In light of the above, the wide scope of power to obtain and request information may be excessive and as recommended previously by ODIHR, the Commissions' powers should be more strictly circumscribed while ensuring the protection of sensitive personal data.[85] **It is recommended to revise the Law or the Commissions' Rules to exclude the possibility of gathering documents or information that are not strictly necessary to the evaluation process, including information falling withing the scope of sensitive personal data** as defined in the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data,[86] as would be amended by (CETS 223) when it enters into force.

67. The Evaluation Commissions initiate the evaluation after receiving from the SCM or from the SCP the list of judges and prosecutors to be evaluated (Article 12 (1) of the Law). Following this, the Commissions inform the subjects of the initiation of the evaluation and requests the judge/ prosecutor to submit (1) a declaration of assets for the last 5 years, (2) the ethics questionnaire and (3) the declaration on the list of close persons, as defined in the Law no. 133/2016 on the Declaration of Wealth and Personal Interests, who work or have worked in the last 5 years in the judiciary, prosecution and public service – all to be submitted within the timeframe determined by the Commissions, which may not be less than 10 days (Article 12 (4)). Failure to provide a reasonable justification for the refusal or for the failure to submit the declarations or the ethics questionnaire in due time constitutes grounds for a finding by the Evaluation Commissions that the subject has not passed the evaluation (Article 12 (4)). Similarly, the Evaluation Commissions may request, at any stage of the evaluation procedure, additional data and information from the subject or other persons, indicating the deadline for submission (Article 14 (6)).

83 See e.g., Article 6 of the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data as would be amended by *Protocol to the Convention for the Protection of Individuals with regard to the Processing of Personal Data* (CETS 223) signed on 9 February 2023 (amendment not yet in force, pending 38 ratifications of the Protocol).

84 See *ODIHR Opinion on the Law on the Selection, Performance Evaluation and Career of Judges of Moldova*, 13 June 2014, para. 38.

85 See ODIHR, *Opinion on the Law on Some Measures related to the Selection of Candidates for the Positions of Members in the Self-administration Bodies of Judges and Prosecutors* (Moldova), 28 September 2022, paras. 45-46; and *ODIHR Report on the evaluation (pre-vetting) of candidates for members of the Superior Council of Magistracy in Moldova* (29 September 2023), paras. 76-77.

86 Especially genetic data and personal data reveal information relating to racial or ethnic origin, political opinions, trade-union membership, religious or other beliefs, health or sexual life.

Failure to submit the information without justifiable reasons, may constitute grounds for refusing to include such information in the appraisal file (Article 14 (9)). **Given the extent of the information and period of time that is covered (data from the last five years), it would be recommended to provide some flexibility in the timeline, with a possibility for the subject of evaluation to request additional time for valid reasons, if and as needed.**

68. Since the integrity check would also include candidates for judicial positions as well, the standards on judicial recruitment are instructive. According to the ODIHR Kyiv Recommendations, the selecting body can request a standard check for a criminal record and any other disqualifying grounds from the police, but *"[n]o other background checks should be performed by any security services*" and the checks undertaken must be handled with utmost care.[87] Similarly, the CCJE strongly advises against background checks that go beyond the generally accepted checks of a candidate's criminal record and financial situation.[88] These limitations should *a fortiori* also apply to incumbent judges and prosecutors.

RECOMMENDATION D.1

To exclude the possibility of *gathering* documents or information that are not strictly necessary to the evaluation process, including information falling within the scope of sensitive personal data according to international human rights standards.

RECOMMENDATION D.2

To provide some flexibility for the timeline to provide information, with a possibility for the evaluation subject to request additional time for valid reasons, if and as needed.

5.3. Hearing before the Evaluation Commissions

69. The Evaluation Commissions conduct their work in closed meetings, which must be attended by at least four members (Article 13 of the Law). After reviewing the information gathered, the Evaluation Commissions communicate to the subject, in writing, any doubts it has about the subject to be discussed at the hearing, and shall provide the subject with access to the materials in the evaluation file relating to those doubts (Article 16 (1) of the Law).

70. A public hearing only takes place if the evaluation subject attends the hearing. Otherwise, the Commission evaluates on the basis of the gathered information. Each Evaluation Commission has evaluation panels who examine the evaluation files and subsequently hold the hearing. These panels consist of three members. The Law is not clear whether the same members who evaluate the information also participate in the hearing or members can alternate.

71. In case an evaluation subject participates in a hearing, they have a right to provide explanations at the hearing on the doubts communicated; be assisted by a lawyer during the assessment procedure; take cognisance of the materials in the assessment file until

87 *ODIHR Kyiv Recommendations on Judicial Independence in Eastern Europe, South Caucasus and Central Asia* (2010), para. 22.
88 CCJE Opinion no. 21, *Preventing Corruption Among Judges*, 9 November 2018, para. 26.

the hearing; submit, in written form, additional data and information which it considers relevant if she/he has been unable to submit it previously; and request a closed hearing (Article 16 (5)). These are welcome procedural guarantees, which are overall in line with international standards on fair proceeding.[89]

72. Where suspicions arise about the subject's integrity, the burden falls on the subject to submit information that will remove the Commission's suspicions. The ECtHR held that it is not *per se* arbitrary according to Article 6 (1) of the ECHR (civil limb) that the burden of proof shifted onto the applicant in the vetting proceedings after the vetting body had made available the preliminary findings resulting from the conclusion of the investigation and had given access to the evidence in the case file.[90] At the same time, **it should be clarified that reversal of the burden of proof occurs only where relevant and sufficient evidence has been adduced by the Evaluation Commission.** In addition, it is not clear how the evaluation subject may rebut the presumption. The duty to demonstrate the lawful origin of property or assets should not impose a disproportionate burden on the evaluated subject and the duty to give explanations should remain reasonable.[91] As mentioned above, it would be advisable **to include possible attenuating circumstances, for instance if an evaluation subject faces an objective impossibility to submit supporting documents to defend themselves.**

73. It is positive that the hearings take place in a public session and are recorded. The evaluation panel may decide to hold the hearing or part of it in closed session if this is necessary for the protection of public order, privacy or morality. If the evaluation panel rejects the subject's request to conduct the hearing or part of it in closed session, the subject may refuse to participate in the hearing. The evaluation shall continue on the basis of the information gathered by the Evaluation Commission without the hearing. Evaluation subjects may be understandably reluctant to air, and have aired, in public, the details of their financial situation, their dealings with family members, and other aspects of their private lives. Such a decision should be taken with due consideration of the right of the vetting subject to the protection of their honour, privacy and reputation as guaranteed under Article 17 of the ICCPR and Article 8 of the ECHR. The Venice Commission previously recommended that a request by the judge concerned to have a closed hearing of their case should normally be granted.[92] **As a key aspect of the evaluation process, the Law may elaborate the criteria and process for the decision-making on holding a (part of a) hearing in public, ensuring that at least the timing, number and nature of the closed meetings are made public along with the conclusions from the closed meetings to enhance transparency of the evaluation process**.[93] **A request by the judge concerned to have a closed hearing of their case should contain compelling reasons and be granted on that basis. A specific rule requiring that a decision concerning the denial of a request to have closed hearing is to be justified in writing would contribute to legal certainty.**

89 See e.g., CCJE, *Opinion no. 17 (2014) on the Evaluation of Judges' Work, the Quality of Justice and Respect for Judicial Independence*,, para. 38, which provides that "*The evaluated judge should have immediate access to any evidence intended to be used in an evaluation so it can be challenged if necessary. Individual evaluation of judges and the inspection assessing the work of a court as a whole should be kept entirely separate. However, facts discovered during a court inspection can be taken account in the individual evaluation of a judge*."

90 See ECtHR, *Xhoxhaj v. Albania*, no. 15227/19, 9 February 2021, para. 352.

91 See e.g., Venice Commission, *Republic of Moldova - Joint opinion of the Venice Commission and the Directorate General of Human Rights and Rule of Law (DGI) of the Council of Europe on the draft Law on the external assessment of Judges and Prosecutors*, CDL-AD(2023)005-e, paras. 74-75.

92 See e.g., Venice Commission, *Republic of Moldova - Joint opinion of the Venice Commission and the Directorate General of Human Rights and Rule of Law (DGI) of the Council of Europe on the draft Law on the external assessment of Judges and Prosecutors*, CDL-AD(2023)005-e, para. 93.

93 *ODIHR Report on the evaluation (pre-vetting) of candidates for members of the Superior Council of Magistracy in Moldova* (29 September 2023), para. 46.

74. Following the evaluation, the Commissions prepare a report with a proposal to "fail or pass" the subject (Article 17 (1) of the Law). Such a report is approved by a unanimous vote by the *evaluation panel* members (Article 17 (2) of the Law). If the panel does not approve the report unanimously, the Evaluation Commission examines the report and approves the report by a majority vote. Given that the Commission's meetings shall be held with the presence of at least four members (Article 13 (2) of the Law), this formula presumably means that at least four members must participate in the decision-making process, however it is not explicitly stated. Article 29 (1) of the Rules of the CEP and Article 40 (1) of the Rules of the CEJ provide that the evaluation report should be approved by a majority vote of *all* non-recused members of the Commission. It is thus **not clear whether the evaluation report should be approved by a majority of the members present or a majority of *all* non-recused members. This is important to clarify, in order to avoid potential ambiguities or controversies, as in practice this would entail that the Rules provide a higher threshold for the adoption.**

75. Article 11 of both Rules specifies that if a member abstains, the vote will be deemed to be "against" and in case of a tie vote, the decision supported by at least two of the international members shall be adopted. It is not clear whether this tie-breaking rule also applies to the vote approving the evaluation report. This is concerning as from Article 11 of the Rules, this could mean that in case of a tie, a decision approving the evaluation report concluding that the subject failed the evaluation could allegedly be adopted by two international members of the Evaluation Commission. **Thus, it appears that even without a majority of all the members in support of the negative evaluation, the Evaluation Commission may nevertheless conclude that the evaluated subject failed the assessment. Given the serious consequences that a negative evaluation has on an evaluated judge, it should rather be the contrary – the lack of a majority in support of the negative evaluation should be interpreted in favour of the evaluated subject**.[94] **Should the approbation of the evaluation report indeed require the majority of votes of all non-recused members, a modality should be introduced to address a tie vote, to avoid that merely two members could adopt an evaluation report concluding that an evaluation subject failed the evaluation.**

RECOMMENDATION E.1

To clarify that reversal of the burden of proof occurs only where relevant and sufficient evidence has been adduced by the Evaluation Commission.

RECOMMENDATION E.2

To reflect that the lack of a majority of all the non-recused members of the Evaluation Commission in support of the negative evaluation should be interpreted in favour of the evaluated subject.

5.4. Publicity of Reports

76. The Evaluation Commission is required to issue a reasoned decision on the subject's evaluation, which shall contain the relevant facts, reasons and the conclusion (Article 17 (1) of the Law). The report is sent to the evaluation subject and the SCM or the SCP, and

94 *ODIHR Report on the evaluation (pre-vetting) of candidates for members of the Superior Council of Magistracy in Moldova* (29 September 2023), para. 47. See also ODIHR, *Opinion on the Law on Some Measures related to the Selection of Candidates for the Positions of Members in the Self-administration Bodies of Judges and Prosecutors* (Moldova), 28 September 2022, para. 68.

the information on the result of the evaluation is also published on the Commission's official website (Article 17 (5)). The report on the evaluation shall be published, taking the necessary measures for the protection of the privacy of the evaluation subject and other persons, on the official website of the Evaluation Commission no later than 3 days after the adoption of the decision (Article 17 (5)).

77. While "*necessary measures for the protection of the privacy*" are taken into account, the need to protect the independence of the judiciary and the prosecution and the necessity to ensure public trust in the process should also be considered, when determining to which extent the different phases of the evaluation process should be public.[95] This is particularly relevant for the detailed evaluation assessments, which are not final and therefore should be treated confidentially and as a rule not be published. Reports may contain issues of personal nature or concerning the personal or family life of an evaluation subject, as well as professional issues that may seriously affect the reputation of the subject concerned, thus potentially amounting to a violation of Article 8 ECHR, especially if the very existence of misconduct is contested afterwards.[96] As also provided by international standards, the principles and procedures on which judicial evaluations are based must be made available to the public. However, the process and results of individual evaluations must, in principle, remain confidential so as to ensure judicial independence and the security of the judge.[97] This is distinct from the issue of publication of final decisions on disciplinary measures, which should be made available to the public. Article 18 (6) of the Law provides that the reasoned decision of the SCM or SCP regarding the outcome of the evaluation shall be published on its official website on the day of adoption, irrespective of a possible appeal. **The immediate publication of the evaluation report upon adoption should be reconsidered, to only occur after the SCJ or SCP's decision becomes final, after exhaustion of appeals. As to the scope of the publicity, a proper balance between ensuring the publicity of the decision, while respecting the private and family life of the evaluated judge, prosecutor or candidate should be reached.**

RECOMMENDATION F.

To reconsider the immediate publication of the evaluation report upon adoption and provide instead that the publication only occurs after the decision of the SCM or the SCP becomes final, after exhaustion of appeals, and to ensure a proper balance between the publicity of the evaluation report that forms the basis for the decision and respect for the private and family life of the evaluated judge, prosecutor or candidate.

5.5. Examination of the Evaluation by the SCM and SCP

78. According to Article 18 of the Law, the SCM or SCP examines the assessment report provided by the Evaluation Commissions and adopts one of the following decisions: (a) accept the report and decide whether or not the evaluation has been passed; (b) reject the report on the evaluation and order, once only, that the procedure for the evaluation of the subject be resumed if it finds factual circumstances or procedural errors which could have

95 *ODIHR Interim Opinion on the Draft Law on the Reform of the Supreme Court of Justice and the Prosecutor's Offices of the Republic of Moldova* (as of September 2019), para. 99.

96 See *ODIHR Interim Opinion on the Draft Law on the Reform of the Supreme Court of Justice and the Prosecutor's Offices of the Republic of Moldova* (as of September 2019), para. 100.

97 See the CCJE, *Opinion no. 17 (2014) on the Evaluation of Judges' Work, the Quality of Justice and Respect for Judicial Independence*, Recommendation 14.

led to the promotion or, as the case may be, the non-promotion of the evaluation; (c) after the repeated evaluation, decide whether or not the evaluation subject has passed.

79. In case of a repeated evaluation, the Evaluation Commissions examine the case again in accordance with the procedures defined for the initial examination. This re-examination might be time consuming and delay the evaluation process. **Given the constitutional role of the SCM and SCP, and the need for the conciseness of the process, consideration could be given to allow these bodies to take the necessary additional measures on their own and take a decision without asking the Evaluation Commissions to resume the evaluation,**[98] **unless there was a serious procedural error which would warrant a renewed procedure before the Evaluation Commission.**

5.6. Dismissal and Legal Redress

80. The decision of the SCM or the SCP to the effect of failure of the evaluation subject results in the dismissal of the judge or prosecutor, who is not entitled to exercise the office of judge and other offices of public dignity for a period of five to seven years from the date the decision of the SCM/SCP becomes final, is not entitled to the one-off severance grant, and is deprived of the right to the special pension provided for in Article 32 of the Law no. 544/1995 on the status of the judge, with the maintenance of the general pension for age limit according to the general conditions established by the Law no. 156/1998 on the public pension system (Article 18 (6) of the Law).

81. Evaluation or vetting proceedings are exceptional and *sui generis* in nature to address an exceptional situation. The ECtHR has recognized that it is consistent with the spirit of vetting to have a more limited scale of sanctions than for ordinary disciplinary proceedings, even considering a life ban as acceptable.[99] The contemplated ban of five to seven years would not appear disproportionate also considering that it would allow the dismissed judge or prosecutor to apply for or work in the public or private sector. This approach also introduces a degree of differentiation on a case-by-case basis.[100] At the same time, it is not clear what the criteria are and who decides upon the differentiation of the length of the ban on fulfilling the functions mentioned above. **It should be clearly regulated in order to avoid an arbitrary approach.**

82. As noted above, in the context of evaluation or vetting, the evaluated subject should have the right to challenge the decision and ensuing sanction before an independent and impartial tribunal that reviews both law and procedure.[101] According to Article 19 (1), the decision of the SCM or SCP may be appealed by the evaluation subject (as well as the Evaluation Commission) to the SCJ within 15 days from the communication of the reasoned decision. The appeal is considered by a panel of three judges, in an open hearing, within 30 days. The SCJ is entrusted with the decision to only allow the appeal if there were admitted serious procedural errors affecting the fairness of the assessment procedure or that there are factual circumstances which could have led to the assessment being passed or failed. In such cases, it orders either the respective Evaluation

98 See also *Joint Opinion of the Venice Commission and the Directorate General of Human Rights and Rule of Law (DGI) of the Council of Europe on the Draft Law on the External Assessment of Judges and Prosecutors* (CDL-AD(2023)005), 14 March 2023, para. 26.

99 See for example ECtHR, *Nikëhasani v. Albania*, no. 58997/18, 13 December 2022, para. 129, reiterating its position in ECtHR, *Xhoxhaj v. Albania*, no. 15227/19, 9 February 2021, para. 412.

100 See e.g., the *Joint Follow Up Opinions of the Venice Commission and the Directorate General of Human Rights and Rule of Law (DGI) of the Council of Europe to the Opinion on the Draft Law on the External Assessment of Judges and Prosecutors*, CDL-AD(2023)035, 9 October 2023, para. 17.

101 See Article 6 (1) of the ECHR, Article 14 (1) of the ICCPR. See also 1990 OSCE Copenhagen Document, para. 5.10. See also CCJE, *Opinion no. 17 (2014) on the Evaluation of Judges' Work, the Quality of Justice and Respect for Judicial Independence*, para. 41, which provides that "*the evaluated judge must have an effective right to challenge an unfavourable evaluation, particularly when it affects the judge's 'civil rights' in the sense of Article 6 of the ECHR. The more serious the consequences of an evaluation can be for a judge, the more important are such rights of effective review*."

Commission or the SCM or SCP to resume the assessment procedure, or it may order the promotion or non-promotion of the evaluation in case it annuls the decision of the SCM after the resumption of the evaluation (Article 19 (5)(2)). The decision is final. The proposed appeal mechanism appears to afford sufficient judicial review of procedural and substantive aspects of the decisions.

5.7. Personal Data Collected During the External Evaluation Process

83. According to Article 14 (11), the gathered information shall be kept, archived, deleted and destroyed in the manner laid down in the rules governing the organization and functioning of the respective Evaluation Commissions. The amendments adopted in September 2024 specify that *"[t]he deletion and destruction of respective information shall be carried out after its transmission to the Superior Council of Magistracy, or, as the case may be, to the Superior Council of Prosecutors".*

84. Generally, the wording of Article 14 (11) is too generic and not sufficient to ensure compliance with international and regional personal data protection standards, especially given the potential sensitivity of the information being gathered. The amendments introduced in September 2024 do not elaborate the modalities and limits pertaining to the collection, use, processing and time limits for the destruction of the data collected during the evaluation process. Given the sensitivity of the information that may be collected, it is fundamental that their confidentiality be guaranteed and that full compliance with international personal data protection standards be ensured. As per international standards, publicly available law should clearly outline the types of personal data that may be held by a public authority, which criteria apply to the use, retention, deletion and disclosure of these data; in this respect the use of personal data should be strictly limited and confined to its original specified purpose; necessary measures should be taken to ensure that records of personal data are accurate; personal data files should be deleted when no longer required; and individuals have the right to have access to and correct their personal data file. [102] **It would be advisable to make a specific reference to such standards.**

85. With respect to the destruction of personal data, one important principle is that personal data should be preserved in a form which permits identification of data subjects for no longer than is necessary for the purposes for which those data are processed.[103] In this respect, it is also important to ensure that the rights of the evaluated subjects are also taken into consideration. In particular, they should be afforded an adequate opportunity to challenge the findings made by the Evaluation Commissions in order to defend themselves in an effective manner, which means ensuring access to information or documents related to their case.[104] This would mean retention at least during the said decisions become final but also potentially during possible actions before the European Court of Human Rights or other international bodies. In any case, the timeline for destruction **of the evaluated subject's personal data collected during the process** should be more clearly specified**, while ensuring that it is reasonable in light of the above consideration.** Otherwise, there is a potential risk of abuse of usage of the information gathered after the evaluation process has finished. **It is also fundamental to ensure adequate security safeguards and accountability of those public bodies that**

102 Including the Council of Europe, *Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data (CETS No. 108)*, 28 January 1981, which entered into force in Moldova on 1 June 2008; and the EU General Data Protection Regulation (GDPR) – Official Legal Text (gdpr-info.eu) as an EU candidate country.

103 *Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data (CETS No. 108)*, Article 5 (e); EU General Data Protection Regulation (GDPR) – Official Legal Text (gdpr-info.eu), Article 5 (1) (e).

104 See e.g., ECtHR, *Thanza v. Albania*, no. 41047/19, 4 July 2023, para. 118.

are given access to such sensitive data and the Law should be supplemented in this respect.

6. TEMPORAL SCOPE AND TRANSITIONAL PROVISIONS

86. The Law envisions a temporary, exceptional and one-off mechanism of ethical and financial integrity check by the Evaluation Commissions of judges and prosecutors in higher positions (Article 3). As a guarantee for a temporary character of the assessment, the Law states that it is an exceptional exercise, unique and limited in time, with the specific aim of ascertaining the integrity of the subjects under its purview (Article 2(1)). Furthermore, legal obstacles against its arbitrary prolongation are included in Article 22 (14), calling for the Law to cease to have effect on the date when the SCJ decides the last appeal against a decision by the SCM/SCP or on the date when the time-limit for appealing against the last SCM/SCP decision expires.

87. The Evaluation Commissions are envisioned to assess the subjects of external evaluation by 31 December 2025 (Article 4 (6) of the Law), but will operate until the SCJ has completed its examination of the last appeal (against the decision by the SCM/SCP, lodged under Article 19). This clear time limitation supports the one-time and limited character of the exercise.

88. Previous experiences with implementing broad-spectrum evaluation or vetting in the judiciary show that the time allotted for the assessment has been underestimated. Given the estimated average duration of a single re-evaluation process, more than 100 days,[105] this may also be the case and it might happen that the mandate of the Evaluation Commissions may need to be prolonged for objective reasons, such as if not all those subjects of external evaluation identified in the Law have passed through. If prolongation is tied to a simple majority of Parliament, it may create a risk of transforming the vetting process into a *de facto* permanent arrangement on the one hand, parallel to the ordinary accountability mechanisms; and on the other hand, an eventual prolongation of this *ad hoc* evaluation mechanism risks making office-holders subject to such evaluation more compliant vis-à-vis the authority which decides on it.[106] Therefore, a possible prolongation should be contemplated in the Law and the decision on the prolongation should belong to a majority larger than simple majority, within Parliament. With respect to Albania, the Venice Commission highlighted that the originally mandated time of vetting institutions (9 years) was considered too long and instead suggested that "*[I]t would be desirable to put a fixed time-limit of about 3-5 years on the length for which [the vetting panels] would exist. There should be a possibility, provided for by the Constitution, for the extension of that period under conditions to be established by law. Following the winding-up of the vetting bodies, ordinary institutions and courts might assume any residual function of deciding on the vetting procedures which had not been concluded*."[107]

89. **It may be beneficial to complement the Law with a possibility for a prolongation of the mandate, with strict conditions established under law (for example, only if not all those subjects to the external evaluation according to the Law have been passed through it) and requiring a qualified majority voting.**

105 See Commission on the External Evaluation of Judges and Candidates for the position of Judge of the Supreme Court of Justice, *2023 Annual Report*, para. 30.

106 See e.g., Venice Commission, CDL-AD(2015)045, *Albania – Interim Opinion on the Draft Constitutional Amendments of the Judiciary*.

107 See e.g., Venice Commission, CDL-AD(2016)009, *Albania – Final Opinion on the Revised Draft Constitutional Amendments on the Judiciary (15 January 2016)*, para. 56.

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