Warsaw, 1 July 2024
Opinion-Nr.: JUD-MDA/493/2023 [NR]

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

MOLDOVA

This Opinion has benefited from contributions made by **Mr. Grzegorz Borkowski**, Judge, International Legal Expert and former Head of Office of the National Council of the Judiciary of Poland; **Ms Tamara Otiashvili**, Senior Legal Expert in Human Rights and Democratic Governance; **Professor Andras Sajo**, Central European University and former judge and Vice-President of the European Court of Human Rights.

Based on an unofficial English translation of the Law.

OSCE Office for Democratic Institutions and Human Rights

Ul. Miodowa 10, PL-00-251 Warsaw
Office: +48 22 520 06 00, Fax: +48 22 520 0605
www.legislationline.org

EXECUTIVE SUMMARY AND KEY RECOMMENDATIONS

In 2022, the Government of Moldova initiated a reform process aiming to evaluate all candidates for existing vacancies on the self-administration bodies for judges and prosecutors of Superior Council of Magistracy (SCM) and Superior Council of Prosecutors, and their specialized boards, as a first step toward systemic judicial reform to alleviate corruption in the justice system. This reform was accompanied by the adoption of a number of laws.

One of those laws is the Law on the External Evaluation of Judges and Candidates for the Position of Judge of the Supreme Court of Justice (the "Law") that specifically regulates the procedures for external evaluation of current Supreme Court of Justice (SCJ) judges and those suspended from office, as well as candidates for SCJ judgeship. The final decision on the basis of the findings by this body are to be made by the SCM, which could include dismissal of a sitting judge.

This Opinion is prepared with a view to complement the findings and recommendations from the ongoing ODIHR monitoring of the process of evaluating the incumbent SCJ judges. It aims at identifying the aspects of the Law that could benefit from improvement to limit, to the extent possible, the negative impact that this or a similar evaluation or vetting procedure may have and to ensure respect for rule of law principles. 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 this equally benefits all participants of the process.

The present Opinion is based on the assumption that this external evaluation process contemplated in the Law has wide political and public support within the country. It notes that it should remain a wholly exceptional, one-time, temporary measure, necessary and proportionate to the specific systemic challenges in the country (such as in case of a documented high incidence of corruption in the justice system and the need to restore public trust in the judiciary and the administration of justice). 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 only be used if the existing ordinary mechanisms and procedures of judicial accountability have proven to be completely ineffective, inadequate and/or malfunctioning.

The Opinion notes that the Law contains a number of safeguards seeking to ensure the independence and impartiality of the currently operational Evaluation Commission, such as protection against external influence, functional immunity, ineligibility criteria as well as high remuneration of commission members and separate budget for the Commission.

At the same time, the Opinion identifies some shortcomings in the Law. Particularly, the selection/appointment procedures for the Evaluation Commission members would have benefitted from further enhancement to ensure gender-balanced composition and ultimately trigger increased public trust in the process. The criteria and rules for evaluating the evidence and for information collection should be clarified to ensure that the evaluation is conducted according to clear and objective

criteria and in a manner that respects the right to private life of the subject of evaluation.

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. Regarding the selection procedure and composition of the Evaluation Commission, though recognizing that it is already formed and operational:
   1. in case of termination/resignation and renewal of membership of the Commission, gender considerations should be taken into account throughout the nomination, selection and appointment process for new members. This could be achieved by requiring that the pool of proposed candidates nominated by the parliamentary fractions 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; [para. 31]
   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 and are then 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. 33]

B. With respect to the replacement of a member of the Evaluation Commission whose mandate has ceased due to resignation, removal or death:
   1. to envisage a timeline for the appointment of the new member by the Parliament; [para. 42]
   2. to contemplate in the Law the nomination and appointment of alternate or substitute members to be pre-selected or elected by the Committee according to the same procedure as the initial members, thus providing that an outgoing member should be replaced by their alternates nominated by the same nominating body who had initially nominated the outgoing member, and to the extent possible, that any replacement is made with respect to gender as well as diversity considerations; [para. 42]
   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; [para. 42]

C. To more precisely define the scope and meaning of the term “ethical integrity” to avoid an overly broad and potentially arbitrary application, while elaborating in the Law and/or Rules of Organization and Functioning the different elements to be considered by the Evaluation Commission for the final evaluation, including with respect to the gravity or severity of the misconduct, the bad faith or wilfulness of the misbehaviour and possible attenuating circumstances; [para. 48]

D. Regarding information gathering:

1. to provide some flexibility for the timeline to provide information, with a possibility for the evaluated judge to request additional time for valid reasons if and as needed; [para. 54]
2. to exclude the possibility of gathering documents or information that are not strictly necessary to the evaluation process, including information obtained from privileged communications and other information falling within the scope of sensitive personal data according to international human rights standards, while ensuring that personal data processing is carried out in full compliance with international standards, particularly with respect to the storage and destruction; [para. 55]

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. 60]
   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 favor of the evaluated subject; [para. 63]

F. to reconsider the publication of the evaluation report pending final decision of the SCM, or, where relevant, for the final appeal to conclude, 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 or candidate; [para. 65] and

G. to reflect in the Law, in case of a repeated positive assessment by the Evaluation Commission, that the SCM should confirm that the evaluation is passed and if it identifies potential grounds for initiating disciplinary proceedings, such proceedings should be initiated in accordance with the regular procedure. [para. 68]

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 OSCE commitments, the OSCE/ODIHR reviews, upon request, draft and existing legislation 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. 65/2023 on External Assessment of Judges and Candidates for the Position of Judge of the Supreme Court of Justice of 30 March 2023 (hereinafter "the Law")[1] with international human rights standards and OSCE human dimension commitments to inform ODIHR's monitoring of this ongoing process. At a later stage, ODIHR will also review the Law No. 252 on External Evaluation of Judges and Prosecutors of 17 August 2023.
3. This Opinion should be read together with the previous legal reviews on the independence of the judiciary in the Republic of Moldova that have been published by ODIHR in 2022 and 2019[2] and 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.[3] The Opinion is prepared with a view to complement the findings and recommendations from the ongoing ODIHR monitoring of the process of evaluating the incumbent SCJ judges. It aims at identifying the aspects of the Law that could benefit from improvement to limit, to the extent possible, the negative impact that this or a similar evaluation or vetting procedure may have and to ensure respect for rule of law principles. 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 this equally benefits all participants of the process.
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 commitments.[4]

1 *Law No. 65 of 30 March 2023 on the external evaluation of judges and candidates for the position of judge of the Supreme Court of Justice*, as last amended on 22 August 2023.

2 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.

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

4 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 […]*".

II. SCOPE OF THE OPINION

5. The scope of this Opinion covers only the Law. Thus limited, the Opinion does not constitute a full and comprehensive review of the entire legal and institutional framework regulating the judiciary and the self-administration bodies of judges 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*[5] (hereinafter "CEDAW") and the *2004 OSCE Action Plan for the Promotion of Gender Equality*[6] 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 an unofficial English translation of the Law, which is attached to this document as an Annex. 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. In 2022, the Government of Moldova initiated a reform process aiming to evaluate all candidates for existing vacancies on the self-administration bodies for judges and prosecutors, i.e., the Superior Council of Magistracy (SCM) and Superior Council of Prosecutors (SCP), and their specialized boards, as a first step toward systemic judicial reform to alleviate corruption. The reform promoted adoption of a number of laws.

11. In March 2022, the Parliament adopted the Law on Some Measures Related to the Selection of Candidates for the Position of Member of the Self-administration Bodies of Judges and Prosecutors governing the assessment of the financial and ethical integrity of candidates for the abovementioned self-administration bodies for judges and prosecutors, which was reviewed by ODIHR.[7] ODIHR's Opinion included a set of recommendations to bring this law further in line with relevant international standards and good practice. Although the *ad hoc* Evaluation Commission set up under this Law developed its own internal regulations as prescribed by the law, a number of gaps in the legislation still remained, including provisions that did not adequately elaborate the evaluation criteria.

5 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.
6 See OSCE Action Plan for the Promotion of Gender Equality, adopted by Decision No. 14/04, MC.DEC/14/04 (2004), para. 32.
7 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*, 28 September 2022.

12. In addition, from June 2022 to August 2023, ODIHR monitored the transparency and fairness of the process of evaluation of integrity of candidates to the SCM.[8] In its report, covering the first phase of this process, ODIHR concluded that overall, the evaluation was generally conducted in an objective, fair and professional manner, although there was room for improvement in the Law and practice to guarantee fairness, credibility and transparency of the process. In particular, ODIHR recommended increasing the transparency of the selection of members of the Evaluation Commission and other similar bodies, enhancing public communication and access to information about important procedural decisions, and refraining from amending the applicable legislation during the process, unless this is exceptionally required to ensure fairness and credibility, as well as to undertake an ex-ante and ex-post facto impact assessment. ODIHR also suggested amending the legal framework to guarantee gender equality and diversity in the composition of the Evaluation Commission or other similar bodies to be established during the reform process. ODIHR assessment also underlined the need to set realistic deadlines and schedules, in order to ensure a transparent, credible process that contributes to building public trust, taking into account the intensive and complex nature of the process, and to introduce compensatory measures for candidates whose appeals were not examined prior to the completion of the appointment process to mitigate negative effects of intentional delays.[9]

13. In March 2023, the Law No. 65/2023 on the External Evaluation of Judges and Candidates for the Position of Judge of the Supreme Court of Justice (SCJ) was adopted. The Law specifically regulates the procedures for external evaluation of current SCJ judges and those suspended from the office, as well as candidates for judgeship in the SCJ, on ethical and financial integrity. Those who passed the integrity assessment, as provided by the above-mentioned Law on Some Measures Related to the Selection of Candidates for the Position of Member of the Self-administration Bodies of Judges and Prosecutors, and judges who submitted a request for resignation are exempt. For the purpose of evaluating existing SCJ judges and candidates to these positions, the Law establishes a specific Evaluation Commission.

14. The purpose of the external evaluation, according to Article 2 of the Law, is an exceptional and one-time assessment, based on the principles of independence of the Evaluation Commission, fairness of the evaluation procedures, publicity of the acts issued during the evaluation process, and exceptional nature of the assessment. The Evaluation Commission shall operate until the appointment of the last judge of the Supreme Court of Justice (Article 4 (4)). The SCM examines the results of the SCJ judge's evaluation in a public sitting based on the evaluation file received from the Evaluation Commission (Article 17). The SCM's decision on the failure to pass the evaluation results in the dismissal of the SCJ judge (Article 17 (4)) and for candidates to SCJ judgeship, only candidates who pass the evaluation shall be admitted to the competition for the position of judge at the SCJ (Article 20(5)).

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

15. A detailed overview of applicable international human rights standards and OSCE commitments pertaining to judicial independence that are relevant for the review of the Law can be found in the *ODIHR Opinion on the Law on some measures related to the*

8 This monitoring process is still ongoing.

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

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)[10] 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).[11] The recent caselaw of the European Court of Human Rights (ECtHR) pertaining to the vetting process in Albania confirms that Article 6 (1) 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, *sui generis* processes.[12] Other relevant documents include the ODIHR Recommendations on Judicial Independence and Accountability (2023 Warsaw Recommendations).[13] These documents and opinions are relevant for both the evaluation of the incumbent judges as well as candidates for the SCJ judgeship.

16. The Joint Opinion of the European Commission for Democracy through Law (hereinafter "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 Supreme Court of Justice of October 2022, and the Joint Follow Up Opinion of the Venice Commission and the DGI to the Opinion on the Draft Law on the Supreme Court of Justice of December 2022 will also be referenced in this Opinion, where relevant.[14]

17. ODIHR reiterates that any process aiming at re-evaluating or vetting[15] sitting judges directly affects judicial independence by jeopardizing the security of tenure and principle of irremovability of judges, which are integral parts of the guarantee of judicial

10 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.

11 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.

12 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*".

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

14 Some provisions of the Draft Law on the Supreme Court of Justice reviewed by the Venice Commission and the Directorate General of Human Rights and Rule of Law (DGI) of the Council of Europe were dealing with the extraordinary evaluation of judges of the Supreme Court of Justice (SCJ), which were then made into a separate Law (under current review in this Opinion), as recommended in the Joint Opinions. 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 Supreme Court of Justice* (CDL-AD(2022)024), 21 October 2022 (which reviewed a draft law of 19 September 2022), and the *Joint Follow Up Opinion of the Venice Commission and the Directorate General of Human Rights and Rule of Law (DGI) of the Council of Europe to the Opinion on the Draft Law on the Supreme Court of Justice*, CDL-AD(2022)049), 19 December 2022.

15 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.

independence.[16] Hence, as underlined in previous ODIHR Opinions, the introduction of such *ad hoc* vetting mechanisms should only be considered in exceptional circumstances, as a measure of last resort, taking into account the following considerations or pre-conditions:

(i) an *ad hoc* vetting mechanism should remain a ***wholly exceptional, one-time, temporary measure, necessary and proportionate to the specific systemic challenges in the country (such as in post-conflict or post-authoritarian setting, or in case of a documented high incidence of corruption in the justice system and the need to restore public trust in the judiciary and the administration of justice),*** not used under normal conditions,[17] or this would otherwise run the risk of setting a precedent where a changing political majority is tempted to proceed the same way;[18]

(ii) it should only be used if the ***existing ordinary mechanisms and procedures of judicial accountability have proven to be completely ineffective, inadequate and/or malfunctioning***;[19]

(iii) it should be based on a ***proper in-depth regulatory impact assessment and strictly justified by duly demonstrated objective and compelling reasons***, in light of the specific circumstances in the country where the deficiencies in the judiciary are of such a magnitude that they require extraordinary measures[20] and that they have paralyzed all other existing mechanisms for judicial accountability; otherwise, this may impact negatively public trust in the judiciary and in the public institutions in general;[21]

(iv) due consideration should always be given to the potential impact of this extraordinary process on the judiciary, and potential destabilization of its work;[22]

(v) ***sufficient financial and human resources and infrastructure must be provided for the implementation of process;***

(vi) there should be ***demonstrated broad political consensus and public support*** within the country for such an extraordinary procedure, and throughout the process;[23]

(vii) designing measures should ***involve the broadest possible scope of stakeholders and inclusive public consultations*** with relevant civil society and political actors, in particular judicial associations;

16 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. Council of Europe, *Recommendation CM/Rec(2010)12 of the Committee of Ministers to member states on judges: independence, efficiency and responsibilities*, para. 49.

17 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. 59. See also e.g., Venice Commission, *Interim Opinion on the Draft Constitutional Amendments on the Judiciary of Albania*, CDL-AD(2015)045, 21 December 2015, para. 100.

18 *Ibid.* para. 59 (2019 ODIHR Opinion on Moldova). See also UN Special Rapporteur on the Independence of Judges and Lawyers (UNSRIJL), *2005 Annual Report*, UN Doc E/CN.4/2005/60 (2005), para. 45.

19 See e.g., International Commission of Jurists, *Judicial Accountability - A Practitioner's Guide* (2016), pages 83-84. As noted by the UNSRIJL, the use of re-evaluation or vetting processes instead of the normally applicable mechanisms inherently carries a risk of "abuse and settlement of scores" when a change of regime occurs, and care should be taken "*to avoid reproducing the previous situation and to ensure that the judicial system gains in authority and credibility*"; see UN SRIJL, *2005 Annual Report*, UN Doc E/CN.4/2005/60 (2005), para. 45.

20 For instance, where there is a documented extremely high level of corruption and/or where there had been considerable political influence on judicial appointments in previous periods, generally accompanied by a complete lack of public trust in the judiciary. See e.g., ODIHR, *Opinion on the Law of Ukraine on the Judiciary and Status of Judges*, 30 June 2017, para. 50. See also e.g., Venice Commission, *Interim Opinion on the Draft Constitutional Amendments on the Judiciary of Albania*, CDL-AD(2015)045, 21 December 2015, paras. 98-99; and Venice Commission and CoE DHR-DGI, *Joint Opinion on the Law on the Judiciary and the Status of Judges and Amendments to the Law on the High Council of Justice of Ukraine*, CDL-AD(2015)007, paras. 72-74

21 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. 59. See also Venice Commission, *Interim Opinion on the Draft Constitutional Amendments on the Judiciary of Albania*, CDL-AD(2015)045, 21 December 2015, para. 98.

22 *Ibid*. para. 59 (2019 ODIHR Opinion on Moldova); and para. 98 (2015 Venice Commission Interim Opinion on the Judiciary of Albania).

23 *Ibid.* para. 59 (2019 ODIHR Opinion on Moldova); and para. 100 (2015 Venice Commission Interim Opinion on the Judiciary of Albania).

(viii) ***adequate time*** should be allowed to ensure objective and qualitative assessment while ensuring the ***openness and transparency of the process***; and

(ix) it should be ***accompanied by greater structural reform of ordinary mechanisms and procedures of judicial accountability and integrity.***

18. If on the basis of the above considerations, evaluation or vetting is considered justified and strictly necessary and is being pursued on an exceptional basis, the process should be ***subject to extremely stringent conditions and safeguards***[24] to protect judges fit to occupy their positions:

(i) it should be ***carried out on an individualized case-by-case basis***, analyzing whether a judge was appointed unlawfully (or derived judicial power from an act of allegiance)[25] and/or whether s/he committed a gross violation of human rights, a serious misconduct amounting to a disciplinary offence that may lead to dismissal from office and/or a criminal offence, which should be the only reasons leading to removal;

(ii) to avoid a risk of the capture of the judiciary in future by the political force which controls the process,[26] such a process should always be ***carried out by a competent, independent and impartial body,***[27] free from external influence or pressure, looking in particular at the modalities of appointment of its members, their non-renewable term of office, their irremovability, the appearance of independence of the body, the complete discretion in deciding on its organizational structure and personnel, and financial independence;[28]

(iii) any decisions on evaluation and removal must be adopted based on clear and objective criteria;

(iv) the procedure should present all the guarantees of procedural fairness,[29] including sufficient time to prepare, notification, presence or legal representation, public hearing and strictly defined exceptions to it, reasoned decision, publicity of the decision; and

(v) the judge shall have the right to challenge the decision and ensuing sanction before an independent and impartial tribunal that has full jurisdiction over all matters of fact and law, and that adequately states the reasons on which its decisions are based.[30]

18. Vetting also often involves an interference with the right to private and family life of judges and prosecutors subject to it, which is protected by Article 17 of the International Covenant on Civil and Political Rights (hereinafter "the ICCPR") and Article 8 of the

24 *Ibid.* para. 59 (2019 ODIHR Opinion on Moldova); and paras. 98-99 (2015 Venice Commission Interim Opinion on the Judiciary of Albania)

25 UNSRIJL, *Report on Guarantees of Judicial Independence*, UN Doc A/HRC/11/41 (2009), para. 64. See also *UN Updated Set of principles for the protection and promotion of human rights through action to combat impunity* (2005), which states that "*judges unlawfully appointed or who derive their judicial power from an act of allegiance may be relieved of their functions by law in accordance with the principle of parallelism. They must be provided an opportunity to challenge their dismissal in proceedings that meet the criteria of independence and impartiality with a view toward seeking reinstatement*".

26 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. 59. See also Venice Commission, *Interim Opinion on the Draft Constitutional Amendments on the Judiciary of Albania*, CDL-AD(2015)045, 21 December 2015, para. 98.

27 See e.g., ECtHR, *Xhoxhaj v. Albania*, no. 15227/19, 9 February 2021, paras. 289-294. See also e.g., 2016 Venice Commission's Amicus Curiae for the Constitutional Court of Albania on the Vetting Law, para. 8.

28 *Ibid.* ECtHR, *Xhoxhaj v. Albania*, paras. 295-302; and 2016 Venice Commission's Amicus Curiae for the Constitutional Court of Albania on the Vetting Law, para. 32.

29 See e.g., UN SRIJL, 2005 Annual Report, UN Doc E/CN.4/2005/60 (2005), para. 45, where the UN Special Rapporteur underlined that *"[c]leaning up without observing international standards for a fair trial or the basic principles for the independence of the judiciary may, far from strengthening the judicial system, undermine it*".

30 See e.g., ECtHR, *Xhoxhaj v. Albania*, no. 15227/19, 9 February 2021, paras. 333-335. See also *ibid.* Sub-Section 4 (2019 ODIHR Opinion on Moldova). See also UNSRIJL, *2005 Annual Report*, UN Doc E/CN.4/2005/60 (2005), para. 45.

European Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter "the ECHR"). According to the case-law of the ECtHR relating to vetting, the dismissal from judicial office, losing all remuneration with immediate effect, has serious consequences for the "inner circle" of a judge, that is, her/his well-being and family members, but also, given the assessment of professional competence carried out by the vetting body, triggered stigmatisation in the eyes of society as being unworthy of performing a judicial function, thereby falling within the scope of Article 8 ECHR.[31] Interference with the right to respect for private life is only acceptable if it complies with the strict requirements of Article 8 (2) ECHR, meaning that it is prescribed by law, pursues a legitimate aim and is necessary in a democratic society, and strictly proportionate to the aim pursued.[32]

3. ANALYSIS AND RECOMMENDATIONS

19. 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. 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.[33] A particularly high threshold must be applied in order to respect the fundamental principle of the independence of the judiciary, and the specific measures adopted must be strictly necessary and proportionate to the factual situation in the country concerned, and appropriately limited in time.[34]

20. Thus, without prejudice to the legitimacy of and the need for the external evaluation of the judges of the SCJ in Moldova and candidates to such positions, the present Opinion will aim at providing recommendations to limit, to the extent possible, the negative impact that such a procedure may have and to ensure respect for rule of law principles during the reform process 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.

21. 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*

31 See e.g., ECtHR, *Xhoxhaj v. Albania*, no. 15227/19, 9 February 2021, paras. 362-369. See also Venice Commission, *Kosovo - Opinion on the Concept Paper on the Vetting of Judges and Prosecutors and draft amendments to the Constitution*, CDL-AD(2022)011, para. 18.

32 Article 8(2) of the ECHR provides: "*There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others"*. See also ECtHR, *Xhoxhaj v. Albania*, no. 15227/19, 9 February 2021, paras. 379-414, where the Court concluded that the interference was sufficiently foreseeable, in the public interest of reducing the level of corruption and restoring public trust in the justice system corresponding to the legitimate aims of national security, public safety and the protection of the rights and freedoms of others, and that the dismissal and lifetime ban imposed on the applicant and other individuals removed from office on grounds of serious ethical violations was not inconsistent with or disproportionate to the legitimate objective pursued by the State to ensure the integrity of judicial office and public trust in the justice system. In *Sevdari v. Albania*, no. 40662/19, 13 December 2022, paras. 94-96, where the Court held that "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", and hence concluded that it violated Article 8 of the ECHR. See also e.g., Venice Commission, *Kosovo - Opinion on the Concept Paper on the Vetting of Judges and Prosecutors and draft amendments to the Constitution*, CDL-AD(2022)011, para. 18.

33 See e.g., International Commission of Jurists, *Judicial Accountability - A Practitioner's Guide* (2016), pages 83-84.

34 See e.g., *ibid.* pages 83-84, *Judicial Accountability - A Practitioner's Guide* (2016).

guarantors of rights, if not accompanied by necessary structural changes, including means to strengthen judicial independence,[35] *proper judicial training,*[36] *and measures to promote a change of culture within the judiciary*."[37] It will therefore be essential **to complement the external evaluation mechanism with a comprehensive review and possible reform of the ordinary accountability mechanism processes, especially in relation to judicial discipline, 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**.

3.1. Evaluation Commission

22. The Evaluation Commission is composed of six members, three members are proposed by parliamentary factions based on the principle of proportionality and the other three members by development partners.[38] The six members of the Evaluation Commission were appointed by the Parliament on 15 June 2023 with the vote of 3/5th of elected members of Parliament. Although one of the members proposed by the development partners has resigned as of 15 May 2024, the Commission is currently operational and adopted its rules on organization and functioning, with amendments introduced in September and November 2023.[39] The first hearings of the subjects were carried out in November 2023, with the first evaluation reports sent to the SCM in December 2023.[40]

23. According to Article 4 (4) of the Law, the Evaluation Commission shall operate until the appointment of the last judge of the Supreme Court of Justice. Article 21 of the Law specifies that *"[t]his Law shall cease to have effect on the date of completion of the examination by the Supreme Court of Justice of the last appeal lodged against the decision of the Superior Council of Magistracy referred to in Article 18*."

24. As noted above, an 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.[41]

25. The Law accords different roles to the Evaluation Commission. On the one hand, the Commission evaluates incumbent SCJ judges, which would be carrying out a vetting process. On the other hand, the assessment of the *candidates* for the SCJ to fill in the vacant positions resulting from the external evaluation process can be seen as part of or similar to the regular process to find suitable candidates for these positions. Since the first

35 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'".*

36 ODIHR, *Kyiv Recommendations on Judicial Independence in Eastern Europe, South Caucasus and Central Asia* (2010), para. 19.

37 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.

38 Article 6 (6) of the Law defines "the development partners" as "international organisations, diplomatic missions and their representations in the Republic of Moldova active in the areas of justice reform and the fight against corruption in the last 2 years".

39 See: <vettingmd.eu>.

40 See for more information: Home (vettingmd.eu).

41 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.

role potentially engages the security of tenure of these judges, it warrants a more cautious approach, and a flawed body would have far-reaching consequences. In that respect, it is welcome that the Law contains a number of safeguards to ensure the personal and institutional independence of the Evaluation Commission.

26. These safeguards include that neither the executive nor the legislative branch has exclusive power in the appointment of the Evaluation Commission's 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[42] (see also Sub-Section 3.1.1), and the three other members are proposed by parliamentary factions while respecting the proportional representation of the majority and the opposition (Article 6 of the Law). Moreover, the members are appointed for a fixed term and serve only until the appointment of the last SCJ judge and completion of appeal procedures (Article 4 (4)). The Evaluation Commission has a separate budget (Article 4 (5)), which contributes to the financial independence of this body. Further, its members are protected by irremovability, benefit from functional immunity along with the employees of the Secretariat (Article 5 (5)) and a high level of remuneration (Article 6 (8)), which constitute additional guarantees of independence.

27. The Law also requires Evaluation Commission members 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 Commission members and its Secretariat, but only with the consent of the Evaluation Commission, with the exception of *flagrante delicto*, where such consent is not required. It is not clear from the text of the Law what is the material scope of the functional immunity. 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 judicial functions.[43] **It is recommended to specify the scope of the functional immunity envisaged in the Law accordingly.**

28. In light of the foregoing, the combination of the above provisions provides strong safeguards to ensure the independence of the Evaluation Commission and that it is not compromised through fear of the initiation of prosecution or civil action, including by state authorities. The independence of the Evaluation Commission is also ensured through its Secretariat (Article 9), which has to "*be independent of any public authority or institution and shall function solely for the purpose of assisting the Evaluation Commission in the performance of its tasks.*" However, the Law also provides that *"[a]t the request of the chairperson of the Evaluation Commission or the head of the secretariat, public authorities and institutions shall be obliged to delegate or second employees to assist the Evaluation Commission in the performance of its duties, where appropriate, by way of derogation from the provisions of the regulations governing the functioning of the public authorities and institutions concerned and the regulations 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

42 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.*"

43 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.

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 Commission should also clarify the required expertise and selection criteria for secretariat staff and their remuneration.**

29. For the external evaluation to be effective, it is important that the powers of the Evaluation Commission be commensurate to the task, and fully respect the rule of law (including transparency) and the rights of the evaluated judge. According to Article 4 (2) of the Law, the Evaluation Commission is not a public authority within the meaning of the Administrative Code, but it is empowered to deal with all questions of fact and law and has the power to gather the necessary information (Article 13). It conducts the proceedings in accordance with the Law. At the end of the proceedings and after the hearing with the evaluated judge or candidate, the Evaluation Commission adopts a reasoned report on the evaluation (Article 16). The SCM 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 latter is in line with the recommendations made in the Venice Commission-DGI's Joint Opinion of October 2022.[44]

3.1.1. Composition and Selection Process

30. According to Article 6, the Evaluation Commission consists of six members. Following a preliminary screening by the Committee on Legal Affairs, Appointments and Immunities ("the Committee"), the members representing parliamentary factions pre-selected by the Committee with a majority vote, are then voted individually with three-fifth votes of the members of Parliament (Article 6 (2)). The three candidates proposed by the development partners, after being elected by the same Committee, are subject to a vote in the plenary with a three-fifth majority.

31. While the current composition consists of four men and one woman,[45] 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.[46] It is worth recalling international recommendations, which urge to seek gender-balanced representation in all appointments made by public authorities to public committees and other public functions.[47] 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*

44 See *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 Supreme Court of Justice* (CDL-AD(2022)024), 21 October 2022 (which reviewd a draft law of 19 September 2022) , paras. 49-52.

45 Ms. Maria Giuliana Civinini, one of the three international members of the Evaluation Commission, resigned as of 15 May 2024.

46 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.

47 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.

legislative, judicial and executive bodies."[48] Unless provided in other legislation, **the Law should ensure that gender considerations are taken into account throughout the nomination, selection and appointment process for members of the Evaluation Commission. Although the Commission is formed and operational, this could nevertheless be addressed by ensuring a gender balance in case of termination/resignation and subsequent renewal of membership of the Commission. This could be achieved by requiring that the pool of proposed candidates nominated by the parliamentary fractions 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.**

32. 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* 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**.[49]

33. 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 Commission 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 three-fifth majority vote for each candidate in the plenary (Article 6 (2)). This means that opposition-backed candidates would not necessarily become a member of the Evaluation Commission. It may be advisable **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**,[50]**or that the Law otherwise requires a specific number of members to be nominated by the majority and by the opposition respectively**. 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 to require 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 important that the Law **allows parliamentary fractions to propose alternative candidates in the event that earlier candidates 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.**

34. The parity between members nominated by the parliamentary fractions and the development partners reduces the risk of politicization of the Evaluation Commission. The six members of the Evaluation Commission need to fulfil the requirements listed in

48 See the OSCE Ministerial Council, Decision No. 7/09, Women's Participation in Political and Public Life, para. 20.

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

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

Article 7 (1) of the Law.[51] Development partners need to 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.[52] **It is thus recommended that the Law offers guidance with respect to the selection procedure ensuring that development partners invite applications from suitable candidates through a competitive process.**[53] **In addition, to enhance the inclusiveness of the process, civil society representatives 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.

35. Finally, while the involvement of development partners or international experts in vetting or similar processes may aim to strengthen the impartiality of and to legitimize 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, the selection of the candidates is itself transparent and based on clear and objective criteria, and that such a scheme is temporary and ultimately replaced with ordinary mechanisms of judicial accountability.[54]

RECOMMENDATION A.1

In case of termination/resignation and renewal of membership of the Commission to take into account, throughout the nomination, selection and appointment process for new members, gender considerations. This could be achieved by requiring that the pool of proposed candidates nominated by the parliamentary fractions 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.

RECOMMENDATION A.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 and are then voted *en bloc* by the parliament instead

51 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

52 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.

53 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.

54 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.

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

3.1.2. Eligibility Criteria

36. The highest level of professionalism should be required for members of the Evaluation Commission as they will be evaluating the most experienced judges of the country. In addition, the Evaluation Commission members need to have an impeccable reputation (Article 7). Unless it is clear in the Moldovan context how this requirement 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 Commission.[55]

37. The Law provides for two ineligibility criteria which aim at limiting political influence or affiliation, these include that a member may not be or have been a member of the parliament, the government, or a political party during the last three years and 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, contrary to disciplinary or other bodies of judicial administration,[56] the exclusion 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 the process.[57] While there is no decisive influence of the political branches as to the appointment of the Evaluation Commission members and the Commission's financial and operational independence appears guaranteed, it may be of concern that none of the members are required to have exercised judicial function[58] or at least have a law degree and/or some legal experience, Article 7(1)(c) referring 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, it is important that the members can draw from relevant knowledge of and experience in judicial systems, with **at least some members of the Commission having past legal experience and/or legal qualifications and the eligibility requirements should be amended accordingly**.

38. According to Article 7 (2), membership of the Evaluation Commission 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 Commission.

55 *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.

56 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), para. 2; 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 ODIHR, *Warsaw Recommendations on Judicial Independence* (2023), para. 17; 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.

57 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.

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

39. It should be ensured that no conflicts of interest arise in the Evaluation Commission when carrying out its various tasks.[59] Article 10 of the Law only notes that members of the Evaluation Commission 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 Commission members to recuse themselves in such situation.**

3.1.3. Membership

40. According to Article 7 (3), membership of the Evaluation Commission shall cease in case of resignation, removal, death or termination of the work of the Evaluation Commission. 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 good reason, 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 two thirds of the members of the Evaluation Commission, without the concerned member voting.

41. **Unless it is clear in the Moldovan context how the term "good reason" is interpreted, the ground for removal for failure to attend without "good reason" can be very subjective and such wording should be clarified. Also how the 30 days are to be counted in case of inability to serve for health reasons is not specified. 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.**

42. It is welcome that in case of termination of membership due to resignation, removal or death, a replacement of the member is envisaged. The matter shall be immediately referred "*to Parliament for the selection and appointment of a new member in accordance with the procedure laid down for the member whose term of office has concluded*" (Article 7 (5)). However, the Law is silent on the timeline for appointing a new member. 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, with a view to avoid impairing or delaying the functioning of the Commission. Alternatively, the Law could envisage the nomination and appointment of alternate or substitute members to be pre-selected or elected by the Committee according to the same procedure as the initial members, ensuring that an outgoing member should be replaced by their alternates nominated by the same nominating body who had initially nominated the outgoing member**(see also paragraph 33 above). **At the same time, to avoid a possible deadlock regarding the parliamentary vote of 3/5th to approve the new member, it would have been useful**

59 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).

to envisage an anti-deadlock mechanism in the Law e.g., the co-optation by the Evaluation Commission 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 safeguarding the balance and independence of the Evaluation Commission.

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

RECOMMENDATION B

With respect to the replacement of a member of the Evaluation Commission:

- To envisage a timeline for the appointment of the new member by the Parliament.
- To contemplate in the Law the nomination and appointment of alternate or substitute members to be pre-selected or elected by the Committee according to the same procedure as the initial members, thus providing that an outgoing member is to be replaced by their alternates nominated by the same nominating body who had initially nominated the outgoing member, and to the extent possible, that any replacement is made with respect to gender as well as diversity considerations.
- 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.

3.2. Evaluation Criteria

44. As underlined in the caselaw of the ECtHR, the evaluation criteria should fulfil the qualitative requirements of accessibility and foreseeability,[60] to avoid possibility for arbitrary application. Article 11 of the Law, as amended in August 2023, sets out criteria for the assessment of candidates' "ethical and financial integrity".

45. 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, where applicable, other professions, as well as if he/she has had an arbitrary behaviour or issued arbitrary acts, in the last 10 years, contrary to the imperative norms of the law and the European Court of Human Rights*

60 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.

had established, before the adoption of the act, that a similar decision had been contrary to the European Convention on Human Rights"; (b) "*in the last 10 years, has admitted incompatibilities and conflicts of interest incompatible with the office of judge of the Supreme Court of Justice in his/her work*." .

46. In both cases, a SCJ judge or a candidate to the position of judge at the SCJ shall be deemed not to meet the criteria of "ethical integrity" if the Evaluation Commission has serious doubts determined by the fact that either of the above-mentioned aspects are 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.

47. 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 applied as a ground for disciplinary sanctions*".[61] While certain international documents do refer to "integrity" as being essential to the proper discharge of the 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.[62] Furthermore, generally, 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 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 generally consist of guiding principles and norms and should not automatically lead to sanctions impacting the status of a judge.

48. In the present situation, the assessment of "ethical integrity" involves, among others, a verification of whether the candidate has seriously violated rules of judicial ethics and professional conduct. As underlined in the caselaw of the ECtHR, the grounds used in the context of vetting or 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*".[63] In the Moldovan context, as already recommended by ODIHR in the 2023 monitoring report[64] 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.[65] Moreover,

61 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.

62 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.

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

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

65 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.

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.[66] 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.**

49. The assessment whether the judge had an *"…arbitrary behaviour or issued arbitrary acts, in the last 10 years, contrary to the imperative norms of the law and the European Court of Human Rights had established, before the adoption of the act, that a similar decision had been contrary to the European Convention on Human Rights*" 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 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 be evaluated through the established procedure. While in cases of clear signs of gross negligence, professional misconduct or other disciplinary violations, the Evaluation Commission can draw relevant conclusions, allegations of criminal nature should be investigated by the competent authorities and sentenced by the criminal court.

50. Further, it is unclear what the reference to "…*in the last 10 years, has admitted incompatibilities and conflicts of interest incompatible with the office of judge of the Supreme Court of Justice"* entails, for example whether this is an admission of the judge or candidate during the present proceedings or whether it follows from the assessment by the Evaluation Commission.

51. A judge 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 16 (4)). There are no references to elements to be taken into account by the Evaluation Commission in terms of aggravating or mitigating circumstances (e.g., the gravity or severity, the surrounding context, the bad faith or wilfulness of any integrity incident, and as to minor incidents, whether there has been sufficient passage of time without re-occurrences, etc.). The Rules of Organization and Functioning of the Evaluation Commission do not further elaborate the elements to be considered when assessing the 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. The Law also does not contemplate possible attenuating circumstances if a SCJ judge being evaluated faces an objective impossibility to submit supporting documents to defend her/himself. The Law would benefit from further elaboration regarding the **different elements to be considered by the Evaluation Commission for the final evaluation of ethical integrity.**

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

52. Financial integrity is assessed based on the determination that (a) "*the difference between assets, expenses and income for the last 12 years exceeds, in total, 20 average salaries per economy, in the amount established by the Government for the year in which the evaluation of the judge began*," and (b) if "*in the last 10 years, has admitted tax irregularities as a result of which the amount of unpaid tax has exceeded, in total, 5 average wages per economy, in the amount set by the Government for the year in which the judge's assessment began.*" For this purpose, the Evaluation Commission verifies the compliance of a judge 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.[67] According to Article 21 of the Rules of Organization and Functioning of the Evaluation Commission, the Commission will use the method for calculating unjustified wealth defined in the Annex of the Rules.

53. 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.[68] At the same time, there should be a proper examination of the submissions, arguments and evidence adduced by the parties.[69] 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.[70] At the same time, the ECtHR has recognized that in the context of vetting and evaluation of a 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.[71] 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.

54. 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.[72] **This should be reflected in the Law.**

RECOMMENDATION C

To more precisely define the scope and meaning of the term "ethical integrity" to avoid an overly broad and potentially arbitrary application, while elaborating in the Law and/or Rules of Organization and Functioning the different elements to be considered by the Evaluation Commission for the final evaluation, including with

67 See: WPYgrYjbl6GB49pfiM3039rC5wznrS9PkK5kBqE3.pdf (vettingmd.eu) and 7zQTY8W87Xam1KLeHIN04pk2QcpbRukX9vi7rAzl.pdf (vettingmd.eu).
68 See e.g., ECtHR, *Xhoxhaj v. Albania*, no. 15227/19, 9 February 2021, para. 325.
69 *Ibid.* para. 326.
70 CCJE, *Opinion no. 17 (2014) on the Evaluation of Judges' Work, the Quality of Justice and Respect for Judicial Independence*, para. 39.
71 See e.g., ECtHR, *Xhoxhaj v. Albania*, no. 15227/19, 9 February 2021, para. 349.
72 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.

respect to the gravity or severity of the misconduct, the bad faith or wilfulness of the misbehaviour and possible attenuating circumstances.

3.3. Initiation of the Evaluation and Information Gathering

55. The Evaluation Commission initiates the evaluation after receiving from the SCM the list of SCJ judges to be evaluated. Following this, the Commission informs the judge on the initiation of the evaluation and requests the judge 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 Commission, which may not be less than 10 days (Article 12). 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 Commission that the evaluation has not been passed (Article 12 (4)). Similarly, the Evaluation Commission may request, at any stage of the evaluation procedure, additional data and information from the evaluated judge or other persons, indicating the deadline for submission and failure to submit the information without justifiable reasons, may constitute grounds for refusing to include such information in the appraisal file (Article 13 (6)). **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 evaluated judge to request additional time for valid reasons if and as needed.**

56. In addition, the Evaluation Commission has extensive powers to request and obtain information from any "*public authorities [and] legal persons under public or private law*". Article 13(3) specifies that these entities may not refuse to provide information on the grounds of protection of personal data, bank secrecy or other data with limited access, except for information that falls under the provisions of Law no. 245/2008 on state secrecy and that has not been declassified. This provision is worded in an overbroad term and may potentially be interpreted expansively, covering, among other access to information obtained from privileged communications, such as those between a judge and his/her defence counsel, medical records (including, doctor/psychologist or psychiatrist records), journalists' sources or other information falling withing the scope of sensitive personal data,[73] which deserve a higher level of protection. The evaluation should not result in wide-ranging investigations into certain aspects of judges' personal life that may be sensitive or into privileged communications, which arguably would go beyond the actual role of the Commission.[74] This wide scope of power to obtain and request information may be excessive and as recommended previously by ODIHR, the Commission's powers should be more strictly circumscribed while ensuring the protection of sensitive personal data and privileged communications.[75] **It is therefore recommended to revise the Law or the Commission's Rules to exclude the possibility of gathering documents or information that are not**

73 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).

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

75 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.

strictly necessary to the evaluation process, including information obtained from privileged communications and other 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, as would be amended by (CETS 223) when it enters into force**.**

57. Further, according to Article 13(10), 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 Evaluation Commission. **Such a wording 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.[76] It would be advisable to make a specific reference to such standards, while ensuring that the Law provides a specific deadline for destruction of the evaluated subject's personal data collected during the process.** Otherwise, there is a risk of abuse of usage of the information gathered after the vetting process has finished.

RECOMMENDATION D.1

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

RECOMMENDATION D.2

To exclude the possibility of gathering documents or information that are not strictly necessary to the evaluation process, including information obtained from privileged communications and other information falling within the scope of sensitive personal data according to international human rights standards, while ensuring that personal data processing is carried out in full compliance with international standards, particularly with respect to the storage and destruction.

3.4. Hearing before the Evaluation Commission

58. The Evaluation Commission conducts its work in close meetings, which must be attended by at least four members (Article 14). After reviewing the information gathered, the Evaluation Commission shall communicate to the judge, in writing, any doubts it has about the judge to be discussed at the hearing, and shall provide the judge with access to the materials in the evaluation file relating to those doubts (Article 15 (1)).

59. A public hearing only takes place if a judge attends the hearing. Otherwise, the Commission evaluates a judge based on the information gathered. The Law is not clear whether the same four members who evaluate the information also participate in the hearing or members can alternate.

60. In case a judge 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 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 15 (5)). These are welcome procedural guarantees, which are overall in line with international standards on

76 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.

fair proceeding.[77] In case of suspicions about integrity, the burden falls on the person assessed 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.[78] 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.[79] 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.**

61. 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 absolutely necessary for the protection of public order, privacy or morality. If the evaluation panel rejects the judge's request to conduct the hearing or part of it in closed session, the judge may refuse to participate in the hearing. The evaluation of the judge shall continue on the basis of the information gathered by the Evaluation Commission without the hearing. Candidates may be understandably reluctant to air, in public, the details of their financial situation, their dealings with family members, and other aspects of their private lives. A decision about rejecting or granting a judge's request 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.[80] **As a key aspect of the evaluation process, the Law may elaborate the criteria and process for the decision-making on holding a (part or entire) hearing closed, 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.[81] 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.**

62. Following the evaluation, the Commission prepares an evaluation report with a proposal to "fail or pass" the subject (Article 16 (1) of the Law) that should be approved by a majority of the members *present* (Article 16 (2) of the Law). At the same time, Article 25 (1) of the Rules provides 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-**

77 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*."

78 *Ibid.* para. 352.

79 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.

80 See Venice Commission Interim Opinion on the Law on Government Cleansing (Lustration Law) of Ukraine, para. 99.

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

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. .

63. Article 11 of the 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 favor of the evaluated subject**.[82] **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 favor of the evaluated subject.

3.5. Publicity of Reports

64. The Evaluation Commission is required to issue a reasoned decision on the candidate's evaluation, which shall contain the relevant facts, reasons, and the conclusion (Article 13 (3)). The report is sent to the evaluated judge and the SCM, and the information on the result of the evaluation is also published on the Commission's official website (Article 16 (5)). The report on the evaluation shall be published, taking the necessary measures for the protection of the privacy of the judge and other persons, on the official website of the Evaluation Commission no later than 3 days after the adoption of the decision (Article 16 (5)).

65. While "necessary measures for the protection of the privacy" are taken into account, the need to protect the independence of the judiciary 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.[83] 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

82 *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.

83 *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.

or concerning the personal or family life of a judge, as well as professional issues that may seriously affect the reputation of the judge concerned, thus potentially amounting to a violation of Article 8 ECHR, especially if the very existence of misconduct is contested afterwards.[84] 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.[85] This is distinct from the issue of publication of final decisions on disciplinary measures, which should be made available to the public. **The publication of the evaluation report should be reconsidered pending final decision of the SCM or, where relevant, for the final appeal to conclude, to ensure ensures 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 or candidate.**

RECOMMENDATION F.

To reconsider the publication of the evaluation report pending final decision of the SCM, or, where relevant, for the final appeal to conclude, 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 or candidate.

3.6. Examination of the Evaluation by the SCM

66. According to Article 17, the SCM examines the assessment report provided by the Evaluation Commission 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 judge be resumed if it finds factual circumstances or procedural errors which could have 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 has been passed.

67. In case of (b), the Evaluation Commission shall 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, especially as it may not yield a different result. Given the constitutional role of the SCM, and the need for the conciseness of the process, SCM should be able to take the necessary additional measures on their own and take a decision without asking the Commission to resume the evaluation. The **repetition of the evaluation process should be reconsidered.**

68. The Law is currently not phrased in a way that the SCM is directed to take a negative decision following a negative evaluation from the Evaluation Commission, nor to take a positive decision following a positive evaluation. The problem arises when the Evaluation Commission assesses a judge in a positive way and the SCM rejects the report and sends it back for re-examination. In case of a second positive assessment, the SCM is still able to take any decision, including a decision on the dismissal of a judge. It gives the SCM broad power, i.e., to dismiss a judge of the Supreme Court without initiating the disciplinary proceedings against him/her (see Article 17 (2) (c)). Such a solution seems to not be in line with the very *rationale* of a vetting process and should be reconsidered. In case of a repeated

84 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.

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

positive assessment by the Evaluation Commission, the SCM should confirm that the evaluation is passed and if it identifies potential grounds for initiating disciplinary proceedings, such proceedings should be initiated in accordance with the regular procedure.

RECOMMENDATION G.

To reflect in the Law, in case of a repeated positive assessment by the Evaluation Commission, that the SCM should confirm that the evaluation is passed and if it identifies potential grounds for initiating disciplinary proceedings, such proceedings should be initiated in accordance with the regular procedure.

3.7. SCM Decision of Dismissal and Legal Redress

69. The decision of the SCM on the failure to pass the evaluation results in the dismissal of the SCJ judge, who is not entitled to exercise the office of judge and other offices of public dignity for a period of seven years from the date the decision of the SCM 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.

70. Evaluation or vetting proceedings are exceptional and *sui generis* in nature to address an exceptional situation. Hence 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.[86] The Law contemplates a seven years ban from exercising judge or other offices of public dignity, which in light of the ECtHR caselaw would not appear disproportionate also considering that it would allegedly allow the dismissed judge to apply to other public position or work in the public or private sector.

71. 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.[87] This constitutes an important safeguard for the judges' independence and the independence of the judiciary overall. According to Article 18, the decision of the SCM may be appealed by the judge concerned to the SCJ within 5 days from the communication of the SCM's reasoned decision. The appeal is considered by a panel of three judges, in an open hearing, within 30 days. The Law also provides that only judges "*who have passed the evaluation and have not served in the [SCJ] until 31 December 2022*" can be members of the panel. This may safeguard against conflict of interest. However, the SCJ is entrusted with the decision to only allow the appeal if it finds that serious procedural errors affecting the fairness of the assessment procedure were admitted by the Evaluation Commission during the assessment procedure or that there are factual circumstances which could have led to the assessment being passed. In such cases, it orders the Commission to resume the assessment procedure. The decision is final.

72. While the panel of the SCJ would *prima facie* satisfy the necessary personal and institutional independence, as underlined in the 2022 ODIHR Opinion, in the circumstances of these

87 See Article 6.1 of the ECHR, Article 14.1 of the ICCPR. See also 1990 OSCE Copenhagen Document, para. 5.10. See also tCCJE, *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*."

appeals before the SCJ, the SCJ judges are likely to know many of the appellants personally, which may lead to recusals.[88]

73. The approach of ODIHR has traditionally been to provide for the possibility to challenge the decisions of disciplinary bodies before an independent body presenting all the characteristics of a "tribunal" under Article 6 (1) of the ECHR irrespective of the fact that such disciplinary bodies may or may not themselves be considered as "tribunal".[89] In a similar way, **the evaluated judge or candidate should be able to challenge the decision of the SCM before a court at all times.** The possibility to challenge the results of the evaluation constitutes an important safeguard to guarantee the independence of judges in the evaluation process. As stated by the ECtHR, the appellate court should comply with the requirement of "full jurisdiction" in the proceedings before it, meaning that it should in particular examined point by point the grounds of appeal and scrutinised the findings of fact and law made by the vetting body.[90] Since the SCM does not itself exercise full jurisdiction but only assess the Evaluation Report prepared by the Evaluation Commission, the evaluated SCJ judge needs to have access to a court under the domestic system, in compliance with Article 6 (1) of the ECHR and Article 14 (1) ICCPR. In that context an issue under Article 6 would arise only if the SCJ failed to provide a "sufficient review" in compliance with Article 6 ECHR. Although the scope of the review contemplated in Article 18 (2) is limited to a certain extent, this may not in and of itself be problematic, since the provision provides for both consideration of serious procedural violations but also substantive issues (factual circumstances which could have led to the assessment being passed), which would seem to ensure a review of both facts and law, and access to an effective remedy.[91]

74. In addition, as stated earlier, the decision of the SCM may be appealed by the judge concerned within 5 days from the communication of the reasoned decision. This may not be sufficient to prepare an adequate appeal. **It is recommended to extend the deadline to allow for sufficient time for a due process.**

3.9. Candidates for SCJ

75. Article 20 (1) provides that the evaluation process as noted above applies to candidates for the position of judge of the SCJ as well. The same evaluation criteria apply, but "…*in the absence of rules of ethics and professional conduct established for the field in which the candidate is or has been active, it shall be verified whether or not the candidate's conduct up to the date of the evaluation gives rise to reasonable suspicions as to his/her compliance with the requirements of ethics and professional conduct established for judges*."

76. A negative evaluation has far-reaching consequences as the report of the Evaluation Commission on the candidate's failure to pass the evaluation shall be forwarded, within 5 days, to "…*the Superior Council of Prosecutors, the Bar Union of the Republic of Moldova or, as the case may be, to the educational institution where the candidate is working for a decision on his/her career*" (Article 20 (3)). The SCM may decide to forward its decision and the Evaluation Commission's report to other public institutions authorized with "verification and control functions". Where the candidates are judges (from other levels than the SCJ) and prosecutors, the consequences provided in Article 17 (4) and (5) (dismissal,

88 *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), para. 78.

89 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. 109. See also 2010 ODIHR Kyiv Recommendations, para. 26 and 2023 Warsaw Recommendations, para. 22; See Joint Opinion on the draft amendments to the legal framework on the disciplinary responsibility of judges in the Kyrgyz Republic, para. 111.

90 See e.g., ECtHR, *Xhoxhaj v. Albania*, no. 15227/19, 9 February 2021, para. 334.

91 *ODIHR Report on the evaluation (pre-vetting) of candidates for members of the Superior Council of Magistracy in Moldova* (29 September 2023), paras. 102 and 106.

inability to hold judgeship or other public offices for 7 years and cuttings in certain entitlements) shall similarly be applied. The inability to become a judge and hold public offices for 7 years would extend to candidates from other professions and those who are unemployed. Article 18(1) of the Law envisages the possibility to appeal the decision to fail the vetting subject, although it only refers to "judges" having the right to appeal. Also, it is not clear what legal redress candidates for the SCJ judgeship, who are not sitting or former judges, may have as Article 18 of the Law regarding appeal against the decision of the SCM seems to apply to the evaluated incumbent judges of the SCJ only. The same legal redress should also be accessible to non-judge candidates.

[END OF TEXT]