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REPORT ON IMPLEMENTATION OF THE ACTION PLAN FOR CHAPTER 23

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related to judiciary

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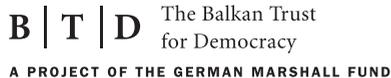
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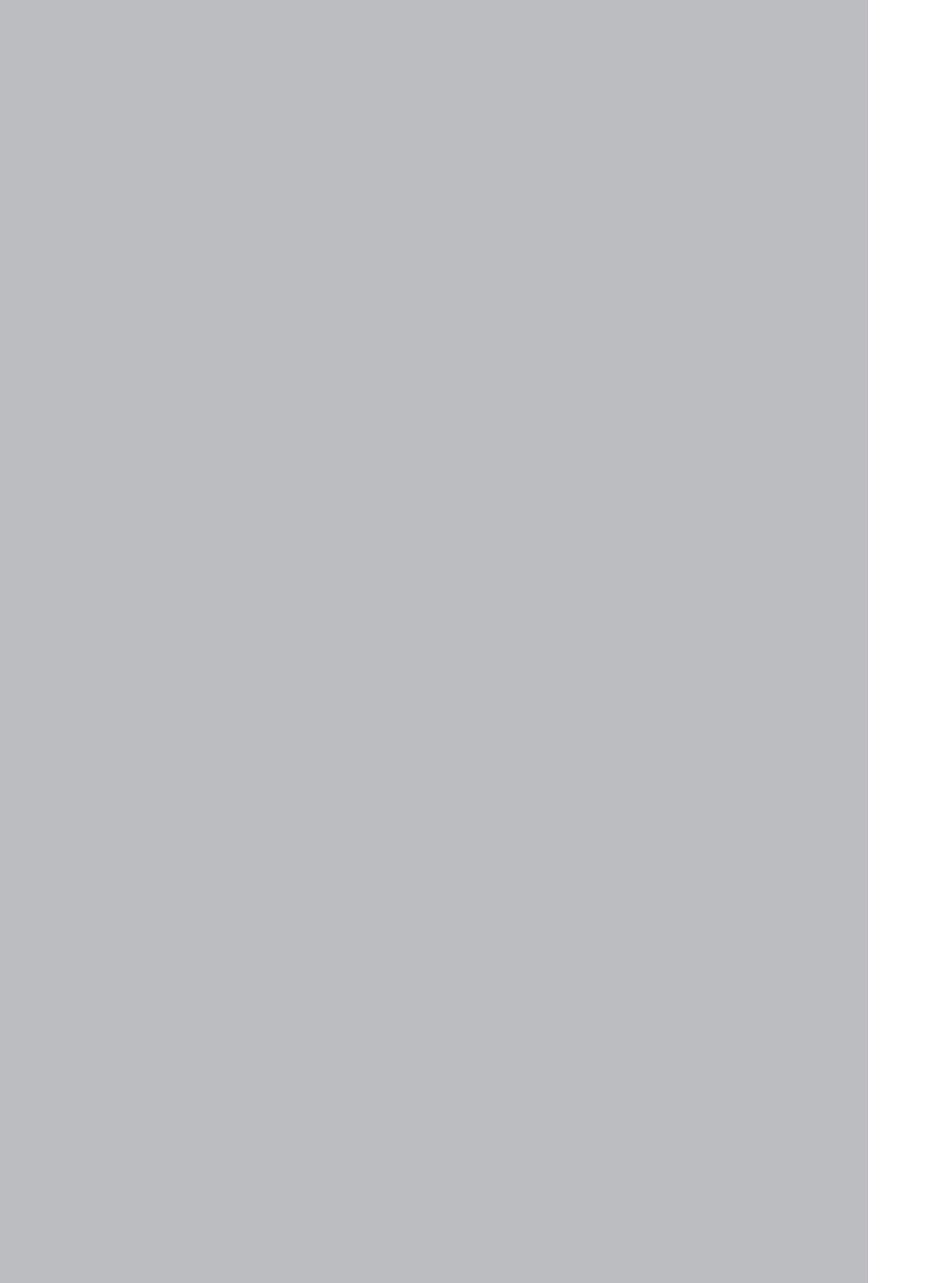
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REPORT ON IMPLEMENTATION OF THE ACTION PLAN FOR CHAPTER 23

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1. Introduction and methodological approach

Action Plan for Chapter 23 states that Serbia will continue to improve its legal and normative framework for the protection and promotion of fundamental rights, in line with the EU *Acquis* and European and international standards. This report on implementation of judiciary-related measures from the Action Plan for Chapter 23 is a result of activities within the project of YUCOM Lawyers' Committee for Human Rights called "Towards Stronger Judiciary through Citizens' Monitoring". The main objective of the project is to determine the situation and assess the progress made by Serbia in the field of reforms of judiciary and fundamental rights and other reforms within the Action Plan for Chapter 23 and Chapter 35.

In April 2016, the Republic of Serbia adopted the Action Plan for Chapter 23 with clear objectives and deadlines, necessary institutional framework, as well as the cost assessment and financial allocation in the fields of: judiciary, anticorruption and fundamental rights. This document presents the most important guidelines for further advance in the process of accession to the European Union. Apart from the Government's quarterly reports on implementation of the Action Plan for Chapter 23, there is no comprehensive reporting by the civil society on implementation of this Action Plan, which makes it significantly more difficult to report on implementation of the measures that are not public.

In its reporting, YUCOM's team started first with the selection of concrete measures in order to show the delays in implementation of the Action Plan in line with the existing capacities. Having timeframe as a guideline, they focused on the measures that were partially implemented, not implemented or implemented continuously. *Report 2/18 on Implementation of the Action Plan for Chapter 23* was selected as the baseline. After the research, the team decided to monitor non-implemented measures related to judiciary in the following fields: constitutional amendments and activities related to budgetary competencies of judicial councils, disciplinary and ethical liability of judges and public prosecutors, as well as automatic allocation of cases.

After determining the state bodies responsible for implementation of the monitored activities, the team began an analysis of publically available documents, by examining the existing reports of the Government, European Commission's bi-annual progress reports on Chapters 23 and 24, civil society's reports on certain measures in this field, as well as information booklets of the responsible bodies. Additional information was obtained by submitting requests for access to information of public importance. Through in-depth analysis, use of interview techniques and organization of expert roundtables in Belgrade and Niš, information was gathered that served as supplement to the report examining the level of implementation of the aforementioned measures.

Collected information was also used to formulate a series of recommendations sent by YUCOM Lawyers' Committee for Human Rights to the Ministry of Justice

pertaining to the first version of the revised Action Plan for Chapter 23, and those recommendations were presented at a session of the National Convention on the European Union's Working Group for Chapter 23. The data in the report paint a comprehensive picture of the implementation status of selected measures since they also take into account the real quality and real effects of the activities marked as implemented. Out of the total of 41 monitored activities within 4 measures, the research showed that 6 of them were fully implemented, 4 partially implemented, 5 were being continuously implemented, while 19 were not implemented. The total of 6 activities marked in the government's reports as implemented, are considered inadequately implemented according to the data gathered through this research, while for one activity there is insufficient data on its adequate implementation.

2. Amendments to the Constitution related to judiciary

In order to achieve adequate level of independence of the judiciary in Serbia, it turns out that the priority would be to strengthen the High Judicial Council and the State Prosecutorial Council and free them as much as possible from political influences, that is, from the influence of other branches of government, as these bodies are responsible for guaranteeing independence, that is, autonomy of judges and prosecutors. Competencies and compositions of these bodies are determined by the Constitution of the Republic of Serbia, so in order to achieve this priority objective it is necessary to amend provisions of the most important legal document. As part of the endeavor to strengthen independence of judiciary, additional amendments to the Constitution were proposed regarding election of the judges elected for the first time (three-year probationary period), election of president of the Supreme Court of Cassation and presidents of other courts, termination of office for judges and prosecutors, position of the Judicial Academy as the requirement for initial judicial appointments, as well as other related issues.

The amendment process started in 2017, and in October 2017, a harmonized version of the judiciary related Amendments to the Constitution of the Republic of Serbia was published, together with the Venice Commission's opinion. Recognizing the importance of independent and efficient judiciary, the European Union provided a series of recommendations for achieving impartiality, integrity and high judiciary standards.¹ Serious commitment to elimination of external influences on the judiciary, allocation of appropriate financial resources, as well as training, is a requirement. When it comes to independence of judiciary, as subsequently stated in the Action Plan for Chapter 23, the National Judicial Reform Strategy for the period 2013–2018 identified the need for amendments to the Constitution, particularly in the part related to meddling of legislative and executive bodies in the process of appointment and removal of judges, presidents of courts, public prosecutors and deputy public prosecutors, elected members of the High Judicial Council and the State Prosecutorial Council, as well as other issues.² The High Judicial Council and the State Prosecutorial Council, in line with the strategic goals, should become the key judiciary institutions with appropriate capacities in terms of fulfilling of their competencies and with precisely defined system of transparency and accountability.

1 Several documents developed in the negotiation process for Chapter 23, including the Screening Report and the European Union Common Position.

2 National Judicial Reform Strategy for the period from 2013 to 2018, available at: <https://bit.ly/2Dnziww>.

When we talk about opening negotiations benchmarks, as per the *Screening Report for Chapter 23*,³ it is planned that Serbia, with the support of external experts, should make a thorough analysis of the existing solutions and possible amendments to the Constitution, bearing in mind the Venice Commission recommendations and European standards. The benchmark is envisioned in order to ensure independence and accountability of the judiciary, and the proposed amendments should include the following points:

- ▶ “The system for the recruitment, selection, appointment, transfer and dismissal of judges, presidents of courts, and prosecutors should be independent of political influence and remain the responsibility of the High Judicial and State Prosecutorial Councils. Entry in the judiciary shall be based on merit-based objective criteria, fair in selection procedures, open to all suitably qualified candidates and transparent in terms of public scrutiny. The High Judicial Council and the Prosecutorial Council should be empowered with leadership and the power to manage the judicial system, including when it comes to immunities. They should have a pluralistic composition, without involvement of the National Assembly (unless solely declaratory), with at least 50% of members stemming from the judiciary, representing different levels of jurisdiction. Their elected members should be selected by their peers;
- ▶ Legal or executive authorities should not have the power to supervise or monitor operations of the judiciary;
- ▶ Reconsider the probation period of three years for candidate judges and deputy prosecutors;
- ▶ Clarify the grounds for the dismissal of judges;
- ▶ Clarify the rules for terminating the mandate of Judges of the Constitutional Court;”

In the process of development of the *Action Plan for Chapter 23* the aforementioned priority benchmark was divided into 8 concrete activities.⁴ Besides concrete analysis of the existing provisions of the Constitution and proposing possible amendments to the Constitution taking into account opinion of Venice Commission and European standards, other activities refer to standard procedure for amendment of the Constitution including initiating the process of amending the Constitution and the adoption of a proposal in the National Assembly to amend the Constitution, preparing the draft of the Constitution and conducting the public debate, submitting the Draft of the Constitution to the Venice Commission for opinion. Other activities include adoption of the new Constitution, and subsequent adoption of the

3 European Commission, *Report on Alignment of Serbia's Legislation with the EU Acquis (Screening Report) for Chapter 23 – Judiciary and Fundamental Rights*, 15 April 2014.

4 Activities 1.1.1.1. to 1.1.1.8, Ministry of Justice, *Action Plan for Chapter 23*, 2016.

Constitutional Law, alignment of judicial laws with new constitutional provisions,⁵ and alignment of by-laws with the amended judicial laws.

Negotiating Position of the Republic of Serbia published in June 2016 stated that the aforementioned analysis of the provisions of the Constitution of the Republic of Serbia was in the final phase,⁶ and that the next step was precisely the initiation of the parliamentary process that should result in adoption of the new Constitution of the Republic of Serbia, and that this would be done by the end of 2017. This has not happened even within a newly defined timeframe. Regarding the change of deadlines, the negotiating position states that for purposes of harmonization of all new provisions of the Constitution of the Republic of Serbia and implementation of recommendations from the Screening Report, the plan is to have all judicial laws amended during 2018, with the process continuing in 2019 with amendment of by-laws and internal regulations. It is stated that the High Judicial Council would complete appointment of all the remaining court presidents, but this was not initiated before November 2018.⁷

It is necessary to state that the *EU Common Position* establishes that Serbia has started preparations for amendment of the Constitution in 2017 bearing in mind the recommendations of the Venice Commission and European standards and that the EU notes the interim measures Serbia proposed to remedy the main shortcomings prior to amending the Constitution.⁸ It is also stated that each step in amendment of related laws and development of by-laws must be made transparently and with a wide public debate. The EU specifically emphasized that it would be necessary to establish an inclusive process with consultations with professional associations and the civil society, and encouraged Serbia to monitor all “legal changes and the impact they generate, in particular doing away with political and other influences on the judiciary”.

Interim benchmark related to the aforementioned amendments states the following: “Serbia strengthens the independence of the judiciary, in particular:

- ▶ Serbia adopts new Constitutional provisions bearing in mind the Venice Commission recommendations, in line with European standards and based on a wide and inclusive consultation process. Serbia subsequently amends and implements the Laws on Organisation of Courts, on Seats and Territorial Jurisdiction of Courts and Public Prosecutors’ Offices, on Judges, on Public

5 Law on Organization of Courts, Law on Seats and Territorial Jurisdiction of Courts and Public Prosecutors’ Offices, Law on Judges, Law on Public Prosecutor’s Office, Law on High Judicial Council, Law on State Prosecutorial Council, Law on Judicial Academy

6 Government of the Republic of Serbia, *Negotiating Position of the Republic of Serbia for Inter-governmental Conference on Accession of the Republic of Serbia to the European Union, Chapter 23 – Judiciary and Fundamental Rights*, Belgrade 2016, pp. 47–48.

7 High Judicial Council, Decision of the High Judicial Council from 01.11.2018 on nominating candidates for court presidents, available at: <https://bit.ly/2RVZAtU>.

8 Council of the European Union, *European Union Common Position – Chapter 23 – Judiciary and Fundamental Rights*, 5 July 2016, p. 3.

Prosecutor's Office, on High Judicial Council and on State Prosecutorial Council, as well as the Law on Judicial Academy. Serbia establishes an initial track record of implementing a fair and transparent system based on merit for the management of the careers of judges and prosecutors including recruiting, evaluating and promoting judges and prosecutors based on periodic, professional performance assessment.”

We note that implementation of all, except the last two of the activities from the Action Plan for Chapter 23 related to amendments to the Constitution was planned for the years 2015, 2016 and 2017, so the delay in their fulfillment was several quarters long. In the last *Report on Implementation of the Action Plan for Chapter 23* developed by the Council for Implementation of the Action Plan for Chapter 23, it is stated that three activities are fully implemented, as follows: initial analysis was conducted based on which the first draft of the amendments to the Constitution was prepared; draft text of the Constitution was prepared and public debate conducted; and the aligned draft was sent to the Venice Commission for opinion. In the *Bi-annual Report* prepared by the Negotiating Team, 3 activities were also marked as fully implemented, but the status of the activity related to the draft and public debate was reversed to partially implemented. We will subsequently go over the chronology and content of the complete process for initiating amendments to the Constitution in the part related to the judiciary, since most of the activities are delayed, and also bearing in mind that certain activities marked as implemented are, in terms of procedure and content, not fully implemented.

2.1. Constitution amendment procedure

According to Article 203 of the existing *Constitution of the Republic of Serbia* from 2006, the right to submit **proposal to amend** the Constitution belongs to voters, deputies, the President of the Republic and the Government.⁹ Referendum is mandatory when the amendment to the Constitution pertains to the preamble of the Constitution; human and minority rights and freedoms; the system of authority; proclamation of the state of war and emergency; derogation from human and minority rights in the state of emergency or war or the proceedings of amending the Constitution.¹⁰ Two thirds of deputies in the National Assembly of Serbia are required for amendment. The right to proclaim an **act on amending the Constitution belongs to the National Assembly**,¹¹ which is the body authorized to propose amendment.

Since the proposed amendments imply amendment of the part related to the system of authority, proposal for amendment will be established by citizens in a referendum. That means that after adoption of the act on amending of the Constitution in the Assembly, the citizens will be able to vote on it in the referendum within 60 days. Proposed amendment to the Constitution has still not

9 Pajvančić Marijana, “Comments on the Constitution of the Republic of Serbia”, Konrad Adenauer Foundation, Belgrade, 2009, p. 270.

10 Ibid., p. 271.

11 Ibid., p. 272.

arrived before the deputies, although the Government submitted the proposal for amendment back in November 2018. The whole process of starting a public debate and developing draft amendment was initiated by the Ministry of Justice, which is not the body authorized to propose amendment. When asked whether a working group was formed in the Ministry of Justice to work on development of the first and subsequent drafts of the amendment, the Ministry responded that there was no working group and that they were “developed by the Ministry of Justice”, without further clarification why the said working group was not established and who in the Ministry was working on this.¹²

2.2. Consultations and public debate organized by the Ministry of Justice with interested parties¹³

Since the amendments to the Constitution are planned for 2018 according to the Action Plan for Chapter 23, and having in mind the responsibilities and proposed timeframe, professional judicial associations have encouraged the Ministry of Justice on several occasions to initiate a public debate for purpose of strengthening independence of the judiciary. According to the Venice Commission’s opinion, when it comes to independence of the judiciary, it is necessary to check several criteria for the state to meet this standard.¹⁴ The Venice Commission, among other conclusions, expresses the opinion that judiciary is independent from other state authorities and that all decisions related to appointment and professional career of judges should be based on objective criteria and within the law. The criteria also state that “an appropriate method for guaranteeing independence of judiciary and of a judicial council, has a decisive influence on the appointment and career of judges”.¹⁵ With the exception of ex-officio members, judges should be elected or appointed by their peers. Similar standards are also proposed for prosecutorial councils, meaning the composition of a Prosecutorial Council should include prosecutors from all levels, but also other actors like lawyers or legal academics, in order to reduce the Assembly’s influence to a minimum.¹⁶

Consultation process started in June 2017 and it was organized in the form of several roundtables during which certain number of professional associations and civil society organizations got an opportunity just to express their own opinions, without a

12 Ministry of Justice, *Response to Request for access to information of public importance*, no. 7-00-332/2018-32, available in the YUCOM archive. The request was sent on 29.10.2018, while the response was dated 13.11.2018.

13 More information on the course of public consultations and debates in a more detailed text within the YUCOM Annual Report for 2017–2018.

14 Venice Commission, Report on the Independence of the Judicial System Part I: The Independence of Judges, Strasbourg, 16 March 2010.

15 Ibid, pp. 7–8.

16 Venice Commission, European Standards as Regards the Independence of the Judicial System: Part II – The Prosecution Service, Strasbourg, 3 January 2011, p. 12.

real opportunity to exchange arguments.¹⁷ Half-way through the process, professional associations and civil society organizations left these consultations and appealed to the Ministry of Justice to present to the public their proposal for amendment to the Constitution of the Republic of Serbia and to “ensure a comprehensive and meaningful debate between the state bodies and the civil society, thus providing necessary legitimacy to the constitutional process”.¹⁸

In January 2018, the Ministry published Draft Amendment to the Constitution of the Republic of Serbia in relation to the judiciary and thus opened a public debate that was planned to last until 8 March 2018, which is the deadline for submitting written comments.¹⁹ The Ministry organized a debate once again. The draft contained elements that would allow greater influence of judicial authority compared to the existing situation, which was reflected in composition of the High Judicial Council and High Prosecutorial Council, and also in the role of Judicial Academy in the election which would result in discrimination in the approach to judicial/prosecutorial profession.²⁰ As the most important, according to the draft amendment, the number of elected members in future councils are below the number determined by the Screening Report. Opinions and comments were given by the High Judicial Council,²¹ the State Prosecutorial Council²² and the Supreme Court of Cassation.²³ Civil society organizations and professional associations quickly left the public debate due to

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- 17 Judges' Association of Serbia, Association of Public Prosecutors and Deputy Public Prosecutors of Serbia, Judicial Research Center, Belgrade Center for Human Rights, Lawyers' Committee for Human Rights, *Press Release on the Public Debate on the Amendments to Constitutional Provisions on Judiciary*, September 2017, available at <https://bit.ly/2DFPxDGg>.
- 18 Judges' Association of Serbia, “Professional associations and organizations supporting rule of law leave the so-called consultative process of amendment of constitution”, October 2017, available at: <https://bit.ly/2Q1C9Ce>.
- 19 Office for Cooperation with Civil Society, Public Debate on the Working Draft of Amendments to the Constitution of the Republic of Serbia, available at: <https://bit.ly/2zbnNkN>.
- 20 Association of Public Prosecutors and Deputy Public Prosecutors of Serbia, Belgrade Center for Human Rights, and Lawyers' Committee for Human Rights, *Press Release on the Draft Version of the Constitutional Amendments published by the Ministry of Justice*, January 2018, available at: <https://bit.ly/2D1CB2g>.
- 21 High Judicial Council, Press Release of the High Judicial Council on the Working Draft of Amendments to the Constitution of the Republic of Serbia released by the Ministry of Justice, January 2018, available at: <https://bit.ly/2yOABlf>.
- 22 State Prosecutorial Council, Press Release and Opinion of the State Prosecutorial Council on the Working Draft of Amendments to the Constitution of the Republic of Serbia released by the Ministry of Justice, February 2018, available at: <https://bit.ly/2FnrrBH>.
- 23 Supreme Court of Cassation, Press Release from the General Session of the Supreme Court of Cassation, February 2018, available at: <https://bit.ly/2AKgDt7>.

disregard for other opinions and atmosphere of animosity at the roundtables. They organized an event called “*Public Hearing of Professors*” in February 2018,²⁴ in order to create space for discussion among academic experts whose representatives were not invited to the public debate.²⁵

The Ministry of Justice received over 35 documents with the comments on draft amendments prepared by various state bodies, civil society organizations (including the ones who asked for the draft to be withdrawn), professors, lawyers and citizens. However, in the version prepared after the receipt of these comments, none of the most important comments were fundamentally adopted, even though the Ministry of Justice’s report provided upon request stated that most of them were accepted or partially accepted.²⁶ Members of the National Convention on the European Union Working Group for Chapter 23, as well as numerous civil society organizations have called upon the Ministry of Justice even before completion of the public debate to withdraw the published working draft of the Amendments to the Constitution.²⁷ The same was done again after completion of the public debate through an open letter to the public highlighting all the deficiencies of the amendment process up to that point.²⁸

24 Video footage from the “Public Hearing of Professors” available at <https://bit.ly/2ONvveh>.

25 Constitutional law professors mostly agree that the constitutional amendments related to the judiciary are not good and the main conclusions from this event refer to procedural issues, separation of power, nomo-technical issues and one-sided interpretation of the Venice Commission’s opinions. Conclusions also state which parts of the working draft are redundant and should not become part of the Constitution and which eliminated ones should be incorporated. They also state that a lot of space is left for political influences when it comes to election of judges, “golden vote”, office of judges/prosecutors, that the Minister of Justice is authorized to initiate disciplinary procedures and that there are issues with the composition of the council. See: Key opinions on the Working Draft of Amendments to the Constitution of the Republic of Serbia, “Public Hearing of Professors”, available at: <https://bit.ly/2DG3zaT>.

26 Ministry of Justice, Response to Request for access to information of public importance, no. 7-00-332/2018-32, available in the YUCOM archive. The request was sent on 29.10.2018, while the response was dated on 13.11.2018.

27 Working Group for Chapter 23 of the National Convention on the European Union, *Press Release on the published Working Draft of Amendments to the Constitution of the Republic of Serbia and public debate called by the Ministry of Justice*, February 2018, available at: <https://bit.ly/2DFhYEh>.

28 Judges’ Association of Serbia, Association of Public Prosecutors and Deputy Public Prosecutors of Serbia, Judicial Research Center – CEPRIŠ, Association of Judicial and Prosecutorial Assistants of Serbia, Association of Judicial Associates of Serbia, Lawyers’ Committee for Human Rights – YUCOM, Belgrade Center for Human Rights, *Open Letter on the occasion of completion of the process led by the Ministry of Justice regarding the proposed amendments to the Constitution of the Republic of Serbia*, March 2018, available at: <https://bit.ly/2TgdDFS>.

First of all, it was pointed out that there was *disrespect of constitutional amendment procedure and of the Action Plan for Chapter 23*. Constitutional amendment procedure starts by submitting a proposal to amend the Constitution which is then adopted by the National Assembly by a two-third majority of the total number of deputies,²⁹ and it is clear that only after that decision of the Assembly, new constitutional solutions may be created. The Assembly has not even reviewed a proposal to amend the Constitution yet, which implies that the public debate up to this point was informal since it was conducted by the Ministry of Justice. The Government, as the body authorized to submit proposal, has simply accepted the solution proposed by the Ministry of Justice and sent it to the Assembly.

Besides not meeting almost any of the set deadlines for implementation of the measure 1.1.1. of the Action Plan for Chapter 23, Legal Analysis of the Constitutional Framework on Judiciary of the Republic of Serbia from 2014³⁰ was ignored, and the working group for development of draft amendment was not formed. Content wise, the first draft Amendment did not meet any of the obligations from the point 1.1 of the Action Plan. According to this proposed solution, judges would be a minority in the High Judicial Council in a functional sense, prosecutors would become numerical minority in the State Prosecutorial Council, while the role of the Assembly in the election of judicial council members would be not only declarative, but also essential – since the Assembly would elect the members who could control judiciary council through the advantage of the president having the decisive vote, or through majority of votes.

The other highlighted problem in the reviewed Draft Amendment is *lack of explanation of the Working Draft of the Amendment*. There is no baseline analysis, no list of problems this regulation should solve, no goals achieved by this regulation, no answer to why adoption of this regulation would be the best solution to the problems, and even no explanation for ten constitutional amendments. Finally, even though it formally participated, *professional and expert public was essentially excluded from this process*. Withdrawal of this document was proposed not only by the civic and professional association, but also by the highest judicial institutions and experts such as the High Judicial Council, the State Prosecutorial Council, the Supreme Court of Cassation, all the courts that, up to that point, held judges' sessions on this subject, as well as the most eminent law professors.

2.3. Requesting the Venice Commission' opinion on draft amendments

Although the civil society organizations, professional associations, judiciary institutions and other relevant parties submitted individual concrete proposals for amendments, they all agreed on summarized objections that were then presented to the public in the Open Letter upon completion of the process led by the Ministry

29 Article 203, Constitution of the Republic of Serbia, "Official Gazette of the RS", no. 98/2006.

30 Legal Analysis of the Constitutional Framework on Judiciary of the Republic of Serbia from 2014, available at: <https://bit.ly/2B7SI7i>.

of Justice regarding the proposed amendments to the Constitution, in March 2018.³¹ Despite all of the abovementioned deficiencies and the civil society's appeals, the Ministry of Justice submitted to the Venice Commission a revised proposal not including the proposed changes. As noted in the *Reports no.1 and no.2 of the Council for Implementation of the Action Plan for Chapter 23*, the Ministry stated that it would prepare a report on the public hearing with the explanation related to adoption or rejection of the delivered proposals.³² The report is not available on the web page of the Ministry, but it was provided to us upon request.³³ It is in the form of a table showing the status of a delivered proposal in terms of its adoption, with explanations that mostly do not reflect actual adoption of the proposal. This mostly refers to situations when deletion or complete change was proposed, and the table shows that the comment was partially adopted, while in reality it was not adopted at all. Statistical data are also not available.

The Council's Report states that the Government, at its 63th session held on 12 April 2018, at the proposal of the Ministry of Justice, adopted the Conclusion approving The Draft Amendments to the Constitution of the Republic of Serbia in the field of Judiciary, prepared by the Ministry of Justice. European Commission's *Annual Report on Serbia* from April 2018, states that Serbian authorities and interested parties must enter into wider and more open debates, since the civil society has already raised the question of inadequacy of the proposed measures related to judiciary (including the composition of the High Judicial Council).³⁴ The Report emphasized the importance of the constitutional reform process in the country, the result of which should be reflected in the draft submitted to the Venice Commission for opinion. At the request of the Judges' Association of Serbia, Consultative Council of European Judges (CCJE) published its *critical opinion* in May 2018 reminding about the problematic solution related to composition of the High Judicial Council, as well as about independence of the judiciary as a whole, and confirming the concerns expressed by national associations.³⁵

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- 31 Judges' Association of Serbia, Association of Public Prosecutors and Deputy Public Prosecutors of Serbia, Judicial Research Center – CEPRI, Association of Judicial and Prosecutorial Assistants of Serbia, Association of Judicial Associates of Serbia, Lawyers' Committee for Human Rights – YUCOM, Belgrade Center for Human Rights, *Open Letter on the occasion of completion of the process led by the Ministry of Justice regarding the proposed amendments to the Constitution of the Republic of Serbia*, March 2018, available at: <https://bit.ly/2TgddFS>.
- 32 Council for Implementation of the Action Plan for Chapter 23, Report no. 2 on Implementation of the Action Plan for the Chapter 23, pp. 5–6.
- 33 Ministry of Justice, *Response to Request for access to information of public importance*, no. 7-00-332/2018-32, available in the YUCOM archive. The request was sent on 29.10.2018, while the response was dated 13.11.2018.
- 34 European Commission, 2018 Annual Report on Serbia, April 2018, available at: <https://bit.ly/2HcTrEz>, pp. 13/14.
- 35 Opinion of the Consultative Council of European Judges Bureau on the constitution amendments, available at: <https://bit.ly/2Fq4hL8>.

The Venice Commission published *Opinion on the Draft Amendments to the Constitutional Provisions on the Judiciary of the Republic of Serbia* on 25 June 2018.³⁶ The Conclusion contained the following recommendations:

- ▶ **Composition of the HJC and the role of the National Assembly:** The election of non-judicial members of the HJC by the Assembly, introducing a first round (3/5th majority) and a second round, in the event that not all the candidates are elected (this time by a 5/9th majority) provides little incentive for the majority in the National Assembly to avoid a second round of voting. This creates the possibility that half of the members of the HJC will be a coherent and like-minded group in line with the wishes of the current government. This Amendment is therefore unlikely to be suitable to ensure pluralism within the HJC and the Venice Commission invites the Serbian authorities to find another solution.
- ▶ **Composition of the HPC and the role of the National Assembly:** As with the HJC, it is important that the HPC not be dominated by the current majority in the National Assembly so as to give it credibility and to gain public trust in the system. Therefore, having five out of 11 members elected by the National Assembly in addition to the Minister of Justice and the Supreme Public Prosecutor of Serbia – who is also elected by the National Assembly – gives rise to concern. As in the case of the HJC, a better solution to ensure pluralism in the Council should be found, and the issues raised for judges in the HJC apply to the prosecutors in the HPC, to the extent applicable.
- ▶ **Dissolution of the HJC:** If the HJC does not make a decision within 30 days the term of office of all its members shall cease. This could lead to hastened decision making or frequent dissolutions of the HJC. Taking into account the composition of the HJC of five-five, the deadlock in the decision-making process could potentially be provoked by the members of the HJC elected by the National Assembly part of the HJC against the judges or vice versa. This has the potential of rendering the HJC inoperative. This paragraph should be deleted or at least the conditions for dissolution tightened.
- ▶ **Dismissal for incompetence:** Disciplinary responsibility for judges and for prosecutors is not covered by the draft Amendments yet they set out very vague reasons for the dismissal of judges and of deputy public prosecutors. It is important that more detail be provided in the draft Amendments regarding disciplinary responsibility and dismissal. The use of vague terminology such as “incompetence” without further specification should be avoided and therefore taken out.
- ▶ **Method to ensure the uniform application of laws:** The Venice Commission recommends deleting the third paragraph of Amendment V, which states that “The method to ensure uniform application of laws by the courts shall be regulated by law”. If, however, it is felt that a reference to the need to ensure proper harmonisation of case law should be included in the Constitution

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 36 European Commission for Democracy through Law (Venice Commission), “Opinion on the Draft Amendments to the Constitutional Provisions on the Judiciary of the Republic of Serbia”, CDL-AD(2018)011, Opinion No. 921/2018, Strasbourg, 25 June 2018, <https://bit.ly/2PxYpUZ>, pp. 20–21.

and if the reference to the role of the Supreme Court in Amendment X is not considered sufficient, then the first paragraph of this Amendment could make reference to taking into consideration or having due regard to the case law.

- ▶ **Public Prosecutors and Deputy Public Prosecutors:** The Supreme Public Prosecutor and the public prosecutors are elected by and responsible (accountable) to the National Assembly. While it is acceptable for the Supreme Public Prosecutor to be elected by the National Assembly and be accountable to it for the overall law-enforcement policy, other public prosecutors should have no direct link to the National Assembly. Amendments XIX and XXI should therefore be modified accordingly.

They also added that other provisions of the draft should be reviewed and amended as recommended in this opinion.³⁷ Civil society used this opportunity also to call on the Ministry of Justice to form a professional working group that would prepare new proposals for Amendment to the Constitution of the Republic of Serbia related to the judiciary, based on the obtained opinion, and followed by public consultations.

2.4. Progress in the field of amendments to the Constitution pertaining to the judiciary during the period covered by the report

On September 11, 2018, the Ministry of Justice published the third Draft Amendment,³⁸ as well as the Draft Constitutional Law, but they were similar to the previous drafts, so they scheduled the aforementioned roundtable.³⁹ At the Roundtable held on September 18, 2018, YUCOM representatives summarized the discrepancies between the new Draft and the Action Plan for Chapter 23 and the Venice Commission's Opinion.⁴⁰

Namely, according to the adopted draft, eminent lawyers with certain professional experience and personal reputation may become members of the High Judicial Council. There is no obstacle for representatives of executive and legislative powers to be considered as eminent lawyers. This is contrary to the Venice Commission's Opinion which clearly states that representatives of the executive power cannot participate in the High Judicial Council's decision making process, at least when it comes to transfer of judges. In addition, the Action Plan for Chapter 23 clearly stipulates merely declaratory role of the National Assembly in the process of election of judges, while the adopted amendments do not include any obstacles for the deputies who are also legal professionals to be elected in both of these bodies, which would give them opportunity to directly decide the election of judges. Furthermore,

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37 Venice Commission, Opinion on the Draft Amendments to the Constitutional Provisions on the Judiciary, Strasbourg, 25 June 2018, <https://bit.ly/2FAOIAz>.

38 Available at: <https://bit.ly/2zVv1tr>.

39 Text of the draft Amendment to the Constitution of Serbia is available on the web page of the Ministry of Justice.

40 Lawyers' Committee for Human Rights YUCOM, *New Draft Amendments to the Constitution do not remove political influence on judiciary*, available at: <https://bit.ly/2QPgOJv>.

according to the method for determining professional experience of eminent lawyers, the deputies and the Ministry officials who are also legal professionals meet the specific criteria of having at least 10 years of work experience in legal work falling under the scope of legal profession relevant for the competencies of the High Judicial Council, because these bodies (besides the judicial ones) have the same competencies as the High Judicial Council would have, according to the proposed solution.

The Venice Commission issued a series of recommendations for improvement of the current position of public prosecutors, and the recommendations pertaining to responsibilities of the Supreme Public Prosecutor have not been fully implemented. Therefore, the Supreme Public Prosecutor does not bear responsibility for their instructions in case the lower ranked public prosecutors believe that those instructions are unlawful. Hence, these amendments do not provide legal remedies against the Supreme Public Prosecutor's instructions. Composition of the High Prosecutorial Council does not guarantee elimination of political influence on prosecutors. Moreover, the political influence would be greater than at the current moment. New solutions propose 6 members elected by the National Assembly (including the Minister of Justice and the Supreme Public Prosecutor), while only 4 members are prosecutors elected by their peers. Importance of their role in this body is diminished by the decision making process. Finally, the possibility that mandates of all the members of the High Judicial Council and the High Prosecutorial Council would cease in case they fail to make a decision on various issues within 60 days, creates additional pressure on the guarantees of independence of the judiciary, which is strongly criticized by the Venice Commission.

Despite disagreement expressed by the professional public, on 11 October 2018, the Ministry of Justice published the fourth Draft Amendment without opening new public consultations, and already on October 24 it announced that the Venice Commission members had reviewed the Draft at their 116th plenary session. The Ministry's press release claims that the Venice Commission determined that the latest version of the amendments was in line with recommendations of the Venice Commission given in its Opinion from June 2018. The Memorandum concludes that "recommendations formulated by the Venice Commission in its Opinion CDL-AD(2018)011 were taken into account".⁴¹

Publishing of this document raised a question why the regular procedure of the Venice Commission for giving opinions on certain amendments was not followed this time. The Memorandum was prepared and sent by the Venice Commission's Secretariat, which is an administrative body. When asked by the public why this amendment was reviewed through an abbreviated procedure, the Venice Commission replied that the Memorandum presents the Venice Commission's opinion and that the Ministry's proposal was delivered to the rapporteurs and verbally presented to the Commission members at their session. The Memorandum was not formally adopted because the amendment proposal had arrived only several days before the sessions,

41 Venice Commission, Secretariat Memorandum – Compatibility of the draft amendments to the Constitutional Provisions on the Judiciary of Serbia submitted by the Ministry of Justice of the Republic of Serbia on 12 October 2018, with the Venice Commission's Opinion on the draft amendments to the constitutional provisions on the judiciary, Venice, 19–20 October, 2018, p. 6, <https://bit.ly/2zVy1tr>.

so there was not enough time for a complete procedure. New issues were not raised, so the new draft was just compared to the previous Opinion of the Venice Commission from June 2018.

Professional public is still dissatisfied with such decision-making by the Venice Commission, since the chance was lost to correct the key objections before the discussion in the National Assembly. As announced in the Government's Plan, initiative for amendment of the Constitution will be sent to the Assembly, and after its adoption by a two-thirds vote, the draft amendment will also be sent. This will be forwarded to the Committee on Constitutional and Legislative Issues which would formally be the official proposer of amendments. There would be a potential for improvement of proposed amendments if the competent committee organized a public debate that would include judges, prosecutors, constitutional law professors, as well as representatives of the non-governmental sector.

At the session held on 29 November 2018, the Government adopted a Proposal to amend the Constitution of the Republic of Serbia in relation to courts and public prosecutors' office.⁴² As stated in the Government's press release, amendments are proposed to the provisions referring to organization of judicial authorities and position of public prosecutors, concretely, the provision of Article 4 of the Constitution, Articles 142–165, and consequently, the provisions of the articles referring to the competencies of the National Assembly, decision-making process of the National Assembly and election and appointment of judges of the Constitutional Court. The assumption is that the adopted draft of the Proposal to be sent to the National Assembly is identical to the 4th version of the Amendment prepared by the Ministry of Justice.

According to the latest *Bi-annual Report on Implementation of the Action Plan on Chapter 23*,⁴³ prepared in February 2019 by the Negotiating Group for Chapter 23 rather than the Council for Implementation of the Action Plan which, by the way, failed to publish both its 3rd and 4th quarterly reports for 2018, the activities pertaining to initiating amendment of the Constitution, adoption of proposal for amendment of the Constitution in the National Assembly, development of the draft of the Constitution and public consultations, are listed as *partially implemented*. In the previous report from August 2018, the activity 1.1.1.2. was marked as not implemented, but in the meantime, the Government submitted proposal for Amendment to the National Assembly. On the other hand, the activity 1.1.1.3. was marked as *fully implemented*, while in the new report that was changed to *partially implemented*. Namely, the implementation status of this activity was changed even though the explanation states that the Ministry of Justice conducted public consultations from January to September 2018.

For the activities related to adoption of the Constitution and the Constitutional Law, it is once again noted that they are *not implemented*, but the explanation states that they would be implemented in II and III quarter of 2019. For the activity related to adoption of a set of judicial laws, it is stated that the workgroup was formed and

42 The Government of Serbia's Press Release, *Government adopts Proposal to Amend Constitution of the Republic of Serbia*, 29 November 2018, available at: <https://bit.ly/2Pd43qe>.

43 Negotiation Group for Chapter 23, "Action Plan for Chapter 23 with Implementation Status on 31st December 2018", Belgrade, February 2019.

that it was working on their harmonization with new provisions of the Constitution which, we emphasize once again, has not been adopted and the existing version has not been proposed by an authorized body.

Finally, we emphasize that the proposed solutions for the Amendment that is now submitted to the National Assembly, raise significant concerns, such as:

- ▶ It allows political majority in the National Assembly to elect half of the High Judicial Council members and most of the members of the future High Prosecutorial Council, which shows the intention to reduce the influence of judges and prosecutors on the work of councils. However, for the first time there is a difference in the structure of councils;
- ▶ It creates possibility for a five-member Committee (the majority of which is selected by the National Assembly through a simple majority vote) to select half of the members of the High Judicial Council, four members of the High Prosecutorial Council, as well as the Supreme Public Prosecutor, with just three votes;
- ▶ It stipulates that term of office of all members of the High Judicial Council and the High Prosecutorial Council should cease in case they fail to make a decision within 60 days, which allows for frequent dissolution of councils;
- ▶ It authorizes the President of the National Assembly to influence termination of terms of offices of all members of the High Judicial Council and the High Prosecutorial Council, which implies that the councils would lose their role in protection of independence and/or autonomy, and become bodies for the issues of status;
- ▶ It maintains the status of public prosecutors' office not as independent, but as solely autonomous body, with strict hierarchy, despite European tendencies towards development of independent criminal prosecution;
- ▶ It differentiates between the position of public prosecutors and deputy public prosecutors when it comes to reasons for termination of their term of office and their disciplinary liability (contrary to deputy public prosecutors, public prosecutors cannot be dismissed due to serious disciplinary offence and incompetence), which means there is a possibility of maintaining public prosecutors' term of office for political reasons;
- ▶ It allows the Judicial Academy to be the only starting point in the judiciary system, without any guarantees of the independence of that institution (leaving the regulation of internal organization and activities of the Judicial Academy to future regulations). According to the proposed solution, the managing body of the Academy will reflect the composition of the High Judicial Council and the High Prosecutorial Council. According to relevant changes, that would mean that the ratio of members appointed by the National Assembly and those appointed by judges and prosecutors would be 11 to 9, in favor of representatives of the National Assembly and the Government, which would solidify political influence on taking office in the judiciary system.

2.5. Revision of the Action Plan for Chapter 23

The Ministry of Justice published the first draft of the revised Action Plan for Chapter 23 at the end of January 2019. After being pressured by a group of non-governmental organizations and professional associations gathered in the National Convention Working Group for Chapter 23, the Ministry extended the proposed short deadline for submission of substantial comments on revision of this comprehensive document. Even though the public did not have clear information regarding the whole process of public consultations, at the session of the NCEU Working Group for Chapter 23, the Negotiating Team and the Ministry of Justice stated that civil society organizations would have a chance to comment on the next version of revised Action Plan, after the European Commission provides its comments on the first draft aligned with the comments from this round of consultations.

Regarding the part of the Action Plan pertaining to amendments of the Constitution related to judiciary, it is noted primarily that the indicators remain almost identical, even though many activities were allegedly implemented and deleted from the Plan. This part pretentiously uses formulations from the Amendments which, as we have already shown, resulted from inadequately implemented and non-transparent public consultations initiated by an unauthorized body. However, since the Amendments were sent by the Government to the National Assembly and since the Committee on Constitutional and Legislative Issues should be the official body proposing the amendments, it is clear that organization of real public debate must be included in the revised activities.

Newly proposed activity marked as 1.1.1.1. Implementation of procedure for amendment of the Constitution of the Republic of Serbia must be clarified as “Implementation of procedure for amendment of the Constitution of the Republic of Serbia in line with the regular procedure for amendment of the Constitution” in order to prevent further violation of the regular procedure, or it must be divided into several activities for each step of the regular procedure. After adoption of the Proposal of Amendment of the Constitution and the Proposal of Draft Constitutional Law on Implementation of the Constitution at a session of the Committee on Constitutional and Legislative Issues, it is necessary to send these documents to the Venice Commission for opinion, which is not envisioned as a separate activity. It would be good to include as a separate activity that the National Assembly should request joint opinion of the Venice Commission and the Consultative Councils of European Judges and Prosecutors in order to obtain a joint stance on constitutional amendments within the Council of Europe. In addition, proposed deadline for implementation of this activity – II and III quarter of 2019 seems unrealistic if we want to have a detailed and meaningful procedure for amendment of the Constitution.

Activity 1.1.1.3. Working on alignment of a set of judicial laws with the Constitution (Law on High Judicial Council, Law on High Prosecutorial Council, Law on Judges, Law on Organization of Courts, Law on Public Prosecutor’s Office, Law on Judicial Academy) in order to ensure quality of amendments through comprehensive and meaningful public debate, should be rephrased as “Preparing a draft set of judicial laws with the Constitution (...)”. It is also stressed that III quarter of 2019 is unrealistic timeframe since the process of amendment of the Constitution needs to be finalized beforehand. IV quarter also seems completely unrealistic in terms of

adoption. The indicator “First drafts of the set of judicial laws developed and provided to the public” must be more precisely expressed as “First drafts of the set of judicial laws developed and public debate opened in line with the regular procedure”. Before that, it is necessary to add as an indicator forming of a working group that would develop drafts of the said laws and be the authority responsible for this activity. After development of drafts of the set of judicial laws (Law on High Judicial Council, Law on High Prosecutorial Council, Law on Judges, Law on Organization of Courts, Law on Public Prosecutor’s Office, Law on Judicial Academy), it is necessary to request special opinion of the Venice Commission in terms of their alignment with the Constitution.

2.6. Review of implementation of activities

Measure 1.1.1. With the support of external experts, Serbia should make a thorough analysis of the existing solutions/possible amendments to the Constitution, bearing in mind the Venice Commission recommendations and European standards, ensuring independence and accountability of the judiciary. (...)

ACTIVITY	Quarter in which implementation is planned	Status of implementation as per Report no. 2 of the Council for Implementation of the AP for Chapter 23	Quarter in which the activity is implemented	Status of implementation based on monitoring	Delay in implementation
1.1.1.1. Analysis of provisions of the Constitution and proposing amendments taking into account opinion of Venice Commission and European standards.	IV quarter of 2015	Activity is fully implemented.	IV quarter of 2014	Activity is implemented	/
1.1.1.2. Initiating the process of amending the Constitution and the adoption of a proposal in the National Assembly to amend the Constitution.	III quarter of 2016	Activity is not implemented.	/	Activity is partially implemented	9 quarters (28 months)
1.1.1.3. Preparing the draft of the Constitution and conducting the public debate.	IV quarter of 2016	Activity is fully implemented.	I – II quarter of 2018	Activity is not adequately implemented	4 quarters (13 months)
1.1.1.4. Submitting the Draft of the Constitution to the Venice Commission on opinion.	I quarter of 2017	Activity is fully implemented.	II quarter of 2018	Activity is not adequately implemented	4 quarters (14 months)
1.1.1.5. Adoption of the new Constitution	IV quarter of 2017	Activity is not implemented.	/	Activity is not implemented	5 quarters (16 months)
1.1.1.6. Adoption of the Constitutional law	IV quarter of 2017	Activity is not implemented.	/	Activity is not implemented	5 quarters (16 months)
1.1.1.7. Alignment of judicial laws with new constitutional provisions (...)	IV quarter of 2018	Activity is not implemented.	/	Activity is not implemented	1 quarter (3 months)

3. Administrative capacities of judicial councils – budgetary competencies

As we have already stated, the High Judicial Council and the State Prosecutorial Council are bodies whose composition and functioning should ensure independence, that is, autonomy of the judiciary. Besides the proposed amendments to the Constitution pertaining to composition and competencies of these bodies, it is also noted that strengthening of administrative capacities and budgetary competencies is the priority when it comes to achieving overall independence. *Serbia Judicial Functional Review* states that although the extent of independence of courts and judicial councils from the executive power seems to be generally appropriate, some countries have established constitutional earmarks to protect their judiciary from encroachments on their financial independence. The analysis states that potentially better financial management, particularly within the judicial councils, could be critical to ensuring that the judiciary can exercise its financial independence more effectively.⁴⁴

With the current solution, responsibility for proposing and allocating budgets for courts and prosecutors' offices is separated between the High Judicial Council and the State Prosecutorial Council on one side, and the Ministry of Justice on the other. The *Screening Report* states that “the functioning of both Councils – in particular with the perspective of receiving new responsibilities – will have to be matched with sufficient administrative and own budgetary resources”.⁴⁵ Recommendation from the Screening related to ensuring independence of the judiciary also envisions for the proposed amendments to pertain to the following: “Sufficient administrative capacities and financial authority over their own budget needs to be ensured to allow the High Judicial Council and the State Prosecutorial Council to effectively perform their tasks. Their work should be governed by transparency and institutional accountability”.⁴⁶

Identical measure was incorporated into the Action Plan for Chapter 23.⁴⁷ Set of the following activities was developed:

- ▶ adoption of Law on Amendments and Supplements to the Law on High Judicial Council and to the Law on State Prosecutorial Council, with introduction of the principle of broadest transparency of their work;

44 Multi-Donor Trust Fund for Justice Sector Support in Serbia, *Serbia Judicial Functional Review*, World Bank, Belgrade, 2014, p. 213, 214.

45 European Commission, *Report on Alignment of Serbia's Legislation with the EU Acquis (Screening Report) for Chapter 23 – Judiciary and Fundamental Rights*, 15 April 2014, p. 6.

46 Ibid., p. 27.

47 Measure 1.1.4., Ministry of Justice, *Action Plan for Chapter 23*, 2016.

- ▶ amending the Rules of Procedure of the High Judicial Council and the Rules of Procedure of the State Prosecutorial Council;
- ▶ strengthening the capacities of administrative office of the councils in the field of the analytical, statistical and managerial capacities; and
- ▶ complete transfer of budgetary competencies from the Ministry of Justice to judicial councils.

This precise transfer of budgetary competencies from the Ministry of Justice to the judicial councils is direct object of monitoring in this report, since these two activities are the only ones that are formally not implemented, and their impact indicators would become visible if the High Judicial Council, that is, the State Prosecutorial Council, independently proposed and executed judicial budget.

Negotiating Position of the Republic of Serbia also states that for effective functioning of judicial councils in terms receiving new competences, **sufficient administrative capacities and own budgetary resources need to be ensured**.⁴⁸ *European Union Common Position* underlines the importance for Serbia to ensure adequate human and financial resources for the councils to make them fully in charge of their own budget. It is also noted that “their work should aim at ensuring an efficient, coherent and transparent court administration and notes the measures Serbia has started taking in this respect.”⁴⁹

European Commission’s *Annual Report on Serbia* clearly states that it is necessary to ensure that the councils can fully assume their role and achieve a coherent and efficient court administration in line with European standards, including the management of the judicial budget. It also states that while the Councils continued to build their capacity, due to legislative and administrative delays, the transfer of full responsibility for the judicial budget has still not happened and it has been delayed for the third time, by one more year, to the beginning of 2019.⁵⁰ Meanwhile, contrary to this report, new draft Law on Amendments and Supplements to the Law on Organization of Courts has further delayed this transfer to the beginning of 2020.⁵¹

3.1. Transfer of budgetary competencies to judicial councils

Namely, according to the *Report on Implementation of the Action Plan for Chapter 23* from August 2018, 6 out of 8 planned activities related to ensuring

48 Government of the Republic of Serbia, *Negotiating Position of the Republic of Serbia for Inter-governmental Conference on Accession of the Republic of Serbia to the European Union, Chapter 23 – Judiciary and Fundamental Rights*, Belgrade, 2016, p. 7.

49 Council of the European Union, *European Union Common Position – Chapter 23 – Judiciary and Fundamental Rights*, 5 July 2016, p. 4.

50 European Commission, 2018 Annual Report on Serbia, April 2018, available at: <https://bit.ly/2HcTrEz>, pp. 13/14.

51 Law on Organization of Courts, “Official Gazette of the RS”, no. 116/2008, 104/2009, 101/2010, 31/2011 – as amended, 78/2011 – as amended, 101/2011, 101/2013, 106/2015, 40/2015 – as amended, 13/2016, 108/2016, 113/2017, 65/2018 – decision of the Constitutional Court, 87/2018 and 88/2018 – decision of the Constitutional Court.

sufficient administrative capacities and budgetary competencies of judicial councils were implemented. The Law on Amendments and Supplements to the Law on State Prosecutorial Council and the Law on Amendments and Supplements to the Law on High Judicial Council were adopted at the Ninth Sitting of the Second Regular Session of the National Assembly of the Republic of Serbia held in December 2015. In January 2016, the High Judicial Council adopted the *Decision on Amendments and Supplements to the High Judicial Council's Rules of Procedure*.⁵² At the same time, the *Decision on Amendments and Supplements to the State Prosecutorial Councils' Rules of Procedure*, but as the need was recognized for broader amendments, new Rules of Procedure were developed. All these activities, as well as the activities pertaining to strengthening the capacities of administrative offices of the councils were implemented in line with the set deadlines, or with minimal delays.

The Law on State Prosecutorial Council does not contain provisions pertaining to the transfer of budgetary competencies, while the full transfer of budgetary competencies from the Ministry in charge of the judiciary to the High Judicial Council, in line with Article 32 (3) of the Law on Organization of Courts, was planned for the first quarter of 2017. One deputy's initiative disputed Article 32 of the Law on Amendments and Supplements to the Law on Organization of Courts, which reads as: "The competencies of the Ministry in charge of the judiciary referred to in Article 57, paragraph 3, Article 70, paragraphs 2, 4 and 5, Article 74, paragraph 2 and Article 75, paragraph 1, item 1, shall be assumed by the High Judicial Council as of June 1, 2016."

The Law on Amendments and Supplements to the Law on Organization of Courts stipulates the following: "The competencies of the Ministry in charge of the judiciary prescribed in Articles 83 and 84 shall cease on June 1, 2016."

On June 1, 2016, the High Judicial Council takes over from the Ministry in charge of the judiciary the rights, obligations, cases and archive needed for performance of the assumed tasks from paragraph 1 of this Article. On June 1, 2016, the High Judicial Council also takes over the civil servants and state employees of the Ministry in charge of the judiciary who work on the activities falling under the assumed scope of works".⁵³

Namely, the initiative states that the obstacle to the transfer of competencies is the need to protect the constitutional principle of separation of powers and mutual checks and balances between legislative, executive and judicial branches of power. With its decision from November 2016, the Constitutional Court initiated procedure for assessment of constitutionality of Article 32 of the Law on Amendments and Supplements to the Law on Organization of Courts, and of the provision of Article 70 of the Law on Organization of Courts pertaining to the tasks constituting court administration, which is in that version separated into competencies of the Ministry and the High Judicial Council.⁵⁴

52 Decision on Amendments and Supplements to the High Judicial Council's Rules of Procedure, "Official Gazette of the RS", no. 4/16.

53 Text of the Initiative for Assessing the Constitutionality available at: <https://bit.ly/2Ahk35i>.

54 Case IUz-34/2016.

3.2. Progress in terms of transfer of budgetary competencies to judicial councils during the period covered by the report

At the session held on 15 November 2018, the Constitutional Court adopted a decision in the case for assessment of constitutionality of disputed provisions of the Law on Organization of Courts. Starting from the existing constitutional framework, and citing the independence of judicial power as the main element of the principle of separation of powers, the said decision of the Constitutional Court states that the proposed amendments transfer the court administration tasks described in Article 70 of the Law (paragraphs 3 and 4) from the Ministry of Justice to the High Judicial Council, but not in other related articles, so the amendment of only one part of the Law transferring competencies from the Ministry to the High Judicial Council would create legal insecurity. Their stance is that the content of provisions of Article 32 (paragraphs 1 and 2) does not have transitional character, but it rather creates an invisible norm that amends or deletes certain competencies of the Ministry of Justice, even though those competencies were not amended in the Law on Organization of Courts, since transitional provisions must be based on substantive provisions. As this would violate principles of the rule of law, the Constitutional Court stated that the disputed provisions of Article 23 were not in compliance with the Constitution of the Republic of Serbia.⁵⁵ Regarding the other disputed Article 70 (paragraph 3) where the initiator disputed the separation of competencies between the Ministry of Justice and the High Judicial Council in performing court administration tasks, the Constitutional Court determined that the request for assessing the constitutionality of this provision was unfounded.

The latest version of the Law on Amendments and Supplements to the Law on Organization of Courts⁵⁶ now proposes a new delay in the transfer of certain competencies from the Ministry of Justice to the High Judicial Council, to 1 January 2020. This is justified by the fact that the amendments to the Constitution of the Republic of Serbia pertaining to the judiciary are currently being developed, so only after their adoption there would be a need to align judicial laws with the amendments, the Law on Organization of Courts being one of them.

Let us return to the aforementioned amendments of the Constitution pertaining to the judiciary. The latest draft of the Amendments to the Constitution pertaining to the judiciary stipulates that the councils propose the budget within their competencies.⁵⁷ Amendment XIII talks about the High Judicial Council's competencies and states that the council "proposes the budgetary funds for the work of the High Judicial Council and the work of courts in matters within its competence pursuant to the law and autonomously disposes of these funds, and (...)". It is interesting that Amendment XVII envisions a possibility for the term of office of the members of the High Judicial Council to cease in case they "fail to make a decision within 60 days from the day of their first attempt to make a decision on proposed budgetary funds

55 Decision of the Constitutional Court IUz 34/2016, "Official Gazette", no. 88/18.

56 Draft Law on Amendments and Supplements to the Law on Organization of Courts, available at: <https://bit.ly/2S7wAQ8>.

57 Ministry of Justice, Draft Constitutional Amendments pertaining to the judiciary improved by comments from the professional public, October 2018, available at: <https://bit.ly/2zVy1tr>.

(...)”. Similar statement may also be found in Amendment XXIX, but it refers to the State Prosecutorial Council, that is, the future High Prosecutorial Council. Amendment XXVI also states that the High Prosecutorial Council “proposes budgetary funds required for the work of the High Prosecutorial Council and the work of public prosecutor’s offices in matters within its competence pursuant to the law and autonomously disposes of these funds and (...)”. The competencies, however, are not constitutionally defined.

Financial independence of courts and prosecutors’ offices is the basic type of independence, which is also recognized by the Venice Commission, but the Amendments to the Constitution still talk about budgetary competencies within the existing competencies which would not be problematic if the part of the competencies related to the councils’ tasks wasn’t in the hands of the executive power. Having in mind the said decision of the Constitutional Court, it is inevitable that solution for potential transfer of competencies would have to wait for the new Constitution and amendments related to the stated laws. In its latest report, GRECO recognizes that building the capacity of the judicial councils would require time and that the transfer of the remaining budgetary and administrative competencies from the Ministry of Justice to the councils is a very important issue.⁵⁸ *Biannual Report on Implementation of the Action Plan for Chapter 23*⁵⁹ of the Negotiating Team, reiterates for the said activities 1.1.4.4. and 1.1.4.7. that they are not implemented and that the transfer of budgetary competencies is delayed due to amendment of the Law on Organization of Courts, and that the Ministry of Justice would form a working group to discuss separation of competencies in line with the said decision of the Constitutional Court. Whether that would lead to deletion of related activity from the revised version of the Action Plan or to some other solution, remains to be seen after completion of the revision, but it is highly unlikely that recommendations from the screening report would be implemented.

3.3. Revision of the Action Plan for Chapter 23

Activity 1.1.3.3. *Transfer of budgetary competencies from Ministry of Justice to High Judicial Council pursuant to new constitutional and legal solutions* replaces the previous activity 1.1.4.4. which stipulated complete transfer of budgetary competencies from the Ministry of Justice to the High Judicial Council pursuant to Article 32, paragraph 3 of the Law on Organization of Courts. Previously proposed measure aimed towards the goal of ensuring independence and autonomy in budget management by the judicial councils, but with the said decision of the Constitutional Court, the disputed Article was declared unconstitutional. This still does not present an obstacle to ensuring that form of full budgetary independence through amendments of the Constitution and with new set of judicial laws, but the Ministry of Justice is clearly going in the different direction even though it’s keeping the part of the formulation pertaining to transfer of competencies – the indicator “Clearly separated competencies of the high Judicial Council and the Ministry of Justice of the Republic of Serbia pertaining to budgetary competencies” shows that such intention does not exist anymore (the same goes for

58 GRECO, “Interim compliance report – Fourth evaluation round, Corruption prevention in respect of members of parliament, judges and prosecutors in SERBIA”, Strasbourg, 18–22 March 2019, p. 8.

59 Negotiating Team for Chapter 23, “Action Plan for Chapter 23 with Implementation Status on 31st December 2018”, Belgrade, February 2019.

the activity 1.1.3.4., former 1.1.4.7), that is, the Ministry is not guided by the interim benchmark, but by the idea from the draft Amendment.

3.4. Review of implementation of activities

Measure 1.1.4. Sufficient administrative capacities and financial authority over their own budget needs to be ensured to allow the High Judicial and the State Prosecutorial Councils to effectively perform their tasks. Their work should be governed by transparency and institutional accountability.

ACTIVITY	Quarter in which the implementation is planned	Status of implementation as per Report no. 2 of the Council for Implementation of the AP for Chapter 23	Quarter in which the activity is implemented	Status of implementation based on monitoring	Delay in implementation
1.1.4.1. Adoption of Law on amendments and supplements to Law on the High Judicial Council which, within current Constitutional provisions introducing principle of the broadest transparency of this institution's work, (...)	III quarter of 2015	Activity is fully implemented.	IV quarter of 2015	Activity is implemented	I quarter (3 months)
1.1.4.2. Adoption of Law on amendments and supplements to the Law on the State Prosecutorial Council which, within current Constitutional provisions introducing principle of the broadest transparency of this institution's work, (...)	III quarter of 2015	Activity is fully implemented.	IV quarter of 2015	Activity is implemented	I quarter (3 months)
1.1.4.3. Amending the Rules of procedure of the High Judicial Council in accordance with amended Law on the High Judicial Council.	IV quarter of 2015	Activity is fully implemented.	I quarter of 2016 / I quarter of 2018	Activity is fully implemented in 2018	1 month
1.1.4.4. Complete transfer of budgetary competencies from Ministry of Justice to High Judicial Council pursuant to Article 32 para 3 of the Law on Organization of Courts.	I quarter of 2017	Activity is not implemented	/	Activity is not implemented	8 quarters (24 months)

ACTIVITY	Quarter in which the implementation is planned	Status of implementation as per Report no. 2 of the Council for Implementation of the AP for Chapter 23	Quarter in which the activity is implemented	Status of implementation based on monitoring	Delay in implementation
1.1.4.5. Strengthening the capacities of Administrative office of the High Judicial Council in the field of the analytical, statistical and managerial capacities, in accordance with extended scope of High Judicial Council's competencies.	Continuously, starting from I quarter of 2015	Activity is being implemented successfully.	Starting from I quarter of 2016	Activity is being implemented continuously	4 quarters (12 months)
1.1.4.6. Amending Rules of Procedure of State Prosecutorial Council according to amended Law on State Prosecutorial Council.	IV quarter of 2015	Activity is fully implemented.	I quarter of 2017	Activity is implemented	5 quarters (14 months)
1.1.4.7. Complete transfer of budgetary competencies from the Ministry of Justice to the State Prosecutorial Council.	I quarter of 2017	Activity is not implemented.	/	Activity is not implemented	8 quarters (24 months)
1.1.4.8. Strengthening the capacities of Administrative office of State Prosecutorial Council in the field of analytical, statistical and managerial capacities, in accordance with extended scope of State Prosecutorial Council's competencies.	Continuously, starting from I quarter of 2015	Activity is being implemented successfully.	Starting from I quarter of 2015	Activity is being implemented continuously	/

4. Automatic allocation of cases

Long duration of court proceedings is one of the most serious obstacles to Serbia's citizens' access to justice. *The Law on Protection of the Right to Trial within Reasonable Time* has come into force on 1 January 2016, but the data on its positive effects are still not available. According to the *Supreme Court of Cassation's Report on the Work of the Courts in the Republic of Serbia for 2016*,⁶⁰ significant decrease was noted in average number of days needed for disposition of cases, however, this trend has not continued in 2017⁶¹ and 2018⁶².

*National Judicial Reform Strategy 2013–2018*⁶³ noted substantial imbalance in the workload among existing courts and prosecutors' offices throughout the country. In order for this problem to be solved, it pointed out the necessity of optimal allocation of judges and balancing their individual wishes and constitutional rights not to be moved from one place to another without their consent with the needs of the entire judiciary in terms of access and proximity.⁶⁴

The Action Plan for Chapter 23 contains measure 1.2.1. which refers to clarifying and implementing the rules for random allocation of cases, including through finding technical solutions to avoid circumventing the system. It points out the necessity to ensure that the system is not open to manipulation and make it subject to regular inspection by the body authorized for monitoring within the High Judicial Council and the State Prosecutorial Council.

Compared to the situation noted in the *Negotiating Position* from 2016 when only small number of courts in Serbia practically used automatic case processing software, certain improvement is noted with the said software being used in more courts, but not without certain difficulties.^{65, 66} One of the problems in software application is **non-recognition of court unit as a special category** which makes it impossible to use the software in courts with multiple court units.⁶⁷ The question that

60 Supreme Court of Cassation, *Annual Report on the Work of the Courts for 2016*, Belgrade, 2017, available at: <https://bit.ly/2zu2DCL>.

61 Supreme Court of Cassation, *Annual Report on the Work of the Courts for 2017*, Belgrade, 2018, available at: <https://bit.ly/2PSdGzO>.

62 Supreme Court of Cassation, *Annual Report on the Work of the Courts for 2018*, Belgrade, 2019, available at: <https://bit.ly/2ULCx DY>.

63 National Assembly of the Republic of Serbia, *National Judicial Reform Strategy 2013–2018*, Belgrade, 2013, available at: <https://bit.ly/2CuMfDx>.

64 European Commission, *Report on alignment of Serbia's legislation with the EU Acquis (Screening Report) for Chapter 23 – Judiciary and Fundamental Rights*, 15 April 2014, p. 8.

65 Allocation of cases was stil mostly done manually, alphabetically, according to volume of work and urgency of proceedings, in line with the annual plan developed by the court president.

66 Information obtained at the Roundtable held on 17 December 2018.

67 Ibid.

arose from practical application was whether it would be possible to correctly assess the case weight at the beginning of the court proceedings or when filing a lawsuit, so the proposals were made for case-weighting to be done in other phases of the proceeding, after the preliminary hearing.⁶⁸

The issue of adequate allocation of cases is significant in relation to the issue of responsibility of court presidents and public prosecutors for potential discrepancies with the automatic case distribution system. That is why the measure 1.2.1 of the Action Plan for Chapter 23 emphasizes the need to prevent circumventing of the system, as well as to conduct regular inspection by the body authorized for monitoring within the High Judicial Council and the State Prosecutorial Council.

4.1. Adoption of Case-Weighing Program

Most of the activities are seriously late in meeting their set deadlines. Thus, the case-weighting program⁶⁹ was supposed to be adopted in IV quarter of 2016. More than two years later, this activity has still not been fully implemented, as well as a series of other related activities. According to the latest *Report on Implementation of the Action Plan for Chapter 23*, this activity is only partially implemented.

At the session on 30 March 2017, the High Judicial Council formed a working group⁷⁰ for implementation of this activity. So far, the working group held three meetings where the case-weighting methodology was discussed and adopted, and the decision was adopted on its application in 20 pilot courts.⁷¹ At its last meeting on 27 September 2017, **the working group adopted results of the pilot test and approved distribution of the case-weighting formula to all higher and basic courts.** It is stated that element of impartiality is ensured through application of an algorithm integrated in the existing case management system which allocates received cases to judges regardless of any engagement of the reception staff, based on previously defined parameters developed by the Working Group for case-weighting methodology.

According to the data provided to the Lawyers' Committee for Human Rights by the High Judicial Council, within the "Judicial Efficiency Project" over 100.000 cases from the automatic case management base were analyzed, while over 1000 cases were processed manually in order to adequately identify main elements in cases that

68 Ibid.

69 Council for Implementation of the Action Plan for Chapter 23, *Report number 2/2018 on implementation of the Action Plan for Chapter 23*, Belgrade, July 2018, activity 1.2.1.11, p. 81.

70 Working Group for development and adoption of case-weighting program that provides gradual approach in introduction of case weighing system as one of the criteria for its allocation.

71 Higher Court in Niš, Higher Court in Novi Sad, Higher Court in Kragujevac, Higher Court in Subotica, Third Basic Court in Belgrade, Basic Court in Novi Sad, Basic Court in Kragujevac, Basic Court in Niš, Basic Court in Zrenjanin, Basic Court in Valjevo, Basic Court in Čačak, Basic Court in Leskovac, Basic Court in Kraljevo, Basic Court in Sombor, Basic Court in Vranje, Basic Court in Sremska Mitrovica, Basic Court in Požarevac, Basic Court in Šabac, Basic Court in Negotin and Basic Court in Užice.

could affect the level of engagement necessary for each separate type of case.⁷² As the result of this process, 80% of the cases are marked as standard, while 20% are classified as types of cases that would require more time.

According to the information provided, the High Judicial Council approved distribution of the case-weighting formula to all basic and high courts,⁷³ so the application of case-weighting methodology in all courts was planned in the next two years,⁷⁴ and **the funds were provided for establishment of preparatory departments** that would be in charge of weighing of cases.⁷⁵ The question is what profession the staff of these preparatory departments would have to be.⁷⁶

The Report on Implementation of the Action Plan for Chapter 23 for numerous activities following the development and adoption of the Program for Weighing of Cases states that they would be implemented only after implementation of that activity. These activities include amendments to the Law on Judges, the Law on Public Prosecutor's Office, the Court Rules of Procedure, the Rules on Administration in Public Prosecutors' Offices, establishment of preparatory departments in courts and public prosecutors' offices that would be in charge of weighing of cases, implementation of the training of judicial and prosecutorial assistants for work in the preparatory departments, as well as commencement of the implementation of provisions of Law on Organization of Courts that transfer jurisdiction for performing of judiciary administration tasks from the Ministry of Justice to the High Court Council.

Even though the Report states that certain activities are not implemented, we have learned from the responses of competent institutions that some activities were already partially implemented, or that at least first steps were taken towards their implementation. This is true when it comes to preparing and implementing the training program for work in preparatory departments for weighing of cases.⁷⁷ Thus, Judicial Academy states in its response that it has already developed a *Manual for Entering Cases into Automatic Case Management Program*⁷⁸ in line with the developed methodology, *Instructions for Filing of Cases* as per the case weighing methodology, and it conducted a training for 292 court staff members.⁷⁹

72 High Judicial Council, Response to Request for access to information of public importance, no. 7-00-145/2018-01, available in the YUCOM archive. The request was sent on 29.10.2018, while the response was dated 14.11.2018.

73 High Judicial Council, Response to Request for access to information of public importance, no. 7-00-145/2018-01, available in the YUCOM archive.

74 Judicial Academy, Response to Request for access to information of public importance, no. 508, available in the YUCOM archive. The request was sent on 29.10.2018, while the response was dated 19.11.2018.

75 Activity 1.2.1.6, Ministry of Justice, *Action Plan for Chapter 23*, 2016.

76 Conclusion from the Roundtable with judges and prosecutors, held in Niš on 22 March 2019.

77 Activity 1.2.1.18, Ministry of Justice, *Action Plan for Chapter 23*, 2016.

78 Automatic Case Management Program.

79 Judicial Academy, Response to Request for access to information of public importance, no. 508, available in the YUCOM archive. The request was sent on 29.10.2018, while the response was dated 19.11.2018.

4.2. Conducting of regular inspection by the High Judicial Council and the State Prosecutorial Council

Transfer of competencies for judiciary administration tasks⁸⁰ from the Ministry of Justice to the High Judicial Council was delayed until the Constitutional Court adopts a decision in the process of assessment of constitutionality of provisions of the Law on Organization of Courts. As we have already mentioned, the decision stating that the provisions of Article 32 of the Law on Amendments and Supplements to the Law on Organization of Courts are not in compliance with the Constitution was adopted on 15 November 2018. The Constitutional Court established that after amendments of Article 32, other provisions of the Law on Organization of Courts regulating competencies of judicial administration were not amended as well. Therefore, content of the disputed article does not have transitional character, but it rather creates a so-called “invisible norm” which violates principle of the rule of law by not being clear enough, precise enough and predictable. After adoption of this decision, transfer of competencies for judicial administration to the High Judicial Council would only be possible after adoption of new amendments and supplements of the Law that would standardize this process in line with the Constitutional Court’s opinion.

The aforementioned decision of the Constitutional Court rendered it impossible for the High Judicial Council to conduct regular inspection of consistent application of amended rules on automatic case allocation in courts. Regardless, the Report determined that this activity was being successfully implemented.⁸¹ It is important to note that in its response, the competent institution refers solely to time restricted methodology for case weighing in 20 pilot courts.

Even though it is not directly linked to implementation of this activity, the Report also mentions the procedure for delegation of second instance civil cases of the Higher Court in Belgrade to other higher courts in the territory of the Republic of Serbia that was finalized in 2017. According to available information, new procedure for delegation of cases is expected at the beginning of 2019.⁸²

Consistent application of amended rules on automatic case allocation in prosecutors’ offices with regular conducting of inspection of their application by the State Prosecutorial Council was assessed as a not implemented activity, without providing any further explanation. Deadline for implementation of both activities was II quarter of 2017.

4.3. Revision of the Action Plan for Chapter 23

Proposed amendments will essentially impede conducting of regular inspection of automatic case allocation by the State Prosecutorial Council and the High Judicial Council. Primarily, it is not clear what competencies a body within the

80 Council for Implementation of the Action Plan for Chapter 23, *Report number 2/2018 on Implementation of the Action Plan for Chapter 23*, Belgrade, July 2018, Activity 1.2.1.19, p. 84.

81 Ibid., Activity 1.2.1.20, Ministry of Justice, *Action Plan for Chapter 23*, 2016, pp. 84–85.

82 Information obtained at the Roundtable held on 17 December 2018.

State Prosecutorial Council would have, or how would those competencies relate to the Ministry of Justice's competencies. Impact indicator for measure 1.2.1 was also changed and it now states that inspection in public prosecutors' offices will be conducted within the framework of the existing laws, by-laws and specific organization of public prosecutors' offices. These changes are followed by deletion of activity 1.2.1.13 which envisioned transfer of competencies for adoption of and supervision over Rules on Administration in public prosecutors' offices from the Ministry of Justice to the State Prosecutorial Council.

Activity 1.2.1.19 related to the transfer of competencies for conducting supervision from the Justice Ministry to the High Judicial Council was not changed despite the fact that the provisions of Article 32 of the *Law on Organization of Courts* regulating this issue have meanwhile been declared unconstitutional. In line with the Constitutional Court's decision, transfer of said competencies may be implemented only with new, more comprehensive amendments of the Law on Organization of Courts after adoption of amendments of the Constitution, so it is not clear why the language mentioning implementation was kept instead of that mentioning adoption and implementation.

It is necessary to note that these activities do not clearly define how the bodies in charge of supervision of automatic case allocation would be formed within the State Prosecutorial Council and the High Judicial Council, or their responsibilities and competencies and their relation to the Ministry of Justice.

4.4. Review of implementation of activities

Measure 1.2.1. Clarify and implement the rules for random allocation of cases, including through finding technical solutions to avoid circumventing the system. Ensure that the system is not open to manipulation and make it subject to regular inspection by the body authorized for monitoring within the High Judicial Council and the State Prosecutorial Council.

ACTIVITY	Quarter in which the implementation is planned	Status of implementation as per Report no. 2 of the Council for Implementation of the AP for Chapter 23	Quarter in which the activity is implemented	Status of implementation based on monitoring	Delay in implementation
1.2.1.11. Preparing and adoption of the Program for weighing of cases that provides gradually approach in the introduction of case weighing system as one of the criteria for its allocation.	During III and IV quarter of 2016	Activity is partially implemented.	/	Activity is partially implemented.	/
1.2.1.12. Amendments to the Law on judges in part which deals with allocation of cases by chance, aiming at implementation of Program for weighing of cases.	I quarter of 2017	Activity is not implemented.	/	Activity is not implemented.	9 quarters (27 months)

ACTIVITY	Quarter in which the implementation is planned	Status of implementation as per Report no. 2 of the Council for Implementation of the AP for Chapter 23	Quarter in which the activity is implemented	Status of implementation based on monitoring	Delay in implementation
1.2.1.13. Adoption of amendments to the Law on Public Prosecutor's Office in order to ensure transfer of competencies for adoption of Rules on administration in the public prosecution and transfer of supervision over its implementation from Ministry of Justice to State Prosecutorial Council.	IV quarter of 2016	Activity is not implemented.	/	Activity is not implemented.	10 quarters (30 months)
1.2.1.14. Adopt amendments to the Court Rules of Procedure in order to clarify rules concerning random allocation of cases (by chance), which will take into account complexity of cases as one of criteria for case allocation (in line with Program for weighing of cases that provides gradually approach in the introduction of case weighing system as one of the criteria for its allocation – Activity 1.2.1.11).	During IV quarter of 2016 and I quarter of 2017	Activity is not implemented.	/	Activity is not implemented.	9 quarters (27 months)
1.2.1.15. Adopt amendments to the Rules on administration in public prosecutors offices in order to clarify rules of random allocation of cases (by chance), which will take into account complexity of cases as one of criteria for case assignment (in line with Program for weighing of cases that provides gradually approach in the introduction of case weighing system as one of the criteria for its allocation Activity 1.2.1.11.).	During IV quarter of 2016 and I quarter of 2017	Activity is not implemented.	/	Activity is not implemented.	9 quarters (27 months)
1.2.1.16. Establishing preparatory departments in courts, which are in charge of, inter alia, weighing of cases.	During I and II quarter of 2017	Activity is not implemented.	/	Activity is not implemented.	8 quarters (27 months)
1.2.1.17. Establishing preparatory departments in public prosecutors' offices, which are in charge of, inter alia, weighing of cases.	During I and II quarter of 2017	Activity is not implemented.	/	Activity is not implemented.	8 quarters (24 months)
1.2.1.18. Preparing the program of training for work in preparatory departments for weighing of cases and carrying out training of judicial and prosecutorial assistants for work in preparatory departments for weighing of cases.	Starting from I quarter of 2017	Activity is not implemented.	/	Activity is not implemented.	10 quarters (31 month)

ACTIVITY	Quarter in which the implementation is planned	Status of implementation as per Report no. 2 of the Council for Implementation of the AP for Chapter 23	Quarter in which the activity is implemented	Status of implementation based on monitoring	Delay in implementation
1.2.1.19. Commencement of the implementation of provisions of Law on organization of the courts that regulates jurisdiction for the performance of duties of judiciary administration in order to transfer jurisdiction of Ministry of Justice in the field of following duties: supervision over the work of courts, supervision over the results of the work of courts, collecting of statistical data and analysis of statistical data from Ministry of Justice to High Judicial Council.	Starting from I quarter of 2017	Activity is not implemented.	/	Activity is not implemented.	9 quarters (27 months)
1.2.1.20. Coherent implementation of amended rules on random allocation of cases in courts with regular supervision of their implementation by the High Judicial Council.	Continuously, starting from II quarter of 2017	Activity is being implemented successfully.	/	Activity is not implemented	8 quarters (24 months)
1.2.1.21. Coherent implementation of amended rules on random allocation of cases in public prosecutors' offices with regular supervision of their implementation by the State Prosecutorial Council.	Continuously, starting from II quarter of 2017	Activity is being implemented successfully	/	Activity is not implemented	8 quarters (24 months)

5. Disciplinary and ethical accountability

The question of accountability of judges and public prosecutors is inseparably linked with their independence and autonomy. Low number of initiated disciplinary proceedings, as well as lack of adequate sanctions resulted in the Screening Report recommendation stating that it is necessary to strengthen the accountability of judges and prosecutors through strict application of all legal and disciplinary means. It is important to note that during development of the screening report, one judge and one public prosecutor were dismissed.⁸³

The recommendation from the *Screening Report* makes a clear distinction between disciplinary and ethical accountability, however, the measure 1.2.2. of the *Action Plan for Chapter 23* creates confusion regarding these two types of accountability. Namely, despite that particular recommendation, only few activities from the Action Plan for Chapter 23 are directly focused on strengthening of disciplinary accountability of judges and public prosecutors, while more of them are focused on strengthening of their ethical accountability. This solution faced criticism from the part of professional public that believes that disciplinary and ethical accountability are generally not connected, that is, that their normative overlapping is unjustified and that it creates legal insecurity. Activities in the Action Plan for Chapter 23, include, among others, amendments to the normative framework that regulates the issue of disciplinary responsibility of judges, public prosecutors and deputy public prosecutors, establishment of the Board of Ethics of the High Judicial Council which would perform monitoring of compliance with the Code of Ethics, analysis and potential amendments of the Code of Ethics for Judges and the Code of Ethics for Public Prosecutors and Deputy Public Prosecutors, development of brochures for judges, public prosecutors and deputy public prosecutors on ethical rules, as well as effective application of the Rules of Procedure on disciplinary proceedings and disciplinary liability of judges and the Rules of Procedure on disciplinary proceedings and disciplinary liability of public prosecutors and deputy public prosecutors.

Negotiating Position of Serbia points out that, accountability of judges and prosecutors remains an issue of concern, bearing in mind that most disciplinary proceedings result in mild disciplinary sanctions and therefore fail to produce preventive effect.⁸⁴ It is especially emphasized that grounds for dismissal need to

83 European Commission, *Report on alignment of Serbia's legislation with the EU Acquis (Screening Report) for Chapter 23 – Judiciary and Fundamental Rights*, 15 April 2014, p. 28.

84 Government of the Republic of Serbia, *Negotiating position of the Republic of Serbia for Inter-governmental Conference on accession of the Republic of Serbia to the European Union, Chapter 23 – Judiciary and Fundamental Rights*, Belgrade 2016, p. 10.

be more specified. The Republic of Serbia needs to establish a well-functioning and impartial disciplinary procedure in order to detect and eliminate irregularities by ensuring a consistent disciplinary practice. In order to ensure all of the aforementioned, as well as independence and reduction of potential risk of external influence, the Ministry of Justice should limit its monitoring role when it comes to the judiciary. With that in mind, the High Judicial Council and the State Prosecutorial Council should strengthen their inspection capacities on sound grounds that authorise them to act *ex officio* or *per* complaints submitted by citizens, state bodies or other legal entities and pertaining to, among other things, other issues of integrity or professional misconduct.

In its Common Position, the European Union stresses the importance for the respective Councils to adopt integrity plans for judges and prosecutors, to organise training and to have an adequate inspection capacity, allowing them to act *ex officio* or on the basis of complaints.⁸⁵ It states that the EU calls on Serbia to ensure fair and impartial disciplinary procedures, as well as regular and effective oversight of the application of ethical standards in the work of judges, and to actively promote ethical behaviour within its judicial system.

5.1. Establishment of working groups for development of draft laws within the Ministry of Justice

The first two activities within the measure 1.2.2. *of the Action Plan for Chapter 23* refer to analysis and amendment of normative framework related to issues of disciplinary accountability of judges⁸⁶, and public prosecutors.⁸⁷ The *Report on Implementation of the Action plan for Chapter 23* from August 2018 states that the appropriate working group was established, but its work was delayed due to changes in composition of the Ministry of Justice, the High Judicial Council and the State Prosecutorial Council.⁸⁸ As the last activity of the working group, the report cites an agreement on conducting comparative legal analysis of disciplinary proceedings.

In order to obtain additional information about the work of this Working Group, we addressed the Ministry of Justice as the authority responsible for both of these activities. Despite our clearly formulated request for access to information, the Ministry of Justice states in its reply that it still has not formed a working group or working groups to work on new drafts of the Law on Amendments and Supplements to the Law on Judges and the Law on Amendments and Supplements

85 Council of the European Union, *the European Union Common Position – Chapter 23 – Judiciary and Fundamental Rights*, July 5th, 2016, pp. 4–5.

86 Activity 1.2.2.6, Ministry of Justice, *Action Plan for Chapter 23*, 2016.

87 Activity 1.2.2.7, Ministry of Justice, *Action Plan for Chapter 23*, 2016.

88 Council for Implementation of the Action Plan for Chapter 23, *Report number 2/2018 on Implementation of the Action Plan for Chapter 23*, Belgrade, July 2018, activity 1.2.2.6 and activity 1.2.2.7, pp. 94–95.

to the Law on Public Prosecutor's Office.⁸⁹ It is important to note that besides the latest information on conducting of comparative legal analysis, the Report does not mention any additional details or deadlines, especially bearing in mind that implementation of this activity has been delayed for almost two years, that is, from IV quarter of 2016.

Most of the planned activities are related to issues of ethical accountability of judges and public prosecutors. There is a plan to form a Board of Ethics as a permanent working body of the High Judicial Council that would oversee compliance with the Code of Ethics, as well as to conduct analysis and potentially amend the Code itself. Rules of Procedure of the High Judicial Council were amended on 13 January 2016, and the Board of Ethics was established by that same decision.⁹⁰ Rules of Procedure of the Board of Ethics were adopted at the session on 4 September 2018, almost three years later. There are still unappointed members of the Board of Ethics. Before adoption of the Rules of Procedure, the working group was active within the High Judicial Council and it analyzed the Code of Ethics for Judges, as well as the work of boards of ethics in other countries.⁹¹ Neither the Report nor the response from the High Judicial Council provide clear information on what phase of its activities the working group is in, or whether it conducted analysis of the Code of Ethics and potentially established the need for its amendments.⁹² Implementation of this activity is almost three years late, since the deadline was II quarter of 2016.

The Action Plan envisions analysis and potential amendments of the Code of Ethics for public prosecutors and their deputies. According to the *Report on Implementation of the Action Plan, Report on the Code of Ethics* was completed in December 2017. As the said Report is not public, it remains unknown whether it recommends amendments to the Code of Ethics. According to the information provided to YUCOM by the State Prosecutorial Council, a working group was formed to develop guidelines for monitoring of the Code of Ethics. Second convocation of the Board of Ethics was elected at the session of the State Prosecutorial Council held on 7 May 2018. Implementation of this activity is almost three years late, since the deadline was II quarter of 2016.

One of the planned activities is development and publishing of a brochure for judges for increasing awareness of ethics rules,⁹³ containing examples of inadequate behavior of judges. Even though this activity is successfully implemented according to the Report, the product itself, the brochure – poster on the High Judicial Council's

89 Ministry of Justice, Response to Request for access to information of public importance, no. 7-00-332/2018-32, available in the YUCOM archive. The request was sent on 29.10.2018, while the response was dated 13.11.2018.

90 Ibid., activity 1.2.2.8, p. 95.

91 Ibid., activity 1.2.2.9, p. 96.

92 High Judicial Council, Response to Request for access to information of public importance, no. 7-00-145/2018-01, available in the YUCOM archive.

93 Council for Implementation of the Action Plan for Chapter 23, *Report number 2/2018 on Implementation of the Action Plan for Chapter 23*, Belgrade, July 2018, Activity 1.2.2.13, p. 103.

web page is essentially just a graphical representation of the Code of Ethics and does not contain examples of inadequate behavior of judges.⁹⁴

According to the response from the State Prosecutorial Council, the same brochure for public prosecutors and their deputies has still not been developed, since this activity depends on the amendment of the Code of Ethics for public prosecutors and their deputies that is still ongoing⁹⁵. This is contrary to the information obtained at the Roundtable⁹⁶ and it is contrary to the Report on Implementation of the Action Plan for Chapter 23 which states that this activity is being successfully implemented, that is, the brochure is distributed to public prosecutors and their deputies.⁹⁷

One of the activities entails proactive participation of judges and the High Judicial Council in developing and monitoring compliance with the Code of Ethics for judges. According to the Report, this activity is being successfully implemented with a note that the High Judicial Council's decisions regarding violation of the Code of Ethics' provisions have been published on the web page.⁹⁸ It is not clear how this ensures proactive participation of judges in development and monitoring of the Code of Ethics for judges.⁹⁹

5.2. Effective application of Rules of Procedure on disciplinary proceedings and disciplinary accountability

According to the Report, effective application of the *Rules of Procedure on disciplinary proceedings and disciplinary accountability of judges* is the activity that is being implemented successfully. It is stated that the disciplinary bodies submit report on their work to the High Judicial Council regularly and upon request. Having in mind the recommendation from the Screening Report and the reasons for that recommendation, it seems that explanation for such conclusion is not sufficient or adequate.¹⁰⁰ If the reason for such recommendation is low number of disciplinary proceedings ending with final decision, mild disciplinary sanctions or low number of judges and public prosecutors dismissed from their duties, then analysis of these elements would need to be incorporated into final assessment of effective application of the Rules of Procedure. It is important to note that certain judges have similar stance

94 Available at: <https://bit.ly/2QmYryi>.

95 State Prosecutorial Council, Response to Request for access to information of public importance, no. PI 50/18, available in the YUCOM archive. The request was sent on 29.10.2018, while the response was dated 13.11.2018.

96 Information obtained at the Roundtable held on 17 December 2018.

97 Council for Implementation of the Action Plan for Chapter 23, *Report number 2/2018 on implementation of the Action Plan for Chapter 23*, Belgrade, July 2018, Activity 1.2.2.14, p. 103.

98 Decision on compatibility with judiciary function, available at: <https://bit.ly/2DXOZM3>.

99 Council for Implementation of the Action Plan for Chapter 23, *Report number 2/2018 on implementation of the Action Plan for Chapter 23*, Belgrade, July 2018, Activity 1.2.2.15, p. 104.

100 Ibid., activity 1.2.2.17, pp. 106–109.

and express opinions that the system of disciplinary sanctions does not function, the sanctions criteria are not clear, the pronounced sanctions are mild, and the practice is inconsistent.¹⁰¹

Available reports on the work of disciplinary commission of the High Judicial Council show a decline in the number of new cases during 2017 compared to previous two years.¹⁰² The number of cases where judges were pronounced guilty of disciplinary infractions is still relatively low compared to the total number of resolved cases. In the structure of pronounced sentences, the most frequent are public warnings and other disciplinary sanctions such as salary reduction compared to very low number of submitted requests for dismissal of judges. Besides significant discrepancy between the number of submitted complaints, initiated proceedings before the disciplinary commission and decisions pronouncing judges guilty of disciplinary infractions, it is worth noting that the said work reports do not provide simple overview and monitoring of the structure of pronounced sanctions.

As per the State Prosecutorial Council's assessment, effective application of the *Rules of Procedure on Disciplinary Proceedings and Disciplinary Liability of Public Prosecutors and Deputy Public Prosecutors* is also being implemented successfully.¹⁰³ When it comes to the work of disciplinary prosecutor of the State Prosecutorial Council, it is noted that there is higher number of disciplinary complaints submitted by parties, which is explained by the trend of submission of disciplinary complaints in case of rejection of criminal complaints.¹⁰⁴ Despite the claim that the Rules of Procedure are being applied effectively, most of the complaints are still being rejected as unfounded, while the disciplinary proceeding is initiated in small number of cases.¹⁰⁵ Some prosecutors state that the pronounced sentences are not mild, and, as an example, they cite the fact that in last two years two deputy public prosecutors were dismissed, which is a considerable number compared to the total number of prosecutors. Statistical data on the work of disciplinary commission of the State Prosecutorial Council, are available as a separate document only up to 2015,¹⁰⁶ while the Work Report and the Information Booklet of the State Prosecutorial Council for 2016 and 2017 do not contain complete information on results of initiated proceedings, that is, on potentially pronounced sanctions.

101 Information obtained at the Roundtable held on 17 December 2018.

102 In 2015 – 23 initiated cases; in 2016 – 32 initiated cases; in 2017 – 18 initiated cases.

103 Council for Implementation of the Action Plan for Chapter 23, *Report number 2/2018 on implementation of the Action Plan for Chapter 23*, Belgrade, July 2018, Activity 1.2.2.18, p. 109.

104 State Prosecutorial Council, *Practice and scope of work of disciplinary prosecutor in 2017*, available at: <https://bit.ly/2SaAqYH>.

105 In 2015 – 167 rejected disciplinary complaints, 8 requests to initiate disciplinary proceedings; In 2016 – 111 rejected disciplinary complaints, 4 requests to initiate disciplinary proceedings; in 2017 – 106 rejected disciplinary complaints, 3 requests to initiate disciplinary proceedings.

106 Statistical data on practice of the State Prosecutorial Council's disciplinary bodies for the period from 01.01.2015 to 30.11.2015, available at: <https://bit.ly/2DZmnlL>.

5.3. Revision of the Action Plan for Chapter 23

Previous reports on implementation of the Action Plan provide only scarce information on activities of the working group in charge of amendments to the Law on Judges and the Law on Public Prosecutor's Office, so, in its responses to our requests for access to information of public importance, the Ministry of Justice even denied the existence of such working group. Based on proposed changes of the authorities responsible for these two activities, it becomes clear that the working group completed its work and now the next step is procedure for adoption of the Law. Namely, the working group is deleted from the plan, so now the responsible authorities are the Ministry of Justice, the Government and the National Assembly. Despite the fact that these are amendments of important systemic laws, the public is excluded from this Working Group's operations.

Regarding disciplinary proceedings against judges and public prosecutors, proposed revision does not provide more specific indicators that would adequately measure implementation of recommendations from the Screening Report. The only indicators for the activities referring to effective application of the rules of procedure on disciplinary proceedings for judges and public prosecutors are still just data on the number of disciplinary complaints and disciplinary proceedings from the Reports of the High Judicial Council and the State Prosecutorial Council. Such indicators do not measure increase in the number of proceedings that end with determination of disciplinary responsibility for infractions or increase in the number of more serious sanctions pronounced. Availability of such data can only be an indicator of transparency of the process itself, but not an indicator of changes compared to unsatisfactory situation noted during the screening.

5.4. Review of implementation of activities

Measure 1.2.2. Strengthen the accountability of judges and prosecutors through a strict application of all legal and disciplinary means, including through:

- Ensuring the effective implementation of "conflict of interest" rules and amending them if need be;
- Ensuring the effective verification of asset declarations and crosschecking with other relevant information;
- Effective monitoring of compliance with the code of ethics and carrying out further evaluation activities and training of judges and prosecutors in ethical behavior;
- Review where necessary and effectively implement rules on disciplinary and dismissal procedures;
- Re-assessing the system of functional immunity ensuring full accountability of judges and prosecutors under criminal law.

ACTIVITY	Quarter in which the implementation is planned	Status of implementation as per Report no. 2 of the Council for Implementation of the AP for Chapter 23	Quarter in which the activity is implemented	Status of implementation based on monitoring	Delay in implementation
1.2.2.6. Analysis and amending normative framework which regulates: – requirements for dismissal of judges with the aim of specifying the requirements; – statute of limitations for disciplinary misdemeanor; – sanctioning regime and practice.	IV quarter of 2015 – IV quarter of 2016	Activity is not implemented.	/	Activity is not implemented	10 quarters (30 months)
1.2.2.7. Analysis, and in case the results of the analysis indicate the need, amending normative framework which regulates: –requirements for dismissal of public prosecutor's office holders with the aim of specifying the requirements; –jurisdiction for conducting disciplinary procedure and decision making, with the aim of examination of double jurisdiction of disciplinary commission; –statute of limitations for disciplinary misdemeanor; – sanctioning regime and practice.	IV quarter of 2015 – IV quarter of 2016	Activity is not implemented.	/	Activity is not implemented	10 quarters (30 months)
1.2.2.8. Amending Rules of Procedure of High Judicial Council which envisages establishment of Board of Ethics of High Judicial Council as a permanent working body.	IV quarter of 2015	Activity is fully implemented.	I quarter of 2016	Activity is implemented	3 quarters (10 months)
1.2.2.9. Analysis and in case the results of the analysis indicate the need, amending Code of Ethics for Judges in order to clarify provisions which define disciplinary liability of judges for non-compliance with Code of Ethics for Judges.	IV quarter of 2015 – II quarter of 2016	Activity is partially implemented	/	Activity is partially implemented	13 quarters (39 months)
1.2.2.10. Analysis and in case the results of the analysis indicate the need, amending Code of Ethics for public prosecutors and deputy public prosecutors in order to clarify provisions which stipulate disciplinary liability of public prosecutors' office holders for non-compliance with Code of Ethics.	IV quarter of 2015 – II quarter of 2016	Activity is being implemented successfully.	Starting from II quarter of 2017	Activity is partially implemented	5 quarters (16 months)

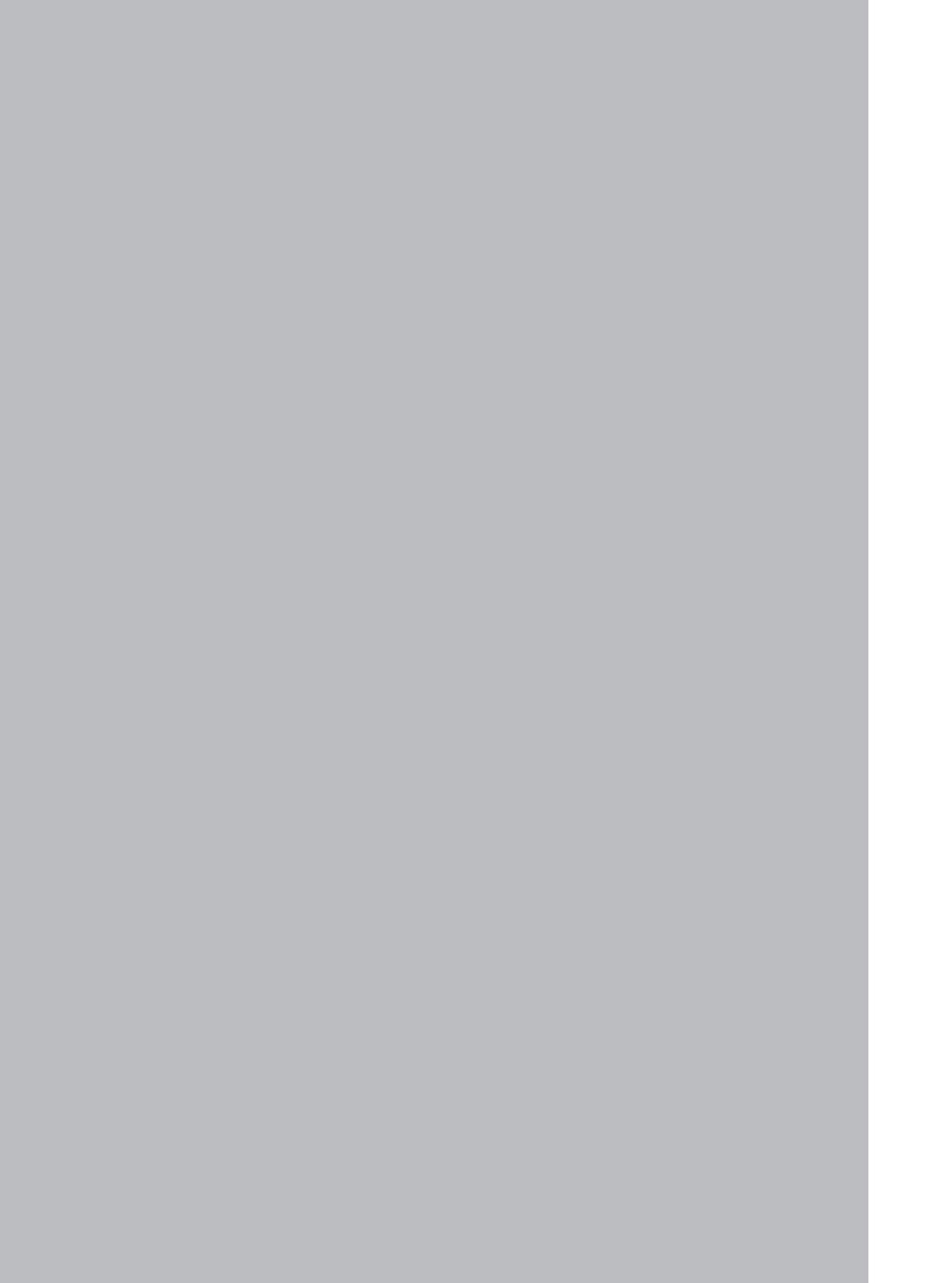
ACTIVITY	Quarter in which the implementation is planned	Status of implementation as per Report no. 2 of the Council for Implementation of the AP for Chapter 23	Quarter in which the activity is implemented	Status of implementation based on monitoring	Delay in implementation
1.2.2.11. Adoption of Rules of Procedure of Board of Ethics of High Judicial Council which will regulate monitoring of compliance with Code of Ethics for Judges and conducting activities of evaluation and training of judges on ethics.	IV quarter of 2015	Activity is fully implemented.	III quarter of 2018	Activity is being implemented continuously	12 quarters (37 months)
1.2.2.12. Organizing seminars for judicial office holders on integrity rules and ethics.	Continuously, starting from I quarter of 2015	Activity is being implemented successfully	Starting from IV quarter of 2015	Activity is being implemented continuously	5 quarters (15 months)
1.2.2.13. Drawing up brochure for judges for increasing awareness on ethics' rules, containing examples of permissible/impermissible conduct Publishing brochure on the website of High Judicial Council.	IV quarter of 2015	Activity is being implemented successfully	III quarter of 2017	Activity is not adequately implemented	8 quarters (25 months)
1.2.2.14. Drawing up brochure for public prosecutors for increasing awareness on rules of ethics containing examples of permissible/impermissible conduct. Publishing brochure on the website of State Prosecutorial Council..	IV quarter of 2015	Activity is being implemented successfully	III quarter of 2017	Status of implementation is not clear	8 quarters (25 months)
1.2.2.15. Proactive approach of judges and High judicial council in creation and monitoring of Code of Ethics for Judges.	Continuously	Activity is being implemented successfully	Starting from II quarter of 2018	Activity is not adequately implemented.	/
1.2.2.16. Amending Rules of Procedure on disciplinary proceedings and disciplinary liability of public prosecutors and deputy public prosecutors with the purpose of introducing proactive approach of disciplinary bodies in monitoring of compliance with Code of Ethics for public prosecutors and deputy public prosecutors.	IV quarter of 2015	Activity is being implemented successfully	Starting from I quarter of 2017	Activity is being implemented continuously	6 quarters (19 months)
1.2.2.17. Effective implementation of Rules of Procedure on disciplinary proceedings and disciplinary liability of judges.	Continuously	Activity is being implemented successfully	Starting from I quarter of 2015	Activity is not adequately implemented.	/

ACTIVITY	Quarter in which the implementation is planned	Status of implementation as per Report no. 2 of the Council for Implementation of the AP for Chapter 23	Quarter in which the activity is implemented	Status of implementation based on monitoring	Delay in implementation
1.2.2.18. Effective implementation of Rules of Procedure on disciplinary proceedings and disciplinary liability of public prosecutors and deputy public prosecutors.	Continuously	Activity is being implemented successfully	Starting from IV quarter of 2016	Activity is not adequately implemented.	/
1.2.2.19. Conduct analysis of provisions that regulate functional immunity of judicial office holders.	II quarter of 2016	Activity is not implemented.	/	Activity is not implemented.	13 quarters (39 months)
1.2.2.20. Implementation of measures in accordance with conducted analysis.	III quarter of 2016	Activity is not implemented.	/	Activity is not implemented.	11 quarters (35 months)

6. Recommendations

- ▶ Adequately implement all the activities pertaining to development of the working draft of the Constitution and hold a public debate after the competent committee of the National Assembly of the Republic of Serbia prepares a formal proposal of an act on the amendment of the Constitution, and include civil society organizations, professional associations, as well as representatives of academic community;
- ▶ After adequately organized public debate, submit the official proposal of the draft Constitution and subsequently of the draft Constitutional Law and the set of judicial laws for opinion to the Venice Commission and other relevant bodies in charge of judiciary issues within the Council of Europe and the European Union;
- ▶ If the competent committee of the National Assembly of the Republic of Serbia does not develop its own proposal, but rather adopts the proposal of the Government of the Republic of Serbia received from the Ministry of Justice, take into account objections and comments from the civil society presented in the part of the report on amendment of the Constitution referring to the judiciary;
- ▶ Pursue the direction of fulfillment of the benchmark related to budgetary competencies of the High Judicial Council and the State Prosecutorial Council over their own budgets in order to allow them to effectively fulfill their obligations by ensuring, whether through certain constitutional solutions or through a set of new judicial laws, transfer of budgetary competencies from the Ministry of Justice to the judicial councils;
- ▶ Ensure implementation of regular supervision over application of the program for automatic allocation of cases by the High Judicial Council and the State Prosecutorial Council through revision of the Action Plan;
- ▶ Consider changing the case weighing methodology by introducing the weighing of cases after preliminary hearings;
- ▶ Change the automatic case management program, so that it can be used for allocation of cases in the courts with multiple court units;
- ▶ Harmonize the indicators of effective application of the rules of procedure on disciplinary liability of judges, public prosecutors and deputy public prosecutors, through revision of the Action plan, so that fulfillment of recommendations from the Screening Report could be adequately measured;
- ▶ Clearly separate activities referring to ethical and disciplinary liability of judges and public prosecutors, into two distinct types of liability in the revised Action Plan;

- ▶ Work on increase of transparency of the process of implementation of the Action Plan, by strengthening capacities of the institutions responsible for implementation of activities, that is, of the persons in these institutions responsible for reporting and persons responsible for access to information of public importance;
- ▶ Define more precisely the authorities responsible for implementation of certain measures related to judiciary, in line with the legal competencies;
- ▶ Systematize reporting on implemented activities by the Council for Implementation of the Action Plan, and introduce reviewing of content and clear measuring in order to decide whether implemented activity corresponds to concrete interim benchmark, by creating mechanism for checking the quality of implemented measures in the revised Action plan.



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