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OPINION ON THE DRAFT AMENDMENTS TO THE LEGAL FRAMEWORK ON THE JUDICIARY

GEORGIA

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Based on an official translation of the Draft Amendments received by the OSCE Office for Democratic Institutions and Human Rights.

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EXECUTIVE SUMMARY

Judicial independence is a fundamental principle and an essential element of any democratic state based on the rule of law. The independence of the judiciary is also crucial for respecting the principle of separation of powers and upholding other international human rights standards. In this respect, a strong legislative framework coupled with effective enforcement mechanisms is essential for ensuring judicial independence and enhancing credibility in the justice system, and, ultimately, for increasing public trust in judicial institutions.

ODIHR has previously assessed the draft amendments introduced to the Organic Law on Common Courts in 2019. The amendments adopted since 2019 addressed to a certain extent ODIHR recommendations including the introduction of provisions to avoid conflict of interest within the High Council of the Judiciary (HCJ) when its members are also judicial candidates, the removal of a requirement for non-judge candidates to pass the judicial qualification examination and the introduction of a procedure for challenging the HCJ decisions regarding the selection of candidates for Supreme Court judgeship. However, certain shortcomings remain unaddressed, as evidenced during ODIHR's monitoring of the selection and appointment process for the candidates of the Supreme Court that ensued.

The proposed amendments aim to enhance transparency within the judicial system, including by enabling public access to judicial acts, reforming some aspects of the process for selecting candidates for the Supreme Court, as well as proactively disseminating information on new legislative changes or vacant positions.

At the same time, this Opinion identifies some shortcomings and important issues which should be addressed, to ensure compliance with international human rights norms, principles and standards on judicial independence. These include, the eligibility and selection criteria as well as the modalities of HCJ's decision-making during the selection of the candidates for Supreme Court judgeship, and the modalities of designating the President of the Supreme Court. In this respect it is welcome that Georgia continues to pursue judicial reform to enhance judicial independence, including to respond to the priority tasks defined by the European Commission as part of the application for integration into the European Union (EU). Such changes should, however, be part of a coherent policy for judicial reform.

More specifically, ODIHR makes the following recommendations to improve the Draft Amendments' compliance with OSCE commitments and international standards:

A. To resolve the contradictions between Article 13 of the current Organic Law on Common Courts regarding the publication of all decisions on the court websites and Article 13[3] of the Draft Amendments, under which a full or partial depersonalized judicial decision can be requested, and specify the conditions of publication, considering the publication of fully depersonalized judicial acts as a rule with the possibility of disclosure of personalized data in case of legitimate interest; [para 20]

B. To simplify the procedure on the access to depersonalized texts and the verification of consent of the parties on disclosure of information, without

compromising the protection of personal data and the judicial system's ability to deliver justice transparently; [para 27]

C. To provide that the judges of the Supreme Court elect/select the President of the Supreme Court among themselves, or alternatively, better define the procedure and objective and merit-based criteria for the election of the President of the Supreme Court to ensure an objective and merit-based process; [para 30]

D. To consider increasing the number of years of required professional experience to be eligible for the position of the Supreme Court judges; [para 32]

E. To reconsider the use of a vote during the selection process of the candidates for the Supreme Court by the HCJ and instead rely on the compilation of the individual evaluations and justifications carried out by each HCJ member; [para 40]

F. To supplement the Draft Amendments to include safeguards pertaining to background checks as per previous ODIHR recommendations; [para 52]

G. To ensure that the Draft Amendments integrate gender and diversity considerations throughout judicial appointment processes; [para 55] and

H. To also include a reference to the principles of non-discrimination, objectivity and equality in the provisions on the selection of Supreme Court judges; [para 58].

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

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

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I. INTRODUCTION

1. On 25 November 2022, the OSCE Office for Democratic Institutions and Human Rights (ODIHR) received a request from the Speaker of the Parliament of Georgia to review of a number of draft laws pertaining to judicial reform, including the draft amendments to the Organic Law on Common Courts (hereinafter the "Draft Amendments").[1]

2. In December 2023, ODIHR responded to this request, confirming the Office's readiness to prepare a legal opinion on the proposed amendments to assess their compliance with international human rights standards and OSCE human dimension commitments.

3. ODIHR already reviewed a previous set of draft amendments relating to the appointment of Supreme Court judges in Georgia in 2019[2] as well as monitored the appointment procedure for Supreme Court judges throughout 2019-2021.[3] This Opinion should be read together with the previous 2019 ODIHR Opinion and ODIHR monitoring reports relating to the appointment of Supreme Court judges in so far as the main findings and recommendations contained therein have not been addressed.

4. This Opinion was prepared in response to the above-mentioned request. ODIHR conducted this assessment within its general mandate to assist the OSCE participating States in the implementation of their OSCE human dimension commitments.[4]

II. SCOPE OF THE OPINION

5. The scope of this Opinion covers only the main changes introduced as part of the current judicial reform process, in particular the draft amendments to the Organic Law on Common Courts. The Opinion will also address, in so far as relevant, the other draft amendments, namely to the Law of Georgia on the Protection of Personal Data, the General Administrative Code of Georgia, the Law of Georgia on Conflict of Interest and Corruption in Public Institutions and the Rules of the Parliament of Georgia. Thus limited, this legal review does not constitute a full and comprehensive review of each and every provision of the above mentioned laws nor of the entire legal and institutional framework regulating the judiciary in Georgia.

6. The ensuing legal analysis is based on international and regional standards, norms and recommendations as well as relevant OSCE human dimension commitments. The

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[1] The legislative package also include draft amendments to the Law of Georgia on the Protection of Personal Data, the General Administrative Code of Georgia, the Law of Georgia on Conflict of Interest and Corruption in Public Institutions and the Rules of the Parliament of Georgia.

[2] See ODIHR, *Opinion on Draft Amendments relating to the Appointment of Supreme Court Judges of Georgia*, 17 April 2019.

[3] During 2019–2021, ODIHR monitored the process for nomination and appointment of Supreme Court judges of Georgia based on requests of the Public Defender (Ombudsperson) of Georgia. Four respective reports on the monitoring of the nomination and appointment of Supreme Court judges were issued. See ODIHR, *Report on First Phase of the Nomination and Appointment of Supreme Court Judges in Georgia*, June-September 2019 (10 September 2019); *Second Report on the Nomination and Appointment of Supreme Court Judges in Georgia*, June-December 2019 (9 January 2020); *Third Report on the Nomination and Appointment of Supreme Court Judges in Georgia*, December 2020 – June 2021 (9 July 2021); and *Fourth Report on the Nomination and Appointment of Supreme Court Judges in Georgia* (23 August 2021).

[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 […]*".

Opinion also highlights, as appropriate, good practices from other OSCE participating States in this field.

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 a gender perspective into OSCE activities, programmes and projects, the Opinion analyses the potential different impact of the proposed amendments on women and men, and also integrates, as appropriate, a diversity perspective.

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

III. LEGAL ANALYSIS AND RECOMMENDATIONS

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

9. For a detailed overview of international standards and OSCE commitments relevant to the independence of the judiciary and judicial appointments, ODIHR refers to its 2019 ODIHR Opinion, especially the Section III.1 on the International Standards and OSCE commitments. In addition, the Opinion will make references, where relevant, to the Venice Commission's Opinion on the draft Organic Law amending the Organic Law on Common Courts (2020).[7]

10. Regarding the publicity of judgments, public access to judicial decisions forms an integral part of the overall right to a public hearing guaranteed by Article 14(1) of the International Covenant on Civil and Political Rights (hereinafter "the ICCPR")[8] and Article 6(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter "the ECHR"),[9] as also underlined in OSCE human dimension commitments.[10] The right is founded on the idea of the open and transparent administration of justice, which protects individuals from arbitrariness. Public access to judicial decisions helps to avoid the administration of justice in secret, protects against abuse of the judicial process, and helps to maintain public confidence in the administration of justice.[11] At the same time, the requirement is not absolute and there are legitimate reasons for restricting the publicity of certain judgments (see below).

2. Background

11. As part of a broad judicial reform process, the Organic Law of Georgia on Common Courts (hereafter "Law on Common Courts", which refers to the current version of this

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[5] UN Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), adopted by General Assembly resolution 34/180 on 18 December 1979. Georgia ratified CEDAW on 26 October 1994.

[6] See the OSCE Action Plan for the Promotion of Gender Equality, adopted by Decision No. 14/04, MC.DEC/14/04 (2004), para. 32.

[7] See Venice Commission, Opinion on the draft Organic Law amending the Organic Law on Common Courts, 8 October 2020.

[8] *UN International Covenant on Civil and Political Rights* (hereinafter "ICCPR"), adopted by the UN General Assembly by the Resolution 2200A (XXI) of 16 December 1966. Georgia acceded to the ICCPR on 3 May 1994.

[9] The Council of Europe's *Convention for the Protection of Human Rights and Fundamental Freedoms* (hereinafter "ECHR"), signed on 4 November 1950, entered into force on 3 September 1953. Georgia ratified the ECHR on 20 May 1999.

[10] OSCE, *Concluding Document of the Vienna Meeting*, Vienna 1989, para. 13.9.

[11] See e.g., ODIHR, Legal Digest of International Fair Trial Rights (2012), Chapter IV)

law) has undergone a number of amendments since 2019.[12] In its 2019 Opinion, ODIHR assessed the 2019 amendments for compliance with OSCE commitments and international standards as well as international recommendations for judicial appointment processes. The Venice Commission has also adopted several opinions on the amendments to the Organic Law on Common Courts in 2019-2023.[13]

12. In its 2019 Opinion, ODIHR concluded that while adopting provisions on criteria, conditions and procedures for judicial selections was a positive development, the draft amendments fell short of guaranteeing an adequate open, transparent, and merit-based selection system and were not fully in line with international standards and recommendations.[14] The final amendments adopted on 1 May 2019 addressed a few ODIHR recommendations including the introduction of provisions to avoid conflict of interest within the High Council of the Judiciary (HCJ), when HCJ members are also candidates and the removal of the requirement for non-judge candidates to pass the judicial qualification examination. However, key shortcomings remained as evidenced during ODIHR's monitoring of the selection and appointment process that ensued.[15] Furthermore, the adopted amendments failed to provide safeguards to prevent the politicization of the appointment process before the parliament, for instance by strictly circumscribing parliament's role to one of supervising compliance with applicable procedures rather than undertaking what amounts to a re-assessment of the competence and integrity of all candidates.

13. These concerns were reiterated in ensuing Venice Commission Opinions along with other problematic aspects of judicial reform. For example, in its 2022 Opinion, the Venice Commission concluded that "*the combined effect of a rushed adoption of the 2021 Amendments and their introduction of an increase in the powers of the* [High Council of Justice] *to second/transfer judges without their consent, and the new and vague grounds for disciplinary misconduct and the suspension of a judge's salary in the case of a disciplinary investigation – may in the specific context of Georgia create a chilling effect on judges' freedom of expression and internal judicial independence*." The HCJ, which is established to ensure the independence and efficiency of the common courts and is in charge of appointing and dismissing judges, continued to suffer from mistrust throughout the judicial reform process, which ultimately has an impact on the independence of the judiciary as a whole[16] and public trust in judicial institutions.

14. The current reform package under review in this Opinion was prepared by the Committee on Legal Affairs of the Parliament of Georgia to meet the priority tasks defined by the European Commission in response to the application for integration into the EU. On 17 June 2022, among other priority conditions, the EU recommended to "*adopt and implement a transparent and effective judicial reform strategy and action plan post-2021 based on a broad, inclusive and cross-party consultation process; ensure a judiciary that is fully and truly independent, accountable and impartial along the entire judicial institutional chain, also to safeguard the separation of powers;*

[12] The UN Human Rights Council has previously recommended that "the Government pursue the reform of the judiciary to enhance its independence, and implement the recommendations of regional organizations to ensure that the legislative framework and procedures governing the appointment of judges to the Supreme Court complied with international human rights standards. See the *Report of the Office of the United Nations High Commissioner for Human Rights*, A/HRC/WG.6/37/GEO/2 (18-9 January 2021).

[13] This includes the *Opinion on the December 2021 amendments of the Organic Law on Common Courts* (20 June 2022); *Urgent Opinion on the amendments to the Organic Law on Common Courts* (2 July 2021); *Opinion on the draft Organic Law amending the Organic Law on Common Courts* (8 October 2020); and *Urgent Opinion on the selection and appointment of Supreme Court judges of Georgia* (16 April 2019) as well as *Follow-Up Opinion* on these four previous opinions concerning the Organic Law on Common Courts (14 March 2023).

[14] See the *ODIHR Opinion on the Appointment of Supreme Court Judges of Georgia,* (17 April 2019).

[15] See list of recommendations on pages 21-23 (*2020 ODIHR Second Monitoring Report*).

[16] According to *survey* conducted by the National Democratic Institute in August 2022, 31 per cent of those polled said the court system had deteriorated in the last 10 years, with 32 per cent saying it remained the same and only 18 per cent saw improvement.

notably ensure the proper functioning and integrity of all judicial and prosecutorial institutions, in particular the Supreme Court and address any shortcomings identified including the nomination of judges at all levels and of the Prosecutor-General; undertake a thorough reform of the High Council of Justice and appoint the High Council's remaining members. All these measures need to be fully in line with European standards and the recommendations of the Venice Commission."[17] Georgia must fulfill these tasks to receive candidate status for the EU.

3. Public Disclosure of Judicial Acts

3.1. Data Protection and Access to Public Information

15. Article 62 (3) of the Constitution of Georgia ensures the publicity of court hearings and judgements. The access to public information is further foreseen in Article 18 (2) of the Constitution and Article 10 of the General Administrative Code of Georgia. The publicity of judicial decisions is also envisaged by Article 13 of the Organic Law on Common Courts. The issue of disclosure of information about a person included in court decisions is, however, to be "*decided in accordance with the law*."

16. Accessibility and publication standards pertaining to judicial decisions are enshrined in Article 14(1) of the ICCPR and Article 6 (1) ECHR, as further elaborated in the case-law of the European Court of Human Rights (hereinafter "ECtHR"). In *Fazliyski v. Bulgaria,* the ECtHR emphasized that the requirement of Article 6 (1) of the ECHR that judgments be pronounced publicly is free-standing, noting that an applicant's ability to access judgments and exercise one's rights of appeal is not decisive but rather whether those judgments were, in some form, made accessible to the public.[18] The ECtHR has also confirmed the existence of a right of access to information in its various judgments on Article 10 ECHR.[19] It is also important in this context to ensure accessible and disability-friendly online justice content, to the extent possible and as far as compatible with fair-trial principles.[20]

17. At the same time, the publicity of judgments should be balanced with the right to respect for private and family life protected under Article 17 of the ICCPR[21] and Article 8 of the ECHR,[22] which also lay down the conditions under which restrictions of this right are permitted. In addition, the *CoE Convention on the protection of individuals with regard to automatic processing of personal data* (Convention 108) sets out principles and rules for personal data processing as well as the rights of individuals.[23] According to this Convention, personal data should be preserved in a form which permits identification of the data subjects for no longer than is required for the purpose for which

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[17] See *the Opinion on the EU membership application by Georgia*, 17 June 2022.

[18] ECtHR, *Fazliyski v. Bulgaria,* Application no. 40908/05, 16 April 2013, para. 65.

[19] See also ECtJHR, *Youth Initiative for Human Rights v. Serbia*, Application no. 48135/06, 15 June 2013; *Magyar Helsinki Bizottság v. Hungary* [GC], Application no. 18030/11, 8 November 2016; and *Sdruženi Jihočeské Matky v. Czech Republic* [dec.], Application no. 19101/03, 10 July 2006.

[20] See ODIHR, *Paper on Gender, Diversity and Justice: Overview and Recommendations* (2019), Key Recommendation 21.

[21] Article 17 of the ICCPR states: "*1. No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation. 2. Everyone has the right to the protection of the law against such interference or attacks*". See also *UN, General Assembly, Revised draft resolution on the right to privacy in the digital age*, A/RES/75/176, New York, 28 December, 2020 and *UN, General Assembly, Resolution on the right to privacy in the digital age*, A/RES/68/167, New York, 18 December 2013.

[22] Article 8 of the ECHR provides: "*1. Everyone has the right to respect for his private and family life, his home and his correspondence. 2. 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 wellbeing 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*."

[23] See *The Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data*, (Convention 108) Strasbourg, 28 January 1981, ratified by Georgia on 1 April 2006.

those data are stored.[24] CCJE Opinion no. 14 provides that "*the online availability of certain judicial decisions could place privacy rights of individuals at risk and jeopardize the interests of companies. Therefore courts and judiciaries should ensure that appropriate measures are taken for safeguarding data in conformity with the appropriate laws*".[25]

18. While there is no question as to the existence of a public interest in public access to judicial decisions, the question could arise as to what extent the public availability of judicial decisions affects the right to privacy and/or right to protection of personal data of individuals involved. The proposed Draft Amendments aim to enable public access to judicial acts, at the same time ensuring personal data protection. However, the proposed approach raises questions with regard to transparency, legal certainty and more generally, the complexity of the process for getting access to court decisions.

19. Chapter 1^1 of the Draft Amendments introduces Articles 13^3, 13^4 and 13^5, which aim to regulate the dissemination of fully or partially depersonalized texts of judicial acts. The draft amendments to the General Administrative Code of Georgia and the Law on the Protection of Personal Data are purely technical, bringing them in line with the draft amendments to the Organic Law of Georgia on Common Courts. The Draft Amendments take into account constitutional guarantees related to personal data protection pertaining to "*person's health, finances, family life, or other personal affairs*" (Articles 13^3 (5)). In this respect, they comply with basic principles of data protection.[26]

20. However, there is a lack of normative coherence between Article 13 of the current Law on Common Courts[27] and the proposed additions to this provision through Chapter 1^1 of the Draft Amendments. While Article 13 provides that "…*a court decision made at an open session as a result of hearing a case on the merits shall be fully published on the website of the court*…", Article 13^3 of the Draft Amendments independently regulates the dissemination of fully or partially depersonalized text of the judicial decision as public information under certain conditions. These conditions include that a decision is taken following an open session, the request is made by a person who would not be able to obtain the full text of the judicial decision in part or in full on the basis of other existing provisions and the request is made as public information. **It is recommended to resolve contradictions and the conditions under which a full or partial depersonalized judicial decision can be requested and is published as a matter of rule.**

21. The Draft Amendments approach public access to judicial decisions as an individual right that is conditional to a rather complicated, burdensome, and long procedure. This approach also departs from a widely accepted concept of the right to access public information, as prescribed in the General Administrative Code of Georgia. In the latter, there is a simplified procedure for access to information in possession of administrative

[24] See also the [*ODIHR Opinion on the Appointment of Supreme Court Judges of Georgia*](), para. 77. Further, of relevance are Regulation 2016/679 of 27 April 2016 on protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) OJ L 119/1 of 4 May 2016 and the EU Directive 2016/680 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data by competent authorities for the purposes of the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, and on the free movement of such data, and repealing Council Framework Decision 2008/977/JHA OJ L 119/89 of 4 May 2016.

[25] *CCJE Opinion no. 14 on "Justice and Information Technologies"*, para. 17.

[26] See the Regulation 2016/679 of 27 April 2016 on protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) OJ L 119/1 of 4 May 2016.

[27] Article 13 on publicity of the proceedings provides: "*1. All cases in the court are discussed in an open session. 2. Consideration of the case at a closed session is allowed only in cases provided for by law. 3. A court decision shall be pronounced publicly in all cases. 3^1. A court decision made at an open session as a result of hearing a case on the merits shall be fully published on the website of the court, and if a court decision is made at a closed session as a result of hearing a case on the merits, only the resolution part of the decision shall be published on the website of the court. The issue of disclosing personal data of a person that are included in the court decisions shall be resolved in accordance with law. 4. (Removed - 06.03.2013, No. 260) 5. In the court, as well as in the court session hall, photo-, film-, video-recording of the proceedings is carried out in accordance with the rules established by this law*".

bodies while Chapter 1^1 of the Draft Amendments instead establishes a number of obstacles to such access. This and other considerations are discussed further below. In general, **the publication on the website of the court, or on a central site, of fully depersonalized judicial acts should be considered the rule, while the disclosure of personalized data, in full or in part, in matters of public interest, especially where it is requested by the press or the applicant can demonstrate a legitimate interest, would be the exception**.

RECOMMENDATION A.

To resolve the contradictions between Article 13 of the current Organic Law on Common Courts regarding the publication of all decisions on the court websites and Article 13^3 of the Draft Amendments, under which a full or partial depersonalized judicial decision can be requested, and specify the conditions of publication, considering the publication of fully depersonalized judicial acts as a rule with the possibility of disclosure of personalized data in case of legitimate interest.

3.2. Modalities for Disclosure of Judicial Acts

22. Article 13^4 (2) of the Draft Amendments provides that until 1 May 2024, a person can apply to the HCJ or to the relevant court to request protection and non-disclosure of public information about the text of judicial acts adopted before 1 May 2023. The Article further notes that if a person does not apply before the deadline, the court considers that they agree to disclose this information to the public. As this is foreseen to safeguard personal data protection, it is even more important that such significant changes are communicated to the public, even more so as some of these judicial acts could have been adopted a while ago and been forgotten. Paragraph 9 obliges the HCJ to periodically inform the public about newly established rules by publishing such information on its website. However, since not everyone may have internet access or be aware of where to seek such information**, alternative ways of communication should be explored for wider public outreach. This may be through national newspapers and relevant professional websites or other media channels.**

23. According to Article 13^4 (3) of the Draft Amendments, the relevant court is given up to a year (until 1 May 2024) to decide on the admissibility of the request for non-disclosure and such a decision enters into force immediately, "*upon the expiration of 1 month from its adoption*" (Article 13^4 (4)). That said, it is not clear why Article 13^4(8) establishes that "*it shall be inadmissible to communicate the fully or partially depersonalized text of a judicial act adopted before 1 May 2023 as public information until 1 May 2025*." This also seems to contradict the above-mentioned paragraphs (2)-(4) that do not justify a total ban of communicating the (fully or partially) depersonalized text of a judicial act adopted before 1 May 2023 as public information until 1 May 2025. A court may take a decision shortly after 1 May 2024 and it would enter into force one month after its adoption as per Article 13^4 (3). **Article 13^4 should be revised to clarify deadlines for the dissemination of depersonalised text of a judicial act.**

24. For the texts of judicial acts adopted after 1 May 2023 the approach is different. When adopting its last judicial act on a case, a court shall decide in open session whether a fully or partially depersonalized text of all judicial acts adopted by the court on the same case shall be communicated as public information. In this case, as per Article 13^5(3) of the Draft Amendments, "*the court,* […] *shall ascertain the will of a person regarding*

the disclosure of information about this person in the form of public information reflected in the judicial act adopted/to be adopted by the court on the same case." The same paragraph notes that if a person refuses to disclose such information or their will is not clear, the court retains the right to allow communication of this information as public information. Article $13^5(4)$ states, "*if this person within the specified time limit does not provide the court with a reasoned refusal in writing to disclose the information*", it is considered that they have consented to the communication of this information in the form of public information, including "*about another person mentioned by this person*". The Article also mentions "*reasonable*" time, without defining the time period. As already mentioned above, a proactive approach in informing participants of their rights pursuant to the existing provisions is as essential for transparency as for the protection of personal data. **It is therefore important that participants in court proceedings are clearly informed about the possibility to request the non-disclosure of personal information in the adopted judicial act(s).**

3.3. Challenging the Court Decisions on Dissemination of Judicial Acts

25. Article 13^5 (5) and (6) of the Draft Amendments provide a possibility to appeal decisions on disseminating the texts of adopted judicial acts both by persons who were affected by the decision (paragraph 5) or any other person (paragraph 6). The appeal decision is final and cannot be appealed to a higher court. Moreover, paragraph 6 limits the appeal of the same decision to one time every two calendar years.

26. The obligation on courts to run proceedings related to disclosure of information for the purposes of further dissemination of judicial decisions may unnecessarily burden courts, moving them away from their fundamental role – to adjudicate cases.[28]

27. In light of the foregoing, **it is recommended to simplify the procedure on access to depersonalized texts as well as the procedure to verify consent of the parties on disclosure of information, without compromising the protection of personal data and the judicial system's ability to deliver justice efficiently.**

> **RECOMMENDATION B.**
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> To simplify the procedure on the access to depersonalized texts and the verification of consent of the parties on disclosure of information, without compromising the protection of personal data and the judicial system's ability to deliver justice transparently.

4. SELECTION OF CANDIDATES TO THE POSITION OF SUPREME COURT JUDGES BY THE HIGH COUNCIL OF JUSTICE

4.1. Election of the President of the Supreme Court

28. Article 21 (1^1) of the Draft Amendments largely replicates and to some extent replaces the current Article 36 (1) of the Law on Common Courts regarding the election of the president of the Supreme Court and also reflects the non-renewable 10 years term stated in Article 61(3) of the Constitution.

[28] For example Para 39 of the *CoE Recommendation CM/Rec(2010)12* provides that "[t]o prevent and reduce excessive workload in the courts, measures consistent with judicial independence should be taken to assign non-judicial tasks to other suitably qualified persons."

29. There are some issues in this draft provision that require clarification. For example, it states that a candidate for the Supreme Court presidency who receives at least two-thirds of the votes of the full membership of the HCJ is nominated. However, the same provision later states that "*A candidate shall be considered nominated if he/she receives a majority of votes from the full membership of the High Council of Justice of Georgia*". It is unclear whether the latter applies to the scenario in which none of the candidates obtain two-thirds of the votes, as the way in which this provision is phrased does not point to any sequence.

30. In addition, as mentioned in the 2019 ODIHR opinion,[29] the manner in which presidents of courts are selected should follow the same procedure as the selection and appointment of other judges. Especially for presidents of Supreme Courts, the relevant processes should formally rule out any possibility of political influence.[30] In the current setting, the President of the Supreme Court is elected by a majority of the Parliament, from among Supreme Court judges, upon the nomination of the HCJ. The Organic Law on Common Courts and the Draft Amendments do not specify what will be the selection criteria, nor the procedure for the HCJ to nominate one of the Supreme Court judges as a candidate to be elected as the President of the Supreme Court by the Parliament. As a result, this could negatively affect the public perception of the Court, undermine its independence and impartiality and risks lessening public confidence in the outcome of the decisions taken by such an institution.[31] To avoid such risks, it is generally recommended to adopt a model whereby the election/selection of the presidents of supreme courts is done by the judges of the Supreme Court concerned.[32] In any case, election/selection procedures for presidents of courts should conform to certain criteria and provide for safeguards in order to maintain the fundamental principles of independence of the judiciary and the impartiality of judges.[33] **It is recommended to provide that the judges of the Supreme Court elect/select the President of the Supreme Court. Alternatively, to limit the discretion of the HCJ in that respect, the Draft Amendments should better define the procedure and objective, merit-based criteria for nomination of the candidate for President of the Supreme Court.**[34]

RECOMMENDATION C.

To provide that the judges of the Supreme Court elect/select the President of the Supreme Court among themselves, or alternatively, better define the procedure and objective and merit-based criteria for the election of the President of the Supreme Court to ensure an objective and merit-based process.

4.2. Eligibility Requirements for Judges of the Supreme Court

31. Article 34 of the Draft Amendments merely provides technical changes to Article 34 of the current Law on Common Courts with regard to judicial candidates. The provision

[29] *OSCE/ODIHR Opinion on Draft Amendments Relating to the Appointment of Supreme Court Judges of Georgia* (17 April 2019)
[30] See *CCJE Opinion No. 19 on the Role of Court Presidents*, paras 37-40.

[32] See *the OSCE 1990 Copenhagen Document*, para 2, 5.3 and 5.5**;** *CCJE Opinion No. 19 on the Role of Court Presidents*, para 53; *The 2010 Kyiv Recommendations*, para 16); and *OSCE/ODIHR, Opinion on Certain Provisions of the Draft Act on the Supreme Court of Poland* (30 August 2017), para 107 and the *OSCE/ODIHR Urgent Opinion on Constitutional Law on the Constitutional Court of the Republic of Kazakhstan* (30 September 2022), para 36.
[33] *CCJE Opinion No. 19 on the Role of Court Presidents*, paras. 37-40 and 53.
[34] See *the OSCE 1990 Copenhagen Document*, paras. 2, 5.3 and 5.5**;** *CCJE Opinion No. 19 on the Role of Court Presidents*, para 53; *The 2010 Kyiv Recommendations*, para. 16); and *OSCE/ODIHR, Opinion on Certain Provisions of the Draft Act on the Supreme Court of Poland* (30 August 2017), para. 107; and the *OSCE/ODIHR Urgent Opinion on Constitutional Law on the Constitutional Court of the Republic of Kazakhstan* (30 September 2022), para. 36.

lists eligibility requirements for becoming a judge, including the Georgian nationality, minimum age (30 years old), required education (Master's degree or equivalent), five years of professional work experience and knowledge of the state language. Those who have been convicted or have been dismissed from judgeship (based on disciplinary grounds) are ineligible. In order to qualify, Article 34 (1) further requires that a candidate "has passed a judge qualification exam, completed a full course of study at the Higher School of Justice and is included in the qualification list of justice students." A person nominated for a judicial position of the Supreme Court or an active or former member of the Supreme Court is exempted, as before, from passing the qualification examination for the position of a judge and from studying at the Higher School of Justice (Article 34 (3) and (4) of the Draft Amendments). Such exemptions are welcome in principle as they facilitate access to the judicial profession, including at the highest level, of jurists with significant experience, in line with the Kyiv Recommendations.[35]

32. However, as mentioned in the 2019 ODIHR Opinion, the requirement for five years of experience, combined with the 30-year old minimum age, falls short of introducing adequate minimum eligibility requirements ensuring higher standards for candidates for the highest court.[36] As recommended in the 2019 ODIHR Opinion and in its monitoring reports, **the lawmakers should consider increasing the number of years of required professional experience, including human rights and constitutional law experience, to be eligible for the position of Supreme Court judge, which would by itself result in a higher age of the candidates**. This is in addition to elaborating further the selection/evaluation criteria for candidates, which should be objective, fair and transparent as detailed below.

RECOMMENDATION D.

To consider increasing the number of years of required professional experience to be eligible for the position of the Supreme Court judges.

4.3. Modalities of Selection of Candidates for the Supreme Court

33. Article 34[1] (11) of the Draft Amendments only introduces slight modifications of a technical nature compared to its current version. It therefore maintains the evaluation of candidates for the Supreme Court pursuant to the criteria defined by Article 35[1] of the current Organic Law on Common Courts, namely "good faith and competence". Evaluation criteria also vary between candidates with judicial experience (paragraph 17) and those without judicial experience (paragraph 16). The elements to assess each criterion are detailed in Article 35[1] of the Draft Amendments. However, there are no other criteria that the candidates to the highest national judicial office are required to adhere to, beyond those required for candidates to lower judicial positions.

34. The selection of judges should be based on objective and clearly defined criteria pre-established by law to assess their ability, integrity and experience, while ensuring that the composition of the judiciary reflects the composition of the wider population and is gender balanced.[37] The objective is to ensure that the respective selections are based on merit, having regard to the qualifications, skills and capacity required to adjudicate

[35] *The 2010 Kyiv Recommendations* state that the "access to the judicial profession should be given not only to young jurists with special training but also to jurists with significant experience working in the legal profession (that is, through midcareer entry into the judiciary). The degree to which experience gained in the relevant profession can qualify candidates for judicial posts must be carefully assessed."

[36] See the *2019ODIHR Opinion* , paras. 32 and 36.

[37] *Ibid.* para. 41 and international and regional sources referenced therein in footnotes 47 to 50.

cases, including at the highest level, by applying the law in conformity with human rights norms.[38]

35. As provided in the 2019 ODIHR Opinion, it is expected that additional personal skills and qualities would be considered for selecting judges to the highest court. For instance, ability to objectively assess needs of different communities and groups, extensive expertise in human rights, since the Supreme Court also has a key role to play in that respect, creativity and flexibility, ability to consider difficult and sensitive issues, commitment to the judiciary as an institution, and other qualities required from candidates for high judicial office, such as reputable conduct and integrity, among others.[39] Although the proposed Article 34^1(11) of the Draft Amendments is more concise and includes a higher level of transparency, as recommended by ODIHR and the Venice Commission, the evaluation criteria for the Supreme Court candidate judges largely follows the pattern set up for lower court judges. In addition, Article 35^1 of the Draft Amendments specifically refers to knowledge of human rights law when evaluating the knowledge of legal norms, but this could be further emphasized by prioritizing these skills for the candidates to the positions of Supreme Court Judges. **It is recommended to supplement the selection/evaluation criteria for Supreme Court judicial candidates in the Draft Amendments beyond those that are required for lower judicial positions.**

36. Finally, the Organic Law on Common Courts and the Draft Amendments do not mention the consideration of ensuring gender balance in the composition of the Supreme Court. Currently, out of the 28 Supreme Court judges currently seating on the bench, there are eleven women and seventeen men.[40] As recommended in the 2019 Opinion, to ensure that gender balance is achieved and maintained with the future appointments, and to be in line with OSCE human dimension commitments,[41] international standards and good practices,[42] **the drafters could consider introducing a mechanism to ensure that the relative representation of women and men within the Supreme Court is taken into consideration when selecting/nominating qualified candidates to be presented to the Parliament**.

4.3.1 Publicity

37. Since the publication of the 2019 ODIHR Opinion and as noted in ODIHR monitoring reports, a number of amendments were introduced to enhance the transparency and fairness of the selection process before the HCJ, including the removal of secret voting and a new requirement that HCJ members provide written justifications for scoring and nomination decisions, which are made public on the HCJ's website at each stage of the process. A right to appeal nomination process decisions was also established. This allows unsuccessful candidates to better understand the rationale behind the HCJ's decision and also contributes the effectiveness of challenging unsuccessful applications,

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[38] See the *2007 UN HRC General Comment No. 32*, para. 19; the *2010 CoE Recommendation CM/Rec(2010)12)*, para. 44; and the *2010 Kyiv Recommendations*, para. 21

[39] See the *Venice Commission, Opinion on the Reform of Judicial Protection of Human Rights in the Federation of Bosnia and Herzegovina, CDL(1999)078*, paras 30 and 32; See *the criteria for appointment* to the UK Supreme Court; See also *ENCJ, Dublin Declaration setting Minimum Standards for the Selection and Appointment of Judges* (May 2012), Indicator no. I.4

[40] See <Supreme Court of Georgia>.

[41] OSCE participating States have committed to provide "for specific measures to achieve the goal of gender balance […] in all judicial and executive bodies" (Athens, 2009) and to ensure "that judges are properly qualified, trained and selected on a non-discriminatory basis" (Moscow, 1991); see OSCE Ministerial Council, Decision No. 7/09, "Women's Participation in Political and Public Life", Athens, 2 December 2009, par 1; and Document of the Moscow Meeting of the Conference on the Human Dimension of the CSCE, Moscow, 10 September to 4 October 1991, par 19.2 (iv).

[42] See the *2019 ODIHR Opinion* , para. 47 and references therein.

in particular if applicants believe that were unfairly treated or that there were violations of the law or procedure during the appointment process.[43]

38. It is noted that public disclosure of the identities of the voting HCJ members together with their respective written justifications is not commonly undertaken in other countries. In the tense context surrounding the process of appointing the Supreme Court judges documented in ODIHR monitoring reports, it appears that openness and transparency were considered essential to enhance public confidence in the process and judiciary in general. ODIHR would nevertheless like to reiterate that when determining the extent to which the different phases of the judicial selection/appointment process should be made public, law-makers should regularly re-assess, in close consultation with the representatives of the judiciary as well as civil society and the public, to which extent, and to which degree of detail such information should be publicized. In this respect, they should duly weighing the *pros* and *cons* of more or full publicity and transparency, balancing the need to protect the independence of individual judges and the necessity to ensure public confidence in the process, which very much depends on the country context and level of public trust in the HCJ and the judiciary in general.[44]

39. While Article 34[1] paragraph 13 of the Draft Amendments also provides that "*the voting results provided for in this paragraph, the decisions taken by the members of* [the HCJ] *in the course of voting, and the reasons for these decisions shall be published on* [their] *website*," it is not clear when such information is to be published and if a candidate would have access to it before a complaint is initiated. This is particularly relevant where the HCJ's decision is annulled and the HCJ adopts a new decision, it cannot be appealed repeatedly before the Supreme Court Qualifications Chamber (see paragraph 55 below). **It is recommended to ensure that essential information on the identity of HCJ members and their votes and justification be disclosed to the candidates concerned in a timely manner, including before a complaint is formally introduced.** The same considerations as above should apply regarding public disclosure of the identities of the voting HCJ members together with their respective written justifications.

4.3.2 Voting

40. The new formulation of Article 34[1](13) of the Draft Amendments maintains a vote at two stages of the selection process by the HCJ. The compilation of the individual evaluations and justifications carried out by each HCJ member should be enough to rank the candidates and determine the short-list and final list of candidates selected by the HCJ to be submitted to the Parliament.[45] As provided by good practice, *"[d]ecisions concerning the selection and career of judges should be* [...] *based on merit, having regard to the qualifications, skills and capacity required to adjudicate cases by applying the law while respecting human dignity*".[46] Beyond adding an additional layer of complexity, a voting procedure would appear not the most adequate modality to ensure selection based on merit and individual votes may also not be congruent with the results of the individual evaluations, which ultimately undermines the requirement for merit-

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[43] See the 2019 ODIHR Opinion, para 57. See also ENCJ, *Dublin Declaration setting Minimum Standards for the Selection and Appointment of Judges* (May 2012), Indicator no. II.9.

[44] See the *2019 ODIHR Opinion,* para. 56 and references cited therein.

[45] See Principle 11, of the *2016 Cape Town Principles on the Role of Independent Commissions in the Selection and Appointment of Judges*. See also the *OSCE/ODIHR Opinion on the Laws on Courts, on Judicial Administration and on the Legal Status of Judges of Mongolia* (3 March 2020), paras. 130-131.

[46] Recommendation CM/Rec(2010)12 of the Committee of Ministers to member states on judges: independence, efficiency and responsibilities, para. 44.

based decision-making.[47] This is the case even if the publication of the written justifications by HCJ members allows the identification of possible contradictions between the votes and the written justifications provided, which could potentially serve as a ground for challenging HCJ decisions. In practice, the ODIHR monitoring reports noted consistency between the votes and the evaluations, though emphasizing that the written justifications appear rather superficial, thereby questioning the very rationale for such additional vote.[48] **The legal drafters should reconsider the use of a vote during the selection process of the candidates for the Supreme Court by the HCJ and instead rely on the compilation of the individual evaluations and justifications carried out by each HCJ member, which would guarantee better a merits-based selection procedure.**

RECOMMENDATION E.

To reconsider the use of a vote during the selection process of the candidates for the Supreme Court by the HCJ and instead rely on the compilation of the individual evaluations and justifications carried out by each HCJ member.

4.3.3 Irregularities in the Selection Process

41. A new proposal in Article 34^3 (13^1) of the Draft Amendments provides that if the Qualifications Chamber of the Supreme Court establishes that a member of the HCJ has "*shown bias*" in the selection process, their "*approach was discriminatory*" and/or exceeded the legally granted powers, as a result of which the candidate's rights were violated or the "*independence of the court was threatened*", they will no longer participate in the selection process of a "*second decree/second nomination*". It is understood that this would exclude the said member of the HCJ from participating in the second stage for the selection of this and other candidates in the same process. This is positive as this provides safeguards for candidates; however, the consequence for such a misbehaviour appears rather limited and that would not prevent the HCJ member from participating in other judicial selection processes, which ultimately may impact the outcome of such selections and ultimately undermine the trust and legitimacy of the judicial appointment processes. **Drafters should consider supplementing the Draft Amendments with additional safeguards that would prevent the participation of a HCJ member who has been removed for the above-mentioned behaviour from participating in other judicial selection processes, at least for some time.**

42. Further, if this is not provided elsewhere or in the relevant legislation, it would be appropriate to provide clear guidance on the criteria and the manner in which these are applied when assessing whether a HCJ member has shown bias by written or spoken words, images, objects, actions, or other evidence of bias or applied a discriminatory approach.

43. In addition, it is unclear what the reference to "*threatening judicial independence*" would mean in practice and how this would be assessed. Such a wording should be reconsidered.

[47] During the selection process in 2019, 20 candidates selected by secret ballot on 4 September 2019 did not coincide with the top 20 candidates based on the scores received, as five of the top-scored candidates were not among the 20 selected; See the *2019 ODIHR Report on the First Phase of the Nomination and Appointment of Supreme Court Judges in Georgia*, page 4.

[48] See the *2021 ODIHR Third Report on the Nomination and Appointment of Supreme Court Judges in Georgia*, para. 21.

44. Finally, the Law or Draft Amendments do not address the situation where several HCJ members would be disqualified on this basis, thereby rendering impossible the voting by a two-third majority of the full composition of the HCJ, and thereby potentially paralyzing the selection procedure for Supreme Court judges. It is recommended **to supplement the Draft Amendments to provide for a mechanism for the HCJ to continue the process even without a two-third majority of the full composition of the HCJ**.

5. SELECTION AND STATUS OF JUDGES

5.1. Modalities of Selecting District (City) and Court of Appeals Judgeships

45. Article 35 of the Draft Amendments introduces procedures for filling judicial vacancies in district (city) courts and courts of appeals. The new version of this article is more concise and simpler than the original one. It introduces deadlines for publicly announcing vacancies, including their dissemination via the public broadcaster and two national broadcasters. Wide dissemination of vacancies is important to reach out to a potentially more diverse pool of candidates reflective of the wider society, and therefore the new dissemination modalities represent a positive change toward more transparency and awareness-raising.[49] **However, to ensure that the vacancies indeed reach out to potential candidates belonging to groups generally under-represented in the judiciary, the Draft could be supplemented to provide for the publication of vacancies through additional means, including relevant professional websites or media, whilst ensuring targeted outreach campaigns and accessibility for persons with disabilities.**

46. Further, paragraph 2 requires a two-third majority vote for appointing a judge to a vacant position, following the selection procedure similar to the one for the Supreme Court judges, taking into consideration the criteria established by Article 35[1]. This includes an evaluation of at least 5 randomly selected cases adjudicated by a candidate, as well as summary/final decisions that were enforced. A justification provided by this Article for this requirement is "*to assess the level of knowledge of the judicial candidate of substantive and procedural legislation, human rights law* […], *the correctness of the application of the relevant legal norms* […], *as well as analytical thinking ability of the judge, ability to express opinions clearly and understandably, logical reasoning and analysis*." The performance evaluation of a candidate, based on randomly selected cases is generally acceptable. At the same time, judges shall not be evaluated under any circumstances for the content of their decisions or verdicts (either directly or through the calculation of rates of reversal).[50] **It is recommended to specify this assessment criteria to exclude the evaluation of the correctness of his/her decision in concrete cases, and rather focus on the analytical and communication skills of the judge.**

47. Paragraph 3 allows the HCJ to appoint unsuccessful consenting judicial candidates to any of the remaining vacancies within the framework of the ongoing competition. In such cases, the HCJ can decide on repeating voting by a majority of those present at its meeting, instead of two-thirds. This is problematic for three reasons. First of all, it is unclear as to the qualification requirements for such second-round appointments compared to the first round, and it is essential that the said candidate fulfils all the

[49] See *2016 Cape Town Principles, Principle* 9 and 10. See also Section 13 of the *2013 Istanbul Declaration on Transparency in the Judicial Process.* See also the *OSCE/ODIHR Opinion on the Laws on Courts, on Judicial Administration and on the Legal Status of Judges of Mongolia* (3 March 2020), para 130.

[50] See the *2010 Kyiv Recommendations*, para. 28.

requirements of the other specific vacancy. Secondly, it is unclear whether the HCJ in the second round is allowed to appoint judicial candidates who have received a lower score in the evaluation than judicial candidates who were rejected in the first round.[51] The latter allows for circumventing the qualification and competency requirements, could encourage favouritism, which could be unfair, discriminatory and unequal towards other candidates. Lastly, there is no ground or justification for requiring only the majority of votes instead of two thirds especially that this envisages a vote for the "*majority of present*" and not "*full membership*." Such voting puts candidates in an unequal condition compared to candidates in the first round of voting and could be detrimental to the fairness and objectivity of the selection process. To replace the qualified majority vote with a simple majority vote would further exacerbate the concerns outlined above. Moreover, this would considerably lower the participation of non-judicial members and their influence of the process, which is generally a guarantee against perception of self-interest, corporatism or cronyism. As noted in previous opinions, in order to ensure the effective "*participation of non-judicial members, it is recommended that adequate quorum for the composition of the judicial council and voting procedures (majorities for adoption of decisions) be adopted to give effect to this aspiration*."[52]

48. In light of the foregoing, **Article 35 (3) should be amended to ensure more transparency and objectivity in the process of appointing unsuccessful candidates to fill in other vacancies, while guaranteeing an equal application of the selection criteria and voting process as for the initial round of the selection process.**

5.2. Tenure

49. Article 36 (4)-(4^3) of the Draft Amendments replicates the existing article with some additions. Most notably, in paragraph 4, wording has been added to the effect that a judge of a district court or court of appeal is appointed for life by a decision taken "*by at least two-thirds of the full membership*." This wording is in line with Article 62 of the Constitution.

50. According to paragraph 4^1, the HCJ also retains a right to decide whether to appoint a judge for life or for a three-year term. Security of tenure and irremovability of judges are integral parts of the guarantee of judicial independence.[53] Judges must have guaranteed tenure until they reach the retirement age or the expiry of their term of office, where this exists.[54] Exceptions to this rule need to be limited to specific cases that are clearly set out in law, and decisions to remove judges should not be taken lightly, or in a summary manner.[55] As emphasized in previous ODIHR opinions, limited terms of office or probationary periods should be avoided as they run the risk that judges may feel under pressure to decide in a certain way during such time, to ensure that they are appointed for life afterwards.[56] If they are nevertheless contemplated, specific safeguards should be in place to prevent that such short initial appointments turn into a risk for judicial independence, including ensuring that the probationary period is short

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[51] See also *the Venice Commission Opinion on the December 2021 Amendments to the Organic Law on Common Courts* (20 June 2022), paras 21-23.

[52] See ENCJ, *Minimum Standards regarding Non-judicial Members in the Judicial Governance* (2016), para. II .4

[53] 2010 CoE *Recommendation CM/Rec(2010)12,* para. 49.

[54] 1985 *UN Basic Principles on the Independence of the Judiciary,* Principle 12. CCJE *Opinion no. 1 (2001),* paras. 57 and 60. The 1998 European Charter on the Statute for Judges affirms that this principle extends to the appointment or assignment to a different office or location without consent (other than in cases of court re-organisation or where such actions are only temporary). See also OSCE *1991 Moscow Document,* para. 19.2 (v), which includes a specific commitment to guarantee the tenure of judges.

[55] See ODIHR, *Opinion on Certain Provisions of the Draft Act on the Supreme Court of Poland*, 30 August 2017, para 67.

[56] See e.g., ODIHR, *Opinion on the Law on the Selection, Performance Evaluation and Career of Judges of Moldova* (2014), para. 37.

and non-extendable, with life appointment automatically granted afterwards.[57] If the tenure is provisional or limited, as stated in the CCJE Opinion no. 1, "*the body responsible for the objectivity and the transparency of the method of appointment or re-appointment as a full-time judge are of especial importance.*"[58] **Such limited terms for appointment should be reconsidered.**

51. In addition, this may allow for selective and subjective treatment of judges by the HCJ, undermining the perception of impartiality and the equality of the selection process. It also appears discriminatory that under proposed paragraph 4^3, a judge who was not appointed for life "*shall not be able to take part in the announced competition for filling the vacant position of a judge in the next three years*". If a judge is not appointed for life, it does not necessarily make them unqualified for a judgeship provided that the selection process is part of a competitive process. Recruitment should be open to all qualified candidates and there should not be discrimination against judges or candidates for judicial office on anything other than ineligibility grounds.[59] **It is recommended to revise Article 36 to allow judges to participate in future competitions without unreasonable limitations.**

5.3. Background Checks

52. There is a proposal to delete Article 35^2 from the Draft Amendments on background checks. There seems to be no equivalent provision in the amendment package, except the current Article 34^2 of the Organic Law on Common Courts which regulates the same issue for the Supreme Court judges. It is unclear whether the intention is to remove the article entirely or perhaps to apply the same requirements for the Supreme Court to other judges. Nevertheless, this proposal does not clarify the methodology to be followed when conducting background checks or any special requirements for the members of the HCJ's structural unit in charge of such checks, conditions for their selection/appointment by the HCJ and their responsibilities, as recommended in the 2019 ODIHR Opinion.[60] **The Draft Amendments should be supplemented accordingly.**

RECOMMENDATION F.

To supplement the Draft Amendments to include safeguards pertaining to background checks as per previous ODIHR recommendations.

5.4. Gender Considerations in the Selection Process

53. An independent, impartial and gender-sensitive judiciary has a crucial role in achieving gender equality and ensuring that gender considerations are mainstreamed into the

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[57] See e.g., ODIHR, *Opinion on the Law on the Selection, Performance Evaluation and Career of Judges of Moldova* (2014), para. 37; and *Report of the UN Special Rapporteur on the independence of judges and lawyers*, A/HRC/11/41, 24 March 2009, para. 56.

[58] See CCJE, *Opinion no. 1 (2001),* para. 53; and *Opinion no. 19 (2016)* on the Role of Court Presidents, paragraph 44; See also the *OSCE/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), paras. 43, 44 and 46.

[59] See the *Recommendation CM/Rec(2010)12*, para 45. See also the Cape Town Principles on the Role of Independent Commissions in the Selection and Appointment of Judges, paras 9 and 10.

[60] See the *ODIHR Second Report on the Nomination and Appointment of Supreme Court Judges in Georgia*, paras. 71-73.

administration of justice.[61] Therefore, states should make an effort to evaluate the structure and composition of the judiciary to ensure an adequate representation of women and provide necessary conditions for the advancement of gender equality within all levels of the judiciary.[62] At the same time, any attempt to achieve diversity in the selection and appointment of judges should not be made at the expense of merit. The *OSCE Athens Ministerial Council Decision on Women's Participation in Political and Public Life* calls on participating States to "*consider providing for specific measures to achieve the goal of gender balance in all legislative, judicial and executive bodies.*"[63] Participating States have also committed to ensure "*that judges are properly qualified, trained and selected on a non-discriminatory basis*" (Moscow 1991).

54. The Constitution of Georgia enshrines equality for all citizens (Article 11(1)). Article 11(3) further notes that "[t]*he State shall provide equal rights and opportunities for men and women. The State shall take special measures to ensure the substantive equality of men and women and to eliminate inequality*." Gender-based discrimination is also prohibited through the Law on Gender Equality (Article 4).

55. The Draft Amendments do not provide any mechanism to ensure that the composition of the judiciary is balanced in terms of gender and other diversity markers.[64] On the contrary, the new provisions retain the principle that in case of a tie in a selection process, the longer-serving judge will be selected. **In order to increase women's representation in the judiciary at all levels, it is recommended to supplement the Draft Amendments with provisions ensuring that gender considerations are taken into account throughout judicial appointment processes. This could consist of introducing a mechanism that ensures that the relative representation of women and men is taken into consideration during appointments, though not at the expense of the basic criterion of merit.**[65]

RECOMMENDATION G.

To ensure that the Draft Amendments integrate gender and diversity considerations throughout judicial appointment processes.

[61] See Article 1 of CEDAW; and UN General Assembly, *Report of the Special Rapporteur on the Independence of Judges and Lawyers on Gender and the Administration of Justice*, A/HRC/17/30, 29 April 2011, para. 45. See also Venice Commission, *Opinion on Proposed Voting Rules for the Constitutional Court of Bosnia and Herzegovina*, para. 13; and *Opinion on Amendments to the Act of 25 June 2015 on the Constitutional Tribunal of Poland*, para. 119

[62] See also UN CEDAW Committee, *General Recommendation No. 23 (1997) on Political and Public Life*, para. 5; *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), pars 182 and 190, particularly Strategic Objective G.1. "Take measures to ensure women's equal access to and full participation in power structures and decision-making"; CoE, *Appendix to Recommendation Rec (2003)3 of the Committee of Ministers on the Balanced Participation of Women and Men in Political and Public Decision-making*, adopted on 12 March 2003, which refers to the goal of achieving a minimum representation of 40% of women and men in political and public life, through legislative, administrative and supportive measures.

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

[64] See ODIHR, *Paper on Gender, Diversity and Justice: Overview and Recommendations* (2019). See also Recommendation B.3 and paras. 44-45 and 49 (the *OSCE/ODIHR Opinion on the Appointment of Supreme Court Judges of Georgia,* (17 April, 2019)); and recommendation on page 23 (*ODIHR Second Report on the Nomination and Appointment of Supreme Court Judges in Georgia*). According to Council Europe's Main factors contributing to the under-representation of women judges in the management of the common courts of Georgia, among Georgia's High Courts, 37.5 per cent of the members of the Constitutional Court and 40 per cent of the members of the Supreme Court are women.

[65] See *2012 ENCJ Dublin Declaration setting Minimum Standards for the Selection and Appointment of Judges*, Indicator no. I.8; See also *OSCE Ministerial Council Decision 7/09 on Women's Participation in Political and Public Life*, 2 December 2009, which specifically calls on participating States to "*consider providing for specific measures to achieve the goal of gender balance in all legislative, judicial and executive bodies*"; the *OSCE/ODIHR Urgent Opinion on Constitutional Law on the Constitutional Court of the Republic of Kazakhstan* (30 September 2022), para 50. See also ODIHR and Venice Commission, *Joint Opinion on the Draft Amendments to the Legal Framework on the Disciplinary Responsibility of Judges in the Kyrgyz Republic*, 16 June 2014, Sub-Section 5.1.

6. Challenging HCJ Decisions

56. The current proposal deletes the existing Article 35[4] of the Organic Law on Common Court which provides for an opportunity and conditions for an appeal of the HCJ decisions on (general) judicial appointments. It is not clear why this article has been removed as it guarantees due process and legal redress and **this should be reconsidered**.

57. At the same time, the possibility to appeal HCJ decisions regarding selection of candidates to the position of Supreme Court judges in Article 34[3] of the Organic Law on Common Courts is retained. Paragraph 13 of the same Article also allows the possibility to appeal the second/new decision adopted by the HCJ after a first decision has been annulled by the Supreme Court's Qualifications Chamber. The Draft Amendments would introduce a new paragraph 13[1], which provides that if the Qualifications Chamber of the Supreme Court establishes that a member of the HCJ has shown bias in the selection process, their approach was discriminatory and/or exceeded the legally granted powers, they will no longer participate in the process, which is positive (see Sub-Section 4.3.3 above).

7. Other Comments

58. Article 35 (7) of the Organic Law on Common Courts states that the selection of district and appellate court judges "*shall be carried out in full compliance with the principles of objectivity and equality*", without discrimination on the basis of "*race, sex, religion, political and other views, their status in society, national, ethnic and social affiliation and other circumstances*". **At the same time, the rules regarding the selection of Supreme Court judges under Article 34[1] of the Draft Amendments do not mention such a principle and should be supplemented in that respect. The list of prohibited grounds for discrimination could be extended to align with international human rights standards and existing national legislation. In particular, the anti-discrimination provision should be supplemented, especially by adding reference to non-discrimination on the basis of skin colour, place of birth or residence, property or social status, belief, marital status, sexual orientation, gender identity, and disability**.[66]

RECOMMENDATION H.

To also include a reference to the principles of non-discrimination, objectivity and equality in the provisions on the selection of Supreme Court judges.

8. Procedure of Developing the Draft Amendments

59. ODIHR refers to its recommendations from the 2019 ODIHR Opinion concerning any law-making process relating to the judiciary, and reiterates that this should be

[66] For example, Article 1 of the Law of Georgia on the Elimination of All Forms of Discrimination (2014) lists the following as prohibited grounds for discrimination: "race, skin colour, language, sex, age, citizenship, origin, place of birth or residence, property or social status, religion or belief, national, ethnic or social origin, profession, marital status, health, disability, sexual orientation, gender identity and expression, political or other opinions, or other characteristics". See also OSCE/ODIHR, Opinion on the Draft Law on the Elimination of All Forms of Discrimination of Georgia (18 October 2013).

transparent, inclusive and involve open, meaningful and effective consultations, a full impact assessment and that adequate time should be allowed for all stages of the process.

60. In particular, the fact that several rounds of amendments to the legal framework on the judiciary have happened in the past few years raises doubts as to whether these frequent legal changes are part of a coherent policy involving a thorough problem analysis and outline of the comparative costs and benefits of all available policy solutions. As specifically noted by the CCJE, too many changes within a short period of time should be avoided if possible, especially in the area of administration of justice.[67] A comprehensive approach, involving a proper policy discussion with all relevant stakeholders and in-depth impact assessment at the outset, should underpin any judicial reform process.

61. It is also noted that some provisions of the Draft Amendments are long, overly detailed and repetitive. While the level of such detailed content could be considered essential by law-makers, it also may lead to ambiguities and misinterpretation that run contrary to the principle of legal certainty and foreseeability. Acknowledging that the issue is beyond the subject under review, law-makers may consider requesting ODIHR to carry out an assessment of the legislative process of Georgia as a follow-up to the one completed in 2015,[68] to provide concrete recommendations to enhance the quality of the process and adopted laws.

62. As recommended in the 2019 ODIHR Opinion, **the public authorities are encouraged to ensure that the Draft Amendments are subjected to transparent, inclusive process and involve open, meaningful and effective consultations, including with representatives of the judiciary,**[69] **judges' and lawyers' associations, the academia, civil society organizations, offering equal opportunities for women and men to participate. Such consultations should take place in a timely manner, at all stages of the law-making process, including before Parliament. As an important element of good law-making, a consistent monitoring and evaluation system of the implementation of legislation should also be put in place that would efficiently evaluate the operation and effectiveness of the Draft Amendments, once adopted.**[70] ODIHR remains at the disposal of the authorities for any further assistance that they may require in any legal reform initiatives pertaining to the judiciary or in other fields.

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67 See CCJE *Opinion no. 18 (2015)*, para. 45.

68 See ODIHR, *Assessment of the Legislative Process of Georgia* (2015). See also CDL-PI(2021)003, *Compilation of Venice Commission opinions and reports concerning the Law making procedures and the quality of the law, endorsed by the Venice Commission at its 126th Plenary Session* (online, 19-20 March 2021).

69 With regard to the judiciary's involvement in legal reform affecting its work, international recommendations have stressed "*the importance of judges participating in debates concerning national judicial policy*" and legislative reform concerning their status and the functioning of the judicial system. See CCJE *Opinion no. 18 (2015)*, para. 31; 1998 *European Charter*, para. 1.8. See also 2010 CCJE Magna Carta of Judges, para. 9, which states that *"[t]he judiciary shall be involved in all decisions which affect the practice of judicial functions (organisation of courts, procedures, other legislation)*"; and ENCJ, *2011 Vilnius Declaration on Challenges and Opportunities for the Judiciary in the Current Economic Climate*, Recommendation 5, which states that *"[j]udiciaries and judges should be involved in the necessary reforms"*.

70 See OECD, *International Practices on Ex Post Evaluation (2010)*.